REVIEW OF COMMONWEALTH EXTRADITION ARRANGEMENTS

Memorandum by the Commonwealth Secretariat and a Report prepared by the HON. TAN BOON TEIK, Attorney-General of Singapore, as Chairman of the Meeting to Review Commonwealth Extradition Arrangements held at Marlborough House, 22-26 November 1982

Annexed is a Report prepared by the Hon. Tan Boon Teik, Attorney-General of Singapore, who chaired a Meeting of representatives of Commonwealth Governments to review Commonwealth extradition arrangements. The Meeting was held at Marlborough House from 22 to 26 November 1982.

2. As the original Commonwealth Scheme for the Rendition of Fugitive Offenders was agreed at a Meeting of Commonwealth Law Ministers in 1966 and as the Review was requested by Law Ministers at Barbados in 1980, it was considered appropriate for the amendments recommedned by the 1982 Meeting to be considered for adoption by this forum.

3. The Meeting examined Commonwealth extradition arrangements very closely over the course of a week and was assisted by two consultants, Professor Ivan Shearer and Dr. Torsten Stein. It was attended by representatives of 36 Commonwealth jurisdictions. The arrangements have therefore been carefully scrutinised and the agreed amendments represent a consensus achieved after considerable discussion and careful drafting.

4. While it is, of course, for Ministers to decide how they will wish to handle the relevant Agenda item, the Secretariat proposes that the question be addressed in the first instance by Senior Officials when they meet on the eve of the Colombo Meeting.

5. Accompanying the Report, for the information of Ministers, is a copy of the uncorrected Draft Summary Record of the November Meeting. Once delegations from that Meeting have responded to the Draft, the final Report will be printed. We would emphasise that it was prepared by the Secretariat and has not yet been the subject of comment by delegates. [Note : The Report has since been published separately.]

6. Papers submitted in advance of the November Meeting have been fully circulated to governments. A number of papers were also made available during the Meeting. These were circulated to all delegates. Additional copies are available from the Secretariat. The papers in question were country papers by the governments of Dominica, Guyana, Hong Kong, Jamaica, Kenya, Papua New Guinea, St. Vincent and the Grenadines, Seychelles, Uganda and Zimbabwe, a paper by Dr. Torsten Stein on the European experience with extradition, and a paper by ICPO-INTERPOL.

ANNEX TO LMM(83)33

REVIEW OF COMMONWEALTH EXTRADITION ARRANGEMENTS

A Report prepared by the HON. TAN BOOK TEIK Attorney-General of Singapore, as Chairman of the Meeting to Review Commonwealth Extradition Arrangements held at Marlborough House, 22-26 November 1982

Summary

A Meeting was held at Marlborough House from 22-26 November 1982 to review in detail the operation of the 1966 Commonwealth Scheme Relating to the Rendition of Fugitive Offenders. The Meeting, attended by representatives of thirty six Commonwealth jurisdictions, agreed with the view expressed by Law Ministers at the Barbados Meeting in 1980 that the Scheme had worked well during the past fourteen years, and also agreed, in broad terms, with the view expressed at that same Meeting that certain aspects of the Scheme might be improved.

2. The general approach of the Meeting, and a summary of its main recommendations, are contained in the Communiqué, annexed to this Report as Appendix A.

3. The meeting adopted a number of specific recommendations for the amendment of the 1966 Scheme. The Scheme as amended (with the proposed additions shown as underlined) is annexed to this Report as Appendix B.

4. Law Ministers are invited to receive this Report and to consider its recommendations.

5. The general and specific recommendations, together with an explantory commentary, are set out in the body of this Report, as follows:

Introductory

6. In 1966, the Commonwealth Scheme Relating to the Rendition of Fugitive Offenders was agreed at a Meeting of Commonwealth Law Ministers held in London. In 1979, its operation was discussed in a paper prepared by Professor I.A. Shearer, which was circulated to Governments. The paper was revised in the light of preliminary views expressed by some Governments, and formed the basis for discussion at the 1980 Meeting of Commonwealth Law Ministers at Barbados. Professor Shearer then further refined the paper into a Consultative Document, taking into account views expressed in Barbados, and made specific

proposals for the amendment of the 1966 Scheme for consideration at the Meeting of delegates held at Marlborough House on 22-26 November 1982.

7. Before reporting on the 1982 proposals, it might be helpful briefly to trace the history, and to discuss the status, of the Scheme. The draft Scheme which was placed before the 1966 London Meeting stemmed from a memorandum circulated by the British Government in May 1964, which recognised that the Imperial Fugitive Offenders Act, 1881, was outmoded in view of the constitutional changes which had occurred since it was enacted. Although as the Commonwealth evolved, practice under the Act had assumed more the character of a particular law of extradition, it did not include some of the rules normally adopted in general international law to safeguard the interests of a fugitive. The response to the 1964 memorandum indicated agreement that further discussions would be helpful. At these discussions, which took place in Canberra in the following year, it was decided that a draft Scheme should be produced for consideration at a future meeting. This meeting was held in London in 1966.

8. The understanding that acceptance of the Scheme would signify no more than that Commonwealth governments had agreed upon general principles which they would follow in the course of drafting their own legislation, was reflected in the relevant paragraphs of the Communiqué issued at the conclusion of the London Meeting, which were in the following terms:

> "The Meeting considered that Commonwealth extradition arrangements should be used upon reciprocity and substantially uniform legislation incorporating certain features commonly found in extradition treaties, e.g. a list of returnable offences, the establishment of a prima facie case before return, and restrictions on the return of political offenders."
>
> "The Meeting accordingly formulated a Scheme setting out principles which could form the basis of legislation within the Commonwealth and recommended that effect should be given to the Scheme in each Commonwealth country."

9. Since 1966, many Commonwealth jurisdictions have enacted legislation implementing the Scheme. Several have drawn upon certain international conventions when drawing up, or amending, their relevant statutes. Others, while not adopting the Scheme as such by their legislation, have in force statutes which partially comply with it. Others, still, are on the point of introducing legislation on the topic.

10. It was felt that, some fourteen years after the introduction of the Scheme, it would be useful to review its provisions to see whether subsequent experience and developments suggested it should be modified. The Commonwealth Secretariat therefore commissioned Professor Shearer to prepare a Discussion Paper for this purpose. 1980 Meeting of Commonwealth Law Ministers in Barbados considered and commended, Professor Shearer's paper. It recognised that the matter was of great importance, and Ministers were concerned to ensure that Commonwealth arrangements in this field worked fairly, effectively, and efficiently.

11. In their Barbados Communiqué of 1980, Law Ministers expressed the view that a number of matters called for attention, and they invited the Commonwealth Secretariat to prepare proposals for amendments to the Scheme so that these might be agreed either before, or at, the next Commonwealth Law Ministers' Meeting. This was done for the Secretariat by Professor Shearer whose Consultative Document was considered by delegates at the special Meeting to Review Commonwealth Extradition Arrangements, held in London on 22-26 November 1982.

12. Written comments or submissions were made on Professor Shearer's Discussion Paper prior to the Barbados Meeting by the Governments of Australia, Barbados, Jamaica, Lesotho, Nauru, Sri Lanka, and Uganda. Papers were also submitted before, or at, the 1982 Review Meeting, by Barbados, Cyprus, Dominica, Fiji, Ghana, Guyana, Hong Kong, Jamaica, Kenya, Malaysia, Papua New Guinea, St. Vincent and the Grenadines, Seychelles, Sri Lanka, Trinidad and Tobago, Uganda and Zimbabwe.

