CHAPTER VI

ROLE OF THE JUDICIARY AND EXECUTIVE IN EXTRADITION PROCEEDINGS

Introduction

Treaties are generally silent as to the designation of organs competent to handle extradition proceedings. Apart from the almost standard recourse to diplomatic channels in the presentation of the requisition and the supporting documents, it is left to the law of the requested State to assign the determination of all questions arising under the treaty to the appropriate organs. Whether the requested State chooses to deal with extradition entirely at the executive level, or to assign exclusively or partly to its judicial organs, has so far not been a matter engaging international concern.\(^1\) The scope of the judiciary in extradition proceedings largely depends upon the national laws of the requested State, because this is, to a large extent, a matter that comes within the domestic jurisdiction of the individual State and International Law does not control that sphere of State activity.

State Practice

It has however, become the question of international interest in advancing the Rule of Law and as the protection of fundamental human rights continues to grow. For it seems to be beyond doubt that constitutionally impartial organs are better fitted to decide questions affecting individual liberties than the organs that are closely geared to governmental policy. Yet at the beginning of the modern era of extradition, executive control was exclusive. France surrendered fugitive criminals under its treaties without any reference to the Courts until 1875. In the United States exclusive executive control was

\(^1\) I.A Shearer, *Extradition in International Law* 197 (Oceana Publications, UK, 1971).
maintained from 1794 to 1842.\textsuperscript{2} Until 1815 the same view was upheld in Great Britain. Indeed, the prerogative of the King to expel aliens was held to exclude even the requirement of a treaty.\textsuperscript{3}

Countries retaining a system of exclusive executive control, such as Ecuador, Panama, Portugal and Eastern European countries, are now in the minority. Belgium was the first State to introduce a measure of judicial control in extradition proceedings. The Belgian Law of 1833 required that extradition cases be submitted for judicial consideration, but did not make judicial determination conclusive either for or against extradition. Thus the executive is empowered to decide request for extradition on its own responsibility, after seeking an advisory opinion from the Court of Appeal.\textsuperscript{4} However, presently the function and the scope of judiciary in extradition proceedings may be either of an advisory or binding nature, depending upon the nature of the question in such proceedings. Again, as different States have developed different practices with respect to the range of judicial enquiry necessary before the person claimed is surrendered to the requesting State, hence the purpose and scope of this enquiry generally is confined to the provisions of the existing treaties between the contracting States and the national Codes to give effect to the requests.\textsuperscript{5}

Therefore, generally, the function conferred upon municipal Courts in extradition cases is threefold. They may be called upon to decide:

1. Whether an application for extradition of a fugitive offender forwarded by the requesting State should be complied with;

\textsuperscript{2} Id at 198.
\textsuperscript{3} Mure v Kaye 4 Taunt. 34 (1811).
\textsuperscript{4} Supra note 1 at 199.
\textsuperscript{5} Satyadev Bedi, Extradition: A Treatise on the Laws Relevant to the Fugitive Offender Within and With the Commonwealth Countries 173(William S.Hein &Co., Inc., United States of America, 2002).
2. Whether extradition of a fugitive should be requested by the State itself from another State;

3. Whether objections raised by the accused against his extradition before the extraditing State are well founded.

Thus, the variety of roles in which judiciary can be involved in controversies concerning extradition makes a survey and analysis of municipal case law a bit difficult. However, current extradition law is a creature of treaties, negotiated by the executive branch and approved by the legislature. Most current treaties give general responsibility for extradition to the executive, investing it with the ultimate authority to determine about rendition to be made, but requiring the Court to determine whether the treaty has been complied with, standards met and procedures followed.6

Because of the bifurcated nature of the extradition process, the proper roles of the judiciary and the executive are debatable. The usual procedure of extradition is for the executive to approve the issuing of an authority to proceed, then the request is dealt through the Courts, and, if the decision is to allow return, the executive has a final discretion as to whether to order the fugitive’s surrender.

It is this final discretion that has given rise to question about respective roles: in one sense, its existence has limited the scope of judicial inquiry at hearing stage, but, more importantly it leaves the way for judicial review of the executive’s exercise of final discretion. With respect to the role of the Courts during the extradition hearing, the existence of an executive element in the final decision on surrender has led Courts to limit

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their own range of inquiry; in past, extradition involved matters of foreign relations which
Courts has eschewed.\footnote{Geoff Gilbert, Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms 78 (Martinus Nijhoff Publishers, The Netherlands, 1998).}

In the United Kingdom, there is a long tradition of leaving some issues to the
Secretary of State. In \textit{re Arton (No.1)},\footnote{United States v Noriega, 746 F Supp 1506 (1990).} the Queen’s Bench Division held that the Court
only had to deal with the strictly judicial aspect of extradition law, not its political aspects.
It further stated that:

“Acts of Parliament are sole source, and at the same time the strict limitation, of the
judicial functions. We are sitting here as judges only, and have nothing to do with political
considerations, except as they may have been introduced into the language of the Acts
which we are called upon to construct”.

Nevertheless, a similar desire to refrain from delving into foreign affairs can be
States Courts investigate the standards of justice that fugitive might receive if surrendered
unless the treaty specifically grants such jurisdiction.\footnote{180US109(1901).}

In the famous case of \textit{Neely v. Henkel}\footnote{180US109(1901).} the Supreme Court refused to enquire into
the legal system of the requesting State to see if it would match the due process guarantees
of the United States. However, the Anglo U.S. Supplementary Extradition Treaty, 1986 in
Article 3(a) provides:
“Notwithstanding any other provisions of the Supplementary Treaty, extradition shall not occur if the person sought established to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality or political opinions, or that he would, if surrendered be prejudiced at his trial or punished, detained or restricted in his liberty by reasons of his race, religion, nationality or political opinions.”

In *re Extradition of Howard*, the Court of Appeal for First Circuit held that Article 3(a) permitted the extradition Court to investigate the treatment, a fugitive offender would receive on return, but did not abolish the rule of non-inquiry in its eternity.

Thus there exists in this field a marked divergence of judicial opinions. Many judiciaries take the view that their task is, in principle, limited to verifying whether the request for extradition is or would be well founded under legal rules in force i.e. national or international and they must abstain from engaging in an assessment of the merits or demerits of the case, since this task appertains essentially to the Courts of the country where the prosecution will take place. However, there are Courts, which as a matter of principle consider it their duty to entertain more deeply the charges and the merits of the case and so in fact they place themselves in advance more or less firmly on the seat of the tribunal of the prosecuting State.

Thus it is well established by State practice that an extradition hearing is not a trial. The judicial proceeding in the extradition cases cannot be regarded as penal measures, a process or a trial because the technicalities of a criminal trial are not entertained in these proceedings as they do not decide anything about the innocence or guilt of the fugitive. The

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12 996 F.2d 1320 (1993).
main purpose of their enquiry is in part to determine whether probable cause exists to believe that the individual committed an offence covered by the extradition treaty.\textsuperscript{14} The enquiry will also justify the holding of the accused either by imprisonment or under bail, to ultimately answer to an indictment, or other proceedings, in which he shall be finally tried upon the charge made against him. Thus it is the function of the extradition magistrate to determine whether a proper case for the extradition of the fugitive offender has been made out by the requesting State. This involves verifying that the person who is being brought before him is a person who is named in the extradition request and its supporting documents, whether a valid treaty exists between States concerned, whether the evidence presented either shows that the accused has been convicted in the requesting State, or establishes probable cause, or reasonable ground to believe that the accused committed acts constituting an offence named in the treaty, which warrant his being sent back to the requesting State. Consequently, its jurisdiction is limited to the formal part of the request and does not involve itself with the merits thereof.\textsuperscript{15}

**Position in India**

The scope of magisterial inquiry in India is governed as per Section 7 of the Indian Extradition Act, 1962. The magistrate shall take the evidence of the requesting State as well as of the fugitive criminal. The fugitive criminal is entitled to show that the offences of which he is accused or convicted are offences of political character and not extradition offences. Besides, if the magistrate comes to a conclusion that sufficient evidence is not there to support the requisition of the requesting State, he is required to discharge the fugitive criminal. It is thus clear that magisterial inquiry which is conducted pursuant to the request for extradition is not a trial. The said inquiry decides nothing about the innocence

\textsuperscript{14} Charles Doyale, *Extradition to and from the United States* 13(Nova Science Publishers, United States, 2008).

\textsuperscript{15} *Supra* note 13 at 256.
or guilt of the fugitive criminal. The main purpose of the inquiry is to determine whether there is sufficient evidence for making out a case on reasonable grounds, which warrant the fugitive criminal being sent to the demanding State. The jurisdiction of the magistrate is limited to the former part of the request i.e. whether the fugitive criminal is liable to be extradited or not and does not concern itself with the merits of trial.\textsuperscript{16}

According to Sub Section 4 of Section 7 of the Act if the magistrate is of the opinion that a \textit{prima-facie} case is made in support of the requisition of the foreign State, he may commit the fugitive criminal to prison to await the orders of the Central Government and shall forward together with such report any written statement which the fugitive criminal may desire to submit for consideration of the Central Government.\textsuperscript{17} The extradition magistrate must determine two things: first, whether the evidence presented is sufficient and whether the conduct alleged to have occurred in the requesting State constituting a crime there, would constitute a crime in India if committed here and is contemplated in the extradition treaty as extraditable offence; and second, whether the person for whom extradition is sought is the person before the Court.\textsuperscript{18}

The extradition magistrate does not have the authority to examine the legal and the political systems of the requesting State. It is fundamentally assumed that the requesting State’s general system for administration of justice is fair and its political and judicial authorities are acting in good faith and the accused on return will get a fair trial.

Where the magistrate is satisfied that the authority to proceed had been issued in respect of the person arrested and that the offence to which the authority to proceed relates is an extradition crime, he is required to commit the fugitive awaiting warrants. The entire jurisdiction under the Act vested in the magistrate is restricted to find out whether there is a

\textsuperscript{17} VK Bansal, \textit{Law of Extradition in India} 108 (Lexis Nexis Butterworths, Wadhwa, Nagpur 2008).
\textsuperscript{18} \textit{Id} at 112.
*prima facie* case warranting the extradition of the fugitive criminal. He cannot go into the validity of the extradition treaty or agreement, as this is a matter within the domain of Central Government.19

**Evidence of Culpability or the Quantum of Proof**

Basically International Law does not provide any guidelines with regard to the quantum of proof or evidence of culpability in securing extradition of the accused from the State of refuge since all questions relating to the procedure are determined by the law of the requested State. Due to the conflict of interests and national policies of States it is very difficult to determine what degree of proof is required before an alleged accused or convict can be surrendered. While the social and economic interests in the repression of crime require that the accused should be brought for the trial in the requesting country as early as possible, yet in the interest of the guarantees of its national laws the requested State can insist that some evidence of criminality be established before the accused is extradited.

