REPORTABLE

IN THE SUPREME COURT OF INDIA

ORIGINAL CRIMINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 178 OF 2015

Verhoeven, Marie-Emmanuelle ….Petitioner

versus

Union of India & Ors. ….Respondents

WITH

CRIMINAL APPEAL NO. 417 OF 2016
(Arising out of S.L.P. (Crl.) No. 8931/2015)

J U D G M E N T

Madan B. Lokur, J.

1. The writ petition is admitted and in the connected matter, special leave is granted.

2. The principal question for consideration is whether there is a binding extradition treaty in terms of Section 2(d) of the Extradition Act, 1962 between India and Chile. Our answer to this question is in the affirmative.

3. The subsidiary question, equally important, is assuming there is no binding extradition treaty between India and Chile, whether a requisition by Chile invoking the principle of reciprocity and the general principles of international law for extraditing the petitioner from India is maintainable. In our opinion, the general principles of international law

do not debar the requisition. However, whether the petitioner ought to be extradited or not is a decision that the concerned Magistrate, before whom the extradition proceedings are pending, will need to take on the evidence and material before him.

4. The case before us has a chequered history inasmuch as the Republic of Chile has sought the extradition of the petitioner who is believed to be a French national. The petitioner is accused of being a conspirator in the assassination of a Chilean Senator on 1st April, 1991. She was sought to be extradited from Germany but the proceedings terminated in her favour. She was then sought to be extradited from India but the Delhi High Court held that the extradition proceedings initiated against her were not in accordance with law. The present proceedings have arisen out of yet another requisition made by the Republic of Chile for her extradition to Chile to face trial in the assassination of the Chilean Senator.

5. The extradition of a fugitive criminal is a serious matter since it involves the liberty of a person and therefore learned counsel for the petitioner placed a large amount of material before us, which he was entitled to do since the matter involved the liberty of his client. The case before us was, therefore, argued for several days and we were taken through the history of extradition laws in India, the procedure in Chile and some general principles of international law were also placed before

us.

6. At one stage, it was submitted on behalf of the Government of India that a French national could not challenge the existence of an extradition treaty between India and Chile but in view of Article 21 of our Constitution which benefits all persons in India, including non-citizens, we did not accept this argument and proceeded to hear the case on the entirety of the material before us. All that we need say in this context is that Article 21 of the Constitution is entitled to the respect and expansive interpretation that it deserves, and more. It is in view of this that we have considered the matter before us.

7. To answer the questions before us, it is necessary to go all the way back to the Extradition Act, 1870 ('the 1870 Act') when India was a colony and a 'possession' of the British Empire.

The Extradition Act, 1870

8. In terms of Section 2 of the 1870 Act, by an Order in Council, Her Majesty could direct the application of the 1870 Act in the case of a foreign State with which an arrangement had been made with respect to the surrender to such State of any fugitive criminal. The Order in Council was required to recite or embody the terms of arrangement; it was also required to be laid before both Houses of Parliament within a specified period, and it was required to be published in the London Gazette.

Section 2 of the Extradition Act, 1870 reads as follows:

> **"2. Where arrangement for surrender of criminals made, Order in Council to apply Act.---**Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign state."

9. Section 17 of the 1870 Act provided for the application of that Act, unless otherwise provided by an Order in Council, to extend to every British possession in the same manner as if the British possession were substituted for the United Kingdom or England. The operative part of Section 17 of the 1870 Act reads as follows:-

> **"17. Proceedings as to fugitive criminals in British Possessions.---**This Act when applied by Order in Council, shall, unless it is otherwise provided by such order, extend to every British possession in the same manner as if throughout this Act the British possession were substituted for the United Kingdom or England, as the case may require."

10. Section 26 of the 1870 Act dealt with the interpretation of certain terms used therein and the term 'British possession' meant (*inter alia*) any colony within Her Majesty's dominions. The term 'governor' meant any person or persons administering the government of a British possession and included a governor of any part of India.

11. Clearly therefore, the 1870 Act applied to that part of India as was a colony within Her Majesty's dominion or was a possession in Her Majesty's dominions. The terms 'British possession' and 'governor' as

mentioned in Section 26 of the 1870 Act read as follows:-

> **26. Interpretation.---**The term "British possession" means any colony, plantation, island, territory, or settlement within Her Majesty's dominions. and not within the United Kingdom, the Channel Islands, and Isle of Man; and all colonies, plantations, islands, territories, and settlements under one legislature, as hereinafter defined, are deemed to be one British possession."
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> The term "governor" means any person or persons administering the government of a British possession, and includes the governor of any part of India."

12. Section 18 of the 1870 Act provided for the saving of laws of British possessions. In other words, the provisions of the Extradition Act, 1870 could be applied by Her Majesty, by Order in Council, to any law enacted before or after the 1870 Act by a British possession to any foreign State, *inter alia*, by directing that such law shall have effect in such British possession, with or without modifications and alterations, as if it were a part of the 1870 Act. Section 18 of the Extradition Act, 1870 reads as follows:-

> **"18. Saving of laws of British possessions.---** If by any law or ordinance made before or after the passing of this Act by the Legislature of any British possession, provision is made for carrying into effect within such possession the surrender of fugitive criminals who are in or suspected of being in such British possession, Her Majesty may, by the Order in Council applying this Act in the case of any foreign state, or by any subsequent order, either
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> > Suspend the operation within any such British possession of this Act, or any part thereof, so far as it relates to such foreign state, and so long as such law or ordinance continues in force there, and no longer;
> >
> > or direct that such law or ordinance, or any part thereof, shall have effect in such British possession, with or without modifications or alterations, as if it were part of this Act."

The Extradition Treaty

13. On 26th January, 1897 the United Kingdom of Great Britain and Ireland and the Republic of Chile entered into a Treaty for the Mutual Surrender of Fugitive Criminals (for short 'the Extradition Treaty' or 'the Treaty'). In terms of Article I of the Treaty, the High Contracting Parties engaged to deliver up to each other under certain circumstances and conditions those persons who, being accused or convicted of any of the crimes or offences mentioned in Article II thereof committed in the territory of one Party are found within the territory of the other Party. Article II of the Treaty provided for the reciprocal extradition for, *inter alia*, the crime or offence of murder (including assassination, parricide, infanticide, poisoning) or attempt or conspiracy to murder.

14. Article VIII of the Treaty provided that the requisition for extradition shall be made through the diplomatic agents of the High Contracting Parties respectively and that the requisition must be accompanied by a warrant of arrest issued by the competent authority of the State requiring the extradition and also by necessary evidence which, according to the laws of the place where the accused is found, would justify his arrest if the crime had been committed there.

15. The Treaty having been signed, an Order in Council was made on 9th August, 1898 and this was published in the London Gazette on 12th August, 1898. Both the Order in Council and the London Gazette

embodied the text of the Treaty between the United Kingdom of Great Britain and Ireland and the Republic of Chile.

16. The Extradition Treaty was subject to ratification and on 14th April, 1898 Her Majesty and the President of the Republic of Chile ratified the Treaty which was brought in force from and after 22nd August, 1898.

17. Soon thereafter, the Gazette of India of 12th November, 1898 reproduced the Order in Council published in the London Gazette of 12th August, 1898 pertaining to the Extradition Treaty between the United Kingdom of Great Britain and Ireland and the Republic of Chile. The Extradition Treaty with the Republic of Chile was, therefore, independently applicable to India as well. Incidentally, none of the affidavits filed by the Union of India, either in the Delhi High Court or in this Court, refer to or mention this gazette notification. The notification was handed over to us in Court by the learned Additional Solicitor General during the course of his submissions. This shows the seriousness with which the Government of India conducted the litigation in the Delhi High Court and initially in this Court and the level of its preparedness.

The Indian Extradition Act, 1903

18. The Indian Extradition Act, 1903 (the 1903 Act) was brought into force on 1st June, 1904 in terms of Section 1(3) thereof. Section 2(c) of the 1903 Act provided that a 'Foreign State' meant a State to which, for

the time being, the Extradition Act, 1870 applied.

19. Section 3 of the 1903 Act provided for a requisition being made by the government of any Foreign State for the surrender of a fugitive criminal of that State, who is in or who is suspected of being in the Provinces of India (later comprising of Part A States and Part C States of India). The surrender was subject to an enquiry in this regard by a Magistrate having jurisdiction to enquire into the crime as if it had been an offence committed within the local limits of his jurisdiction.

20. The relevant provisions of Section 3 of the Indian Extradition Act, 1903 read as follows:-

> "3(1) Where a requisition is made to the Central Government by the Government of any Foreign State for the surrender of a fugitive criminal of that State, who is in or who is suspected of being in the States, the Central Government may, if it thinks fit, issue an order to any Magistrate who would have had jurisdiction to inquire into the crime if it had been an offence committed within the local limits of his jurisdiction, directing him to inquire into the case.
>
> (2) The Magistrate so directed shall issue a summons or warrant for the arrest of the fugitive criminal according as the case appears to be one in which a summons or warrant would ordinarily issue.
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> (3) When such criminal appears or is brought before the Magistrate, the Magistrate shall inquire into the case in the same manner and have the same jurisdiction and powers, as nearly as may be, as if the case were one triable by the Court of Session or High Court, and shall take such evidence as may be produced in support of the requisition and on behalf of the fugitive criminal, including any evidence to show that the crime of which such criminal is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime."

21. On 7th March, 1904 an Order in Council was made declaring that

Chapter II of the Indian Extradition Act, 1903 shall have effect in British India as if it were a part of the Extradition Act, 1870. Consequently, the provisions of Chapter II of the Indian Extradition Act, 1903 which dealt with the surrender of a fugitive criminal in the case of a Foreign State was made applicable to British India. This position continued till Independence.

Indian Independence (International Arrangements) Order, 1947

22. Around the time of Independence, the Indian Independence (International Arrangements) Order, 1947 (for short 'the Order') was notified by the Secretariat of the Governor-General (Reforms) on 14th August, 1947 in exercise of powers conferred by Section 9 of the Indian Independence Act, 1947. The Order has the effect of an agreement duly made between the Dominion of India and the Dominion of Pakistan and came into effect from 15th August, 1947.[1] The Order provides, inter alia, that the rights and obligations under all international agreements to which India is a party immediately before the appointed day will devolve upon both the Dominion of India and the Dominion of Pakistan and will, if necessary, be apportioned between the two Dominions. The effect of this is that the Extradition Treaty entered into by the United Kingdom of Great Britain and Ireland and the Republic of Chile continued in force as far as India is concerned.

[1] The agreement was reached on 6th August, 1947 but the notification was issued on 14th August, 1947

The Extradition Act, 1962

23. To avoid any misgivings and apprehensions about the status of the extradition treaties entered into between British India and foreign States (including Commonwealth countries) the Extradition Act, 1962 (for short 'the Act') was enacted by our Parliament. It was brought into force on 5th January, 1963.

24. Section 2(d) of the Act defines an extradition treaty as including a treaty for the extradition of fugitive criminals made before 15th August, 1947 which extends to and is binding on India. The definition is important and is in the following terms:-

> "2(d) "extradition treaty" means a treaty, agreement or arrangement made by India with a foreign State relating to the extradition of fugitive criminals, and includes any treaty, agreement or arrangement relating to the extradition of fugitive criminals made before the 15th day of August, 1947, which extends to, and is binding on, India."

