

LOOPHOLES IN EXTRADITION

Tanushri More

Jindal Global Law School, Haryana

INTRODUCTION

International law lacks austere enforcement owing to the absence of a sovereign, sanction and a "grundnorm"¹. Non compliance emanates from the absence of sanctions and this disables the universal application of International laws. 'Extradition' is a form of International law that aims at the delivery of a fugitive of justice by one nation state to another which requires coordination and compliance by nations to the Extradition treaties ratified by them.² Generally, there is a consensus in International law that there is no obligation on states to extradite fugitives of justice without being signatories to these treaties. The principles of 'sovereignty' enunciate that every nation has jurisdiction over its people within its borders. However, the principles of reciprocity and comity leads to States following the norm of extradition.³

The nonexistence of international obligation and the prerogative to demand domestic criminals from other countries has caused the evolution of a web of extradition treaties. When there is no extradition agreement, sovereign states can still implore the expulsion of a fugitive of justice pursuant to the domestic laws of the State required to extradite the individual. This can also be done under the immigration or any other domestic laws which may be applicable under the jurisdiction of the State where the individual has fled.⁴ Although, there are multilateral conventions which cover extradition but the most commonly used mode for implementation are bilateral agreements signed between two nation states. There are a multiplicity of problems which arise in the implementation of bilateral extradition treaties, however, these problems are endemic to the very nature of extradition law and cannot be erased by the application of multilateral conventions.

This paper aims to trace the evolution of bilateral extradition treaties as the tools of enforcement for extradition. In the process, this paper will highlight the problems with bilateral extradition treaties. It will elucidate some recent cases of extradition, such as that of Vijay Mallya to illustrate the existing problems with extradition treaties. Finally, it will

¹ Edwin W. Patterson, *Hans Kelsen and His Pure Theory of Law*, Volume 40, Issue 1, California Law Review 4, (1952).

² M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 Case W. Res. J. Int'l L. 27 (1983), <http://scholarlycommons.law.case.edu/jil/vol15/iss1/5>

³ Ibid.

⁴ Dan E. Stigall, *Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law*, 3 Notre Dame J. Int'l & Comp. L. 1 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2211219&download=yes

conclude by explaining the principle of '*Aut dedere aut judicare*'⁵ and bringing to light the role of United Nations in the supervision and enforcement of these bilateral extradition treaties.

EVOLUTION OF BILATERAL EXTRADITION TREATIES

The concept of Extradition can be traced back to ancient Egyptian and Chinese civilizations. The Egyptians first entered into a peace treaty with the Hittite King when the Pharaoh of Egypt impeded the attempts of the Hittite invasion.⁶ Extradition clauses formed a part of this peace treaty. According to the treaty, both the nations were required to deliver the activists who had fled back to their native countries seeking shelter.⁷ Post this, Extradition was not implemented by any other nations until the Treaty of Falaise in 1174 AD in which the English monarch authoritatively made provisions for extradition.⁸ The treaty of Falaise was ratified between Henry II and William of Scotland which set out a mutual extradition agreement between Scotland and England.⁹

Some of the earliest cases of extradition were recorded in Britain and America. Britain's first extradition treaty dates back to 1591 when Brian O'Rourke, who was an Irish nobleman, fled to Scotland. Queen Elizabeth, had demanded for O'Rourke's delivery from Scotland to England. The Treaty of Berwick, ratified in 1586 was a tool for Queen Elizabeth to secure O'Rourke's custody. The first Anglo-American extradition agreement was in the form of a clause within the Jay Treaty signed in 1794. The Treaty was signed between Britain and America to end war and restore peace. Although it was a short lived agreement, it contained some of the most important principles which continue to govern the Extradition laws in American Treaties till date. It ensured that the practice of extradition was dictated by law and not by any foreign policies. The Jay Treaty emancipated Extradition laws in America from political offences.

Initially extraditions were conducted by states for the delivery of political and sovereign offenders. However, contemporary extradition laws recognise 'political offence' to be an exception to extradition and does not allow the extradition of fugitives entitled to be punished for political offences.¹⁰ "*Political crimes are rarely extraditable, because countries don't want to be accused of aiding a coup or opposing a foreign regime. In 1934, an Italian court refused to extradite the assassins of Yugoslavia's King Alexander, on the grounds that*

⁵ *supra* note 4.

⁶ Barbara M. Yarnold, *International Fugitives: A New Role for the International Court of Justice* (Greenwood Publishing Group, 1991).

