CHAPTER V

HUMAN RIGHTS IDEOLOGY AND EXTRADITION

5.1. INTRODUCTION:

The Human Rights Movement had a very powerful impact on international law and international relations since Second World War. It impacted the very perception about the nature of international law. Until recently, international law addressed only the actions of states and individuals had no standing to allege a nation's violation of international laws. Within the last fifty years, various international agreements have propelled the importance of individual rights to the forefront of international law. The incremental thrust of human rights ideology due to robust development of the jurisprudence of human rights did impact the domain of extradition. Even though for a long time the law of extradition maintained a state centric approach, of late under the influence of human rights ideology, it acquired individual centric dimensions.

5.2 EXPANDING HUMAN RIGHTS ORIGIN OF INDIVIDUAL RIGHTS

This chapter attempts to examine major human right barriers, particularly, prohibition against capital punishment and torture, developed in the law of extradition due to influence of various major international instruments on human rights. It also examines the role of diplomatic assurances in securing extradition in the face of human right oriented objections and also the dilemma relating to rule of non inquiry. Since ICC is the apex development in the development of international criminal law and has its base

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1 After World War II, naturalism became the dominant theory in international law. Unlike positive law, which argues that a nation can give and take away individual rights, the individual rights guaranteed by natural law are both permanent and universal. See, P.K. Menon, The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine, 1 J. TRANSNAT’L L. & POL’Y 153-154 (1992)

2 The positivist view dominated international law. The traditional, or 'positivist', approach claims that individuals only have rights as expressly provided in Individuals and so they were denied standing under international law to allege violations of their rights.

on human rights ideology, this chapter also analysis the positive implications of the same in meeting some challenges and dilemmas relating to extradition.

5.2.1 Expanding Individual Rights - An Overview of Major International Instruments

The United Nations established after Second World War with an aim to preserve international peace and security views human rights in the light of natural law. International agreements concluded under the auspices of UNO, including the Universal Declaration of Human Rights" (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), recognized the individual's entitlement to human rights. The universal adoption of individual rights revolutionized the status of the individual in international law and provided clear, enumerated individual entitlements.

The growth of individual rights has been slow but steady during the latter half of this century, beginning with the UDHR after World War II. Individual rights were further expanded by the ICCPR and subsequent interpretations of these, and other, documents. The generally acknowledged natural individual rights include the right to life, the right to self-determination, freedom from torture or cruel and unusual punishment, and freedom of thought and conscience. These rights are asserted by the U.N. Charter," listed in the UDHR defined in the ICCPR, and adopted by approximately fifty additional declarations and conventions on specialized issues, such as genocide and terrorism.4

The UDHR a landmark beginning of UNO’s commitment to protect human rights contains a list of human rights, and is considered a basic part of customary international law being reflective of the consensus of UN members. It was followed by a stream of international declarations and covenants which, whether binding outright or as soft law, reshaped the status of the individual. The principles of the UDHR, while not legally binding, are considered implicit in U.N. membership.

The UDHR prohibits arbitrary arrest, detention, or exile of individuals by nations. The UDHR allows individuals to seek asylum from persecution and draws a distinction between political and non-political crimes. The Declaration entitles the individual to a fair and public hearing by an impartial tribunal to determine her rights and any charges brought against her.

The ICCPR is an improvement in the sense that it provides specific and binding obligations assumed under the UDHR. Thus, the ICCPR differs from the UDHR, which is a non-binding declaration. Because the ICCPR is an international treaty, it forms part of conventional international law. The ICCPR is designed to protect individuals from arbitrary government action, specifically arbitrary arrest and detention. The ICCPR also guarantees the right of all people to self determination. The other important developments include the Geneva Conventions of 1949, the Refugee Convention of 1951, the Protocol of 1967 relating to the status of Refugees. Particularly important UN Convention which is exerting great influence on extradition proceedings is the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 1984.


5.3  INDIVIDUAL ORIENTATION IN PRINCIPLES OF EXTRADITION

The modem trend to expand human rights and to eliminate traditional barriers to individual standing has been set in and groomed further by an incremental number of general, specific, global and regional human right instruments. This trend did not stop only with adoption of those legal instruments that directly sought to protect the human rights per se but has also crept up to those other legal concepts and legal instruments whose primary focus is not the protection of human rights per se. Alongside many concepts that allowed the influx of human rights ideology into their conceptual or procedural framework extradition too finds its place.
Criminal justice system is one field in which the rights of individuals are at stake and therefore, human rights ideology has great significance in that area. The protection of human rights through the criminal justice delivery system is an indispensible feature of any system governed by the rule of law. Criminal law has always been a great source for the enlargement of human rights. In other words, many of our existing fundamental and inalienable rights, if studied carefully, would have their origins in situations and cases relating to criminal jurisprudence. The criminal justice system in a democratic society, adhering to the rule of law, has to carefully balance different and sometimes conflicting interests: firstly, the legitimate interest of the State in the observance of national laws, the fight against crime and the maintenance of internal security; secondly, the interest of the victims of crime and abuse; and, thirdly, the rights of the accused or the convicted and sentenced offender. International human rights law acknowledges the need to balance State power and individual liberty, and sets out the minimum guarantees that States must observe throughout their criminal justice process.  

Extradition being a tool of facilitating the administration of criminal justice has obviously could not be immune to the influence of human rights ideology because extradition involves the surrender, by one nation to another, of an individual who has been accused or convicted of an offense outside the territory of the former and thereby exposes the concerned individual to the administration of criminal justice in the other

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country. Extradition law therefore impacts the individual in the process of rendition. As extradition law developed, international law recognized the importance of protecting the individual. As naturalism slowly replaced positivism as the dominant theory of international law extradition procedure also changed, becoming more formalized and developing various exceptions and limitations. The growth and expansion of the human rights concepts have inevitably led to cover the vast area of international cooperation in criminal matters whose most renowned form, extradition, has been for centuries dominated by considerations and concerns deeply rooted in state interests such as sovereignty, maintaining power and domestic order, keeping external political alliances etc.

With the influence of ideas of political liberalism giving rise to an entirely new concept of democratic state, extradition treaties began to accommodate some protection to individual involved in the extradition. As the questions of surrendering an alleged criminal to the demanding state always involve questions of human rights, many western democracies do not want it to be left to the discretion of the executive authorities in matters involving individual liberty. They have thus enacted laws enumerating offences for which the alleged criminal could be surrendered. Commonly accepted exceptions to extraditability like double criminality, rule of specialty, political offences are examples of such minimal protection granted to individuals. It is a significant stage of evolution because individual came into the focus of extradition proceedings that take place between two states.

Although extradition law and practice does not recognize any general exception to extradition where the human rights of the fugitive are threatened in the requesting State, objections to extradition based on human rights grounds have become commonplace in extradition proceedings. The Human rights movement which had such powerful impact on international law relations in the post second world war turned its

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6 Rendition refers to the formal process of extradition through a treaty
attention to extradition. Treaties, executive acts and judicial decisions have all been impacted.\(^9\)

The impact of human rights philosophy in the legal mechanism of extradition is incremental. The present level of human right sensitivity of extradition process no doubt is much higher and more visible compared to the earlier times. However, since long the individuals who are subjected to extradition process have been enjoying minimal protection derived from traditional limitations on state power, namely extraterritoriality, application of principles such as rule of specialty, double jeopardy, dual criminality, and the political offense exception.

(i) **Double Criminality**

It is a requirement of reciprocity. According to this, the offense charged against the accused or convicted must be a crime in both the requesting and the asylum nation. The rule of double criminality is a standard clause in almost all extradition treaties so much so that the Swiss Federal Tribunal once held that double criminality was a tacit precondition for all extradition cases even where the treaty was not express on the matter.\(^10\)

The rule of double criminality ensures, among other things, respect for the principle of *nullum crimen sinelege*. From the human rights perspective this rule serves the most important function of ensuring that a person’s liberty is not restricted as a consequence of offences not recognized as criminal by the requested State.\(^11\) Keeping in view the factum of diversity in criminal laws of different countries and the fact that criminal liability entails serious consequences as deprivation of human right to liberty, right to human dignity etc, the rule of double criminality is an important safeguard for fugitive. Especially, it sounds morally repugnant to punish a person who might become liable for a crime which in his contemplation is not an offence. The value of this principle

\(^9\) Ibid, 187  
becomes more apparent when the laws of various countries relating to offences such as euthanasia, suicide, adultery, and abortion are compared.\(^{12}\)

(ii) **Rule of Specialty**

Rule of specialty provision requires that the requesting State undertake to prosecute the fugitive only in respect of extradition crimes set out in extradition request and further he cannot be given punishment more severe than was provided by the applicable law of the requesting State at the time of the request for extradition. The requesting State is further obliged to give the fugitive an opportunity to leave the country before instituting criminal proceedings for any other offence. efl In essence, the doctrine of specialty “reflects a fundamental concern of governments of governments that persons who are surrendered should not be subject to indiscriminate prosecution by the receiving government…”\(^{13}\)

Thus the rule of specialty protects the legitimate expectation of the requested state and the fugitive criminal that he will not be prosecuted for an offence other than the one for which his extradition is allowed after employing due process of law. In a way rule of specialty is just another side of the rule of double criminality. So, this rule also provides double shielded safeguard for the human right to life and liberty.

(iii) **Political Offence Exception**

According to this rule of exception to extradition, if the offence for which extradition is requested is regarded by the requested State as an offence of political nature then extradition may be denied. Virtually all extradition treaties contain either explicitly or by implication, the political offence exception or some discretion in the requested State to refuse extradition.\(^{14}\)

The political offense exception has three, basic purposes. First, the exception recognizes the legitimacy of political dissent. Second, it guarantees the rights of the accused. Third, the political offense exception protects the interests of both the requesting

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\(^{13}\) United States v. Puentes, 500 F.3d 1567, 1572 (11th Cir. 1995) (quoting Fiocconi v. Attorney Gen. of the United States 462 F.2d 475, 481 (2d Cir. 1972.)

\(^{14}\) Ibid.
and the asylum nation. The principle of political offence exception is justified by different rationales.\(^{15}\) It is in the first place based on the wish to remain aloof from political conflicts in other States and not become involved in them by extraditing political offenders. Secondly, it is based on the premise that resistance to oppression is legitimate as it is a matter of right to self determination of people and that political offences can therefore be justified by circumstances. Thirdly, there is a humanitarian justification whereby a political offender should not be extradited to a State where he risks an unfair trial. In all these rationales only third one seems to be solely directed at offenders. Despite the difficulties involved in the application of the principle of political offence exception, it has afforded political dissidents protection from persecution and the perils of “victor’s justice”.\(^{16}\) The political offence exception reflects a desire on the part of states to ensure the fairness of a trial, while also evidencing a degree of concern for the right to equal treatment, a concern now reflected in the discrimination clause typically contained in many extradition treaties.

**Double Jeopardy**

Double jeopardy is a procedural defence that forbids a defendant from being tried again on the same (or similar) charges following a legitimate acquittal or conviction. In common law countries, a defendant may enter a peremptory plea that he has been acquitted or convicted of the same offence. In some countries, double jeopardy is a constitutional right and in other countries it enjoys statutory protection. The right not to be tried twice for the same offence is a fundamental legal and human right recognised in many Bills of Rights and human rights treaties.\(^{17}\)

While the above mentioned traditionally followed principles, no doubt, provide important safeguards, it, is often felt that it would be erroneous to take the view that the

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\(^{17}\) Eg. Art 14(7) of ICCPR, 1966, Article 50 of the E.U. Charter of Fundamental Rights
The safeguards mentioned above were precisely meant to protect human rights of fugitives. In fact these provisions were rather incorporated over the period of time into the extradition treaties with different objectives and consideration.18 Thus the principle of double criminality ensures that a requesting State may not prosecute a person for conduct that the requested State itself does not consider criminal. The principle of speciality aims to prevent an abuse of the requested State’s criminal process.19 The political offence exception prevents the requested State’s courts from adjudging the internal political disputes of the requesting State.20 Generally, these safeguards seek to protect the integrity of the criminal system of the requested state rather than the individual human rights of a person who is being sought for extradition.21

It would appear that a sense of fair punishment has long motivated extradition law, with death penalty clauses appearing in Latin American treaties as early as 1889 to provide for the commutation of such a penalty when a requested state had a fundamental objection.22 Long-standing exceptions, such as those barring extradition on grounds of lapse of time and the retroactive application of the criminal law, also reflect aspects of what is today would be termed a fundamental human right, the right to a fair trial. A similar fair trial component can also be found in the recurring exceptions concerning in absentia convictions, extraordinary and adhoc courts, amnesties, final judgments and acquittals.