13. At the invitation of the Commonwealth Secretariat, in view of the proposal concerning the recognition of the role of the International Criminal Police Organisation in extradition, a representative of ICPO-INTERPOL was present at the Meeting. In view also of the experience of the Member States of the Council of Europe in the operation of the European Extradition Convention, 1957, some of the features of which had been incorporated in the 1966 Commonwealth Scheme, Dr. Torsten Stein of the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, was invited by the Secretariat

to present a paper and attend the Meeting as an additional consultant.

14. The Meeting unanimously elected the Attorney-General of Singapore, the Hon. Tan Boon Teik, as its Chairman.

15. The following agenda was adopted by the meeting:

(a) Whether, and in what form, reciprocity of designations should be required under the Commonwealth Extradition Scheme

(b) INTERPOL 'Red Notices'

(c) Returnable offences

(d) Appeals by requesting governments against discharge of fugitives

(e) Circumstances precluding return

(f) The double criminality rule

(g) Prosecution for additional offences after return

(h) The death penalty

(i) Return by consent

(j) Political offences and terrorism

(k) Costs

(l) Legal aid

(m) Any other specific items

16. No further specific proposals were put forward under item (m), but Kenya gave notice that it wished to raise, for general discussion, the question of the prima facie case as a requirement for committal in extradition cases.

Reciprocity of Designations

17. The 1966 Scheme was designed to replace the Imperial Fugitive Offenders Act, 1881. The 1881 Act applied by paramount force to all the British dominions, and was continued in most Commonwealth countries after independence as part of the received body of statute law. There was thus no question of selective application of that Act between the different parts of the Commonwealth, except that under Part II of the Act of 1881 provision was made for simplified extradition procedures as between certain neighbouring territories designated by Order in Council. This latter facility was preserved in an appropriately modified form in Clause 16(a) of the 1966 Scheme.

18. The 1966 Law Ministers' Meeting considered but rejected the suggestion that the Commonwealth Extradition Scheme should be formalised in a multilateral convention. That Meeting instead agreed with the British proposal that the Scheme should take the form of an agreed set of recommendations for legislative implementation by each government. As Mr. Dick Taverne, QC, put the point on behalf of the British Government, it had not so far been the practice for Commonwealth agreements to take the form of treaties or formal conventions, which would require registration with the United Nations. It was hoped that the Meeting would agree to make firm recommendations to Governments to enact legislation on the principles of the Scheme, which were designated to operate by way of reciprocity. It was suggested by Jamaica at the 1982 Meeting that the time might have arrived for Commonwealth arrangements to be embodied in a multilateral treaty, and that this would also assist in overcoming problems with designations. The suggestion, however, was not supported by other delegates.

19. Reciprocity was reflected in the 1966 Scheme in two ways. First, in Clause 1 it was stated that "the general provisions set out in this Scheme will govern the return of a person from one part of the Commonwealth, in which he is found, to another part thereof, in which he is accused of an offence." In the Communiqué dated 4 May 1966, it was stated that "the Meeting accordingly formulated a Scheme setting out principles which could form the basis of legislation within the Commonwealth and recommended that effect should be

given to the Scheme in each Commonwealth country." Secondly, it was recognised that not all Commonwealth countries would be able to move immediately to the passage of the recommended legislation. Hence, Clause 16 of the Scheme provided that "nothing in this Scheme shall prevent...(b) the application of the Scheme with modifications by any part of the Commonwealth in relation to any other part which has not brought clauses 1 to 15 fully into effect."

20. Nothing in the 1966 Scheme suggested any intention that the Scheme, as a whole, be selectively applied, as though by a system of interlocking bilateral arrangements. In practice, however, this has become the case for some Commonwealth countries, which have designated only certain other Commonwealth countries under their legislation, omitting others which have adopted the 1966 Scheme, or to which the legislation could be applied with the modifications envisaged by Clause 16(b). In part this disappointment of the hope that the Scheme would achieve universal application throughout the Commonwealth has resulted from inertia, where the relevant legislation requires that designation be made by Order in Council, or similar methods of proclamation. Attention was drawn at the 1982 Meeting to the Commonwealth Countries Act of Barbados and New Zealand, which offered an alternative and simpler model of application of legislation to Commonwealth countries.

21. The 1982 Meeting accepted the suggestion made in the Consultative Document that no amendment to the Scheme itself was desirable to remedy its incomplete application in practice. To amend the Scheme in such a way as explicitly to exclude selective application of the Scheme seemed undesirable as an implication of infringement of the sovereign legislative independence of each Member country. On the other hand, there was general agreement at the Meeting that bureaucratic inertia accounted for a good deal of the present incompleteness of application, with consequent "safe havens" for fugitives, and recognition of the desirability that urgent consideration be given at the governmental level in each Member country to the desirability of applying the Scheme to other Member countries (with such modifications, envisaged by Clause 16, as might be necessary) without preconditions as to bilaterial assurances of reciprocity.

22. The Meeting's conclusion on this question was expressed in the Final Communiqué, paragraph 5 (see Appendix A), which "urged governments collectively to consider whether, in respect of their own jurisdictions, they might be prepared to apply the Scheme broadly to other Commonwealth Members, without waiting for assurances of reciprocity. There was a general feeling that governments would not wish to appear to be acting selectively within the Commonwealth association."

Provisional Warrant of Arrest - INTERPOL Notices

23. Under Clause 4 of the 1966 Scheme, where a fugitive is suspected of being in, or on his way to, another part of the Commonwealth, the competent judicial authority in the latter part may issue a provisional warrant of arrest "on such information and under such circumstances as would, in that authority's opinion, justify the issue of a warrant if the returnable offence of which the fugitive is accused had been an offence committed within that authority's jurisdiction." The meeting agreed that no particular difficulty had been encountered in practice in the matter of provisional warrants, but that thought should be given to the question of giving status, either in the Scheme, or in national legislation, to the international circulations ("Red Notices") of the International Criminal Police Organisation (INTERPOL). These circulations indicate that an arrest warrant has been issued in a country, that the requesting authorities of that country guarantee that arrest will be followed by a formal request for extradition, and that the Secretary-General of INTERPOL is satisfied that there is no reason to believe that the fugitive is wanted for political, military, racial, or religious reasons.

24. A detailed presentation on the procedures and safeguards applied by INTERPOL was given to the meeting by its Deputy Chief of the General and Research Studies Division, Dr. K.S. Karunatilleke. The meeting also noted that reference was made to the status of INTERPOL circulations in the European Extradition Convention, 1957. It was agreed that, although the present provisions of laws in Commonwealth countries justifying the issue of a provisional warrant of arrest were probably wide enough, in most cases, to allow information provided through INTERPOL channels to be taken into account, it would be desirable to recognise the importance of the facilities provided by INTERPOL in securing the speedy apprehension of fugitives by including an express reference in the Scheme.

25. The meeting accordingly recommended the addition to the present clause 4(1) of the words:

> "and for the purpose of this paragraph, information contained in an international notice

issued by the International Criminal Police Organisation (INTERPOL) in respect of a fugitive may be considered by the authority, either alone or with other information, in deciding whether a provisional warrant should be issued for the arrest of that fugitive."

