REVIEW OF THE 1966 COMMONWEALTH SCHEME RELATING TO THE RENDITION OF FUGITIVE OFFENDERS

Memorandum by the Commonwealth Secretariat and a Discussion Paper prepared by Professor I. A. Shearer of the University of New South Wales

It will be recalled that the draft of a Discussion Paper by Professor I. A. Shearer on the Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth was circulated to Law Ministers in November last year. The Governments of Sri Lanka and Jamaica have since forwarded their preliminary views on his paper, and these are contained in LMM(80)6 and LMM(80)7. It did not prove possible in the time available to arrange for Professor Shearer's paper to be revised and so his paper is attached substantially in its original form. If any further comments are received, these will be collated and distributed.

2. It might be helpful briefly to trace the history, and discuss the status of the Scheme which was finalised at the 1966 (London) Meeting of Commonwealth Law Ministers. The draft Scheme which was placed before that Meeting stemmed from a memorandum circulated by the British Government in May 1964, which recognised that the United Kingdom Fugitive Offenders Act, 1881 was outmoded in view of the constitutional changes which had occurred since it was enacted. Although as the Empire developed into a Commonwealth of independent nations, 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.

3. 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.

4. 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 based 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."

5. Since 1966, many Commonwealth jurisdictions have enacted legislation implementing the Scheme. Several have taken into account 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.

6. It was felt that some 14 years after the introduction of the Scheme, it would be useful to review its provisions to see whether subsequent experience and developments suggested that it should be modified. The Commonwealth Secretariat therefore commissioned Professor Shearer to prepare a Discussion Paper for this purpose.

7. In his Paper, Professor Shearer concludes that the 1966 Scheme has worked well as a basis for co-operation, and suggests that any defects and ambiguities that it may be considered to have can be remedied by collective action after appropriate discussions.

8. It is not expected that Law Ministers will wish to submit the Scheme, and Professor Shearer's tentative suggestions to detailed scrutiny at Barbados. Apart from the crowded agenda, necessarily, few delegations will include in their number, representatives of the other departments of Government which are responsible for, or concerned with, extradition matters. However it is hoped that Ministers will wish to give their general views on the issues raised and their possible resolution, and take the opportunity of highlighting any other problems that may have arisen in their jurisdictions in this area of the law.

9. While being conscious of international principles and obligations, Law Ministers might feel that in their commitment to enhancing mutual assistance in the field of the administration of justice, it is a desirable aim that Commonwealth extradition arrangements should continue, as far as is practicable, to be based substantially on uniform legislation. If it is the wish of Ministers, the Secretary-General would arrange the preparation of firm proposals for consideration by Governments in the light of the discussions at Barbados.

REVIEW OF THE SCHEME RELATING TO THE RENDITION OF FUGITIVE OFFENDERS WITHIN THE COMMONWEALTH

By Professor I. A. Shearer, University of New South Wales, Australia.

Summary
It has been thought desirable to attempt a broad review of the operation of the Commonwealth extradition scheme, adopted in 1966, in the light of subsequent experience.

The review embraces such questions as the extent of the adoption of the Scheme by Member countries and of its application; the description of returnable offences and the application of the double criminality rule; the principle of speciality; the return by a requested country of its own citizens; terrorism and the concept of political offences; other circumstances precluding return including the death penalty; the costs of extradition and reciprocal assistance; appeals; return by consent; and legal aid.

The object of this review is to stimulate thought among Member countries on the working of the Scheme and to encourage an exchange of views. The review has been kept brief, and citations largely avoided, so as to indicate as broadly as possible the areas where improvements might be thought desirable. To the same end specific proposals for amendment of the Scheme have not been formulated at this stage except hypothetically, in some instances, in order to clarify the point raised for consideration. It should also be emphasized that the questions raised in the review are not necessarily exhaustive of the matters deserving consideration.

In the light of comments which it is hoped that this review will provoke, a more detailed exposition of the questions covered in the review, and of other suggested questions, may be prepared.

Introductory
1. Thirteen years have now passed since the *Scheme relating to the Rendition of Fugitive Offenders Within the Commonwealth* was adopted by the Commonwealth Law Ministers at London in May 1966 [Appendix]. Although the Scheme has been kept under periodic review at subsequent meetings of Law Ministers, it has been thought that a more general review of the Scheme in the light of international and Commonwealth developments in this area of law would be useful.

Adoption of the 1966 Scheme
2. It will be recalled that the 1966 Scheme was never intended as a multilateral convention but was designed as an agreed basis upon which member States of the Commonwealth would enact legislation so as to provide for a uniform scheme of extradition within the Commonwealth.

3. The main advantages of such a uniform legislative pattern were seen as—

a) the replacement of the increasingly archaic Fugitive Offenders Act, 1881 (Imp.), which no longer corresponded with the realities of contemporary Commonwealth relations, by a modern extradition system in harmony with general international principles;

b) the promotion of a uniform scheme to link Commonwealth countries which follow common legal traditions and share a similar perception of legal values;

c) the avoidance of complex and time-consuming bilateral treaty negotiations between Commonwealth countries in the field of extradition.

