HISTORICAL RETROSPECT: INTERNATIONAL AND NATIONAL PERSPECTIVE

In this chapter, extradition has been put into historical and legal context. The goal is to help us understand both extradition and treaty law. It is opined that the treaty studies could benefit from a clarification of important concepts. It begins with the history of extradition then move on to discuss its legal origins.

(a) **International Perspective**

Throughout the history of its practice, extradition has remained a system consisting of several processes whereby one sovereign surrenders to another sovereign, a person sought after as an accused criminal or a fugitive offender. The practice originated in earlier non-western civilizations such as Egyptian, Chinese, Chaldean and Assyro-Babylonian civilizations. In those days the practice of the delivery of a requested person to the requesting sovereign was usually based on facts or treaties but they also occurred by reciprocity and comity as a matter of courtesy and good-will between sovereigns. The delivery of a person was usually a subject of the requesting sovereign or that of another sovereign but seldom, if ever, the person delivered was a subject of the requested sovereign. Undertaking involving the rendition of fugitives was deemed an essential feature of friendly relations between the sovereigns and consequently the performance of such acts was often unsolicited. Thus, rendition did not always derive from the process of extradition but was more likely a gesture of friendship and co-operation between the sovereigns. Consequently the formal process of extradition is only one of the modes of rendition. Extradition up till now has been one of the least resorted to practices as compared to other modes of rendition. In fact, in contemporary practice there are more persons who are surrendered delivered or returned by one State to another in a variety of ways (both
legal and extra-legal), then there are renditions through formal extradition.¹
Extradition has a long, indeed ancient history and many of its levels evolved over
time to meet the needs of nations as they developed their external relations. But as
intercourse between States has expanded and compounded and lately transformed
their interest in protecting human rights, the rules that control international extradition
appear increasingly antiquated.²

In early times Grotius recognized the duty of a State under natural law, either
to punish fugitive offenders itself or else to surrender them to the State concerned
under its laws and bringing them to justice. Extradition did not however become a
general legal obligation and surrender of fugitive offenders has been dealt with
through the countries, mainly as a matter of courtesy or subservience on the part of
one sovereign towards another.³ Sovereign States oblige one another by surrendering
those persons who most likely affected the stability of their political order of the
requesting State. Thus, the stronger the relationship between the sovereigns, the more
interest and concern they had for each on surrendering those political offenders who
had created the greatest dangers to their respective welfare. Common criminals were
the least sought after species which affected only other individuals and not the
sovereign or the public order. The history of extradition can be divided into four
periods.

1. Ancient times to 17th century: a period revealing almost exclusive concern for
   political and religious offenders;

2. The 18th century and half of the 19th century: a period of treaty making chiefly
   concerned with military offenders characterizing the condition of Europe
during that period.
3. From 1833 to 1948: a period of collective concern in suppressing common criminality.

4. Post 1948 developments which ushered in a greater concern for protecting the human rights of persons and reveal awareness for the need to have international due process of law regulate international relations.\(^4\)

Writers agree that fugitive offenders ought to be returned by extradition and the practice has a long history which has been extensively researched. The first recorded extradition treaty in the world dates, circa 1280 BC. In that second oldest document in diplomatic history, Ramses II, Pharaoh of Egypt, signed a peace treaty with Hittites after he defeated their attempt to invade Egypt. This treaty applied to the surrender of great men, which has been taken to political offenders and not ‘common criminals’; extradition treaties today on the other hand, specifically exempt political offenders from surrender.\(^5\) While there is little record in the intervening centuries it appears that until the 1700s nations typically sought individuals for political and religious offences.\(^6\) An unusual, in fact surprising feature of the treaty of 1280, consists in the provision that the extradited person should not be liable to punishment. The new “brotherhood”, as it was called, of the two rulers, was extended by the treaty to their sons and their countries, transcending the personal character which was to prevail for millennia in international conventions. The religious sanctions were more elaborate. A thousand of the Hittite Gods and thousands of the Egyptian were invoked, a number of them specifically by name.\(^7\) Treaties including provision for the surrender of criminals are recorded in succeeding eras of history,\(^8\) but the actual extent to which regular surrender of common criminals was conducted before the 18\(^{th}\) century A.D. is a matter of some controversy,\(^9\) extradition was in the pre-Christian times, even if the term itself was unknown and with very few of today’s procedures
being incorporated the ‘diplomatic request’ was usually accompanied by a threat of war if the fugitive were not to be surrendered. Shortly after the agreement between the Egyptian and Hittites one finds extradition taking place, if rarely in ancient Israel. The Hindu Code of Manu also made provision therefore. Thus extradition was known in ancient times, although its practices would bear little relation to the system in operation today. For the period of the Dark Ages, there is little available evidence one way or the other about the practice of extradition; nevertheless a treaty concluded in the 10th century by the rulers at Byzantium and the Princess Kiev did allow for it. So far traceable history shows that the first treaty that dealt with extradition in Europe was made in 1174 between England and Scotland. Like most extradition treaties of the pre-modern period extradition was but one issue in a comprehensive inter-State agreement. In continental Europe, France was providing for the extradition of common criminals as early as 1376. However, many treaties contained provisions dealing with extradition during the middle ages and that all types of offenders were returned, usually only if such a treaty provision existed; the Anglo-Dutch treaty of 1662, whilst primarily designed to obtain a return of political enemies also allowed for the return of any other offender requested. It would be rare for a common criminal to flee abroad from the UK in the first place and it cannot be doubted that the system was in reality a means by which the State could expel those people who were conducive neither to people nor to the public good. The process then in operation would bear no direct relationship to today’s law and practice. Nevertheless, with regard to continental European treaties, the position seems to have been closer to present practice, as the Franco-Savoyan treaty of 1376 referred to above illustrates.  
It adduces evidence that there were a considerable number of treaties in existence, that
extradition seldom took place in the absence of a treaty obligation and that extradition was not overwhelmingly limited to political offenders.

