

# **INTERNATIONAL COOPERATION TO COMBAT TRANSNATIONAL ORGANIZED CRIME - WITH SPECIAL EMPHASIS ON MUTUAL LEGAL ASSISTANCE AND EXTRADITION**

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## **I. TRANSNATIONAL ORGANIZED CRIME**

Presently there are various transnational crimes which are being committed by the people of the world generally and particularly under the influence of criminal organizations. Drug trafficking, money laundering, trafficking in women and children, illicit manufacturing of and trafficking in fire arms, acts of corruption, use of violence and extortion and illegal trafficking and transportation of migrants are the main transnational crimes with which the countries of the world are confronted. There is a rapid growth and geographical extension of organized crime in its various forms which has become a threat to the security of the international society, stability of sovereign states impairing the quality of life in addition to undermining the human rights and fundamental social values.

Recognizing the growing threat of organized crime with its destabilizing and corrupting influence on fundamental social, economic and political institutions which demands increased and more effective international cooperation, the United Nations General Assembly passed a Resolution No.49/159 on 23 December, 1994. The said Resolution emphasized the need for improved international cooperation at all levels for more effective mutual assistance between the states in

their fight against organized transnational crime. The said Resolution urged states to implement the Political Declaration and the Global Action Plan against organized transnational crime adopted at Naples.

## **II. EXTRADITION**

The modern word extradition is perhaps derived from the practice which was called "extra-tradition" because it was against the traditional hospitality offered to an alien by a state who had allegedly committed an offence and sought refuge or asylum to save himself from prosecution or punishment. The term extradition has its origin in the Latin word "extradere" which means forceful return of a person to his sovereign. Mr. Cherif Bassiouni defined extradition as a system consisting of several processes whereby one sovereign surrenders to another sovereign a person sought as an accused criminal or fugitive offender. Similarly, Dr. S. Bedi interpreted extradition as an act of international legal help and cooperation for the purpose of suppressing criminal activities consisting of handing over an individual, accused or convicted of a criminal offence by one state to another, which being competent, intends to prosecute or punish him in accordance with its laws.

## **III. HISTORICAL BACKGROUND**

The origin of international cooperation for the suppression of crimes go back to the very beginning of formal diplomacy. The surrender on demand of an accused or convict by a state to which he had fled for

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refuge in order to defeat prosecution or punishment by the state within whose jurisdiction the alleged crime was committed, is not a new phenomena in international relations. The practice originated in early non-western civilizations such as Egypt, China, the Chaldean and Assyro-Babylonian. In the early days of practice, the delivery of a requested person to the requesting sovereign was undertaken in solemn formulas and was performed with pomp. Delivery of individuals to the requesting sovereign was usually based on pacts or treaties but it also occurred on the basis of reciprocity and comity (as a matter of courtesy and goodwill between sovereigns). In fact, the whole history of extradition has been a reflection of the political relations between the states in question.

The first recorded extradition treaty in the world dates back to 1280 BC. In the second oldest document in diplomatic history, Ramases-II, Pharaoh of Egypt signed a peace treaty with the Hittites after he defeated their attempt to invade Egypt. This document was written in Hieroglyphics and carved on the Temple of Ammon at Karnak and is also preserved on clay tablet, in Akhodroin in the Hittite archives of Boghazkoi. The peace treaty provided expressly for the return of persons sought by each sovereign who had taken refuge on the others' territory. Since then, however, only the practice of Greece and Rome in extradition arrangements found its way into European texts of international law.

In fact, from antiquity until the late 18<sup>th</sup> century the persons sought by another state were generally political or religious opponents of the ruling families and they were not necessarily fugitives from justice charged with common crimes. Thus the stronger relationship between the sovereigns, the more interest and concern

they had for each others welfare and the more intend they would be of surrendering those political offenders who had created the greatest dangers to their respective welfare. The common criminals were the least sought-after species of offenders since their harmful conduct affected only other individuals and not the sovereign or public order.