25. Section 3 of the Act is also of some importance and it provides for the issuance of a notified order by the Central Government applying the provisions of the Act, other than Chapter III, to such foreign State or part thereof as may be specified in the notified order. The said Section also provides that where the notified order relates to a treaty State, it shall set out in full the extradition treaty with that State.

Section 3 of the Act reads as follows:-

> **"3. Application of Act**. (1) The Central Government may, by notified order, direct that the provisions of this Act, other than Chapter III, shall apply to such foreign State or part thereof as may be specified in the order.

(2) The Central Government may, by the same notified order as is referred to in sub-Section (1) or any subsequent notified order, restrict such application to fugitive criminals found, or suspected to be, in such part of India as may be specified in the order.

(3) Where the notified order relates to a treaty State:-

(a) it shall set out in full the extradition treaty with that State,-
(b) it shall not remain in force for any period longer than that treaty; and
(c) the Central Government may, by the same or any subsequent notified order, render the application of this Act subject to such modifications, exceptions, conditions and qualifications as may be deemed expedient for implementing the treaty with that State.

(4) Where there is no extradition treaty made by India with any foreign State, the Central Government may, by notified order, treat any Convention to which India and a Foreign State are parties, as an extradition treaty made by India with that foreign State providing for extradition in respect of the offences specified in that Convention."

26. Another important provision in the Act is Section 34-B relating to a provisional arrest. This Section provides that on receipt of an urgent request from a foreign State for the immediate arrest of a fugitive criminal the Central Government may request the jurisdictional Magistrate to issue a provisional warrant for the arrest of the fugitive criminal. Section 34-B of the Act reads as follows:-

"34-B. **Provisional arrest**. (1) On receipt of an urgent request from a foreign State for the immediate arrest of a fugitive criminal, the Central Government may request the Magistrate having competent jurisdiction to issue a provisional warrant for the arrest of such fugitive criminal.

(2) A fugitive criminal arrested under sub-section (1) shall be discharged upon the expiration of sixty days from the date of his arrest if no request for his surrender or return is received within the said period."

27. On or about 16th March, 1956 (well before the Extradition Act,

1962) came into force, an unstarred question No. 439 was raised in Parliament by Shrimati Ila Palchoudhury requiring the Prime Minister to state the countries with which India has an extradition treaty. In response to the unstarred question, Prime Minister Shri Jawaharlal Nehru (who was also the Minister for External Affairs) laid on the table of the House a list of extradition treaties with foreign countries concluded by the British Government on behalf of India before Independence and which were still in force. One of the foreign countries with which an extradition treaty had been entered into on behalf of India and still in force was the treaty with Chile executed on 26th January, 1897.

28. When the Extradition Bill was introduced in 1961 and considered in Parliament, Shri D.C. Sharma (an Hon'ble Member of Parliament) referred to Clause 2(d) of the Extradition Bill and stated on 7th August, 1962 that he had a list of countries with which India has an extradition treaty entered into prior to 15th August, 1947. One of the countries so mentioned by Shri D.C. Sharma was Chile.

29. These details have been mentioned for the purposes of recording the submission of the learned Additional Solicitor General that the Extradition Treaty between India and Chile was in force not only before Independence but also thereafter and that is how the Prime Minister of India understood the position.

30. However, even though there might have been an extradition treaty

in force between India and Chile, the fact of the matter is that post 5th January, 1963 the provisions of the Act would not be applicable to the Extradition Treaty without an appropriate notified order issued in accordance with Section 3(1) [read with Section 3(3)] of the Act. Apparently realizing this, the Government of India notified an Order dated 28th April, 2015 (gazetted on 29th April, 2015) under Section 3(1) read with Section 3(3) of the Act making the Act applicable to the Republic of Chile.

31. The notified order contains three errors and it is reproduced below:-

> "G.S.R. 328(E) – Whereas the Extradition Treaty between the United Kingdom of Great Britain and Ireland, and the Republic of Chile was concluded and signed at Santiago on the January 26, 1897 and the Ratification exchanged at Santiago on the April 14, 1898, are considered to be in force between the Republic of India and the Republic of Chile;
>
> And whereas the Central Government in exercise of the powers conferred by sub-Section (1) of Section 3 of the Extradition Act, 1962 (34 of 1962) had directed by an order number G.S.R. 56 dated 5th January, 1963 that the provisions of the said Act, other than Chapter III shall apply to the Republic of Chile;
>
> Now, therefore, in exercise of the power conferred by sub-section (3) of the Extradition Act, 1962 (34 of 1962), the Central Government hereby sets out the aforesaid Treaty as under:-
>
> Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and his Excellency the President of the Republic of Chile, having determined, by common consent, to conclude a Treaty for the extradition of criminals, have accordingly named as their Plenipotentiaries:-
>
> Her Majesty the Queen of the United Kingdom of Great Britain and Ireland John G. Kennedy, Esq., Minister Resident of Great Britain in Chile; and

> His Excellency the President of the Republic of Chile, Senor Don Carlos Morla Vicuna, Minister of Foreign Affairs;
>
> Who, after having exhibited to each other their respective full powers, and found them in good and due form, have agreed upon the following Articles:-
>
> (The Articles of the extradition treaty are reproduced in the notified order, but not reproduced here)
>
> Now therefore, in the exercise of the power conferred by sub-section (1) of Section 4 of the Indian Extradition Act, 1962 (34 of 1962), the Central Government hereby direct that the provision of the said Act, other than Chapter III, shall apply to the Republic of Chile with effect from the date of publication of this notification, in respect of the offences specified in the above Treaty."

32. The first error in the notified order is the reference to GSR 56 dated 5th January, 1963 to the effect that the provisions of the Act other than Chapter III shall apply to the Republic of Chile. GSR 56 is totally (and admittedly) irrelevant to the context and has absolutely no concern with the Republic of Chile. The second error is that the notified order is purported to have been issued in exercise of powers conferred by Section 4(1) of the Indian Extradition Act, 1962. Section 4(1) has no relevance to the context. What is relevant is Section 3(1) of the Act. The third error is that there is no statute called the Indian Extradition Act, 1962. What has been enacted by Parliament is the Extradition Act, 1962.

33. The validity of the notified order dated 28th April, 2015 was challenged by the petitioner by filing W.P. (Crl.) No. 1215 of 2015 in the Delhi High Court and a prayer was also made for quashing a requisition made by the Republic of Chile for the extradition of the petitioner from

India to Chile.

34. During the pendency of the writ petition, the Government of India having realized the errors committed in the notified order dated 28th April, 2015 issued a corrigendum on 11th August, 2015 (published in the Gazette of India) in which reference to GSR 56 dated 5th January, 1963 was deleted and sub-section (1) of Section 4 of the Indian Extradition Act, 1962 was substituted to read sub-section (1) of Section 3 of the Indian Extradition Act, 1962. No correction was made with regard to the so-called Indian Extradition Act, 1962. The casualness with which the corrigendum has been issued by the Government of India is quite apparent.

The corrigendum dated 11th August, 2015 reads as follows:-

> "GSR 628(E)- In the order of the Ministry of External Affairs, dated the 28th April, 2015 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-Section (i) *vide* G.S.R. 328(E), dated the 29th April, 2015, ---
>
> In the said order, ---
> (i) In the second paragraph, **for** "had directed by an Order number G.S.R. 56, dated January 5, 1963" **read** "directs";
>
> (ii) In the last paragraph, **for** "sub-section (1) of section 4", **read** "sub-section (1) of section 3".

35. In view of the corrigendum dated 11th August, 2015 it must be held that the notified order dated 28th April, 2015 was partially defective and therefore the application of the Extradition Act, 1962 to Chile would be effective only from 11th August, 2015 when the corrections were carried out and not 28th April, 2015. However, this makes no difference to

the ultimate result of this case.

The factual background

36. On 1st April, 1991 (the first Red Notice issued by Interpol erroneously shows the year as 1992) a terrorist attack was perpetrated leading to the assassination of Senator Jaime Guzman Errazuriz of Chile. Initial investigations apparently did not point to the involvement of the petitioner Marie Emmanuelle Verhoeven (believed to be a French national). However, when further facts came to light in 2010, it appeared that the petitioner was a member of a subversive organization responsible for the assassination. Accordingly, a warrant for the arrest of the petitioner was issued on 21st September, 2010 by the Court of Appeal of Santiago in Chile. On the basis of this arrest warrant and a request made by National Central Bureau (or NCB) at Santiago, Chile (and presumably on the basis of other available information) a "Red Notice" was issued by Interpol on 27th January, 2014 for the location and arrest of the petitioner for an incident that occurred on 1st April, 1992 (actually 1991) with a view to extradite her to Chile and also for her provisional arrest. The Red Notice mentioned that NCB Santiago, Chile and the Interpol General Secretariat be immediately informed on the fugitive being found.

37. A few days later on 29th January, 2014 the petitioner was indicted for the offence above-mentioned.

38. It appears that pursuant to the Red Notice issued by Interpol, the

petitioner was arrested in Germany but the concerned court in Germany held by an order dated 6th June, 2014 that the extradition of the petitioner was illegal. We are not concerned with the proceedings in Germany and this is being mentioned only for completing the factual background.

39. Much later, on 17th February, 2015 the petitioner was detained and arrested while crossing the Nepal border at the immigration point in Sunauli, Uttar Pradesh. She was produced before the concerned Magistrate in Maharaj Ganj in Uttar Pradesh and brought to Delhi on a transit remand. She was then produced before the Chief Metropolitan Magistrate, Patiala House Courts, New Delhi on 21st February, 2015 and remanded to judicial custody till 24th February, 2015

40. Thereafter, on 24th February, 2015 the petitioner was produced before the Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi who ordered her provisional arrest under Section 34-B of the Act. The petitioner has been in judicial custody ever since that day. The petitioner challenged her provisional arrest by filing W.P. (Crl.) No. 666 of 2015 in the Delhi High Court and also a subsequent order continuing her judicial custody as a result of the Red Notice issued by Interpol. In the writ petition, the petitioner sought her immediate release from Tihar Jail, Delhi.

41. In the meanwhile and apparently on information received regarding the arrest of the petitioner, the Embassy of Chile gave a *Note*

Verbale on 24th February, 2015 to the Ministry of External Affairs, Government of India. The *Note Verbale* is of some importance and it reads as follows:-

> "The Embassy of the Republic of Chile presents its compliments to the Ministry of External Affairs of the Republic of India – CPV (Consular Passport, Visa) Division - and has the honor to request the extension of the detention period of the French citizen MARIE EMMANUELLE VERHOEVEN on the basis of the request for preventive detention enclosed with this Note, issued by the Supreme Court of Chile.
>
> The request for preventive detention to secure the extradition to be sought was issued in matter No. 3.118-2015 tried by the Supreme Court of Justice, at the request of the Special Investigating Judge of the Santiago Court of Appeals Hon. Mario Carroza Espinosa.
>
> As regards Ms. Verhoeven, described in the documents enclosed, a warrant of arrest was issued against her on January 27, 2014. She was indicted on January 29, 2014 as perpetrator of a terrorist attack leading to the assassination of Senator Mr. Jaime Guzman Errazuriz on April 1, 1991.
>
> The extension of Ms. Verhoeven's detention period is grounded on the need of taking into consideration Chilean internal procedures to subsequently request the Government of the Republic of India to extradite the accused. Indeed, the Chilean Supreme Court of Justice, upon making a decision as regards the request for extradition filed by the Court having charged Ms. Verhoeven with such crime, shall cause that a case file is opened, which will include the pieces of evidence supporting the request for extradition.
>
> Said request shall be remitted to the Chilean Ministry of Foreign Affairs for translation into the English language before it is formally submitted to the Indian Ministry of Foreign Affairs.
>
> Additionally, to prevent the person whose extradition will be sought from fleeing from justice, the Court of jurisdiction over the case has asked the Supreme Court to issue a preventive detention warrant. According to the Chilean criminal procedure system, a request for preventive detention – just like a request for extradition- is made and decided by a court, the Executive Power having no bearing whatsoever therein. The Executive is to act at subsequent stages, i.e. administrative and diplomatic stages of an active extradition proceeding.
>
> All in all, this request for preventive detention is aimed at extending the

detention period of Ms. Verhoeven so that each and every judicial, administrative and diplomatic steps that need to be taken prior to the formal extradition request being filed are carried out in due time, and also at securing that the person sought is at the disposal of the competent authorities of the Republic of India at the time of formally filing the request for extradition.

