CHAPTER VII

CONCLUSION AND SUGGESTIONS

The struggle against transnational crime can be viewed from a Darwinian\(^1\) perspective as an evolutionary competition. If transnational fugitive offenders adapt to the changing global environment more rapidly than governments, the criminals will grow stronger, gain increased control of services and profit at the expense of lawful societies. In the evolutionary race to adjust to an ever more interconnected global environment, criminal enterprises have already perfected the ability to operate across geographic, linguistic and legal borders and made that ability part of genetic heritage. Meanwhile, criminal justice authorities labour to achieve even slow, incomplete and inefficient cooperation. Legal systems are burdened with obsolete concepts, practices unsuited to present circumstances and rigid mindsets that inhibit change. While the adaptable criminals grow more powerful in the global economic system and in national societies. In the present study an attempt has been made to put opposing viewpoints fairly, and to suggest solutions which make adequate allowance for the advancement in the effectiveness of extradition as an international measure of cooperation in suppression of crime and asylum as the mechanism of protection of the rights of individuals.

Beginning with the first Chapter that deals with the **Introduction** the general concept of extradition has been discussed along with the definitions given by various jurists. It is clear from the conceptual analysis that extradition law is a mixture/amalgamation of international and domestic law involving a complex admixture of

\(^1\) Theory of evolution given by Charles Darwin that explained about “Survival of the fittest” as an alternative description of natural selection.
levels and forms of regulation which incorporate different levels of international and domestic law. In this chapter itself the problems faced by the authorities on account of the absence of a uniform code on the principles that govern extradition of the fugitives and criminals in obtaining the custody of criminals have been pointed out. Moreover the political intervention has been observed as another major problem hampering the process of extradition. The importance of the extradition mechanism to combat international criminalization and persistent problems inherent in traditional extradition procedure has formed the basis of research issues raised in this Chapter.

Moving on to the second Chapter that is Historical Perspectives of Law of Extradition, the historical development of the extradition has been made in detail. This Chapter reveals that the extradition originated in the earlier non western civilization such as Egyptian, Chinese, Chaldean and Assyro Babylonian civilizations. Since then, however, only practice of Greece and Rome’s extradition arrangements touched their way into European texts of International Law. Regarding the first treaty, extradition can be traced back as early as twelfth century when an extradition arrangement was signed between English King Henry III and Scottish King William in 1174. The other study that has been generally accepted by jurists reveals that the first recorded extradition treaty in the world dates circa 1280 BC where Romes II, Pharaoh of Egypt, signed a peace treaty with the Hittites after he defeated their attempt to invade Egypt.

From the historical review it has been recognized that in those remote days the persons sought by another States, did not necessarily mean that they were fugitives from justice charged with common crimes. In fact they were generally political or religious opponents of the ruling families, the stronger the relationship between sovereigns, the more interest and concern they had for each other’s welfare, the more their interest to surrender the political offenders which were dangerous to their authority/welfare. This situation
prevailed from the ancient time to seventeenth century when the exclusive concern of the extradition was for political and religious offenders. From the eighteenth century to the first half of nineteenth century which was a period of treaty making, mainly concerned with military offenders characterizing the condition of Europe during that period. Again from latter half of the nineteenth century to first half of twentieth century the main concern of extradition shifted to the suppression of common criminality. Post 1948 developments dealt mainly with the protection of human rights revealing the awareness for the permanent need to have international due process of law to regulate international relations. Thus it is clear that the history of extradition can be primarily divided into four periods which reveal that the practice originated with the need to preserve internal order of the respective States, at that time it hardly had any concern with international cooperation or protection of human rights. At one time it has manifested itself in the preservation of the political and religious interests of the States, gradually shifting to serve xenophobic and militaristic tendencies and finally becoming an international means of cooperation in the suppression of common criminality.

Industrial revolution and the advent of jet era, an advanced stage in the process of scientific adventure had a deep effect on the progress and development of extradition law, speedy means of transportation, communication by conquering time and distance, travelling by airway with supersonic speed. All this proved to be advantageous for the criminals to extend their sphere of activities and perpetrate numerous unlawful acts, which in turn forced the States to take steps to bring extradition law up to dates in both specific and general terms. Almost one hundred treaties pertaining to extradition were made during the eighteenth and early part of nineteenth centuries. The procedural rules were more simplified to allow easier extradition.
The common interest of States to prevent transnational criminality along with the recognition of basic Principles of Natural Justice gradually softened the exaggerated feeling of national sovereignty unfettered by law and the emergence of Humanitarian International Law to protect individual rights and interests, has paved the way for true International Law on extradition.

Whether the International Law imposed a legal duty on State to extradite common criminal, has been viewed as a highly controversial issue. Hugo, Grotius took the view that the State of refuge should either punish or surrender the criminal back to the State seeking its return that means it was a disjunctive duty to either prosecute or surrender. Whereas Vattel considered extradition a clear legal duty specially in case of serious crimes. He was supported by other jurists like Burlamaqui, Rutherford. On the other hand opponent view was taken by Pufendrof, Voet, Martine, Kluber who regarded extradition as a matter of imperfect obligation only, which was required to be confirmed and regulated by special agreement in order to secure the force of International law.