The history of extradition can be divided into four periods:

- i) Ancient times to the 17<sup>th</sup> century - period revealing an almost exclusive concern for political and religious offenders;
- ii) 18<sup>th</sup> century and first half of the 19<sup>th</sup> century - a period of treaty making which chiefly concerned military offenders characterizing the condition of Europe during that period;
- iii) 1833 to 1948 - A period of collective concern for suppressing common criminality; and
- iv) post 1948 development which ushered in a greater concern for protecting human rights of persons and revealed an awareness of the need to have international due processes of law to regulate international relations. The historical evolution of the practice of extradition expressly demonstrates that extradition in earlier times was used for preservation of political and religious interest of the states but gradually it evolved into an international cooperation for the preservation of the world's social interests and suppression of crimes. This common interest of states, in the suppression and prevention of crime, coupled with the increasing recognition of basic principles which gradually softened the

exaggerated feeling of national sovereignty unfettered by law and the emergence of humanitarian international law giving full protection to individual rights and interests, has paved the way for a true international law on extradition.

#### **IV. THE DUTY TO EXTRADITE**

Hugo Grotius asserted that the state of refuge was obligated either to return the accused to the requesting state or punish him under its own laws. Similarly, De Vattel argued that international law imposed a definite legal duty on the state to extradite persons accused of serious crimes. Puffendorf represented a contrary view and argued that the duty to extradite was only an imperfect obligation which required an explicit agreement in order to become fully binding under international law and thus to secure the reciprocal rights and duties of the contracting states. Similarly, Billot took the position that there was no right to extradition save by contract or agreement between states. The duty to extradite only by virtue of a treaty, whether it be bilateral or multilateral has become the prevalent practice amongst states, though reciprocity and comity still exists as a legal basis relied upon by a number of states, usually through the support of national legislation.

Most of the conventions on international criminal law reflect the existence of the general principle either to extradite or punish. The signatory states to these conventions have incorporated this obligation into their domestic laws. However, it is unclear whether the duty to prosecute or extradite is disjunctive or co-existent. If the duty to extradite or prosecute is disjunctive or an alternative one, then there is a primary obligation to extradite, if relevant conditions are

satisfied and a secondary obligation to prosecute under national laws, if extradition cannot be granted. If the duty to extradite or prosecute is co-existent rather than alternative or disjunctive, then the requested state can choose between extradition and prosecution at its discretion.

#### **V. RECIPROCITY**

Reciprocity is one of the legal basis for extradition in the absence of a treaty which is a part of international principles of friendly cooperation amongst nations. Reciprocity, as a substantive requirement of extradition (whether based on a treaty or not) arises with respect to various specific aspects of the process. The essential question is whether it requires that the process of both the requesting and the requested state be alike or whether respective states will reciprocally recognize their respective processes. Reciprocity to a large extent means parallelism or symmetry between the two processes of the requested and the requesting state. However, the requested state may consider that the certain aspect of the requesting states criminal process is so alien to its system as to lack any basis of reciprocity.

#### **VI. DOUBLE CRIMINALITY**

Double criminality refers to the characterization of the relator's criminal conduct in so far as it constitutes an offence under the laws of the two respective states. Hence, the general rule is that the offence in respect of which extradition is requested must be an extraditable offence not only under the law of the requesting state but also under the law of the requested state. Hence, no state is under any legal obligation to deliver up a fugitive offender to a foreign state on its demand if the person so demanded is charged with an offence, which is a crime under the law of the demanding state only but not

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punishable under the legal system of the state of refuge. The principle of double criminality can also be termed as the identity rule. The role of double criminality gives rise to sometimes difficult promises mainly for the reason, firstly, because of variation of laws and institutions in the two countries and secondly because the act charged does not amount to a corresponding crime.

There are three approaches to determine whether the offence charged even though criminal in both states falls within the meaning of double criminality:

- i) Whether the act is chargeable in both states as a criminal offence regardless of its prosecutability.
- ii) Whether the act is chargeable and also prosecutable in both states and
- iii) Whether the act is chargeable, prosecutable, and could also result in the conviction in both states.

Hence, there is a nexus between double criminality and extraditable offences.