In the light of the absence of a treaty on extradition between both countries, the Chilean Government guarantees to the Government of the Republic of India that the State organs will ensure reciprocity in case a similar request is filed by the competent authorities of your country.

The Chilean Embassy expresses the formal intention of the competent Chilean Authorities to timely request the extradition of Ms. Marie Emmanuelle Verhoeven.

The Embassy of the Republic of Chile avails itself of this opportunity to renew to the Ministry of External Affairs of the Republic of India- CPV (Consular Passport, Visa) Division – the assurances of its highest and most distinguished consideration."

42. The *Note Verbale* mentions the date of offence as 1st April, 1991 (which seems to be the correct date) while the Red Notice mentions the date of incident as 1st April, 1992. The discrepancy between the two dates can become important (in a given case) since the question of the liberty of an individual is involved. However, for the present purposes, that is overlooked and ignored since it does not have any material impact on the final decision in these cases.

43. The second important fact that is explicit from a reading of the *Note Verbale* is that the Embassy of Chile acknowledged that there is no extradition treaty between India and Chile and that the request for extradition is made only by way of a reciprocal understanding in case a similar request is made by the competent authorities of India.

44. The process of extradition of the petitioner from India to Chile was also the subject matter of consideration in the Republic of Chile. Section 637 of the Criminal Procedure Code in Chile provides for the extradition of a fugitive criminal. In terms of this Section, upon receipt by the Supreme Court of Chile of a request concerning the extradition, the same shall be remanded to the Court Attorney who will then report whether the extradition is lawfully proper in accordance with the Treaty signed by the nation in which the convict is found or otherwise in the absence of a treaty, with the international law principles.

45. In terms of Section 638 of the Criminal Procedure Code in Chile, upon the report of the Supreme Court's Prosecutor, the Supreme Court shall render a decision whether the extradition is lawful or not.

46. In terms of 639 of the Criminal Procedure Code in Chile, the Supreme Court shall send to the Ministry of Foreign Affairs a copy of its decision and ask that relevant diplomatic steps be taken (if necessary) to obtain the extradition of the offender.

47. Sections 637, 638 and 639 of the Criminal Procedure Code in Chile read as follows:-

> "Section 637 (685) - Upon receipt by the Supreme Court of the docket, it shall remand the same to the court attorney, who shall decide whether the extradition is lawfully proper in accordance with the treaties signed by the nation in which a convict has sought refuge or otherwise, in the absence of a treaty, with the international law principles.
>
> Section 638 - Upon the Supreme Court's Prosecutor having issued its report,

the Court shall afford priority to the case and render a founded decision on whether the extradition is lawful or not.

Section 639 (687) - If lawful, the Supreme Court shall send to the Ministry of Foreign Affairs a copy of the decision referred to in the foregoing paragraph and ask that the relevant diplomatic steps be taken to obtain the offender's extradition.

It shall also enclose a certified copy of the background information on the merits of which a warrant of arrest was issued against the offender or a final judgment has been rendered, if dealing with a convict.

Upon completion of these formalities, the Supreme Court shall return the file to the originating court."

48. Following the aforesaid procedure, the Supreme Court of Justice of Chile rendered a decision on 9th March, 2015 in respect of the extradition of the petitioner in the matter of the assassination of Senator Jaime Guzman Errazuriz perpetrated on 1st April, 1991. It was held by the Hon'ble Judges of the Supreme Court that there is no extradition treaty between Chile and India and therefore for making a request for the extradition of the petitioner, the general international law principles must be applied as prescribed in Section 637 of the Criminal Procedure Code. Thereafter, the general international law principles were broadly mentioned by the Supreme Court as having been clearly enshrined in the Havana Convention on 20th February, 1928 and the Montevideo Convention on Extradition ratified by Chile on 2nd July, 1935 as well as bilateral treaties on the matter with several countries and opinions by domestic and foreign doctrine. India is not a signatory to the Havana Convention or the Montevideo Convention.

49. The majority opinion written by four Hon'ble Judges of the Supreme Court of Justice of Chile specifically held:

> "Between Chile and India there is no treaty on extradition; therefore, to make a decision on the request, the general international law principles must apply, as prescribed in section 637 of the Criminal Procedure Code."

50. The dissenting Judge did not specifically disagree with this conclusion of the majority that there is no extradition treaty between Chile and India. It must, therefore, be held that the unanimous conclusion of the Supreme Court of Justice of Chile is that there is no extradition treaty between the Republic of Chile and the Republic of India.

51. Be that as it may, on the basis on the above conclusions, it was held that it was lawfully proper to request the Government of India to extradite the petitioner for her alleged liability as a principal offender in the terrorist attack perpetrated in Santiago on 1st April, 1991. The operative portion of the decision of the Supreme Court of Chile reads as follows:-

> "In view also of the provisions in Sections 635, 636, 637, 638 and 639 of the Criminal Procedure Code, it is hereby stated that it is lawfully proper to request the Government of India to extradite Marie Emmanuelle Verhoeven for her alleged liability as Principal Offender in the terrorist attack against a political authority, leading to the assassination of Senator Jaime Guzman Errazuriz, perpetrated in Santiago on April 1, 1991, as stated in clause 1 of this decision.
>
> For fulfillment of this decision, be an official letter sent to the Minister of Foreign Affairs so that such diplomatic formalities as necessary be carried out."

52. Pursuant to the decision of the Supreme Court of Chile, another *Note Verbale* was given by the Embassy of Chile to the Ministry of External Affairs on 24th March, 2015. This *Note Verbale* acknowledged that the request for the extradition of the petitioner was being made on the basis of international law principles from multilateral conventions and bilateral treaties on extradition, among which is included the extradition treaty between the Republic of Chile and the United Kingdom of Great Britain and Ireland signed at Santiago on 26th January, 1897 in force for both countries. On the basis of the provisions contained in the Treaty, the *Note Verbale* also drew attention to the resolution of the Supreme Court of Justice of Chile dated 9th March, 2015, and the arrest warrant issued against the petitioner on 27th January, 2014 and her indictment on 29th January, 2014 as a principal offender in the terrorist attack carried out on 1st April, 1991 that resulted in the assassination of Senator Jaime Guzman Errazuriz. The *Note Verbale* dated 24th March, 2015 reads as follows:-

> "The Embassy of the Republic of Chile presents its compliments to the Honourable Ministry of External Affairs of the Republic of India, and has the honour to request, upon requisition of the Honourable Supreme Court of Chile, the extradition of the French national MARIE EMMANUELLE VERHOEVEN, Chilean Identity Card for Aliens No.12.046.818-9, born on October 8, 1959, on the basis of the principles of international law derived from the multilateral conventions and bilateral treaties on extradition, among which is included the Extradition Treaty between the Republic of Chile and the United Kingdom of Great Britain and Ireland, signed at Santiago on January 26, 1897, in force for both countries, and complementarily on the basis of the provisions contained in the said Treaty on such matters as applicable between Chile and India.

This request is made pursuant to the resolution of the Honourable Supreme Court of Justice of Chile, Case No.3118-2015, in its decision of March 9 of the current year, by order of the Special Investigating Judge of the Santiago Court of Appeals, Hon. Mario Carroza Espinosa, in Case No.39.800-1991 of the former 6th Criminal Court of Santiago, due to infringement of Act No.18.314 on terrorist acts and assassination of Chilean Senator Jaime Guzman Errazuriz.

This Note - accompanying the formal request for extradition - is submitted in accordance with the applicable regulations contained in the Chilean laws. Pursuant thereto, the Ministry of Foreign Affairs is primarily responsible for carrying out the diplomatic formalities involved in an extradition request granted by Chilean courts of justice, while the latter are the only organs responsible for the judicial aspects of such requests.

Ms. Verhoeven is subject to an arrest warrant dated January 27, 2014 and a bill of indictment dated the 29th day of the same month and year, as principal offender in the terrorist attack carried out on April 1, 1991 that resulted in the assassination of Senator Jaime Guzman Errazuriz, and is based on the attached documents, particularly on those mentioned in the annexed index.

All of the documents included in the aforementioned index, certified by the Judicial Authorities of Chile, are duly authenticated by the Ministry of Justice of Chile, the Ministry of Foreign Affairs of Chile and the Embassy of the Republic of India in Chile.

The Government of Chile wishes to reiterate to the Government of the Republic of India its full willingness to provide the supplementary information that the competent Indian authorities may deem necessary for the successful development of this extradition case.

The Embassy of the Republic of Chile avails itself of this opportunity to convey to the Ministry of External Affairs of the Republic of India the assurances of its highest consideration and esteem."

53. Based on the *Note Verbale* of 24th March, 2015 and the accompanying documents as well as the notified order dated 28th April, 2015 the Government of India passed an order on 18th May, 2015 noting that the offences alleged to have been committed by the petitioner are stated to be extradition offences in terms of the Extradition Treaty

between Chile and India. Accordingly, a request was made under Section 5 of the Act to the Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi to inquire whether a *prima facie* case for the extradition of the petitioner is made out. Accordingly, the Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi took up the case for consideration and this led the petitioner to challenge the notified order of 28th April, 2015 and the order of 18th May, 2015 by filing W.P. (Crl.) No. 1215 of 2015 in the Delhi High Court.

54. For the purposes of completing the record, it may be stated that a formal request for the extradition of the petitioner was placed before the Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi by the Special Public Prosecutor on behalf of the Government of India on 27th May, 2015.

Proceedings in the High Court

55. The Delhi High Court took up both the writ petitions for consideration. In its judgment and order dated 21st September, 2015 (impugned before us to a limited extent by the petitioner) the High Court was *prima facie* satisfied that the Extradition Treaty was applicable to British India. However, "since the issue involves complicated questions of political importance, it appears to us that the same cannot be decided conclusively on the basis of the limited material available before us." It was further held that "the Extradition Treaty executed on behalf of India

prior to 15.08.1947 cannot be held to have automatically ceased to exist after India achieved sovereignty." The High Court concluded that the interception of the petitioner on the basis of the Red Notice issued by Interpol was not illegal but the provisional arrest of the petitioner under Section 34-B of the Act could not be ordered in the absence of a notified order under Section 3(1) of the Act. Consequently, the provisional arrest of the petitioner on 24th February, 2015 was held to be without jurisdiction.