However, the contemporary practice followed by the States reveals that extradition has not been looked upon as an absolute international duty and that if a State wishes to ensure that it secures the return of its own criminals it must enter into treaties with other States. But contrary to this Common Law approach, the Civil Law Countries demonstrated a greater willingness to grant extradition in the absence of treaty on the basis of comity or reciprocity. Thus the common interest of States in the preservation of law and order within their domain has progressively led to the extradition of criminals even in the absence of a treaty or agreement between the States. Moreover every State is supreme in its territory, each State under the very notion of sovereignty, is completely free to grant or refuse extradition of aliens, irrespective of the existence of a treaty on this subject matter. As it is generally accepted that while a treaty creates certain rights between the States being Parties
to it, which can be invoked by one State against the other. However, it is also clear that it does not limit the liberty of a State if it intends to perform certain acts in the exercise of its wide sovereign power.

Generally extradition by bilateral treaties has been a prevailing practice. All developed and most developing countries are Parties to bilateral treaties. Thus the States whose laws or established practices prevent them from extraditing in the absence of a formal international agreement, extradition treaties are sole means by which they cooperate with each other in surrendering fugitive criminals to the jurisdictions competent to try and punish them. The present system of extradition through bilateral treaties is not perfect and, therefore, far from being fully effective. The gap in almost every country’s treaty network is both loose and full of loopholes. There is a trend of resistance or reluctance on the part of States to cater into new bilateral treaties or supplement to existing ones, which as readily understandable since extradition is not usually a pressing issue in International Law. Usually the States do not denounce all their extradition treaties in anticipation of a fundamental revision of their municipal laws. The effect of war on treaties generally has had a severe impact on extradition treaties; moreover legal doubts surround the effect of State Succession on extradition treaties.

In addition to bilateral treaties, States are becoming the Parties to the scheme of extradition between groups of nations having geographical or political affinity. The obvious advantage of these multilateral Convention schemes over the bilateral and multilateral extradition treaties lies in that they greatly reduce if not completely eliminate the divergent stipulation which embarrass national authorities when dealing with extradition matter on a bilateral or multilateral basis. There are various important existing regional arrangements. For example, Arab League Extradition Agreement, 1952; the Benelux Extradition Convention, 1962; the London Scheme on Rendition of Fugitive
Offenders, 1966; the European Convention, 1957; the Inter American Convention, 1933; the Nordic States Schemes on Extradition, 1962; the O.C.A.M. Convention, 1961, These regional conventions contribute to the trend of creating general rules of extradition which can finally lead to universal codification of the law of extradition through the consistent efforts of international community. A universal extradition Convention regarded as the ideal, is yet an unrealizable form of international arrangement for extradition.

The study reveals that the history of extradition in India can be traced back from the Pre-Independence era. Presently in India, extradition is regulated by the Extradition Act, 1962 (Act of 1962) which repealed and replaced the Indian Extradition Act, 1903 and the Fugitive Offenders Act, 1881. The Act of 1962 adapted the dichotomy between these former dual procedures so that Chapter III of the Extradition Act, 1962 dealt separately with extradition amongst Commonwealth countries which had entered into extradition arrangement with India; and Chapter II dealt with all other foreign countries and those Commonwealth countries which do not fall under Chapter III. However, the Act of 1962 was amended in 1993 so that the reference to ‘Commonwealth countries’ was more or less, removed and the amended Chapter III now deals with any foreign State which has entered into an extradition treaty with India and in respect of whom the Indian government thinks it expedient to apply the Chapter III procedures instead of applying Chapter II procedures.

Though there are numerous provisions which deal with extradition, each case has to be considered individually and according to the applicable provisions. However, there are general rules that have been dealt within Chapter III under the heading General Principles of Extradition which are common to most extradition laws that have been developed by one way or the other through bilateral treaties, regional arrangements, national laws of various States and judicial decisions of municipal Courts. In 1990, the General Assembly of the United Nations approved Model Treaty on Extradition containing many of these
principles, which aims to provide a ‘useful framework’ for States in the negotiation and revision of bilateral agreement and the same have also been incorporated in Revised Model Treaty of Extradition 2004 and Model Law on Extradition, 2004.

It is indicated in this study that there are some accepted general principles of extradition. The first and the foremost general principle of extradition is the extradition treaties. Extradition treaties and legislations not only supply the broad principles and rules of extradition but also dictate the very existence of the obligation to surrender fugitive criminals. The majority of international extradition agreements are bilateral treaties, though now a days alternative forms like multilateral treaties and regional arrangements have also been developed by the States. Thus, the extradition treaties may be deemed declarative of an existing reciprocal relationship or creative of the substantial basis of the very process. There are mainly two kinds of treaties List Treaty which contains a list of crimes for which a suspect will be extradited and Dual Criminality Treaty that generally allow for the extradition of the criminal suspect if the punishment is more than one year imprisonment in both the countries. The effect of War on treaties can be categorized in certain class of treaties that definitely extinguishes between the belligerent States. For instance those of amity alliance. The other category includes the treaty stipulating for permanent rights and general agreement and professing to aim at perpetuity not ceasing on the occurrence of war. Regarding the effect of State Succession on extradition treaties it has been concluded that when a new State comes into existence which formally formed the part of an older State, its acceptance or rejection of treaty obligations of extinct (former) State is a matter for the new State to determine by an express declaration or by conduct in the case of each individual treaty as the consideration of the policy required.

