CHAPTER VI

PROLIFERATION OF SERIOUS CRIMES & HUMAN RIGHT BARRIERS TO EXTRADITION - IMPLICATIONS, EXPERIENCES AND RESPONSES OF INDIA

6.1. INTRODUCTION

The previous part of the thesis dealt with the intrusion of human rights ideology into the politico legal institution of extradition. While the attempts to sensitize the extradition law with human rights philosophy is laudable, such task is not without challenges. Particularly, tough is the challenge that comes from the growing need of the international community to suppress the proliferating incidence of transnational and international crimes, especially terrorism threatening the national or international security.

In this chapter an attempt is made to discuss the implications of human right ideology in extradition process in the wake of challenges from proliferation of serious crimes across the world with special reference to Indian situation. It examines few illustrations in which the human right situation in India has been called in question. Further, a detailed analysis of the recently proposed Bill on Prevention of Torture, 2010 with its revision in 2011 has been carried out to assess whether this legislative response could meet the challenge of negative prospects of extradition requests of India due to its bad profile of torture situation. This is followed by a brief overview of implications of the stand of India regarding ICC.
6.2 PROLIFERATION OF SERIOUS CRIMES & RESPONSES OF EXTRADITION LAW

Trans-national crime is a global problem. Countries all over the world are concerned about the increase in the level and sophistication of trans-national crimes. The advancements in the field of technology relating to communication and transportation has proved to be a boon to both constructive as well as destructive forces. The widespread political, economic, social and technological changes as well as variations in legislation, procedures and policies in different countries on mutual assistance in criminal matters have allowed organized crime groups to become increasingly active in the international arena. International criminal organizations are taking full advantage of globalization of world markets, dismantling of trade barriers, the increased ease of international travel, liberalized emigration policies, high-tech communications equipment and sophisticated money laundering techniques to enhance and further their criminal efforts and to forge alliances with other criminal groups. They are engaged in such felonious activities as illicit drug trafficking, money laundering, the use of violence and extortion, acts of corruption, trafficking in women and children, illicit manufacturing of and trafficking in firearms, environmental crime, credit card fraud, computer related crime, illegal trafficking of stolen vehicles, industrial espionage and sabotage, maritime piracy, etc. At present criminal can manage to use the entire world as field of his operation. He commits crime in one country or even in different countries simultaneously, can deposit the money from those operations in some other country and flee to any other country. The impact of organized crime may vary in differing societies but is likely to be more devastating in developing societies like India, where it may supplant or exert considerable control over the state by filling the gaps in the provision of

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1 The United Nations Convention against Transnational Organized Crime (article 3) gives a clear definition: an offence is transnational in nature if:
(a) It is committed in more than one State;
(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
(c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
(d) It is committed in one State but has substantial effects in another State

social amenities. In India the organized crime is stratified, organized and administered like any other corporate office in the legal business world.

**Forms of international cooperation in criminal matters**

Several interdependent forms of international cooperation in criminal matters can be identified from an analysis of legal practice and doctrine:

- extradition
- mutual legal assistance
- transfer of criminal proceedings
- execution of foreign sentences
- recognition of foreign criminal judgements
- confiscation of the proceeds from crime
- collection and exchange of information between intelligence and law enforcement services
- regional and sub-regional legal forums
- access to justice.

For the investigator and prosecutor confronted with modern organized crime, relying on international cooperation has become a necessity, and of the various forms of international cooperation in criminal matters that are recognized in States’ national practice and doctrine, extradition and mutual legal assistance constitute the main focus of the treaties.

If the growth of transnational crimes is to be stemmed, it is obviously going to require the co-operation of all countries not only affected, but also concerned by its development. To facilitate international concerted efforts to combat this problem, mutual legal assistance and extradition procedures are emphasized. The international community has responded by creating new institutions and expanding the network of bilateral and multilateral treaties designed to outlaw trans-national crimes, promote extradition, and authorize mutual assistance.\(^3\) The European Union recently agreed and adopted the Framework Decision on the European arrest warrant and surrender procedures between

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member States to allow European Union countries a simplified method of surrendering suspects between States.\(^4\)