56. As regards, the validity of the order dated 18th May, 2015 requesting for an inquiry whether the petitioner ought to be extradited or not, the High Court held as follows:

> "71. On a combined reading of Sections 4 and 5 of the Act, it is clear that the order of the Central Government for Magisterial Inquiry into the extraditability of the offence committed by the fugitive criminal would follow upon a request for extradition received from the foreign State concerned. Thus, the proceedings for extradition would be set in motion with a request made by the foreign State concerned under Section 4 of the Act.
>
> 72. In the present case, such extradition request under Section 4 of the Act was made by the Republic of Chile through its Embassy on 24.03.2015. However, the fact remains that by that date the provisions of the Extradition Act were not made applicable to the Republic of Chile since the notification under Sub-section (1) read with Sub-section (3) of Section 3 came to be published only on 29.04.2015. We have already held that by virtue of the said notification dated 28.04.2015 published in the Gazette of India dated 29.04.2015, the provisions of the Act are made applicable to the Republic of Chile w.e.f. 29.04.2015 only. That being so, we are of the view that the extradition request dated 24.03.2015 cannot be treated as a requisition for surrender in terms of Section 4 of the Act. In other words, a request made on or after 29.04.2015 can only be acted upon for directing Magisterial Inquiry into the extraditability of the alleged offence committed by the petitioner in

> Chile. Therefore, we are of the view that the first respondent had erred in passing the order dated 18.05.2015 directing Magisterial Inquiry accepting the extradition request dated 24.03.2015 of the Republic of Chile. The fact that the provisions of the Act are made applicable subsequently to the Republic of Chile by notification dated 28.04.2015 published in terms of Section 3(1) of the Act, in our considered opinion, is of no consequence. The extradition request dated 24.03.2015 cannot be held to have been validated by virtue of the subsequent notification dated 28.04.2015.
>
> 73. For the aforesaid reasons, we are of the view that the order of the respondent No. 1 dated 18.05.2015 under Section 5 of the Act was passed without there being any valid request for extradition from the Republic of Chile. Therefore, on that ground itself the order dated 18.05.2015 is liable to be declared as illegal."

57. In view of its findings, the High Court declared the provisional arrest of the petitioner as without jurisdiction and illegal and it was accordingly set aside; the order for an inquiry under Section 5 of the Act was also declared illegal and that too was set aside. However, the High Court made it clear that its decision did not preclude the Government of India from initiating appropriate steps afresh for the extradition of the petitioner following the due process of law. It is under these circumstances that the issues are now before us.

Further developments

58. During the pendency of the writ petitions before the High Court, certain significant developments occurred that were apparently not brought to the notice of the High Court. Some further developments after the decision of the High Court have also been placed before us.

59. For reasons that are not clear, NCB Santiago conveyed a diffusion

request on 29th May, 2015.[2] This was immediately followed by a communication from Interpol on 30th May, 2015 cancelling the Red Notice as well as the diffusion request. The apparent reason for the cancellation was that the Red Notice was being replaced by another request.

60. Apparently, in light of the above developments, NCB Santiago sent a request on 30th June, 2015 to Interpol for the issuance of a Red Notice. This was followed by NCB Santiago sending a diffusion request on 1st July, 2015 to secure the attendance of the petitioner pending an analysis of its request for the issuance of a Red Notice by Interpol. What is more important is that on 8th July, 2015 the office of the Legal Affairs, Interpol General Secretariat gave intimation to the effect that the Red Notice against the petitioner is being reviewed by Interpol and that the diffusion sent by NCB Santiago was not in conformity with the Interpol constitution and rules and therefore the diffusion would be deleted from the Interpol database. A request was also made by Interpol to remove the information recorded against the petitioner from the national database based on the diffusion. The intimation sent by the office of the Legal Affairs of Interpol General Secretariat reads as follows:-

"The General Secretariat hereby is referring to the diffusion circulated

[2] A 'diffusion' is a "request for cooperation or alert mechanism." "This is less formal than a notice but is also used to request the arrest or location of an individual or additional information in relation to a police investigation. A diffusion is circulated directly by an NCB to the member countries of their choice, or to the entire INTERPOL membership and is simultaneously recorded in INTERPOL's Information System." [Information obtained from http://www.interpol.int/INTERPOL-expertise/Notices]

by NCB Santiago, Chili, on 1 de July de 2015 against VERHOEVEN f/n Marie Emmanuelle (DOB 8 October 1959).

Please be advised that a red notice against the same individual for the same facts and charges it is being reviewed by INTERPOL's Commission for Control Files (CCF). The CCF concluded in its latest session to block the information as a precautionary measure pending its final conclusion on whether the red notice is compliant with INTERPOL's Constitution and rules. Therefore, the diffusion will be deleted from INTERPOL databases.

You are kindly requested to note that international police cooperation through INTERPOL's channels in these cases would not be in conformity with its Constitution and Rules.

Finally, you are requested to remove from your national databases the information recorded against the a/m individual based on the aforementioned diffusion.

The Office of Legal Affairs remains at your disposal for any further information."

61. In an affidavit filed in the High Court on or about 28th July, 2015 by the Central Bureau of Investigation (NCB – India Interpol, New Delhi) in W.P. (Crl.) No.1215 of 2015 it was categorically stated that:

> "The result of this communication is that at present Red Corner Notice issued by INTERPOL HQ and the Diffusion issued by NCB-Chile are not in existence."

62. Be that as it may, it appears that pursuant to the analysis carried out by Interpol on the request of Chile, a fresh Red Notice was issued for the arrest and extradition of the petitioner by Interpol on 30th October, 2015.

63. Also, as a result of the liberty granted by the High Court, the issue of the petitioner's extradition was again taken up by the Republic of

Chile. On 21st September, 2015 the Embassy of Chile gave a fresh *Note Verbale* requesting for the provisional arrest of the petitioner for the purpose of her extradition "on the basis of the Principles of International Law derived from the multilateral conventions and bilateral treaties on Extradition, among which is included the Extradition Treaty between the Republic of Chile and the Republic of India in force between both countries, and complementarily on the basis of the provisions contained in the said Treaty."

The *Note Verbale* of 21st September, 2015 reads as follows:

> "The Embassy of the Republic of Chile in India presents its compliments to the Honourable Ministry of External Affairs of the Republic of India, CPV Division, and has the honour to request the Provisional Arrest for the purpose of Extradition of the French National Ms. Marie Emmanuelle VERHOEVEN, born on October 8, 1959, on the basis of the Principles of International Law derived from multilateral conventions and bilateral treaties on Extradition, among which is included the Extradition Treaty between the Republic of Chile and the Republic of India, in force between both countries, and complementarily on the basis of the provisions contained in the said Treaty.
>
> It is to be elevated to the highest attention of that Honourable Division the Judgment passed Monday 21st September, 2015 by the Honourable High Court of Delhi which in its paragraph number 76, page 46, in the concerned matter of fugitive, stated that "the respondents have not been precluded to initiate appropriate steps afresh for extradition of petitioner (FC) by following due process of law."
>
> Therefore, since the liberty has already been allowed to Union of India for initiating afresh steps for extradition of petitioner (FC), it is kindly and urgently requested to the Union of India to provisional arrest for the purpose of Extradition of the FC.
>
> The Embassy of the Republic of Chile in India avails itself of this opportunity to renew to the Honourable Ministry of External Affairs, CPV Division, the assurances of its highest esteem and consideration."

64. A reading of the *Note Verbale* makes it quite clear that the request for the provisional arrest of the petitioner was now made on the basis of the Extradition Treaty between Chile and India, with India having made the Extradition Act, 1962 applicable to Chile. This is a significant and material departure from the earlier *Notes Verbales* which indicated an uncertainty of the existence and binding nature of the Extradition Treaty.

65. Thereafter, acting on the *Note Verbale* an application was moved by the Government of India for the provisional arrest of the petitioner under Section 34-B of the Act and the prayer made was granted by the Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi on 22nd September, 2015.

66. As far as the Republic of Chile is concerned, on 19th October, 2015 its Deputy Special Investigating Judge in the Court of Appeals in and for Santiago addressed a request to the Supreme Court of Chile "to please cause that such steps as necessary are taken to initiate an extradition proceeding" against the petitioner. Acting on the request, the office of the Prosecutor in the Supreme Court submitted a report of 6th November, 2015. In the report, an examination of all the relevant material was carried out by the Prosecutor's office and it was concluded that it was lawfully proper to request, through diplomatic channels and in accordance with the extradition treaty between Chile and India, for the extradition of the petitioner from India.

67. In accordance with the laws in Chile, the matter was then considered by the Supreme Court of Justice of Chile. In its decision rendered on 11th November, 2015 the Supreme Court gave a finding that the Extradition Treaty of 26th January, 1897 between the Republic of Chile and the United Kingdom of Great Britain and Ireland is an existing Extradition Treaty between Chile and India. This Treaty was ratified by the parties and enacted in Chile on 14th April, 1898. It was also published in the Official Gazette in Chile on 22nd April, 1898. As such, it was held that the Treaty is in full force and effect between the Republic of Chile and the Republic of India. The Supreme Court also noted that the provisions of the Extradition Act, 1962 had been made applicable to the Republic of Chile and therefore from the point of view of the Government of India also the Extradition Treaty was in force.

68. The Supreme Court noted that two of the Hon'ble Judges in the Supreme Court of Chile voted for rendering a judgment that supplements the earlier decision of the Supreme Court given on 9th March, 2015. This was because that decision had already established the appropriateness of the request for extradition of the petitioner.

69. Consequently, the Supreme Court of Chile decreed that it was lawfully appropriate to request the Government of Chile to extradite the petitioner for the offence alleged against her, namely a terrorist attack carried out on 1st April, 1991 that resulted in the assassination of Senator

Jaime Guzman Errazuriz. On this basis, the Republic of Chile gave a *Note Verbale* on 16th November, 2015 with a formal request to the Government of India for extraditing the petitioner.

70. The extradition request and the accompanying documents were examined by the Ministry of External Affairs and on 14th December, 2015 an order was issued under Section 5 of the Act requesting the Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi to enquire into the extradition request made by the Government of Chile in respect of the petitioner.

71. On the substantive facts mentioned above, the petitioner filed a writ petition in this Court under Article 32 of the Constitution being W.P. (Crl.) No.178 of 2015 on or about 29th September, 2015. The prayers made in the writ petition are for a writ of *habeas corpus* and a direction for the petitioner's release from Tihar Jail, New Delhi; a writ of *certiorari* quashing the orders passed by the Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi directing the provisional arrest of the petitioner under Section 34-B of the Act and for quashing the extradition proceedings and for other consequential reliefs. The petitioner also preferred Special Leave Petition (Crl.) No. 8931 of 2015 on or about 13th October, 2015 challenging the correctness of the judgment and order passed by the Delhi High Court to the extent that it holds that the decision rendered by the High Court does not preclude the Government of India

from initiating appropriate steps for the extradition of the petitioner after following the due process of law. The petitioner is also aggrieved that the High Court did not strike down the notified order of 28th April, 2015 or conclude that there was no extradition treaty between Chile and India.

Discussion on the existence of the Extradition Treaty

72. The primary issue to be decided is whether there exists an extradition treaty between India and Chile. In other words, the question is whether the Extradition Treaty entered into on 26th January, 1897 between the United Kingdom of Great Britain and Ireland with the Republic of Chile is still in force and binding on India and Chile.

73. This question may first be looked at from the point of view of the Republic of Chile. It appears, with great respect, that initially there was some uncertainty in Chile about the existence of the Treaty. This inference may be drawn from the *Note Verbale* of 24th February, 2015. In that *Note Verbal* it was specifically acknowledged that there is no treaty on extradition between Chile and India. Therefore, the basis on which a request for extradition of the petitioner was made by the Government of Chile to the Government of India was on the basis of reciprocity.