Thus it is fair enough to accept that human rights considerations have long played a part in extradition. Even if conceding to the argument that such considerations were once motivated more by state interests than as recognition of individual rights, they were nonetheless intended, or accepted, as giving some degree of protection to the individual extraditee from abuse, and that abuse can be described today in human rights terms.

19 Ibid
22 JS Reeves, “Extradition Treaties and the Death Penalty” (1924) 18 AJIL 298 at 198-300.
5.4 MODERN TREND TO ADD ON HUMAN RIGHT IDEOLOGY TO EXTRADITION

There is no standard rule of international law to the effect that extradition must be compatible with human right norms. At the same time there is no bar to let human right considerations into extradition process. Also, the traditionally accepted principles did already allow individual oriented safeguards which however proved inadequate to ensure respect for and protection of human rights. Therefore the growing promotion of human right jurisprudence and support for the same from different sectors could enhance the space for human right considerations in the extradition process over a period of time.

Now, states are increasingly concluding extradition treaties that include human right provisions. One popular clause is that extradition should not be granted for the purpose of punishing a person for their race, religion, nationality or political opinions. Another such provision excludes extradition where the requesting state retains the death penalty and is unwilling to provide assurances that this penalty will not be implemented if the fugitive is extradited. Another provision allows the requested state to refuse extradition if the person might be subjected to torture. To certain extent these clauses have helped to overcome the limitations inherent in the traditional safeguards developed by extradition law\(^{23}\).

Importantly these developments did not stop with bilateral treaties. Multilateral treaties have also begun to deal with the alleged violations of human rights as a ground for refusing extradition.

*Broad Glimpse of Multilateral Prescriptions for Human Right Considerations in Extradition.*

The 1957 European Convention on Extradition\(^{24}\) contains provisions that exclude extradition when the requesting state is unwilling to provide assurances that the death


\(^{24}\) Adopted on 13\(^{th}\) Dec 1957, 359 UNTS 273
penalty will not be imposed if the person is extradited\textsuperscript{25} or if the principle of non refoulement would be offended\textsuperscript{26}. The principle of non refoulement is also upheld in the International Convention against the Taking of Hostages of 1979, the Inter American Convention on Extradition, and the Commonwealth Scheme for Rendition of Fugitive Offenders of 1990\textsuperscript{27} The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment\textsuperscript{28} explicitly prohibits extradition where the requested person is in danger of being subjected to torture. Given the proliferation of these clauses in recent extradition treaties, it is not surprising that states have begun to include human rights provisions in their municipal extradition legislations\textsuperscript{29}.

(i) UN Model Treaty on Extradition 1990

The 1990 United Nations Model Treaty on Extradition\textsuperscript{30} excludes extradition if there are grounds to believe that the request has been made to prosecute or punish a person on account of that person’s race, religion, nationality, ethnic origin, political opinion, sex or status\textsuperscript{31} or if the person would be subjected to torture or cruel, inhuman or degrading punishment\textsuperscript{32}, or if the person has not achieved or would not receive minimum guarantees in criminal proceedings as contained in the Article 14 of the International Covenant on Civil and political Rights, 1996\textsuperscript{33}.

The Model Treaty indicates that there has also been a clear intention on the part of treaty drafters to rely on the provisions of a rights-protecting instrument, such as an

\textsuperscript{25} U.N. Model Treaty, 1990, Art 11
\textsuperscript{26} Ibid Art 3(2)
\textsuperscript{27} Dugard and Van den Wyngaert, ‘Reconciling Extradition with Human Rights’(1998) American Journal of International Law, 192
\textsuperscript{28} Adopted on 10\textsuperscript{th} Dec 1984, 359 UNTS 273
\textsuperscript{30} 14\textsuperscript{th} Dec 1990, GA/45/116
\textsuperscript{31} Art 3(b) U.N. Model Treaty, 1990,
\textsuperscript{32} Ibid, Art 3(f)
\textsuperscript{33} Ibid
international human rights convention, to bolster the protection of human rights within the extradition regime established by the treaty.\textsuperscript{34}

The Model Treaty begins provides for a general obligation to extradite, provided the extraditable offence is serious enough to warrant extradition. Seriousness is usually measured by the term of imprisonment attached to the offence, although here.\textsuperscript{35}

The Model Treaty then provides for several exceptions to the extradition obligation, seven of which are mandatory\textsuperscript{36} in nature while eight are optional\textsuperscript{37}. It is observed that these exceptions generally give “less weight … to traditional obstacles to co-operation like fiscal offences and the nationality of the offender, while more systematic attention (is) paid to the protection of human rights.”\textsuperscript{38} Mandatory exceptions in the Model Treaty include traditional extradition exceptions for political offences,\textsuperscript{39} military offences\textsuperscript{40} and offences for which there has been a final judgment in the requested state.\textsuperscript{41} With respect to the first, the footnote suggests the possibility of exemption from the political offence exception for any offences where an aut dedere aut judicare obligation has been assumed under an international convention such as the crime of genocides, or where the parties have agreed the offence is not political for the purposes of extradition.\textsuperscript{42} Model Treaty also bars extradition in situations where the requested individual has “become immune from prosecution or punishment for any reason,

\textsuperscript{34} Joanna Harrington, Background paper on Human Rights Exceptions to Extradition Moving Beyond Risks of Torture and Ill-treatment available at http://www.isrcl.org/Papers/Harrington.pdf available accessed on 9th Jul 2012.
\textsuperscript{35} The Model Treaty however refrains from deciding what is (and is not) the appropriate measure, leaving states to decide whether an extraditable offence is one punishable by one or two years’ imprisonment Art 2 UN Model Treaty on Extradition, 1990.
\textsuperscript{36} Art 3(a)(g).
\textsuperscript{37} Art 4(a)(h).
\textsuperscript{39} Art 3(a).
\textsuperscript{40} Art 3(c)
\textsuperscript{41} Art 3(d)
\textsuperscript{42} Article VII of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, 78 UNTS 277, (1951) 45 AJIL Supp. 6 provides that: “Genocide and the other acts enumerated in Article III (of the Genocide Convention) shall not be considered as political crimes for the purpose of extradition.”
including lapse of time or amnesty,"\(^{43}\) and, with respect to trials in absentia, where: the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he has not had or will not have the opportunity to have the case retried in his or her presence.\(^ {44}\)

The Model Treaty also contains a discrimination clause\(^ {45}\) which improves on its European and Inter-American cousins by extending the extradition exception to risks of discrimination based on the grounds of “ethnic origin, sex or status” in addition to race, religion, nationality or political opinion.\(^ {46}\)

The most innovative of the mandatory exceptions contained in the Model Treaty is that contained in Article 3(f) which bars extradition:\(^ {47}\)If the person whose extradition is requested has been or would be subjected in the requesting state to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights (Art 14).\(^ {48}\) By expressly incorporating the ICCPR’s fair trial guarantees in Article 14, while also implicitly incorporating the ICCPR prohibition on torture and cruel treatment,\(^ {49}\) Article 3(f) expressly acknowledges and accepts a role for human rights in extradition that goes beyond providing an extradition exception where there is a real risk of serious ill-treatment in the requesting state.\(^ {50}\) It also implicitly adds to the prohibition on extradition that is contained in Article 3 of the UN Convention against Torture and Other Cruel,

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\(^{43}\) Art 3(e) of UN Model Treaty on Extradition. Although a footnote suggests that “some countries may wish to make this an optional ground for refusal.”

\(^{44}\) Art 3(g) UN Model Treaty on Extradition.

\(^{45}\) Art 3(b) UN Model Treaty on Extradition.

\(^{46}\) Joanna Harrington, Background paper on Human Rights Exceptions to Extradition Moving Beyond Risks of Torture and Ill-treatment available at http://www.isrcl.org/Papers/Harrington.pdf available accessed on 9th Jul 2012

\(^{47}\) Ibid

\(^{48}\) Ibid

\(^{49}\) Art 7 of the ICCPR provides that “No-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

\(^{50}\) Joanna Harrington, Background paper on Human Rights Exceptions to Extradition Moving Beyond Risks of Torture and Ill-treatment available at http://www.isrcl.org/Papers/Harrington.pdf available accessed on 9th Jul 2012
Inhuman or Degrading Treatment or Punishment (UNCAT),\textsuperscript{51} which despite its full title, only bars extradition where there is a danger of torture, and not where there is a danger of other forms of ill-treatment.\textsuperscript{52} Moreover, the Model Treaty’s Article 3(f) makes past incidences of unfair punishments, as well as past incidences of unfair trials, sufficient grounds in themselves for refusing extradition and unlike the UNCAT prohibition, there is no obligation to link the past incident with an ongoing or future threat of unfairness.\textsuperscript{53}

The optional exceptions listed out by the Model Treaty includes a pending prosecution clause,\textsuperscript{54} a death penalty clause,\textsuperscript{55} and an extraordinary and \textit{ad hoc} tribunals clause.\textsuperscript{56} A footnote to the Model Treaty further suggests that the restriction on extradition where there is a real risk of the imposition of the death penalty in the requesting state could also be applied to “the imposition of a life, or indeterminate, sentence.” The Model Treaty also contains an optional nationality clause, with the additional requirement to prosecute in the requested state when extradition is refused,\textsuperscript{57} and an optional humanitarian clause to take into account an extraditee’s “age, health or other personal circumstances.”\textsuperscript{58} It also suggests that extradition may be barred if the offence was committed within the territory of the requested state,\textsuperscript{59} or committed outside the territory of either state,\textsuperscript{60} or if the requested state, having jurisdiction over the offence, has decided to refrain from prosecuting the extraditee.\textsuperscript{61} No other exceptions are found in the text of the Model Treaty, although the footnotes provide an additional optional exception for fiscal offences, as well as a sufficient evidence clause to bar extradition where there is insufficient proof according to the evidentiary standards of the requested state.

\textsuperscript{52} Joanna Harrington, Background paper on Human Rights Exceptions to Extradition Moving Beyond Risks of Torture and Ill-treatment available at http://www.isrcl.org/Papers/Harrington.pdfavailable accessed on 9th Jul 2012
\textsuperscript{53} ibid
\textsuperscript{54} Art 4 (c) UN Model Treaty on Extradition.
\textsuperscript{55} Art 4 (d) UN Model Treaty on Extradition.
\textsuperscript{56} Art 4 (g) UN Model Treaty on Extradition.
\textsuperscript{57} Art 4 (a) UN Model Treaty on Extradition.
\textsuperscript{58} Art 4 (h) UN Model Treaty on Extradition,,
\textsuperscript{59} Art 4 (f) UN Model Treaty on Extradition.
\textsuperscript{60} Art 4 (e) UN Model Treaty on Extradition.
\textsuperscript{61} Art 4 (b) UN Model Treaty on Extradition,
A Critical Analysis of the Model Treaty

According to the applicable UN Manual, the Model Treaty on Extradition is “an important innovation in international co-operation in criminal matters, because of both its contents and its structure” and, as a summary of the key extradition exceptions applicable at the end of the twentieth century, it does an admirable job. It is also clear, however, that the content and structure of the Model Treaty builds on developments and trends in both Europe and the Americas and as such, marks not so much a departure from the old notions of extradition law as a distillation of the standards which may now have become acceptable to a wide range of states.