As already discussed in previous chapter,20 in Civil Law Countries, the requesting State is not normally required to provide any evidence to support the case against the fugitive, although the requested State is typically entitled to seek further information if it considers it necessary.21 As exception to this there are some Civil Law Countries, the extradition legislation or national statutes of which do require the requesting State to submit evidence in support of the request. For example under Section 416 of the Criminal Procedure Code (2003) of Bosnia and Herzegovina, the requesting State must, submit, in

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20 Chapter III, at 156-158.
21 For example, Article 12(2) of the European Convention on Extradition, 1957, Article 11 of Inter-American Convention on Extradition, 1981.
addition to information permitting to identify the wanted person, an indictment or verdict or decision on detention or any other act which is equivalent to such a decision.22

By contrast, Common Law Countries have traditionally required the requesting State to submit, in addition to arrest warrant, evidence which must amount to a *prima facie* case against the person whose extradition is being sought. In addition, under the rules of evidence in force, in many Common Law Countries, only evidence presented in a certain format – for example, sworn affidavits by direct witnesses is admissible, while other types of evidence, most notably, hearsay information is excluded.23

The question of the appropriate evidentiary requirements in extradition proceedings has been the subject of debate. As stated by Sibylle Kapferer24 that from the point of view of the State’s interest in effective law enforcement, extradition proceedings should not turn into a trial, and evidentiary requirements assimilated to those which apply to criminal trials are deemed counterproductive. On the other hand, evidence is needed for the requested State to assess whether extradition would result in a violation of the rights of the individual, and consequently in breach of its obligations under international human rights and refugee law.

**Evidence in Case of Convicts**

Civil Law Countries do not make any distinction between a suspected or a convicted fugitive and hence the Courts of the requested State surrender the fugitive on the mere production of the original or an authenticated copy of the sentence or writ of condemnation issued by the competent judge of the requesting State. On the other hand, the

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24 *Supra* note 22 at para 55.
Common Law Countries separately define the terms ‘fugitive’ and fugitive criminals as including convicted person. However, they make minor differences between the two cases during their proceedings.

In case of a suspected fugitive, such evidence must be produced at extradition hearing, as would according to the law of the State of asylum, justify the committal of the fugitive for trial if the crime had been committed in that State. In other words a prima-facie case must be established at the extradition hearing that the fugitive has committed the act charged in the foreign country. On the other hand proceedings relating to convicts are considerably simpler than those where a fugitive is merely accused of a crime. Thus it is not necessary to go into the facts of the case. Nor would it appear to be necessary in ordinary case to show that the act charged is a crime in the State of asylum.

In this case judge must order the fugitive committed for extradition such evidence to be produced that would according to the laws of requested State, prove that he was so convicted. This includes proof of the record of conviction and the sentence of the Court and that the fugitive is a person to whom the sentence refers. This could be clarified from Article 12(2) of European Convention on Extradition, 1957 which States that:

“The request shall be supported by:

a) the original or authenticated copy of the conviction and sentence or detention order immediately enforceable…………………."

Article 14 and 15 of Scheme Relating to the Rendition of Fugitive offenders within the Commonwealth, 1966 also stipulate the similar provisions.


26 Supra note 5 at 178.

27 Supra note 13 at 261.
The Extradition Treaty between the United Kingdom and Israel, 1960 in Article 8(4) follows the same practice. It runs:

“If the request relates to a person already convicted, it must be accompanied by the judgment of conviction and sentence passed against him in the territory of the requesting party and by a Statement showing how much of the punishment has not been yet carried out.”

Article 10(4) of Extradition Treaty between United States of America and Sweden, 1860 also made similar difference as to the evidence required in case of person accused of crime or already convicted. This distinction was later on dropped and replaced by general provisions for evidence of criminality, such as would justify his apprehension and committal for trial in the requested State. Contrarily now the modern United States law of extradition provides that if the Judge deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or Convention shall clarify the same to the Secretary of State.\(^{28}\) The Extradition Treaty made between United States and South Africa\(^ {29}\) runs as follows:

“The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party, applied to, either to justify the committal of the prisoner for trial, in case the crime or offence had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person convicted by the Courts of the High Contracting Party who make the requisition, and that the crime or offence of which he has been convicted is one in


\(^{29}\) Extradition Treaty made between United States and South Africa, 1947(Article-8).
respect of which extradition could, at the time of such conviction, have been granted by the High Contracting Party applied to.”

Similarly the Extradition Treaty between the United States of America and New Zealand, 1970 in Article 4 provides:

“Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, either to justify his committal for trial if the offence of which he is accused had been committed in that place or to prove that he is the person convicted by the Courts of the requesting Party.”

It is to be noted that in Common Law Countries the convicted fugitive includes a person who has merely been sentenced, one who has already served part of his punishment and also the one who has been on parole, but it does not include a person sentenced in Contumacy (i.e. default of appearance), as is provided in Civil Law system as stated in Re- Carbon water field.30

**Position in India**

In a proceeding for extradition no witness is examined for establishing an allegation made in the requisition of the foreign State. Section 7 of the Indian Extradition Act pertains to procedure before magistrate.

Sub Section 2 of Section 7 reads as under:

7(2) “Without prejudice to the generality of the foregoing provisions, the Magistrate shall, in particular, take such evidence as may be produced in support of the requisition of the foreign State and on behalf of the fugitive criminal, including any

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30 (1960) 2 All ER178.
evidence to show that the offence of which the fugitive criminal is accused of or has been convicted is an offence of political character or is not an extradition offence.”

The language of this Section clearly shows that while the magistrate holding an enquiry is to take such evidence as may be produced in support of the extradition request made by the foreign State, the Court is equally bound to take such evidence as may be produced or sought to be produced by a fugitive criminal including the evidence which can show that the offence of which he is accused or has been convicted, is an offence of political character or that it is not an extradition offence. It is, however, pertinent to note that this right given to fugitive is not an unfettered right, which can be extended to seek to lead any evidence, any number of witnesses whether relevant or irrelevant or which has no nexus with the matter and does not advance the case of the petition in any way.\textsuperscript{31}

The object of the extradition proceedings is mainly to find out if the request made by the foreign State has a sound basis and material ground that would justify the extradition of the person requested to be extradited. The enquiry before the magistrate in extradition proceedings cannot be converted into the trial of the offence for which the extradition of the fugitive is sought. At this stage of enquiry, the magistrate is only required to find out that if based upon the evidence and material produced in support of the requisition of foreign State and also that produced by the fugitive offender, \textit{a prima facie case} lies in support of the request for extradition.

In the famous case of \textit{Mahinder Pal Singh Kohli v The State and Another},\textsuperscript{32} the extradition of the petitioner had been requested by the United Kingdom in order to face trial for the commission of the offence of kidnapping, rape and murder of Ms Hannah Foster in UK. The petitioner examined his brother and also filed the affidavit of his wife in

\textsuperscript{31} \textit{Supra} note 17 at 72-73.
\textsuperscript{32} (2006) 129 DLT 185.
his defence. Besides that, he moved the application for summoning as many as seven witnesses all of them based in England. The extradition magistrate dismissed the application. The petitioner preferred the writ petition before the Hon’ble High Court of Delhi. Mr. Justice R.C. Jain while disposing of the writ petition held:

“The impugned order does not suffer from any illegality or material irregularity which calls for any interference by this Court. The petition is accordingly disposed of.”

Section 10 of the Indian Extradition Act, 1962 provides that the documents duly authenticated are to be taken as evidence. The documents which may be taken in evidence are warrants, depositions or statements and judicial documents stating the facts of the case or conviction order. The extradition magistrate has a limited jurisdiction to *prima facie* conduct enquiry to find out whether the fugitive is liable to be committed awaiting decision of the government to be extradited. The distinction must be borne in mind between the evidence which would be looked in extradition proceedings or otherwise to find a person guilty at the criminal trial. Whereas in a trial, the Court may look into both oral and documentary evidence which would enable him to ask question in respect of which the accused may offer explanation, such detailed procedure is not required to be adopted in these proceedings. If evidence in strict sense is requested to be taken in an enquiry forming the basis of *prima facie* opinion of the Court, the same would lead to absurdity as held in *Sarabjit Rick Singh v Union of India*33:

“Whereas in a trial the Court for the purpose of appreciation of evidence may have to shift the burden from stage to stage, such a procedure is not required to be adopted in an enquiry.”

Evidence on Behalf of the Accused

The concomitant of “evidence of guilt” is “evidence in defense” and clearly if the former is grounded in a “probable cause” standard, then the later is it’s corollary and cannot be excluded from the context of the required standard and bear on the same.34 This right has been recognized by the Courts as early as in Jimenez v Aristeguita35 as it stated:

The accused is not entitled to introduce evidence which merely goes to his defense but he may offer limited evidence to explain the elements in the case against him, since the extradition proceeding is not a trial of the guilt or innocence but of the character of the preliminary examination held before a committing magistrate to determine whether the accused shall be held for trial in another tribunal.

Summarizing the position of the United States, Whiteman states that:

In as much as the actual trial of the accused (assuming he is merely charged with an offence) is to take place in the requesting State if and when he is extradited, the extradition hearing which the requested State may accord the accused normally limit the scope of its inquiry to whether a proper case for extradition has been made out under the applicable law and/or treaty on the basis of the evidence furnished by the requesting State in support of its extradition request while the accused may introduce evidence to show that the case comes within a prohibition against extradition contained in the applicable treaty and/or law (e.g., political offence, national law of asylum State, prosecution barred by lapse of time) or to show that he is not, in actuality, the person sought by the requesting State, he may not generally,

35 311 F 2d 547(1962).
introduce evidence in defence to the merits of the charge or merely to contradict the
evidence of guilt submitted by the requesting State.36

Earlier, the Supreme Court in Collins v Loisel37 also held that the accused in
an extradition proceedings while he may not put on full defence, may submit
evidence to rebut the requesting Country’s prima facie case. Moreover, he is entitled
by statute to an evidentiary hearing.38

The Statutory provisions of various Countries and the practice of the Courts
have developed providing that the identity of the person arrested must be proved
before the extradition judge decides the question of committal. The judge is bound to
consider evidence given by the accused that he is not the person named in the
warrant.39

On the similar ground the accused is entitled to produce evidence as to proof
of his nationality, where it is relevant according to the provisions of the treaty.
Moreover, he is also allowed to present evidence, not to contradict the statements
made by the prosecution but to explain the statement of the witnesses of the
requesting State. In addition to these, the defendant can take advantage of any
statutory or treaty provisions which place a limitation upon the right of the requested
State to surrender him to a foreign country. He may seek to establish that the crime
alleged is an offence of political character or for any other reason not an extraditable
crime or that the request for his surrender although purporting to be made for an
extraditable offence was in fact made for the purpose of prosecuting or punishing

37 259 U S 309, 317 (1922).
38 18 United State Code, Section, 3184
him on account of his race, religion, nationality or political opinions, or that he has acquired exemption by lapse of time either in accordance with the law of the State of asylum or of the requested State or that he has already been tried and acquitted or punished of offence. He may also be allowed to explain the testimony offered against him by way of dispositions in such a manner which may preclude him from holding that he had the requisite criminal intent to violate the laws of the requesting State.