Nevertheless, it cannot be denied that ancient treaties do not represent to any degree a conscious international effort to co-operate in suppressing ordinary crime. Such extradition provision as did exist were included only incidentally in treaties of peace and alliance, in which a willingness to deliver up the criminals of the other was just one of a number of gestures of friendship and co-operation. It is not out of place to acknowledge that there is an interesting and largely unexplored field of diplomatic history on this issue. It is sufficient to note presently that, although the surrender of common criminals may not have been quite as exceptional as had usually been thought, the effective beginnings of modern international co-operation in the suppression of crime gained momentum since the 18th century.

That the escape of common criminals was not seen as a danger requiring sustained and concerted counter-measures on an international scale before the 18th century is not surprising when the conditions of life in earlier times are considered. Firstly, the transport facilities were crude and often perilous. Secondly, escape from his home city or community usually resulted in arduous exile for the fugitive. Before the days of cosmopolitan cities and the abolition of slavery, a stranger was the object of suspicion and was often subjected to arbitrary harassment. A livelihood in the place of refuge was rendered uncertain for the citizen of another State. The interests of the fugitive were better served by allowing the consequences of his crime within his own community rather than by elopement to distant places where he would also be separated, perhaps permanently, from his family and friends. Thirdly, from the point of view of the pursuing authorities, a criminal departed represented a problem solved; his return was unlikely in the nature of things, and the community as rid of a
troublesome member. Thus the intercourse of criminals between different places was so slight as not to warrant a regular system of formal extradition arrangements between kingdoms and fiefdoms whose political relations were, in any event, subject to frequent change.\textsuperscript{12}

The present system of extradition started to evolve during the 18\textsuperscript{th} century in Europe between contiguous States. The UK as an island, was insulated from the rest of the continent’s fleeing fugitives, it did not enter into many extradition treaties at that time. By comparison\textsuperscript{13} France took the lead in the development of extradition in 18\textsuperscript{th} century by entering into arrangements with all her immediate neighbors except England: the law countries in 1746; Wurttemberg in 1759, Spain in 1765, Switzerland in 1777, and Portugal in 1783. France maintained her leadership in this field during two thirds of the 19\textsuperscript{th} century.\textsuperscript{14} The remaining treaties are divided roughly equally between those treaties expressed to be concerned with the reciprocal rendition of ‘criminals’ and those concerned with ‘vagabonds’. It is not apparent that there existed any great practical distinction between the two. In French law a vagabond is a person of no fixed abode and without lawful means of support, the great majority of criminals might have been brought within this description in the 18\textsuperscript{th} century. Some treaties described several categories of offender in an indicative rather than in a limitative sense. Such, for e.g. was the treaty between France and Wurttemberg of 1759 which provided for the extradition of ‘brigands’ malefactors, robbers, incendiaries, murderers, assassins, vagabonds, cavaliers, fantassins, dragoons and housards.\textsuperscript{15} The UK modern law began in 1794 with the Jay treaty which was concluded with US. It included many features known in modern treaties, such as the need for a \textit{prima facie} case and the requisition process being initiated by diplomatic communications.
It can be seen that at the close of the 18th century a great number of international agreements had been concluded dealing with a limited range of problem concerning the escape of criminals. This range was largely confined to the areas to which practical necessity had driven the contracting parties. Desperate characters infesting the roads, deserting troops and boundary were persistent nuisances who could not long be tolerated. The approach was pragmatic rather than doctrinaire, many of the more refined principles of extradition followed only upon the more general appreciation of the wider dimension of the problem of escaping criminals. Apart from the absence of cheap and fast means of transport and important factor limiting the desire of many States for more elaborate and more comprehensive measures to restore fugitive criminals to the country seeking them was the general harshness of the criminal law of the time. Beccaria, the celebrated 18th century Italian humanist, recognized the advantages of extradition but opposed its general adoption until an amelioration of barbaric punishments and oppressive procedures had been achieved. “Powerful voices were raised against prevailing conditions, chief amongst which was that of Voltaire, who perhaps more than anyone else, prepared the way for the implementation of the reforms that Beccaria had proposed. In England the work of Jeremy Bentham was similarly influential. After the turn of the century objections to extradition based on humanitarian considerations began to lessen as reform was gradually implemented.”