Scope of Returnable Offences

26. The offences to which the Scheme presently applies are set out in Annex 1 to the Scheme. No person may be extradited except for a returnable offence as described in the Annex and punishable in the requesting country by imprisonment for twelve months or by a greater penalty.

27. The Meeting considered two distinct questions arising from the present scope of returnable offences. The first was whether reference should be included in the list to offences created by multilateral international conventions, such as crimes in relation to aircraft, and internationally protected persons. It was pointed out that the obligation to extradite for such offences arose from the contractual obligations assumed under the relevant Convention itself. But since the Commonwealth Scheme is often considered that the Scheme ought, for the sake of completeness, to include an "open-ended" reference to such offences so as to ensure that no gap was disclosed. It was further considered that, reflective of the reciprocity principles underlying the Scheme, the inclusion of offences under international conventions should be only of those to which both the requested and the requesting countries were parties. The meeting therefore recommended that to Annex 1 of the Scheme be added a new paragraph C as follows:-

"C. Extradition offences established under multilateral international conventions to which both the requesting and the requested parts of the Commonwealth are parties."

28. The second question raised concerned the possibility of widening the scope of returnable offences to include a number which had not previously been covered. The Canadian Bill, for example, proposed that certain offences against the administration of justice, escape from custody, public disorder, and offences against firearms and nuclear safety laws be made extraditable. Some countries also considered that income tax evasion and other offences of a fiscal character ought to be extraditable. The Meeting discussed the desirability of the inclusion of these items, and although there was agreement that crimes of a purely fiscal character need not necessarily, in principle, be non-extraditable, there was no consensus as to the particular additional offences which ought to be made extraditable.

29. It was recalled that, at the 1966 Meeting, the specific enumeration of offences was preferred, as a model, to the European formula of specifying offences only by way of punishability by a certain degree of severity. So far as non-fiscal offences were concerned, it was thought that at this stage the two approaches might be combined, by retaining the present list but adding an "open-ended" formula allowing additional offences to be included on the basis of reciprocity between requesting and requested States.

30. So far as fiscal offences were concerned, it was pointed out that a certain degree of caution was evident in other international conventions on extradition. In the European Convention, fiscal offences were extraditable only by special agreement as between the parties. It was considered by the Meeting, after some discussion, that a similarly flexible approach should be adopted by the Commonwealth, leaving it to each Member country to decide for itself which fiscal offences should be extraditable, and permitting extradition for such offences to take place as between it and other Commonwealth countries whose laws provided similarly. Since the approach in this regard was the same as that decided for opening the list to other offences generally, it was decided to combine both decisions in the one comprehensive formula, as follows:

"D. Offences not described in paragraphs A, B, or C, but which are returnable under the law of the requested part of the Commonwealth, notwithstanding that any such offences are of a purely fiscal character."

Appeals By Requesting Governments

31. The 1966 Scheme provides in Clause 8 for review of a committal order for extradition by way of habeas corpus or like process. No corresponding right is given under the Scheme to requesting countries (or the authorities acting on their behalf) to a review of decisions not to commit for extradition. Whether such a right might exist by way of certiorari, mandamus, or other similar processes is doubtful, and has been the subject of conflicting judicial decisions in Commonwealth jurisdictions.

32. A proposal was made in the Consultative Document that a clear right of review on behalf of requesting governments be included in the Scheme, extending not only to questions of law but also to the weight of the evidence. The Meeting noted that the Canadian Bill of 1979 had provided for a right of review by requesting governments limited to questions of law, and opinion was divided as to the desirability of extending the right to questions of fact. The delegate of India pointed out that, in some jurisdictions, the requesting government was not a formal party to the proceedings resulting from its request, and that the proposed addition could not be put in the form of a "right of appeal by requesting governments". In reply, it was stated that the exact wording of the Scheme was in any event not binding; the principles of the Scheme were rather to be looked to, which might require varied translation in legislative implementation to accord with the particular circumstances of local institutions and laws.

33. In view of the special need for local adaptation of such provisions as clause 8, and the absence of a consensus as to whether the right of review by requesting governments should extend to both questions of law and questions of fact, the Meeting decided to adopt a formula which would leave these matters to the legislative discretion of each Member. It therefore agreed that the following paragraph should be added to clause 8 of the Scheme:

> "(2) It will be provided that an application may be made by or on behalf of the government of the requesting part of the Commonwealth for review of the decision of the competent judicial authority in committal proceedings."

Circumstances Precluding Return

34. The Imperial Act of 1881 had provided for general grounds on which the return of the fugitive might be refused. These grounds were triviality, lack of good faith on the part of the requesting authorities, or "otherwise" where it would be "unjust, or oppressive, or too severe a punishment to return the fugitive". In 1966 it was considered that these grounds should be made more specific in view of the difficulty that had been encountered in interpreting the word "otherwise", and also in view of the fact that political offences were now to be excepted from the operation of the Scheme. Cases under the 1967 UK Act implementing the Scheme, however, showed that doubts still remained as to what circumstances should be taken into account, and criticism had been directed at the Scheme, in this respect, for being too restrictive.

35. The Meeting agreed that the clause should be reworded so that a greater degree of discretion should be allowed in the consideration of circumstances precluding return. It was also agreed that the words "under which the offence was committed" in the phrase "it would, having regard to all the circumstances under which the offence was committed, be unjust, or oppressive or too severe a punishment" were unnecessarily restrictive also and should be omitted.

36. Accordingly the Meeting agreed to add a new paragraph (d) to existing paragraph (3) of clause 9, reading:-

> "or, (d) any other sufficient cause"

and to reword the continuation of paragraph 3 as follows:-

> "it would, having regard to all the circumstances be unjust or oppressive or too severe a punishment to return the fugitive or, as the case may be, to return him before the expiry of a period specified by that authority."

The Double Criminality Rule

37. The double criminality rule is a fundamental rule of extradition and finds expression in the Scheme in clause 10, which provides that "the return of a fugitive offender will either be precluded by law or be subject to refusal by the competent executive authority if the facts on which the request for his return is grounded do not constitute an offence under the law of the country or territory in which he is found."

38. The difficulty encountered with this rule since 1966 derived not from the Scheme itself but from the draftsmanship of section 3(1) of the United Kingdom Fugitive Offenders Act, 1967, which implemented clause 10 of the Scheme. This section had the effect of requiring the elements constituting the offence for which extradition was requested to be the same in the laws of both the requesting and the requested States, instead of looking to the facts of which the fugitive was accused. The result of this section, which had been copied in some other Commonwealth jurisdictions, had been to make Commonwealth extradition more

exacting, in this respect, than extradition with non-Commonwealth countries under treaties, and to lead to such unmeritorious discharge of fugitives as in the case of R. v. Brixton Prison, ex parte Gardner [1968] 2 Q.B. 399.

39. The Meeting unanimously agreed that the United Kingdom provision was an unfortunate translation of clause 10 into legislative terms and that its emulation was undesirable. Attention was drawn to such alternative and preferable offence as "an offence, however described, that, if committed in Canada, or within Canadian jurisdiction, would be one of the crimes described in Schedule 1."

40. Since the fault lay not in the Scheme itself but in particular national legislation based on the Scheme, no proposal for amendment was adopted by the Meeting. It was agreed, however, that the views of the Meeting on this point should be reflected in the Communique, which accordingly contained, in paragraph 9, the note that -

> "The Meeting also recognised that the double criminality requirement as expressed in some national legislation was unsatisfactory, but that the fault did not lie with the Scheme. Those governments who had followed the precedent in question were invited to look at their legislation with a view to meeting the difficulties arising in Gardner's case."