Another accepted general principle under International Law is that the political offences may not give rise to extradition on the consideration of humanity. The reason of
exemption can be well apprehended that to surrender unsuccessful rebels would surely amount to delivering them to summary executive or to the risk of being tried and punished by a justice coloured by political passion. Because of the absence of a universal definition of political offence the extradition of political offenders has always remained a controversial issue. However, the political offences have been categorized into Pure Political Offences and Relative Political Offences. There is no difficulty in the matter of purely political offences; the problem arises in the matter of relative political offences. The difficulty arises in the case of ordinary crimes such as murder, robbery when they are politically motivated. International terrorism presents a particular problem for extradition, as most transnational acts of terror are politically motivated and fall within the tests traditionally laid down for political offender. Modern treaties, multilateral treaties and bilateral treaties, tend to expressly provide that the acts of International Terrorism shall not be treated as political offence for the purpose of extradition. For example, SAARC Convention (Suppression of Terrorism) Act, 1993 in Article 1 specially provides that the terrorist acts will not be regarded as a political offence. The other categories that do not fall in the category of political offences are Aggression, Crimes against Humanity, War Crimes, Piracy, Hijacking, Slavery and other forms of Traffic in Women and Children, Counterfeiting, Kidnapping, International Traffic in Narcotic Drugs and Racial Discrimination. But there is still little conclusive agreement as to what constitutes political offence in law of extradition.

Although law and practice does not recognize a general exception to extradition where the human rights of the fugitive are threatened in the requesting State. But objections to extradition based on human rights ground have become commonplace in extradition proceedings. There are some human rights violations that may be absolute obstacles to extradition (such as torture), or that may in appropriate circumstances thwart
extradition (such as denial of fair trial). In the cases where there is a conflict between obligation of the State to extradite and obligation to protect fundamental human rights, generally preference to the latter is given. The judicial systems of various countries have given importance to human rights over extradition treaties. It would be wrong to see protection of human rights of fugitives an obstacle to extradition proceedings because it is not requested States obligation to respect human rights which prove a hindrance for effective cooperation in criminal matter rather it is the requesting State’s failure to protect human rights is a stumbling block in the International Cooperation.

The principle of Double (or Dual) Criminality is yet another deeply ingrained general principle of extradition law. The principle requires that an alleged crime for which extradition is sought be punishable in both the requested and requesting States. A traditional method of giving effect to the principle has been the adoption in extradition treaties, the lists of extraditable offences. This approach i.e. *in concerto* (objective) which emphasized terminology, is susceptible to a rigid and technical formality, and presented difficulties for emerging categories of more complex crimes. The modern approach i.e. *in abstracto* over weighs the traditional approach which pertains that the authorities should look at totality of the conduct and decide whether any combination of those acts and/or omission would constitute an offence in force in the requested State.

The study also reveals that in the list of general principles of extradition, Doctrine of Speciality is also an internationally accepted Principle. According to this principle, the person whose extradition has been requested may only be prosecuted, tried or detained for those offences which provided grounds for extradition or those committed subsequent to extradition. The doctrine is, a concomitant of a requested State’s right to determine the extraditability of the person sought for the offence specified. This principle protects the relator from unexpected prosecution, even though it is principally advanced as a means of
protecting the requesting State from abuse of its process. However in some cases the rule is also waived by inserting alternative provisions which authorize the requesting State to prosecute and punish the person surrendered for an offence other that for which he was extradited, if he gives his free and voluntary consent to or he himself states that he is willing to stand trial for such other offence. But the absence of clear guidelines on the making of requests for waiver of speciality gives considerable scope of circumvention of various safeguards on extradition. The Doctrine has been further extended to Re-extraditing to a third State. In this case, the re-extraditing State must first secure the consent of the original surrendering State before granting the second extradition request to third State. The other extension applies in the case of death penalty. Generally those States who have abolished death penalty, make the surrender of the alleged offender subject to the undertaking that in case of conviction, death penalty will not be inflicted upon the person extradited or it will be commuted to a prison sentence or fine or both.

The Nationality plays a very important role in extradition proceedings. The surrender of a national has always remained a controversial point and practice of States considerably differs on it. Unlike political offence exemption, the exception of national has to do with person rather than with the offence. The exemption of the national takes two forms: absolute and qualified, the former provides that nationals of requested State may not be surrendered whereas the latter states that the Contracting Parties ‘shall be under no obligation to surrender their nationals’. The first category exempt their nationals from extradition relying on Greco-Roman heritage, while the latter category that accept the principle of surrendering all persons including their own nationals apply the Common Law system. Recent media reports have highlighted the risk that criminals could evade justice through naturalization. The exception of non-extradition for nationals jeopardizes
international efforts to fight transnational crime. Thus the States should take giant strides towards enacting the laws that allow their nationals to be extradited.

