In International Law, if a fugitive is requested by a State with which no extradition arrangement already exists, there is no general international duty to extradite or punish the fugitive.\(^1\) Under International Law, a State is free to extradite and is not limited to the explicit terms of the treaty as a matter of comity.\(^2\) The term surrender refers to the situation in which a person is already in custody pursuant to action taken by the national authorities under its Municipal Law.

After the completion of the inquiry under Section 7 or Section 17 of the Act, the magistrate may decide whether the fugitive can be extradited or not, then he may commit the fugitive to prison to await the orders of the Central Government. If the fugitive has been committed to prison and magistrate has submitted his report to the Central Government, and the Central Government is of the 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.\(^3\) Article 16 of the treaty with Belarus stipulates as follows:

“1. If the extradition is granted, the requested party shall notify the time and place of delivery of extradited person.

2. The requesting party shall remove the person sought from the territory of the requested party within forty five days or such longer period, which may not exceed sixty days. If he is not removed within that period, the requested party may refuse to extradite him for the same offence and release the person.” Whereas Article 9 of the same treaty makes provision that if the fugitive sought to be extradited is serving
sentence for any other offence in the territory of the requested party, the extradition may be postponed till the completion of the proceedings, completion of sentence or his release, which shall be advised to the requesting party. But, if the postponement of extradition may cause lapse of time or impede the investigation, the person can be temporarily extradited at the request of the requesting party and the temporarily extradited person must be returned to the requested party immediately after the end of the proceedings of the case.\textsuperscript{4} Section 3188 of the United States law, provides that if, after “two calendar months” from the date of receipt by the Secretary of State of the certified copy of the transcript of the proceedings, the relator has not been surrendered, he is entitled to be released by order of the judge of United States. This statutory time limit does not begin to run until there has been final adjudication of the extradition request. In \textit{Duran v. United States}, the court held that the two calendar months under Section 3188 begins to run after the final adjudication and certification of extradition.\textsuperscript{5}

\textbf{Power of the High Court to Discharge the Person Apprehended:}

Under Section 24 of the Act, if the fugitive criminal is not conveyed out of India within two months, the High Court upon application made to it and upon proof of the fact that a reasonable notice of the intention of the fugitive criminal to make such an application has been given to the Central Government, may order the discharge of the fugitive criminal unless sufficient cause is shown to the contrary. This Section does not authorize the detention of a fugitive criminal beyond two months after his committal.\textsuperscript{6} Section 24 of the Act reads as follows “Discharge of the person apprehended if not surrendered or returned within two months- 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, is not conveyed out of India within two
months after such committal, the High Court upon application made to 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 the Central Government, may order such prisoner to be discharged unless sufficient cause is shown to the contrary.” High Court has the power to issue certain writs.\(^7\)

Even after the Central Government decides to extradite a fugitive he can still file a fresh petition to challenge the decision on all or any of the grounds open to him.\(^8\) In a case, the fugitive was arrested on a request of the United States of America on 12\(^{th}\) April 1989 and committed to prison to await the orders of the Central Government. However he made a representation to the Central Government under Section 8 of the Act, read with Section 9 thereof. On 3\(^{rd}\) October 1994, the Ministry of External Affairs informed the United States embassy in New Delhi of the Government’s decision not to extradite the petitioner. Petitioner was not released from the custody even after this decision. The petitioner gave notice to the Central Government of his intention to make an application to the High Court seeking his discharge under Section 24 of the Act, on 1\(^{st}\) November 1994; he was not released even after the Government received this application. Again on 22\(^{nd}\) April, 1995 the petitioner filed the petition before the Court where High Court was of the opinion that, “the compulsive force of Section 24 of the Act mandates the High Court to discharge the fugitive out of custody on an application made by him when he is not conveyed out of India without any sufficient cause within two months of his committal to prison by the magistrate under Section 7(4), upon proof that reasonable notice of the intention to make such an application had been given to the Central Government.”\(^9\)
Release of Fugitive Detained on Bail:

Section 25 provides a fugitive arrested or detained under the Act, right to bail. Section 25 makes the provisions of the Code of Criminal Procedure 1978, relating to bail applicable in the same manner as they would apply to the offence of which he is accused or convicted in the foreign State, had been committed in India. The law relating to bail is contained in Sections 436 to 450 of Chapter XXXIII of the Code of Criminal Procedure, 1973. Section 436 deals with situation, in what kind of cases bail should be granted. Section 439 deals with the special powers of the High Court or the Court of Sessions regarding grant of bail. Under Sections 437 and 439 bail is granted when the accused or the \textit{detenu} is in jail or under detention. So it will apply to extradition cases also. If a fugitive is arrested under Section 41(1) (g) of CrPC, he can be released on bail if the warrant or the requisition for extradition is not received.