Viewed from a human rights perspective, the Model Treaty offers both innovation and limitation. While the clause incorporating the human rights standards of the ICCPR is a welcome addition to the UN’s list of exceptions to extradition, its application is immediately limited by the inclusion of a separate death penalty clause, since this suggests that the death penalty, in and of itself, cannot be considered a form of torture or cruel, inhuman or degrading treatment or punishment. This limitation also extends to the suggested exception for life and indeterminate prison sentences, but would not extend to unmentioned penalties, such as a mandatory sentence of the “three strikes” variety, indicating a rather haphazard approach to the protection of human rights. There are also complications with the fair trial aspect of the ICCPR incorporation clause, given that its Article 14 guarantees overlap with several of the Model Treaty’s specific fair trial exceptions. The trial in absentia clause is one example. Under the ICCPR incorporation clause, extradition is barred absolutely if the extraditee was tried in absentia since Article 14(3)(d) of the ICCPR provides that everyone has a right “to be tried in their presence.” But under the specific trials in absentia exception, extradition can proceed even if the accused was not tried in his or her presence so long as he or she will be present at the re-
trial. The dilemma as to which clause should take precedence is simply not addressed by the Model Treaty.

Other exceptions also raise concerns about the Model Treaty’s internal inconsistencies in the protections accorded to human rights. Take, for example, the discrimination clause which has been extended to apply to discrimination on the grounds of “ethnic origin, sex or status” and yet stands strangely beside a nationality clause which continues to discriminate between a country’s nationals and its non-national permanent residents on the very basis of status. This can be contrasted with the long-standing practice adopted by Scandinavian countries to treat resident aliens and nationals alike in matters of extradition.65 Or take the political offence exception, which timidly avoids stating that crimes such as genocide are not political for the purposes of extradition, even though this issue was decided long ago by the Genocide Convention.66

What is most evident by this examination of the protection accorded to human rights within the four corners of an extradition treaty drafted in the 1990s is the remarkable resistance of traditional extradition exceptions to any attempt to replace them with an all-encompassing “human rights exception”. States seem on the whole very reluctant to move away from the traditional, and more specific, exceptions for say, political offences, the rights of the defence, and discrimination, and even in the more recent European Union Convention on Extradition,67 an alternative to outright abolition of the political offence exception had to be provided in order to facilitate the treaty’s adoption. While often described as traditional exceptions to extradition, these exceptions also support a contemporary role for the protection of some human rights in matters of extradition. The key limitation, however, is that the exception be incorporated into the terms of the applicable extradition treaty, hence the need to consider developments in both constitutional law and international human rights law which also suggest a greater

65 As indicated in the Scandinavian reservations to the European Convention on Extradition.
67 Adopted 27 September 1996, OJ 96/C 313/02. The Convention’s Explanatory Report can be found in OJ 97/C 191/03.
role for human rights protections in matters of extradition. Its general format of obligation then exception is the same as that used in all the major multilateral treaties of the post-war period and its use of footnotes for additional exceptions suggests that a consensus has yet to be reached.

(ii) Model Law on Extradition, 2004

The following exceptions to extradition provided under the model law have a bearing on human right protection to fugitive criminals. They are, Offences of Political Nature,\(^{68}\) Discrimination clause,\(^{69}\) Torture, Cruel, Inhuman or Degrading Treatment or Punishment,\(^{70}\) Fair trial standards-Judgement in absentia-Extraordinary or ad hoc court or tribunal,\(^{71}\) Ne bis in idem,\(^{72}\) Statute of limitation,\(^{73}\) Military offences,\(^{74}\) Nationality,\(^{75}\) Death penalty\(^{76}\).

More recently, courts and tribunals, both international and national have recognized that the possible violation of a person’s in the requesting state may justify refusing extradition. This development is significant because it indicates a determination on the part of courts to give preeminence to the protection of human rights over the obligation of a state to extradite under a concluded treaty\(^{77}\).

Accepting that human right jurisprudence has at present a significant impact on extradition process, a basic question that arises is, whether extradition request will suffer a negative outcome because of any violation of every acknowledged human right. As per common understanding, human rights, as enumerated in international instruments, usually fall into three categories. The first category includes the rights, like, right to privacy, the freedom of thoughts, conscience and religion, freedom of expression and of assembly which may be restricted for certain purposes, such as public safety, the

\(^{68}\) Sec. 4  
\(^{69}\) Sec. 5  
\(^{70}\) Sec. 6  
\(^{71}\) Sec. 7  
\(^{72}\) Sec. 8  
\(^{73}\) Sec. 9  
\(^{74}\) Sec. 10  
\(^{75}\) Sec. 11  
\(^{76}\) Sec. 12  
\(^{77}\) Ibid
protection of public order, etc. In the second category we find those rights which can be suspended during emergency situations but no derogation is allowed during normal circumstances. These rights include right to personal freedom and right to a fair trial. And the third category of rights is those which can never be derogated, not even in times of war and public emergency. They are called absolute rights and include the right to life, right to freedom from torture or inhuman or degrading treatment or punishment.

A look at international development reveals that there is so far no consensus about any distinct group of human rights as constituting the core set of human rights. However, it is generally believed that normally extradition can be challenged when there are strong reasons to believe that fugitive’s substantive rights falling into the second and third category will be violated if he were to be returned. 

Currently, the two predominant circumstances which are seriously taken note of while considering extradition requests from human rights perspective are, imposition of death penalty and infliction of torture in the requesting state. Therefore, in the following pages special attention is paid to discuss these two issues. In the ensuing discussion on the aspect of torture as a human right to barrier to extradition, even the death row phenomenon is examined as an issue concerning torture. So far as the issue- whether the infliction of death penalty per se constituted human right barrier to extradition is –that is dealt separately.

5.5 DEATH PENALTY AND TORTURE AS BARRIERS TO EXTERRADITION

5.5.1 Capital Punishment or Death Penalty

By the end of the twentieth century, over half of all countries in the world had abolished the death penalty in law or practice. Amnesty International reports that, in recent years, an average of two countries annually have abolished the death penalty in law, or, having already done so for ordinary offenses, have proceeded to abolish it for all offenses. By the end of 2010, 96 countries had abolished the death penalty for all crimes,

<http://www.amnesty.org/ailib/intcam/dp/abrelist.htm>
and two thirds of all nations were considered abolitionist either in law or in practice. Even those states that retain capital punishment in practice they have not executed anyone during the past decade or more, or have made an international commitment not to carry out any executions.

Capital punishment is sought to be abolished or at least curtailed by many international human rights treaties.

(i) At global level

The International Covenant on Civil and Political Rights\(^{80}\) (or "ICCPR"), adopted by the U.N. in 1966, proclaims "the inherent right to life" of every human being. It placed restrictions and safeguards on the death penalty in countries which have not abolished it. Thus in those countries that retained the capital punishment a "sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime .... This penalty can only be carried out pursuant to a final judgement rendered by a competent court." It explicitly states that a "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." Nothing in the article "shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the [Covenant]."

Second Optional Protocol to ICCPR adopted in 1989 is the most significant attempt of UN to abolish capital punishment\(^{81}\) which while acknowledging the world wide effort to abolish capital punishment for all purposes sought each state party to "take all necessary measures to abolish the death penalty within its jurisdiction.

(ii) At Regional level

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At regional level both the American Convention as well as the European Convention on Human Rights, lend further support to the global initiative to abolish death penalty.

The American Convention on Human Rights\textsuperscript{82} (or "Convention") forbids capital punishment for "political offenses or related common crimes."\textsuperscript{83} It prohibits the execution of "persons who, at the time the crime was committed, were under eighteen years of age or over seventy years of age" and pregnant women.\textsuperscript{84} The Convention mandates that "countries that have not abolished the death penalty [may impose it] only for the most serious crimes" and are not to extend such punishment "to crimes to which it does not presently apply."\textsuperscript{85} It further mandates that the death penalty "shall not be reestablished in states that have abolished it." Subsequently, in 1990, the General Assembly of the Organization of American States adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty\textsuperscript{86} ("Protocol"). Referring to the recognition of the right to life and restrictions on the application of the death penalty in Article 4 of the American Convention on Human Rights, the Protocol obligates states that are parties to it not to "apply the death penalty in their territory to any person subject to their jurisdiction."\textsuperscript{87} The parties are, however, allowed to declare at the time of ratification or accession that "they reserve The right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature."\textsuperscript{88}

Europe remains in the forefront of the global movement to abolish the death penalty.\textsuperscript{89} The European Convention for the Protection of Human Rights and Fundamental Freedoms,\textsuperscript{89} (ECHR) which entered into force in 1953, recognized capital

\textsuperscript{83} Ibid, Art. 4(4), 1144 U.N.T.S. at 145.
\textsuperscript{84} Ibid at 146.
\textsuperscript{86} Ibid, Art. 1, 29 I.L.M. at 1448.
\textsuperscript{87} Ibid, Art. 2, 29 I.L.M. at 1448
punishment as an exception to the right to life. Yet European states acknowledged in 1985 the trend toward abolition of capital punishment by adopting Protocol No. 6 to the European Convention Concerning the Abolition of the Death Penalty ("Protocol No. 6"). Protocol 6 calls for the abolition of the death penalty in times of peace, explicitly stating that "[t]he death penalty shall be abolished.

Another promising development was the call in November 1999 by the African Commission on Human and Peoples' Rights ("African Commission") for a moratorium on executions.

On perusal of the above described international conventions it is obvious that there are few but nevertheless significant human right instruments that prohibit death penalty. Yet, we cannot assert that there is no general rule of prohibition of death penalty as there is no strong customary principle as such. The diverging views over the retention of death penalty seem irreconcilably divided.

The arguments usually forwarded by those countries have been as follows;

i) Insisting on the death penalty exception hampers the smooth flow of extradition between states thereby diminishing the spirit of international cooperation to suppress crime.

ii) It interferes with the judicial discretion of the requesting state thereby encroaching upon the sovereignty of another state.

iii) Diplomatic treaties and the judicial system are two different and independent institutions. Whereas the requesting state may assure the requested state that capital punishment will not be imposed, the court may go ahead and impose it thereby straining the relationship and cooperation of the two countries.

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According to UN Convention against Torture, 1984, torture is any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person for such purpose as obtaining from him or a third person information or confession punishing him for an act he or third person has committed or intimidating or coercing him or third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of public official or other person acting as an official in an official capacity. It does not include pain and suffering arising only from inherent in or incidental to lawful sanctions. This latter statement raises the contested issue whether the definition of torture encompasses judicial corporal punishment or the death penalty. Some states have used this statement to argue that this wording by its very existence legitimizes the use of the death penalty or corporal punishment. Others disagree saying these provisions are without prejudice to other international treaties which safeguard the right to life and the security of a person. In fact, in some cases, international and regional institutions have found that certain forms of corporal punishment do amount to torture or inhuman and degrading treatment.

However, due to a growing trend toward abolition of capital punishment, retentionist states, such as India and the United States, encounter resistance to their extradition requests from surrendering states that have abolished the death penalty. Consequently, this situation results in one of the following three possible outcomes: (1) letters from relevant legal representatives of the requesting state giving assurances that the death penalty will not be imposed; (2) bilateral extradition treaties explicitly including the promise from the requesting state not to apply the death penalty after the extradition; or (3) a refusal by the state to extradite. Indeed, clauses providing for assurances have become commonplace as part of model extradition treaties adopted by the United Nations and other international organizations.