### **VII. EXTRADITABLE OFFENCES**

Extraditable offences are offences that are punishable under the laws of both parties and either enumerated among the extraditable offences or found according to the formula for ascertaining extraditability in the applicable treaty. In the absence of a treaty, if extradition is based on reciprocity, the offence must be mutually recognized as extraditable. Where extradition is based on comity, it will depend exclusively on applicable national law. In addition to designating extraditable offences, the criminality of the relator's alleged conduct must satisfy the requirement of double criminality, i.e. the offence charged must constitute a crime in the two legal systems.

The substantive requirements to extradition are that a person accused of or found guilty of an offence in the requesting state be surrendered to that state, provided the following criteria are met:

- i) If a treaty exists, the offence must be listed or designated.
- ii) If no treaty exists, the respective states will reciprocate for the same type of offence.
- iii) If no treaty or reciprocity exists, but the request is based on comity, the requested state will rely on its customary practice.
- iv) Furthermore, in all three instances, the offence charged must also constitute the offence in the requested state i.e. double criminality.

A corollary to the requirements of extraditable offence and double criminality is the doctrine of speciality.

### **VIII. THE DOCTRINE OF SPECIALTY**

The doctrine of speciality embodies the theory in international law that compels the requesting state to prosecute the extradited individual upon only those offences for which the requested country granted extradition. This doctrine is premised on the assumption that whenever a state uses its formal processes to surrender a person to another state for a specific charge, the requesting state shall carry out its intended purpose of prosecuting or punishing the offender only for the offence for which the requested state conceded extradition. The doctrine of speciality developed to protect the requested country from abuse of its discretionary act of extradition. The violation of speciality occurs when after extradition, the requesting nation charges and prosecutes or seeks to prosecute the relator for a crime

not agreed to by the requested nation in the extradition proceedings. Implicitly, this doctrine provides the relator with assurances against unexpected prosecution.

### **IX. U.N.O. RESOLUTIONS**

The United Nations adopted the Model Treaty on Extradition (General Assembly Resolution No.45/116 of 14 December, 1990) and the Model Treaty on Mutual Assistance in Criminal Matters (General Assembly Resolution No.45/117 of 14 December, 1990) which serves as an important basis for the national legislation of UN principal countries in their respective fields. No doubt the aforementioned Model Treaties are quite exhaustive but still difficulties are being faced by the various countries due to lack of international cooperation and refusal of extradition on various grounds. However, it is not conducive to the maintenance of international economic, political and social order that wrong doers escape from justice as a result of non-cooperation amongst the states and lack of mutual legal assistance and extradition. The principle of *aut dedere aut judicare* (extradite or punish) has to be employed wherever necessary and appropriate.

### **X. OBJECTIVES OF SEMINAR**

The main object of this seminar is to explore the ways and means of strengthening and improving international cooperation to combat transnational crime, particularly through effective implementation of the mechanism of mutual legal assistance and extradition.

### **XI. EXTRADITION LAW OF PAKISTAN**

In Pakistan, we have the Extradition Act, 1972 which is quite helpful for suppressing transnational organized crime

through international cooperation. However, according to Section 5 (2) of the Extradition Act, 1972 of Pakistan, no fugitive offender shall be surrendered:

- a) if the offence in respect of which his surrender is sought is of a political character or if it is shown to the satisfaction of the Federal Government or of the Magistrate or Court before whom he may be produced that the requisition for his surrender has, in fact, been made with a view to his being tried or punished for an offence of a political character;
- b) if the offence in respect of which his surrender is sought is not punishable with death or with imprisonment for life or a term which is not less than twelve months;
- c) if the prosecution for the offence in respect of which the surrender is sought is, according to the law of the State asking for the surrender barred by time;
- d) if there is no provision in the law of, or in the extradition treaty with, the State asking for the surrender that the fugitive offender shall not, until he has been restored or has had an opportunity of returning to Pakistan, be detained or tried in that State for any offence committed prior to his surrender, other than the extradition offence proved by the facts on which the surrender is based;
- e) if it appears to the Federal Government that he is accused or alleged to have been convicted of such an offence that if he were charged with that offence in Pakistan he would be entitled to be discharged under any law relating to a previous acquittal or conviction.