Satyadev Bedi has listed the following points which form the essential issues for judicial enquiry before the person claimed can be surrendered:

1. Whether the person claimed and the person detained is one and the same person.

2. Whether the requisition and documents presented by the requesting State meet all the necessary requirements for the proceedings mentioned in existing treaties or under the Act.

3. Whether the alleged crime or offence has been perpetrated within the jurisdiction of the requesting State, since it is desirable that the jurisdiction of the forum \textit{delicati commissi} be as far as possible called upon to render judgment.

4. Whether the crime or offence is extraditable under the existing treaties or in their absence, under the national codes or the principles of the International Law.

5. Whether the extradition of the person claimed is sought for a political, military, religious, racial or fiscal offences.

\begin{footnotes}
\begin{footnote}{Re Arton (No.1) (1896) 1QB108; R.v. Governor of Brixton Prison Ex parte Kelozymski (1955)1QB540.}
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6. Whether the person sought to be extradited has become immune from prosecution or punishment by reason of lapse of time according to the laws of either the requesting or the requested State.

7. Whether the person demanded has already been tried and discharged or punished, or is still under trial in the requested State, or has been granted an amnesty or pardon for the crime for which extradition is sought.

8. Whether the person claimed is the national of the requested State.

Thus during the extradition hearing a judicial authority of the requested State shall determine the question of extradition, upon examination of the requisition, the documents and the evidences presented by requesting State or by the person detained. Therefore, in addition to allowing evidence that “explains” the requesting country’s proof, Courts have allowed evidence that “negates” or “obliterates” that proof. As held in Re Sindona.

“In admitting ‘explanatory evidence’, the intention is to afford an accused person the opportunity to present reasonably clear cut proof which would be of limited scope and have some reasonable chance of negating a showing of probable cause.”

In another case Re Singh the Court held that the ‘due process guarantees that there is a fair decision making process before official action is taken, which directly impairs a person’s life, liberty or property……. Due process mandates that a judicial proceedings, give all parties an opportunity to be heard on the critical and decisive allegations when got to the core of the parties claim or defence and to present evidence on the contested facts’ which forms one of the basis of accepting the evidence on behalf of the accused.

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The judicial trend makes it clear that an individual facing extradition is permitted to introduce evidence that refutes the finding of probable cause by offering evidence that explains the circumstances before the Court.46

**Surrender**

Generally the laws of most countries provide for a judicial enquiry into the case involving extradition of the person claimed after the receipt of a request from the requesting State. It is, however, universally recognized that the granting of extradition, is ultimately, the function of the executive branch of the government and usually performed either by the Ministry of Justice or the Foreign Minister or the Secretary of State for the Home Department of the Government of requested State.47 In United States if the judge or magistrate certifies the fugitive for extradition, the matter then falls to the discretion of the Secretary of State to determine whether as a matter of policy the fugitive should be released or surrendered to the agents of the country that has requested his or her extradition.48

The procedure for surrender, described in treaty and statute, calls for the release of the prisoner if he or she is not claimed within a specified period of time, often indicates how extradition requests from more than one country for the same fugitive are to be handled.49 Extradition treaties may also provide that, in case where a fugitive faces charges or is serving a criminal sentence in a country of refuge, he may be temporarily surrendered to a requesting State for purposes of prosecution, under the promise that the State seeking the extradition will return the fugitive upon the conclusion of criminal proceedings.50

46 *Supra* note 6 at 312 (2002).
47 *Supra* note 13 at 280.
48 Michael John Gracia, *Extradition to and from the United States: Overview of Law and Recent Treaties* 25 (Diange Publishing Darby, United States, 2010).
49 *Agreement on Extradition between the European Union and the United States of America, 2003* (Article-10).
50 *Agreement on Extradition between the European Union and the United States of America, 2003*
Section 3186 titled 18 of the United States Code provides:

“The Secretary of State may order the person committed under Sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offence of which charged.”

Section 3184 relates to Extradition of Fugitive from Foreign Countries to United States and 3185 relates to Fugitive from country under control of United States into United States.

When the determination is in favour of extradition the requested State through its Foreign Office will make arrangements with the diplomatic representative of the requesting State for the transfer of custody of the person detained. Notwithstanding that treaties, Conventions and statutes are often silent with regard to actual time and place of the delivery of the fugitives. It is, however, necessary that in order to give effect to extradition agreements the Contracting Parties must settle those matters mutually without unreasonable delay. It becomes more important as certain treaties, taking into account the situation of the Contracting Parties, make specific provision for surrender of the person demanded either at the frontier port or airport which is most convenient for transportation or embarkation or if no place of surrender has been agreed upon, the person to be extradited shall be surrendered at the place designated by the diplomatic mission of the requested State.

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51 Extradition Treaty between Belgium-Algeria, 1971(Article-13(3)); Belgium-Germany, 1958 (Article-16(3)); Israel – Australia, 1975 (Article-17).
52 Extradition Treaty between Australia-Italy, 1973(Article-18); Belgium-Brazil, 1953 (Article-13); Belgium – Israel, 1956(Article-11(2)).
Various multipartite Conventions, agreements between countries and national statutes lay down a definite time limit from the date of communication of the final determination or counting from the date on which he was placed at its disposal, by which the requesting State must remove the person from its territory. If it fails to do so, the person apprehended may be released and the requested State may refuse to arrest him again for the same offence. The language used in a number of instruments is mandatory in nature, directing that the person claimed be set at liberty if the requesting State does not act within the time set. However, if special circumstances prevent a Party from surrendering or obtaining the custody of the fugitive to be extradited within the prescribed period at the appointed place, it shall notify the other Party to extend the period and a new date will be settled between the Parties to give effect to the judicial enquiry.

Surrender and conveyance by the United Kingdom takes place before two months have expired after committal to await surrender or after the decision of the Court where a writ of habeas corpus has been issued. The term ‘two months’ has been defined as two calendar months. Similarly if there is an application for habeas corpus, surrender must be made within two months of the end of such proceedings.

Section 3188 of United States Statute, Chapter 209 deals with the time of commitment pending extradition. The Statute runs as under:-

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54 Montevideo Convention on the Rights and Duties of States, 1933 (Article-11); the European Convention on Extradition ,1957, (Article-18); the Afro-Asian Convention ,1961(Article-27).
55 Extradition Treaty between Belgium-Algeria, 1970 (Article-13(3)); Belgium-Germany ,1958 (Article-16(3)); United Kingdom- Austria, 1963(Article-15); United Kingdom-Sweden, 1963(Article-16).
56 The Australia Extradition(Foreign States)Act, 1966 (Article-18); the Indian Extradition Act ,1962, (Article 24); the Great Britain Extradition Act, 1870, (Article-12).
57 Supra note 13 at 282.
58 The British Extradition Act, 1870(Article-12).
“Whenever any person who is committed for rendition to a foreign government to remain until delivered up in pursuance of a requisition, is not so delivered and conveyed out the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from jail to which he was committed, by the readiest way, out of the United States, any judge of the United States, or of any State, upon application made to him or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of the State, may order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge out not to be ordered”.

Thus the stipulated time period of surrender and conveyance is two months in the United States. On the other hand there are some treaties which do not mention specific time limit within which the person sought must be removed from the territory of the requested State. In such circumstances the laws of the requested State generally prescribe the time limit and the accused may be set at liberty after the expiration of that period and he may not subsequently be detained for the same offence. The United Nations Model Treaty on Extradition, 1990 also does not specify any time limit. Article 11 of this treaty relates to the surrender of the person, which only states that the person shall be removed from the requested State within such reasonable period as the requested State specifies and, if the person is not removed within that period, the requested State may release the person or may refuse to extradite that person for the same offence. On the same line The Model Law on Extradition, 2004 does not limit the time of surrender it states under Section 28 that the requesting State shall arrange for the surrender of that person and shall inform its counterpart in the requesting State without undue delay on the decision, the place

61 Extradition Treaty between India-Canada, 1987 (Article-12); Israel-Sweden, 1963 (Article-15(2)); United Kingdom-Finland, 1975 (Article-15(2)).
62 Model Treaty on Extradition, General Assembly Resolution, 45/116, December 14, 1990 (Article-11(2)).
and date of surrender and the length of time for which the person was detained for the purpose of his extradition.

As mentioned earlier the language used in a number of instruments is mandatory in character, directing that the person claimed be set at liberty if the requesting State does not act within the time set. However, if special circumstances prevent a party from surrendering or obtaining the custody of the fugitive to be extradited within prescribed period at the appointed place, it shall notify the other party to extend the period and a new date will be settled between the parties to give effect to the judicial enquiry. Article 11(3) of the UN Model Treaty on Extradition 1990 makes the similar provision. 63 Section 28(3) of Model Law on Extradition, 2004 pertains to the discharge of the person. It states:

“If the person sought is not surrendered to the requesting State within the date provided for in the applicable extradition treaty or agreement, or, in the absence of such a treaty or agreement or specific date provided for therein, or where such treaty or agreement refers to the requirements of the domestic legislation of (country adopting the law), within (x days) after the date the surrender warrant or other final order of extradition was issued in accordance with subsection (2), or entered into force in case of postponement of surrender, the (competent executive authority of country adopting the law) (shall) (may) seek to obtain a judicial order for the discharge of that person”.

Postponement of Surrender or Conditional Surrender

Sometimes problem do arise when a person sought to be extradited is, at the time of the request for extradition is under arrest, in custody, out on bail, under prosecution or

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63 Article 11(3) of the Model Treaty on Extradition, 1990 runs: “If circumstances beyond its control prevent a party from surrendering or removing the person to be extradited, it shall notify the other party. The two parties shall mutually decide upon new date of surrender and the provisions of paragraph 2 of the present Article shall apply”.

serving a sentence for a crime committed in the asylum State. In these circumstances the requested State while not rejecting the application for extradition may postpone or defer extradition until the person in question has been discharged whether by acquittal or on expiration of his sentence or otherwise the proceedings are terminated. Generally the provisions are found in the national statutes, bilateral as well as multilateral treaties for the postponement or deferment of extradition of the person concerned. For example the British Extradition Act of 1870 in Article 3(3) provides that:

“A fugitive criminal who has been accused of some offence within English jurisdiction not being the offence for which his surrender is asked or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise.”