Before granting bail under this Section, the magistrate has to satisfy itself that in case the petitioner is released on bail at this stage he would face extradition proceedings, if any, initiated against him at any time under the Act, and prove his innocence. As per Section 25 of the Act in relation to bail, the magistrate before whom the fugitive criminal is brought shall have as far as may the same powers and jurisdiction as the Court of Sessions under CrPC. Under the code there is limitation on the power of the magistrate to grant bail to a person accused of an offence punishable with death or life imprisonment. But there is no such limitation on the power of the Court of Sessions. Since the magistrate’s power is equated with that of the Court of Sessions to grant bail to a fugitive, there should be no such limitation on the power of the magistrate with regard to granting bail under the Act. Similarly the power of a Court of Sessions to direct any person, who had been released on bail to be arrested and committed to custody, can be exercised by a magistrate under the Act.
question of resorting to Section 9 of the Act came before the High Court of Kerala for
grant of bail by a magistrate who can deal with the fugitive Rajan Pillai who was a
fugitive from Singapore as he had not been arrested under a warrant issued under
Section 9. Section 9 of the Act describes the, “Power of the Magistrate to Issue
Warrant of Arrest in Certain Cases-
(1) Where it appears to any magistrate that a person within the local limits of his
jurisdiction is a fugitive criminal of a foreign State he may, if he thinks fit, issue a
warrant for the arrest of that person on such information and on such evidence as
would, in his opinion, justify the issue of a warrant if the offence of which the person
is accused or has been convicted had been committed within the local limits of his
jurisdiction.
(2) The magistrate shall forthwith report the issue of a warrant under sub-section (1)
to the Central Government and shall forward the information and the evidence or
certified copies thereof to that Government.
(3) A person arrested on a warrant issued under sub-section (1) shall not be detained
for more than three months unless within that period the magistrate receives from the
Central Government an order made with reference to such person under Section 5.”

In the above referred case where the matter was whether the fugitive Rajan
Pillai’s surrender amounted to judicial custody entitling the magistrate to grant him
bail. Justice, K T Thomas gave a restrictive interpretation to Section 9 which holds
that it dealt only with the procedure for issuance of warrant and that too only the
magistrate who had earlier issued the warrant can deal with a fugitive who surrenders.
“In other words a magistrate in India before whom a fugitive criminal surrender, other
than the one who issued the arrest warrant, is not empowered to exercise powers
under Section 25 of the Act. It may be that Section 9 is not controlled by the
preceding Sections in the chapter. It may also be that the magistrate who can exercise powers under Section 9 need not necessarily be the magistrate to whom the Central Government has issued the order under Section 5 of the Act. However, Section 9 would not clothe any fugitive criminal, merely because that fugitive criminal has appeared before him. A fugitive whose detention is made on the strength of a warrant issued under Section 9 is valid only for three months unless within that time the Central Government appoints a magistrate under Section 5 of the Act.

Miscellaneous:

Section 26: “Abetment of Extradition Offences- A fugitive criminal who is accused or convicted of abetting, conspiring, attempting to commit, inciting or participating as an accomplice in the commission of any extradition offence shall be deemed for the purposes of this Act to be accused or convicted of having committed such offence shall be liable to be arrested and surrendered accordingly.” This Section makes abetting, conspiring, attempting to commit, inciting or participating as an accomplice in the commission of the extradition offence, an extradition offence. Section 107 of the Indian Penal Code 1860, defines abetment in the following manner.

“Abetment of a thing- A person abets the doing of a thing, who-
Firstly- Instigates any person to do that thing; or
Secondly- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an Act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
Thirdly- Internationally aids, by any Act or illegal omission, the doing of that thing.