74. The Supreme Court of Chile, in its decision rendered on 9th March, 2015 specifically concluded that there is no extradition treaty between Chile and India. Consequently, the Supreme Court of Chile held that a request for extraditing the petitioner should be based on general

international law principles such as those enshrined in the Havana Convention and the Montevideo Convention on Extradition as well as bilateral treaties between several countries and *opinio juris*.

75. The subsequent *Note Verbale* of 24th March, 2015 did not (and could not) depart from this decision of the Supreme Court of Chile rendered on 9th March, 2015 that there was no extradition treaty between Chile and India. The request for extradition of the petitioner was, therefore, made on the basis of the principles of international law derived from multilateral conventions and bilateral treaties on extradition "among which is included is the Extradition Treaty between the Republic of Chile and the United Kingdom of Great Britain and Ireland signed at Santiago on 26th January, 1897, in force for both countries." In any event, Chile acknowledged the existence of the Extradition Treaty of 26th January, 1897 but it was not clear as far as the Government of Chile is concerned whether that treaty was binding and in force in India and whether in the context of bilateral treaties, the reference to 'both countries' was to Chile and the United Kingdom of Great Britain and Ireland.

76. Subsequently however, there was clarity on the issue of the existence of an Extradition Treaty between Chile and India when the Supreme Court of Chile rendered its decision on 11th November, 2015. The decision made it clear that there was in fact an Extradition Treaty between Chile and India executed on 26th January, 1897 and that it was in

force and binding on India. In coming to this conclusion, the Supreme Court of Chile relied on the notified order issued by the Government of India on 28th April, 2015 (gazetted on 29th April, 2015) under Section 3(1) [read with Section 3(3)] of the Act thereby making the Extradition Treaty of 26th January, 1897 applicable to the Republic of Chile. The Supreme Court of Chile found this to be conclusive (and, with great respect, quite rightly) that the intention of the Government of India was to enforce the Extradition Treaty and make the Act applicable to the Republic of Chile.

77. In addition to this, and perhaps to confirm whether the Republic of Chile was bound by the Extradition Treaty, the Supreme Court of Chile noted that it was ratified by the Government of Chile on 14th April, 1898. Thereafter, it was published in the Official Gazette on 22nd April, 1898. Therefore, if there was any doubt at all, it was made clear that even the Government of Chile was bound by the provisions of the Extradition Treaty.

78. The Supreme Court of Chile found, both from the point of view of the Government of Chile and the Government of India that there is in existence and in force a binding Extradition Treaty between the two countries.

79. Now, the issue may be looked at from the point of view of the Government of India. Learned counsel relied on the Report of the Expert Committee No. IX on Foreign Relations particularly paragraphs 42 to 45

thereof which relate to existing treaties and engagements between India and other countries and tribes. He strongly relied upon its contents to submit that the Extradition Treaty was no longer in existence. The Report of the Expert Committee No. IX on Foreign Relations is a part of the Partition Proceedings (Vol. III). In the Preface to this volume by the Partition Secretariat of the Government of India on 5th December, 1947 it is stated that the volume has brought together the reports, papers and decisions on all matters connected with Expert Committees III to IX.

80. In paragraph 42 of the Report, a reference is made to Annexure V which contains a list of 627 treaties, conventions, agreements etc. entered into by the Government of India or by H.M.G. in which India or Pakistan or both are interested. Paragraph 43 of the Report refers to the legal position, which is that:

> "India minus Pakistan will remain the same international entity as she was before partition. She will continue, in respect of the rest of India, to be subject to the obligations and entitled to the benefits of all international engagements to which pre-partition India was a party either directly or through H.M.G., except those in respect of which she is rendered by partition incapable of exercising its rights and performing its obligations. This position will not be affected by any change in her constitutional set-up or by the acquisition by her of the status of a Dominion. The position which Pakistan will occupy in this respect is, however, not altogether clear. If she is regarded as a new State, one view is that she will not be bound by any treaty to which the pre-partition India was a party nor will she be entitled to any benefits thereunder. This conclusion is also supported by the opinion of international jurists, and according to Sir Thomas Holland –
>
> > "In the case of loss of part of territory, the old State continuing to exist, if the lost part, however separated, becomes an independent State, it starts free of all general obligations; nor, on the other hand,

> can it claim any of the general advantages which it enjoyed when part of the State from which it has been separated."

81. Thereafter, in paragraph 45 of the Report, the Committee expressed its inability to pronounce an authoritative opinion on the legal aspects of the matter in view of the short time available. The Committee recommended that both Governments (India and Pakistan) should take steps to obtain expert legal opinion on all aspects of the matter.

82. It was pointed out by learned counsel for the petitioner that Annexure V to the Report does not mention the Extradition Treaty between India and Chile although three other extradition treaties are mentioned. It was submitted, in view of this, that the Expert Committee on Foreign Relations did not recognize the existence of the Extradition Treaty between United Kingdom of Great Britain and Ireland and Chile or indeed between India and Chile.

83. Learned Additional Solicitor General submitted in response that the list was not exhaustive and the report of the Expert Committee was subsequently considered by the Steering Committee which gave a note that it was in substantial agreement with the views expressed by the Expert Committee and that the conclusions reached by that Committee should be approved. However, the Steering Committee noted that the Expert Committee had not been able to reach an agreed decision on the juridical position on the international personalities of India and Pakistan and its effect on treaty obligations and membership of International

Organizations. Accordingly, the Steering Committee proposed to put up a separate note for consideration by the Partition Council. The view of the Steering Committee reads as follows:-

> "The report of Expert Committee No. IX appointed to examine the effect of partition on foreign relation is attached. The Steering Committee are in substantial agreement with the views expressed therein and recommend that the conclusions reached by the Committee be approved.
>
> 2. The Expert Committee has been unable to reach an agreed decision on the juridical position regarding the international personalities of India and Pakistan (paragraphs 14 and 15) and its effect, if any, on Treaty Obligations (paragraphs 43 and 44) and membership of International Organisations (paragraph 47). The Steering Committee propose to put up separately a note on this subject for consideration by the Partition Council at a later date."

84. The Steering Committee was silent about paragraph 42 which referred to Annexure V containing the list of 627 treaties, conventions and agreements. Be that as it may, the recommendations of the Steering Committee were approved by the Partition Council, which also noted that the Steering Committee would put up a separate note for its consideration as mentioned.

85. The Steering Committee then put up a note on the juristic position regarding international personality and treaty obligations. This was with respect to who inherits the international obligations and corresponding privileges contracted by the Government of India. The Steering Committee examined the matter threadbare and gave its conclusions as follows:-

"To sum up, the position in international sphere consequent upon the setting up of the two new Dominions will be as follows:-

(1) All international obligations assumed by pre-existing India will devolve on the Dominion of India and that Dominion will be entitled to the rights associated with such obligations. (In this category will fall India's membership of the United Nations.)

(2) All international obligations assumed by the pre-existing India which have exclusive territorial application to any area comprised in Pakistan will devolve on the Dominion of Pakistan with all the rights associated with such obligations.

(3) All international obligations assumed not by the international entity known as India as such but by His Majesty's Government in the United Kingdom acting on behalf of the British overseas possessions and which have territorial application to India as a whole will devolve on both the Dominions with all the rights associated with such obligations."

86. It is significant that in the body of the note, the Steering Committee observed that "there may be treaties to which the whole British Empire is a party and which may have territorial application to India as a whole. The rights and obligations under such treaties will likewise be inherited by both the Dominions."

87. The note given by the Steering Committee was submitted for consideration of the Partition Council. It was recorded that Mr. Mohd. Ali did not subscribe to the view set out in the note and that he considered that the Government of India would disappear altogether as an entity and would be succeeded by two independent Dominions of equal international status. The Partition Council then considered the entire issue and in its decision it was held as follows:-

"The Council agreed that the Constitutional Adviser [Mr. Cooke] should be requested to evolve, if possible, a formula which would meet the case of both sides. Such a formula, if evolved, would be placed before the Pakistan and India Cabinets for their approval."

88. Following upon the decision of the Partition Council, the Governor-General issued the Indian Independence (International Arrangements) Order, 1947 on 14th August, 1947 which recorded an agreement between the Dominion of India and the Dominion of Pakistan. The Schedule to the Order is important and this reads as follows:-

"SCHEDULE

Agreement as to the devolution of international rights and obligations upon the dominions of India and Pakistan

1. The international rights and obligations to which India is entitled and subject immediately before the 15th day of August, 1947, will devolve in accordance with the provisions of this agreement.

2. (1) Membership of all international organizations together with the rights and obligations attaching to such membership, will devolve solely upon the Dominion of India.

For the purposes of this paragraph any rights or obligations arising under the Final Act of the United Nations Monetary and Financial Conference will be deemed to be rights or obligations attached to membership of the International Monetary Fund and to membership of the International Bank for Reconstruction and Development.

(2) The Dominion of Pakistan will take such steps as may be necessary to apply for membership of such international organizations as it chooses to join.

3. (1) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of India will devolve upon that Dominion.

(2) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of Pakistan will devolve upon that Dominion.

4. Subject to Articles 2 and 3 of this agreement, rights and obligations under all international agreements to which India is a party immediately before the appointed day will devolve both upon the Dominion of India and upon the Dominion of Pakistan, and will, if necessary, be apportioned between the two Dominions."

89. It is quite clear from the above, that all international agreements to which India (or British India) was a party would devolve upon the Dominion of India and the Dominion of Pakistan and if necessary the obligations and privileges should be apportioned between them. There is no limitation in the above Order that it is only with regard to the 627 treaties mentioned by the Expert Committee No. IX on Foreign Relations – the reference is to "all international agreements". Quite clearly, the extradition treaty between the United Kingdom of Great Britain and Ireland and Chile was a part of all the treaties entered into (by India or British India) and in terms of the above Order the rights and obligations in that treaty devolved upon the Dominion of India and the Dominion of Pakistan.

90. That apart and additionally, as already mentioned above, when an issue was raised in Parliament on 16th March, 1956 by Smt. Ila Palchoudhury, Prime Minister Shri Jawaharlal Nehru (who was also the Minister of External Affairs) laid on the table of the House a list of treaties concluded before Independence on behalf of India and which were still in

force. The Extradition Treaty of 26th January, 1897 was included in that list and therefore as far back as in 1956 (much before the present controversy arose) the Government of India was of the view that there was an extradition Treaty with Chile.

91. It will also be useful to recall the debate in Parliament on 7th August, 1962 on the Extradition Bill when Shri D.C. Sharma, an Hon'ble Member of Parliament, referred to the existence of a large number of extradition treaties entered into before 15th August, 1947. One of the extradition treaties mentioned by the Hon'ble Member was in existence an Extradition Treaty with Chile.

92. Reference may also be made to Document A/CN.4/229 titled "Succession of States in respect of bilateral treaties – study prepared by the Secretariat" of the International Law Commission on the topic of "Succession of States with respect to treaties". This document is extracted from the Yearbook of the International Law Commission 1970, Vol. II.[3] The Document notes:

> "A considerable number of extradition treaties concluded in the nineteenth and twentieth centuries are applicable, either automatically or by subsequent extension, to dependent territories of the parties which later became independent States. In addition, States parties to extradition treaties have sometimes undergone changes in international status (constitution of unions or federations, secession, annexation, restoration of independence, etc.) which have affected their participation in these treaties."