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Many countries now refuse to extradite fugitives to retentionist states in the absence of assurances that the death penalty will not be sought. This practice derives from two separate, but related developments. First, international tribunals and national courts have issued a series of decisions condemning the extradition of suspects from abolitionist countries to retentionist countries. Second, inter-governmental organizations such as the European Union ("EU") and individual nations such as Mexico have long opposed the death penalty as a matter of principle. The EU, Mexico, and many other abolitionist nations have made abolition of the death penalty one of the key items on their foreign policy agenda.\(^96\)

In reality, the exception becomes a mandatory one as most countries in Western Europe for example refuse to surrender a fugitive if he/she faces the risk of being sentenced to death. Some examples of this exception include:\(^97\)

(i) In the recent past, Uganda made a request to the United Kingdom through the diplomatic channel for the extradition of two persons involved in a murder case. They faced the death penalty in Uganda if convicted. The request was not granted on the grounds that the United Kingdom had abolished the death penalty. The two fugitives are still believed to be at large in the United Kingdom.

(ii) In a recent case where an Iranian fugitive was sought by both Japan and Iran from the Netherlands the latter’s government granted extradition to Japan, because the offender faced a death penalty in his mother country while Japan gave an assurance that the prosecutor would not seek a death penalty and therefore it would not be imposed.

National courts, such as the Supreme Court of Canada, have likewise held that extraditions of suspects to face the death penalty are constitutionally prohibited. Eg

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\(^97\) Ibid
Minister of Justice Vs Burns and Rafay. Burns and Rafay are both Canadians who were 18 years old at the time they allegedly murdered Rafay's parents and sister in the state of Washington. They then fled to Canada. Washington charged them with first-degree murder, a capital crime.

The Canadian Minister of Justice signed an extradition order for both men, refusing to seek assurances that the death penalty would not be imposed upon Burns' and Rafay's return to the United States. Burns and Rafay appealed. After commenting on recent exonerations of death row inmates in the United States, reviewing the "international trend against the death penalty," and other practical problems in the administration of the death penalty, the Supreme Court of Canada ultimately held that article 7 of the Canadian Charter of Rights and Freedoms precluded the defendants' extradition, absent assurances the United States would not seek the death penalty.

National courts in The Netherlands, Switzerland, and South Africa have likewise required assurances that the nation requesting extradition would not impose the death penalty. Indeed, the Italian Constitutional Court has gone one step further, refusing to extradite suspects even in the face of assurances. In the case of Pietro Venezia, the Italian Constitutional Court held that under no circumstances would Italy extradite an individual to a country where the death penalty existed, despite the United States' assurances.

In R (Amin) Vs Secretary of State for the Home Department, European Court of Human Rights held that extradition in circumstances which put the life of defendant in jeopardy may violate Art 2 of European Convention on Human Rights.

Human Rights Committee response about consideration of death penalty as barrier to extradition:

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98 2001 SCC 7 (S.C. Canada, 22 March 2001)
100 (2004) 2A C 653
The UN Human Rights Committee has had several occasions to address the subject of capital punishment in situations involving requests for extradition. Since the Committee's function is related to parties' compliance with the Civil and Political Rights Covenant, the specific issues it has addressed in the context of extradition are: (1) whether extradition of an individual to a country where he or she would face the death penalty would constitute violation by the sending state of its obligations under the Civil and Political Rights Covenant, and (2) whether the "death row phenomenon" is in itself a violation of the Civil and Political Rights Covenant. A few complaints under the Second Optional Protocol procedure and the Committee's views on a few other communications will be discussed here.

In *Kindler Vs Canada*,\(^1\) the fugitive, who was extradited by Canada to the United States, claimed that the decision to extradite him violated several articles of the Civil and Political Rights Covenant, including Articles 6 and 7, since he was likely to be executed in the United States. The Committee held that Article 6 of the Civil and Political Rights Covenant did not prohibit capital punishment but, as Article 6(2) restricted the circumstances in which capital punishment might be imposed. In other words, if Kindler "had been exposed, through extradition from Canada, to a real risk of violation of Article 6, paragraph 2, in the United States, that would have entailed a violation by Canada of its obligations under Article 6, paragraph 1."\(^2\)

The Committee held that Article 6 did not "necessarily require Canada to refuse to extradite or to seek assurances."\(^3\) Since the decision to extradite without assurances was not taken by Canada "arbitrarily or summarily," in the light of the reasons given by Canada-"the absence of exceptional circumstances, the availability of due process, and the importance of not providing a safe haven for those accused of or found guilty of murder"-the Committee held that Canada did not violate its obligations under Article 6.

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The Ng Case on 5 November 1993, the Human Rights Committee adopted its views in Ng v. Canada, another Canadian case concerned with the extradition of the claimant to face the death penalty in the State of California in the U.S.A., which was alleged to be in breach of a number of the Covenant stipulations.

In this case, the main thrust of the allegations in this regard revolved around the issue of whether the proposed method of execution by gas asphyxiation would be a breach of Article 7of the Covenant. The Committee pronounced on this issue in the following manner:

In determining whether, in a particular case, the imposition of capital punishment constitutes a violation of Article 7, the Committee will have regard to the relevant personal factors regarding the author, the specific conditions of detention on death row and whether the proposed method of execution is particularly abhorrent. In the instant case, it is contended that execution by gas asphyxiation is contrary to internationally accepted standards of human treatment, and that it amounts to treatment in violation of Article 7 of the Covenant. The Committee begins by noting that whereas Article 6, Paragraph 2, allows for the imposition of the death penalty under certain limited circumstances, any method of execution provided for by law must be designed in such a way as to avoid conflict with Article 7.

The committee is aware that, by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of Article 7 of the Covenant; on the other hand, Article 6, Paragraph 2, permits the imposition of capital punishment for the most serious crimes. Nonetheless, the Committee reaffirms, as it did in its general comment 20 (44) on Article 7 of the Covenant that, when imposing capital punishment, the execution of the sentence “must be carried out in such a way as to the least possible physical and mental suffering”. In the present case, the author has provided detailed information that execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as

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swiftly as possible, as asphyxiation by cyanide gas may take over ten minutes. In the instant case and on the basis of the information before it, the Committee concludes that execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of “least possible physical and mental suffering”, and constitutes cruel and inhuman treatment, in violation of Article 7 of the Covenant. Accordingly, Canada, which could reasonably foresee that Mr. Ng, if sentenced to death, would be executed in a way that amounts to a violation of Article 7, failed to comply with its obligations under the Covenant, by extradition Mr. Ng without having sought and received assurances that he would not be executed.  

In a fairly recent case, in Judge Vs Canada, the Human Rights Committee found that Canada had violated article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) by deporting Roger Judge to the United States to face a death sentence in 1998. Roger Judge had been sentenced to death in Pennsylvania, but escaped from prison and fled to Canada. While there, he was convicted of two robberies and sentenced to ten years. In 1998, Canada deported him to the United States to serve his death sentence. The Committee concluded that an abolitionist country violates the right to life protected by article 6 when it deports a detainee to the United States without seeking assurances that the death penalty will not be carried out. The Committee's decision did not consider whether incarceration on death row was cruel, inhuman, or degrading.

5.5.2 B. Prohibition of Torture

The prohibition of torture is found in a number of international human rights and humanitarian treaties and is also regarded as a principle of general international law. The prohibition of torture is also considered to carry a special status in general international law, that of jus cogens, which is a 'peremptory norm' of general international law.

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108 Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para 10. See also, International Criminal Tribunal for the former Yugoslavia, Prosecutor v Delalic and Others, Case IT-96-21-T, Judgment 16 November 1998, paras 452, 454; Prosecutor v Furundzija, Case IT-95-
General international law is binding on all states, even if they have not ratified a particular treaty. Rules of *jus cogens* cannot be contradicted by treaty law or by other rules of international law.

The prohibition of torture is found in Article 5 of the Universal Declaration of Human Rights (1948) and a number of international and regional human rights treaties. The vast majority of states have ratified treaties that contain provisions that prohibit torture and other forms of ill-treatment. These include: the International Covenant on Civil and Political Rights (1966),\(^{109}\) the European Convention on Human Rights (1950),\(^ {110}\) the American Convention on Human Rights (1978)\(^ {111}\) and the African Charter on Human and People's Rights (1981)\(^ {112}\). A number of treaties have also been drawn up specifically to combat torture. These are:

- The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (Convention against Torture);
- The European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment 1987;
- The Inter-American Convention to Prevent and Punish Torture 1985.

International Covenant on Civil and Political Rights, 1966\(^ {113}\)

**Article 7**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

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\(^{109}\) Arts 7 and 10(1)ICCPR

\(^{110}\) Art 3 ECHR.

\(^{111}\) Art 5(2) ACHR.

\(^{112}\) Art 5 African Charter

\(^{113}\) Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966. Entry into force 23 March 1976.
Article 3
No one shall be subjected to torture or to inhuman or degrading treatment or punishment
American Convention on Human Rights (Pact of San José, Costa Rica, 1969)

Article 5 Right to Humane Treatment:

- Every person has the right to have his physical, mental, and moral integrity respected.
- No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.
- All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
- Punishment shall not be extended to any person other than the criminal.
- Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
- Minors while subject to criminal proceedings shall be separated from adults and brought before specialised tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
- Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

Rome Statute of the International Criminal Court, 1998\(^\text{114}\)

Article 7 Crimes against humanity

For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

"Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused;

except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

The absolute prohibition of torture and ill-treatment is underlined by its non-derogable status in human rights law. There are no circumstances in which states can set aside or restrict this obligation, even in times of war or other emergency threatening the life of the nation, which may justify the suspension or limitation of some other rights. 115 States are also restricted from making derogations which may put individuals at risk of torture or ill-treatment -- for example, by allowing excessive periods of incommunicado detention or denying a detainee prompt access to a court. 116 This prohibition operates irrespective of circumstances or attributes, such as the status of the victim or, if he or she is a criminal suspect, upon the crimes that the victim is suspected of having committed. 117

State officials are prohibited from inflicting, instigating or tolerating the torture or other cruel, inhuman or degrading treatment or punishment of any person. An order from a superior officer or a public authority may not be invoked as a justification for torture. 118

States are also required to ensure that all acts of torture are offences under their criminal

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115 Art 4 of the ICCPR, Article 15 of the ECHR and Article 27 of the ACHR provide, in certain strictly defined circumstances, that states may derogate from certain specified obligations, to the extent that is strictly required by the exigencies of the situation. No derogations are permitted with respect to the Articles prohibiting torture or cruel, inhuman or degrading treatment or punishment. The African Charter contains no emergency clause and therefore allows no such derogation.


118 Art 2, the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This principle was also enshrined in the Charter of the Nuremberg and Tokyo Tribunals 1946, and subsequently reaffirmed by the UN General Assembly. It can also be found in the Statutes of the international criminal tribunals for Rwanda and Yugoslavia and, with minor modification in the Statute of the International Criminal Court.
law, establish criminal jurisdiction over such acts, investigate all such acts and hold those responsible for committing them to account.\textsuperscript{119}

\textit{The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (popularly referred to as CAT):}

This convention deserves more elaborate examination because adoption of CAT in the year 1984\textsuperscript{120} is a concrete move by United Nations in the direction of developing international practices towards prohibition of torture and other cruel, inhuman or degrading treatment. The Optional Protocol of CAT, 2002 (OPCAT)\textsuperscript{121} aims to create global system of inspection of places where torture and other cruel, inhuman and degrading treatment or punishment takes place. CAT stands out for its exclusive focus on the problem of torture.

CAT is the first international instrument which defined ‘Torture’. Torture as defined in the Declaration was criticized on various counts. Hence CAT provided a more elaborate definition of torture which appears in Art 1.