4. *The Survey of Extradition and Fugitive Offenders Legislation in Commonwealth Jurisdictions* prepared by the Secretariat for presentation at the Law Ministers' Meeting at Winnipeg in August 1977 showed that the following 28 Member States or Associated territories had legislated since 1966 consistently with the Scheme:– Antigua, Australia, Bangladesh, Botswana, Cyprus, Dominica, Fiji, Grenada, Kenya, Lesotho, Malaŵi, Malaysia, Malta, Mauritius, Nauru, Nigeria, Papua New Guinea, St. Christopher, Nevis and Anguilla, St. Lucia, St. Vincent, Western Samoa, Sierra Leone, Singapore, Sri Lanka, Swaziland, Tonga, the United Kingdom, Zambia. Some other jurisdictions have enacted legislation since the *Survey* was prepared, see, for example, the Extradition (Commonwealth Countries) Act 1979 of Seychelles and the Extradition Act 1979 of Barbados.

5. The United Kingdom Fugitive Offenders Act, 1967, was extended to a number of territories for whose international relations the United Kingdom is responsible. These territories are Belize, Bermuda, British Antarctica, British Indian Ocean Territory, Cayman Islands, Central and Southern Line Islands, the Sovereign Base Areas in Cyprus, Falkland Islands, Gibralta, Hong Kong, Montserrat, New Hebrides, Pitcairn Island, St. Helena, Turks and Caicos Islands, the Virgin Islands. The cases of Brunei and Southern Rhodesia are exceptions. The United Kingdom legislation was also extended to a number of territories which have since become independent and are now full Member States of the Commonwealth, e.g. The Bahamas, Solomon Islands, Tuvalu and Kiribati.

6. The remaining Member States had not, at the time of the *Survey*, legislated specifically to adopt the 1966 Scheme, but in some cases partial uniformity with the Scheme is achieved by reason of pre-1966 or post-1966 amendments. These countries were:– Canada[1], The Gambia, Ghana, Guyana, India, Jamaica, New Zealand, Tanzania, Trinidad and Tobago, Uganda.

1 A Bill to implement the 1966 Scheme lapsed upon the dissolution of the Canadian Parliament in May 1979.

Reciprocal application of legislation

7. The terms of the 1966 Scheme are silent as to the procedures for its application between Member countries which have implemented the Scheme. Clause 16(a) of the Scheme allows the possibility of bilateral arrangements between parts of the Commonwealth for further or alternative provision for the return of offenders, and Clause 16(b) envisages the application of the Scheme with modifications by any part of the Commonwealth which has implemented the Scheme to another part which is still operating under the Imperial Act of 1881 or has otherwise not fully brought the Scheme into effect.

8. There seems no reason therefore to suppose that application of national legislation in implementation of the Scheme in relation to other Member countries which have acted similarly requires any formal arrangement between those countries apart from the Scheme itself. As a matter of legislative technique, however, it has been found necessary in most parts of the Commonwealth to provide that a part of the Commonwealth to which the Act applies is a part so designated in subordinate legislation. For example, the United Kingdom Fugitive Offenders Act, 1967, s. 2 provides that—

> "(1) Her Majesty may by Order in Council designate for the purposes of section 1 of this Act any country for the time being mentioned in subsection (3) of section 1 of the British Nationality Act 1948...or any other country within the Commonwealth; and any country so designated is in this Act referred to as a designated Commonwealth country..."

The Fugitive Offenders (Designated Commonwealth Countries) Order, 1968, No. 303 (S.I. 1968 I, p. 904) was then made listing all the Member countries of the Commonwealth, and subsequent Orders in Council have designated other countries as they have become Commonwealth Members.

9. An alternative legislative technique is to define "Commonwealth country" in separate legislation, e.g. Acts Interpretation legislation, and thereby achieve an internally uniform application of legislation, including that relating to extradition, to all parts of the Commonwealth. New Zealand has enacted the Commonwealth Countries Act 1977 which lists all Commonwealth countries in an easily amended Schedule and also makes executive certificates as to the status of a country or territory as being within the Commonwealth conclusive evidence.

10. Some Member countries which have implemented the Scheme have, by contrast, appeared to use designation procedures selectively and have not designated other Member countries before first seeking, by diplomatic notes, assurances of reciprocity. This seems in some cases to have been a time-consuming procedure and to have resulted in a far from complete application of the Scheme even among those Member countries which have fully implemented the Scheme in their own legislation. The extent of designations can be assessed by reference to the *Survey of Extradition and Fugitive Offenders Legislation in Commonwealth Jurisdictions* (Commonwealth Secretariat, 1977). Resort to what in effect amounts to bilateral arrangements for the application of the Scheme seems contrary to the intentions of the Scheme and constitutes a partial failure in the present working of the Scheme that can, and ought to, be speedily remedied.

11. On the other hand, it is reasonable that a Member country having implemented the Scheme might not wish to apply its legislation in an unqualified fashion to a country which is operating under other legislation. To the extent of the inconsistency or incompatibility thereby arising, subordinate legislation to implement special arrangements of the kind envisaged by Clause 16 of the 1966 Scheme could be desirable. Thus the United Kingdom Fugitive Offenders Act 1967, for example, provides in s. 2—

> "(3) Her Majesty may by Order in Council direct that this Act shall have effect in relation to the return of persons to, or in relation to persons returned from, any designated Commonwealth country...subject to such exceptions, adaptations or modifications as may be specified in the Order."