Extradition treaties were all bipartite. They provided for extradition in respect to specific crimes, rather than employing general and sweeping terms, “political crimes were almost invariably excepted – in striking contrast to the practice of former centuries, when extradition was looked upon primarily as a matter of politics and was therefore freely inflicted on political enemies of the foreign sovereign whose favor
was courted. The reverse policy was foreshadowed by the French revolution, which offered asylum to foreigners persecuted for the cause of liberty.” A new course was definitely inaugurated by Belgium which has arisen herself from revolution, interdicted by a law of 1833 the extradition of ‘political’ criminals. Extradition of military deserters, the foremost extradition type of the 18th century, survived only in rare cases. Except for England and US, most countries likewise rejected extradition of their own nationals, because of overemphasis upon sovereignty and distrust of foreign courts. Belgium also set an example in that her extradition statute was the first to protect the right of the defendant by an orderly procedure. The practical significance of the new extradition law depended, of course, on the particular treaties, enactments, policies and practices of the countries in question. It was considerable in Franco-Belgium relations. Generally, however, circumstantialities at the expense of the prescribed legal procedures greatly curtailed the effectiveness of extradition.17

Article VI of the law of 1833, which was re-enacted in the law of 1856, provides, “it shall be expressly provided in the treaties that a foreigner may not be persecuted punished for any political offence committed before extradition.” An early treaty to adopt the principle of non-extradition of political fugitives was the treaty of November 22, 1834 between Belgium and France. Similarly, Russia adopted this principle in nearly all of its extradition treaties since 1867. The form of the provision has been for most of these treaties mandatory, either precluding the requested State from surrendering the political fugitive or enjoining the requesting State from seeking his extradition, although in exceptional instances the form has been permissive.

Thus prior to French revolution extradition was mainly sought for recapturing political fugitives, the primary concern of the State being the preservation of its political form. However, with the emergence of the idea of international community
based on co-operation of States, the focus of extradition shifted from capturing political fugitives to achieving more effective administration of justice and suppression of common crimes. The emergence of new political institutions after the French revolution, which promoted more liberal and representative forms of Government, introduced a different perspective on political offenses from what had hitherto to prevail. It came to be regarded unjust to make the moral validity of a political activity entirely dependent on the success of failure of the attempt. As a consequence, most of the extradition treaties exclude political offenses from extraditable crimes. In the US, treaties which are self-executing in form became part of the law, but it has been found convenient to enact legislation to implement extradition treaties. In Great Britain, treaties are not part of Municipal Law, and extradition treaties require parliamentary legislation accompanied by passing a statute to give effect to each treaty as it is entered into. In France, extradition treaties were given effect without legislation until 1927. Now statutes are often drafted to operate in the absence of treaties, though this is not true of the US or Great Britain … “for many years efforts have been made by scholars and jurists to supplement national law and bipartite treaties by general acceptance of a uniform code of International Law on extradition, or by multipartite conventions to be adhered to by all States, or by territorial groups of States. The treaty of Amiens in 1802 must be considered the mother of all multipartite conventions on extradition, though the renewal of war prevented its extradition article being put into operation… a multipartite convention an international penal law, which also dealt with extradition, was concluded between Argentina, Uruguay, Bolivia, Paraguay and Peru in 1889, and an extradition treaty between the US and sixteen other American States was signed in 1902, but was not brought into force. An extradition convention between Costa Rica, Guatemala,
Honduras, Nicaragua and Salvador was adopted as part of the program of the Central American Peace Conference of 1907. 1911 brought an extradition convention between Ecuador, Peru, Columbia, Bolivia and Venezuela. In 1912 an international commission of jurists drafted a project for an American Extradition Convention at Rio de Janeiro. A second extradition convention was signed by the Central American States in 1923 and went into effect the next year … In 1927 a commission drafted for the consideration of the Sixth International Conference of American States, a project of a General Convention of Private International Law, book 3 of which Penal Extradition Law – included a title dealing with extradition, which with only slight alterations, was adopted by a conference in 1928 and is known as the Bustamante Code… The Seventh International Conference of American States, held at Montevideo in 1933, approved a convention on extradition. In 1934 the Central American States were their Extradition Convention of 1923. Not with standing this persistent movement towards a more general regulation of extradition than is possible through bipartite treaties and national legislation, it appears that only four multipartite extradition conventions are in force at the present time, namely the treaty of 1889 between Argentina, Uruguay, Bolivia and Peru, the treaty of 1911 between Ecuador, Peru, Columbia, Bolivia and Venezuela, the central American convention of 1934 and the Bustamante Code of 1928. Ratification of the convention of Montevideo has been deposited by the US, Chile and the Dominion Republic (as of Apr 1, 1935). This situation is evident not only of the difficulties which face any multipartite convention, because of the various national interests and points of view to be reconciled, but of certain special difficulties which are inherent in the subject of extradition.”