The Speciality Rule

41. The speciality rule is an important general rule of extradition law, which was incorporated into intra-Commonwealth practice for the first time by the 1966 scheme. The rule upholds three important principles. First, it protects the alleged fugitive from having to face charges after return of which he has had insufficient notice, and of which no prima facie case of guilt has been made out before the judicial authorities of the requested country. Secondly, it reinforces both the double criminality rule and the rule prohibiting extradition for political offences, ensuring that such offences cannot be charged after surrender. Thirdly, it protects from abuse the legal processes of the requested country which is called upon in extradition to surrender its personal jurisdiction over, and protection of, the accused fugitive.

42. In approaching proposed modifications of this rule, arising out of particular problems which various countries had encountered under the Scheme, the Meeting was conscious of the degree of care needed to ensure that the basic protection of the rights of the fugitive, secured under the principle, was not substantially diminished.

43. A minor modification, proposed by Uganda, was readily accepted by the Meeting. This was to remove the unduly restrictive words in clause 13(1) which required that the fugitive be afforded an opportunity "of going back to the first mentioned part" [i.e. the originally requested part of the Commonwealth] before being prosecuted for offences other than those for which he had been extradited. It was pointed out that the principle required only that the fugitive be given an opportunity to leave the prosecuting country, and the Meeting agreed to the substitution of the words:-

> "of leaving the second mentioned part."

44. The major problem encountered in the working of the Scheme arising from the speciality rule was of delay or refusal of consent to the prosecution after return for offences other than those for which extradition had been granted. It was not an uncommon experience that additional offences came to light only after return, although, as some pointed out at the Meeting, lack of diligence could also be a factor in some cases. The wording of the present Scheme, in clause 13(2), allowed requests for consent only in respect of "a returnable offence of the same nature as the offence for which he was returned", which was generally felt to be unduly restrictive. On the other hand, if the consent provisions were to be widened to include any returnable offence, and thus to include offences which might have nothing to do with the facts proved in the earlier extradition proceedings, the requested country might wish to be satisfied that a prima facie case was made out before giving consent.

45. Accordingly it was agreed that, in paragraph (2) of clause 13, the words "a returnable offence of the same nature as the offence for which he was returned" be deleted and replaced by:-

> "any returnable offence",

and that a new paragraph, to be numbered (3), be added to clause 13 reading:

"When considering a request for consent under paragraph (2) the executive authority of the requested part of the Commonwealth may call for such particulars as it may require in order that it may be satisfied that such request is otherwise consistent with the principles of this Scheme, and shall not unreasonably withhold consent; but where in the opinion of the requested part of the Commonwealth it appears that, on the facts known to the requesting part of the Commonwealth at the time of the original application for return of the fugitive offender, application should have been made in respect of such offence at that time, that fact may constitute a ground for refusal."

46. A consequence of the re-ordering of paragraphs in clause 13 was to draw attention to the need to re-draft the present paragraph (3), dealing with re-extradition to third countries, more felicitously, and to impose the same conditions on re-extradition as were now to be imposed on consent to prosecution. Accordingly, the existing paragraph (3) of clause 13 was deleted, and the following new paragraph (4) agreed to by the meeting:-

"The requesting part of the Commonwealth shall not, without the consent of the requested part, return or surrender to another country or territory a fugitive offender returned to the requesting part and sought by such other country or territory in respect of any offence committed prior to his return; and in considering a request under this paragraph the requested part of the Commonwealth may call for the particulars referred to in paragraph (3) and shall not unreasonably withhold consent."

47. A further problem raised at the Meeting was of the very common occurrence that a person being sentenced for a certain offence asks that other admitted offences be taken into account in the imposition of penalty. The request that other offences be taken into account is made only after conviction for the originally charged offence. Where a person has been extradited to face trial on that offence, much time could elapse before the necessary consent is obtained from the requested State for the taking into account of such offences. Moreover, where the additional offences which the returned fugitive requests be taken into account in sentencing are not extraditable, no consent can be requested. In those circumstances it becomes practically impossible for the fugitive "to wipe the slate clean". The Meeting agreed that the Scheme should accommodate this situation, and resolved that the following new paragraph (5) be added to clause 13:-

"Nothing in this clause shall prevent a court in the requesting part of the Commonwealth from taking into account at the request of the fugitive any other offence, whether returnable or not under this Scheme, for the purpose of passing sentence on a fugitive convicted of an offence for which he has been returned under this Scheme, where the fugitive desires that such other offences shall be taken into account."

The Death Penalty

48. Considerable variation in practice with regard to the death penalty exists among Commonwealth countries. In the drafting of the 1966 Scheme, it was considered that, in view of these variations, no uniform rule could be devised. As a result, an optional provision was placed in Annex 2 of the Scheme allowing countries which did not carry out the death penalty (either at all, or in relation to the particular offence for which extradition was requested) to refuse extradition where such a penalty might be imposed. In considering refusal of extradition on this ground however, countries were to have regard "to all the circumstances of the case and to any likelihood that if not returned (the fugitive) would be immune from punishment."

49. The Meeting discussed these provisions at considerable length, but in the end rejected a suggestion that the discretion to refuse extradition on account of the death penalty be removed into the body of the Scheme, since this would be seen as an attempt to elevate an optional discretion into a rule. On the other hand, much support was found for the suggestion that reference should be made in the provision to the growing informal practice of securing assurances from requesting countries that the death penalty, if imposed, would not be carried out. However, as Jamaica pointed out, the difficulty with such "assurances" was that, in any constitutional systems, they could not be given, since commutation of the death penalty was a prerogative act, the exercise of which could not be assumed or guaranteed.

50. The formula finally adopted by the Meeting appeared in a new paragraph (2) to clause 1 of Annex 2, as follows:-

"In determining whether a fugitive would be likely to suffer the death penalty, the executive authority shall take into account any representations which the authorities of

the requesting part of the Commonwealth may make with regard to the possibility that the death penalty, if imposed, will not be carried out."

Return By Consent

51. Not infrequently an accused fugitive, on being made aware that a warrant for his arrest has been issued to another country and that extradition proceedings are to be instituted, wishes to return to that country immediately to face trial, or to plead guilty, and to waive formal committal proceedings. At present the Scheme does not provide for this; requested authorities are reluctant to accept the fugitive's word and to allow him to depart freely, for fear that he may change his mind and escape to a third country.

52. The Meeting considered that there would be much advantage in a new provision in the Scheme that would allow committal proceedings to be waived, provided that the wishes of the fugitive were made genuinely freely, and for the fugitive to be returned to the requesting country in proper custody. India questioned whether admission to bail pending the return ought to be allowed as an option, but it was pointed out that in extradition cases generally this was a discretionary matter to be decided under local law and practice. A point was also raised whether the speciality rule should protect the voluntary returnee after his return, in the same way as an extradited fugitive. The Meeting decided that the person consenting to return should be given the option of waiving the speciality rule before, but not after, return.

53. Accordingly the Meeting approved the following new clause, to be inserted into the Scheme as clause 5A:-

"(1) A fugitive offender may waive committal proceedings, and if satisfied that the fugitive has voluntarily and with an understanding of its significance requested such waiver, the competent judicial authority may make an order by consent for the committal of the fugitive offender to prison, or for his admission to bail, to wait return.