Despite lack of full reciprocity many Member countries which have implemented the Scheme have designated without special arrangements such non-Scheme countries as Canada and New Zealand.[2]

Returnable offences

12. The 1966 Scheme provides in Clause 2(1) that a fugitive will only be returned for a returnable offence. Returnable offences are described in Annex 1 of the Scheme. The question arises whether the Annex requires revision in the light of the unilateral action by some Member countries to add certain offences as returnable under their legislation. The need for unilateral extension of the list arises particularly from the growing number of offences being created by international conventions; in countries of the British constitutional tradition treaties affecting private rights do not automatically become law without legislation, and the only convenient way of giving effect to such internationally created offences in relation to Commonwealth countries is to include them in the existing legislation implementing the 1966 Scheme. For example Australia has added a number of offences to the 28 listed in the Annex to the Scheme in order to give effect to the offences created by the Genocide Convention, 1948, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971, and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 1973. It is unlikely that any Commonwealth member would object to such additions since they are consistent with the spirit, if not the letter, of the 1966 Scheme. If the Scheme were to be revised, however, it

2 Both these countries, however, have indicated their intention to implement the Scheme in the near future. New Zealand has enacted the Fugitive Offenders Act, 1976, amending the Imperial Act of 1881, as a temporary expedient.

would be desirable to add, possibly as paragraph C. of Annex 1 such an inclusive category as "offences established under international conventions to which both the requesting and the requested parts of the Commonwealth are parties."

13. Arising for separate consideration is the question whether offences, other than international offences, which are not described as returnable offences under the Scheme, ought in principle to be able to be added unilaterally in national legislation. For example, in the Canadian Fugitive Offenders Bill of 1978 (which lapsed in 1979) the following additional offences were listed–

> Obstruction of judicial proceedings or proceedings before governmental bodies or interference with an investigation of a violation of a criminal statute by influencing, bribing, impeding, threatening or injuring by any means any officer of the court, juror, witness or duly authorized criminal investigator;
>
> assisting or permitting the escape of a person from custody;
>
> offences against the laws relating to civil disorders and riots;
>
> offences against the laws relating to firearms and other weapons, ammunition, explosives, incendiary devices or nuclear materials;
>
> income tax evasion.

While many such unilaterally determined offences might give rise to little controversy, income tax evasion has, at least in the past, been regarded as an offence falling outside the traditional operation of extradition arrangements. The wider category of fiscal offences, which would also include customs offences and violation of exchange control regulations, was left for future decision in the European Convention on Extradition, 1957. Article 5 of that Convention provides that "Extradition shall be granted...for offences in connection with taxes, duties, customs and exchange only if the Contracting Parties have so decided in respect of any such offence or category of offences."

14. A possible solution to the question raised is to leave the matter to be resolved on a basis of reciprocity. A further paragraph could be considered for addition to Annex 1 of the 1968 Scheme as follows–

> "D. Offences not described in paragraphs A., B. and C. but which are returnable under the laws of both the requesting and the requested parts of the Commonwealth."

The advantages of this solution would be the introduction of a degree of flexibility in the accommodation of the Scheme, and the avoidance of the necessity of universal agreement when only some Member countries feel the need to make certain other offences returnable.[3] The disadvantage, if it should be seen to be such, is the consequent reduction, albeit slight, of the uniformity of application of the Scheme on a Commonwealth-wide basis.

Double criminality

15. A difficulty in the Scheme, or at least in the Act of 1967 implementing the Scheme in the U.K., is evidenced by the decision of the English High Court in *R.* v. *Brixton Prison ex parte Gardner* [1968] 2 Q.B. 399. While not questioning the decision as a matter of legal interpretation, officials in one Commonwealth country have described the point on which the extradition application was held to fail in this case as "a nuisance"; it is thought that this view may be entertained elsewhere also.

16. The point arose as follows. A warrant was issued in New Zealand charging the fugitive with offences of false pretences. The fugitive was arrested in England and committed for return. On application for habeas corpus the fugitive argued that the particulars of the offences alleged against him in New Zealand related to false representation as to *future events*; since the passing of the Theft Act 1968 such representations did not constitute offences under English law. The circumstance that the evidence tendered in support of the application contained facts which, if they had occurred in England, would enable *other* extraditable offences to be charged in England was irrelevant[4]; regard must be had only to the acts or omissions constituting the offences actually charged in the requesting state. The Court accepted this submission (which was supported also by counsel for the Governor of Brixton Prison) pointing out that s. 3(1)(c) of the Act of 1967 clearly required proof of double criminality in rigorous form—

> "S. 3(1) For the purposes of this Act an offence of which a person is accused...is a relevant offence if–
>
> ...
>
> (c)...the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of the United Kingdom if it took place within the United Kingdom...."