Explanation 1- A person who, by willful misrepresentation, or by willful concealment of a material fact which he is bound to disclose, voluntarily cause or procures, or
attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2 – Whoever, either prior to or at the time of the commission of an Act, does anything in order to facilitate the commission of that Act, and thereby facilitate the commission thereof, is said to aid the doing of that Act.”

**Property of the Fugitive:**

Section 28 of the Act says that the property found in possession of the fugitive criminal at the time of his arrest, may be delivered to the requesting State along with the fugitive at the time of his surrender. The property found with him may be material in providing the offence for which fugitive’s extradition is sought. The treaties between India and other foreign States make provisions in this regard. Article 15 clause 2 of the treaty with Poland stipulates that, “the requested State may condition the surrender of the property upon satisfactory assurances from the requesting State that the property will be returned to the requested State as soon as practicable. The requested State may also defer the surrender of such property if it is needed as evidence in the requested State.” But the treaties between India and Nepal and India and Bhutan do not make any provision in this regard.

**Power of the Central Government to Discharge a Fugitive:**

Section 29 of the Act empowers the Central Government to withhold the surrender of the fugitive criminal if it appears that-

1. The offence is trivial in nature;
2. The application for the surrender of the fugitive criminal is not made in good faith;
3. The application for surrender is not in the interest of justice;
4. The application has been made for political reasons;
5. It is unjust or expedient to surrender the fugitive.

The Central Government has very wide powers under this Section to stay proceedings and discharge the fugitive criminal at any stage of the enquiry or even before arrest or after the arrest and also after the conclusion of the enquiry i.e., when the magistrate after inquiry has committed the fugitive criminal to the prison awaiting orders of the Central Government conveying him out of India. It confers power on the Central Government to discharge a fugitive criminal in case it finds that it would be unjust to surrender or return a fugitive criminal to the requisitioning State. The extradition of a fugitive could be unjust if it is oppressive. The High Court of Delhi has held that the extradition of a fugitive is certainly unjust, unfair and highly unreasonable if its operation has allowed after the fugitive being in custody for eight and half years.\textsuperscript{20} It is now generally recognized that the fugitive will not be extradited if the crime is of trivial nature. It might be the reason that even a Government interested in the surrender of a fugitive may not request the extradition of a fugitive who had committed a minor crime. According to the practice of extradition the requesting State has to bear all the extradition expenses which the requested State may have to incur in respect of the extradition proceedings, apart from its own expenses on the appointment of a lawyer and the transportation of witness from the territorial State. However, extradition may also be refused if the territorial State considers the crime of the fugitive to be of trivial nature. Section 10 of the Fugitive Offenders Act, 1881 makes the similar provision. In a case\textsuperscript{21} the court discharged the fugitive on the basis of long delay in requesting for surrender as well as triviality of the crime. However, what comprises a crime of trivial nature is more a matter of circumstance than of definition. This may, therefore, vary from situation to situation and should be left to the discretion of the territorial State. The Central Government
has the power to discharge a fugitive if the application for surrender has not been made in the interest of justice. This is an equally explosive plea which may strain relations between the two States and it is unlikely to be exercised by the Government, except in very rare cases.

The Central Government may discharge the fugitive criminal if it is satisfied that the application for surrender has been made for political reasons. This reason amounts to judge the intentions of the requesting State and is an impractical proposition for the Central Government to determine. The last reason under this Section for the discharge of a fugitive at any stage is when it appears to the Central Government that it is unjust and inexpedient to surrender the fugitive. This reason will be in consideration of the nature of the crime, the lapse of time between the commission of crime and the demand for surrender, and the duration of his stay and his record within the territorial State. If all or any of these considerations impress upon the Central Government that it would be unjust or inexpedient to surrender the criminal, it may well discharge him. It is worth mentioning that Section 29 of the Indian Extradition Act is identical with Section 10 of the Fugitive Offenders Act, 1881 which stipulates that, “when it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of the fugitive not being made in good faith in the interest of justice or otherwise, it would, having regard to the distance, to the facilities for communications, and to all the instances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be remanded until after the expiration of the period named in the order, or may take such other order in the premises as to the court, seems unjust.” It seems that the power to
Ascertained the good faith of the application has been given to a superior court, but in India these powers are given to the Central Government.