93. With reference to India, the Document notes in paragraph 22 that most of the extradition treaties concluded by the United Kingdom also

[3] http://www.un.org/law/ilc/index.htm

applied to India. It is noted that in 1956 the Prime Minister of India tabled a list of treaties with 45 countries. It is further noted that a similar issue was also raised during the passage of the Extradition Bill and the Minister of Law took the same position, namely, that extradition treaties concluded by the United Kingdom remain in effect, despite some argument to the contrary.

94. Our attention has also been drawn to the Consular Manual (Revised Edition 1983) issued by the Ministry of External Affairs. This appears to be an internal document for the benefit of officers of the Ministry of External Affairs. This makes a reference in Chapter 8 to Annexure III on extradition treaties with foreign countries executed by the Government of the United Kingdom on behalf of India prior to January 1938 and still in force. In that list is mentioned the Extradition Treaty with Chile executed on 26th January, 1897. It may be recalled that the Gazette of India of 12th November, 1898 reproduced the Order in Council published in the London Gazette of 12th August, 1898 pertaining to the Extradition Treaty between the United Kingdom of Great Britain and Ireland and the Republic of Chile. Therefore, not only was the Extradition Treaty recognized as binding on the Government of the United Kingdom of Great Britain and Ireland but also that it was in force in India.

95. In our opinion, there is more than sufficient material to conclude that from 1897-1898 onwards, the Government of British India and the

Government of India considered itself bound by the Extradition Treaty entered into with the Republic of Chile on 26th January, 1897 and the Government of India has always been of the view that the Extradition Treaty is in force in India.

96. Therefore, both from the point of view of Chile and India, the Extradition Treaty is in existence and binding upon each State.

Proceedings in the International Court of Justice

97. However, learned counsel for the petitioner contended, notwithstanding this, that the Extradition Treaty was not binding on India, although the existence of the Treaty might not have been denied. In this context he relied on the contention advanced on behalf of the Government of India in the preliminary objection to the assumption of jurisdiction by the International Court of Justice on Pakistan's application in the case concerning the ***Aerial Incident of 10th August, 1999 (Pakistan v. India)*** decided on 21st June, 2000.[4]

98. The view canvassed by the Government of India was that it had never regarded itself bound by the General Act for the Pacific Settlement of International Disputes signed at Geneva on 26th September, 1928. This was specifically stated by the Minister for External Affairs in a communication addressed to the Secretary General of the United Nations on 18th September, 1974. Alternatively, it was submitted that the General Act had been repudiated by the Government of India.

[4] ICJ Reports 2000, page 12

99. Accepting both the principal submission as well as the alternative submission, the International Court of Justice held in the majority opinion in paragraph 28 of the judgment as follows:-

> "28. Thus India considered that it had never been party to the General Act of 1928 as an independent State; hence it could not have been expected formally to denounce the Act. Even if, *arguendo,* the General Act was binding on India, the communication of 18 September 1974 is to be considered in the circumstances of the present case as having served the same legal ends as the notification of denunciation provided for in Article 45 of the Act. On 18 October 1974 the Legal Counsel of the United Nations, acting on instructions from the Secretary-General, informed the member States of the United Nations, together with Liechtenstein, San Marino and Switzerland, of India's "notification". It follows from the foregoing that India, in any event, would have ceased to be bound by the General Act of 1928 at the latest on 16 August 1979, the date on which a denunciation of the General Act under Article 45 thereof would have taken effect. India cannot be regarded as party to the said Act at the date when the Application in the present case was filed by Pakistan. It follows that the Court has no jurisdiction to entertain the Application on the basis of the provisions of Article 17 of the General Act of 1928 and of Article 37 of the Statute."

On this basis, it was held that the International Court of Justice had no jurisdiction to entertain the application of Pakistan. The decision of the International Court of Justice has really no relevance to the facts of the case before us.

100. Be that as it may, a completely misconceived reliance was placed by learned counsel for the petitioner on the counter-memorial filed by the Government of India to the memorial filed by Pakistan in the above proceedings. In the counter-memorial, a reference was made to a notification of succession to the General Act of 1928 received by the

Secretary-General from the Government of Pakistan on 30th May, 1974. In response to that notification, the Minister of External Affairs sent a notification to the Secretary-General on 18th September 1974. Learned counsel for the petitioner relied upon certain passages from the notification. The relevant portions of the notification relied on by learned counsel are underlined by us. The notification says, *inter alia* the following:

> ". . . 2. In the aforementioned communication, the Prime Minister of Pakistan has stated, inter alia, that as a result of the constitutional arrangements made at the time when India and Pakistan became independent, Pakistan has been a separate party to the General Act of 1928 for the Pacific Settlement of International Disputes from the date of her independence, i.e. 14th August 1947, since in accordance with Section 4 of the Indian Independence (International Arrangements) Order 1947, Pakistan succeeded to the rights and obligations of British India under all multilateral treaties binding upon her before her partition into the two successor States.
>
> The Prime Minister of Pakistan has further stated that accordingly, the Government of Pakistan did not need to take any steps to communicate its consent de novo to acceding to multilateral conventions by which British India had been bound. However, in order to dispel all doubts in this connection, the Government of Pakistan have stated that they continue to be bound by the accession of British India to the General Act of 1928. The communication further adds that 'the Government of Pakistan does not, however, affirm the reservations made by British India'.
>
> 3. In this connection, the Government of India has the following observations to make:
> (1) The General Act of 1928 for the Pacific Settlement of International Disputes was a political agreement and was an integral part of the League of Nations system. Its efficacy was impaired by the fact that the organs of the League of Nations to which it refers have now disappeared. It is for these reasons that the General Assembly of the United Nations on 28 April 1949 adopted the Revised General Act for the Pacific Settlement of International Disputes. (2) Whereas British India did accede to the General Act of 1928, by a communication of 21 May 1931, revised on 15 February 1939, neither India

nor Pakistan, into which British India was divided in 1947, succeeded to the General Act of 1928, either under general international law or in accordance with the provisions of the Indian Independence (International Arrangements) Order, 1947. (3) India and Pakistan have not yet acceded to the Revised General Act of 1949. (4) Neither India nor Pakistan have regarded themselves as being party to or bound by the provisions of the General Act of 1928. This is clear from the following: (a) In 1947, a list of treaties to which the Indian Independence (International Arrangements) Order, 1947 was to apply was prepared by 'Expert Committee No. 9 on Foreign Relations'. Their report is contained in Partition Proceedings, Volume III, pages 217-276. The list comprises 627 treaties in force in 1947. The 1928 General Act is not included in that list. The report was signed by the representatives of India and Pakistan. India should not therefore have been listed in any record as a party to the General Act of 1928 since 15 August 1947. (b) In several differences or disputes since 1947, such as those relating to the uses of river waters or the settlement of the boundary in the Rann of Kutch area, the 1928 General Act was not relied upon or cited either by India or by Pakistan. (c) In a case decided in 1961, the Supreme Court of Pakistan while referring to the Indian Independence (International Arrangements) Order, 1947 held that this Order 'did not and, indeed, could not provide for the devolution of treaty rights and obligations which were not capable of being succeeded to by a part of a country, which is severed from the parent State and established as an independent sovereign power, according to the practice of States'. Such treaties would include treaties of alliance, arbitration or commerce. The Court held that 'an examination of the provision of the said Order of 1947 also reveals no intention to depart from this principle'. (d) Statements on the existing international law of succession clearly establish that political treaties like the 1928 General Act are not transmissible by succession or by devolution agreements. Professor O'Connell states as follows: 'Clearly not all these treaties are transmissible; no State has yet acknowledged its succession to the General Act for the Pacific Settlement of International Disputes' (1928). (State Succession in Municipal Law and International Law, vol. II, 1967, page 213.) See also Sir Humphrey Waldock's Second Report (article 3) and Third Report (articles 6 and 7) on State Succession submitted to the International Law Commission in 1969 and 1970, respectively; Succession of States and Governments, Doc. A/CN.4/149-Add.1 and A/CN.4/150 – Memorandums prepared by UN Secretariat on 3 December 1962 and 10 December 1962, respectively; and Oscar Schachter, 'The Development of International Law through Legal Opinions of the United Nations Secretariat', British Yearbook of International Law (1948) pages 91, 106-107. (e) The Government of Pakistan had attempted to establish the jurisdiction of the International Court of Justice in the Trial of Prisoners of War case in May 1973 and in that connection, as an alternative pleading, for the first time cited the provisions of the General Act of 1928 in support of the Court's jurisdiction to deal with the

matter. Although the Government of India did not appear in these proceedings on the ground that their consent, required under the relevant treaty, had not been obtained before instituting these proceedings, their views regarding the nonapplication of the General Act of 1928 to India-Pakistan were made clear to the Court by a communication dated 4 June 1973 from the Indian Ambassador at The Hague.

4. To sum up the 1928 General Act, being an integral part of the League of Nations system, ceased to be a treaty in force upon the disappearance of the organs of the League of Nations. Being a political agreement it could not be transmissible under the law of succession. Neither India nor Pakistan have regarded themselves as bound by the General Act of 1928 since 1947. The General Act of 1928 was not listed in the list of 627 agreements to which the Indian Independence (International Arrangements) Order, 1947 related and India and Pakistan could therefore not have been listed in any record as parties to the 1928 General Act. Nor have Pakistan or India yet acceded to the Revised General Act of 1949.

5. The Government of Pakistan, by their communication dated 30 May 1974, have now expressed their intention to be bound by the General Act of 1928, without the reservations made by British India. This new act of Pakistan may or may not amount to accession to the General Act of 1928 depending upon their wishes as a sovereign State and the position in international law of the treaty in question. In view of what has been stated above, the Government of India consider that Pakistan cannot, however, become a party to the General Act of 1928 by way of succession under the Indian Independence (International Arrangements) Order, 1947, as stated by Pakistan.

101. The notification of 30th May, 1974 of the Government of Pakistan was only with reference to succession by Pakistan to the rights and obligations of British India to all treaties binding upon her before partition including, of course, the General Act of 1928. That is all. The response notification of 18th September, 1974 given by the Minister of External Affairs to the Secretary-General of the United Nations therefore confined itself to the General Act of 1928 and the effect of the Indian Independence (International Arrangements) Order, 1947 and must be

appreciated in that context. The Government of India was explicit that it was not a party and was never bound by the General Act of 1928. That should have been the end of the matter. However and additionally, the Government of India brought out that the Supreme Court of Pakistan, in ***Messrs. Yangtze (London) Ltd. v. Barlas Brothers***[5] had taken the view that "The Indian Independence (International Arrangements) Order, 1947 did not and, indeed, could not provide for the devolution of treaty rights and obligations which were not capable of being succeeded to by a part of a country, which is severed from the parent State and established as an independent sovereign Power, according to the practice of States."[6] In other words, even the Supreme Court of Pakistan held the view that the Indian Independence (International Arrangements) Order, 1947 did not provide for the devolution of treaty rights and obligations to the Government of Pakistan. She could not, therefore, rely on the General Act of 1928. It was only this view that was put forward by the Government of India. The counter-memorial did not contradict or abrogate the Indian Independence (International Arrangements) Order, 1947 as suggested by learned counsel for the petitioner.