As mentioned earlier, in the early days of European history of extradition, the fugitives were not necessarily fugitives from justice charged with common crimes, but they were either political or religious opponents of ruling families or deserters of the armed forces of the requesting States. However, later on with the rise of liberalism in the mid-nineteenth century in the Western countries, the Courts of requested countries refused to surrender the individuals who were either guilty of or charged with political or military offences. The rational for this exclusion (military offences) rests on the appraisal of the very offence, i.e. it is peculiar rather than general and affects a disciplinary aspect of internal organisation within given State without causing any harm to the world community as in the case of International Crimes. Presently there are considerable number of bilateral as well as multilateral Conventions along with national statues that expressly prohibit extradition of military offenders if it consists solely a breach of military law.

It may be here recalled that extradition before twentieth century was closely interwoven with European history and between the 16th to 18th century Europe’s fiscal and economic structure was chaotic and oppressive, and this explains the origin of fiscal offences as exclusion to extradition. But later the socio-economic contract theory of twentieth century brought about major change in the category of economic offences and some fiscal offences were ranked as more serious common crimes as witnessed by laws on smuggling, traffic in currency etc. International White Collar Crimes figured out as an important item in Commonwealth Scheme Relating to Rendition of Fugitive Offenders, 1982. Now, it is clear that rule of International Law do not prohibit extradition for such fiscal offences, these are now being incorporated in extradition treaties.
The study also reveals contrary views on *Prima facie* evidence. The idea of *Prima facie* evidence according to which, before a person is surrendered to the foreign State to be prosecuted for an offence committed there, some evidences of guilt should be produced has been stated as obscure by some jurists. The justification given for this point is that the extradition is a measure of international judicial assistance in restoring a fugitive to a jurisdiction with the best claim to try him, and it is no part of the function of the assisting authorities to enter upon questions which are prerogative of that jurisdiction. But the other viewpoint that supports the *prima facie* evidence as an essential requirement suggested that the imposition of the *prima facie* case requirement is related to distance and relative in convenience, that if a person is to be sent for trial to a place a long distance away, he should not be sent on the mere strength of a warrant of arrest but only upon such evidence of criminality as would show that he had a substantial case to answer. In Common Law system the *prima facie* has been first introduced in the Jay Treaty of 1974 between the United States and Great Britain. Whereas the Civil Law Countries followed the inquisitional method in criminal prosecution that do not require the establishment of a *prima-facie* case before granting an extradition request. Both the systems have relative advantages; the Civil Law system greatly facilitates the procedure of extradition, whereas the Common Law system looks more upon the individual liberty. Altogether the two systems seem apparently irreconcilable, they are not far apart. Therefore, there is no universal standard on the amount of evidence required to grant an extradition request. It is thus advisable that countries should keep track of the standard of evidence that is required by different countries.

Lapse of time is also a general principle relying upon which the States refuse to grant extradition of a person claimed if he has obtained immunity from prosecution or punishment according to the Statute of Limitation. This exemption or exception is based
upon the principle of public policy or humanity as no person can be permitted to disturb the status quo. If an aggrieved or injured person does not take any action against the accused within the period prescribed by statute, he should not be permitted to drag on with his accusations against other until eternity. Many States preclude extradition if prosecution for the offence charged or enforcement of the penalty has become barred by lapse of time under the applicable law. Under some treaties the applicable law is that of the requested State, in other that of the requesting State and under some treaties extradition is precluded if either State’s statute of limitations has made the offence time barred.

Thus it can be clearly stated that States have considerable latitude in establishing their national legal framework for extradition. Conditions and requirements vary significantly from one country to another which in turn leads to differences in various general principles. Practically these differences have been the cause of complications in extradition relations. Besides this it can also not be denied that although differences continue to exist, national extradition regimes are also similar in many ways, various general principles and requirements have been derived from State’s extradition laws, procedures and practices.

In the fourth Chapter **Extradition and Asylum** a comparative analysis of Extradition has been made with Asylum. The word Asylum is a Latin word and it is derived from Greek word ‘Asylia’ which means inviolable place. The term is referred to those cases where the territorial State declines to surrender a person to the requesting State and provides shelter and protection in its own territory. The practice of asylum preceded in origin to that of extradition and, therefore, extradition became an exception to asylum, both by the reason of substance and as a consequence of their historical development. The practice originated in sanctuaries offered by the holy places in ancient times. Divinity thus protected the unfortunate member of the society from certain primitive and cruel form of
punishment. Asylum was not always uniform, in fact the practice was uneven, at one time it was selectively applied, and at other it was considered as a privilege rather than right. In the middle age asylum laws were incorporated by ecclesiastical norms. Ecclesiastical asylum right represented the Catholic Church’s mercy and forgiveness to the secular world. On the other hand presence of asylum and refugee rights is sometimes considered as an achievement of the modern International Law. Indeed it has gained more importance since the beginning of the twentieth century and has become a core issue of the modern democracies. There is no clear demarcation line in history to indicate the shift from predominant practice of religious and ecclesiastic asylum to what becomes political asylum. Thus the asylum was not based on fear of god but on territorial sovereignty of States that would exist only among independent sovereignties. On this basis the asylum can be categorized into: (a) Territorial Asylum, (b) Extraterritorial Asylum. Territorial asylum is one where the State of refuge accords it to an individual upon its own territory. The territorial asylum has been further classified into (i) Political Asylum, i.e. for Political defectors ii) Refugee Asylum, i.e. for those who fear persecution in their own country (iii) General asylum, i.e. for persons who have deserted their country to such economic betterment but do not enjoy the status of immigration. The same principle of asylum to political offenders applies to the refugee asylum also that their extradition will lead to unfair tial and infringement of the Rule of Law. A refugee has been defined under Article 1 of the Convention on the Status of Refugees, 1951.