**Extraterritorial Jurisdiction:** Territorial Jurisdiction is exercised by a State in relation to crimes committed on its territory (territorial jurisdiction). States can also exercise jurisdiction on crimes committed by their nationals abroad (extraterritorial jurisdiction), even if the act the national committed, was not illegal under the law of the territory in which, an act has been committed. As an example, the American Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003, asserts jurisdiction over American citizens travelling abroad. Section 34 of the Extradition Act, 1962 stipulates that, “An extradition offence committed by any person in a foreign state shall be deemed to have been committed in India and such person shall be liable to be prosecuted in India for such offence.”

States can also, in certain circumstances exercise jurisdiction over acts committed by foreign nationals on foreign territory. This form of jurisdiction tends to be much more controversial. The least controversial basis is that under which a State can exercise jurisdiction over acts that affect the fundamental interests of the State, such as spying, even if the act was committed by foreign nationals on foreign territory. Also relatively non-controversial is the ability of a State to try its own nationals from crimes committed abroad. Some nations such as France, as a matter of law, will refuse to extradite its own citizens, but will instead try them for crimes committed abroad.

More controversial is the exercise of jurisdiction where the victim of the crime is a national of the State exercising jurisdiction. In the past, some States have claimed
this jurisdiction, while others have been strongly opposed to it, in cases in which an
American is involved. In more recent years however, a broad global consensus has emerged in permitting its use in the case of torture, "forced disappearances" or terrorist offences (due in part to it being permitted by the various United Nations conventions on terrorism); but its application in other areas is still highly controversial. For example, former dictator of Chile, Augusto Pinochet was arrested in London in 1998, on charges of human rights abuses, on demand of Spanish judge Baltazar Garzon, not on the grounds of universal jurisdiction but rather on the grounds that some of the victims of the abuses committed in Chile, were Spanish citizens. Spain then sought his extradition from Britain, again, not on the grounds of universal jurisdiction, but by invoking the law of the European Union regarding extradition; and he was finally released on grounds of health. Argentinean, Alfredo Astiz’s sentence is part of this juridical frame.

The Indian Information Technology Act, 2000 largely supports the extraterritoriality of the said act. The law states that a contravention of the Act that affects any computer or computer network situated in India will be punishable by India– irrespective of the culprit’s location and nationality. Section 75 of the Act provides, “Act to apply for offences or contravention committed outside India.—(1) Subject to the provisions of sub-section (2), the provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality.

(2) For the purposes of sub-section (1), this Act shall apply to an offence or contravention committed outside India by any person if the Act or conduct constituting the offence or contravention involves a computer system or computer
network located in India.” It gives jurisdiction to the Indian courts to try the offences committed by any person while sitting in any part of the world, if, while committing the offence, the offender in the process of committing offence used a computer or computer network or computer system located in India. This provision gives power to the court to try the offence but for the purposes of securing the presence of the offender, the recourse to Indian Extradition Act, 1962 has to be taken and thereby all the principles of extradition had to be complied before the offender can be tried by an Indian court.

The former Union Minister for Law and justice, M Veerappa Moily said that the Government of India would bring in amendments to Information Technology and Extradition Act to make them more effective in tackling cyber crime. On the sidelines of a function in Mangalore in 2009, he said that the IT Act of 2008 requires certain provisions to deal with cyber crime. The amendments were drafted shortly. The amended law would have provisions to nab cyber criminals, including those with terrorist organizations, operating from overseas. He is cited to have remarked, “for this, the Extradition Act too would require amendments so that the accused could be brought here to undergo legal trial.” Enhancing his argument further he added, “tackling cyber crime requires international cooperation and we have to sell our ideas to other nations and convince them how cyber crime can be harmful to everyone”. He emphasized upon reaffirming the Government's commitment to crack down on it, as according to him the cyber crime impacts the nation's economic activities and investment. Commenting upon its drawbacks, Moily added, “Foreign Direct Investment (FDI) will reduce if we fail to provide effective safeguards against cyber crime. Terrorist organizations too are involved in cyber crime and they could be a major threat to the security and growth of the country”. More recently, a CBI judge
also emphasized on its importance saying that India is yet to sign a treaty with other countries to extradite accused involved in cyber crimes.\textsuperscript{24}