**Terrorism**

The crime of international terrorism has assumed horrendous proportions. Although, the crime of terrorism has existed for centuries, in the recent past it has become a dangerous phenomenon, affecting almost all nations of the world. The need for international cooperation to combat transnational crimes has increased considerably in the last decades and continues to do so, particularly following the events in New York of 11 September 2001. Some of the reasons being – it has become easier to be to escape conviction or punishment by fleeing abroad, a growing number of crimes are organized on an international level, technical and other developments make national societies increasingly vulnerable to what happens outside their national territory.\(^5\)

In this increasingly interdependent world, no country can tackle terrorism effectively in isolation and cooperation among States to prevent and punish acts of terrorism is therefore of paramount importance. The ability of States to assist each other quickly and efficiently is no longer an optional bonus but an absolute necessity if they are to combat terrorism effectively. Like all transnational organized crime, poses serious problems for national justice systems. It is the national courts that try perpetrators since there is no international court that is competent to try terrorism cases.

Given its transnational nature, terrorism can no longer be combated solely through bilateral or regional agreements. Therefore, many international counter-terrorism conventions and protocols are concluded to provide the essential legal tools and mechanisms for national authorities to carry out cross-border investigations and to eliminate safe havens for suspected terrorists.

\(^4\) The EU Framework Decision on the European arrest warrants and surrender procedures between Member States (EAW), 13 June 2002, *OJL* 190 of 18.07.2002, p.1. EAW, however, failed to include human rights among the specific grounds on which a suspect’s surrender may be refused.

Attempts have been made by international community to repress and eliminate international terrorism in all its form and manifestations ever since this evil act turned up. After the assassination of the King Alexander 1 of Yugoslavia and the Prime Minister Louis Barthou of France in 1934, a Convention for the Prevention and Punishment of Terrorism was concluded in Geneva in 1937,\(^6\) in which terrorism, including conspiracy and incitement, was treated as criminal offences, for which the accused could be extradited. This was the first response of the international community towards such a terrorist act as assassination.

With the burst of terrorist attacks relating to civil aviation in the 60s of the last century, it was soon realized that the rules of international law on criminal jurisdiction did not give States wide enough jurisdiction to deal with offenders and that the existing extradition regime was not adequate. Thus a number of international conventions have been concluded relating to hijacking and aircraft sabotage.\(^7\) In addition to the reaction to aircraft hijacking and sabotage, the response of the international community to other areas was also given in the fight against international terrorism, thus drawing up certain international conventions in area such as hostage taking, the crime against internationally protected persons, the safety of maritime navigation, the safety of fixed platform located on the continental shelf, terrorist bombing and the financing of terrorism.\(^8\) With these conventions having come into force, some rules on extradition have been modified to the effect that the extradition regime has thus been effectively strengthened. Some new dimensions can be seen as follows:

\(^6\) *BYIL*, Vol. XIX, 1938. Twenty-four States signed the Convention, however only one country, British India, ratified and the treaty never came into force.


The universal legal framework against terrorism consists of a set of instruments adopted at the global level that contain a series of legally binding standards for States to prevent and counter international terrorism. The 13 major UN instruments relating to specific terrorist activities remain fundamental tools in the fight against terrorism. India is a Party to all the 13 major legal instruments. The most important of these treaties are:-

(i) The Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft, 14 September 1963; 


By definition, international instruments provide all States parties with the legal foundations for judicial cooperation without geographical restrictions. These treaties focus on international cooperation with regard to criminal justice and are designed to facilitate investigation and prosecution when offences are of an international nature.

**Drug Trafficking**

Drug trafficking is a global illicit trade involving the cultivation, manufacture, distribution and sale of substances which are subject to drug prohibition laws.
trafficking has become one of the major criminal activities of organised crime groups that plan, operate and control the deals across national boundaries. Transnational drug crimes attract the attention of law enforcement agencies of all countries and places as illicit drug markets know no borders and their transnational nature puts them beyond the reach of any single government, rich or poor. Since the mid 1990s, drugs trafficking have become an increasingly serious problem. A UN report said "the global drug trade generated an estimated US$321.6 billion in 2003. Illicit drug trafficking is the most significant transnational organized crime which has become a serious issue confronting both developing and developed countries. In most countries, despite years of drug suppression and prevention efforts, the cycle of drug trafficking and drug abuse continues. If allowed to remain unabated, the drug menace will considerably destroy the quality of life of people and hamper countries in their social, economic and cultural development. It is imperative for effective and strong enforcement mechanisms to be set up to suppress the problems.