(2) The competent executive authority may thereafter order return at any time, notwithstanding the provisions of clause 6 (relating to seeking habeas corpus).

(3) The provisions of clause 13 (relating to the speciality rule) shall apply in relation to a fugitive offender returned under this clause, unless waived by him."

Political Offences and Terrorism

54. The provisions of clause 9(1) and (2) excluding offences of a political character from the scope of the Scheme, and for the preclusion of return where prosecution or prejudice on account of race, religion, nationality or political opinions is likely in the opinion of the requested authorities, were the single most notable change in the Commonwealth Scheme from the old Imperial Act of 1881. The provisions were largely borrowed from the European Extradition Convention, 1957.

55. No suggestion was made at the meeting that these provisions were unsatisfactory, as they stood. However, it was pointed out that experience since 1966 had revealed a strong belief that many acts of indiscriminate violence, such as the hijacking or destruction of civil aircraft, hostage-taking and the like, even though committed for political purposes, ought not to be protected as non-extraditable offences. International conventions had already declared that two crimes, genocide and apartheid, ought on no account to be treated as being of a political character for the purposes of extradition. Other conventions had stopped short of so declaring crimes to be non-political, but had gone some way towards this end by declaring that countries having custody of offenders were obliged either to prosecute themselves or to extradite to another State having jurisdiction. Examples of such conventions are the Hague and Montreal Conventions on Hijacking and Crimes in Relation to Aircraft, and the Convention on Crimes Against Internationally Protected Persons. The European Convention on the Suppression of Terrorism, 1977, went much further in cataloguing an extensive list of crimes of violence which would not qualify as politcal for the purposes of extradition.

56. The extensive discussion of this item at the Meeting revealed that there was considerable support for any efforts designed to curb the increase in politically motivated indiscriminate violence, causing death or injury to innocent by-standers, and also for the incorporation into the Commonwealth Scheme of present and future multilateral conventions restricting the invocation of the political offence exception. Since reciprocity underlay the Commonwealth Scheme, and there was little likelihood that any one list of such offences

would command universal acceptance, it was decided that an indicative list of offences to which the exception might not apply be placed in the optional provisions of the Scheme as new Annex 3. Any Member country could adopt all or any of the offences on this list or additional offences not inlcuded in the list, and apply these exceptions on a basis of reciprocity to other Member countries.

57. The proposal made in the Consultative Document for the exclusion from the category of political offences of attacks on the life of a Head of State was rejected by the Meeting as too restrictive. The Meeting considered that this item should appear as just one of the optional items in Annex 3, which would embrace also attacks on the life of Ministers of governments, murder generally, and acts declared to be crimes under certain international conventions, where an option to prosecute or extradite was given.

58. The Meeting resolved to amend the body of the Scheme in only one respect. This was to renumber the present Clause 9(1) as Clause 9(1)(a), and to add a new paragraph (b) to incorporate the exclusion from the category of political offences of those crimes declared by multilateral international conventions to be extraditable notwithstanding their political character. At present these conventions are only the Genocide Convention, and the Convention on the Crime of Apartheid, but others might later be concluded, and would thus become automatically incorporated into the Scheme as between those Member countries which became parties to the convention. The new sub-paragraph (b) reads:-

> "Paragraph (a) shall not apply in relation to offences established under any multilateral international convention to which both the requesting and the requested parts of the Commonwealth are parties and which are declared thereby not to be regarded as political offences for the purposes of extradition."

59. The Meeting then resolved to place in new optional Annex 3 the remaining categories of offences which Member countries would be free to regard, on a basis of reciprocity, as extraditable notwithstanding their political character. Annex 3 reads as follows:-

"Discretion as to Definition of Political Offences

1. It may be provided by a law in any part of the Commonwealth that certain acts shall not be held to be offences of a political character including:-

(a) an offence against the life or person of a Head of State or a member of his immediate family or any related offence described in Annex 1(B),

(b) an offence against the life or person of a Head of Government, or of a Minister of a Government, or any related offence described in Annex 1(B),

(c) murder, or any related offence described in Annex 1(B),

(d) an act declared to constitute an offence under a multilateral international convention whose purpose is to prevent or repress a specific category of offences and which imposes on the parties thereto an obligation either to extradite or to prosecute the person sought.

2. Any part of the Commonwealth may restrict the application of any of the provisions made under the paragraph 1 to a request from a part of the Commonwealth which has made similar provisions in its law."

Costs of Extradition

60. The Meeting considered and agreed with the proposal in the Consultative Document that no provision was required in the Scheme dealing with the bearing of the cost burden of representing requesting countries in extradition proceedings. Since the 1966 Scheme came into operation, informal arrangements had been reached in which such assistance was often offered on a basis of reciprocity. This matter could satisfactorily be left to such information regulation.

Legal Aid

61. The Meeting similarly considered that no express provision was needed in the Scheme relating to the provision of free or subsidised legal representation to accused fugitives. This matter too could be left to be regulated by the laws and practices of the countries concerned.

Presentation of a Prima Facie Case

62. The delegate of Kenya had earlier reserved the question of the prima facie case for general discussion. The rule that a requesting country must establish before the judical authorities of the requested country a prima facie case of guilt of the offence for which extradition is requested, is a rule peculiar to countries of the common law tradition. It does not find a place in the extradition laws of non-Commonwealth countries, nor in such conventions as the European Extradition Convention. It was noted that recently in the United Kingdom an Interdepartmental Working Party reviewing the law and practise of extradition had been divided on the question whether to recommend dispensing with the rule. On the other hand, it was pointed out to the meeting that States which had hitherto dispensed with the rule were also States which refused to extradite their own citizens. This was not generally the case with Commonwealth countries.

63. The Meeting resolved not to delete or amend Clause 5(a) of the 1966 Scheme, which incorporates the prima facie case requirement. At the same time it recognised that the 'hearsay rule' might give rise to difficulty in presenting a prima facie case from a distance, but that the Scheme did not itself prohibit the presentation of such evidence. These views were reported in paragraph 11 of the Communique.

APPENDIX A

MEETING TO REVIEW
COMMONWEALTH EXTRADITION ARRANGEMENTS
HELD AT MARLBOROUGH HOUSE, 22 -26 NOVEMBER 1981

COMMUNIQUÉ

Representatives of 36 Commonwealth jurisdictions met in Marlborough House for the week of 22 to 26 November 1982 to review in detail the workings of the 1966 Commonwealth Scheme Relating to the Rendition of Offenders. The Meeting unanimously elected the Attorney-General of Singapore, the Hon. Tan Boon Teik to act as its Chairman.

2. The Meeting, which was opened by the Deputy Secretary-General, Chief E.C. Anyaoku, marked the culmination of a period of intensive Commonwealth consultation which began in Barbados in 1980, when Commonwealth Law Ministers reviewed the Scheme in general terms. Ministers concluded then that the Scheme had served the Commonwealth well, but had identified areas in which it might be improved. The Commonwealth Secretary-General, responding to an invitation from Law Ministers, had then invited Professor Ivan Shearer to prepare a series of specific proposals for consideration by governments.

3. Representatives expressed the view that the Commonwealth Scheme has worked well, but noted that some jurisdictions had still not adopted it. The Meeting was pleased to learn from a number of representatives that their governments were actively reviewing their extradition arrangements with a view to early legislation.