(There was no evidence or argument before the Court that the particular ingredients of the offence as charged in New Zealand would be an offence against the law of Scotland—see s. 3(4).) It is undoubtedly true that the intention of the 1966 Scheme was to introduce the principle of double criminality into Commonwealth extradition. The Imperial Act of 1881, s. 9 had expressly applied to offences "notwithstanding that by the law of the part of Her Majesty's dominions in or on his way to which the fugitive is or is suspected of being it is not an offence..." Paragraph 10 of the Scheme of 1966 stated the principle in the following terms–

3 Such a clause would also make waivers of the speciality rule under Clause 13(2) more flexible since waivers can be granted only in respect of returnable offences e.g. at present a requested country cannot consent to a prosecution for gaol breaking by the requesting country.

4 In *R.* v. *Governor of Brixton Prison ex p. Rush* [1969] 1 All E.R. 316 it was held that, although the Canadian charges of conspiracy were *ex facie* a crime in England, the evidence disclosed the lack of an element necessary to constitute the offence in English law. It thus seems that regard will be had to the evidence for the purpose of characterizing the offence when to do so would operate *in favorem libertatis* and against the requesting State, but not where to do so would favour extradition.

"10. The return of a fugitive offender will either be precluded by law or be subject to refusal by law or be subject to refusal by the competent executive authority[5], *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." [emphasis added]

If in s. 3(1)(c) of the U.K. Act of 1967 the words "facts on which the request...is grounded" had been used in place of "the act or omission constituting the offence" the point upon which the applicant succeeded in *Gardner's Case* could not have been raised. The question thus arises whether the formulation of the double criminality rule in the U.K. Act of 1967 goes beyond what is required in order to provide for the substance of the principle and erects an unnecessarily technical barrier to extradition in cases where there is no doubt that the conduct of the fugitive, viewed as a whole, is criminal under the laws of both requesting and requested countries and constitutes an offence broadly described in the list of returnable offences.

17. It was pointed out by Lord Parker C.J. in *Gardner's Case* [1968] 2 Q.B. 399 at 412 that s. 3(1)(c) of the Act of 1967 goes further than s. 26 of the Extradition Act 1870, applying in respect of foreign States, which provides–

"26. The term "extradition crime" means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act."

There is an element of tautology in s. 26 but it is submitted, with respect, that Lord Parker C.J. is correct in his view that under the Extradition Act 1870 it is unnecessary for the purpose of satisfying the double criminality rule that the offence charged be examined in every particular of its constituent elements as required to sustain the charge under the law of the requesting State. Thus the surprising result emerges that the double criminality rule is more exacting, under United Kingdom law, in relation to Commonwealth extradition than it is in relation to extradition with foreign states.

18. It has not been possible for the purposes of the present study to survey the legislation of each of the Commonwealth member countries which have legislated on the subject of Commonwealth extradition since the Commonwealth Law Ministers' Meeting in 1966, but it would seem that many of these member States have legislated similarly to the United Kingdom with regard to the incorporation of the double criminality rule, e.g. Australia,[6] Malaysia[7] and Singapore.[8] In Canada, by contrast, the lapsed Bill to give effect to the 1966 Scheme sought to provide in clause 2(1) similarly to the less rigorous requirements of the Imperial Act of 1870 and thus to the test applied in respect of foreign countries–

"'returnable offence' in respect of a part of the Commonwealth, means an offence, however described that, if committed in Canada or within Canadian jurisdiction, would be one of the crimes described in Schedule I..."

It is submitted that the Canadian formulation is to be preferred to that of the United Kingdom as more accurately reflecting the intention of Clause 10 of the 1966 Scheme and as avoiding the anomaly of imposing a more stringent test of double criminality in extradition applications from Commonwealth countries than in the case of foreign countries. The Canadian formula, or any other that looks to the facts underlying the offence charged rather than to the formal ingredients of the charge, would also meet the point made by the Rt. Hon. Lord Hailsham of St. Marylebone in his concluding remarks on the discussion of extradition at the 1973 Meeting of Commonwealth Law Ministers; speaking of *Gardner's Case* the Lord Chancellor remarked that that case would seem to require that "it was necessary for countries to keep each other informed of any changes in domestic criminal law for they could affect the rights of extradition."[9]

19. Problems of double criminality arise also in respect of extraterritorial offences. The Scheme avoids reference to jurisdiction and defines a returnable offence merely as one "punishable by a competent court" in the requesting country (Clause 2(a)). Under the Act of 1881 problems of extraterritorial offences could normally be resolved within the Commonwealth on the common basis of admiralty jurisdiction, but with the gradual replacement of that jurisdiction by local legislation[10] and the fragmentation of the characterization of such ships as "British ships" a reciprocity of jurisdiction concept is needed in Commonwealth extradition. A simple realization of this concept is contained in the U.K. Fugitive Offenders Act, 1967, s. 3(c) which includes as a relevent offence an extraterritorial offence which would be an offence against the law of the United Kingdom if it were committed in corresponding circumstances outside the United Kingdom.[11] The point is an important one in view of the growing extent of activities related to the exploitation of the continental shelves and economic zones of coastal countries, as well as events occurring on board ships and aircraft.