The drug trade is also closely connected to other areas of transnational crime such as terrorism, human trafficking and illegal arms trading. On December 9th 1994, the General Assembly of the United Nations issued a Declaration on Measures to Eliminate International Terrorism wherein it expressed, *inter alia*, its concern “at the growing and dangerous links between terrorist groups and drug traffickers and their paramilitary gangs, which have resorted to all types of violence, thus endangering the constitutional order of states and violating basic human rights”.

Since then, much stronger and broader statements have been made, especially in Security Council resolution 1373 (2001) wherein the Council “Notes with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials….”

6.3 TRANSNATIONAL CRIME & INDIAN SCENARIO

Criminal gangs have been operating in India since ancient times. There is no firm data to indicate the number of organized criminal gangs operating in the country, their
membership, their *modus operandi* and the areas of their operations. Thousands of organized criminal gangs operate in the countryside. In India, organized crime is at its worst in Mumbai, the commercial capital of the country. The first well-known organized gang to emerge in recent times was that of Varadharajan Mudaliar in the early sixties. His illegal activities included illicit liquor, gold smuggling, gambling, extortion and contract murders. Three other gangs emerged shortly thereafter, namely, Haji Mastan (gold smuggling), Yusuf Patel (gold smuggling) and Karim Lala (drug smuggling). During the emergency in 1975, when there was a crackdown on the Indian Mafia, new gangs emerged. Dawood Ibrahim, the most successful, came in conflict with the Pathan gangs of Alamzeb and Amirzada which led to bitter internecine gang warfare. The Pathan gangs were liquidated to leave the field free for Dawood Ibrahim. In 1985, there was increased police pressure which made Dawood Ibrahim flee the country. In March 1993, Dawood Ibrahim was behind the serial bomb blasts in Mumbai in which 257 persons died and 713 were maimed. Public and private property worth several million rupees was destroyed. Investigation revealed the transnational character of the conspiracy, the objective of which was to cripple the economy, create communal divide and spread terror in the commercial capital of India. Dawood Ibrahim, Tiger Memon and Mohammed Dosa are presently reported to be operating from Dubai. Their field of activity primarily extends to extorting money from builders and film producers, mediating in monetary disputes, and undertaking contract killings. The other major gangs of Mumbai indulging in organized crime are those of Chhota Rajan (Drug Trafficking and Contract Killings), Arun Gawli (Contract Killings and Protection Money), Late Amar Naik (Protection Money) and Choota Shakeel.¹⁴

Organized crime exists in other cities too, though not to the same extent as in Mumbai. There are several gangs operating in Delhi from neighboring State of Uttar Pradesh indulging in kidnapping for ransom. Om Prakash Srivastava, alias Babloo Gang of Uttar Pradesh, has been responsible for organizing kidnappings in Delhi and Mumbai in which ransom amounts were paid in foreign countries through “Hawala”. Land Mafia

has political connections and indulges in land grabbing, intimidation, forcible vacation, etc. Of late, the gang lords of Mumbai have started using Delhi as a place for hiding and transit. Chhota Rajan group is strengthening its base in Delhi.

Ahmedabad city has been a hotbed of liquor Mafia because of a prohibition policy (banning of liquor). The Mafia became synonymous with the name of Latif, who started in the mid-seventies as a small time bootlegger and grew up to set up a 200 strong gang after eliminating rivals with intimidation, extortion, kidnappings and murders. He won municipal elections from five different constituencies with strong political patronage. He was killed by the police in an encounter in 1997.15

A boom in construction activities in Bangalore city has provided a fertile breeding ground for the underworld. Builders are used for laundering black money. Forcible vacation of old disputed buildings is a popular side business for the underworld. The local gangsters in the State of Karnataka have connections with the underworld of Mumbai. One of the Mumbai gang operations here is the Chhota Rajan gang.16

6.3.1 Drug Trafficking

India is a vast country with land borders extending over more than 15000 kilometers and a sea coast line of over 7000 kilometers. India’s narcotic problem needs to be visualized from its geographical situation. India is flanked on either side by two regions which are internationally acknowledged as major sources of illicit opiates namely, South-West Asia (Afghanistan and Pakistan) and South-East Asia (Myanmar, Laos, Thailand). Additionally, Nepal, a traditional producer of cannabis, both herbal and resinous, fringes the country in the North.17

The illicit drug trade in India has centered around five major narcotic substances namely heroin, hashish, opium, herbal cannabis and methaqualone. The Indo-Pak border has traditionally been the most vulnerable to drug trafficking. Drug trafficking through India consists of hashish and heroin from Pakistan, hashish from Nepal, white heroin from Myanmar and heroin from Bangladesh. For the last several years, India has also

15 Ibid p.171
16 Ibid
17 Ibid , p.573
become a base for the manufacture of heroin, particularly in and around the opium producing districts of Uttar Pradesh, Madhya Pradesh and Rajasthan.