Article 144 of the British Extradition Act, 2003 makes similar provision of return to extraditing territory to serve sentence. The bilateral treaties that deal with such type of situation generally provide that when the person sought is the subject of proceedings or has been sentenced in the requested State for an offence other that the one pertaining to the request for extradition, the requested State may postpone or defer his surrender until the conclusion of the proceedings and the full execution of any punishment that has been awarded. Article 14 of the Extradition Treaty between the United States and Brazil, 1961 states that:

“When the person whose extradition is requested is being prosecuted or is serving a sentence in the requested State, the surrender of that person under the provisions of the present treaty shall be deferred until the person is entitled to be set at liberty, on account of the crime or offence for which he is being prosecuted or is serving a sentence, for any of the following reasons: dismissal of the prosecution, acquittal, expiration of the term of the
sentence or the term to which such sentence may have been commuted, pardon, parole or amnesty”.

Besides this the provisions have also been made by various bilateral, multilateral treaties and national statutes for temporary extradition for trial of an individual who is charged with crime in one country but being detained in another country on the condition that after trial he will be returned to the country granting temporary or conditional extradition. For example, the Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America, 2003 in Article 14(1) provides that ‘if the extradition request is granted for a person who is being proceeded against or is serving a sentence in the requested State, the requested State may temporarily surrender the person sought to the requesting State for the purpose of prosecution. If the requested State requests, the requesting State shall return that person to the requesting State after the conclusion of the proceedings against that person, in accordance with conditions to be determined by mutual agreement of the States’.

Article 14(2) deals with the postponement of extradition proceedings against a person who is being prosecuted or who is serving a sentence in that State. The provision further states that the postponement may continue until the prosecution of the person sought has been concluded or until such person has served any sentence imposed.

The European Convention on Extradition, 1957 also deals with both the aspects: postponement of surrender and the conditional surrender. Article 19 of the Convention contains the similar provision. It states as under:

1. The requested Party may, after making its decision on the request for extradition, postpone the surrender of the person claimed in order that he may be proceeded against by that Party or, if he has already been convicted, in order
that he may serve his sentence in the territory of the Party for an offence other than that for which extradition is requested.

2. The requested Party may, instead of postponing surrender, temporarily surrender the person claimed to the requesting Party in accordance with conditions to be determined by mutual agreement between the Parties.

Article 12 of the Model Treaty on Extradition, 1990 also lays down both the aspects. The London Scheme for Extradition within the Commonwealth, 2002 on the same lines also stipulates the rule for postponement of extradition and temporary transfer of prisoners to stand trial.64 On the similar lines the Model Law on Extradition, 2004, Section 29 deals with postponed and Section 30 with temporary surrender.65 Article 18 of the Benelux Extradition Convention of 1962 also deals with conditional surrender of the fugitive offender.

Some recent treaties have also incorporated in their provisions, ill health of the prisoner claimed as a ground for the postponement of the extradition, if in the opinion of a competent medical officer, he cannot be transported from the requested State to the requesting State without endangering his life due to grave illness, until such time as the danger has been sufficiently mitigated For instance Extradition Treaty between Argentina and Brazil, 1961 (Article-9); United States and Brazil,1961 (Article-15); United States and Sweden, 1963 (Article-5(6)).

The provision of postponement of surrender has been invoked in Re Rubio case66 by the Supreme Court of Chile in 1962. In this case after the careful perusal of the

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64 The London Scheme for Extradition within the Commonwealth, 2002 (Article-18).
66 (1962) 40 ILR 212.
document supplied by the requesting State and the relevant laws of both the countries, had granted the extradition of one Jose Roberts Rubio an Argentinean national, who was wanted by his national State for committing aggravated theft in an inhabited place in Argentina in 1957 and who was also proceeded against in the requested State for committing the same offence in 1961. However, the Court decreed that the surrender of the accused to the Argentinean authorities should be deferred until the termination of the legal proceedings pending against him and until he has served whatever sentence may be imposed by the Chilean Court.

**Position in India**

If the magistrate appointed under Section of 5 of the Indian Extradition Act, 1962, on consideration of the evidence, is satisfied that a *prima facie case* is made out against the fugitive criminal, he is required to commit him to prison and forward the result of his enquiry to the Central Government together with his report and any written statement which the fugitive criminal may have submitted for consideration of the Central Government. In case the magistrate is of the opinion that *prima facie case* is not made out in support of the requisition of the foreign State or Commonwealth Country, he is under obligation to discharge the fugitive criminal. In the former case, the Central Government is required to take a decision as to whether the fugitive criminal should be extradited, and if the decision is in the affirmative, the Central Government is required under Section 24 of the Act to convey him out of India within two months after his committal by the magistrate to prison.67 The language of Section 24 runs as under:

“If a fugitive criminal who, in pursuance of this Act has been committed to prison to await his surrender or return to any foreign State or Commonwealth country is not conveyed out of India within two months after such committal, the High Court upon application made to

67 Supra note 17 at 155.
it by or on behalf of the fugitive criminal and upon proof that reasonable notice of the intention to make such application has been given to Central Government may order such prisoner to be discharged unless sufficient cause is shown to the contrary.”

Thus it is clear that if the fugitive criminal is not conveyed out of India within the stipulated time, the Central Government may order the discharge of the fugitive criminal unless sufficient cause is shown to the contrary. Section 24 does not authorize the detention of a fugitive beyond two months after his committal except only in the case where sufficient cause is shown.

A similar provision was embodied in the Fugitive Offenders Act, 1881 in the form of Section 7 of the Act under which if a fugitive, who has been committed to prison in any part of Her Majesty’s dominion to await his return, is not conveyed out within one month after such committal, a superior Court upon an application by or on behalf of the fugitive, may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody. This provision came up for consideration before the Queen’s Bench division in Re Shutter (No.2).\(^6\) The facts of the case were that the Chief Metropolitan Magistrate under the Fugitive Offenders Act, 1881 committed the fugitive criminal to prison on 15 July 1959 to await his return to Kenya in connection with commission of a serious offence in that country. The fugitive was not conveyed out of Brixton Prison where he was committed within one month of his committal. The applicant moved for an order of his discharge pursuant to Section 7 of the Fugitive Offenders Act, 1881. The Learned Judge observed that:

“I think that the natural meaning is ‘Shall’, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody.”

\(^6\) (1959) 3 ALL ER 481.
Similar issue came before the High Court of Delhi for consideration in *George Kutty Kuncheria v. Union of India and Anor*\(^69\)

The facts of the case in brief are that fugitive criminal, consequent to the request of United States of America, was arrested on 12 April 1989. The inquiry was conducted and finding the existence of a *prima facie case* in support of the requisition of United States of America, the accused was committed to the prison to await the order of the Central Government under Section 8\(^70\) of the Act read with Section 29\(^71\) thereof. On October 3, 1994, the Ministry of External Affairs informed the United States Embassy in New Delhi of the Government’s decision not to extradite the petitioner. Despite this decision, the petitioner was not released from custody. The petitioner filed the application under Section 24 before the High Court of Delhi. It was held:

The compulsive force of Section 24 of the Act mandates the High Court to discharge the fugitive criminal out of custody, on an application made by him when he without any sufficient cause is not conveyed out of India within two months of his committal to prison by the Magistrate under Section 7(4),\(^72\) upon proof that reasonable

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\(^{69}\) (1998) 71DLT726.

\(^{70}\) Section 8 of the *Indian Extradition Act*, 1962 runs: Surrender of fugitive criminal. If, upon receipt of the report and statement under sub-section (4) of section 7, the Central Government is of opinion that the fugitive criminal ought to be surrendered to the foreign State ,it may issue a warrant for the custody and removal of the fugitive criminal and for his delivery at a place and to a person to be named in the warrant.

\(^{71}\) Section 29 of the *Indian Extradition Act*, 1962 states: Power of Central Government to discharge any fugitive criminal. If it appears to the Central Government that by reason of the trivial nature of the case or by reason of the application for the surrender or return of a fugitive criminal not being made in good faith or in the interests of justice or for political reasons or otherwise, it is unjust or inexpedient to surrender or return the fugitive criminal, it may, by order, at any time stay any proceedings under this Act and direct any warrant issued or endorsed under this Act to be cancelled and the person for whose arrest the warrant has been issued or endorsed to be discharged.

\(^{72}\) 7(4) of the *Indian Extradition Act, 1962* states that: If the magistrate is of opinion that a *prima facie* case is made out in support of the requisition of the foreign State, he may commit the fugitive criminal to prison to await the orders of the Central Government, and shall report the result of his inquiry to the Central Government, and shall forward together with such report, any written statement which the fugitive criminal may desire to submit for the consideration of the Central Government.
notice of the intention to make such an application had been given to the Central Government.

It is to be noted here that the petitioner had already given notice to the Central Government of India of his intention to make an application to the High Court seeking his discharge under Section 24 of the Act.

**Postponement of the Extradition**

India has entered into bilateral treaties which provide that if the fugitive criminal, whose extradition is being sought is facing trial or serving sentence for any other crime in the territory of the requested State, the requested State may postpone the extradition till the time the trial within the territory of the requested State is concluded or the fugitive has undergone the sentence imposed. The purpose is not to delay the prosecution but to bring the fugitive to face prosecution in both the States and also undergo imprisonment if convicted. In case of postponement of extradition, if according to the law of the requested State such period may impede the investigation or would cause the expiry of limitation, the fugitive may be extradited temporarily on the special request of the requesting State so that the fugitive criminal may face prosecution in the requesting State. However, in this eventuality the requesting State shall surrender the fugitive criminal back to the requested State immediately after the end of the proceedings in the territory of requesting State.\(^73\) For example the Extradition Treaty of India with United States, 1999 in Article 14 provides for the temporary or deferred surrender. It states that:

1. If the extradition request is granted in the case of a person who is being prosecuted or is serving a sentence in the requested State, the requested State, subject to its laws, may temporarily surrender the person sought to the requesting State for the purpose of prosecution. The person so surrendered shall be kept in custody in the

\(^73\) Supra note 17 at 203-204.
requesting State and shall be returned to the requested State after the conclusion of
the proceedings against that person, in accordance with conditions to be
determined by agreement of the Contracting States.

2. The requested State may postpone the extradition proceeding against a person who
is being prosecuted or who is serving a sentence in that State. The postponement
may continue until the prosecution of the person sought has been concluded or
until such person has served sentence imposed.

Similar provisions are made in the Extradition Treaties signed with Bulgaria, Poland,
Ukraine and Kuwait.

