

# International Law on Extradition: Changing Dimensions & Present Realities



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**4 OCTOBER, 2014**

# Introduction: The Institution of Extradition



- Extradition is the process by which a person charged with or convicted of a crime under the laws of one state is arrested in another state and returned to the former state for trial and punishment.
- Although States have no general obligation in international law to extradite persons, the practice is vital for enforcing international legal rules and compelling respect for law and order. In practice, extradition is usually done by treaty, reciprocity or comity. (Hugo Grotius asserted a state's duty either to extradite or prosecute accused criminals)
- Without the institution of Extradition accused criminal offenders can't be investigated, prosecuted, convicted and appropriately punished, and will remain at large as

# Jurisdictional Authority



- Jurisdiction is critical as a legal ingredient to the extradition process. For extradition to occur legally, a state must establish lawful jurisdiction over both the criminal offense and an accused offender.
- Intl. Law sets limits on a state's jurisdiction to apply its statutes extraterritorially. Traditionally, a state may not prosecute a criminal seized beyond its borders unless it has both lawful jurisdiction over the committed act and has gained jurisdiction over his person. In effect, the jurisdiction to prescribe must exist before the jurisdiction to adjudicate and enforce.
- Obtaining extraterritorial jurisdiction for extradition involves a two step process. First, it must be determined whether the requesting state's domestic law covers the offensive act. Second, a sovereign state must ascertain whether it may proscribe such conduct extraterritorially under intl. legal rules.

# Five Principles



- For the second criterion, Govts can apply any of the intl. law's five generally accepted principles, for exercising prescriptive jurisdiction: territoriality, nationality, the protective principle, passive personality and universality.
- Territoriality: Territory is indeed the physical basis of a state, and subject to any special rules of intl. law such as those relating to Human Rights and other intl. obligations undertaken by it, a state's jurisdiction is exclusive and absolute. This principle determines jurisdiction acc. To the location of the crime and holds that a state may punish crimes committed within its territory. ('floating territory')- For extradition, Territoriality remains the most widely accepted and applied principle.

# Nationality



- The principle of nationality recognizes the exercise of authority by a state in respect of its organic linkage with its nationals and other permanent residents. It allows a state to prescribe laws that bind its nationals, regardless of the location of either the national or the offense. The nationality principle extends a state's jurisdiction to actions taken by its citizens outside its territorial boundaries. The Govt. is expected not only to protect its citizens when they are abroad, but it may also punish its citizens' criminal conduct, regardless of where it occurs.

# Protective Principle



- Protective Principle justifies exercise of authority by a state in order to protect vital aspects of its political and economic systems. It concerns acts abroad that are considered prejudicial to state's security interests. Under this principle, a state may exercise jurisdiction over certain acts that take place outside its territory, when such acts threaten the security, territorial integrity, or political independence of the state.

# Passive Personality Principle



- Passive Personality Principle gives a state extraterritorial jurisdiction over offenses committed against its nationals, regardless of where the crime occurs. Jurisdiction is based on the nationality of the victim. This principle has not been widely used, mainly because it is controversial and often conflicts with territoriality principle. It implies that people carry the protection of their state's law with them beyond the state's territorial jurisdiction. This challenges the fundamental premise of a state's sovereign jurisdiction over its own territory (undermining the fundamental principle of territorial sovereignty).

# Universality Principle



- Pursuant to Universality Principle, a state exercises authority to enforce intl. criminal law. The offenses under this law, so far, include, piracy, genocide, war crimes and crime against humanity.
- The principle of universal jurisdiction recognizes that certain acts are so heinous and widely condemned that any state may prosecute an offender once it obtains custody. Such crimes are of universal interests to states and their perpetrators are considered to be enemies of mankind.



# Principles in support of Extra-territorial jurisdiction



- Three of the above intl. law principles specifically support the legal theory of extra-territorial jurisdiction. In order of practical legal priority, these are the universality principle, the protective principle and the passive personality principle.
- These legal principles provide grounds for Govts to extend their scope of jurisdiction criminals abroad to secure their extradition. However, the above principles of exercise of state authority often give rise to overlapping claims to jurisdiction by states. Intl. law does not recognize any order of priority among these competing jurisdictional claims. It has, nevertheless, evolved the institution of extradition which may be pressed into service by states in situations of competing jurisdictional claims. Indeed,

# Extradition Vs Deportation



- States have, since time immemorial, also practiced expulsion or deportation of undesirable persons, usually foreigners, as a method of resolving some of the problems of administration of criminal justice. But there are differences between extradition and deportation. Deportation is usually a unilateral act, whereas extradition is bilateral. Deportation does not necessarily entail judicial proceedings before or after the act of deportation; whereas extradition anticipates a prior judicial proceeding in the requesting state, followed by another, judicial (extradition) proceeding in the requested state, and often culminating in further judicial proceeding in the requesting state after extradition.