The speciality rule

20. The speciality rule operates at two stages in most legislation implementing the Scheme. It operates first as a restriction on surrender where the requested country must be satisfied that the law of the requesting country, or the terms of a special arrangement, provide that the fugitive will not be dealt with for offences committed prior to his surrender other than as permitted by the rule. Secondly, the rule is incorporated as an express limitation on the rights to deal

5 O'Higgins points out that this phrase suggests an alternative legislative approach by leaving such questions to executive authority permitting discretionary waiver of the rule:

"Reform of intra-Commonwealth extradition" [1966] Crim. L.R. 361 at 364.

6 Extradition (Commonwealth Countries) Act 1966–1976, s. 4(1A).

7 Commonwealth Fugitive Criminal Act 1967, s. 8(2)(e).

8 Extradition Act 1968, s. 2(1).

9 Minutes, p. 73.

10 See, e.g., the Crimes at Sea Act, 1979 (Australia).

11 See also Extradition (Commonwealth Countries) Act 1966–1976, s.4(5)(c), (7), (8) (Australia).

with a fugitive who has been surrendered by another Commonwealth country.[12]

21. Some difficulty has been felt by certain countries in giving legislative form to the definition of other offences caught by the rule. The Scheme itself, in clause 13(2) describes an offence in respect of which a returned fugitive may not be detained or tried as one "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, a returnable offence of the same nature as the offence for which he was returned." What is meant by a "lesser offence"? While the offence of inflicting grievous bodily harm might be proved by the same facts on which a surrender for attempted murder is requested and is clearly a "lesser offence", in other cases it may not always be so clear that one offence is "lesser" than another. For example, would the statutory offence in some Commonwealth jurisdictions of causing death by dangerous driving be a "lesser offence" than manslaughter when each carries the same maximum penalty of life imprisonment? The problem might therefore be overcome, with no evident prejudice to the rights of the fugitive, if the word "other" were substituted for "lesser" in clause 13 of the Scheme.

22. A related, though different, problem arises where the fugitive is returned on a charge of embezzlement of £5,000 and, after the return but before trial, further investigations reveal that the sum involved is £50,000. The offence is the same but the circumstances are more grave. Where the charges are separated into a number of counts of an indictment it would be necessary to seek the consent of the surrendering country to the charging of additional counts of a "returnable offence of the same nature". It would seem that in practice, although consent to charge additional offences is regarded as an exceptional procedure to be used only in special circumstances, consent will ordinarily be given where additional offences or evidence have come to light after the original requisition for extradition had been made, or where a fresh or re-formulated charge of a comparable nature could be preferred either on the basis of the same facts or in the light of additional evidence discovered after the fugitive's surrender. There may be, however, some special problems in federal countries, such as Australia and Canada, where State or Provincial authorities wish to charge a returned fugitive for other offences, and where the offences were known at the time of the requisition made by the federal authorities, but the State or Provincial authorities were unaware of the extradition proceedings. Such reflections prompt a re-examination of the relationship between the rule of speciality and the requirements of justice. Why should a fugitive be placed in such a tactically advantageous position with respect to other charges? Three reasons might be given: (a) where the fugitive is to be sent a long distance for trial, it is right that he should be surrendered only for those offences which have been specified and in respect of which evidence has been adduced. There is a strong relationship between this aspect of the rule, and the requirement of showing a prima facie case of guilt. This reason applies the more strongly where the fugitive is not a citizen or habitual resident of the requesting country. (b) The rule of speciality indirectly reinforces both the double criminality rule and the rule against extradition in respect of political offences, by making it impossible for additional offences to be charged unless the surrendering authorities are satisfied that the offence is extraditable. (c) The rule 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.

23. For all these reasons, however difficult in practice some applications of the rule may be, it would seem unacceptable to propose abandonment of the rule of speciality altogether. It is strongly indicated, however, that executive practice in considering requests under Clause 13(2) of the Scheme for consent to prosecution for other offences be re-examined. Article 14 of the European Convention on Extradition, 1957, makes such consent mandatory "when the offence for which it is requested is itself subject to extradition in accordance with the provisions of this Convention", but, of course, the European Convention does not require the production of a prima facie case of guilt by the requesting authorities. Thus the nub of the problem of speciality seems to be the requirement of a prima facie case. A basis for solution of the difficulty may be the dispensing with the proof requirement in charges of a related nature connected with the course of conduct for which the fugitive has been returned. In respect of charges of a different nature, unrelated to that course of conduct, consent to waive the speciality rule might reasonably be refused.

Citizenship of fugitives

24. In countries of the British constitutional tradition the rule against the extradition by a State of its own citizens, favoured by countries of the Roman Law tradition, has not generally been followed. Although there is some evidence that at least a discretion to refuse surrender of citizens has been gaining greater acceptance in common law countries in recent years, the problem remains that criminal jurisdiction is primarily territorial. If extradition is refused on the grounds of citizenship in respect of an offence committed in the requesting State, justice will fail unless legislation in the requested country permits jurisdiction to be assumed on the basis of nationality or on some basis other than territoriality. For these reasons a discretion to refuse the return of citizens or permanent residents was not included in the body of the Scheme but was placed in the optional supplementary provision (2) of Annex 2; by virtue of Clause 17 other countries may reserve their positions with regard to a country applying the exception, or may apply the Scheme with modifications to such a country.