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- f) If he has been accused of some offence in Pakistan, not being the offence for which his surrender is sought, or is undergoing sentence under any conviction in Pakistan, until after he has been discharged, whether by acquittal or on the expiration of his sentence or otherwise.

Sections 6 & 7 of the Extradition Act, 1972 deals with the procedure through which a foreign state can make a requisition to the Federal Government of Pakistan for the surrender of the fugitive offender and the conduct of a magisterial inquiry by the Federal Government of Pakistan. Pakistan has liberal provisions for receiving the evidence against the fugitive offender because it admits authenticated official certificates of facts and judicial documents stating facts against the fugitive offender as evidence. Similarly, in magisterial inquiry in Pakistan, the warrants, depositions or statements on oath which purport to have been issued, received or taken by any court of justice outside Pakistan or copies thereof or certificates of or judicial documents stating the fact of conviction before any such court are also admitted.

The magisterial inquiry in Pakistan is conducted only to find out a prima facie case and the same cannot be regarded as a regular trial by a court of law. The evidence before a magistrate would be relevant in determining the extraditability of an offender. The rule of specialty is also contained in Section 16 and Section 5(2)(d) of Pakistan's Extradition Act, 1972. Furthermore, the extradition law in Pakistan also provides for the surrender of everything found in the possession of a fugitive offender at the time of his arrest subject to the right of any third party.

In Pakistan, the following are extradition offences:

1. Culpable homicide
2. Maliciously or wilfully wounding causing grievous bodily harm.
3. Rape
4. Procuring or trafficking in women or young persons for immoral purposes.
5. Kidnapping, abduction or false imprisonment or dealing in slaves,
6. Bribery.
7. Perjury or subordination or perjury or conspiring to defeat the course of justice.
8. Arson
9. An offence concerning counterfeit currency.
10. An offence against the law relating to forgery.
11. Stealing, embezzlement, fraudulent conversion, fraudulent false accounting, obtaining property or credit by false pretences receiving stolen property or any other offence in respect of property involving fraud.
12. Burglary, house - breaking or any similar offence.
13. Robbery
14. Blackmail or extortion by means of threats or by abuse of authority
15. An offence against bankruptcy law or company law.
16. Malicious or wilful / damage to property.
17. Acts done with the intention of endangering vehicles, vessels or aircraft.
18. An offence against the law relating to dangerous drugs or narcotics.
19. Piracy
20. Revolt against the authority of the master of a ship or the commander of an aircraft.

21. Contravention of import or export prohibitions relating to precious stones, gold and other precious metals.
22. Aiding and abetting, or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit, any of the aforesaid offences.

Interestingly, the concept of extradition law was specifically upheld in Islamic history in the shape of the Al-Huddebiyah Treaty.

A new law has been promulgated in Pakistan known as the National Accountability Bureau Ordinance, 1999 which envisages international cooperation/requests for mutual legal assistance.

Moreover, Pakistan has very stringent legal provisions for punishing offenders accused of drug trafficking. In this connection, Pakistan has a law embodied in the Act of the Parliament generally known as Control of Narcotic Substances Act, 1997 which contains a very broad/wide definition of narcotic drugs and describe maximum sentences. Even this Act of 1997 contains a full-fledged chapter on international cooperation. The Pakistan Government is legally bound to render mutual legal assistance to a foreign state to collect evidence, conduct investigation and even to freeze, confiscate and forfeit assets of an offender in Pakistan subject to legal process in Pakistan. Pakistan has also a law for sharing forfeited property with a foreign state on reciprocal basis by mutual treaties.