The Extraterritorial Asylum has been further classified into Diplomatic Asylum which means granting of asylum in the legation premises, it is an exceptional measure and controversial, The Asylum in premises of International Institutions in extreme case of danger from mob rule and Asylum in warships which have been treated as floating territory of the flag State. The basic difference between Territorial and Extra Territorial asylum has
been brought about by M. Cherif Bassiouni when he states that extraterritoriality denies the sovereignty of State on whose territory it is exercised, while territoriality affirms the sovereignty of the State on whose territory it is practiced. Thus it is the sovereignty that gives the State the right to grant asylum. The Right of Asylum has been recognized under international instruments as well as domestic enactments. The United Nations General Assembly recognized this right as early as in 1948. Some States have accepted asylum as a customary law without a formal legal basis or as provisions in Constitutions, treaties and domestic legislations are binding on the very States who adopt them even though that State has discretionary application.

Asylum has been considered as a human right which developed in the International Law as a part of minority protection from political persecution. The traditional doctrine goes; asylum is a right of the State and not of the individual. The present position in International Law is that asylum is a right of States rather than of individual, except for the Principle of non refoulement, which has become the part of International Law. However, the national laws differ widely on the subject, the Constitutions of Socialist Countries of Eastern Europe contain provisions amounting to an individual right to asylum.

The study also shows that Extradition and Asylum are closely related, in as much as refusal of extradition may in effect constitute the granting of asylum. The institutional practices of both have developed side by side with distinct purposes and functions. They are neither identical nor merely two sides of the same coin. International refugee protection (Asylum) and criminal law enforcement (Extradition) are not mutually exclusive. International Refugee Law does not as such stand in the way of criminal prosecution. It also does not it generally exempt refugees and asylum seekers from extradition. Yet in determining whether a refugee or asylum seeker may be lawfully extradited, the requested State is bound to take into consideration the legal safeguards in place for those who flee
persecution rather than prosecution, and who are therefore, in need of international refugee protection i.e. Asylum. The sovereign right to control the presence of aliens, among them refugees, is conditioned by the prohibitions of *refoulement* explicitly worded in Article 33 (1) of the Refugee Convention, 1951 i.e. principle of *non-refoulement* which means that States cannot return aliens to territories where they might be subjected to torture, in humane or degrading treatment. There are exceptions to the principle, stipulated in Article 33(2), if the refugee is regarded as a danger to the security of the country or danger to the community of that country. There are other regional and international instruments that invoke the principles of *non-refoulement*. For Instance American Convention of Human Right, 1969 (Article 22(8)); Inter American Convention to Prevent and Punish Torture, 1985 (Article 13(4)), and Article (3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. Though India is not signatory to the 1951 Convention Relating to the Status of Refugees or its 1967 Protocol, yet India is signatory to various other international and regional treaties and Conventions relating to human rights and refugee laws such as the United Nations Declaration on Territorial Asylum, 1967; the International Covenant on Civil and Political Rights, 1966. India is also Member of Executive Committee of the United Nations High Commissioner for Refugees. India continues to grant asylum and provide direct assistance to some 200,000 refugees from neighbouring States as at January 2012 according to UNHCR.

In case when the requested State finds itself in conflicting obligations whether to extradite, the duty that arise from bilateral or multilateral extradition agreement or bound by its *non-refoulement* obligations, International Refugee and Human Right law prevail over any obligation to extradite. The United Nations Charter establishes the prevalence of Charter’s obligation over those arising from other International Agreements (Article 103 in conjunction with 55(C) and 56). Regarding the application of the principle of *non-
*refoulement* in extradition cases if the extradition of a refugee has been sought by his or her country of origin, the requested State is precluded under Article 33(1) of the 1951 Refugee Convention or customary International law from extraditing the wanted person unless he is covered under the exception clause i.e. 33(2) and if the country requesting extradition is different, the State should analyze whether the surrender of the refugee would be consistent with its *non-refoulement* obligations, International Refugees and Human Rights Law. Similar considerations applying to refugees recognized by a country other than the requested State are also relevant in situations where a request for extradition concerns a “mandate refugee” that is a person determined to be refugee by UNHCR on the basis of its Statute. The UNHCR stands for United Nations High Commissioner for Refugees. The UNHCR is an international body that monitors and reviews for States to comply and for unrestricted use of the 1951 Convention on the Status of Refugee and its 1967 Protocol.