4. Overriding considerations of the Meeting were that the Scheme be, and be seen to be, fair as between the individual and the state, and that essential safeguards should not be impaired by any proposal to make the Scheme more efficient.

5. The Meeting was conscious, too, of the fact that wanted fugitives can exploit loopholes which exist by virtue of any incomplete application of extradition arrangements between Commonwealth countries. While they recognised the right of a government to insist upon reciprocity in such matters, delegates urged governments collectively to consider whether, in respect of their own jurisdictions, they might be prepared to apply the Scheme broadly to other Commonwealth Members, without waiting for assurances of reciprocity. There was a general feeling that governments would not wish to appear to be acting selectively within the Commonwealth association. Moreover, the Meeting was anxious to encourage designation on as wide a basis as possible and saw the formula contained in Barbados and New Zealand legislation as offering one approach which would minimise administrative effort in keeping lists up-to-date. It also expressed its gratitude to the Commonwealth Legal Advisory Service for its work in conjunction with the Commonwealth Secretariat in providing a most valuable survey of Commonwealth extradition laws and the parts of the Commonwealth to which they extend. They asked that the Survey be revised regularly and kept up-to-date, and invited governments to ensure that the Secretariat is kept fully informed of developments.

6. In the course of the deliberations, the Meeting agreed to amendments to the Scheme in a number of important areas. To enable police to respond quickly to the presence of fugitives in their jurisdiction, the Meeting agreed that the role of INTERPOL should be recognised, so that the information contained in their "international red notices" would be receivable by the courts when an application is made for a provisional warrant.

7. Recognising the need to respond to problems of international terrorism, delegates discussed at length the problems presented by the "political offences" exception, an exception which appears in other multilateral international extradition agreements. There was a widely held view that murder could, in no circumstances, be a political act and so be immune from punishment by reason of the murderer crossing an international boundary. Many delegates saw as invidious any selection of individuals who would be granted special treatment, such as Heads of State, and felt that the category should be as broad as it can be. They saw the lives of innocent bystanders as being no less deserving of protection than those of anyone else. The Meeting saw the matter as deserving further study. It accepted an amendment to the Scheme that was narrower than many delegates would wish. It invited the Commonwealth Secretary-General to consult with governments with a view to their considering whether there was a need for a braoder category of acts which should not be regarded as being offences of a political character for the purposes of extradition.

8. The Meeting agreed that extradition offences created by international conventions to which both countries involved are parties, should be included as returnable offences, even if they were not within the list of such offences appended to the Scheme. To broaden the scope of the Scheme further, delegates agreed that other offences not in the list but returnable under the laws of the requested part of the Commonwealth should be incorporated. This, delegates hoped, would lead to a broadening of the list of returnable offences as countries amend their own laws, without the need to meet periodically simply to review the list.

9. The Meeting also reviewed the mechanics of the extradition hearing. It agreed that the requesting State should have a right of judicial review, as is already the case with an accused person. It also agreed that it should be open to a fugitive to consent to his return, and so save both the time he might otherwise spend in custody and considerable expense and inconvenience. The Meeting also recognised that the "double criminality" requirement as expressed in some national legislation was unsatisfactory, but that the fault did not lie with the Scheme. Those governments who had followed the precedent in question were invited to look at their legislation with a view to meeting the difficulties arising in Gardner's case.

10. Delegates also recognised that, as a consequence of the rise in international "white collar" crime, there was a need to examine the position of fiscal offences. Fraud, theft, and similar offences were already within the Scheme, but the considerable strain on the economies of some countries was being aggravated by those who defrauded the revenue or unlawfully plundered a country's depleted holdings of foreign exchange. Agreement was reached on an amendment which, it was hoped, would enable some of these practices to be attacked. However, frequently foreign fiscal laws did not satisfy the requirement of "double criminality", a concept on which the Scheme is based.

11. Delegates also considered whether the requirement that a requesting State first establish a prima facie case before extradition was granted might be removed from the Scheme. Difficulties with the "hearsay rule" and other rules of evidence had been encountered in establishing a prima facie case from a distance. It was observed that the Scheme was not intended to preclude the admission of hearsay evidence. The Meeting drew attention to difficulties encountered where the same evidence might be admissible in one jurisdiction but not in another, and invited governments to bear this in mind when reviewing their extradition laws. The meeting felt that the requirement of a prima facie case was a principle essential to the Scheme.

12. The Meeting invited its Chairman to report the outcome of the deliberations to Commonwealth Law Ministers for adoption by them in Colombo, Sri Lanka in February 1983

13. The Meeting expressed its gratititude to the Hon. Tan Boon Teik for the skilful manner in which he guided their proceedings. These dealt at times with highly technical matters and the meeting applauded the Attorney-General's skill in achieveing a consensus against a background of varying State practice. It also expressed its indebtedness to Dr. Ivan Shearer and Dr. Torsten Stein, consultants to the Meeting: Dr. Shearer, for his constructive suggestions which formed the basis for their deliberations and Dr. Stein for sharing with delegates the beenfits of the European experience in the field of extradition. The Meeting also thanked the Commonwealth Secretary-General and the staff of the Commonwealth Secretariat for the manner in which the Meeting was conceived and carried into effect.

APPENDIX B

FINAL REVISED SCHEME AS RECOMMENDED BY THE MEETING TO LAW MINISTERS

Scheme Relating to the Rendition of Fugitive Offenders Within the Commonwealth

Scope

1. (1) The general provisions set out in this Scheme will govern the return of a person from one part of the Commonwealth, in which he is found, to another part thereof, in which he is accused of an offence; and in particular his return will only be precluded by law, or be subject to refusal by the competent executive authority, in the circumstances mentioned in this Scheme.

(2) for the purposes of this Scheme a person liable to return as mentioned in paragraph (1) is described as a fugitive offender and each of the following areas is described as constituting a separate part of the Commonwealth, that is to say:-

(a) each sovereign and independent country within the Commonwealth together with any dependent territories (which expression, for the purposes aforesaid, includes protectorates and protected states) which that country designates, and

(b) each country within the Commonwealth, which, though not sovereign and independent, is not a territory designated for the purposes of the preceding sub-paragraph.

Returnable Offences

2. (1) A fugitive will only be returned for a returnable offence.

(2) For the purposes of this Scheme a returnable offence is an offence described in Annex 1 (whatever the name of the offence under the law of the countries and territories concerned, and whether or not it is described in that law by reference to some special intent or any special circumstances of aggravation), being an offence which is punishable by a competent court in the country or territory to which return is requested by imprisonment for twelve months or a greater penalty.

Warrants, Other Than Provisional Warrants

3. (1) A fugitive offender will only be returned if a warrant for his arrest has been issued in that part of the Commonwealth to which his return is requested and either -

(a) that warrant is endorsed by a competent judicial authority in the part in which he is found (in which case, the endorsed warrant will be sufficient authority for his arrest), or

(b) A further warrant for his arrest is issued by the competent judicial authority in the part in which he is found, not being a provisional warrant issued as mentioned in clause 4.

(2) The endorsement or issue of a warrant as mentioned in this clause may be made conditional on the competent executive authority having previously issued an order to proceed.