Section 34 of the Act gives jurisdiction to the Indian courts to try the accused of the crimes committed outside the territorial jurisdiction of India. Section 34 A stipulates that, “Prosecution on Refusal to Extradition: Where the Central Government is of the opinion that a fugitive criminal cannot be surrendered or returned pursuant to a request for extradition from a foreign State, it may, as it thinks fit, take steps to prosecute such fugitive criminal in India.” If the Central Government decides not to extradite the fugitive, then he may be prosecuted in India and the case may be referred to the prosecuting agency. States generally do not want to prosecute in the requested State because it is not convenient to the requested State as well as the fugitive.

The treaty between India and Ukraine\textsuperscript{25} provides that, “the nationals of one of the contracting parties shall not be extradited to the other contracting party. The requested contracting party shall submit the material and evidence to its competent authorities for prosecution if the act committed is considered as an offence under the laws of both the contracting parties.” Some other treaties\textsuperscript{26} also make the same provision. The Act also makes provision for prosecuting a fugitive if extradition is refused on the above grounds, under Section 34A, which reads as follows, “Prosecution on Refusal to Extradition: Where the Central Government is of the opinion that a fugitive criminal cannot be surrendered or returned pursuant to a request for extradition from a foreign State, it may, as it thinks fit, take steps to prosecute such fugitive criminal in India.” It clearly says that if the Central Government decides not to extradite the fugitive then he can be prosecuted in India so
that the guilty can be punished. As far as the author’s information on this matter is concerned, no such fugitive has been prosecuted in India. Further, Section 34B of the Act provides that a fugitive can be arrested, immediately on receipt of an urgent request from a foreign State. Then, the Central Government may request the magistrate having competent jurisdiction to issue a provisional warrant for the arrest of such fugitive criminal. Whereas, “a fugitive criminal can be put under arrest under three circumstances. First, when an order is issued by the Central Government under Section 5 of the Act to the magistrate for making an inquiry into the offence, on receipt of such an order of Central Government, the magistrate is empowered to issue warrants for the arrest of the fugitive criminal and thereafter to proceed to make necessary inquiry as per the procedure laid down in Section 7 of the Act; Second eventuality under which arrest of the fugitive criminal can be made is under Section 9 of the Act when it appears to any magistrate that a person within the local limits of his jurisdiction is a fugitive criminal of a foreign State, he may issue a warrant for his arrest. The magistrate thereafter is required to report to the Central Government the fact of issue of warrants. Such a person cannot be detained for more than ninety days unless within the said period the magistrate receives from the Central Government an order made with reference to such a person under Section 5 of the Act, the third category is the provisional arrest as provided in Section 34B of the Act, which is made on the basis of an urgent request from a foreign State for immediate arrest of a fugitive criminal. On receipt of such a request the Central Government may request the magistrate of competent jurisdiction to issue provisional warrant for the arrest of such fugitive criminal. Discharge of such fugitive criminal on expiry of the period of sixty days is mandatory under sub-section (2) of section 34B, if no request is made for his surrender or return within the said period.”27
It is equally applicable to both treaty and non-treaty States, since Section 34B comes under chapter V of the Act which may be applied to any State irrespective of its treaty status. Further, an urgent request for arrest of a fugitive can come from any State whatever be its treaty status. In the case of a fugitive from treaty State, since no formal request from such State is required for his surrender, the mention of request in Section 34B(2) may have to be construed as receipt of a foreign warrant for the fugitive’s arrest from such treaty State. All the same, the chance of misconstruction cannot be ruled out altogether. Hence to avoid any misconception, it is suggested that Section 34B(2) be amended to include the term receipt of foreign warrant expressly in addition to ‘receipt or request’. Section 34B(2) of the Act can be considered as the protector of the personal liberty of the fugitive, enshrined in the Article 21 of the Constitution of India which stipulates, “No person shall be deprived of his life or personal liberty except according to procedure established by law.” It is clear that the protection extended by it covers all ‘Persons’. In other words it can be said that the expression of ‘Person’ is not confined only to citizens but extends even to foreign nationals, including fugitives. In view of the clear provision of the Article 367(1) of the Constitution, Section 3(42) of General Clauses Act can be pressed into service in so far as the definition of ‘Person’ is concerned. As per the definition of ‘Person’ in General Clauses Act, that expression includes not only a natural person but also a juristic person, a deity or a Gurudwara.