Further the Asylum seekers are also protected against *refoulement* by virtue of Article 33(1) of the 1951 Refugee Convention and customary International Law for the duration of the asylum procedure in both the cases i.e. when the country requesting the extradition of an asylum seeker is the asylum seeker’s country of origin and in case when the request has been made by a country other than the asylum seeker’s country of origin.

As far as the relation between the extradition and asylum procedure is concerned it has been concluded that the final determination on the asylum claim should, in principle, precedes the decision on extradition, both asylum claim and extradition request should be examined in separate procedures under separate set of rules with criteria and requirements.

The extradition proceedings concerning refugees who are arrested in a country other than the country of asylum is often initiated on the basis of ‘Red notices’ transmitted through INTERPOL Channels which is world’s largest Police Organisation. But it has
recommended that the country where the refugee has been arrested must give due
consideration both to their refugee status and to any previous decisions to refuse
extradition. Another area where the linkages between extradition and asylum are
particularly close is exclusion from international refugee protection specifically defined
under Article 1F of 1951 Refugee Convention, but the analysis reveal that there is no
automatic correlation between “extraditable” and “excludable” offences. Thus here it may
be concluded that, extradition and asylum intersect in a number of ways if the person
whose extradition is sought is a refugee or an asylum seeker. These two institutions should
be coordinated in such a way so as to enable States to rely on extradition as an effective
tool in preventing impunity and fighting transnational crime in a manner which is fully
consistent with their international protection obligations.

The Chapter on **Procedural Aspects of Extradition** reveals that the extradition
Conventions and agreements do not usually contain provisions on procedure. Generally the
laws of the requested State determine the stages of the procedure and the competent
authorities for reaching a decision on whether or not to grant extradition. Though there are
certain similarities and common features, extradition procedures vary considerably from
one country to another including differences in evidentiary requirements and standards.
There are three main sources from which procedural rules for extradition emanate: 1) Treaty; 2) Specific extradition legislation; 3) General criminal law and procedural
legislation (applicable to extradition by analogy). Basically extradition is a formal process,
which involves sovereign acts of two countries. Extradition proceedings are initiated only
after a formal request is made by country seeking the arrest and surrender of the person
concerned for the purposes of prosecution or enforcement of a sentence.

The generally accepted mode of request for the extradition is that it must be in
writing, accompanied by other relevant documents that include arrest warrant, text of
relevant laws, information regarding the identification of the fugitive and a description of the allegations against the fugitive or in the case of a person already convicted the copy of the judgment. These elements are usually deemed sufficient in Civil Law countries. While in Common Law countries in addition to these elements, *prima facie* evidence is considered as an essential to the extradition request. The 1990 Model Treaty on extradition and Revised Manuals on Model Treaty on Extradition, 2004 specifically lists down the ingredients of the request for extradition in Article 16 as the guidelines that can be incorporated by the States. Besides this, presently the various provisions in the extradition law provide the right to the requested State to demand additional information, if it considers the information already provided not sufficient to meet the extradition request. As far as the position in India is concerned it should be in writing and put forth before the extradition magistrate.

The arrest of the alleged offender is the primary object of a request for the purpose of extradition. The laws of the various countries expressly provide for the arrest of the person claimed while dealing with the subject. The latest development in the international cooperation and mutual assistance is the European Arrest Warrant that is valid throughout all Member States of the European Union. Once issued it requires another Member State to arrest and transfer a criminal suspect or sentenced person to the issuing State so that the person can be put on trial or complete a sentence. In India Section 6 of the Indian Extradition Act, 1962 states that on the receipt of an order of the Central Government under Section 5, the magistrate shall issue a warrant for the arrest of the fugitive criminal.

The whole process of the presentation of the formal request takes so much time and provides ample of opportunity to the offender to flee to another country. The national and International Laws of various countries make the provisions for the provisional arrest. However, there is no uniform pattern among the States providing for the provisional arrest
of the fugitives as regards the channel of communication of such request. Section 34 B of the Indian Extradition Act, 1962 makes the provision for the provisional arrest on the receipt of an urgent request from a foreign State for the immediate arrest of such fugitive criminal. The legal standard governing temporary release on bail in an extradition case is onerous and vary from State to State, in addition to showing that he or she is not a flight risk or a danger to community, the extradition offender must establish that ‘special circumstances’ exist to justify release on bail. Evidently the general rule regarding release on bail is that the person claimed has no right to bail, that the Courts, in their discretion, have the power to grant such release on bail pending the final hearing. Section 25 of the Indian Extradition Act 1962 as amended in 1993, deals with the release of persons arrested, on bail applying the provisions of Code of Criminal Procedure, 1973.

Sometimes the country of asylum receives concurrent demands for the surrender of the same person for the same act or different acts. The requested State while determining this question takes into consideration various circumstances, especially the seriousness or gravity of the alleged offence, the place of commission of the said offence or crime and the nationality of the person sought, the date of request and reciprocity. But there is no uniformity regarding which factor to be considered on the priority basis. On the other hand there are various national statutes and treaties that do not make any distinction between multiple requisitions for the same offence or different offences, leaving it to the discretion of the requested State. Contrarily sometimes a State restricts its freedom by entering into an agreement or a treaty with other State or States and the treaty itself expressly determines the factor to be undertaken while determining this question.