Person in Transit

Extradition should be effected directly between the two States by the police of the
extraditing State taking the person in their custody to the requesting State (and if by air or
sea, preferably in an aircraft or ship registered in the extraditing State) and there handing
him over to its police. The problem of transportation of an extradited person generally do
not arise when both the requested and requesti ng States share a common border or are
adjacent States. But the difficulty arises in those cases where the extradited person has to
pass through the territory of a third State. It is an established International Law that no
foreign State, can lawfully demand the conveyance of a fugitive offender surrendered to it
by another State pursuant to extradition treaty, through the territory of the third State unless
the latter gives its consent either expressly or impliedly. Thus on these grounds, a transit

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74 Treaty on Extradition between the Republic of India and Republic of Bulgaria, 2006 (Article-11)
75 Extradition Treaty between the Republic of India and the Republic of Poland, 2005 (Article -7).
79 Supra note 13 at 286.
State is fully entitled either to refuse or to place any condition prior to authorization of conveyance through its territory.

There has been a considerable difference of opinion among various jurists regarding the transit State’s relationship to the extradition process and to the conditions upon which permission for transportation may be granted.

According to Violet the common interest of States in the suppression of crime imposes a duty upon the requested State to extradite the fugitive offender, it also equally imposes a duty to aid the State which asks for transportation for an extradited person through the third States, subject to certain exceptions such as where a person is extradited for a political or military offence or where the extradited person is a national of its own or of the requested State. Furthermore, he asserts that as the State of transit is not granting extradition so it has no reason to ask for the documents which a requested State may require. 80 On the opposite side Billot 81 and Fiore 82 are of the opinion that the State of transit should retain complete liberty of action in each case and should have before it all facts necessary for it. Statutes which have provisions regulating the transit of extradited person widely differ in their requirements. The Belgian Law concerning Extradition, 1874 in Article 4 stipulates that the offence, for which the person is extradited must be extraditable under that law, shall not be political, and that prosecution or punishment for it is not be affected by the Statute of Limitation. Whereas French Law of Extradition, 1927, under Article 28 requires the reciprocity and excludes political and military offenders. The

80 Maurice Violet, La Procedure d’Extradition, Specialement dans le pays de refuge, 237 (Paris, 1898) as cited by Bedi, Supra note 13 at 287.
81 A. Billot, Traite de L’ Extradition, etc. op. cit. 278 (Paris 1874) as cited by Bedi, ibid.
82 P. Fiore, Traite de droit penal international et de l’ Extradition 665 (Paris, 1880) as cited by Bedi, ibid.
Netherlands Extradition Law, 1875 as amended in 1967 needs that the offence must be included in the treaty with the extraditing State.\(^{83}\)

In compliance with their national statutes the bilateral treaties concluded by these States manifest different traditions, customs prevalent among the States on the subject i.e. the offence concerned is an extraditable offence and is not among the exceptions laid down in the treaty and the extradited person is not a national of the transit State.\(^{84}\) For example Article 17 of Belgium Extradition Treaty with United States of America, 1987 states that in case of Transit:

1. Either Contracting State may authorize transportation through its territory, of a person surrendered to the other State by a third State. A request for transit shall be made through diplomatic channel or directly between the United States Department of Justice and the Ministry of Justice of Belgium. The facilities of the International Criminal Police Organisation (INTERPOL) may be used to transmit such a request. This request shall contain a description of the person being transported and a brief statement of the facts of the case, as well as a confirmation of the existence of the documents referred under Article 10(2)(e).\(^{85}\) A person in Transit may be detained in custody for 24 hours. Transit may be refused for a national of the requested State and for a person sought for prosecution or to serve a penalty of deprivation of liberty imposed by authorities of that State.

2. No authorization for transit is required when air transportation is used and no landing is scheduled on the territory of the State being transited. If an unscheduled

\(^{83}\) The Netherlands Extradition Law, 1967 (Article-20).

\(^{84}\) Extradition Treaty between Belgium-Algeria, 1971 (Article -17); Belgium-Germany, 1958 (Article-19); Belgium-Lebanon, 1953(Article-15).

\(^{85}\) Extradition Treaty between United States of America and Belgium, 1987, under Article 10(2)(e) relates to provisional arrest. The application of provisional arrest shall contain a statement of the existence of a warrant of arrest or a finding of guilt or judgment of conviction against the person sought.
landing occurs, that State may require the request for transit as provided in paragraph(1) that State shall detain the person to be transported until the request is received and transit is effected, so long as the request is received within 24 hours of the unscheduled landing.

Certain bilateral treaties consider public tranquility of the transit State as an additional condition to authorize the conveyance through its territory of person extradited by one State to another. For instance, Extradition Treaty between Argentina-Brazil, 1968 (Article 15); Israel-United States, 1962 (Article 17); United States of America-Brazil, 1961 (Article-19). There are some bipartite treaties also that do not apply the restriction of nationality very rigidly as they allow the transit State to refuse or grant transit to their own nationals. For example, Extradition Treaty between Belgium and Israel, 1956 (Article- 14).

Besides this the multilateral Convention on extradition also includes the provisions on transit. Some of multipartite Conventions do not require condition with regard to nationality of the person extradited or the nature of the offence. They mostly require a document indicating that extradition has actually taken place. An original or an authenticated copy of the decree of the extradition is required to be presented for example in the case of the Montevideo Convention, 1933(Article-18); the Arab Convention, 1952, (Article-15); the OCAM Convention, 1961(Article -59).

On the other hand the European Convention on Extradition, 1957 in Article 21 prohibits transit when the offence concerned is regarded by the granting State as an offence of a political or purely military character. It further authorizes the State to forbid transportation where its own national is involved. It states under Article 21 (2) that:
“Transit of a national within the meaning of Article 6\textsuperscript{86} of a country requested to grant transit may be refused.”

Opposite to this the Inter American Second Draft Convention on Extradition, 1957 permits passage of the person extradited irrespective of his nationality and the nature of the offence through the territories of the State of transit provided that such transportation shall not create difficulties of public order in that State.\textsuperscript{87}

But the same has been totally changed in the Inter American Third Draft Convention of 1973 under Article 22 that authorizes the State to oppose transit of the person extradited through its territory not only for the difficulties that might create public tranquility but also for the reason that the person being extradited is considered to be a political asylee, or if he being the national of the State of transit.

Again contrary to this the Model Treaty on Extradition\textsuperscript{88} does not lay down any condition, neither to the nationality of the extradited person or to the nature of offence. Article 15 of the Model Treaty states that:

1) Where a person is to be extradited to Party from a third State through the territory of the other Party, the party to which the person is to extradited shall request the other Party to permit the transit of that person through its territory. This does not apply where air transport is used and no landing in the territory of the other party is scheduled.

2) Upon the receipt of such a request, which shall contain relevant information, the requested State shall deal with this request pursuant to procedures provided by its

\textsuperscript{86} European Convention on Extradition, 1957 under Article 6 deals with the extradition of nationals, 6(1)(a) states that a Contracting Party shall have the right to refuse the extradition of nationals.

\textsuperscript{87} Article 19 of the Inter-American Second Draft Convention on Extradition, 1957.

\textsuperscript{88} United Nations General Assembly Resolution, 45/116, December 14, 1990.
own law. The requested State shall grant the request expeditiously unless it’s essential interests would be prejudiced thereby.

3) The State of transit shall ensure that legal provisions exist that would enable detaining in custody during transit.

4) In the event of an unscheduled landing, the party to be requested to permit transit may, at the request of the escorting officer, hold the person in custody for 48 hours, pending receipt of the transit request to be made in accordance with paragraph 1 of the present Article.

Again the Model Law on Extradition, 2004 incorporates the nature of the offence under Section 38. This provision states that “without prejudice to applicable treaty obligations, or in the absence of an extradition treaty or agreement or where such treaty or agreement refers to the requirements of the domestic legislation (country adopting the law), transit of a person through the territory of (country adopting the law) shall be allowed under Section 37 of the present law unless:

a) the conduct that constitutes the offence in respect of which transit permission is requested would not, if committed in (country adopting the law), constitute an offence, which, however described, is punishable under the law (country adopting the law);

b) the essential interests of (country adopting the law) prejudiced

But as far as nationality is concerned it maintains its earlier stand. Thus it is clear that the conditions of transit may vary as per treaties, Conventions and statutes but generally all provide that an application for transit shall be made and considered in the same manner as a requisition for extradition through diplomatic channel.
Position in India

Though there is no provision in the Extradition Act of 1962 as regard to transit but the same has been incorporated in the bilateral treaties with other countries. For example Article 20 of Extradition Treaty of India and Kingdom of Bahrain, 2004 relating to transit it states that:

1. Transit of a person who is subject of extradition from a third State through the territory of a Contracting State to the territory of the other contracting State shall be granted on submission of a request, provided that the offence concerned is an extraditable offence under the provisions of this treaty.

2. Transit of a national of the requested State may be refused if it is inadmissible under its law.

3. The request for transit must be accompanied by the documents mentioned in this treaty.

4. The documents mentioned in the foregoing paragraph shall be delivered to the requested State, forty five days before the date fixed for transit.

Thus, besides other procedural formalities regarding the nature of offence it should be an extraditable offence as per the provisions of the treaty and the transit of a national may be refused if it is inadmissible under its law. Similar provisions apply to other bilateral treaties also.89

But different condition exists as per Extradition Treaty between India and the Republic of Bulgaria, 2006. Article 15 of this treaty states that:

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89 Extradition Agreement between India and Germany, 2004 (Article 23)India- France, 2005 (Article 20); India-Kuwait, 2007 (Article 20).
“Transit may be refused on the same grounds on which extradition may be refused under this treaty and the provisions of Article 890 apply to transit requests”

On the other hand there are other extradition treaties like Extradition Treaty between Republic of India and Republic of Korea where there is no condition regarding nature of the offence or the nationality of the fugitive offender and only requires a request in writing made through the diplomatic channel.91 Similar conditions are stipulated in Article 19 of Extradition Treaty between India and South Africa, 2005.

Thus the conditions of transit vary as per the bilateral treaties entered with other countries.

**Conviction in Absentia**

Another matter of concern relates to the fact that the Civil Law States sometimes prosecute a fugitive in his absence. There are two types of Conviction in Absentia: those cases where the fugitive is permitted to challenge the conviction on his return, known as contumacious conviction, and those where he is not. In the later situation, it is hard not to proceed as though the fugitive is convicted, whereas contumacious convictions have been treated as if they left the fugitive in the same position as if he had been merely accused. While such an approach may be suitable for contumacious convictions, it is arguable that the ability to challenge the conviction in abstentia is a violation of the fugitives fundamental right to a fair trial and that the refusal to grant surrender could be justified on that ground.