The Government of India has taken various legislative, administrative and preventive measures to counter drug trafficking in the country. India is one of the few countries in which an adequately deterrent penal system has been developed with regard to drug trafficking. Among the prominent legislative measures are the provisions of deterrent punishment under the NDPS Act, 1985, applications of preventive detention of drug traffickers under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA).

6.3.2 Illegal Firearms Trafficking

Firearms trafficking is a global phenomenon and generally resorted to for generating profit, purchasing narcotics and supporting illegal activities of organized criminal groups.

In India, the states of Punjab which were affected by terrorist activities during the 1980s and Jammu & Kashmir have been particularly vulnerable to arms trafficking across the border. India has a long border with Pakistan, Nepal, Bhutan, China, Myanmar and Bangladesh. The Border Security Force, which guards the borders, continues to seize large quantities of AK Series rifles, heavy machine guns, pistols and revolvers, rocket launchers, rifles, magazines and ammunition.

In 1993, a consignment of AK-56 rifles, magazines, live rounds and hand grenades was sent from a Gulf country by land at the cost of Dighi Jetti in the State of Gujarat. Subsequently, huge quantities of arms, ammunition and explosives were...

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18 The Narcotic Drugs & Psychotropic Substances (NDPS) Act, 1985, which was enforced with effect from 14 November 1985, provides for a minimum punishment of 10 years rigorous imprisonment and a fine of one hundred thousand Rupees extendable to 20 years rigorous imprisonment and a fine of two hundred thousand Rupees. In respect of repeat offenses, the Act provides for the death sentence in certain circumstances. In remaining cases, a minimum punishment of 15 years rigorous imprisonment and a fine of Rs.1.5 hundred thousand, which is extendable up to 30 years rigorous imprisonment and fine of three hundred thousand Rupees.

smuggled into India by sea route at Shekhadi in District Raigad. These were used for bomb blasts in Mumbai on 12 March 1993, which caused terror, widespread damage, loss of 257 lives and maiming of 713 persons. During investigation, some of the arms recovered included 62 AK-56 rifles with 280 magazines and 38,888 rounds, 479 hand grenades, 12 pistols of 9 mm make with \ ammunition, 1100 electronic detonators, 2313 kgs. of RDX, etc. The Police Authorities in the state of Madhya Pradesh in central India recovered 24 AK-56 rifles, 5250 cartridges, 81 magazines and 27 hand grenades on 4 November 1995\textsuperscript{20}

On 17 February 1996, Delhi Police recovered 361 pistols of 0.30 caliber with the inscription “Made in China by Norinco”, 728 magazines and 3738 live rounds in a cavity in the undercarriage of a caravan bus. In this case, a Swiss national and an Iranian national living in Pakistan since 1981, were detained and the investigation disclosed that this in fact was the second consignment, the first one having been successfully smuggled into India in 1995. 22 persons including five foreign nationals have been prosecuted in the court of law in this case.\textsuperscript{21}

A sensational case called the Purulia arms drop case was an example of illicit arms trafficking by air. On 17th December 1996, an Antonov 26 aircraft dropped over 300 AK47/56 rifles and 20,545 rounds of ammunition, dragnov sniper weapons, rocket launchers and night vision devices in Purulia village in West Bengal. The aircraft was bought from Latvia for US$2 million and chartered by a Hong Kong registered company Carol Airlines. Payments were made mostly from foreign bank accounts. The aircraft picked up a consignment of arms from Bulgaria using end-users certificate issued by a neighboring country. The arms were airdropped over Purulia in the state of West Bengal.\textsuperscript{22}

6.3.3 Money Laundering

Crime pays and criminals naturally want to be able to enjoy their profits without worrying about the police or the courts. This is not a new economic sociological problem.