12 See e.g. the Fugitive Offenders Act, 1967 (U.K.) ss. 4(3), 14.

25. It is appreciated that for special reasons some Commonwealth member countries cannot surrender their citizens, such as in the case of Cyprus whose Constitution forbids it. But where a Commonwealth country wishes to reserve its right to refuse surrender of citizens on a discretionary basis it should consider providing for jurisdiction over the alleged offender itself.[13] This is the position of European countries; elementary justice would seem to require that a fugitive should not escape on grounds of nationality alone.

26. The Canadian Transfer of Offenders Act 1977 – 78 which permits Canada to enforce sentences imposed on Canadian citizens abroad and to repatriate for enforcement of their Canadian sentences citizens of reciprocating countries prompts the question whether the adoption of a Commonwealth-wide scheme for the transfer of convicted offenders would eliminate the need for any country to refuse to surrender its own citizens. With the two schemes operating side by side, extradition of a citizen would be for trial only, with repatriation following upon conviction for service of the sentence. Such a proposal is beyond the scope of the present paper, but is the subject of an Australian Memorandum presented to the 1977 meeting of Commonwealth Law Ministers.[14]

Political offences and terrorism

27. The concept of political offences in extradition is well-known and need not be traversed here. The particular formulation of the prohibition against the return of persons accused or convicted of an offence of a political character in the 1966 Scheme (clause 9(1) and (2)) is drawn from the similar provisions of the European Convention on Extradition, 1957, and includes not only a prohibition against the surrender of persons accused or convicted of offences of a "political character" but also those who, if returned, would be prosecuted, or might be prejudiced at their trial or punished, on account of race, religion, nationality or political opinions.

28. In view of the increasing use of violence in politically connected or motivated acts, such as hijacking of aircraft or the taking of hostages, the Member States of the Council of Europe adopted in 1977 the European Convention on the Suppression of Terrorism. The chief aim of the Convention was to restrict the concept of political offences contained in the 1957 Convention on Extradition by declaring that, for the purposes of extradition, a number of offences commonly associated with terrorism are not to be regarded as political offences. These offences are defined as including hijacking and other dangerous acts in relation to aircraft, offences against diplomats, kidnapping, the use of bombs and firearms, and other serious offences involving acts of violence. Derogation from the political offence category is not, however, complete, for the right to refuse surrender where the fugitive might be tried or punished, or might suffer prejudice, on account of his race, religion, nationality or political opinions, is preserved. The qualification is thus a delicately balanced one, but it clearly places politically motivated violent crime outside the prima facie political offences category and protects only those persons against whom it could legitimately be established (to borrow the dictum of Lord Radcliffe in *Schtraks* v. *Government of Israel*[15]) that the requesting State is proceeding "for reasons other than the enforcement of the criminal law in its ordinary, what I might call its common or international, aspect."

29. The United Kingdom has ratified the Convention and has given it the force of domestic law in the Suppression of Terrorism Act, 1978. The acts embraced within the legislation extend to 19 categories of offences. The Act applies in relation to the Fugitive Offenders Act, 1967 in respect of any Commonwealth country which is a party to the 1977 European Convention and may also be extended in respect of other Commonwealth countries whether they are parties to the Convention or not. The possibility of extension to non-Convention Commonwealth countries envisages that similar legislation might be adopted by those countries, and also embraces the possibility that the United Kingdom might return a fugitive accused or convicted of a violent offence coming within the Act even without the assurance of reciprocity. If there were a common mind among Commonwealth countries which tended towards the provisions adopted by the European Convention on Terrorism, any future steps towards revision of the 1966 Scheme should explore the possibility of adding similar provisions to existing clause 9 of the Scheme.

Other circumstances precluding return

30. The 1966 Scheme, in setting out three specific and exclusive grounds for consideration under this head, is more restrictive than s. 10 of the Fugitive Offenders Act, 1881 which provided additionally for discharge where "... for any reason it would, having regard to the distance, to the facilities for communication and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period." The New Zealand case of *Re H.* [1971] NZLR 982, decided under the Act of 1881, held that it was a ground for discharge where the fugitive's health would be so seriously impaired by a long journey (owing to an uncontrollable hysterical condition) that he would be unlikely ever to be fit to stand trial. No doubt this was an unusual case; more usual cases can be imagined where the state of health of the fugitive merely justifies a delay in return. Even these cases do not appear to be provided for in the 1966 Scheme. It would thus seem desirable to consider the addition of a fourth sub-paragraph to the existing paragraph (3) of Clause 9 of the Scheme as follows–

13 See, e.g. Lesotho, Fugitive Offenders (Amendment) Order, 1972. The Penal Code of India, by s. 3, extends to all offences committed by Indian citizens abroad.

14 LMM (77) 6. See also the accompanying paper by Mr. Anthony Webb on the transfer of offenders.

15 [1964] A.C. 556.

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

(d) the state of health or other personal circumstances of the fugitive,
it would, having regard to all the circumstances..."

Cases coming under this new sub-paragraph would normally be treated as cases calling for delay rather than discharge. The addition of the words "or other personal circumstances" should provide sufficient flexibility to deal with any other cases of an unusual nature.