# Extradition: Lawful & Unlawful



- Extradition involves formal rendition or handing over by a state of a convicted or alleged offender to another state to be dealt with acc. to the latter's criminal law. Under intl. customary law, a state has no obligation to extradite persons to another, although its is not precluded from extraditing a person wither on voluntary basis or on the basis of reciprocity.
- Since extradition implies removal of an offender or an alleged offender from one sovereign jurisdiction to another with the consent of the former, any forcible or clandestine removal of an alleged offender from one country by another without the former's consent amounts to an act of impermissible intervention. (Abduction of Adlof Eichman from Argentina by Israeli agents

# Extradition: Largely Bilateral



- The existing framework of cooperation between countries to facilitate administration of criminal justice by allowing rendition of persons accused or convicted of offences by one country to another where they must face the due process of law consists chiefly of a large number of bilateral treaties of extradition often backed by domestic extradition enactments. (post-18<sup>th</sup> century phenomenon)
- In the absence of such treaty undertakings, there is no obligation on the part of a state to extradite an offender or an alleged offender to another state. Even such a treaty obligation is often limited by a clause referred to as “the political offenses exception”. This clause in the extradition treaties has in the past rendered many an extradition treaty ineffective in facilitating extradition of

# Developments to strengthen Intl. co-operation on Extradition



- The gross violations of human rights of innocent civilians involved in most acts of terrorism, have led to legal developments to strengthen intl. co-operation among states for combating terrorism, as also to curb discretion of states in deciding whether or not to grant extradition pursuant to an extradition treaty. Three developments to be noted-
  1. First, the intl. community has endeavoured to grapple with specific types of acts of intl. terrorism and provide for their prevention and punishment of offenders. These categories of acts include terrorist acts against civil aviation, maritime transport, and off-shore installations, and marking of plastic explosives. Intl. Organizations such as ICAO and IMO have played a commendable role in

# Developments to strengthen Intl. co-operation on Extradition...contd.



- Most of these Conventions provide for an obligation on the part of the state party to exercise its jurisdiction in respect of an alleged offender found within its jurisdiction, if it decides not to extradite.
- Second, at the regional level, the EC has adopted a Convention specifically on intl. Terrorism whereby this obligation is further sharpened and crystallized into a more definitive obligation *to extradite or prosecute*. (*aut dedere aut judicare*)
- Thirdly, some of the post-1970s bilateral extradition treaties have set a new trend in clarifying offences which would not be considered political offenses, thereby drastically limiting the requested state's discretion to reject a request for extradition.

# Implications of these developments



- The above developments, thus, portend the emergence of three principal features of the modern extradition law, namely, (a) an obligation to exercise jurisdiction to prosecute or to extradite; (b) an obligation to assist in such exercise of jurisdiction by another state with rendition of assistance including any evidence in the possession or control of a state; and (c) drastic limitation, if not elimination, of the political offenses exception even in cases of bilateral extradition treaties.

# Process of Extradition



- Where there are extradition treaties, these coupled with domestic legislation usually lay down the procedure for extradition. The state requesting extradition must comply with three cardinal principles. First, the offense, i.e. an offense for which extradition is requested, must be envisaged under the treaty. Second, this offense must be a criminal offense in both countries. Third, there must be a *prima facie* case established against the person whose extradition is being sought.
- Added to these essential conditions are the human rights requirements that the person to be extradited must be assured of a fair trial, and that upon extradition he can only be tried and punished exclusively for the offence for which his extradition is requested (the rule of specialty).