\textsuperscript{20}Ibid
\textsuperscript{21} Ibid 576
\textsuperscript{22} Ibid
However, geopolitical developments over the past 50 years together with economic globalization have meant that the international movement of money has increased. The rapid expansion of international financial activity has gone hand-in-hand with the development of transnational crime, which takes advantage of political borders and exploits the differences between legal systems in order to maximise profits. The groups involved are genuinely multinational and pose a direct threat to the financial stability of economic systems. They destabilise democracy because they are backed by clandestine networks subject to the law of the underworld.  

Money laundering cannot be disassociated from other forms of crime. It is a fact that it thrives on corruption. Corrupt people use financial techniques to hide their fraudulently obtained assets and the continued successful application of these techniques depends on the involvement of influential accomplices. Money laundering is therefore at the centre of all criminal activity, because it is the common denominator of all other criminal acts, whether the aim is to make profits or hide them.

6.3.4 Human Trafficking (Women and Children)

‘Traffic in human beings’ implies illegal movement of people from one country to another in violation of existing national laws and procedures. The countries of the West have become highly vulnerable on this count as they are attracting hoards of illegal emigrants mainly because of their relative economic prosperity. India has also been significantly affected by such immigrants. India is found to be both the country of origin and destination for trafficking in women. While the exact number of victims is not known, it is estimated that 25000 to 40000 women and children are trafficked into India for sexual exploitation from Nepal and Bangladesh every year.

India & International Conventions on Terrorism and other Organised Crimes

India is party to the 13 sectoral conventions on terrorism adopted by the UN. With the objective of providing a comprehensive legal framework to combat terrorism, India took

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23 Ibid, p.578
24 Ibid, p.579
25 Ibid
26 Cullen, Kathryn Du Pont, Human Trafficking’, Facts on File (2009), p92
the initiative to pilot a draft Comprehensive Convention on International Terrorism (CCIT) in 1996. Largely as a result of India’s active pursuance, a text for the CCIT was advanced to the 6th Committee of the UN General Assembly in 2010 with most of the issues resolved and legal language suggestions to overcome these remaining few contentious matters.

India is a signatory to the South Asia Association for Regional Cooperation (SAARC) Convention for Suppression of Terrorism. India enacted the SAARC Convention (Suppression of Terrorism) Act. Extraditable crimes include unlawful seizure of aircraft; unlawful acts against the safety of civil aviation; crimes against internationally protected persons; common law offences like murder, kidnapping, hostage taking; and offences relating to firearms, weapons, explosives and dangerous substances, etc. when used as a means to perpetrate indiscriminate violence involving death or serious injury, or serious damage to property.

In May 2011, the Indian Government ratified two UN Conventions - the United Nations Convention against Corruption (UNCAC) and the United Nations Convention against Transnational Organised Crime (UNTOC) and its three protocols. Having ratified both Conventions, India became the fourth South Asian country after Afghanistan, Pakistan and Sri Lanka to ratify the UNTOC while joining Afghanistan, Bangladesh, Maldives, Nepal, Pakistan and Sri Lanka in ratifying the UNCAC. The United Nations Office on Drugs and Crime (UNODC) is mandated by its Member States to assist in the implementation of both Conventions, which along with the UN Drug Conventions of 1961, 1971 and 1988 underpin all the operational work of UNODC.

The UNTOC was adopted by General Assembly in 2000 and came into force in 2003. The Convention is the first comprehensive and global legally binding instrument to fight transnational organized crime. States that have ratified UNTOC commit themselves to taking a series of measures to prevent and control transnational organized crime, including (i) the criminalising of the participation in an organized criminal group, of money laundering, related corruption and obstruction of justice and (ii) the adoption of

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27 SAARC Regional Convention on Suppression of Terrorism, Bangalore Summit Declaration of 17 November 1986, came into force on 22nd August 1988
frameworks for extradition, mutual legal assistance and international cooperation. The UNTOC is further supplemented by three Protocols, which target specific forms of organized crime:

1. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, provides an agreed upon definition of trafficking in persons. It aims at comprehensively addressing trafficking in persons through the so-called three P's - Prosecution of perpetrators, Protection of victims and Prevention of trafficking.

2. The Protocol against the Smuggling of Migrants by Land, Sea and Air, also provides a definition of smuggling of migrants. The Protocol aims at preventing and controlling smuggling of migrants, promoting cooperation among States Parties, while protecting the rights of smuggled migrants.