\textit{General Obligations of State Parties to CAT- An Overview:}

- Each State party is obliged to take effective legislative, administrative, judicial or other measures to prevent acts of torture. The prohibition against torture shall be absolute and hence states are obliged to uphold the prohibition even in a state of war and in other exceptional circumstances (article 2);\textsuperscript{122}

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\textsuperscript{119} Art 4, 5, 7, 12 and 13 the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See also Human Rights Committee General Comment 20, paras 13 and 14.
\textsuperscript{120} Entered into force in 1987. Text available at \url{http://www2.ohchr.org/english/law/cat.html}
\textsuperscript{121} Entered into force in 2006. Text of protocol available at \url{http://www2.ohchr.org/english/law/cat-one.html}
\textsuperscript{122} Art 2:
1 Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.
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• No State party may expel or extradite a person to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture (article 3);\footnote{Art 3 1.No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.}

• States Parties Each State must ensure that acts of torture are serious criminal offences within its legal system (article 4);\footnote{Art 4 Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties whichtake into account their grave}

• With regard to prohibited offence of torture, each state party is expected to assume jurisdiction not only on the basis of principle of territorial jurisdiction but also on the basis principles of jurisdiction, namely, principle of nationality and principle of passive personality (Art 5);\footnote{Art 5 1.Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State (b) When the alleged offender is a national of that State; 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article 3. This Convention does not exclude any criminal jurisdiction exercised in accordance}

• Each State party shall, on certain conditions, take a person suspected of the offence of torture into custody and make a preliminary inquiry into the facts (article 6);\footnote{Art 6 1.Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted 2. Such State shall immediately make a preliminary inquiry into the facts 3. Any person in custody pursuant to paragraph I of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

\footnote{123}
- State party shall either extradite a person suspected of the offence of torture or submit the case to its own authorities for prosecution (article 7);\textsuperscript{127}

- Where there are reasonable grounds to believe that an act of torture has been committed, every State party shall ensure that its authorities make investigations (article 12);\textsuperscript{128}

- State party shall ensure that an individual who alleges that he has been subjected to torture will have his case examined by the competent authorities (Article 13);\textsuperscript{129}

**Specific Provisions of CAT on Extradition**

So far as extradition is concerned, the articles which expressly mention about extradition are, Articles 3, 5, 6, 7, 8 and 16. According to Article 3 of CAT where there are substantial grounds for believing that any person would be in danger of being subjected to torture in case he is extradited, expelled or returned (refouled), the state parties should not extradite, expel or return such person. For the purpose of determining whether there are such grounds, all relevant considerations including, where applicable,
the existence of a consistent pattern of gross, flagrant, or mass violations of human rights in the state concerned.

According to Article 5, state parties have to take measures to establish jurisdiction over the offence of torture when such offence is committed within its territory under its jurisdiction (includes even ships or aircraft registered on its name) or when the alleged criminal or victim of such offence is its national. Also, when the offender alleged to have committed the act of torture is present in its territory and it does not extradite him to any state which has the jurisdictional authority to prosecute him, then that state itself must take steps to establish jurisdiction over such an offense.

According to Article 6, if the state party in whose territory the person who allegedly committed the prohibited offence of torture is present, when satisfied about circumstances so warrant shall take him into custody or take other legal measures and continue the same till such time only as is necessary to enable institution of criminal or extradition proceedings and immediately make preliminary enquiry into facts. The matter of custody should immediately be intimated to those states which have jurisdictional basis over the offence as per the terms of Article 5. The findings of the preliminary enquiry also must be communicated to them and shall also let them know if it intends to exercise jurisdiction over the offender.

According to Article 7, when the state party does not extradite the alleged offender to extradite to the countries which have jurisdictional basis to try the offence according to the terms of Article 5 has to submit the case to competent authorities to prosecute. So far as the person against whom proceedings are brought is concerned, Article 7 (3) prescribes that such person shall be guaranteed fair treatment in all stages of proceedings.

According to Article 8, the offence of torture (including acts of attempt to torture, compliance with or participation in acts of torture) is deemed to be extraditable offence in any extradition treaty existing between state parties. They are to undertake measures to include the said offences in the list of extraditable offences in every extradition treaty.
which they conclude between them. Further, it says that in situations where there is no extradition treaty concluded but a request for extradition has been made, CAT may be considered as the legal basis for considering the request of extradition. A further clarification is that state parties which do not make extradition conditional upon the existence of a treaty nevertheless must recognize the prohibited offences as extraditable offence between themselves subject to the conditions prescribed by the law of the requested state.

According to Article 8, for the purpose of extradition, the prohibited offence of torture must be deemed to have occurred not only in the state party in which territory the offense has been committed but even in those state parties whose nationality is possessed either by the offender or by the victims of the offence.

Article 16 deals with the obligation of states to prevent other acts of cruel, inhuman or degrading treatment or punishment. That means the Convention has not kept the acts of cruel, inhuman or degrading treatment or punishment on the same pedestal of act of torture. While the latter is absolutely prohibited, the former need only to be prevented. The Convention has not established any linkages whatever between extradition and acts of cruel, inhuman or degrading treatment or punishment. However, it has not kept itself a barrier to any other international instruments or national law which might establish such linkage.  

**Difference between Torture and other forms of `cruel, inhuman or degrading treatment or Punishment**

The Convention defines ‘torture’ thus:

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130 Art. 16 1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.
.... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected or having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.\textsuperscript{131}

The exact boundaries between 'torture' and other forms of 'cruel, inhuman or degrading treatment or punishment' however, are often difficult to identify and may depend on the particular circumstances of the case and the characteristics of the particular victim. Both terms cover mental and physical ill-treatment that has been intentionally inflicted by, or with the consent or acquiescence of, the state authorities. The 'essential elements' of what constitutes torture contained in Article 1 of the Convention against Torture include:

The infliction of severe mental or physical pain or suffering;
By or with the consent or acquiescence of the state authorities;
Cruel treatment, and inhuman or degrading treatment or punishment are also legal terms. These refer to ill-treatment that does not have to be inflicted for a specific purpose, but there does have to be an intent to expose individuals to the conditions which amount to or result in the ill-treatment. Exposing a person to conditions reasonably believed to constitute ill-treatment will entail responsibility for its infliction. Degrading treatment may involve pain or suffering less severe than for torture or cruel or inhuman treatment and will usually involve humiliation and debasement of the victim.

It is often difficult to identify the exact boundaries between the different forms of ill-treatment as this requires an assessment about degrees of suffering that may depend on the particular circumstances of the case and the characteristics of the particular victim. In some cases, certain forms of ill-treatment or certain aspects of detention which would not constitute torture on their own may do so in combination with each other. Ill-treatment is,

\textsuperscript{131} Art 1.
however, prohibited under international law and even where the treatment does not have the purposive element or, as far as degrading treatment is concerned, is not considered severe enough (in legal terms) to amount to torture, it may still amount to prohibited ill-treatment.\textsuperscript{132}

\section*{5.6 CAT SUPPORTIVE MODEL LAW AND MODEL TREATY OF EXTRADITION:}

Just as the law relating to torture has recognized the importance of making inroads into extradition process, the law relating to extradition also understood the importance of developing torture sensitive extradition law. This is visible from the model law of extradition developed by United Nations.

It is common knowledge that extradition is basically a bilateral process. However, United Nations has taken initiative to provide model law of extradition which can be followed by the countries. Though it is true that it is only a model law and so is not binding, the fact that such law has behind it some international consensus should sufficiently indicate that whatever directions that are set by the Model law of extradition are made with deep consideration.

The General Assembly adopted the Model Treaty on Extradition in 1990\textsuperscript{133} (later amended in 1997\textsuperscript{134}) based on the experiences and trends relating to extradition law around the world.

In 1997, the General Assembly while adopting complementary provision to Model Treaty further instructed Secretary General to elaborate model legislation to assist member states in giving effect to the Model Treaty on Extradition. Section 6 of the final version of Model Law on Extradition, 2000 also provides that Extradition shall not be granted, if, in the view of the [competent authority of country adopting the law], the

\begin{itemize}
\item \textsuperscript{132} Only the practice of the European Court of Human Rights explicitly uses the notion of relative severity of suffering as relevant to the borderline between 'torture' and 'inhuman treatment'. The usual approach is to use the existence or otherwise of the purposive element to determine whether or not the behaviour constitutes torture.
\item \textsuperscript{133} General Assembly Resolution 45/116 of 14 December 1990
\item \textsuperscript{134} General Assembly Resolution 52/88 of 12 December 1997.
\end{itemize}
person sought [has been or] would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment.

The Revised Manual on the Model Treaty on Extradition (adopted in Dec 2002) in its comment on art 3 (f): Torture, cruel, inhuman or degrading treatment or punishment and minimum guarantees in criminal proceedings maintained that Extradition shall not be granted (f) If the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in Art 14 of the International Covenant on Civil and Political Rights, as

135 Paragraph 57
136 Art 4 deals with optional grounds of refusal of extradition
137 Paragraph 58
138 Extradition shall not be granted (f) If the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in Art 14 of the International Covenant on Civil and Political Rights,
unlike the UNCAT prohibition, there is no obligation to link the past incident with an ongoing or future threat of unfairness.  

Other Relevant Standards

In addition to international human rights law and the laws of armed conflict, a considerable range of other rules and standards have been developed to safeguard the right of all people to protection against torture and other forms of ill-treatment. Although not of themselves legally binding, they represent agreed principles which should be adhered to by all states and can provide important guidance for judges and prosecutors. These include:

- Standard Minimum Rules for the Treatment of Prisoners (1957 as amended in 1977)
- Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975)
- Code of Conduct for Law Enforcement Officials (1979)
- Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1982)
- Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment (1988)
- Basic Principles for the Treatment of Prisoners (1990)
- Basic Principles on the Role of Lawyers (1990)

Guidelines on the Role of Prosecutors (1990)
- Rules for the Protection of Juveniles Deprived of their Liberty (1990)
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)
- Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991)
- Declaration on the Protection of All Persons from Enforced Disappearance (1992)
- Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) (1999)

5.7 JUDICIAL DICTA AND TORTURE AS BARRIERS

5.7.1 Death Row Phenomenon gained particular focus because of its ability to bar Extradition.

Death Row Phenomenon

The term “death row phenomenon” grew in recognition following the European Court of Human Rights (ECHR) decision on the extradition case of Jens Soering from the United Kingdom (UK) to the United States (US). The January 14, 2009 report of then Special Rapporteur on Torture, Manfred Nowak, to the United Nations (UN) Council, the Special Rapporteur highlighted the significance of “dynamic interpretation” of human rights treaty law in relation to death penalty issues and the “universal trend towards the abolition of capital punishment.”

Death row phenomenon cases before Human rights Committee typically arise as violations of Articles 7 and 10 of ICCPR.