# Process of Extradition...contd.



- A state may surrender a fugitive offender to a requesting state in the exercise of its sovereignty even in the absence of an extradition treaty. It may however, make extradition subject to certain conditions. It may require exchange of notes/memorandum of understanding laying down certain conditions for extradition. The requested state may require an assurance that it shall be given reciprocal treatment in similar circumstances. Similarly it may seek an assurance that the surrendered offender shall not be awarded death penalty, if the requested state does not prescribe death penalty under its law. Another condition may relate to the rule of specialty cited earlier. (Extradition of Abu Salem and Ottavio Quattrochi to India from Portugal and Malaysia respectively)

# Changing Dimensions of Extradition



- During recent decades although the basic concept of extradition remains the same, namely, the return of fugitive offenders to a requesting state for trial, the content of extradition law has changed significantly.
- There are three major factors, which led to a drastic metamorphosis in the concept of extradition. Firstly, and most importantly, the crime of intl. terrorism has assumed horrendous proportions. Although, the crime of terrorism has existed for centuries, in recent past it has become a dangerous phenomenon, affecting almost all nations of the world. Modern intl. terrorism has become extremely destructive, involving bombing of buildings, bombing of aeroplanes, suicide bombings, hijacking of aircrafts, crashing aeroplanes into the buildings etc

# Legal Responses to tackle Intl. Terrorism



- In order to tackle ever growing menace of terrorism, the intl. community has reacted swiftly and concluded several intl. treaties for combating terrorism. Some of the important treaties are-
1. Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft, 14 Sept. 1963
  2. Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 16 Dec. 1970
  3. Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 Sept, 1971
  4. Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Intl. Civil Aviation, 24 Feb. 1988 to Montreal Convention 1971
  5. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Dec 14, 1973
  6. Intl. Convention Against Taking of Hostages, 17 Dec. 1979

# Legal Responses to tackle Intl. Terrorism..contd.



7. Convention for the Suppression of Unlawful Acts Against the Safety of Intl. Maritime Navigation, Mar. 10 1988 (1988 SUA Convention); and Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf, Mar. 10 1988

Four special UN Conventions have been negotiated to deal with particular activities associated with destructive terror violence, viz.

1. Convention on the Physical Protection of Nuclear Material (PPNM Convention), Oct. 26 1979
  2. Convention on the Marking of Plastic Explosives for the Purpose of Detection (Plastic Explosives Convention), sponsored by ICAO IN 1991
  3. Intl. Convention for the Suppression of Terrorist Bombings (adopted by UN GA in 1997)
  4. Intl. Convention for the Suppression of the Financing of Terrorism, Dec. 9 1999 (adopted by UN GA in 1999)
  5. Indian Proposal on the Comprehensive Convention on Terrorism in 1996.
- To make these treaties fully effective it was necessary to stipulate in them stringent provisions for the extradition of offenders who flee to foreign lands after committing heinous crimes covered under these instruments. It is for these reasons that all the above-mentioned treaties contain clauses providing for extradition.

# Extradition Law in India



- The Extradition Act, 1870 (enacted by British Parliament) as amended from time to time, was made applicable to India (Sec. 17). Act dealt with the extradition of fugitive criminals from and to other countries outside the British dominion.
- The Fugitive Offenders Act, 1881 (enacted by British Parliament) regulated the extradition of fugitive offenders inter se the Commonwealth countries. Sec. 32 of this Act provided for its application to British possessions.
- India passed its own Indian Extradition Act in 1903. The Act laid down the procedure to be followed in India after a valid requisition for extradition was received from a foreign state (such right of a foreign Govt. were dependent on there being a treaty).

# Extradition Law in India: Post-Independence



- A major political change took place on Aug. 15 1947, when India became an independent dominion of the British Commonwealth. Sec. 7 of the Independence Act provided –
  - (b) The suzerainty of His Majesty over Indian States lapses and with it, all treaties and agreements in force at the date of passing of this Act bet. His Majesty and the rulers of Indian States...
- The imminent question arose concerning the validity of various extradition treaties bet. The native Indian States and the British Govt.
- The effect of new constitutional situation on the extradition arrangements bet. India and the State of Tonk was considered by the Supreme Court in *Dr. Ram Babu Saksenea v The State (1950)*. The question was how far the extradition treaty (of 1869) bet. The Govt. of India and Tonk State was affected by the merger of the State into India. It was held that the treaty must be deemed to be ineffective.
- Though the Indian dominion had power to enact any legislation reg. matters of extradition concerning the Indian States after their execution of Instruments of Accession, no such law, however, was

# Extradition Law in India: Post-Independence..contd.



- After Jan. 26, 1950: when India proclaimed herself a sovereign democratic republic on Jan. 26, 1950, the need for extradition arrangements bet. Indian native States disappeared. They became an integral part of the republic as Part B States. By an Adaptation Order of 1950, IPC as well as Cr.PC were extended to them. By the same order, the Indian Extradition Act, 1903, was made applicable to the whole of India with the exception of Part B States.
- Then came the all-imp. case before the Supreme Court of India: The State of Madras v CG Menon (1954) in which the Fugitive Offenders Act, 1881, a part of the extradition law of India, regulating the extradition of fugitive criminals *inter se* the Commonwealth countries, was held inapplicable in India.
- Thus, Menon's case created a vacuum in the law of extradition from India to Commonwealth countries; which resulted in the Extradition Bill, in 1961 to overcome anomalies/lacunae in the existing law, and to enact a consolidated law for extradition of fugitive criminals to all foreign states and Commonwealth countries.