⁷ Bassiouni, *supra* note 2, Christopher L. Blakesley, *The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History*, 4 B.C. Int'l & Comp. L. Rev. 39 (1981), <http://lawdigitalcommons.bc.edu/iclr/vol4/iss1/3>

⁸ *Scotland, - Constituent Unit, United Kingdom*, The Encyclopaedia Britannica (Feb 11, 2017, 11:42 AM), <https://global.britannica.com/place/Scotland/History#ref483834>.

⁹ Rebecca Rideal, *Extradition - A Very Brief History*, The History Vault (Feb 11, 2017, 11:45 AM), <http://www.thehistoryvault.co.uk/extradition-a-history/>.

¹⁰ Bassiouni, *supra* note 2.

the crime was political."¹¹In the eighteenth century the scope of extradition was widened to include military offenders. Nineteenth and twentieth century saw a shift in the practice of extradition. During this time the extradition agreements started entailing the exchange of "common criminals" charged with the offences of violation of domestic laws of the particular States they belonged to.¹²

The practice of Bilateral Extradition Treaties saw an increase in the 1800s. Post World War II period experienced an unparalleled increase in this practice because the number of independent states had increased and so did the requests for extradition. The developed countries increased their cooperation in penal matters but the developing countries relied heavily on bilateral treaties to emphasize their sovereignty. Common law based systems used bilateral treaties and their national legislations to carry out extradition whereas Civil law countries did not place much reliance on treaties and extradited fugitives based on national legislations, reciprocity, comity and also agreements.¹³

CONUNDRUM OF THE LAW OF EXTRADITION

The law of extradition whether implemented through multilateral treaties or bilateral treaties, faces problems of enforcement. One major problem is that these treaties are binding only on the signatory states and hence there is no obligation to extradite a fugitive if a country is not signatory to an agreement. Further, even if they are signatories to the treaties for extradition, they cannot be forced to extradite criminals because there exists no system of sanctions imposed on countries not abiding by the law of extradition.¹⁴ There is a lack of uniformity in the enforcement of extradition treaties and this lack of uniformity diminishes the legitimacy of the law itself. The law of extradition is completely based on the existence of a treaty and most of the cases regarding extradition disputes have also held that there is no obligation to extradite fugitives in the absence of a treaty.¹⁵

In such situations, the fugitives tend to believe that they can flee justice by going to a country which does not have an extradition treaty with the country in which the crime was committed. This encouragement can lead to evasion of justice on a massive scale, thus undermining the sole intention behind the formulation of extradition laws in the first place. Excessive reliance on bilateral treaties of extradition treaties by countries can also cause various other problems such as "*state succession, severing of diplomatic relations, war and a perennial dilemma of maintaining a network of treaties with over one hundred states.*"¹⁶

¹¹Claire Suddath, *A Brief History of Extradition*, The Time (Sept 30, 2009), <http://content.time.com/time/world/article/0,8599,1926810,00.html>

¹²Yarnold, *supra* note 6.

¹³1 M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (Oceana Publications, 1996).

¹⁴Bassiouni, *supra* note 2.

¹⁵*Factor v. Laubheimer*, 290 U.S. 276, (1933), *Valentine v. United States*, 299 U.S. 5, (1936).

¹⁶Yarnold, *supra* note 6, Bassiouni, *supra* note 2.

One of the most important problem with extradition treaties is that the treaty allowing extradition also sets grounds for defence against that extradition. 'Political offence exception' is an excellent paradigm which explains this problem of providing a defence to an offense in the treaty itself. This exception is included in most of the contemporary extradition agreements and none of these agreements objectively define 'political offense'. As a result, a wide interpretation and discretion can be awarded to such an exception leading to most of the fugitives escaping justice. Therefore, it is essential to develop a firmer law for extradition so that criminal (whether political, corporate or international) cannot flee justice.

CASE ANALYSIS- EXTRADITION OF VIJAY MALLYA

The most recent case of extradition in India is that of Vijay Mallya who had launched a major business venture by establishing Kingfisher Airlines in 2005.¹⁷ Kingfisher had eventually become insolvent and the company had to be liquidated. It had not paid its employees' salaries for over 15 months and had also lost its licence of operating as an airline due to its heavy debts. The company had over One Billion U.S. Dollar worth of bank loans which it was unable to pay.¹⁸ The amount it owed to banks was continuously growing. In addition to that it had tax arrears which were to be paid and it also owed certain amounts to small creditors which was also due.¹⁹ Since Vijay Mallya was the owner of Kingfisher Airlines, he was also accused of being a "wilful defaulter" under the Indian Law and was also subject to allegations of money laundering, misappropriation etc.²⁰