Harvard University’s Research in International Law program appointed a committee in 1932 to draw up a draft convention on the subject of extradition. The
result of the committee’s deliberations accompanied by elaborate commentaries and an exhaustive bibliography of the subject, appeared in 1935. It represents the most comprehensive study of extradition law and practice hitherto undertaken, and its recommendations are generally of a progressive and realistic nature. Unlike some previous attempts at codification, the Harvard Draft proposed a number of optional reservations which made it possible for States to adhere while maintaining certain conservative positions possibly as a consequence of the international situation at that time, which led to the ultimate collapse of the League of Nations, the draft failed to secure the attention from status that it deserved. A proposal of the International Criminal Police Organization was also made in 1948. In 1960, the Asian-African Legal Consultative Body prepared a draft convention on extradition at its Colombo session. In September 1965, the Commonwealth Conference of Law Ministers and Chief Justices expressed the desire of having a Commonwealth Code of Extradition. In March 1966, the Commonwealth Law Minister signed an accord in London for speedy extradition of fugitives between the Commonwealth countries. In 1985, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders urged member States to promote their activities at the international level to combat organized crime. From the 19th century onwards the focus of extradition was on common serious crimes due to the fact that such crimes replaced political offences as crimes affecting the stability of a State. One of the most striking occurrences in the history of extradition is that whereas extradition began as a political phenomenon that largely excluded common crimes, by the 19th century, the situation flip-flopped and extradition became a criminal phenomenon that largely excluded political crimes. Most commentators explain the change as a product of two revolutions, one ideological and the other material. In fact the 20th century saw a trend to exclude
political offences in extradition arrangements. This has however recently changed because of the increase in the international terrorism. From the 19th century to present there has also been an increase by States to conclude extradition treaties. This increase may be attributed to the increased mobility of citizens as well as the increase in international trade.

By contrast, international views of individual human rights have evolved rapidly during the last century-especially after WWII and the establishment of UN. Where once a sovereign rights of nations were paramount and a country’s request to obtain an individual to stand trial or serve a sentence was given great weight, contemporary society has a distinctly different view. International treaties, conventions and covenants have recognized the importance of individual rights and may be in conflict with extradition processes.25

In the era of globalization with increased forms and manifestations of international crimes causing major harmful consequences and transnational crimes like drug trafficking and terrorism, international cooperation in penal matters is indispensable and extradition the most important of all its modalities. These goals can only be accomplished through non-partisan, comprehensive and detailed legislation, which fairly balances the sometimes competing interests of efficient justice and its fair execution.26

(b) National Perspective

Pre Independence:

Indian law is largely based on the English Common Law because of the long period of the British colonial influence during British period. Various legislations first introduced by the Britishers are still in effect in their modified forms today. Before
independence, the law of extradition applicable to India was found scattered in the UK Extradition Act, 1870; the Fugitive Offenders Act, 1881 and later the Indian Extradition Act, 1903 came into force. The Indian Extradition Act, 1903 was the first Indian legislation in the field of extradition. Extradition within the British Empire were dealt with the Fugitive Offenders Act, 1881 reason being that it was done through a special procedure for the apprehension of fugitive and their trial of cases were internal to the Empire. On the other hand, the extradition with other ‘foreign countries’ were governed by the Extradition Act, 1903. The procedure for extradition was more cumbersome with other countries relating to the condition like *prima facie* evidence, double criminality, political offence exception etc.

The Extradition Act, 1903 worked as a supplement to the British Extradition Act, 1870 and 1873. The Indian Extradition Act, 1903 defines a “foreign State” as a State to which the English Extradition Acts, 1870 and 1873 apply. These are certain foreign countries with which the British Government has entered into extradition treaties and to which the English Extradition Acts have been applied by Order in Council. In other words, these foreign States may be referred as treaty States. The Extradition Act, 1870 dealt with the extradition of fugitive criminals with other countries outside the British Dominion. It was made applicable to India by virtue of its Section 17 which provides that, “this Act, when applied by order in council, shall in less it is otherwise provided by such order, extend to every British possession were substituted for the United Kingdom or England, as the case may require.” The Fugitive Offenders Act, 1881 which was also enacted by the Parliament of the United Kingdom regulated the extradition of fugitive offenders within the Commonwealth countries. It was made applicable to the British possessions by virtue of its Section 32,
like Section 17 of the Extradition Act, 1870 which provides that, “If the legislature of a British possession pass any Act or Ordinance:

1. For determining the offences committed in that possession to which this Act or any part thereof is to apply; or

2. For determining the court, judge, magistrate, officer or person by whom and the manner in which any jurisdiction or power under this Act is to be exercised; or

3. For payment of the costs incurred in returning a fugitive or a prisoner, or in sending him back if not prosecuted or if acquitted or otherwise in the execution of this Act; or Part 4. In manner for the carrying of this Act or any part thereof into effect in that possession, it shall be lawful for Her Majesty in council necessary or proper for carrying into effect the object of this Act, that such Act or ordinance, or any part thereof, shall with or without modification or alteration be recognized and gives effect to throughout her Majesty’s Dominion and on the high seas of it were part of this Act.”