31. Although a proposal for an amendment of the Scheme does not seem to be required, it is worth noting in passing the decision of the Queen's Bench Division (Lord Widgery C.J., Griffiths and Gibson JJ.) in *Re Tarling* [1979] 1 All E.R. 981 holding that an applicant for habeas corpus is required to put forward on his initial application the whole of the case which is then fairly available to him; he is not free to advance an application on one ground, and to keep back a separate ground of application as a basis for a second or renewed application to the court. It would seem from the reasoning of the court that this principle would apply, in the absence of fresh evidence, even where the grounds set out under Clause 9(3) of the Scheme are not invoked, as they are under the U.K. Act of 1967, by way of habeas corpus or where there is no equivalent of s. 14(2) of the U.K. Administration of Justice Act 1960.

32. A more radical approach to Clause 9(3) of the Scheme is suggested by a reading of the Canadian Fugitive Offenders Bill, 1978. The Canadian Bill ignores Clause 9(3) altogether, thus prompting the question whether the three grounds for discharge or delay are necessary at all in the light of the changes that have occurred since their original appearance in the Act of 1881. The first ground, triviality, might be argued to be unnecessary in the light of the specified list of returnable offences under the Scheme coupled with the requirement that they be punishable by a possible penalty of at least 12 months' imprisonment by the law of the requesting State. (The argument might have been made more strongly had the latter prescription under the Scheme applied also to the law of the requested State). The second ground, "bad faith", is a difficult one to invoke against a fellow member of the Commonwealth, since it can scarcely be done without directly impugning the motives of the requesting country. It might persuasively be argued that cases of accusations "not made in good faith in the interests of justice" are already subsumed within the extended concept of political offences contained in Clause 9(2). The third ground, passage of time, might, however, be thought to have continued weight since a lengthy period of time, for which no adequate reason has been given, between the commission of the offence and the request for return, might raise a question of fairness, having regard to all the circumstances of the case. It is to be emphasized that the question of time-barred offences (prescription) which is usally dealt with expressly in treaties with civil law countries, does not normally arise as between common law countries.

33. While the Canadian Bill rejects implementation of Clause 9(3) of the Scheme, it incorporates a novel exclusionary ground. Section 18 provides that "The Minister may refuse to order the surrender of a fugitive offender where it appears to him that the fugitive offender would be likely to suffer an excessively severe or inhumane punishment for the returnable offence in respect of which his return is requested". This section goes beyond Supplementary Provision 1 contained in Annex to the 1966 Scheme dealing with the death penalty. It might be concluded from the drafting history of the Canadian Bill that section 18 was the outcome of political factors special to Canada. The Canadian Bill thus sharpens the question whether Clause 9(3) of the 1966 Scheme should be left more or less in its present form (subject to the addition proposed above for cases of health or personal hardship) or whether it should be abandoned and redrafted more in line with the Canadian Bill. The result of the latter approach might be the drawing of the death penalty exception out of the optional Annex and its incorporation in the main body of the Scheme.

Costs

34. Extradition is a costly procedure and a significant extra burden is placed on the requesting country where it is required to engage counsel in the requested country. The 1966 Scheme is silent on the subject. Bilateral arrangements have, however, dealt with the problem as between some Commonwealth members.[16] The United Kingdom (in respect of England and Wales) has made arrangements on a reciprocal basis to arrange and meet the cost of legal representation of the requesting country with Australia, Canada, Cyprus, Gibraltar, Hong Kong, Kenya, Malta and New Zealand. Australia offers the services of its Crown Solicitor to represent requesting countries in extradition proceedings, including any proceedings by way of appeal or review. Costs and disbursements are met by the Australian Government including, where necessary, the briefing of counsel by the Crown Solicitor. No undertakings that Australia will receive reciprocity of treatment are required but Australia may vary the terms of its assistance to particular countries if it should later transpire that they do not provide similar assistance in the case of an Australian request.

35. Reciprocal arrangements as to costs are not normally made on a formal treaty basis but are made as the occasion arises; when an extradition request is made one party will inquire of the other whether such a reciprocating understanding is desired. It may happen that an unusually complex case arises in which either the requested country will have to confess its inability to provide representation from its own resources or in which the requesting country prefers to engage at its own expense counsel of its own choice. But in the normal run of cases,

16 Commonwealth Secretariat, *Survey of Extraditions and Fugitive Offenders Legislation in Commonwealth Jurisdiction* (1977)—Annex, "Particulara of Legislation, Case-law or State practice regarding legal costs of extradition in the Commonwealth countries."

representation of the requesting country by the government legal officers of the requested country appears to work satisfactorily and indeed to have certain advantages; a body of expertise and experience is built up in the government legal department and information on procedural or other difficulties can be readily exchanged with other countries. The question arises whether this practice should be formalised by being written into any revision of the 1966 Scheme. The main argument against such a step would seem to be that the cost burden might fall more heavily on the small Member countries if they are in such a position that they anticipate receiving more requests than they would make. In such circumstances Members might prefer to leave the matter to bilateral arrangements as and when the occasion arises. The argument in favour of formalising reciprocity of representation, at least in cases which are not usually difficult or complex, is that countries which have not previously made or received requests will have a starting point from which to approach the question of costs which may, of course, be varied in the light of special circumstances, by individual arrangements. It is worthy of note that an increasing number of bilateral extradition treaties outside the Commonwealth make express provision for reciprocal representation by local authorities in the requested State. The logic of this course within the Commonwealth seems inescapable, whether it is to be achieved by formal incorporation in the Scheme, or otherwise.