**XII. FIGHT AGAINST TRANSNATIONAL ORGANIZED CRIME THROUGH  
EFFECTIVE IMPLEMENTATION OF THE MECHANISM OF MUTUAL  
LEGAL ASSISTANCE AND EXTRADITION**

With the advent of modern technology in communication the world has grown to be pretty small. With the world growing yet smaller, crimes committed within one country are no longer confined to within its own borders but it so often happens that the looted and plundered money is laundered and filtered through various channels involving various countries. There are numerous instances where leaders of the third world have made wrongful and illegal gains in their respective countries and then stashed away their ill-gotten wealth either in the Swiss Banks or in the Carribean Islands, which have been safe havens for them. However, the world has not slept over their wrong doings. There has been a continuous effort to curb such activities and even countries which were safe havens till recent past, have legislated new laws aimed at mutually co-operating with each other to make the world a better and safer place.

The hand of mutual assistance was extended from one country to another primarily based on reciprocal promises. Laws on mutual assistance developed of late in the early 80s and various countries have enacted the same. The safe havens of Switzerland and to some extent the Carribean Islands are no longer safe with the advent of these laws. The Swiss Banks still have numbered accounts, but it has become mandatory on the operator of the account to disclose the name of the beneficiary in the Account Opening Form. This has been done in order to eradicate corruption and crime in one form or another from the entire world. Swiss Banks no longer encourage or launder dirty money for others.

In my paper I try to highlight the role of Pakistan where laws of mutual assistance were sought and its laws invoked in the trial of its former Prime Minister. Pakistan invoked the jurisdiction of the Swiss Police in Berne under the Swiss Federal Act on International Mutual Assistance in Criminal Matters, This was an Act which was enacted on 20 March, 1981 and amended on the 4 October, 1996 by the Swiss Confederation.

It was under this Act that certain documents along with a complaint were presented by the Government of Pakistan to the Berne Police in Switzerland seeking its assistance in investigating some of the crimes committed by the Pakistan's former Prime Minister, Ms. Benazir Bhutto and her husband Asif Ali Zardari.

On the complaint being made, the Berne Police started investigating into the matter and thereafter referred the matter to an investigating Magistrate in Geneva. The Investigating Magistrate in turn summoned documents not only from the Swiss Banks but also took into possession documents from the companies that were involved in the commission of the offence. He also obtained documents from Zardari's agent, Jens Schlegelmilch and from Cotecna & SGS. Once these documents had been summoned by the Investigating Magistrate in Geneva he, on examination, found that not only some crime had been committed by Ms. Bhutto and Asif Ali Zardari in Pakistan on which mutual assistance had been sought, but these persons had conspired with Jens Schlegelmilch and the officials of Cotecna and SGS, who were Swiss nationals to commit acts which were offences under Swiss law as well. Apparently, money



laundering had taken place in Geneva. He, therefore, indicted all these persons. It was at this stage that the Judge in Geneva invoked the reciprocal promise of Pakistan, under the mutual assistance programme, to provide assistance in effecting service of the indictment orders on Mrs. Bhutto and Zardari in Pakistan.

Letters Rogatory were received from the Investigating Magistrate in Geneva through diplomatic channels in Pakistan for onward service on Mrs. Bhutto and Zardari. These Letters Rogatory also contained copies of original documents that had been collected by the Judge in Switzerland. It was after service had been effected in terms of the Letter Rogatory that these documents were used in the trial of Mrs. Bhutto and Zardari. The State of Pakistan obtained certified copies of these documents which accompanied the Letters Rogatory duly attested in the manner as prescribed under the law of evidence in Pakistan, and they were proved in court. During the course of the hearing a Commission was sent from the Lahore High Court, for authentication of certain documents from the Geneva Court. The Swiss authorities facilitated the task and the Commission was able to discharge its functions. These documents primarily brought home the guilt of the accused which resulted in their conviction, and the famous judgment of the Lahore High Court was delivered on the 14 April, 1999.

This is the first case in the history of the world where the former Prime Minister of a country has been convicted through the due process of law on charges of corruption and corrupt practices and Pakistan is the first country to have invoked the mutual assistance programme to achieve the desired results. The system worked.