102. The counter-memorial had nothing to do with any treaty with any country, much less the Extradition Treaty, nor did it concern itself with any issue other than the issue of the jurisdiction of the International

[5] PLD 1961 SC 573
[6] Verbatim record of the public sitting held on 4th April, 2000 in the International Court of Justice

Court of Justice to adjudicate the dispute between Pakistan and India in the context of the General Act of 1928. The contents of the counter-memorial did not validate the Report of the Expert Committee, as indeed it could not. This is the error made by learned counsel for the petitioner in appreciating the proceedings before the International Court of Justice.

103. Learned counsel for the petitioner also forgets that the Indian Independence (International Arrangements) Order, 1947 had the effect of an agreement between the Dominion of India and the Dominion of Pakistan. These two Dominions did not agree to exclude any treaty, convention or agreement from the purview of the Indian Independence (International Arrangements) Order, 1947 as a result of the Partition Proceedings. Indeed, neither Dominion could wish away the existence of any pre-Independence treaty. On the contrary, the two Dominions specifically agreed that the "rights and obligations under all international agreements to which India is a party immediately before the appointed day will devolve both upon the Dominion of India and upon the Dominion of Pakistan." Therefore, it is not possible to read the exclusion or elimination of any treaty from the purview of the Indian Independence (International Arrangements) Order, 1947, much less through the Report of the Expert Committee. The Extradition Treaty with Chile was very much included in the arrangement between the Dominion of India and the Dominion of Pakistan with only the question of apportionment kept open,

if necessary.

104. We also cannot overlook the submission of the learned Additional Solicitor General that the Report of the Expert Committee was not the final word on the subject under discussion. The Report was considered by the Steering Committee whose views were then considered by the Partition Council. It is only thereafter that some finality was reached through an Order that had the effect of an agreement between the two Dominions. The list of 627 treaties prepared by the Expert Committee was not exhaustive nor was it intended to be exhaustive, nor were the views of the Expert Committee conclusive. They were subject to the decision of the Partition Council and eventually the Governor-General (reforms). It is for this reason that the Indian Independence (International Arrangements) Order, 1947 issued by the Governor-General (Reforms) did not specify any treaty or treaties but all inclusively referred to the devolution of the rights and obligations under all international agreements, without limitation.

105. Finally, as far as extradition treaties generally are concerned, the provisions of Section 2(d) of the Act have been made applicable to all such treaties entered into prior to Independence. Nothing could be clearer or more explicit on the subject.

106. Assuming the report of the Expert Committee limited the agreement between the two Dominions only to 627 pre-Independence

treaties, that could not wipe out the existence of other treaties entered into, prior to Independence, on behalf of India, including the Treaty mentioned in the Gazette of India of 12th November, 1898. It is nobody's case that the Report of the Expert Committee resulted in the termination or repudiation of pre-Independence treaties that were acknowledged to be binding on India. Such a contention completely overlooks the contents of the Indian Independence (International Arrangements) Order, 1947.

107. That the Extradition Treaty was in existence and it was not unilaterally terminated or repudiated is also clear from two major overt acts: firstly, the statement of the Prime Minister in Parliament recognizing an Extradition Treaty with Chile and secondly, the statutory enactment, namely, the Extradition Act, 1962 which specifically gave recognition through Section 2(d) thereof to all extradition treaties entered into prior to 15th August, 1947. If there was any controversy whether the Government of India recognized itself as bound by the Extradition Treaty, then that was put to rest by the notified order of 28th April, 2015 under Section 3(1) of the Act (gazetted on 29th April, 2015 with a corrigendum issued on 11th August, 2015) whereby the Government of India made the Act applicable to the Republic of Chile. This left absolutely no manner of doubt that India was bound by the obligations under the Extradition Treaty. These public and overt acts after Independence confirm and acknowledge, on behalf of India, the existence and binding nature of the Extradition Treaty

between India and Chile.

108. That apart, this Court has taken the view in ***Rosiline George v. Union of India & Ors.***[7] (relying upon ***Babu Ram Saksena v. State***[8]) that our Independence and subsequent status as a sovereign republic did not put an end to the treaties entered into prior to 15th August, 1947 by the British Government on behalf of India. This is what was said in paragraph 26 of the Report:

> "It is thus obvious that in *Babu Ram Saksena case* this Court approved the proposition of international law that a change in the form of Government of a contracting State does not put an end to its treaties. India, even under British rule, had retained its personality as a State under international law. It was a member of the United Nations in its own right. Therefore, grant of independence in the year 1947 and thereafter the status of Sovereign Republic could not have put an end to the treaties entered into by the British Government prior to August 15, 1947 on behalf of India."

109. Nothing can be a clearer exposition of the law, particularly with respect to extradition treaties. What is also of importance is how the Government of India viewed the factual position in relation to an extradition treaty. In the factual position before us, did the Government of India terminate the Treaty or did it recognize its obligations under the Extradition Treaty? In this context, reference must be made to Article XVIII of the Extradition Treaty. This reads as follows:-

> "The present Treaty shall come into force ten days after its publication in conformity with the forms prescribed by the laws of the High Contracting

[7] (1994) 2 SCC 80
[8] 1950 SCR 573 [5 Judges]

> Parties. It may be terminated by either of the High Contracting Parties by a notice not exceeding one year, and not less than six months.
>
> It shall be ratified, after receiving the approval of the Congress of the Republic of Chile, and the ratifications shall be exchanged at Santiago as soon as possible."

There is nothing to indicate that the Government of India resorted to this Article to terminate or repudiate the Extradition Treaty. On the contrary, as mentioned above, the Government of India overtly accepted and acknowledged the Treaty and even made the Extradition Act applicable to Chile.

110. Our attention was also drawn to ***Halsbury's Laws of England***[9] wherein it is stated in paragraph 642 with regard to treaties entered into by the 'mother state' on behalf of its colonies as follows:

> "642. Territorial application clauses. The position of former colonial territories with regard to treaties entered into by their mother state, after their independence, is influenced by the existence in some such treaties of territorial or colonial application clauses. These in effect permit non-metropolitan territorial sub-divisions of states to contract in or contract out of treaties independently of the mother country. Incidentally, therefore, when self-governing dominions of the Crown eventually achieved statehood the question whether they succeeded to United Kingdom treaties did not arise, since they were already parties to them. Similarly, when other British overseas territories were granted independence, the prime question in relation to treaties was often not whether those territories succeeded to the treaties, but whether those treaties already applied to them in their new international capacities by some territorial clause contained in them."

A reference was made to India in a footnote to the aforesaid passage, to the effect that though she was not a self-governing State at the relevant time, she was an original member of the United Nations and a party to the

[9] Volume 18(2) 4th Edition

Charter of the United Nations in her own right. In this context, we might also recall that as far as the Treaty is concerned, India had gazetted it in the Gazette of India of 12th November, 1898 when it reproduced the Order in Council, even though India was, at that time, not a self-governing State.

A political question – alternative view

111. It was submitted by the learned Additional Solicitor General, in the alternative, that the existence of a treaty is a political question and that this Court cannot go into the issue whether there is a subsisting and binding treaty of extradition between India and Chile. Effectively, the contention is that the word of the Government of India on the existence of a treaty should be accepted. It is difficult to fully accept the proposition in the broad manner in which it has been stated.

112. In ***Sayne v. Shipley***[10] in a discussion pertaining to the 1903 treaty between the United States and the Republic of Panama, it was held, referring to ***Terlinden v. Ames***[11] and ***Ivancevic v. Artukovic***[12] that the conduct of foreign affairs is a political function but the advice that a treaty is still in effect is not conclusive though it is entitled to great weight and importance. It was said as follows:

> "The Assistant Legal Advisor for Treaty Affairs of the State Department has advised the District Court that Article XVI of the 1903 Treaty is still in effect. Because we recognize that the conduct of foreign affairs is a political, not a judicial function, such advice, while not conclusive on this Court, is entitled to

[10] 418 F.2d 679 [United States Court of Appeals, Fifth Circuit]
[11] 184 U.S. 270 (1902)
[12] 211 F.2d 565 [United States Court of Appeals, Ninth Circuit]

> great weight and importance. It is the general rule that the courts will accord great, but not binding, weight to a determination by the Executive Department that a treaty is terminated, at least when private rights are involved."

113. In ***Terlinden*** it was held that: "… on the question whether this treaty [the treaty between the United States of America and the Kingdom of Prussia concluded on 16th June, 1852 and ratified on 30th May, 1853] has ever been terminated, governmental action in respect to it must be regarded as of controlling importance."

114. In ***Jhirad v. Ferrandina***[13] the Government of India sought the extradition of an Indian citizen from the United States, relying on the 1931 extradition treaty between the two countries. It was held as follows:

> "Whether an extradition treaty exists is an issue with major foreign policy implications and one which does not easily fall within the sphere of the Judicial Branch of Government. Thus, it is that courts have given great weight to the position taken by the Executive Branch concerning the validity of extradition treaties. In Sayne v. Shipley, the Fifth Circuit said:
>
> > "Because we recognize that the conduct of foreign affairs is a political, not a judicial function, such advice from the Executive Branch], while not conclusive on this Court, is entitled to great weight and importance."
>
> In the case at bar, the United States, through the Acting Secretary of State, certified on August 14, 1972, that "the treaty of extradition between the United States and India is therefore considered a good subsisting and binding convention between the United States and India." Further, the Executive Branch strongly indicated its continuing affirmation of the Treaty when (in July of 1967), in conjunction with a prior extradition between the United States and India, notes were exchanged between the two Governments.
>
> The position of the Executive Branch, though persuasive, is not conclusive. The Court must evaluate the facts concerning the Treaty on its own."

115. There are a few other decisions on the subject, but there is none

[13] 355 F. Supp. 1155 [S.D.N.Y. 1973]

that crystallizes the extent to which the judiciary can go in the matter of determining whether a treaty is subsisting or not. The matter is certainly not free from doubt, but it does appear that there cannot be complete judicial abstinence in the matter as mentioned in ***Sayne***.

116. In ***Baker v. Carr***[14] the United States Supreme Court (though not dealing with extradition) observed that it would be erroneous to say that every case relating to foreign relations lies beyond judicial cognizance. Reference was made to ***Terlinden*** and 'governmental action' on the subject. This is what the Court had to say about judicial review and foreign relations:

> "*Foreign relations:* there are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature, but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action. For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question, "governmental action . . . must be regarded as of controlling importance," if there has been no conclusive "governmental action," then a court can construe a treaty, and may find it provides the answer. *Compare Terlinden v. Ames,* 184 U.S. 270, 285, *with Society for the Propagation of the Gospel in Foreign Parts v. New Haven,* 8 Wheat. 464, 492-495."

117. As far as we are concerned, in ***Rosiline George*** this Court made a reference to a decision of the Supreme Court of the United States in ***Tom***

[14] 369 U.S. 186

C. Clark v. Alvina Allen[15] wherein it was held that whether a State is in a position to perform its treaty obligations is essentially a political question. This view has been accepted by Justice Sathasivam in ***Abu Salem Abdul Qayoom Ansari v. State of Maharashtra***.[16]

118. It was also observed in ***Rosiline George*** that whether a treaty has been terminated by a State is essentially a political question. It was observed:

> "Whether a treaty has been terminated by the State is essentially a political question. The governmental action in respect to it must be regarded as of controlling importance. So far as India and the United States of America are concerned, it is amply evidenced by their actions that the two States fully recognise their obligations under the 1931 treaty."