International jurisprudence on the death row phenomenon was further developed in Pratt et al v. Attorney-General for Jamaica et al.\textsuperscript{142} The Judicial Committee of the Privy Council, in Pratt, recognized the death row phenomenon as a violation of the Jamaican Constitution. The Pratt court ruled that the execution of Earl Pratt and Ivan Morgan, who were on death row for over 15 years, violated the Jamaican Constitution. Pratt and Morgan faced several inexplicable delays while exercising rights for appeal under the domestic laws and individual complaint procedures under the ICCPR Optional Protocol and the Inter-American Commission on Human Rights. The Pratt court found an “instinctive revulsion against” the possibility of execution following the prolonged “agony of suspense for so many years” on death row was a breach of the Jamaican Constitution as inhuman treatment.\textsuperscript{143}

The HRC has held that prolonged delays alone do not constitute per se cruel, inhuman or degrading treatment.\textsuperscript{16} However, in \textit{Francis Vs Jamaica},\textsuperscript{144} the HRC heavily weighed the almost 12 year delay faced by Clement Francis when combined with other factors he faced while on death row.\textsuperscript{145} The Human Right Committee considered (1) the state’s role in the delay, (2) the conditions endured on death row and (3) the mental deterioration suffered on death row. In view of these factors working in concert, the HRC found violations of ICCPR Articles 7 and 10, “accepting the ‘death row phenomenon’ as cruel and inhuman punishment under international law.”\textsuperscript{146}

While the threshold for HRC acceptance of the death row phenomenon remains high, it continues to state that “it would be willing to accept the doctrine under the proper set of facts.”\textsuperscript{147}

\textsuperscript{145} Ibid
\textsuperscript{146} Ibid
It has been seen that the Human Rights Committee has taken a different approach to the issue of the death row phenomenon than several domestic jurisdictions including the Judicial Committee of the Privy Council and more importantly the European Court of Human Rights. The jurisprudence of the Committee has the merit of flexibility with the opportunity of taking into account individual circumstances where “compelling” circumstances dictate.\textsuperscript{148} Some have described the standard set by the Human Rights Committee as “behind” those set by other jurisdictions including the Strasbourg Court. The justification for the restrictive approach towards death row phenomenon is perhaps because the Committee has to take a global view rather than a purely European or specifically local one as in the case of domestic tribunals. Furthermore, it must always be remembered that the European jurisprudence has, of necessity, only arisen in the context of extradition or deportation from a European state to face the death penalty abroad.\textsuperscript{149} Different considerations may apply where an international tribunal seeks to impose its authority and views on the purely internal application of the punishment.\textsuperscript{150}

\textit{The Soering Case}\textsuperscript{151}

Perhaps the most significant recent case illustrating the normative force of the prohibition against torture is, \textit{Soering} Case. In Soering, the Court considered whether the extradition of a capital murder suspect from the United Kingdom to Virginia would violate European Convention proscriptions against "torture\textsuperscript{152} or "inhuman or degrading treatment or punishment," given the conditions existing for death row prisoners in the United States. Soering was a German national attending college in Virginia. When his girlfriend's parents were murdered in March 1985, Soering and his girlfriend fled Virginia. In April 1986, Soering was arrested in England. Following Soering's arrest, the United States government requested extradition pursuant to an existing extradition treaty. Soering began judicial proceedings under the European Convention to block extradition, alleging that his extradition to the United States would violate Article 3 of the European

\textsuperscript{148} IJIL, Vol. 43
\textsuperscript{149} Ibid
\textsuperscript{150} Ibid
\textsuperscript{151} 161 Eur.Ct.HR
\textsuperscript{152} Art 3 of European Convention on Human Rights
Convention because Virginia was seeking the death penalty which might subject him to adverse conditions of Virginia's death row.

The Court first determined that exposure to the "death row phenomenon" would violate Article 3. The Court then held that Article 3 imposes a duty upon contracting states to refuse extradition in cases that present a substantial risk of an Article 3 violation. It maintained that the fact that the violation would take place outside the territory of requested state would not absolve it from the responsibility for any foreseeable consequences of extradition suffered outside. It held that “… it would hardly be compatible with the underlying values of the Convention that common heritage of political traditions, ideals, freedom and the rule of law to which the Preamble refers, where a contracting state knowingly surrenders a fugitive to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the allegedly committed”. Extradition, according to the Court, in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intent of the article, and in the Court’s view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving state by a real risk of exposure to inhumane or degrading treatment or punishment proscribed by that article. In other words, in such a case the requested State incurs responsibility of not extraditing the fugitive if it has reasonable grounds to foresee that a violation of human rights will occur in the requesting state.

In response to the Court’s ruling, the United Kingdom refused to extradite Soering to the United States until the capital murder charges against him were dropped. There are quite a large number of works which support the Soering dictum and the notion that human right considerations, particularly the possibility of exposure to torture, should be taken into consideration in extradition process. Particularly noteworthy is that premier institutions like Institute of International Law, and The International Law


\[154\] The Resolution of The Institute titled 'New Problems of Extradition' adopted in 1983 has a paragraph to this effect See, Year Book of Institute of International Law, Vol 60, 1983 at pp 211 and 306
Association\textsuperscript{155} have approved the line of argument that extradition request must be rejected where there is real risk of violation of human rights of the fugitive criminal.

5.7.2 Other Cases on Torture or Inhuman Treatment as a Human Right Barrier

A series of cases before the European Court of Human Rights provides a survey of the Court’s application of its provision against torture. These examples illustrate how abstract principles have been applied to concrete cases and demonstrate the diminishing threshold of what constitutes torture.

A recent case in 2010 that illustrated the absolute character of prohibition against torture is, \textit{A Vs the Netherlands}.\textsuperscript{156} In this case the European Court maintained that that it is acutely conscious of the difficulties faced by states in protecting their population from terrorist violence and that this makes all the more relevant to underline that Article 3 of European Convention on Human Rights enshrines one of the most fundamental values of democratic societies.

\textit{Chahal case:}

The most significant authority confirming the application of the Soering principle to deportation cases is the ECHR decision in \textit{Chahal Vs UK} \textsuperscript{157}. In that case the ECHR found that there was sufficient evidence of a real risk of ill-treatment and underlined that to return a person in these circumstances would be a breach of Article 3 of ECHR. The application of the Article 3 was absolute. It contained no exceptions within it, nor could it be derogated from in time of national emergency under Article 15:

\textit{“The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these

\textsuperscript{155} International Law Association, Vol 66, Conference Report 4, 1994, pp 142-70
\textsuperscript{156} ECHR (Application Ni 4900.06) Judgment, 20th July 2010
circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.”

This jurisprudence has been substantially strengthened by the recent judgment in *Mamatkulov*, in which the Grand Chamber decided that interim measures of protection requested by the Court are binding on States parties to the ECHR. In *Brada Vs France*, the Committee against Torture (CAT) found that:

“The State party's action in expelling the complainant in the face of the Committee's request for interim measures nullified the effective exercise of the right to complaint conferred by article 22, and has rendered the Committee's final decision on the merits futile and devoid of object. The Committee thus concludes that in expelling the complainant in the circumstances that it did the State party breached its obligations under article 22 of the Convention.”

Extradition is denied by ECHR primarily when there is a real risk of torture. After Soering case, later cases allowed court to clarify the standard for determining as to what constitutes the real risk of torture. The European Court summarized the relevant principles in Mamatkulov case.

“It is the settled law of the court that extradition by contracting state may give rise to an issue under Article 3, and hence engage responsibility of that state under the convention, where substantial grounds have been shown for believing that the person in question would, if extradited, face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. The establishment of such responsibility necessarily involves an assessment of conditions in the requesting country against the standards of art 3 of the convention. In determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to Article 3 exists, the court will assess the same in the light of material placed before it or, if necessary, material obtained proprio motu.

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158 Chahal Case para 80
Since the nature of contracting state’s responsibility under Article 3 lies in the act of exposing an individual to the risk of ill treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the contracting state at the time of extradition. The court however is not precluded, however, from having regard to information which comes to light subsequent to the extradition.”

In the case of *Oldatenko Vs Ukraine* involved the application from Oldakento detained in a penitentiary institution in the Kherson region (Ukraine), objecting his extradition to Turkmenistan. Court noted the existence of numerous and consistent credible reports of torture, routine beatings and use of force against criminal suspects by the Turkmen law-enforcement authorities. There were reports of beatings of those who required medical help and denial of medical assistance. According to the Report of the United Nations Secretary-General, torture was also used as a punishment for persons who had already confessed. Reports equally noted very poor prison conditions, including overcrowding, poor nutrition and untreated diseases. It appeared from different reports that allegations of torture and ill-treatment were not investigated by the competent Turkmen authorities. In the light of these different considerations, taken together, the Court was satisfied that the applicant's extradition to Turkmenistan would be in violation of Article 3.

While the extradition requests are primarily hit by allegations of death penalty or acts of torture, there are also other human right considerations that crop before the court to be considered as barrier for extradition, expulsion or deportation. They include allegations about certain forms of prison sentences or harsh interrogation methods as constituting inhuman and degrading treatment, discrimination, unfair trials etc. To illustrate the same, few cases are mentioned below.

*In Ireland Vs United Kingdom*, intimidatointerrogation techniques are considered as acts of inhuman and degrading treatment.

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162 25 Eur Ct H.R. (ser.A) (1978), 58 ILR 190
In *Khandr Vs Canada*, the interrogation of youth with no access to legal advice, extraction of statements from him regarding serious criminal charges against him, depriving him from sleep etc is held to be against the fundamental Canadian standards relating to treatment of prisoners.

In *Bader Vs Sweden* case, the complainant successfully resisted the attempt of his deportation on the ground that he would be at the risk of meeting death penalty imposed in his absence.

South Africa experienced resistance to its extradition requests due to its practice of apartheid.

Lack of Fair trial as barrier

The right to be tried by a proper court of law and the right to a fair trial are among the most important civil and political rights. It holds a prominent place in a democratic society. On several occasions the European Court of Human Rights has held that these rights hold such a prominent place in a democratic society that they cannot be sacrificed to expediency, not even in the case of very serious crimes, such as terrorism or organized crime. In the Soering Case, the European Court of Human Rights acknowledged that extradition might be refused in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting State. The court, however, emphasized that there would need to be a serious infringement of procedural rights before this matter could amount to a bar on extradition.

Strong evidence for the importance of the “right to fair trial” in the extradition context can be adduced from the 1990 UN Model treaty on Extradition. Article 3 – which lists the “mandatory grounds for refusal of extradition-clearly specifies that extradition shall not be granted ‘if the person … would not receive the minimum guarantees in criminal proceedings as contained in the ICCPR, Article 14’.” It should

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163 Canada (Prime Minister) Vs Khandr, 2010 SCC 3
164 466 EHRR 13
168 *Soering v. United Kingdom*, note 33, para 113.
169 Art 3 (f) Model Treaty on Extradition.
be emphasized that the Model Treaty covers both the situation of a fugitive not having received the minimum guarantees in criminal proceeding and where the fugitive would not receive the minimum guarantees in criminal proceedings.

In practice also many States have subjected the extradition to express condition that the extradite would be accorded a fair trial. For example, when the US extradited Ziad Abu Eain to Israel in 1982, the Executive secured an undertaking from Israel that he would be tried by a civilian court, not a military court, and that he would be accorded all the fair trial rights required by human rights conventions.\(^{170}\) Similarly in February 1996, the Canadian Government extradited a Canadian national, Dennis Hurley, to Mexico on the condition that Mexico agree in writing to take “all reasonable measures” to ensure his safety while in detention there, permit his counsel and Canadian Embassy officials to visit him and communicate with him “at any reasonable time” and “make its best efforts” to ensure that he was brought to trial and tried “expeditiously”.\(^{171}\) In Re Saifi\(^{172}\) the English Divisional court was satisfied that it would be unfair to return the applicant to Indian on the ground that evidence supporting the request for extradition had been obtained in bad faith. The case against the applicant depended upon the evidence of one witness which had been obtained under extreme duress. The court expressed concern that there was a significant risk that misbehavior by the Indian police had so tainted the evidence as to render a fair trial impossible.\(^{173}\)

Ensuring right to a fair trial in the extradition process is often faced with many difficulties particularly in view of the fact that there are variations regarding norms of fairness in criminal trials, since criminal proceedings are essentially the products of a nation’s history, tradition, and legal culture. The interpretation of identical provisions may even vary from State to state, depending on the legal culture, the particularities, and

\(^{170}\) GA Resolution and Notes verbale on the Extradition of Mr. Eain (1982)22 I.L.M 442.
\(^{171}\) Canada, Department of Justice, Press release, Minister of Justice Orders Release of Dennis Hurley to Mexico (27 Feb. 1996).
\(^{172}\) (2001) 4 All ER 168.
the checks and balances within the system of each State.\(^{174}\) However, there are some minimum standards of fair trial that are accepted as binding by virtually all societies, cultures, and legal traditions despite differences in specifications.