# Scheme of the Extradition Act, 1962



- Act consists of five chapters and two Schedules. Chapter I deals with preliminary matters, viz. short title, extent and applicability of the Act, and definitions. Ch. II deals with the extradition of fugitive criminals to foreign states and to Commonwealth countries in general, and Ch. III deals with return of fugitives only to those Commonwealth countries having extradition arrangements with India. Ch. IV is concerned with the return of accused or convicted persons from foreign states or Commonwealth countries to India and Chapter V deals with miscellaneous matters, viz. jurisdiction as to offences committed at sea or in the air, the power of the Central Govt. to discharge a fugitive criminal under certain circumstances, simultaneous requisitions from more than one state, certain restrictions on surrender, etc. The first schedule gives a list of



# Scheme of the Extradition Act, 1962...contd.



- The provisions of Extradition Act, 1962 may be divided under four headings-
  1. General Conditions of extradition
  2. Certain restrictions on surrender
  3. Procedure reg. extradition of fugitive criminals
  4. Miscellaneous provisions.
- General Conditions of extradition
  1. Principle of double-criminality
  2. The existence of an extraditable offence, and
  3. The existence of an extradition treaty

# Restrictions on Surrender



- The following conditions of extradition are usually incorporated in Extradition Act and treaties-
  1. Extradition shall not be granted for political offences
  2. The request for extradition should not be time barred
  3. The rule of speciality
  4. Non bis in idem

# Extradition (Amendment) Act, 1993



- Due to growing incidents of terrorism, growing connection between terrorists groups and illicit traffic of narcotic drugs and the significance attached to fiscal, revenue and taxation offences which affect the economies of the developing countries and might even affect their survival as independent sovereign economic entities, the content of extradition under intl. law has undergone a radical change.
- The Indian Extradition Act has therefore been amended in 1993 to omit the list of extraditable offences from it. The amended Act defines an extraditable offence as being an offence, in relation to a foreign state being a treaty state, an offence provided for in the extradition treaty with that state.

# Extradition (Amendment) Act, 1993...contd.



- For foreign states, other than a treaty state, it means an offence punishable with imprisonment for a term which is not less than 1 year. Although, no specific definition of terrorism is given, this amendment would include all offences including those of terrorism. Furthermore, to cover the offences of terrorism the 1993 amendment provided for a comprehensive list of offences which are not to be regarded as offenses of a political character.
- The Schedule of the list of offences contain a comprehensive list of offences such as offences under the Anti-Hijacking Act, 1982, offences under the Suppression of Unlawful Acts against the Safety of Civil Aviation Act, 1982 etc which are not to be regarded as political offences.
- Similarly, India has concluded its extradition treaties in a manner which reflects the above-mentioned factors.

# Concluding Remarks



- The earlier extradition treaties and laws contained a long List of extraditable offences such as murder, kidnapping, rape, theft, cheating, forgery, sinking or destroying a vessel at seas, damaging or destroying an aircraft in the air, smuggling of gold and any narcotic substances, immoral traffic in women etc. In view of the modern developments, the new extradition treaties generally don't contain any list of offences but define an extradition offence as any offence which is constituted by conduct which under the laws of each contracting state is punishable by a certain term of imprisonment, normally for a period of at least 1 year. The offence of fiscal nature and traffic of narcotic drugs have also been included in the amended extradition Act and recently concluded extradition treaties of India.

## Concluding Remarks...contd.



- There are scores of multilateral, regional, bilateral treaties, MoUs, notes, model laws etc in the area of extradition. It is clear that the law in this area needs to be harmonized, rationalized and made uniform. Therefore, the need for a comprehensive, universal treaty cannot be ignored, which could be concluded under the auspices of the UN. Such a treaty should avoid duplication of efforts and multiplicity of treaties and confusion at the implementation level.

Thanks for your attention &  
patience.



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