Soon after he was charged with all of these offences, Vijay Mallya fled to the United Kingdom. India kept requesting The United Kingdom for Vijay Mallya's extradition, but all in vein. A syndicate of banks had approached the Supreme Court to pass a decree in order to prevent Vijay Mallya from going abroad because of all the pending debts which was owed to them by Vijay Mallya's company. However, Vijay Mallya had already fled as per the media reports.²¹

In early 2016, a non-bailable warrant was issued against Vijay Mallya by a court in Hyderabad and a special court in Mumbai and the warrants were being contested by his lawyer while he was enjoying a luxurious time in London.²² The warrant issued by the special court in Mumbai was issued under the Prevention of Money Laundering Act, 2002,

¹⁷ *"Is Vijay Mallya India's worst businessman?"*, FirstBiz (First Post Business), Sept 27, 2012.

¹⁸ *"India's Richest #84 Vijay Mallya"*, Forbes (Accessed May 2014).

¹⁹ Narayan, Khushboo; Johnson, T A; Vikraman, Shaji, *"Vijay Mallya: Once upon a time there was a king"*, The Indian Express, March 13, 2016.

²⁰ Ibid. *"What is Vijay Mallya accused of?"*, The Indian Express, March 11, 2016.

²¹ *13 banks move SC to stop Vijay Mallya but he has already left India*, Economic Times, 2016.

²² *"Hyderabad court issues non-bailable warrant against Vijay Mallya"*, The Times of India, March 13, 2016., Sanjay Suri, *"Vijay Mallya still at UK country home, seeks expensive legal opinion"*, CNN-IBN, March 13, 2016.

in pursuance of a special plea made by the Enforcement Directorate in the special court.²³ Further, allegations of transferring Rs. 4000 crores to tax havens was made against Vijay Mallya.²⁴ Soon his property was provisionally attached by the Enforcement Directorate for all the money that he owed to the various banks, creditors and towards payment of tax.

India has had a history of facing problems in extraditing fugitives from the United Kingdom. It has a list of about 60 people that India wants extradited which includes Vijay Mallya (The Indian Liquor Baron) and Christian Michel (The Middleman in the AugustaWestland helicopter deal).²⁵ The Former IPL mastermind, Lalit Modi, who is charged with the evasion of Indian Law has also found refuge in the United Kingdom and has not been extradited as yet. Recently Prime Minister Modi and Theresa May had a meeting where they shared the same opinion that criminals should not be allowed to flee from facing the consequences of evading law and from facing justice. The list of the 60 people was handed over to the U.K. and a similar list of 17 people was given to India who U.K. seek under the Mutual Legal Assistance Treaty. They directed the respected authorities in both the countries dealing with extradition to hold a meeting at the earliest and formulate better terms and conditions for extradition between both the countries in order to expedite the process and make it more efficient.²⁶

Further, India and Britain also contracted to hold annual strategic dialogue at the echelon of union home secretary to mutually deal with concerns relating to terrorism, organised crimes, visa and immigration matters.²⁷

Two weeks post this meeting, the CBI obtained a non- bailable warrant against Vijay Mallya. They have also secured an extradition request from the special Court in Mumbai. They will soon verify all the documents and forward the extradition request to U.K. in pursuance of the discussions between the Prime Ministers of both the countries. ²⁸

AUT DEDERE AUT JUDICARE

'Aut dedere aut judicare' in Latin means- "either extradite or prosecute". It puts a legal obligation on States to prosecute a person guilty of committing a crime where no other state has requested for his/her extradition. This obligation does not limit itself to territorial

²³ *"Mumbai court issues non-bailable warrant against Vijay Mallya in money laundering case"*, IANS, ABP Live, April 18, 2016.

²⁴Dev Chatterjee & PTI, *"Vijay Mallya Allegedly Transferred Rs 4,000 Crore To Tax Havens by fooling everyone"*, Act Now News, March 15, 2016.

²⁵ *India expects early extradition of Vijay Mallya after May- Modi talks*, HT (Hindustan Times), Nov 7, 2016.

²⁶ *supra* note 25.

²⁷ *India expects early extradition of Vijay Mallya after May- Modi talks*, TOI (Times of India), Nov 7, 2016.