This power was exercised for the British India by an Order in Council, declaring that chapter IV of the Indian Extradition Act, 1903 shall be recognized and given effect to throughout Her Majesty’s Dominion and on the high seas as if it were part of the Fugitive Offenders Act, 1881. The procedure for extradition of fugitive offenders from British possessions was less complicated. In part I of the Fugitive Offenders Act, 1881 a fugitive may be apprehended under an endorsed warrant or a provisional warrant and the warrant so issued in one part of the Crown’s Dominion. The fugitive when apprehended is brought before the magistrate who heard the case in the same manner and had the same jurisdiction and powers as if the fugitive was charged with an offence committed within his jurisdiction. The magistrate can make an order for the surrender of fugitive on the warrant issued by the Secretary of State or
an appropriate officer, if the magistrate is satisfied after the expiry of fifteen days from the date on which fugitive was committed to prison. Within the ‘British possession’ there was provision for the inter colonial ‘backing of warrants’ to which part I of the Fugitive Offenders Act has been applied. In part II of the Fugitive Offenders Act, after receiving a warrant for the apprehension of a fugitive by a magistrate from a proper authority may merely apprehend the fugitive by endorsing the warrant. If the magistrate before whom the fugitive apprehended is brought, is satisfied that the warrant is duly authenticated and the prisoner is the same person named in the warrant then the fugitive may be extradited without any further proceedings. But Section 10 of the Act had provision to discharge the fugitive if the case is trivial or if the case is unjust or oppressive or too severe punishment will be given on return of the fugitive either at all or until the expiration of a certain period. The procedure for extradition of fugitive offenders was less complicated under part II than part I of the Act. 28 One of the main differences between two parts of the Act lies in the matter of proof of guilt. The courts may expand considerable effort on proof of guilt before a fugitive is returned under part I of the Act, as in illustrated by the Canadian case of R. v Delisle. The judge while speaking of the Fugitive Offenders Act, said, “the underlying principle of such legislation is the same which governs in extradition matters…our Government will not surrender to a foreign State, however friendly, any person…without first having ascertained, by the proceedings and finding of the highest courts of Canada, that such crime has really been committed by that person. Likewise, Canada will not surrender to any Government of Her Majesty’s possessions any criminal fugitive without clear evidence of guilt made and controlled under the authority of the superior courts.” However, the courts have, as a rule been less particular in this matter than in the case under an extradition treaty. For instance,
in the Canadian case of *re Harrison* the judge drew attention to fact that there was a
difference between the Extradition Act, 1870 and the Fugitive Offenders Act, 1881.
He noted that under the latter, the judge has discretion and may if he so desires,
“accept only the allegation of the complaint as the foundation for issuing a warrant.”
The judge said further, “it is quite obvious that same additional care ought to be taken
in facilitating criminal proceedings in the various parts of the Empire, to which alone
the Fugitive Offenders Act applies.”

As can be seen from part II of the Act, the return of a fugitive offender to a
contiguous territory is extremely informal with little concern over proof of guilt. The
discretion given to the magistrate under Section 10 to refuse the return of a fugitive, if
it appears that the application has not been made in good faith or the punishment will
be unjust or overly severe, is rarely exercised. It is to be noted that there is no specific
list of crimes for which a person may be extradited from one part of the
Commonwealth to another. Any offence which is punishable by twelve months hard
labor and which the judge does not consider to be too trivial in nature is an
extraditable crime. Furthermore, although under International Law, a person once
extradited may generally not be tried for an offence other than the one for which he is
extradited, no such provision exists under the Act and a person may be tried for a
crime other than the one listed in the warrant for his return.\(^{29}\) Indian Extradition Act,
1903 was the first legislation in the field of extradition. This Act laid down the
procedure to be followed in India after a request was made from a foreign State. The
basis of such a request could be a treaty between the two States. The Fugitive
Offenders Act, 1881 was applicable at the same time and it dealt with the British
possession. This was how the extradition was carried out before India’s independence.
Post-Independence:

India attained independence from the British Crown on August 15, 1947 and became a Sovereign Democratic Republic on January 26, 1950. Prior to independence, apart from treaties with foreign States, there were agreements between the British Government and the princely States in India, governing extradition between them. With the attainment of freedom by India, the former British India split into two sovereign States, India and Pakistan. With regard to princely States, British paramountcy lapsed and they became free to remain independent enclaves or join one or the other sovereign State. Resultantly, all the princely States gradually merged with India and Pakistan. With this merger, the extradition arrangements between the erstwhile princely States and the British Government also lapsed. The case of Ram Babu Saxena v State, came before the Supreme Court where it was held that, “As from the appointed day-

(a) …

(b) The suzerainty of His Majesty over the Indian States lapses and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States… .As a result of this provision, the extradition treaty between Tonk and the British Government must be deemed to have lapsed with effect from the 15th August 1947. If matter stood there, obviously there would be nothing left upon which Section 18 of the Indian Extradition Act could possibly operate. There was, however a Standstill Agreement entered by the Indian Dominion with the Indian States, first Article of which runs as follows:

1. Until new agreements in this behalf are made, all agreements and administrative arrangements as to matter of common concern now existing
between the Crown and any Indian State shall, in so far as may be appropriate, continue as between the Dominion of India or, as the case may be, the part thereof and the State.

2. In particular, and without derogation from the generality of sub-clause (i) of this clause the matters referred to above shall include the matters specified in the schedule to this agreement.”

The schedule does mention ‘extradition’ as one of the matters to which the Standstill Agreement is applicable. This was certainly intended to be a temporary arrangement. Under the Standstill Agreement the provisions of the various treaties continued to regulate matters of extradition of criminals as between the different State on one hand and the Indian Dominion on the other hand till any new agreement was made between them.31 Justice Mukherjee was of the view that, “It seems to us that in these altered circumstances the Extradition treaty of 1869 has become entirely incapable of execution. It is not possible for the Tonk State to make or demand extradition.”32 At international level, India agreed that all international agreements to which India was a party would devolve upon the Dominion of India. As provided under schedule of the Indian Independence Order 1947:

“Agreement as to the devolution of international rights and obligations upon the Dominion of India and of Pakistan.

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

2. (i) 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 Book for Reconstruction and Development.