However, it is necessary for a fugitive to get benefitted under Section 34B(2), that is he must be arrested under Section 34B(1) of the Act and not under Section 9 of the Act, which empowers a magistrate within local limits of his jurisdiction, to issue a warrant for arrest, if it appears to him that a person is a fugitive. It was invoked in *Bansil Mutei Shiblaq v Union of India and Ors*, where the fugitive was arrested on
the basis of the Red Corner Notice issued by the Interpol, on the request of the Government of the UAE, on January 7, 2007 when he came to Indira Gandhi International Airport, New Delhi. After the expiration of sixty days of the arrest, the fugitive for his discharge moved an application under Section 34B (2) of the Act. But, the Additional Chief Metropolitan Magistrate rejected the application for discharge reasoning that the arrest of the fugitive criminal does not fall within the purview of Section 34B (1) of the Act. The order of magistrate was challenged before the High Court of Delhi and it was held that the detention clearly fell within the Section 34B. In deciding the case, reliance was placed upon the judgment of the two Division Bench of the court, namely Flemming Luding Larsen v Union of India and Anr and Pragnesh Desai v Union of India which say that with the expiry of the statutorily prescribed period, the individual had a vested right to be discharged, if no request was received from the requesting country.

Section 34C of the Extradition Act, 1962 further stipulates that, “Provision of life imprisonment for death penalty- Notwithstanding anything contained in any other law for the time being in force, where a fugitive criminal who has committed an extradition offence punishable with death in India, is surrendered or returned by a foreign State on the request of the Central Government and the laws of that foreign State do not provide for a death penalty for such an offence, such fugitive criminal shall be liable for punishment for life only for that offence.”

Article 4 sub-para (d) of the UN Model Treaty, provides an optional ground for refusing extradition. This arises when the offense for which extradition is being sought carries the death penalty, unless the requesting State undertakes not to impose the death penalty or not to carry it out if it is imposed. While some countries have capital punishment, other countries have abolished capital punishment. It can
generally be observed that the latter countries tend to refuse extradition of fugitive offenders to the former, based on the ground that capital punishment may possibly be imposed. In reality, the exception becomes a mandatory one as most countries in Western Europe for example refuse to surrender a fugitive if he/she faces the risk of being sentenced to death.

Therefore, many countries are amending their domestic laws to accommodate the requirement that in cases where capital punishment is likely to be imposed, the requesting State will not carry it out. India amended its extradition law providing that in extradition cases, the original death sentence in the requesting State will be substituted with life imprisonment or a lesser sentence. In the recent past, there is a call for the abolition of capital punishment especially emanating from human rights advocates. However, the death penalty exception to extradition is opposed by countries that still retain capital punishment in their legal systems. The arguments forwarded by those countries are as follows;

i) Insisting on the death penalty exception hampers the smooth flow of extradition between States thereby diminishing the spirit of international cooperation to suppress crime.

ii) It interferes with the judicial discretion of the requesting State thereby encroaching upon the sovereignty of another State.

iii) Diplomatic treaties and the judicial system are two different and independent institutions. Whereas the requesting State may assure the requested State that capital punishment will not be imposed, the court may go ahead and impose it thereby straining the relationship and cooperation of the two countries.

Various treaties between India and other foreign States make provision in this regard. For example Article 8 of the treaty between India and United States of
America, provides that if the offence for which extradition is sought is punishable with death under the laws of the requesting State and is not punishable with death under the laws of the requested State, the requested State may refuse extradition. Some other treaties make provision that if under the laws of the requesting State the fugitive is liable to death penalty for the offence for which his extradition is sought but the law of the requested State does not provide for death penalty in a similar case, the requested State may deny extradition unless the requesting State gives an assurance which is considered sufficient by the requested State that the death penalty will not be given. Nowadays, States do not extradite the fugitive if assurance is not given that the capital punishment would not be imposed on him.