²⁸ *Ibid*.

crimes, it applies to extraterritorial crimes and is binding on criminals or victims of alien nationality as well.²⁹

The States have also agreed to cooperate amongst themselves and with the competent International Tribunal to stop fugitives from escaping justice and to fight against the impunity granted against crimes whether they are offences of national or international concern.³⁰ Several conventions give effect to this obligation of cooperation in the battle against impunity given to criminals and fugitives. This is done by the application of the principle of "*aut dedere aut judicare*". "... *Extradition and prosecution are alternative ways to combat impunity in accordance with Art. 7, para 1 [of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984].*"³¹ The essential nature of the obligation to extradite or prosecute in the crusade against impunity is widely acknowledged by the States, it not only applies to international crimes but has also been incorporated into the sectoral conventions against international terrorism which have been ratified between States since 1970.

This obligation to extradite or prosecute which emanates from the principle of "*aut dedere aut judicare*" has been recognized since the time of Hugo Grotius who captured the essence of this principle and postulated the principle of "*aut dedere aut punire*" during his era. "*Aut dedere aut punire*" means either extradite or punish. "*When appealed to, a State should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal.*"³² The contemporary jargon substitutes "punishment" with "prosecution" as the alternative to extradition in order to reflect better the opportunity that an alleged reprobate may be found not guilty.³³

ROLE OF THE UNITED NATIONS

²⁹ Stephen Hall, *International Law*, Butterworths Tutorial Series, LexisNexis Butterworths (2nd ed. 2006).

³⁰ General Assembly resolution 2840 (XXVI) of 18 December 1971 entitled "Question of the punishment of war criminals and of persons who have committed crimes against humanity"; General Assembly resolution 3074 (XXVIII) of 3 December 1973 on the "Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity"; and principle 18 of Economic and Social Council resolution 1989/65 of 24 May 1989 entitled "Effective prevention and investigation of extra-legal, arbitrary and summary executions"

³¹ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, at p. 443, para. 50.

³² II Hugo Grotius, *De Jure Belli ac Pacis*, chapter XXI, section IV, 527–529 at 527 (English translation by Francis W. Kelsey, Oxford/London: Clarendon Press/Humphrey Milford, 1925).

³³ The obligation to extradite or prosecute (*aut dedere aut judicare*), Final Report of the International Law Commission, 2014, Adopted by the International Law Commission at its sixty-sixth session, in 2014, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 65). The report will appear in *Yearbook of the International Law Commission, 2014*, vol. II (Part Two), United Nations.

The International Law Commission had deliberated on the topic of 'The obligation to extradite or prosecute (*aut dedere aut judicare*)' as a part of a larger issue on the 'Jurisdiction with regard to crimes committed outside national territory' at its first session in 1949.³⁴ This obligation has also found reference in several articles and draft codes of the United Nations. A number of multilateral conventions contain the obligation of extraditing or prosecuting and it is from these conventions that the principle of "*aut dedere aut judicare*" has emerged.³⁵

The United Nations developed a formula for the efficient implementation of the principle of extradition or prosecution in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. This was known as *The Hague Formula*. Even though the judgement of this particular case is confined to dealing with crimes like Torture, the formula can be interpreted and used in a wider sense in order to render guidance for the implementation of the principle as a whole. "*The Court's ruling may also help to elucidate the meaning of the prosecute-or-extradite regime under the 1970 Hague Convention and other conventions which have followed the same formula.*"³⁶

The United Nations has several multilateral conventions which mandate parties to extradite fugitives on requests from the other signatories on the determination and establishment of an offence committed by the fugitive. However, before doing this it is essential for the States to establish their jurisdiction over the crime in order to adequately equip themselves to investigate into the offence and prosecute the criminal for the same. This mechanism has been used as a tradition aimed to prevent suspects from escaping justice, if proven guilty.³⁷

According to The Hague Formula, extradition should only be to a State having jurisdiction to try the offence. In addition to this, extradition cannot be substituted by other informal modes of dispatching criminals such as deportation, extraordinary rendition etc. This is because such modes do not entail important human rights protections which are assured in the case of formal extradition requests. With the establishment of the International Criminal Court and other International tribunal competent to deal with crimes and criminals, the United Nations also offers a third alternative to the States of bringing fugitives to justice.

Thus the United Nations has made successful efforts for the implementation of the principle of extradition, however, the absence of an obligation and sanction on disobedience leads to a lack of enforcement of the principle among Nations but if all the States agree to co-operate and bring criminal to justice like India and U.K. then the criminal will not be successful in fleeing justice so easily.

³⁴ United Nations, *The Work of the International Law Commission*, vol. 1, 37 (8th ed., New York: United Nations 2012).

³⁵ Draft code of crimes against the peace and security of mankind, art. 8, para. (3)

³⁶ *supra* note 33.

³⁷ *supra* note 31.