In case of India Section 30 of the Indian Extradition Act, 1962 deals with the competing requests. The Complete discretion lies with the Central Government taking into
account various factors like gravity of offence, territoriality of offence, nationality of criminal, order of requests and reciprocity.

Next Chapter deals with the **Roles of the Judiciary and Executive in Extradition Proceedings**. Treaties are generally silent as to the designation of organs competent to handle extradition proceedings. The scope of the judiciary in the extradition proceedings largely depend upon the national laws of the requested State. As to a large extent this is a matter that comes within domestic jurisdiction of the individual State and International Law does not control that sphere of State activity. But presently in the international interest in advancing the Rule of Law and the protection of fundamental human rights it seems to be beyond doubt that constitutionally, impartial organs are better fitted to decide the questions affecting individual’s liberty than the organs that are closely geared to governmental policy. The current extradition law is a creature of treaties, negotiated by the executive branch and approved by the legislature. Most current treaties give general responsibility for extradition to the executive, investing it with the ultimate authority to determine rendition to be made, but requiring the Court to determine whether the treaty has been complied with, standards met and procedure followed. However, because of the bifurcated nature of extradition process, the proper roles of the judiciary and the executive are debatable. The scope of magisterial inquiry in India is governed as per Section 7 of the Extradition Act, 1962. The magistrate shall take the evidence of the requesting State as well as of the fugitive criminal. It is clear that magisterial inquiry which is conducted pursuant to the request for extradition is not a trial.

During the extradition hearing a judicial authority of the requested State determines the question of extradition upon examination of requisition, the documents and the evidence presented by requesting State and the person detained. Therefore, in addition to
allowing evidence that explains the requesting Country’s proof, Courts also allow the accused to produce evidences that “negates” or “obliterates” that proof.

Further if the Judge or the Magistrate certifies the fugitive for extradition, the matter then falls to the discretion of the executive to determine whether as a matter of policy the fugitive should be released or surrendered to the agents of the country that have requested his extradition. Various extradition treaties also stipulate that, in case where a fugitive faces charges or serving a criminal sentence in the country of refuge, he may be temporarily surrendered to the requesting State for the purpose of prosecution, under the promise that the State seeking the extradition will return the fugitive upon the conclusion of criminal proceedings. Various international instruments lay down a definite time limit within which the fugitive must be surrendered and also call for the release of the prisoner if he or she is not claimed within this specified period. In United Kingdom and United States the time of limitation is two calendar months.

With regard to India Section 24 of the relevant Act provides the period of two months for the surrender of fugitive offender after his/her committal and if the fugitive criminal is not conveyed out of India within the stipulated time, the Central Government, may order the discharge of the fugitive criminal unless sufficient cause is shown to the contrary.

Sometimes a person sought to be extradited is, under arrest, in custody, out on bail, under prosecution or serving a sentence for a crime committed in Asylum State. In these circumstances the requested State may postpone or defer extradition until the person in question has been discharged whether by acquittal or on expiration of his sentence or otherwise the proceedings are terminated. Some recent treaties have also incorporated in their provisions, ill health of the prisoner claimed as a ground for postponement of
extradition. Similar provisions of the postponement of surrender are provided in the bilateral treaties signed by India with other countries.

Extradition is generally effected directly between the two States by the police of the extraditing State taking the person in their custody to the requesting State and handing him over to its police. The problem arises when the requesting and requested State does not share a common border and the extradited person has to pass through the territory of a third State. In this case the conditions vary as per treaties, conventions, statutes but all commonly provide that application for transit shall be made and considered in the same manner as a requisition for extradition through diplomatic channel. The Indian Extradition Act of 1962 does not lay down any provision regarding transit and the same has been incorporated in the bilateral treaties with other countries but the conditions differ from one treaty to another.

Regarding in absentia conviction, Courts of some States treat it in the same manner as a conviction in which the offender was present, reasoning that, on their face, both types of convictions establish probable cause for the purpose of extradition. On the other hand the Courts of other States decline to find probable cause in support of extradition when the government has relied on little more than the in absentia conviction itself in support of its extradition request. Generally in absentia conviction has been lastly considered by various countries in deciding whether to grant extradition, it has not been considered as a defence to request for extradition.

The Writ of Habeas Corpus is for the most part called into requisition to test the legal validity of the instruments being used for the conviction and extradition. The Federal Courts of United States under Section 751 and 753 of United States Revised Statutes (1878), can grant this writ. Similar provisions of appeal under Section 26 have been
incorporated in British Extradition Act of 2003. Habeas Corpus or judicial review remains the correct means of redress against Magistrate’s decision falling outside the scope of the statutory rights and in jurisdictional challenges. Article 32 and 226 of the Indian Constitution deal with the writ of *Habeas corpus* clearly complying with the provisions of Article 21 which provide that no person shall be deprived of life and liberty except in accordance with the procedure established by the law in those matters also where a fugitive is ordered by the extradition magistrate to be detained, awaiting the decision of Government of India.