The issues of the execution of Devender Pal Singh Bhullar and charging Abu Salem, a close associate of international fugitive Dawood Ibrahim, under clauses demanding death sentence are set to create a diplomatic row between India and Europe. The European Union, on October 10, 2011 declared abolition of the death penalty the world over as one of their human rights and foreign policy objectives to mark October 10, as the World and European Day against the Death Penalty. In a joint declaration by Catherine Ashton, European Union High Representative for Foreign Affairs and Security Policy, and Thorbjørn Jagland, Secretary General of the Council of Europe, reaffirmed united opposition to the death penalty, and committed to work for its worldwide abolition. The declaration unfolds its intention in the following words, “we consider capital punishment to be inhumane, and a violation of human dignity. Experience in Europe has taught us that the death penalty does not prevent an increase in violent crime, and nor does it bring justice to the victims of such crimes. Any capital punishment resulting from a miscarriage of justice, from which no legal system can be immune, represents irreversible loss of human life.”
Earlier, in a letter to the Union Home Minister, P Chidambaram, Ashton had made it clear that the grouping opposes death sentence pronounced to Devender Pal Singh Bhullar, a Khalistani militant. Bhullar is facing the gallows after President Pratibha Patil rejected his petition of mercy. Bhullar was deported from Germany on 18th January, 1995, after his application seeking political asylum was rejected by German authorities. The decision to deport him was declared illegal by a Frankfurt court two years later. Bhullar was then arrested by Delhi Police at the airport on charges of falsification of documents. However, he was later handed over to the Punjab Police, who booked him under the Terrorist and Disruptive Activities (Prevention) Act, for engineering bomb blasts at the Youth Congress office in Delhi and elsewhere in Punjab. Outgoing German ambassador to India, Thomas Matussek believed that Germany wouldn’t have deported him, knowing the fate of his case. He said that Bhullar’s deportation came as he had not disclosed full fact before German authorities and the court there. He added further saying, “Unfortunately for him and for us, he presented a forged passport and gave totally wrong story. When that was put to court it was clear there was no basis for his asylum and court ruled he could be deported. Later on, a real story came out. He had not told us.” Matussek made it clear that in a similar case in future, the person would not be deported. He categorically said, “If this case comes up in Germany now and he tells the full story, we will not deport him.”

However, in the case of Abu Salem, the High Court of Portugal had cancelled the extradition order of 2005, under which the gangster was handed to Indian authorities and was brought to India. The High Court had cancelled the extradition order on grounds that the terms and conditions of extradition were violated by Indian authorities. As per the extradition order, he shall not be given the death sentence and not be put to trial for the offences other than mentioned in the extradition order and
not be given a sentence of twenty five years. The CBI filed an appeal at the Supreme Court in Lisbon, contending that India has strictly adhered to the terms and conditions of the extradition order. According to the sources, the Constitutional Court's Judges have made it clear that the judgement of lower court which acknowledged violation of extradition treaty does not, by itself, oblige India to render Salem back to Portugal. The underworld leader, Abu Salem will remain in India as the top court of Portugal has observed that it was not obliged to extradite the gangster back to the European country after it was held there was violation of deportation rules by Indian authorities. The declaration also called for full implementation of a recent UN Resolution, which called for global moratorium on the use of the death penalty, with a view to its complete abolition. The EU is also the first regional body to have adopted rules prohibiting the trade in goods used for capital punishment (and torture and ill-treatment), as well as the supply of technical assistance related to such goods. The EU’s political commitment has been matched by substantial financial support for concrete projects.

**Rule Making Powers:** Section 36 of the Extradition Act empowers the Central Government to make rules in this regard. Under this Section, the Central Government can make rules by notification in the official Gazette to carry out the purposes of the Act. It is read as, “Power to make rules. (1) The Central Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act. (2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-- (a) the form in which a requisition for the surrender of a fugitive criminal may be made;
(b) the form in which a warrant for the apprehension of any person in a foreign state to which Chapter III applies may be made;
(c) the manner in which any warrant may be endorsed or authenticated under this Act;
(d) the removal of fugitive criminals accused or in custody under this Act and their control and maintenance until such time as they are handed over to the persons named in the warrant as entitled to receive them;
(e) the seizure and disposition of any property which is the subject of, or required for proof of, any alleged offence to which this Act applies;
(f) the form and manner in which or the channel through which a magistrate may be required to make his report to the Central Government under this Act;
(g) any other matter which has to be, or may be, prescribed.