3. The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition promotes, facilitates and strengthens cooperation among States Parties in order to prevent and control the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition by mainly committing Member States to introduce solid registration and storage systems for all legally produced arms.


To make the international treaties which are developed to control the transnational crimes fully effective it was necessary to stipulate in them stringent provisions for the extradition of offenders who flee to foreign lands after committing heinous crimes covered under these instruments. It is for these reasons that all the above-mentioned treaties contain clauses providing for extradition.
In view of growing incidence of international terrorism; growing connection between terrorist groups and illicit traffic of dangerous drugs and the significance attached to fiscal, revenue and taxation offences which affect the economies of the developing counties and might even affect their survival as independent sovereign economic entities, the content of the concept of extradition under international law has undergone a radical change. As far as India is concerned these changes have been primarily carried out by amending the 1962 Extradition Act as well as by negotiating and concluding new extradition treaties with foreign states. Thus, the (Indian) Extradition Act has been amended to omit the list of extraditable offences from it. The amended Act defines an extraditable offence as being an offence, in relation to a foreign state being a treaty state, an offence provided for in the extradition treaty with that state. For foreign states, other than a treaty state, it means an offence punishable with imprisonment for a term which is not less than 1 year. It may thus be seen that although there is no specific definition of terrorism this amendment would include all offences covered by the above definition including those of terrorism. Furthermore, to cover the offences of terrorism the amendment made to the 1962 Act in 1993 provided for a comprehensive list of offences which are not to be regarded as offences of a political character. The Schedule of list of offences contains a comprehensive list of offenses such as offences under the Anti-Hijacking Act, 1982, offences under the Suppression of Unlawful Acts against the Safety of Civil Aviation Act, 1982 etc which are not to be regarded as political offences.

The earlier extradition treaties and extradition laws generally contained a long list of extraditable offences such as murder, kidnapping, rape, theft, cheating, forgery, sinking or destroying a vessel at sea, damaging or destroying an aircraft, in the air smuggling of gold and any narcotic substances, immoral traffic in women. In view of

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the above mentioned developments the new extradition treaties concluded by India generally do not contain any list of offences but define an extradition offence as any offence which is constituted by conduct which under the laws of each contracting state is punishable by a certain term of imprisonment, normally for a period of at least 1 year.\textsuperscript{31}

\textbf{6.4 HUMAN RIGHTS IDEOLOGY IN DEALING WITH TERRORISTS}

The incremental pace of development of international law to counter terrorism demonstrates the committed and concerted efforts of the international community to suppress the terrorism. Countries deem the task of punishing the terrorists an issue of ensuring their national security and public accountability. Therefore, when the terrorists flee to other countries both the government as well as public would be too keen on obtaining the extradition of the fugitive terrorist. International extradition serves an important function by providing a mechanism under which states cooperate with one another by surrendering to the requesting state a fugitive accused or convicted of a crime committed within the territory of the requesting state or having produced detrimental effects there. The process, usually embodied in bilateral treaties, plays a crucial role in international law enforcement and reflects the common interest of the world community in prosecuting serious crimes by ensuring that criminals do not find safe havens. There is, however, an equally important complementary and competing common interest in guaranteeing the protection of basic human rights of defendants.

\textit{Counter Terrorism encounters the following problems}

The usual difficulties concerned with extradition relating to terrorism are;

Firstly, political offence exemption for extradition because in most of the acts of terrorism there will be indistinguishable overtones of political objectives.

Secondly, imprecise definition of terrorism making it difficult to list the offence of terrorism as one of the offences subject to extradition.

\textsuperscript{31} The Extradition Treaties between India and the United Kingdom, India and the USA, and India and Canada etc.
The political dimensions encountered either in facilitation or rejection of extradition of terrorists is a familiar experience to many countries. While the multilateral treaties addressing the issue of terrorism are trying to circumvent the discrimination of individual countries and thereby promoting the prospects of extradition of terrorists, the changing dimension of extradition law due to influence of human rights ideology is having its own restrictive impact on the prospects of extradition of terrorists.