(ii) …

3. (i) 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.

(ii)…

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

So, it can be said that India has agreed to devolve the agreements unto its Dominion which it entered into before 15th day of August, 1947. In *Jhirad v Ferrandina*, the extradition of Jhirad, who was the former Judge Advocate General of Indian Navy, an Indian citizen and a resident in the USA, was sought by the Government of India. While working with the Indian Navy, he embezzled a portion of Naval Prize Fund with the administration which he had been entrusted. But Jhirad challenged the extradition proceedings by way of a writ of *habeas corpus* before the United States District Court, New York. The GoI sought extradition under a treaty made in 1931 between the United States and Great Britain at a time when India was a Dominion of Great Britain. The treaty was applied by Great Britain to India in 1942. In 1950 India achieved independence. Somewhat later, in 1967, the validity of the
treaty as a treaty between the United States and India was confirmed by an exchange of notes between the State Department of the United States and the Government. The court held that, “As part of the creation of Dominion of India, the Indian Government agreed to take an assignment of all treaties signed on its behalf by the Great Britain. The subsequent change to a ‘Republic’ was certainly of only evolutionary nature, thus the 1931 treaty would appear to survive. This judgment supports the view that new nations inherit the treaty obligations of the former colonies. There is tendency in the direction of continuity of treaties upon independence of colonial territories. The GoI has considered pre-independence treaties as binding on itself. It has therefore; set at rest the controversy over whether or not extradition treaties are inherited by a new State. Oppenheim is of the view that such treaties are political and therefore do not pass on to the new States.  

The same way, applicability of the Fugitive Offenders Act, 1881 and the Extradition Act, 1870 was not completely gone after India attained independence but they remain applicable to some extent. The India (Consequential Provision) Act, 1949 provided that, “On and after the date of India’s becoming a Republic, all existing law, that is to say, all laws which, whether being a rule of law or of provision of an Act of Parliament of any other enactment or instrument whatsoever, is in force on that date or has been passed or made before that date and was into force thereafter, shall, until provision to the contrary is made by the authority having power to alter that law and subject to the provision of sub-section (3) of this Section have the same operation in relation to India, and to person and things in anyway belonging to or connected with India, as it would have had if India has not become a Republic.”

In other case of Re Government of India and Mubarak Ali Ahmed, which was decided by the Queen’s Bench Division of the High Court of justice in 1952, the court
spoke to the problem. The applicant attempted to obtain a writ of *habeas corpus* to prevent his return to India for forgery. The counsel for the applicant maintained that he had been presented for political reasons by India and was considered to be a spy of Pakistan. Lord Chief Justice, Goddard did not find that the application would be presented as a political offender and ordered his return. However, after citing *Re Castioni* he said in part, “I am quite sure that in a proper case the court would apply the same rules with regard to application under the F.O.A., 1881 as it does under Article 5.3(1) of the Extradition Act, 1870. If it appears that the offence with which the prisoner was charged was in effect a political offence, no doubt this court would refuse to return him.”

The case reached on the conclusion that the F.O.A., 1881 was in force on January 26, 1950 by virtue of the above Section of the India (Consequential Provision) Act, 1949.

The Madras High Court found that the Act was in effect in India in the case of *C G Menon and another* but found that part II of the Act could not be enforced by the court as it denied the equal protection of the law and was repugnant to the Constitution of India. Menon was therefore not returned to Malaya. However the case was appealed to the Supreme Court of India, which found that the F.O.A., 1881 was not in force in respect to India and raised some very serious questions as to India’s position in regard to the surrender of fugitives to other Commonwealth countries. In speaking of the F.O.A., 1881 the court said in part, “the situation completely changed when India became a Sovereign Democratic Republic. After the achievement of independence by no stretch of imagination could India be described as a British possession and it could not be grouped by an order in Council among those possessions. Truly speaking, it became a foreign territory so far as other British possessions are concerned and the extradition of persons taking asylum in India,
having committed offences in British possessions could only be dealt with by any arrangement between the Sovereign Democratic Republic of India and the British Government and given effect by appropriate legislation...The provision of that Act could only be made applicable to India by incorporating them with appropriate change into an Act of the Indian Parliament and by enacting an Fugitive Offenders Act.” In the light of the above fact it can be said that part II (Section 12 or 14) is enforceable in India as provided in Article 372 of the Indian Constitution which stipulates that, “Continuance in force of existing laws and their adaptation-

1. Notwithstanding the repeal by the Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislative or other competent authority.

2. For the purposes of bringing the provisions of any law in force in territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations or modification shall not be questioned in any court of law.

3. Nothing in clause (2) shall be devided-

(a) To empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or
(b) To prevent any competent legislature or other competent authority from repealing or amending any law adopted or modified by the President under the said clause.”

Thereafter, notification of Ministry of External Affairs as released on 21st May 1955 be referred here, which stated that “…in a certain case of extradition of an offender, the Supreme Court of India recently ruled that in the changed circumstances, the English Fugitive Offenders Act, 1881 is no longer applicable to India. There can therefore, be no question of issuing a warrant of arrest, addressed to a foreign police or a foreign court, in respect of persons who are residing outside India except in accordance with the Code of Criminal Procedure, 1898.