119. Although this may not necessarily be a fully accurate statement of the law, we leave it at that since the issue does not arise in these cases. In any event, we leave these issues of termination of a treaty or performance of treaty obligations being political questions to be decided in an appropriate case. However, we can say that it does appear though, that the reason for terminating an extradition treaty would be a political question, so also whether India should enter into an extradition treaty with a foreign State and whether India should issue a notified order under Section 3(1) of the Act making the Act applicable to a foreign State would also be a political decision. But whether a treaty exists between India and a foreign State may not necessarily be a political question or a political

[15] 331 U.S. 503, 518
[16] (2011) 11 SCC 214

decision – a lot depends on 'governmental action' which would certainly be of 'controlling importance' though not conclusive. Nevertheless, we are clear that if the Executive were to inform the Court that there exists a treaty between India and a foreign State, the Court would defer to the decision of the Executive and would not ordinarily question the information.

Applicability of Section 34-B of the Act

120. It was submitted by learned counsel for the petitioner that the detention and provisional arrest of his client on 22nd September, 2015 under Section 34-B of the Act soon after the judgment of the High Court was illegal. It was submitted that there was no request from Interpol to detain and arrest the petitioner and therefore there was no occasion for her arrest particularly since the proceedings against her had been quashed by the High Court the previous day in its judgment dated 21st September, 2015. We are not inclined to accept this submission.

121. It is not at all necessary that the arrest of a foreign national for a crime committed outside India can only be on the basis of a Red Notice. It is true that in ***Bhavesh Jayanti Lakhani v. State of Maharashtra & Ors.***[17] it was explained that a Red Notice is issued to seek the provisional arrest of a wanted person. It is not a warrant of arrest. It is a request made by the NCB to Interpol Headquarters for the provisional arrest of a person wanted for extradition and against whom a national or international court

[17] (2009) 9 SCC 551

has issued a warrant of arrest. It is another matter that a Red Notice issued by Interpol acts as a *de facto* international arrest warrant. However, this is subject to the condition that a request for extradition, along with necessary evidence, would be produced by the requesting State without delay.

122. But the absence of a Red Notice does not preclude the Government of India from arresting a fugitive criminal and producing him or her before a Magistrate in accordance with law. Thereafter, the provisions of Section 34-B of the Act can be brought into play, provided there is an urgent request from a foreign State for the provisional arrest of a fugitive criminal. This is precisely what transpired in the present case when the Embassy of Chile made an urgent request through the *Note Verbale* of 22nd September, 2015 for the arrest of the petitioner. That *Note Verbale* was acted upon by the Government of India and an application moved before the Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi who granted the prayer for the provisional arrest of the petitioner. No illegality or irregularity can be found in the procedure adopted for the provisional arrest of the petitioner.

123. Learned counsel for the petitioner submitted that the petitioner's arrest under Section 34-B of the Act could be made only on a request from a foreign State (as mentioned in the Section) and not by a representative of a foreign State or even the Embassy of a foreign State.

This argument is stated to be rejected. Section 2(e) of the Act defines a foreign State to mean any State outside India and it includes every constituent part, colony or dependency of such State. A request made by the Embassy of a foreign State is as good as a request made by the foreign State itself. If this is not accepted, it will lead to an absurd situation where the Head of State or the Head of the Government of a foreign State would be required to make a request for extradition. This is simply not an acceptable proposition.

Extradition and reciprocity

124. The principle of reciprocity has quite an 'ancient' history. As noted in the Final Report of the International Law Commission (2014) on "The obligation to extradite or prosecute" (*aut dedere aut judicare*):

> "The role the obligation to extradite or prosecute plays in supporting international cooperation to fight impunity has been recognized at least since the time of Hugo Grotius, who postulated the principle of *aut dedere aut punire* (either extradite or punish): "When appealed to, a State should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal." The modern terminology replaces "punishment" with "prosecution" [*aut dedere aut judicare*] as the alternative to extradition in order to reflect better the possibility that an alleged offender may be found not guilty."[18]

In other words, if a State is unwilling to extradite a fugitive criminal, it should undertake the responsibility of prosecuting him or her, the theory being that a criminal should not go unpunished. The prosecute-or-extradite regime received the imprimatur of the International Court of

[18] Hugo Grotius lived from 1583 to 1645

Justice in the case concerning ***Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)***[19] in the context of the Convention against Torture, but "the Court's ruling may also help to elucidate the meaning of the prosecute-or-extradite regime under …. other conventions" which have followed the same formula as the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft.[20]

125. In ***Rosiline George*** there is a discussion on extradition. It is mentioned in the paragraph 16 of the Report that extradition denotes the process whereby under a concluded treaty, one State surrenders to any other State at its request, a person accused or convicted of a criminal offence committed in contravention of the laws of the requesting State, such requesting State being competent to try the alleged offender. "Extradition is founded on the broad principle that it is in the interest of civilized communities that criminals should not go unpunished and on that account it is recognized as a part of the comity of nations that one State should ordinarily afford to another State assistance towards bringing offenders to justice."

In ***Terlinden***, it was said:

> "Extradition may be sufficiently defined to be the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender."

126. The discussion on extradition by Justice Ganguly in ***Abu Salem*** is

[19] Judgment of 20th July, 2012; I.C.J. Reports 2012, p. 422
[20] Paragraph 65(15) of the above Report of the International Law Commission

not only very erudite but also very instructive. The learned Judge noted that doctrinally speaking extradition has five substantive ingredients: reciprocity; double criminality; extraditable offence; speciality and non-inquiry. For the present purposes, it is not necessary to deal with each ingredient.

127. Suffice it to say that it is on the basis of reciprocity that the Republic of Chile first sought the extradition of the petitioner as mentioned in the *Note Verbale* of 24th February, 2015. The same principle of reciprocity was resorted to by the Government of India when it sought the extradition of Abu Salem from Portugal, although the request made by the Government of India to Portugal sought his extradition also by relying on the International Convention for the Suppression of Terrorist Bombings. Justice Ganguly, however, points out in paragraph 63 of the Report that "The primary consideration for the request of extradition was the assurance of reciprocity."

128. For invoking the principle of reciprocity, there need not even be an extradition treaty between India and the foreign State as is apparent from a reading of the decision of this Court in ***Abu Salem***. In fact, India did not have any extradition treaty with Portugal and yet it made a request for the extradition of Abu Salem on the basis of reciprocity. It is only around the time that the request was made that the Government of India issued a notified order under Section 3(1) of the Act directing that the

provisions of the Extradition Act, 1962 other than Chapter III shall apply to the Republic of Portugal.

129. We are, therefore, in agreement with the submission of the learned Additional Solicitor General that on the basis of a request made by Chile as contained in the *Note Verbale* of 22nd September, 2015 the petitioner could have been validly detained and placed under provisional arrest under Section 34-B of the Act, on a reciprocal basis, Extradition Treaty or no Extradition Treaty between India and Chile. The further requirement (in terms of Section 34-B of the Act) would however be for Chile to make a formal request for extraditing the petitioner from India on the basis of credible evidence against her of having committed an extradition offence punishable both in Chile as well as in India.

Subsidiary issues

130. It was also submitted by learned counsel that the Government of India had not applied its mind at all when the Act was made applicable to the Republic of Chile. This argument is also without any basis and learned counsel has not pointed out or suggested any general or specific procedure that the Government of India should follow for making the Act applicable to a foreign State, except the issuance of a notified order under Section 3(1) of the Act. Admittedly, such a notified order has been issued in respect of the Republic of Chile and the natural presumption is that this official act has been done after due application of mind. In any event,

whether the Extradition Act is to be made applicable to a foreign State or not is entirely a political decision to be taken by the Government of India and there must be judicial abstinence in this regard. We have no doubt that this is an area that cannot be the subject matter of judicial review.

131. It was also submitted that the High Court ought not to have given liberty to the Government of India to once again initiate the process of extradition. The submission is misplaced. It is really for the Republic of Chile to decide whether it would like to have the petitioner extradited or not. The Government of India has no say in the matter. The Republic of Chile decided to renew its request for the extradition of the petitioner in November, 2015. The Government of India chose not to ignore that request but to act upon it. That is a political or diplomatic decision that the Government of India took. The petitioner has no say in the matter and judicial abstinence on such an issue prevents us from commenting on the decision.

Dissemination of information

132. Finally, learned counsel for the petitioner commented on the dissemination of information by the Ministry of External Affairs through its official website. It was pointed out that the official website informs everybody that India had entered an extradition treaty with Chile in 2015. Learned counsel relied on this information to contend that the Government of India does not recognize the Extradition Treaty of 1897

and there is no extradition treaty entered into with Chile in 2015. Consequently, the entire proceedings against the petitioner are vitiated.

133. It is extremely unfortunate that the official website of the Ministry of External Affairs gives misleading information not only to Indians but also to the world at large. The learned Additional Solicitor General was quite upset at the misleading information given on the official website and informed us that he had given a piece of his mind to the concerned officials in the Ministry. Whether amends have been made by the Ministry of External Affairs and whether the advice given by the learned Additional Solicitor General has been taken by the Ministry of External Affairs in the right spirit or not does not concern us. All that we need say is that in this day and age when communication and communication technology are so important, the Ministry of External Affairs has to be far more careful in the information that it disseminates to the world at large.

134. We may also note the relaxed attitude of the Ministry of External Affairs as evidenced by the manner in which the notified order dated 28th April, 2015 was drafted by it. The text of the notified order leaves much to be desired. We have already pointed out three errors in the notified order, none of which should have occurred at all. The errors only show the laid-back manner in which the Ministry of External Affairs conducts its internal affairs. To make matters worse, the corrigendum gazetted on 11th August, 2015 fails to correct the error in the earlier notified order

where the Extradition Act, 1962 is referred to as the Indian Extradition Act, 1962. It is time that the Ministry of External Affairs gets over the colonial hangover. Though the error is minor and not substantive, it should not have been there at all. We need say nothing more on this subject except to be optimistic and hope that the Ministry of External Affairs of the Government of India takes matters of law far more seriously than is evident from the material on record before us.

135. It is time to realize that India is now a significant and important player in the world stage. Very little attention appears to have been paid to affairs of international law as is evident from the manner in which the affidavits have been drafted and filed by the Government of India not only in the Delhi High Court but also in this Court. Most of the relevant material handed over to us in Court by the learned Additional Solicitor General did not form a part of any affidavit filed by the Government of India. True, there is no dispute about the authenticity of the material handed over to us in Court but that is not the issue. What is in issue is the nonchalant response of the Government of India on a matter concerning the liberty of an individual, even if that individual happens to be a foreign national who is in India.

Conclusion

136. On the basis of the material before us, we hold that there is a binding extradition treaty between India and Chile and that the provisions

of the Extradition Act, 1962 (other than Chapter III thereof) are applicable to the Republic of Chile in respect of the offences specified in the Extradition Treaty.

137. The extradition proceedings pertaining to the petitioner are pending before the Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi. We make it clear that we have not pronounced on the merits of the controversy pending before him and have confined our consideration only to the existence or otherwise of the Extradition Treaty between India and Chile. The learned Magistrate should decide on the extradition of the petitioner on the merits of the case and the evidence before him. Any observations incidentally made by us on the merits of the extradition requisition will not bind the learned Magistrate for the purposes of the final outcome of the proceedings.

138. The writ petition and the criminal appeal are dismissed. No costs.

…….J
(Madan B. Lokur)

New Delhi;
April 28, 2016

…….J
(N.V. Ramana)