The rapid development, indeed transformation, of international human rights law in the last four decades has lent credence and coherence to this special interest by providing it with content and specificity and by extending its reach and scope. At the beginning of the new millennium, individuals are able to invoke international and regional human rights norms on a wide variety of subjects ranging from the abolition of capital punishment and torture to the right to a fair trial and other fundamental freedoms. There is, also, an increasingly wider adherence by states who are parties to these norms.\(^{32}\)

In considering decisions on extradition or the transfer of suspects, states cannot turn a blind eye to the potential for breaches of a number of rights including, among others the non-derogable right to freedom from torture, cruel, inhuman and degrading treatment and the right to a fair trial as well as the principle of legal certainty and freedom from discrimination in order to ensure that they meet their obligations under international human rights law.\(^{33}\)

Human rights are inalienable. They should not be taken away. Certain human rights however can be restricted in specific circumstances as long as the restrictions do not undermine the spirit of the right itself and are applied only in specific situations and according to due process. The right to freedom of association and assembly and the right to respect for private life are all examples of rights that may be subject to certain restrictions in the context of counter-terrorism. The right to liberty may be restricted if a

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person is found guilty of a crime by a court of law, including of a terrorist act punishable under the applicable law.

Some provisions contain grounds for qualifying the enjoyment of a particular right in order to protect the rights of others or for the protection of national security but due process must be observed and qualifications should only be applied on an exceptional basis when necessary.

Counter-terrorism can impact on human rights in a large number of ways. Human rights are likely to be engaged at all stages in the process of combating terrorism, including the following examples:

**Criminalization**
In legislating, it is crucial that States ensure that the principle of legality is applied. There have been concerns that overly broad definitions of ‘terrorism’ may lead to criminalization of legitimate activities such as lawful protests and expressions of opinion which, while unpalatable, do not amount to incitement to violence.³⁴

**Prosecution**
Prosecutions of terrorists may be extremely complex, sensitive and vulnerable to security concerns. Despite the difficulties involved in prosecuting terrorist offences, the right to a fair trial must be guaranteed in terrorism cases. Miscarriages of justice in terrorism cases not only lead to violations of individual rights but also to impunity for those actually responsible for terrorist acts.

**Detention**
Both convicted and suspected terrorist detainees must be treated humanely, regardless of the nature of the crimes that they have, or are alleged to have, committed. Even in the context of terrorism, arbitrary detention and disappearances can never be justified but

detention is only possible in accordance with the law. Furthermore, all persons detained, including those suspected of terrorism, have the right to habeas corpus or equivalent judicial procedures at all times and in all circumstances to challenge the lawfulness of their detention.

**Prevention**

Counter-terrorism activities designed to detect, disrupt and prevent terrorist attacks may involve techniques which interfere with the right to privacy. A legislative framework is needed for this kind of activities to ensure that they are proportionate to their aims.

The use of force by law enforcement officers to prevent an imminent terrorist attack is of particular concern. Clear rules need to be in place for the use of force in the context of counter-terrorism. Accountability for inappropriate use of force should be ensured through the establishment of independent and effective complaints mechanisms.

**6.5 DEATH PENALTY AND TORTURE AS HUMAN RIGHT BARRIERS TO EXTRADITION**

In the context of extradition requests against fugitive criminals accused or convicted of serious transnational crimes like terrorism, drug trafficking, the two most important human rights standards which work against the conceding of such requests are prohibition against imposition of death penalty and prohibition against torture. Therefore, a brief attention is paid to these two prohibitions before examining the impact of human right safeguards on the extradition requests of India.

(i) **Capital Punishment**

Due to a growing trend toward abolition of capital punishment, retentionist states, like India and 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.\textsuperscript{35}

(ii) **Torture**

An examination of human rights instruments amply illustrate that freedom from torture is viewed as an absolute human right. So, existence of torture practices in the administration of criminal justice in the requesting state is a major hurdle for clearance of extradition request.

Torture is often used to punish, to obtain information or a confession, to take revenge on a person or persons or create terror and fear within a population. Some of the most common methods of physical torture include beating, electric shocks, stretching, submersion, suffocation, burns, rape and sexual assault. Psychological forms of torture and ill-treatment, which very often have the most long-lasting consequences for victims, commonly include: isolation, threats, humiliation, mock executions, mock amputations, and witnessing the torture of others. Torture and inhuman treatment constitute a significant component in the administration of criminal justice by many countries in the world.\textsuperscript{36}

As already noted, over the past few decades a number of international agreements and declarations\textsuperscript{37} like UDHR, 1948, Covenant on Civil & Political Rights,\textsuperscript{1} 1966, Geneva Conventions, 1949 etc have condemned the practice of torture. Regional Conventions like European Convention on Human Rights and Fundamental Freedoms,