Similar proceedings have also been initiated by Pakistan in London where

mutual assistance has been sought on the charges of drug trafficking which have been brought against Mr. Zardari in Pakistan. The United Kingdom has a mutual assistance programme but it is restricted only to drug related offences. The mutual assistance programmes should be extended to other offences as well, like Switzerland which not only extends to drug related practices but also to money laundering as well. It would be very helpful for countries to gather evidence from other countries proving the commission of offences. In the English Courts evidence has so far been collected which definitely goes to show the wealth that had been amassed by Zardari but in the event of Pakistan not being able to prove its case against Mr. Zardari on drug trafficking charges, none of the evidence so collected would either be transmitted to Pakistan nor could be used. Mutual assistance programmes should be extended so as to cover all criminal acts and not be restricted to only one or two special instances.

Pakistan has also made another great headway when a Judicial Commission investigating allegations of fixing cricket matches proceeded to Australia and set up a Pakistani court in Melbourne. This could only be done under mutual assistance extended to each other by the two countries. A Victorian Supreme Court offered its court premises where the Judicial Commission assembled. The laws of Pakistan were made applicable. The process of service was provided by the Australians and it has been so reported in the Age of Melbourne of 9 January, 1999:

“A Mont Albert tram was rattling and a seagull circled above as the judge made his entrance. The High Court of Lahore was in such session as it can never have been before. On one wall was the Victorian coat of arms. On the other hung a

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portrait of Muhammad Ali Jinnah, the founder of Pakistan, Judge Abdul Salam Khawar invoked the name of "Almighty Allah" as he began. On his desk sat a small Pakistan flag. Thus a few square metres of Australia became, for a moment, Pakistan."

These proceedings are an eye opener for the rest of the world. It clearly demonstrates that in the near future there is a possibility of courts of one country travelling to another using the paraphernalia of the host country, including the law enforcing agencies in the host country for effecting service and summoning witnesses and documents, proving these documents in accordance with the law of one's own land by physically doing it in the host country and once the evidence is so collected and proven, to use it in your own country against the person charged with the offence. This could open new frontiers in the trial of cases. Video technology is already a new frontier but is still at its infancy stage. Statements of witnesses are already being recorded via video link and cross-examination is also done in the same manner but has limited practice at the moment. In the near future, I am sure this technology will be in everyday use.

The nations of the world must unite to make a solid commitment to enact the laws on mutual assistance. There should be no immunity to any one in respect of the crimes committed in any part of the world. In the recent past, in Rome, 120 states adopted a statute for a Permanent International Criminal Court with jurisdiction over war crimes and crimes against humanity - including those committed in peace times. The role of the International Court of Justice and Interpol (International Criminal Police Organisation) should be enhanced and the

nations of the world should submit to its jurisdiction through treaties or under the umbrella of the United Nations.

UNO should also strive to prepare a common list of extraditable offences which should be accepted by all the nations of the world. The mandatory grounds for refusal to extradite an offender should be reduced to the minimum. The new investigating methods and technologies should be made admissible in evidence against the fugitive offenders in the requested states. New laws should be enacted for sharing the assets of an offender by the requesting and the requested states.

Before concluding this paper, I would like to propose that a International Authority for Extradition must be established under the control of U.N.O. and all the states should forward their requests for extradition of their fugitive offenders along with the necessary evidence to the said court which would decide the question of extradition after hearing the fugitive as well as representatives of the requested states. The creation of an independent and impartial International Authority for deciding extradition cases is essential because no state is under any legal obligation to surrender a fugitive offender in the absence of a specific treaty. There is no unanimity amongst the states on the point of extradition or legal assistance on the criminal laws of various countries which are sharply divided on many crimes as well as on the question of guilt of the fugitive. Moreover, there is a historical basis for non-extradition of nationals as it gives a sense of security and preference in favour of their own national jurisdiction. Hence, in order to achieve international co-operation for the suppression of transnational organized crime, states should accept the authority of an international body on extradition. This body/authority should also be empowered

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to grant compensation/import fines on a state in case a request for extradition of a fugitive offender proves to be false, illegal and based on political considerations alone.

In the end, Pakistan for its part would be willing to cooperate with any international move which advances the cause of suppressing transnational organized crime.