2. In the circumstances, to obtain a fugitive offender from the United Kingdom and other Commonwealth countries, the following procedure may be adopted as long as the new Indian Extradition Law is not enacted and the Commonwealth countries continue to honour our requests for the surrender of the fugitive offenders notwithstanding decisions of the Supreme Court:

(a) The magistrate concerned will issue a warrant for the arrest of the fugitive offender to Police Officials of India in the usual form prescribed under the Code of Criminal Procedure, 1989.

(b) The warrant for arrest, accompanied by all such documents as would enable a \textit{prima facie} case to be established against the accused will be submitted by the magistrate to the Government of India in the Ministry of External Affairs, through the State Government concerned.

3. This Ministry, in consultation with the Ministries of Home Affairs and Law, will make a requisition for the surrender of a fugitive offender in the form of a
letter, requesting the Secretary of State (in the case of Dominions, the appropriate authority in the Dominion) to get the warrant endorsed in accordance with law. This letter will be addressed to the Secretary of State (or other appropriate authority in case of Dominions) through the High Commissioner for India in the United Kingdom/Dominion concerned will be accompanied by the warrant issued by the magistrate at (a) of Para 2 above and other documents received therewith.”

Further, the Extradition Act, 1962 was enacted which came into force on January 5, 1963. It contains five chapters and a schedule. Chapter I consists of short title, extent and commencement, definition and application of the Act. Chapter II consists of extradition of fugitive criminals to foreign States and to which chapter III does not apply. Chapter III deals with the return of fugitives only to those countries having extradition arrangements with India. Chapter IV of the Act contains provisions relating to surrender or return of accused or convicted persons from foreign States. Miscellaneous provisions have been discussed in the V chapter. It was amended in 1993 so that the reference to ‘Commonwealth countries’ was more or less, removed. The main differences between the procedure employed under chapter II and chapter III after 1993 amendment is that under II chapter if *prima facie* case is not made out the fugitive shall be discharged. As provided under Section 7:

“(1)...

(2) Without prejudice to the generality of the foregoing provisions, the magistrate shall, in particular, take such evidence as may be produced in support of the requisition of the foreign State and on behalf of the fugitive criminal, including any evidence to show that the offence of which the fugitive criminal is accused or has been convicted is an offence of political character or is not an extradition offence.
(3) If the magistrate is of opinion that a *prima facie* case is not made out in support of the requisition of the foreign Stat, he shall discharge the fugitive criminal.

(4) If the magistrate is of opinion that a *prima facie* case is made out in support of the requisition of the foreign State, he may commit the fugitive criminal to prison to await the orders of the Central Government, and shall report the result of his inquiry to the Central Government, and shall forward together with such report, any written statement which the fugitive criminal may desire to submit for the consideration of the Central Government.”

Under chapter III there is no need of *prima facie* case to be made. As provided under Section 17 of the Extradition Act, 1962, “Dealing with fugitive criminal when apprehended. If the magistrate, before whom a person apprehended under this chapter is brought, is satisfied on inquiry that the endorsed warrant for the apprehension of the fugitive criminal is duly authenticated and that the offence of which the person is accused or has been convicted in an extradition offence, the magistrate shall commit the fugitive criminal to prison to await his return and shall forthwith send to the Central Government a certificate of the committal.” The procedure of extradition under chapter III is less complicated as compared to chapter II.

However, it is a well-established principle of International Law that no right to extradition exists apart from a treaty. Whereas, there is also provision in Section 31 (d) of the Extradition Act, 1962 in the absence of a treaty which stipulates that, “where there is no extradition treaty made by India with any foreign State Central Government may, by notified order, treat any convention to which India and foreign State are parties, as an extradition treaty made by India with that foreign State providing for extradition in respect of the offence specified in that Convention.” It
means a fugitive criminal can be extradited even in the absence of a treaty between India and a foreign State, if both the countries are party to a convention which can be treated as an extradition treaty and where offence committed is specified as a crime, as happened in the case of Abu Salem’s extradition.

The Indian court once had the occasion to refuse the extradition of Tarasov to Russia in 1963 because there was no extradition treaty between India and the Soviet Union. But, the Supreme Court of India once held that, “the extradition with foreign States is, except in exceptional cases, governed by treaties and arrangements made.” In the light of the above fact, conclusion can be made that there is no universal rule in International Law that imposes a duty on States with respect to extradition. It would be wrong to say that extradition cannot take place in the absence of a treaty. However, in India the basis for a claim for extradition can be a treaty between India and foreign States as provided, “the term ‘extradition’ denotes the process whereby under a concluded treaty one State surrenders to any other at its request, a person accused or convicted of a criminal offence committed against the laws of the requesting State being competent to try the alleged offender.” The above definition of extradition given by the Supreme Court of India clearly mentions that the surrender of alleged criminals and escaped convict is usually made in pursuance of some treaty arrangement. Ordinarily, extradition is governed by a treaty which operates in the nature of a contract and by implementing statutory provisions. Extradition treaty comes into action when an accused person is to be surrendered by a State in whose territory he is found, to a State where he allegedly committed crime or was convicted of a crime. Treaties serve as an international agreement between the requesting and requested States which can be bilateral or multilateral. Extradition treaties can be classified as having an enumerative and eliminative method. A treaty that follows the
enumerative method lists and defines the crimes for which extradition shall be granted. In the eliminative or ‘no list’ method, extraditable offenses are defined in terms of their punish ability according to the laws of the two countries by a minimum standard of severity.40