### 5.8 RULE OF NON INQUIRY

There are few instances that provide a starker example of the conflict between individual rights and state rights in international law. On the one hand, extradition treaties often oblige states to render individuals suspected of crimes to other states. On the other hand, many times the receiving state has a faulty or affirmatively corrupt justice system.\(^{175}\) Under the rule of non-inquiry, courts while hearing extradition cases are not expected to inquire into the procedures or treatment, including possible physical abuse, that await the extraditee in the requesting state.

Traditionally in many countries including the United States, Canada, and the UK the courts in the extradition process, have followed the doctrine of non-inquiry, which holds that a court hearing a case involving an extradition request must refrain from considering how the extradite will be treated upon extradition; that is, whether the extraditee will receive a fair trial, whether the rights of the extradite will be akin to those usually granted by the requested country, and whether the extradite may be subject to torture upon extradition.\(^{176}\)

One of the main obstacles to application of human rights norms to extradition process has been the rule non-inquiry. This rule of non-inquiry is an obstacle for the extradite to enjoy promotion of human right ideology into extradition law because it can prevent the fugitive from producing evidence to show that he will be denied a fair trial, discriminated against on grounds of race, religion or political opinion, or subjected to inhuman or degrading treatment in the requesting State. For example, in *Neely v.*

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**Henkel** wherein the US Supreme Court established non-inquiry as the American approach to extradition requests from other countries, the defendant Charles Neely whose extradition sought from US to Cuba on a charge of embezzling more than $10,000 was denied such opportunity. Neely argued that the American statute governing extradition did not guarantee him all of the rights, privileges and immunities that are guaranteed in the Constitution. Neely further argued that he would not receive a fair trial if he were to be extradited to Cuba. The Court rejected Neely’s arguments and spelled out the principle of non-inquiry, stating that American citizens committing crimes in other countries must submit to their method of trial and punishment. Likewise in **Jhirad Vs Ferrandina**, the Court stated that “it is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation”. Non-inquiry was recently restated and reaffirmed in **Ahmad Vs Wigen**, in which the fairness of Israel’s system of criminal justice in the occupied territories was questioned in habeas corpus proceedings aimed at preventing the fugitive’s extradition to Israel, the US Court of Appeals for the Second Circuit stated that the interests of international comity are ill served by requiring a foreign nation such as Israel to satisfy a US district court judge about the fairness of its laws and the manner in which they are enforced. The court rules that it was not the duty of the American court system to monitor the integrity of other nations’ courts. A latest example is the 2008 decision by USA in **Munaf Vs Geren**, where the Supreme Court applied this rule to the transfer of two U.S. citizens from U.S. military custody to Iraqi custody for trial in Iraqi courts. In response to their claim that they were likely to be tortured in Iraqi custody, the Court stated that “it is for the political

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177 Neely Vs Henkel, 180 U.S. 109 (1901).
179 536 f.2d 478, 484-85 (2d Cir. 1976).
180 910 f.2d 1063, 1067 (2d Cir. 1990), aff’g 726 F.Supp. 389 (E.D.N.Y. 1989).
181 The United States continues to follow the non-inquiry approach to extradition for several reasons. First, the United States does not want its courts to scrutinize foreign affairs. The Constitution gives such responsibility to the executive branch, not the judiciary. Second, the courts are not suited to investigate and evaluate foreign affairs. Third, courts are reluctant to render decision that would infringe upon another nation’s sovereignty. Finally, judicial scrutiny of foreign judicial practices impedes the extradition process, therefore allowing dangerous criminals to evade prosecution. See Kyle M. Medley, “The Widening of the Atlantic: Extradition Practices between the United States and Europe”, Brooklyn Law Review, vol. 68 (2003). p. 1224.
182 553 U.S. 674 (2008).
branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments.”

Questioning the Rule of Non-Inquiry

Article 3 of the Convention Against Torture\textsuperscript{183} states that “No State Party shall expel, return (‘re-fouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture” and “For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.” In 1990 the United Nations General Assembly sought to ensure that human rights would receive full respect in the extradition process when it gave approval to the UN Model Treaty on Extradition.\textsuperscript{184} The member States have also been urged “to continue to acknowledge that the protection of human rights should not be considered inconsistent with effective international cooperation in criminal matters, while recognizing the need for fully effective mechanisms for extraditing fugitives”.\textsuperscript{185}

Obviously, these prescriptions require the states to move beyond their approach of non-inquiry stand.

Many countries are eroding the rule of non inquiry by taking into consideration the available information about human right situation in requesting states. Most of the European countries tend to apply the judicial inquiry model in extradition cases rather than non-inquiry. One commentator has even took a strong stand that if a State, by extraditing a person, knowingly concurs in a violation of that person’s fundamental


\textsuperscript{185} General Assembly Resolution 52/88, 12 December 1997, para 8.
human rights by another state, it is co-responsible for this infringement as a participator.\textsuperscript{186}

Why do some states still apply the rule of non inquiry in extradition proceedings, What state interests are at play when determining whether to examine the nature and fairness of foreign justice?\textsuperscript{187}

Firstly, judicial inquiry into another state’s domestic practices entangles courts in conflict with traditional understandings of state sovereignty and independence. To be more precise, as a prudential matter, there are concerns about the wisdom of allowing one state’s courts to sit in judgment on another’s courts. In a state-centric international system, many factors militate in favor of a rule that state commitments are absolutely binding and not subject to further judicial questioning.\textsuperscript{188}

Secondly, the denial of an extradition request can lead to international tensions and can have serious foreign policy implications. After all, extradition has long been viewed as a matter of international comity and a way of promoting friendly relations between countries.

Thirdly, the Justice Department may also hesitate to second-guess the fairness or motivations of extradition requests, as it has an interest in receiving reciprocal cooperation from foreign ministries of justice. The constellation of these interests combines to form a powerful interest in favor of a rule of non inquiry in extradition proceedings.

Fourthly, including a rule of non inquiry may increase the credibility of a government’s commitments to its obligations. When an extradition request is denied, it can be harmful for domestic actors who have staked their reputation on successfully arresting the

\textsuperscript{186} Christine van den Wyngaert, Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box? International and Comparative Law Quarterly / Volume39 / Issue04 / October, p. 759
suspect. In addition, one country’s decision that another country’s justice system is unfair or biased can be understood as a repudiation of all the commitments that the countries mutually entered into in their extradition treaty.

Fifthly, courts are interested in the efficient resolution of controversies and may lack the tools and time necessary to investigate foreign justice systems. It is unclear that judges have the ability to fairly assess the mechanisms and procedures of foreign countries. The adversarial briefing system utilized in common law countries may not provide a good way to educate a court about foreign justice. Stability and consistency are not necessarily the most prevalent attributes of courts, and thus negotiators may be wary to include such a potentially powerful and unpredictable exception in extradition treaties.

Sixthly, even if courts were equipped to analyze the fairness of foreign justice systems, and other institutions approved, such an approach could effectively exclude some countries from extradition at all. The mere fact that a country’s judicial system is perceived as unfair does not mean that other countries do not have an interest in mutual extradition arrangements with that country. But the prospect of having extradition requests denied may lead some decision-makers to forego the process entirely.

Seventhly, alternatives to extradition, including forcible abduction or extraordinary rendition, may be adopted instead. These alternatives may be more politically harmful to government officials than formal extradition.

Lastly, domestic institutions may have other reasons to favor a rule of non-inquiry in extradition decisions. The individuals, officials, and groups involved in extradition proceedings have interests and incentives of their own. State Department officials may be biased in favor of promoting cordial relations with other nations because of their institutional constraints and competencies.

5.9  **DIPLOMATIC ASSURANCES**

The term assurance is used when a requesting state in connection with the surrender of a person wanted by it makes representation to the state that with regard to certain issue of concern to the requested state. It is a formal assurance issued by
Diplomatic assurances have special significance in the present era of enhancing a global system of cooperation in penal matters which are of global concern like terrorism or drug trafficking. As one can observe in the past few decades the practice of extradition and other forms of international cooperation in dealing with criminal problems has significantly expanded. The need to curb the transnational crimes motivated the international community to expand and liberalise the state cooperation and develop a higher level of confidence among governments in the practice of extradition and other forms of mutual legal assistance to curb the crimes. The emphasis is to make the state cooperation more pragmatic and less formal when compared to earlier times as is evident from the developments in the European region in the form of European Arrest Warrant and other framework decisions relating to cooperation in criminal matters. Simultaneous to these developments, we also observe the intrusion of human right ideology into the conceptual framework of extradition by which the states are increasingly subjected to the compulsions of having to satisfy the human right norms applicable to extradition process.

In a situation where the requested is confronted with the obligation or desire to extend its cooperation in penal matters to the requesting state seeking extradition of a fugitive criminal charged or convicted of an offence and at the same time is also obliged to ensure that human rights guaranteed to be observed in extradition process are not violated, diplomatic assurances offers a pragmatic way out of this dilemma.

Diplomatic assurances thus will be typically useful in the following type of situations.

- A state requests extradition in pursuance of a bilateral or multilateral treaty casting an obligation on the requested state to extradited the requested fugitive criminal. The requested state is bound by other human right treaties as well say for example, Convention against Torture or European Convention on Human Rights. The requesting state may not or may not be a party to the same conventions to which the requested state is a party.
• The criminal law and justice system of the requesting state might be different to that of requested state or at least it might vary in certain aspects if not in its entirety: and the practices of the requesting state in connection with substantive or procedural human right norms are of lesser standard than that of the requested state and might generally be reputed to be questionable.

Diplomatic assurances issued in the context of extradition basically address the human right concerns of the requested state in conceding the extradition request of the receiving state. These concerns are usually about substantial or procedural human issues arising out of the law or practices followed by the requesting state. Substantial issues usually relate to the type of penalty, its duration or the manner in which it is carried out like, death penalty or solitary confinement. Procedural issues usually relate to due process and the rights of individual. The concerns the requested state may have could stem from their international obligations, their constitutions or their national laws.\(^{189}\)

When a diplomatic assurance is provided by the requesting state that it would it would not subject the fugitive criminal to violation of human rights as apprehended by the requested state, it facilitates the following advantages.

1. By allowing extradition on the basis of diplomatic assurance the requested state could avoid the political displeasure it could have obtained had it refused the extradition by virtue of its allegiance to human right norms to be maintained in extradition system.

2. The requested state would feel satisfied that it maintained its obligation to ensure the observance of human right guarantees to the fugitive criminal even after extraditing him to a country which is likely to violate those guarantees because it did not allow extradition until and unless the requesting state gave a solemn and formal promise it that such thing would not happen.

3. The sovereign expectations of any country do not tolerate any country to inquire into its internal affairs. (The rule of non inquiry). Therefore, deeper inquiry and

examination of human right situation to provide a basis for acceptance or rejection of extradition request would be a politically and administratively difficult matter for the executive or judicial authorities of the requested state. Diplomatic assurances given by the requesting state bypasses such difficulty.

4. Providing assurances helps achieve the goals of inter state cooperation in penal matters particularly because they are in keeping with the principle of ‘aut dedere aut judicare’ (extradite or prosecute). Increasingly international treaties and national laws require states to extradite or prosecute. This principle assumes lot of importance in the context of international crimes with gross consequences like terrorism. This trend places the extradition in a new light of emphasis. States in their treaty based obligations are required to exercise greater diligence both in seeking to achieve extradition and when they reject extradition to extradite, to prosecute domestically. Thus perfunctory rejection of extradition without exercising due diligence in seeking to make extradition possible is no longer acceptable in the context of inter-state cooperation in criminal matters, especially serious crimes like terrorism and drug trafficking. States must therefore seek avenues to facilitate extradition when its domestic prosecution may not be as effective as might be possible for the requesting state. For a state to assume prosecutions is more onerous than requiring diplomatic assurances and relying on them.