(3) Every rule made under this Section shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.”

The rules made under this Section can be reviewed and struck down by courts as invalid, if they are ultra vires of the Constitution or the Act. They can also be struck down on the ground of procedural ultra vires, which means that the rules are made without complying with the prescribed procedure. Regarding procedural
requirements, the Act provides for notification of rules in the official Gazette and hence if the rules have not been so notified the courts would strike them down. Another procedural requirement is that every rule made under the Act shall be laid before each House of Parliament for a total period of thirty days. The Act provides for simple laying and it is not subject to either affirmative or negative resolution and hence non compliance with such lying down will not invalidate the rules so made. If the rules made are unreasonable, then also they could be struck down, as ‘unreasonableness’ has now developed into an independent ground for judicial review of delegated legislation. A very important power given to the Central Government under the Act is that the Central Government may through a notified order, add or omit any offence from the Schedule to the Act, listing offences which are not be regarded as political offences. The power given here, though camouflaged as a power to make delegated legislation, on closer scrutiny appears to be a plenary power. It is a basic principle of delegated legislation that the legislature cannot delegate the plenary or essential legislative function. Hence, if challenged before courts, the provision is liable to be struck down on the ground of excessive delegation.35

Repeals and Savings:

This provision is contained in the Section 37 of the Act. After the Extradition Act, 1962 came into force, the Indian Extradition Act, 1903 and the corresponding law was repealed. The Extradition Acts, 1870 to 1932 and the Fugitive Offenders Act, 1881 insofar, as applied to and operated as part of law of India, were also repealed. Now the Extradition Act, 1962 is applicable to entire India.

The Government of India has discretionary power to surrender or not to surrender. Whether a requested State will surrender often depends on whether it will respect the asserted claim of jurisdiction. Accordingly, it is argued that countries are
more likely to enter into extradition treaties when they have similar understandings of jurisdiction without which surrender of fugitives may be difficult to achieve. The various treaties between India and foreign States clearly show that the requested State shall consider the gravity of interest, the territorial jurisdiction of the requesting State, the effect of the offence on security, defense, the interest of the requesting State in prosecuting the fugitive, for deciding the extradition of the fugitive criminal. It is argued that the discretion which the Central Government may exercise, in the matter of surrender or non-surrender of the fugitive, is compact with many difficulties. On one hand, the liberty of the individual is involved; on the other hand, the friendly relation with the requesting State is involved and this is at stake, if the executive authority commits any indiscretion in the matter. Therefore, it has been rightly said, “the extradition is an aspect of our foreign relations” and there is more “at stake than the liberty of the accused.”
References

3. Section 8 of the *Extradition Act, 1962*
4. Extradition treaty between India and Beralus, 2008
7. Article 226 of the Constitution of India [Supreme Court also has the power to issue writs under Article 32]
10. Section 25 of the *Extradition Act 1962*, Bail is the safeguard for the appearance of the court to facilitate fugitive’s release pending inquiry or investigation. See also *Govind Prasad v West Bengal* (1975), CriLJ 1249,1255 (Cal.)
17. Extradition treaty between India and Poland, 2008
18. Extradition treaty between India and Nepal, 1963
19. Extradition treaty between India and Bhutan, 1997


25. Extradition treaty between India and Ukraine, 2008, Article 4

26. (i) Extradition treaty between India and UAE, 2000, Articles 5 and 7

(ii) Extradition treaty between India and Kuwait, 2007, Article 7

(iii) Extradition treaty between India and Bulgaria, 2008, Article 6.1

(iv) Extradition treaty between India and Poland, 2008, Article 6.1

27. Flemming Lunding Larson v Union of India & Anor (1998) 72 DLT 80

28. Nagaraj Naraynan, op. cit., p.192

29. Bansil Mutei Shiblaq v Union of India and Ors (2007) III AD (Cr) (DHC) 81

30. Flemming Luding Larsen v Union of India and Anr (1998) 72 DLT 80

31. Pragnesh Desai v Union of India (2004) 73 DRJ 84

32. Extradition treaty between India and United States of America, 1999