Indian courts have granted extradition for such offences which are mentioned in the Act but not in the treaty. Thus, in *Re Murlidhar Bhagwandas* (1918), the Bombay High Court was called upon to decide if a person accused of cheating in Hyderabad State could be apprehended under Section 7 of the Indian Extradition Act, 1903 when cheating was not one of the offences for which extradition was provided for by the treaty of 1867 between the British Government and the Hyderabad State. It was held that it is not implied in the treaty that there cannot be extradition for offences not mentioned in the treaty. Again, in *Jamna v Emperor* (1926), the extradition of Jamna was sought for theft in Jasalmere State. Theft was an extraditable offence under the first Schedule to the Act, but not under the treaty with Jasalmere. Similarly in the case of *Ram Babu Saxena*, a resident of the United Provinces was charged under Section 383 and 420 of the Indian Penal Code with having committed extortion and cheating in the State of the Tonk, it was contended on his behalf that, among other grounds, the treaty of 1869 between the British Government and the State of Tonk did not cover the offences charged against the appellant and therefore, no extradition of the appellant could be demanded in view of Article 18 of the Act. It was held that the Act does not derogate from any such treaty when it authorizes the Indian Government to grant extradition for some additional offences. Thus, Indian courts generally held that if the offence was not mentioned in the treaty but was included in the Act, then the fugitive offenders could be surrendered on requisition to the demanding State depending on the liberal interpretation of the extradition treaties.
However the situation is different after the independence and a list of offences, which are not to be regarded as offences of a political character, is given in the Schedule to the Extradition Act, 1962.\textsuperscript{41} Section 2(j) of Extradition Act, 1962 says, “Treaty State means a foreign State with which an extradition treaty is in operation.” So far, India has signed extradition treaties with the following States\textsuperscript{42}:

1. Australia
2. Bahrain
3. Belarus
4. Belgium
5. Bhutan
6. Brazil
7. Bulgaria
8. Canada
9. Egypt
10. France
11. Germany
12. Hong Kong
13. Indonesia
14. Iran
15. Kazakhstan
16. Kuwait
17. Malaysia
18. Mauritius
19. Mexico
20. Mongolia
21. Nepal
22. Oman
23. Philippines
24. Poland
25. Portugal
26. Republic of Korea
International Law prescribes no special form or procedure for making of an international agreement, yet a treaty, which is an international agreement, creates certain legal rights and obligation between the parties and binds them to observe the rules of conduct laid down therein as law. In addition, a treaty serves as a limiting factor on the unrestricted competence of a sovereign State, because after concluding a specific treaty with another State or international organization, that State is under certain obligation to observe those rules which are specifically enshrined in that treaty. Thus in the absence of any international authority for the conservation of order, observation of justice and repression of crime, it is the construction of the provisions of the applicable treaty which controls the mutual conduct of the independent political communities in their international relations. At present, India has extradition arrangement with the following countries:

1. Fiji
2. Italy
3. Papua New Guinea
4. Singapore
5. Sri Lanka
6. Sweden
7. Tanzania
8. Thailand
9. Peru

It is the policy of the Government of India to conclude extradition treaties with as many countries as possible to ensure availability of fugitive criminals for trial. Negotiations are held through diplomatic channels on the basis of drafts proposed by either side.

India was not alone in its attempts to simplify and streamline its extradition procedures. On December 14, 1990 the United Nations General Assembly adopted a Model Treaty on Extradition and invited Member States to take it into account when revising the existing treaty relations. The Preamble to the Model Treaty says, “…that the establishment of bilateral and multilateral arrangements for extradition will greatly contribute to the development of more effective international cooperation for the control of crime”, “…that in many cases existing bilateral extradition arrangements are outdated and should be replaced by modern arrangements which take into account recent developments in international criminal law.” The Model Treaty contains an obligation to extradite (Article 1) and defines extraditable offences in accusation cases as offences punishable by at least one (or two) year’s imprisonment or in conviction cases if four (or six) months of the sentence remain to be served (Article 2). It sets out a number of mandatory grounds for refusal (Article 3) as well as optional grounds (Article 4).

Historically, the practice of extradition was dependent upon the good relations between the sovereigns of the requested States and the requesting State. Presently,
extradition has taken on a more formal nature with prescribed procedures necessary to affect it. In India the development of extradition law has followed the path of the various periods in the country’s history. The theory of extradition involves an analysis of extradition from its ancient roots to its present position. The extradition of a fugitive from India to a foreign country or vice-versa is governed by the provisions of the Indian Extradition Act, 1962 and the treaties between them.
References

4. M.C. Bassiouni, *op.cit.*, pp. 4-5
15. I.A. Shearer, *op.cit.*, pp.9-10
16. *Ibid*, p.11
20. I.A. Shearer, *op.cit.*, pp.1-2
22. The London Times, Mar. 27, 1966
23. GA Resolution No. 39/112, UN GAOR, 39th Session (14 December, 1990)
32. *Ibid*
33. *Jhirad v Ferrandina* 355 Fed Supp 1155
35. Robert E Clute, *op. cit.*, pp.24-25
36. *Ibid*, pp. 24-26


43. *Ibid*