Without assurances there would be more cases of refusal of extradition only because of the doubts nourished by the requested state have not been cleared.

5. Diplomatic assurances can facilitate human right guarantees to the fugitive criminals even in a country that does not accord such guarantees to criminals in general because the requesting state also would feel the political pressure from the possibility that if it violates its assurance, the requested state and even the may justifiably refuse its extradition requests in future.

Diplomatic assurances take a variety of forms. Some are simply oral promises. Others are written documents, in some cases signed by officials from both governments. The content of the assurances also varies, and assurances against torture are sometimes
packaged with other promises, such as for a fair trial. Some assurances do no more than reiterate that the receiving government will respect its domestic law or its obligations under international human rights law. Some diplomatic assurances include arrangements for post-return monitoring. It can be offered by the requesting state on its own or it may be given on the basis of request for the same by the requested state. The rule of specialty, one of the general principles of extradition concept also comes to the rescue of the requested state to object deviation from the assurance by the requesting state when the specifics of the assurance are included in the judicial order granting extradition.

An assurance may be offered by the requesting state in the form of legal obligation. Whenever an assurance I made in the form of legal obligation the state to which it is it is offered can seek legal enforcement by diplomatic or other legal means, including bringing an action before International Court of Justice subject to jurisdictional conditions.\textsuperscript{190} Usually the diplomatic assurance is no more than a political bilateral agreement. So, when they same are breached it does not entail any legal consequences. It however may entail political repercussion because the same is treated as violation of comity and good faith.

\textbf{Current State of Affairs:}

Individual rights have been established under international law. Various court decisions and international agreements have recognized these rights and enacted safeguards for them. Unfortunately, the result has not been uniform. The growing concerns of governments in pursuing international terrorists, drug traffickers and other criminals are affecting the protection once given the individual by the political offense exception and the extradition process itself. Despite these rights and the existence of valid procedures for obtaining custody of fugitives, nations continually circumvent these procedures. Extradition is in a state of flux.

\footnote{\textsuperscript{190} Ibid.}
Will ICC Help?

**ICC and Positive Implications to Extradition**

Human Rights ideology is behind the establishment of 1996 which is a significant advancement in the administration of criminal justice on a true international basis. ICC is entrusted jurisdiction over four most serious crimes, all of which carry serious human right implications in a negative way. They are genocide, war crimes, crimes against humanity and aggression (yet to be defined). Article 89 of the Rome Statute permits the Court to request the arrest and surrender of that person from any country where that person may be found. However, Article 98 precludes the ICC from making a request for the surrender of a person when doing so would require the requested country to act inconsistently with its obligations under international law or international agreements which include bilateral extradition agreements or arrangements.

The functional link between ICC and extradition is that both of them are concerned with administration of criminal justice. While the former is an international forum, the latter is not a forum but a mechanism to facilitate administration of criminal justice. Therefore, both will have mutual implications. On the positive side, some dilemmas associated with the institution of extradition particularly those arising out of political offence exception and application of human right standards could be overcome by surrendering the required criminals to ICC.

A major dilemma is regarding the political offence exception typically allowed as a result of which many offenders of serious crimes escape from meeting criminal justice. Since a neutral judicial body like ICC can now prosecute crimes of grave nature such as "crimes against humanity" and "the crime of genocide" many of the policy reasons behind the theory of the political offense doctrine will cease to exist in this new body of law.

There are two sides to the political offense exception. The reasons for opposition, and again the exception, are strong. While in some cases there is a real and apparent need for asylum (whether for national political reasons or humanitarian reasons), in others, the criminal gets to use, and will take advantage of, the exception. The ICC, absent the
political offense doctrine, will actually cater to both proponents and opponents of the doctrine when used interstate. For those in support of the doctrine, the ICC will grant a fair trial with minimal worry of cruel punishment. Furthermore, states will be able to maintain the appearance of neutrality to their counterparts via cooperation with the Court.

For those who oppose the exception, the ICC will favor their ideas while suppressing their fears of the doctrine. The ICC will deter criminal activity rather than encourage it. The ICC, therefore, is one place where the abolition of the political offense doctrine may approach the possibility of making both sides content.  

Other arguments in favour of ICC

1. The negotiation of bilateral and multilateral treaties results in a multi-tiered extradition process. Amongst the solutions to the disparity of tests and procedures in extradition law, the establishment of an International Criminal Court is the best.

2. An ICC would Foster neutrality in extradition. Delivering an individual to a neutral body would avoid any appearance of choosing sides on an issue. Part of the original purpose of the political offense exception was to allow the requested state to remain neutral regarding another state's political conflict.

3. The prosecution of a particular case or individual might also be a source of conflict or embarrassment, either because of foreign policy or internal politics. For example, governments unwilling to extradite terrorists or drug traffickers to the United States because of political tension or public opinion could avail themselves of the ICC and thereby maintain a neutral stance toward the United States.

4. An ICC would facilitate the prosecution of individuals or groups whose control of domestic courts is insidious. The very nature of a crime or the individual involved

may intimidate a court. Current multilateral conventions, even those recently updated, may be subject to existing bilateral treaties as well as participating nations' reservations. An ICC would dilute the control of powerful nations over extradition partners, the latter of which would no longer be subject to economic, political, or military pressure to extradite.

5. An ICC Would Provide a Neutral Forum. ICC would provide a neutral forum with uniform laws applicable to all who come before the Court. Nations who fear that the accused would not receive a fair trial in the requesting nation would be able to turn to a neutral ICC. Furthermore, nations that are reluctant to extradite to a particular country because of popular sentiment will have a viable alternative forum. The ICC would provide a neutral jurisdiction and clear rights framework to which nations could surrender both nationals and other fugitives.

6. ICC would create uniformity in Extradition Law and Procedure. An ICC would ensure that all nations are treated equally by preventing the formation of a multi-tiered extradition process. It would eliminate the uncertainties facing an individual in a different criminal justice system by providing uniform procedure and protections.

7. ICC Would expedite extradition process and reform. ICC with clear jurisdiction and procedures would eliminate the need for irregular rendition. The negotiation of updated bilateral treaties, as well as multilateral agreements, necessary to eliminate drug trafficking and clarify the political offense exception, takes time and frustrates officials seeking extradition. In addition, domestic laws prohibit many nations from extraditing nationals to foreign countries, shielding fugitives from punishment. Proponents of an ICC believe that an international court would supplement existing extradition treaties and give those governments unable to extradite to another nation a viable alternative. Furthermore, agreement on an ICC structure would facilitate, rather than hamper, bilateral cooperation by providing a clear procedural framework for extradition, free of domestic legal pitfalls.

8. Since ICC would provide a means of enforcing extradition decisions it would eliminate the need for nations to resort to abduction, since the court would
function as a mechanism for resolving conflicts over extradition decisions. The presence of an international body capable of resolving extradition disputes would also have a deterrent effect on nations who would otherwise resort to abduction to obtain jurisdiction over a fugitive.

Whereas current extradition treaties have no enforcement mechanisms, an ICC could pursue jurisdiction by imposing sanctions and placing international obligations upon resistant nations.

*Arguments not in favour of ICC but in favour of improvising the existing system of extradition*

1. The current system of bilateral and multilateral extradition treaties and conventions covers a broad range of topics. Opponents of an ICC argue that the current system is increasingly effective in bringing criminals to justice.
2. The expectations and perspectives of nations change over time, and an ICC may not change to suit them.
3. Sovereignty is a fundamental right of nations, and includes the right to domestically prosecute crimes committed on their territory. Preservation of national sovereignty requires that nations, not international bodies, determine their own laws. Each nation must be able to control and protect its citizens, allowing other nations to determine their own internal responsibilities. Critics state that an ICC would undermine a nation's legislature and judiciary, and place its citizens at the mercy of a non-domestic body.
4. International Standards do not suit regional problems
5. Any proposed ICC would depend on good faith participation. Opponents argue that nations who refuse to extradite under the current system are unlikely to do so under an ICC.
6. The anticipated advantage from neutrality of ICC could be nullified because of politicization of ICC. Any politicization will produce unjust decisions by which nations and individuals will be bound.
7. ICC would have to balance both common law and civil law traditions, accommodating, for example, the differences in evidentiary and prosecution procedures. ICC opponents argue that a better solution is to continue establishing ad hoc courts as the need arises, which will eliminate a politicized bureaucracy and still punish criminals.

8. There is no clear international criminal law upon which an ICC could rely. Any law that an ICC adopts would bind nations as well as individuals. An ICC, dependent upon the support of its signatory nations, will choose the safe middle ground of policy and not risk challenging the position of more powerful members. Worse still, it might develop unacceptable definitions of international crimes that could not be challenged by domestic courts.

9. Bilateral arrangements are more responsive to changed environments than multilateral agreements. The modification of existing treaties tailors changes to the immediate needs of participating nations. Any ambiguity that exists in law is necessary to maintain flexibility in the courts and to adapt to changes in the international system. ICC could thereby undermine the growth and improvement of domestic justice systems.

10. ICC would not guarantee basic liberties, currently enjoyed domestically, nor would it maintain an effective political offense defense. Instead, an ICC would constitute an aggregate of systems, not all of which recognize extensive individual rights and freedoms. Some ICC opponents claim that the recent changes to the political offense exception maintain significant rights safeguards? They believe that, while the expanding list of non-political crimes has reduced the acts that can be considered political, other modifications maintain the spirit of the exception. An ICC, however, might sacrifice basic human rights in an attempt to create a universally accepted criminal law.
5.10 SUMMARY:

The powerful presence of Human Rights Ideology since the Second World War brought a visible impact of extradition – thereby introducing a new phase of development to the Constitution. The subject of extradition, namely the individual sought to be extradited, received very limited focus for a long time. But the new dynamics of extradition with human rights orientation begun to cast special focus on the individual concerned while there is no strong appeal that possible violation of every possible human right be constituting a basic for rejection of extradition request, enough consensus has emerged to indicate that extradition be rejected on the ground of possible violation of core rights. Even though there is not yet a definite agreement about which speak rights are core rights, enough jurisprudence has evolved to unhesitantly conclude that possible imposition of death penalty, torture infliction have emerged as strong barriers for positive consideration of extradition requests.

The new dynamics of extradition law with a human rights approach calls into question the compromise that had to be made to the rule of non enquiry which is reflective the typical overriding importance always enjoyed by the concept of sovereignty since the emergence of state system. Rule of non enquiry prevents the requested state to enquire into the internal human rights situation. Whereas the knowledge of human rights situation in the requesting state facilitates the requested state in allowing or rejecting the extradition request, the rule of non inquiry obviously blocks such an assessment.

Diplomatic assurance issued by the requesting state that it would not violate the human rights of the extradited individual provides a viable alternative to the situation because requested state can base its decision on this sovereign assurance without having to offend the requesting state by inquiring into its internal profile of human rights.

ICC, the World Judicial Forum for International Criminal Justice is a very significant development when viewed from the perspective of either Human Rights Ideology or Extradition Law. However, at present, it has a limited but of course very crucial mandate. Widening its jurisdictional ambit to cover other serious crimes like terrorism and drug trafficking will greatly enhance the utility of ICC in meeting the
contemporary challenges of administration of criminal justice. Particularly, it is very essential to include terrorism. Surrendering the fugitive criminal to neutral body like ICC can help overcome many dilemmas involved in the decision of extradition to the requesting states, particularly those arising out of the application of political offence exception and human rights standards.