Appeals by requesting governments

36. It has long been accepted in England that there is no right of appeal by a requesting government against the refusal of a magistrate to commit for surrender, whether under the Extradition Act 1870 or the Fugitive Offenders Act, 1881 or 1967. In *Atkinson* v. *United States Government,*[17] however, this view was for the first time challenged when the requesting government proceeded by way of a case stated by the magistrate. The House of Lords ultimately rejected the argument that an appeal by way of case stated lay, although Lord Morris's dissenting speech pointed out the anomaly thereby created that a mistake made by a magistrate as to a point of law would go uncorrected. In the unreported case of *Re Slater* in 1977 the Government of Singapore applied by way of certiorari to review the order of a magistrate, but a Divisional Court of the English High Court disposed of the application without pronouncing upon the availability of this procedure.

37. It is a plausible argument that requesting governments should be given a right of appeal against failure to commit, whether by way of review of the magistrate's finding of fact or on questions of law.[18] The analogy of committal proceedings in domestic criminal law is not entirely apt; the requesting government is disadvantaged by distance and by procedural complexities in renewing a requisition for return and in presenting further evidence. The cost factor is also much greater. The question whether a right of appeal lies at the instance of a requesting government against non-committal depends in England on legislation other than the Extradition or Fugitive Offenders Acts, and so it is likely to be in other Commonwealth jurisdictions. While other considerations obviously apply in proceedings other than extradition matters, the question whether special review procedures available to requesting governments, balancing those offered to the fugitive, ought to be written in to fugitive offenders legislation, is worthy of considerations.[19]

Return by consent

38. Some cases have occurred in recent years where the fugitive has desired that extradition proceedings be waived in order that he may return more speedily, and voluntarily, in order to face the charges made against him. Difficulty has arisen from the lack of any legislative provision empowering a magistrate to make a "consent order" for return in such cases. If proceedings have already commenced, the requesting government would have the option to withdraw its request, but in this case the fugitive could not lawfully be returned in custody and, if the fugitive suddenly changed his mind, proceedings would have to be begun afresh. There is merit in the suggestion that any revision of the 1966 Scheme should contain provision for "consent orders", which would dispense with the committal proceedings on express waiver by the fugitive. If a balancing advantage is to be given to the fugitive in such cases, it might be considered that the speciality rule should apply on his return to the requesting country notwithstanding the fugitive's essentially voluntary return.[20] If the speciality rule were to apply in such cases, care would be needed to ensure that all likely charges were fully considered before the order for return was made.

Legal aid

39. It is the position in a number of Commonwealth countries that legal aid is available, whether free or on a contributory basis related to need, to fugitives in extradition proceedings. Such aid is granted under legal aid provisions or schemes of general application and not specifically under fugitive offenders legislation.[21] While there seems to be no evidence that fugitives are being denied legal assistance on account of indigence, in any revision of the Scheme a provision might appropriately appear to the effect that legal aid will be made available to the fugitive in proceedings for return under the Scheme in the same circumstances and under the same conditions as legal aid is made available to citizens of the requested country in criminal proceedings.

17 [1971] A.C. 197.

18 The Fugitive Offenders Bill, clause 13, of Canada which lapsed in 1979, provided for appeals on questions of law against committal or discharge.

19 A right of appeal against the granting of habeas corpus is available to a requesting government in England under the Administration of Justice Act, 1960, s. 15.

20 Cf. *R. v. Corrigan*[1931] 1 K.B. 527.

21 E.g. India, Criminal Procedure Code, 1973, ss. 303, 304.

Conclusion

40. There is every reason to conclude that the 1966 Commonwealth Scheme on Rendition of Fugitive Offenders has proved to be a successful and progressive basis for co-operation, and that Commonwealth extradition has been placed on a footing consonant with the best international principles and practice. Such defects or ambiguities as the Scheme may be held to have, in the light of experience, can be remedied by collective action after appropriate discussions. The intention of the present review has been to stimulate thought about some possible areas for improvement, without descending to too much detail. Much may be learnt from the judicial and executive experience of Member countries, and firm proposals for amendment of the Scheme, or the foreclosure of other possible areas for discussion, have been deliberately avoided at this stage.

APPENDIX

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.

(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 judicial 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.

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 (whichever 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

8. 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.

Circumstances precluding return

9. (1) 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.

(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 reason 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,

it would, having regard to all the circumstances under which the offence was committed, 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 it 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 clarged 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 going back to the first 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, a returnable offence of the same nature as the offence for which he was returned) will be precluded by law.

(3) The reference in paragraph (2) to detention includes a reference to detention for the purposes of any proceedings for returning or surrendering the fugitive offender to any country or territory for trial or punishment and, accordingly in the case of a fugitive to whom this clause relates such return or surrender will be precluded by law if the offence for which his return or surrender is requested is such an offence as is mentioned in paragraph (2).

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 references 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.

ANNEX 2

Supplementary Provisions

Discretion as respects return for offences punishable by death

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.

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.