Provisional Warrants

4. (1) Where a fugitive offender is, or is suspected of being, in or on his way to any part of the Commonwealth but no warrant has been endorsed as mentioned in clause 3(1)(a) or issued as mentioned in clause 3(1)(b), the competent judicial authority in that part of the Commonwealth may issue a provisional warrant for his arrest on such information and under such circumstances as would, in the authority's opinion, justify the issue of a warrant if the returnable offence of which the fugitive is accused had been an offence committed within that authority's jurisdiction

and for the purposes of this paragraph information contained in an international notice issued by the International Criminal Police Organisation (INTERPOL) in respect of a fugitive may be considered by the authority, either alone or with other information, in

deciding whether a provisional warrant should be issued for the arrest of that fugitive.

(2) A report of the issue of such a provisional warrant, together with the information in justification or a certified copy thereof, will be sent to the competent executive authority and, in a case in which that authority decides on the said information and any other information which may have become available that the fugitive should be discharged, that authority may so order.

Committal Proceedings

5. (1) A fugitive offender arrested under a warrant endorsed or issued as mentioned in clause 3(1), or under a provisional warrant issued as mentioned in clause 4, will be brought, as soon as is practicable, before the competent judicial authority who will hear the case in the same manner and have the same jurisdiction and powers, as nearly as may be, including power to remand and admit to bail, as if the fugitive were charged with an offence committed within that authority's jurisdiction.

(2) The competent judicial authority will receive any evidence which may be tendered to show that the return of the fugitive offender is precluded by law.

(3) Where a provisional warrant has been issued as mentioned in clause 4 but, within such reasonable time as with reference to the circumstances of the case the competent judicial authority may fix -

(a) a warrant has not been endorsed or issued as mentioned in clause 3(1), or

(b) where such endorsement or issue of a warrant has been made conditional on the issue of an order to proceed, as mentioned in clause 3(2), no such order has been issued,

the competent judical authority will order the fugitive to be discharged.

(4) Where a warrant has been endorsed or issued as mentioned in clause 3(1) the competent judicial authority may commit the fugitive to prison to await his return if-

(a) such evidence is produced as establishes a prima facie case that he committed the offence of which he is accused, and

(b) his return is not precluded by law, but, otherwise, will order him to be discharged.

(5) Where a fugitive offender is committed to prison to await his return as mentioned in the preceding paragraph, notice of the fact will forthwith be given to the competent executive authority in that part of the Commonwealth in which he is committed.

Consent Order For Return

5A. (1) A fugitive offender may waive committal proceedings, and if satisfied that the fugitive offender has voluntarily and with an understanding of its significance requested such waiver, the competent judicial authority may make an order by consent for the committal of the fugitive offender to prison, or for his admission to bail, to await return.

(2) The competent executive authority may thereafter order return at any time, notwithstanding the provisions of clause 6.

(3) The provisions of clause 13 shall apply in relation to a fugitive offender returned under this Clause unless waived by him.

Return or Discharge By Executive Authority

6. After the expiry of 15 days from the date of the committal of a fugitive offender to prison to await his return, as mentioned in clause 5, for, if a writ of habeas corpus or other like process is issued with reference to him, from the date of the final decision thereon of the competent judicial authority (which-ever date is the later), the competent executive authority will order his return unless it appears to that authority that, in accordance with the provisions set out in this Scheme, his return is precluded by law or should be refused, in which case that authority will order his discharge.

Discharge By Judicial Authority

7. (1) Where after the expiry of the period mentioned in paragraph (2) a fugitive

offender has not been returned, an application to the competent judicial authority may be made by or on behalf of the fugitive for his discharge and if

(a) reasonable notice of the application has been given to the competent executive authority, and

(b) sufficient cause for the delay is not shown, the competent judicial authority, will order his discharge.

(2) The period referred to in paragraph (1) will be prescribed by law and will be one expiring either -

(a) not later than two months from the fugitive's committal to prison as mentioned in clause 5, or

(b) not later than one month from the date of the order for his return made as mentioned in clause 6.

Habeas Corpus and Review

8. (1) It will be provided that an application may be made by or on behalf of a fugitive offender for a writ of habeas corpus or other like process.

(2) It will be provided that an application may be made by or on behalf of the government of the requesting part of the Commonwealth for review of the decision of the competent judicial authority in committal proceedings.

Circumstances Precluding Return

9.(1)(a) The return of a fugitive offender will be precluded by law if the competent judicial or executive authority is satisfied that the offence is of a political character.

(b) Paragraph (a) shall not apply in relation to offences established under any multilateral international convention to which both the requesting and the requested parts of the Commonwealth are parties and which are declared thereby not to be regarded as political offences for the purposes of extradition.

(c) Any part of the Commonwealth may adopt the provisions set out in Annex 3.

(2) The return of a fugitive offender will be precluded by law if it appears to the competent judicial or executive authority -

(a) that the request for his surrender although purporting to be made for a returnable offence was in fact made for the purpose of prosecuting or punishing the person on account of his race, religion, nationality or political opinions, or

(b) that he may be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

(3) The return of a fugitive offender, or his return before the expiry of a specified period, will be precluded by law if the competent judicial or executive authority is satisfied that by reaosn of -

(a) the trivial nature of the case, or

(b) the accusation against the fugitive not having been made in good faith or in the interests of justice, or

(c) the passage of time since the commission of the offence, or

(d) any other sufficient cause,

it would, having regard to all the circumstances be unjust or oppressive or too severe a punishment to return the fugitive or, as the case may be, to return him before the expiry of a period specified by that authority.

(4) The return of a fugitive offender will be precluded by law if the competent judicial or executive authority is satisfied that he has been convicted (and is neither unlawfully at large nor at large in breach of a condition of a licence to be at large), or

has been acquitted, whether within or outside the Commonwealth, of the offence of which he is accused.

(5) The competent authorities for the purposes of this clause will include -

(a) any judicial authority which hears or is competent to hear such an application as is mentioned in clause 8, and

(b) the executive authority by whom any order for the fugitive's return would fall to be made.

(6) It will be sufficient compliance with any one of the paragraphs (1), (2), (3), (4) and (5) if a country decides that the competent authority for the purposes of that paragraph is exclusively the judicial authority or the executive authority.

(7) If the competent executive authority -

(a) is empowered by law to certify that the offence of which a fugitive offender is accused is an offence of a political character, and

(b) in the case of a particular fugitive offender, so certifies,

the certificate will be conclusive in the matter and binding upon the competent judicial authority for the purposes mentioned in this clause.

Double - Criminality Rule

10. The return of a fugitive offender will either be precluded by law or be subject to refusal by the competent executive authority if the facts on which the request for his return is grounded do not constitute an offence under the law of the country or territory in which he is found.

Postponement of Return of Fugitive Charged or Sentenced when Found

11. Where a fugitive offender -

(a) has been charged with an offence triable by a court in that part of the Commonwealth in which he is found, or

(b) is serving a sentence imposed by a court in that part of the Commonwealth, then until such time as he has been discharged (whether by acquittal, the expiration or remission of his sentence, or otherwise) his return will either be precluded by law or be subject to refusal by the competent executive authority as the law of the country or territory concerned may provide.

Priority Where Two or More Requests Made

12. Where requests for the return of a fugitive offender to two or more parts of the Commonwealth fall to be dealt with at the same time, the competent executive authority will determine to which part he should be returned and, accordingly, may refuse the other requests; and in determining the matter that authority will consider all the circumstances of the case and in particular -

(a) the relative seriousness of the offences,

(b) the relative dates on which the requests were made, and

(c) the citizenship or other national status of the fugitive and his ordinary residence.