Difficulties do arise in such cases where the person sought is a person convicted merely par contumacy (i.e., for non-appearance before foreign Court) because, the laws of the Commonwealth Countries are very clear on the point when they say that “conviction” and “convicted” do not include or refer to a conviction which under foreign law is a

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90 Article 8 of Extradition Treaty between India and the Republic of Bulgaria, 2006, relates to Request and Accompanying Documents.

91 Extradition Treaty between Republic of India and Republic of Korea , 2004 (Article-16).
conviction for contumacy, but the term “person accused” includes person so convicted for contumacy. Under the legal system of these States no judgment in criminal case is valid unless the Court has personal jurisdiction of the accused which a Court can acquire either by the appearance of the accused voluntarily before the Court or through the service of process upon the person in a manner prescribed by law and when a person, at all times during the proceedings, is outside the territorial jurisdiction of the Court, the judgment rendered by such Court is “always null and void.  

As a result of this approach, a British Court in Re Coppin case held that a person, whose extradition has been requested for an offence of which he had been committed *par contumacies* in France, could be surrendered as an accused person even though the Anglo-French Treaty of 1843, under which the case was decided referred only to the surrender of the accused person.

Identical approach was evolved by the Courts of United States also which held that a conviction pronounced in the absence of the accused in a foreign jurisdiction is not conclusive of the individuals guilt and the United States is only compelled to extradite a defendant convicted in absentia if after scrutinizing the depositions presented by the requesting State, it determines that sufficient evidence of the criminality of the relator is established. Moreover, if the record presented was insufficient evidence, to warrant a reasonable belief that the petitioner was guilty of the crime charged, he will never be surrendered as under its laws an accused is entitled to the benefit of counsel, to the right of cross examination and to introduce evidence in his own behalf but a conviction in absentia denies these basic rights. Hence the United States holds that persons so convicted will be

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92 Section 26 of the *British Extradition Act*, 1870.
93 Supra note 13 at 265.
94 (1866) LR 2 ChApp 47.
treated for the purpose of extradition as persons charged with crimes, unless there is a specific treaty stipulation contrary to this.  

On the other hand in recent cases a number of Courts have held that an *in absentia* conviction provides sufficient evidence of criminality on its face to satisfy the probable cause requirement governing extradition requests. In *Gouveia v. Vokes*[^Gouveia], Portugal sought the defendant’s extradition on the basis of an in absentia conviction under which he was sentenced to three years and nine months imprisonment. The magistrate judge found the defendant extraditable, and the defendant thereafter sought review of that decision by filing a petition for a writ of habeas corpus. While the District Court ultimately granted the relief sought on the grounds that a statutory amendment authorizing the extradition of American citizens under the treaty was not applicable to the defendant (because he had been convicted prior to the amendment), it recognized that, given the limited scope of review of a magistrate’s decision and the “modest requirements” of Section 3184[^Section3184], it could not “question whether, in fact, the Portuguese Court was correct in finding the defendant’s guilt.”

Similarly in *United States v. Robert Bogue*[^Bogue], France sought the defendant’s extradition on the basis of an in absentia conviction. After the magistrate Judge issued a certificate of extraditability, the defendant filed a petition for a writ of habeas corpus alleging, in part, that the magistrate’s determination of probable cause was erroneous because it was based solely on an in absentia conviction. Relying on *Gouveia case*, the District Court ruled that such a conviction was legally sufficient to satisfy the probable cause requirement. The District Court found that “the French government’s procedural

[^Gouveia]: Galline v. Fraser, 278 F (2d)77(1960).
[^Section3184]: United States Code, Title 18 › Part II › Chapter 209.
fairness in undertaking the defendant’s trial in his absence” was beyond the scope of review in determining the reasonableness of magistrate’s ruling. Again in *United States v Avidic* the District Court held that an in absentia conviction by a Tribunal in Bosnia and Herzegovina was sufficient on its face to establish probable cause for the defendant’s extradition.

In a recent treaty between United Kingdom of Great Britain and Northern Ireland and the United Arab Emirates on Extradition, 2008, Article 7 (4)(d) provides that:

“In the case of a person who has been convicted in absentia, the assurance provided for in Article 4(1)(f)”.

Article 4(1)(f) further states that:

(1) Extradition shall not be granted under this treaty in any of the following cases:

(f) If the person has been convicted in absentia, unless an assurance is provided that the person will be entitled to retrial or appeal amounting to retrial under the domestic law of the Requesting State.

Thus it is clear that on such assurance the extradition could be made in case of a person convicted in absentia.

From above discussion, it can be concluded that some Courts treat in absentia conviction in the same manner as a conviction in which the defendant was present, reasoning that, on their face, both types of convictions establish probable cause for purposes of extradition. When the defendant has participated at his trial but then voluntarily excused himself prior to the conclusion of the proceedings, Courts have found

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100 Criminal Action No. CR.07-M06 (2007).
that an ensuing conviction rendered in absentia is sufficient to establish probable cause to extradite the fugitive.\textsuperscript{102} Representation by counsel at the trial in some cases were not considered to be enough to give an in absentia conviction conclusive effect for purposes of probable cause.\textsuperscript{103} In those cases, as well as cases where the defendant was not present at trial, many Courts treat the in absentia conviction as a charge, requiring an independent determination of probable cause, based on the evidence presented that the fugitive committed the offence for which extradition is sought, as in the case of \textit{Haxhiaj v Hackman}\textsuperscript{104}.

In practice, this has resulted is some Courts declining to find probable cause in support of extradition when the government has relied on little more than the in absentia conviction itself in support of its extradition request.\textsuperscript{105} For example in \textit{In re Extradition of Ribaudo}, Italy sought the defendant’s extradition on the basis of an in absentia conviction for conspiracy and drug trafficking under which the defendant was sentenced to eleven year imprisonment. The only evidence provided in support of the defendant’s extradition was the decision of the Florence Court of Appeal, which referenced records of taped conversations involving the defendant and others and two incriminating letters. The District Court found that because the underlying record evidence had not been provided, it could not make an independent determination concerning whether there was probable cause to believe that the defendant committed the crimes charged. Additionally, the Court found that the “description of the underlying evidence” in the decision from the Florence Court Appeal itself did not support a reasonable belief that the defendant was guilty of the charged crimes.

\textsuperscript{102} \textit{United States ex rel. Bloomfield v. Gengler}, 507 F.2d 925\textsuperscript{2nd} Cir. 1974).
\textsuperscript{103} \textit{Gallina v. Fraser}, 278 F. 2d 77\textsuperscript{2nd} Cir. 1960).
\textsuperscript{104} 528 F. 3d 282\textsuperscript{4th} Cir. 2008).
\textsuperscript{105} \textit{In re extradition of Ribaudo}, (2004) WL 21302.
While in other cases, the foreign judgment appears to have provided sufficient information for the Courts to make an independent determination of probable cause. And, in another category of cases additional records have been provided which the Courts have relied upon to arrive at their probable cause ruling. In United States, an in absentia conviction will be lastly considered by the Secretary of State in deciding whether the grant of extradition, is not a defense to request for extradition, nor is it a basis for dismissing an extradition request.

**Extradition and Habeas Corpus**

The functions of a writ of Habeas Corpus are for the most part called into requisition to test the legal validity of the instruments being used for the conviction and extradition. The Courts of the United States may upon this writ consider the question whether the indictment or affidavit is so framed as to contain a sufficient charge of crime. The question of the truth or falsity of the charges is not before the Court. Their truth is for the time being assured. The sufficiency of the statement is really a matter of interpretation of a written document, and this is regularly a question of law. The reason why the prisoner can bring the matter before a United States Tribunal is, that the prisoner is held under color of authority derived from the Constitution and laws of the United States as held by the Court in *Roberts v Reilly*. The Court further stated that the jurisdiction of the Courts of the Asylum State, or other State where the prisoner happens to be is not excluded, since though the prisoner is held under authority derived from the Federal law, he is not held by an officer of the United States.

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110 116 U S 80 (1885).
Thus when the case has been brought within the terms of the treaty, and the fugitive criminal is within the domain of his own government, he may, if he considers himself in custody in violation of a treaty of the United States, apply to the Federal Tribunals for a writ of habeas corpus. Thus the Federal judges or Federal Courts can grant under Section 751 and 753 of the United States Revised Statutes, 1878 acting, of course, within their respective jurisdictions. There is hardly any doubt that Section 753 of the United States revised Statutes covers the case of a person extradited to the United States under the provisions of a treaty, and there after held as prisoner in violation of such treaty. Upon the hearing of the case the Court or Judge is to determine whether the prisoner’s restraint violates any provision of a treaty, either express or implied, and if this is found to be true, he will be discharged. Where fugitive criminals have been surrendered to the United States charged with offences against State authority, and delivered up to that authority, and are by the State dealt with in a way that violates the treaty, the Federal Tribunals will exercise their now unquestioned power to supply a corrective remedy by means of the writ of habeas corpus.\footnote{William Smithers Church, \textit{A Treatise of the Writ of Habeas Corpus: Including Jurisdiction, False Imprisonment, Writ of Error, Extradition, Mandamus, Certiorari, Judgments, etc. with Practice and Forms} 601 (The Law Book Exchange Ltd. Union, New Jersey, 2002).}

In United Kingdom also prior to the appeal rights introduced by the Extradition Act, 2003 (Section 26) habeas corpus was the appropriate avenue for legal redress against extradition committals by the magistrate where extradition was sought to country other than the Republic of Ireland, evidence of the alleged offence was presented to the magistrate’s Court. If the Court found that the evidence would be sufficient to warrant the accuser’s trial if charged with an offence committed within the jurisdiction of the Court, a committal order was made pending delivery of the accused to the foreign authorities who sought his extradition. In the case of an Irish fugitive, the magistrate’s Court acted upon a
sufficient Irish warrant, and was not required to hear evidence which made out a *prima facie case* against the accused.\textsuperscript{112} In all cases, there was a statutory requirement that the prisoner be informed of the right to apply for a writ of habeas corpus.

The Extradition Act, 2003 has, furthermore, brought about substantial changes to extradition procedures and to the role of habeas corpus as a means of avoiding extradition. The Act distinguishes between ‘category 1 territories’ and ‘category 2 territories’ as designed by order of Secretary of State. Procedures for dealing with extradition requests to category 1 territories are contained in Part 1 of the Act. The foundation of Part 1 lies in the U.K’s obligations in European Law.\textsuperscript{113} As expressed by Lord Bingham in *Gibson v. U.S.A.*:\textsuperscript{114}

“There has been a movement among the member States of the European Union, gaining strength in recent years, to establish, as between themselves, a simpler, quicker, more effective procedure, founded on member State’s confidence in the integrity of each other’s legal and judicial systems.”

This gave rise to the European Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States.\textsuperscript{115} Under Part 1 of 2003 Extradition Act (which seeks to transpose into national law the obligations of the Framework Decision), the magistrate does not consider the sufficiency of the evidence against the person whose extradition is sought.