Regarding the property of the fugitive offender, extradition laws of various countries, bilateral treaties as well as multilateral Conventions usually provide for the surrender of the property to the requesting State, found in the possession of the extradited person at the time of his apprehension, relating to the offence or which may be useful as evidence in proving the extraditable offence or crime. Section 28 of the Indian Extradition Act, 1962 deals with the delivery of the property along with the fugitive at the time of his surrender. There is no uniform practice among States with regard to costs or expenses incurred in extradition proceedings of the person sought, each case has to be referred to the relevant treaty between the States to access what expenses can be realized from the requesting State. However, the general view is that applicant State shall not be charged with any part of the salaries of judicial officers, the requesting State should bear only special expenses as witness fees, jail board, transportation and the like. No explicit rule has been made under the Indian Extradition Act, 1962 and the same has been made in the bilateral treaties signed by India with many countries.

Thus the thesis presented the survey of the historical development of the law of extradition, critical analysis of general principles of extradition which form the very basis of law of extradition, comparative study of extradition with asylum, extradition procedure
followed by Civil Law Countries and Common Law Countries vis a vis position of law of extradition in India, Role of Executive and Judiciary in extradition proceeding. On the basis of this study the following suggestions are put forward:

Suggestions

- The procedural complexity can be accounted as one of the most serious handicaps under which extradition labours. The solution to this problem could be the simplified procedure with least formal proceedings aimed at the shortening of process to expedite and grant as much as possible the convenience in the surrender of the required fugitive. This approach has also been suggested by the United Nations while framing the Model Treaty on Extradition, 1990 and its Revised Manual, 2004 under Article 6.

- The lack of uniformity among the States with regard to procedural aspects as well as the general principles of the law of extradition present the perplexing problems to the requesting State seeking the return of the fugitive offender. To canvass the possibility of concluding single Convention or Model Code of Extradition, so too the need for common obligation to extradition would be well served by a single instrument having world wide application is suggested here as solution to this problem.

- To adhere too strictly to the non-extradition of nationals impedes the spirit of extradition and attempts to narrow the loop holes, is snatched by the fugitive offender to escape from justice, particularly if the refusal to extradite is not in line with the rule ‘aut dedere aut judicare’. And even if the principle is applied to counter the refusal of extradition, questions still arise especially with regard to the promptness and sufficiency of evidence of crime scene as
well the enthusiasm of requested State to prosecute. Thus it is suggested that nationality should not be considered as a ground for the refusal of extradition.

- The decision in the extradition cases should be made exclusively by judges instead of representatives of executive branch of power. Firstly the transfer of final decision making right from executive to judiciary would enable application of Principles of Rule of Law because judges are more likely to practice rights of an individual rather than members of executive. Secondly the decisions of executives are likely to be politically motivated and depend on the terms / relations of the requested and requesting countries.

- To expedite the process of extradition, efforts should be made to harmonize the evidential requirement i.e. rule relating to *Prima facie* evidence. One possible step that can be taken is to establish a universal standard on the amount of evidence required to grant extradition request. It could be based on the United Nations Model Treaty of Extradition that requires as a minimum “a statement of the offence, including an indication of the time and place of its commission.” In view of the need for simplification of the evidentiary requirements in extradition proceedings it is recommended that States should not insist on the establishment of a “*prima facie* evidence of guilt” for granting an extradition request.

- It is recommended to restrict offences qualifying as political offences to the essential minimum. Terrorism, transnational organized crime, drug trafficking, corruption and specified categories of offences such as: murder, manslaughter, inflicting serious bodily harm, sexual assault, kidnapping, abduction, hostage-taking, extortion, and using explosives endangering human life and resulting in property damage should be specifically excluded
from the category of political offences so that extradition for serious offences is not precluded as unjustified claims. An offence which merits application of the political offence exception should not be used to preclude extradition.

- In order to enhance International Cooperation, it is recommended to interpret the principle of Dual Criminality in a flexible manner. The relevant authority should be required to look at the totality of the conduct, focusing on the criminality of the conduct whatever its label. The requirement should be satisfied even if the offence is categorized differently in two States or if some components of the conduct forming extradition offence or mutual legal assistance are not entirely same.

- Law enforcement strategies vary between and among nations. In order to reach some common ground for effective interdiction of international traffickers, it is important to develop international cooperative policing efforts. It is suggested that existing resources such as INTERPOL, EUROPOL can be made more effective by making further studies to learn how to strengthen these agencies to make their role more explicit in the maintenance of the world peace.

- It is suggested that asylum claim and extradition request of the fugitive should be examined in separate procedures under separate set of rules. The submission of an extradition request should not render an asylum application inadmissible without further proceedings nor should it be taken as a sufficient basis for rejecting an asylum application.

- The Revised Manuals on Model Treaty on Extradition, 2004 along with the Model Law, 2004 should be used as fundamental document, that when adopted universally by the States can prove to be effective in achieving
cooperation in the field of Extradition by streamlining the national legislation in two ways: first where extradition treaties or arrangements exist, as a procedural or enabling framework not with a view to replacing or substituting a treaty in force, but in order to support its implementation. Secondly, in case of countries that extradite in the absence of a treaty, as a supplementary, comprehensive and self-standing framework for surrendering the fugitives to the requesting States.