Speciality Rule

13. (1) This clause relates to a fugitive offender, who has been returned from one part of the Commonwealth to another part thereof, so long as he has not had a reasonable opportunity of leaving the second mentioned part.

(2) In the case of a fugitive offender to whom this clause relates, his detention or trial in the part of the Commonwealth to which he has been returned for any offence committed prior to his return (other than the one for which he was returned or any lesser offence proved by the facts on which that return was grounded or, with the consent of the

requested country or territory, any returnable offence) will be precluded by law.

(3) When considering a request for consent under paragraph (2) the executive authority of the requested part of the Commonwealth may call for such particulars as it may require in order that it may be satisfied that such request is otherwise consistent with the principles of this Scheme, and shall not unreasonably withhold consent; but where in the opinion of the requested part of the Commonwealth it appears that, on the facts known to the requesting part of the Commonwealth at the time of the original application for return of the fugitive offender, application should have been made in respect of such offence at that time, that fact may constitute a ground for refusal.

(4) The requesting part of the Commonwealth shall not, without the consent of the requested part, return or surrender to another country or territory a fugitive offender returned to the requesting part and sought by such other country or territory in respect of any offence committed prior to his return; and in considering a request under this paragraph the requested part of the Commonwealth may call for the particulars referred to in paragraph (3) and shall not unreasonably withhold consent.

(5) Nothing in this clause shall prevent a court in the requesting part of the Commonwealth from taking into account at the request of the fugitive any other offence, whether returnable or not under this Scheme, for the purpose of passing sentence on a fugitive convicted of an offence for which he has been returned under this Scheme, where the fugitive desires that such other offence shall be taken into account.

Return of Escaped Prisoners

14. (1) In the case of a person who -

(a) has been convicted of a returnable offence by a court in any part of the Commonwealth and is unlawfully at large before the expiry of his sentence for that offence, and

(b) is found in some other part of the Commonwealth, the provisions set out in this Scheme, as applied for the purposes of this clause by paragraph (2), will govern his return to the part of the Commonwealth in which he was convicted.

(2) For the purposes of this clause this Scheme shall be construed, subject to any necessary adaptations or modifications, as though the person unlawfully at large were accused of the offence of which he was convicted and, in particular -

(a) any reference to a fugitive offender shall be construed as including a reference to such a person as is mentioned in paragraph (1), and

(b) the reference in clause 5(4) to such evidence as establishes a prima facie case that he committed the offence of which he is accused shall be construed as a reference to such evidence as establishes that he has been convicted.

(3) The references in this clause to a person unlawfully at large shall be construed as including reference to a person at large in breach of a condition of a licence to be at large.

Ancillary Provisions

15. Each Commonwealth country or territory will take, subject to its constitution, any legislative and other steps which may be necessary or expedient in the circumstances to facilitate and effectuate -

(a) the return of a fugitive offender who is in transit in its territory for that purpose,

(b) the delivery of property found in the possession of a fugitive offender at the time of his arrest which may be material evidence of the offence of which he is accused, and

(c) the proof of warrants, certificates of conviction, depositions and other documents.

Alternative Arrangements and Modifications

16. Nothing in this Scheme shall prevent -

(a) the making of arrangements between two or more parts of the Commonwealth for further or alternative provision for the return of offenders,

(b) the application of the Scheme with modifications by any part of the Commonwealth in relation to any other part which has not brought clauses 1 to 15 fully into effect.

Supplementary Provisions

17. Any part of the Commonwealth may or may not adopt either or both of the supplementary provisions set out in Annex 2 but, where such a provision is adopted, any other part of the Commonwealth may in relation to the first part reserve its position as to whether it will give effect to clauses 1 to 15 or will give effect to them subject to such exceptions and modifications as appear to it to be necessary or expedient or give effect to any arrangement made under clause 16(a).

ANNEX 1

Description of Returnable Offences

A. 1. Murder of any degree

2. Manslaughter

3. An offence against the law relating to abortion

4. Maliciously or wilfully wounding or inflicting grievous bodily harm

5. Assault occasioning actual bodily harm

6. Rape

7. Unlawful sexual intercourse with a female

8. Indecent assault

9. Procuring, or trafficking in, women or young persons for immoral purposes

10. Bigamy

11. Kidnapping, abduction or false imprisonment, or dealing in slaves

12. Stealing, abandoning, exposing or unlawfully detaining a child

13. Bribery

14. Perjury or subornation of perjury or conspiring to defeat the course of justice

15. Arson

16. An offence concerning counterfeit currency

17. An offence against the law relating to forgery

18. 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

19. Burglary, housebreaking or any similar offence

20. Robbery

21. Blackmail or extortion by means of threats or by abuse of authority

22. An offence against bankruptcy law or company law

23. Malicious or wilful damage to property

24. Acts done with the intention of endangering vehicles, vessels or aircraft

25. An offence against the law relating to dangerous drugs or narcotics

26. Piracy

27. Revolt against the authority of the master of a ship or the commander of an aircraft

28. Contravention of import or export prohibitions relating to precious stones, gold and other precious metals

B. 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 offences listed in paragraph A above.

C. Extradition offences established under multilateral international conventions to which both the requesting and the requested parts of the Commonwelath are parties.

D. Offences not described in paragraphs A,B or C, but which are returnable under the law of the requested part of the Commonwealth, notwithstanding that any such offences are of a purely fiscal character.

ANNEX 2

Supplementary Provisions

Discretion as Respects Return For Offences Punishable By Death

1. (1) The return of a fugitive offender may be refused by the competent executive authority where it appears to that authority that, by reason that -

(a) if he was returned he would be likely to suffer the death penalty for the offence for which his return is requested, and

(b) in the country or territory in which he is found or in any part thereof that offence is not punishable by death,

it would, having regard to all the circumstances of the case and to any likelihood that if not returned he would be immune from punishment, be unjust or oppressive or too severe a punishment to return him.

(2) In determining whether a fugitive would be likely to suffer the death penalty, the executive authority shall take into account any representations which the authorities of the requesting part of the Commonwealth may make with regard to the possibility that the death penalty, if imposed, will not be carried out.

Discretion as Respects Return of Citizens etc.

2. (1) The return of a fugitive offender who is a national or permanent resident of the part of the Commonwealth in which he is found -

(a) may be precluded by law, or

(b) may be refused by the competent executive authority:

Provided that return will not be so refused if the fugitive is also a national of that part of the Commonwealth to which his return is requested.

(2) For the purposes of this paragraph a fugitive shall be treated as a national of a part of the Commonwealth if that part consists of, or includes -

(a) a Commonwealth country of which he is a citizen, or

(b) a country or territory his connection with which determines his national status,

in either case at the date of the request.

ANNEX 3

Discretion as to Definition of Political Offences

1. It may be provided by a law in any part of the Commonwealth that certain acts shall not be held to be offences of a political character including:-

(a) an offence against the life or person of a Head of State or a member of his immediate family or any related offence described in Annex 1 (B);

(b) an offence against the life or person of a Head of Government, or of a Minister of a Government, or any related offence described in Annex 1(B);

(c) murder, or any related offence described in Annex 1(B),

(d) an act declared to constitute an offence under a multilateral international convention whose purpose is to prevent or repress a specific category of offences and which imposes on the parties thereto an obligation either to extradite or to prosecute the person sought.

2. Any part of the Commonwealth may restrict the application of any of the provisions made under paragraph 1 to a request from a part of the Commonwealth which has made similar provisions in its laws.

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