\textsuperscript{112} *Backing of Warrants (Republic of Ireland) Act, 1965*, Section-52(2) repealed by *the Extradition Act 2003*, Section 218(a).


\textsuperscript{114} (2007)1 WLR 2367.

\textsuperscript{115} 2002/584/JHA, June13, 2002.
The House of Lords held *In re Hiladi*¹¹⁶ that the framework decision makes it clear that the admissibility or sufficiency of the evidence is not for determination by a judge in the requested State and so, an application for habeas corpus on the ground that, for whatever reason, there is no case to answer in the requested State must always be rejected as having been excluded by the provisions of the Statute.

In category 2 cases, the magistrate must decide whether there is an evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him.¹¹⁷ This amounts to the old requirement, albeit in the new form, of providing material establishing a case to answer.

Habeas corpus or judicial review nevertheless remains the correct means of redress against magistrate’s decisions falling outside the scope of the statutory rights and in jurisdictional challenges. In *R(Nikonovs) v Governor of Brixton Prison and Anor*¹¹⁸ Scott Baker L.J. observed:

> It would in my judgment require the strongest word in a provision….. to remove the ancient remedy of habeas corpus.

The Courts have now, however, on occasion taken the view that judicial review is more appropriate procedure than habeas corpus in matters relating to extradition especially where the applicant is detained pursuant to a lawful order of a Court as held in *Gronostajski v. Poland*.¹¹⁹

But still the habeas corpus remains an appropriate remedy against decisions of the lower Courts in a number of procedures for sending accused persons to stand trial in

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¹¹⁷ Section 84(1) and 86(1) of the *British Extradition Act*, 2003.
International Courts. In proceedings for an accused person’s delivery up to the International Criminal Tribunal for the Former Yugoslavia\textsuperscript{120}, the magistrate does not need to be satisfied that there is a sufficient evidence to warrant trial by the Tribunal. An accused person can challenge the order for delivery by way of habeas corpus (in England) or review by the High Court of Judiciary (in Scotland). In each case, the magistrate must inform the accused person of the right to apply for habeas corpus.\textsuperscript{121} There are similar provisions in relation to the International Criminal Tribunal of Rwanda\textsuperscript{122} and in relation to the International Criminal Court (ICC).\textsuperscript{123}

**Position in India**

It has been clearly declared in Article 21 of the Constitution of India that no person shall be deprived of life and liberty except in accordance with the procedure established by the law. Therefore to examine the question of illegal detention, certain mechanism is needed with utmost promptitude. The writ of Habeas Corpus acts as such mechanism under Article 32 and 226 of the Indian Constitution\textsuperscript{124}. Blackstone called the writ ‘the great and efficacious writ in all manner of illegal confinement’.\textsuperscript{125}

Personal liberty, protected under Article 21, is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show the impugned detention meticulously accords with the procedure established by law. It is a general rule, which has always been acted upon by the Courts of England that if any person

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\textsuperscript{121} The United Nations (International Tribunal) (Former Yugoslavia) order (1996), S.I. 1996/716, Article 6 and 11 as cited by Zellick, Supra note 113 at 84.
\textsuperscript{122} The United Nations (International Tribunal) (Rwanda) order (1966), SI 1996/1296, Articles 6 and 11 as cited by Zellick, ibid at 84 and also see Statute of the international Criminal Tribunal for Rwanda,1994 adopted by the Security council Resolution, 955, November 8, 1994.
\textsuperscript{124} Supra note 17 at 201.
\end{flushleft}
procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the Court will not allow the imprisonment to continue. 126 The same rule has been followed by the Courts in India even in those matters where a fugitive is ordered by the extradition magistrate to be detained, awaiting the decision of Government of India.

The issue came for the consideration before a Division Bench of the Calcutta High Court in *Rudolf Stallman v. Emperor* 127 pertaining to the detention order passed under the Extradition Act whether it can be challenged by the writ of habeas corpus. It was held that, without express repeal, the right to issue possessed by this Court cannot be said to have been taken away.

In another case *AC Tops v. Emperor* 128 it was held by the Court that there is no provision in the Extradition Act under which a fugitive criminal can apply for a writ of habeas corpus if the magistrate commits him to prison. But this view is not the correct view. The right which is enshrined in the Constitution of India and is available to citizens as well as aliens, including accused persons, cannot be denied to a fugitive criminal on the ground that there is no provision under the Extradition Act to enforce the same. To enforce one’s fundamental rights, as embodied in the Constitution of India, no other enactment is necessary and the same cannot be taken away by legislation. The writ of habeas corpus is very much available to the fugitive criminal to challenge her detention order after the conclusion of the enquiry. 129

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126 *Id.*
127 (1911)ILR 38 Cal 547.
128 50 Ind Cas 17 (1918).
129 *Supra* note 17 at 202.
Thus it may be concluded that the writ of habeas corpus can be allowed if the magistrate has transgressed his power and the finding, which he has arrived at, is illegal or if he has erred in the procedure.

**Property of Fugitive Offender**

During the investigations of the criminality of the act or acts and before submitting his report for the committal of the alleged offender or offenders to the executive for surrender to the requesting State, the trial magistrate or judge must determine the nature of the property found in his possession at his place of abode and that may be the proceeds, or effects of such act or acts for which his extradition is demanded and that may be needed for the purpose of the trial to establish his guilt. The magistrate may order delivery of such property along with the accused. The usual provision is that every article of property (including anything which may serve as evidence of the commission of the crime) found in the possession of the fugitive may be seized and delivered up with the fugitive if the authorities so decide. The rights of any third Parties, however, are generally reserved.130

In accordance with this general rule, extradition laws of various countries, bilateral treaties as well as multilateral Conventions usually provide for the surrender of the property to the requesting State, found in the possession of the extradited person at the time of his apprehension, relating to the offence or which may be useful as evidence in proving the extraditable offence or crime.131

In practice the police, when arresting the fugitive, carry out a search of both his person and his place of abode and take possession of any property likely to be connected with the offence charged, together with anything more generally in the fugitive’s

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131 *Supra* note 13 at 291.
possession. This practice has been developed under Article 5 of the Extradition Act, 1870 in the United Kingdom. If property connected with the case has been disposed of to third Parties by the prisoner, then the police serve the notice on the holders not to part with it until the proceedings against the prisoner has been settled. This notice is, however, only in the nature of a warning and has no legal effect in itself. Thus in Wood hall case\(^\text{132}\) where the US government had advanced an application asking the Court that certain securities, said to be the proceeds of forgeries by the accused, should be left in custody until the case has been disposed of in the United States. Chief Magistrate Sir J Ingham held otherwise and advised that no police magistrate has any power to make an order for the custody of such property.

Acknowledging this deficiency in the Statute of 1870, various Commonwealth Countries have included in their Acts a specific provision dealing with property found on fugitive offenders which may be material as evidence in proving the extradition offence. For example Article 27 of Canadian Statute on Extradition, 1970; Article 27 of Extradition Statute of Australia, 1988; and Article 28 of the Indian Extradition Act 1962. Presently the British Extradition Act, 2003 in Article 172 incorporates similar provisions.

Identical provisions have been inserted in the various bilateral treaties concluded by various countries for example, Extradition Treaty between Argentina-Brazil, 1961 (Article 12); Belgium and Algeria, 1971 (Article-12); Belgium and Brazil, 1953 (Article-12); U.S.A. and Brazil, 1961 (Article-20), U.S.A. and New Zealand, 1970 (Article -16). Similar provisions have also been incorporated in multilateral Conventions i.e. the Arab Convention on Extradition of 1952 (Article-12); the European Convention on Extradition of 1957 (Article-20); the Afro-Asian Convention on Extradition of 1961 (Article-25); the O.C.A.M. Convention on Extradition of 1961 (Article-54) for the delivery of any property

\(^{132}\) (1888) 20 QBD 832.
or object found in the possession of the accused at the time of his apprehension that may be needed for the purpose of trial.

Because “the property in possession” has not been precisely elaborated anywhere. The question often arises as to whether the phrase ‘found in possession’ should be interpreted in a narrow or rigid, or in a liberal manner. In a number of International Agreements and Statutes, only objects in the possession of the person claimed are to be delivered\(^\text{133}\) while the other agreements clearly assert that such delivery shall not be limited to articles found in his possession but covers everything including that which has been sold or hired out or which are subsequently discovered or objects important as evidence for his prosecution may be in hands of others.\(^\text{134}\) There are other treaties and Conventions also which do not specify different kinds of property,\(^\text{135}\) they leave this matter on the national law of the requested State to decide which property shall be delivered if extradition of the person concerned, is granted. Thus, it is reasonable to hand over everything which constitutes accessories of the crime, whether found at the time of arrest or discovered later on or which is likely to be of use as evidence of the act charged to the requesting State along with the person extradited.\(^\text{136}\)

There are still some States which, relying on their national legislation and treaty provisions, do not surrender to the requesting States goods found in the possession of the person claimed. Thus in 1937 Colombia requested the “extradition” of money and other

\(^{133}\) *The Arab Convention on Extradition*, 1952 (Article-12); *the Afro-Asian Convention on Extradition*, 1961 (Article-29); *the Commonwealth Scheme on Extradition*, 1966 (Article-15), Extradition Treaties between Israel-Austria, 1961(Article-17);United Kingdom –Sweden,1963 (Article-17) Argentina- Brazil, 1968(Article-12)

\(^{134}\) *The European Convention on Extradition*, 1957 (Article 20); *the O.C.A.M. Convention on Extradition*, 1961(Article-54); *the Benelux Convention on Extradition*, 1962 (Article-20), Extradition Treaties between Belgium-Brazil, 1957 (Article-12); United States- Brazil, 1961 (Article-20); Belgium-Algeria, 1970 (Article-12(1)).

\(^{135}\) Extradition Treaties between Belgium-Germany, 1958 (Article-18); Israel-United Kingdom, 1960 (Article-15); Israel-United States, 1962 (Article-11); U.S.A- South Africa, 1999 (Article-11); the Multilateral Conventions e.g. *Pan American Convention on Extradition*,1902 (Article 10); *the Commonwealth Scheme on Extradition*, 1966 (Article-15).

\(^{136}\) *Supra* note 5 at 209.
objects alleged to have been fraudulently obtained by one Kloes who was detained by Venezuela pending extradition proceedings. The Federal Cassation Court of Venezuela denied the request stating that:

“……… The concept of real extradition, that is, of goods, objects or instruments of the crime, is, clearly novel and anti-judicial………….. since it is not contemplated in Venezuela legislation nor in public treaties subscribed by the Republic or in the doctrine of International Law. Indeed, the provisions upon the matter, contained in the Code of Criminal Procedure, refer only to the existing concept of extradition, which is personal”. 137

In addition to this, in the bilateral treaties, 138 multilateral Conventions 139 and statutes 140 of various Countries, the rights of the third Parties in property seized are expressly preserved or are to be examined, protected and respected. Consequently, the extraditing State may make the delivery of such property subject to the conditions that it would be returned on demand to the requested State when the interests of third persons are involved or when the person extradited is not put on trial or is acquitted or when such property is proved, not to have been acquired by means of the acts for which extradition is requested. These treaties and Conventions also authorize the requested State to retain the property temporarily if it needs that as evidence in other criminal proceedings or postpone the delivery of that until such proceedings are concluded.

137 In re Kloes (1937) 9 AD411.
138 Extradition Treaties between U.S.A-Brazil, 1961 (Article-2); Argentina-Brazil, 1961 (Article-12); Belgium-Algeria, 1971(Article-12); U.S.A.-New Zealand,1970 (Article-6).
139 Pan American Convention on Extradition, 1902 (Article-10); the European Convention on Extradition ,1957 (Article-20(4)); the O.C.A.M. Convention on Extradition, 1961 (Article-52(2)).
140 France Extradition Law, 1927 (Article-29); German Statute on Extradition , 1969 (Article -66); Canadian Statutes on Extradition, 1970 (Article-27).
**Position in India**

Section 28 of the Indian Extradition Act, 1962\(^\text{141}\) provides that every property found in the possession of the fugitive at the time of his arrest, which may be material in proving the offence for which his extradition is sought, may be delivered to the requesting State along with the fugitive at the time of his surrender. Various treaties endorse this view. This provision has been made because the articles and property found may be useful in proving the culpability of the fugitive. All such property which may serve as evidence or which were found in possession of the fugitive, shall be surrendered if extradition is granted. If extradition is sought by many countries then it is for the requested State to ensure before handing over the property to one State, that the property so handed over would be provided to the next State if the same is also required there for proving the guilt of the fugitive.\(^\text{142}\)

Certain treaties have also made the provisions that the requested State may refuse to handover such property unless a satisfactory assurance is received from the requesting State that the articles will be returned to the requested State as soon as possible.\(^\text{143}\) On the other hand India has also entered into bilateral extradition treaties with some countries where there are no provisions for the surrender of the articles found in possession of the fugitive at the time, his arrest has been made.\(^\text{144}\)

Such surrender of property is always subject to the laws of the requested State and the property will be surrendered only to the extent the laws of the requested State permit. The surrender of the property has to take place even if the fugitive cannot be surrendered

\(^{141}\) Section 28 of the Indian Extradition Act, 1962 states: Everything found in the possession of a fugitive criminal at the time of his arrest which may be material as evidence in proving the extradition offence may be delivered up with the fugitive criminal on his surrender or return, subject to the rights, if any, of third parties with respect thereto.

\(^{142}\) Supra note 17 at 162.

\(^{143}\) Extradition Treaty between India and Republic of Turkey, 2001 (Article-22); India and Mongolia, 2001 (Article-17); India and French Republic, 2005 (Article-19); India and Republic of South Africa, 2005 (Article-16).

\(^{144}\) Extradition Treaty between India and Bhutan, 1997; India and Nepal, 1963.
owing to his death or if he has escaped from the territory of the requested State, unless the requested State has a claim for that property or the same is required for trial in the requested State. The Extradition Treaty of India with United States of America in 1999, Article 16 stipulates this provision:

16(1): “To the extent permitted under its laws, the requested State may seize and surrender to the requesting State all articles, documents, and evidence connected with the offence in respect of which extradition is granted. The items mentioned in this Article may be surrendered even when the extradition cannot be effected due to the death, disappearance, or escape of the person sought.”

Thus in the eventuality, the requested State may defer the surrender of the property till the trial in the requested State is over or may conditionally surrender the property to the requesting State with an assurance that the property will be returned to the requested State as soon as possible and also such surrender of property would not in any manner effect the right of the requested State or the third State in the said property which had been acquired in the property by such State and the requesting State shall surrender the property to the requested State in case of such right.

**Expenses Incurred in Extradition Proceedings**

It is generally known that great expense is incurred in connection with extradition proceedings. Therefore, the provisions have been inserted in some national laws and treaty arrangements dealing with these matters. Furthermore, the expenses connected with the arrest, committal, detention, and extradition of the person demanded become very important when the laws of the Asylum State require judicial investigation and determination before a fugitive offender can be surrendered. Because there is no unanimity
among the publicists of the States regarding the payment of expenses, however, there are divergent and conflicting views expressly by the scholar and observed by the States in their practices.\textsuperscript{145} Under the laws of certain States as well as various treaties, all expenses or costs connected with apprehension and surrender of the person claimed should be borne by the foreign government making the application for extradition because in their opinion surrender is granted in first place in the interests of the requesting State. The United States Code expressly provides:

“All costs or expenses incurred in any extradition proceedings in apprehending, securing and transmitting a fugitive shall be paid by the demanding authority.”\textsuperscript{146}

On the similar lines the Law of Brazil is very explicit when it states that:

“The expenses incurred in the detention or surrender shall be borne by the requesting State, but it shall not be obliged to pay anything for the services rendered by the Public employees paid by the Brazilian Government”\textsuperscript{147}

In contrast the Statute of Switzerland specifically provides that the expenses involved in extradition proceeding should be borne by the requested State. However, it is further suggested that the reimbursement of expenses in connection with apprehension, detention and surrender of a fugitive offender should be defrayed by the requesting State because it is that State which is keenly interested in punishing criminal for disturbing its socio economic order. In addition, it is also ensured that extradition proceedings are not instituted unless there is a strong case on a serious charge.\textsuperscript{148}

\textsuperscript{145} Supra note 5 at 213.
\textsuperscript{146} 18 United States Code, Section 3195.
\textsuperscript{147} Brazil Decree Law No. 394 (1938) regulating extradition, Article-14.
\textsuperscript{148} Extradition Law of Switzerland, 1892(Article-31).
The treaty provision on this subject like any other aspects of extradition do not show any uniform practice among the States. Number of treaties add qualifications with regard to expenses incurred in extradition proceedings, inserting in treaty arrangements, provisions which either deny any claim for the costs of the proceedings or of imprisonment or allow the requested State to charge from the requesting State for the Court proceedings where the person concerned is legally represented before the Courts of the requested State.\footnote{Supra note 13 at 294.} The Extradition Treaty of 1961\footnote{Article -18.} between United Kingdom and Sweden provides:

“Expenses incurred in the territory of the requested High Contracting Party by reason of extradition shall be borne by that Party. However, the requesting Party shall bear any expenses occasioned by being legally represented before the Courts of the requested party.”

Similarly the Extradition Treaty between France and Togolese Republic of 1963\footnote{Article -61.} states:

“Expenses incurred under the procedures prescribed in this title shall be borne by the requesting State, is being understood that no claim shall be made for the costs of proceedings or of imprisonment.”

Mostly the treaties concluded by the United States have detailed and precise provisions elaborating every item of cost. The Extradition Treaty between the United States and New Zealand, 1970 contains the following provisions:\footnote{Article -17.}

“Expenses related to the transportation of the persons sought shall be paid by the requesting Party. The appropriate legal officers of the country in which the extradition proceedings take place, shall by all legal means within their power, assist

\footnote{Supra note 13 at 294.}
\footnote{Article -18.}
\footnote{Article -61.}
\footnote{Article -17.}
the officers of the requesting Party before the respective judges and magistrates. No pecuniary clause, arising out of the arrest, detention, examinations and surrender of person sought under the terms of this Convention, shall be made by the requested Party other than as specified in the second paragraph of this Article and other than for the lodging maintenance and board of the person sought.”

There are other treaties which expressly provide that each Party will bear (or will not request the reimbursement of) the costs or expenses incurred in its own territory.\textsuperscript{153} However the treaties of other countries make it clear that the cost of conveyance shall be borne by the State applying for extradition. Thus under the Treaty between the Netherlands and Israel 1956 in Article 24 states:

“Each of the Contracting States shall defray the expenses incurred by the arrest within its territory, the detention, maintenance and the conveyance to its frontier or part of embarkation, of the person whom it may have consented to surrender in pursuance of the present agreement. All other expenses incurred in connection with the transportation of the person to be extradited shall be borne by the requesting State.”

Thus in the absence of any uniform practice among States with regard to costs or expenses incurred in extradition proceedings of the person sought, it is necessary to refer in each case the relevant treaty to access what expenses can be realized from the requesting State. However, the general view is that while the applicant State should not be charged with any part of the salaries of judicial and other officers who participate in extradition proceedings and are paid out of the public treasury of the requested State, the requesting

\textsuperscript{153} Extradition Treaties between Belgium – Germany, 1958 (Article -21); Argentina-Brazil, 1961 (Article-13); United States - Argentina, 1972 (Article-19).
State should bear special expenses i.e., witness fees, jail board, transportation and the like. This confirms to the practice of majority of States\textsuperscript{154}.

**Position in India**

As far as the expenses of extradition proceedings are concerned there is no explicit rule in the Indian Extradition Act, 1962. India has made the provisions regarding expenses in bilateral treaties signed with many countries.

The Bilateral Treaty between India and Republic of Bahrain, 2004. Under Article 21 provides:

1. The requested State shall meet all the expenses necessitated by the extradition of the person arising within its territory but the requesting State shall pay all transportation expenses to its territory.

2. The requesting State shall bear the expenses of the return of the extradited person to the place, he was in at the time of his extradition if his commission of the offence or complicity is not proved.

Similarly Extradition Agreement between the Republic of India and Kingdom of Bhutan 1997 in Article 9 stipulates that the expenses of any apprehension, detention or surrender made in pursuance of this agreement shall be borne and defrayed by the requested State.

On the contrary the Extradition Treaty between India and Republic of Bulgaria, 2006 under Article 19 also states that extradition expenses shall be borne by the Party on whose territory they have been incurred and airfares and transit expenses incurred in relation to

\textsuperscript{154} Supra note 13 at 296.
the extradition of the person shall be borne by the requesting State. The extradition treaties with other States also have similar provisions.\footnote{Extradition Treaty between India–Germany, 2001 (Article-27); India-France, 2005 (Article-23).}

Undoubtedly the time and expense involved, where extradition proceedings may be long and drawn out for procedural reasons are factors which tend to discourage the pursuit of all but most dangerous criminals. Therefore, procedural complexity and the lack of clarity in the position and role of executive and judiciary in the extradition proceedings, as this is, to large extent, a matter coming within domestic jurisdiction of the individual State and International law does not govern that sphere of State activity must be accounted as one of the most serious handicaps under which extradition labours. The next and the last chapter under the heading Conclusion and Suggestions, concludes the study and makes suggestions.