\textsuperscript{36} A 2001 Report by Amnesty International highlighted the use of torture by 140 states between 1997 and 2001, and found that every year thousands of perpetrators beat, rape and electrocute other human beings.
1950,\textsuperscript{38} American Convention on Human Rights, 1969\textsuperscript{39} prohibit torture. Adoption of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in the year 1984\textsuperscript{40} is a most crucial and concrete move by United Nations in the direction of building up of international practices towards prohibition of torture and other cruel, inhuman or degrading treatment. The rationale is that the 1984 U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) prohibits the extradition as well as the deportation of a person to a state "where there are substantial grounds for believing that he would be in danger of being subjected to torture" and allows no derogation. In fact, it is even claimed\textsuperscript{41} that prohibition against torture is a rule of \textit{Jus Cogens}.

On perusal of the provisions of CAT relating to extradition, it is clear that they broadly two situations. They are;

a. When the individual to be extradited is accused or convicted of the offence of torture

b. When the individual to be extradited is likely to be subject to torture because of such extradition.

For the purpose of this thesis, only the latter situation is focused upon in examining the implications to India of prohibition of torture under CAT and its friends like European Convention on Human Rights.

The judicial bodies and Committees settled under these agreements have been examining the issues related to torture whenever they are brought before them for their consideration. Whenever they are examining the torture issues in the context of extradition and also its related concepts like deportation, they are contributing to the

\textsuperscript{38} According to Art 3, No one shall be subjected to torture or inhuman or degrading treatment or punishment.
\textsuperscript{39} Art. 5 prescribes Freedom from Torture
\textsuperscript{40} Entered into force in 1987. Text available at http://www2.ohchr.org/english/law/cat.html
\textsuperscript{41} In the International Criminal Tribunal for Yugoslavia (ICTY) case of \textit{Prosecutor Vs DeLalic} No IT-96-21-T
enhancement of nexus between extradition law and torture law at global level. Example, the judgment of European Court of Human Rights in Soering case.42

Incrementally strengthening International Human Rights Law prohibiting Torture through Jurisprudence of the International Judicial Bodies like European Court of Human Rights clearly demonstrates that extradition will be refused if there is a real risk that the fugitive, if surrendered, will be subject to torture. The European Court of Human Rights referred to its "well established" case law on Article 3 that "where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country," there is an implied obligation not to expel the person in question to that country. The court stated that "it should not be inferred from the Court's remarks [about] the risk of undermining the foundations of extradition" in the "that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged."43

The UN Human Rights Committee, in relation to the ICCPR has also noted in Chitat Ng Vs Canada,44 that ‘if a state party extradites a person within its jurisdiction in such circumstances, and if, as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party may be in violation of the Covenant.

From the above discussion it is clear that a bad scenario of torture practices prevailing in the receiving state can clearly block any positive consideration its extradition requests. The growing allegiance of world community to prohibit torture has

In 1998 it was stated that torture has over the years has been recognized “as a peremptory form of general international law” that is ‘jus cogens’ accepted by almost every state in the world.42 Soering case has confirmed the existence of a “human rights exception” to extradition where it can be shown that there is a real risk that the person wanted for extradition will be subjected to torture, or some other form of serious ill-treatment, in the state making the extradition request. The case established the principle that a state would be in violation of its obligations under the ECHR if it extradited an individual to a state, in this case the U.S., where that individual was likely to suffer inhuman or degrading treatment or torture contrary to Article 3 ECHR. Refer, Soering v the UK, (1989) 11 EHRR 439.43


been turning out to be a strong factor behind the rejection of requests for extradition of even most wanted criminals like terrorists. Before examining how India is experiencing the negative impact of its torture scenario on the positive prospects of its extradition requests, it is apt to present the reports on the prevailing torture situation in India.

6.6 TORTURE SCENARIO IN INDIA

Some excerpts are produced here from the Report on Torture in India made by Asian Centre of Human Rights in the year 201145.

- From 2001 to 2010, the National Human Rights Commission (NHRC) recorded 14,231 i.e. 4.33 persons died in police and judicial custody in India. This includes 1,504 deaths in police custody and 12,727 deaths in judicial custody from 2001-2002 to 2009-2010.46 A large majority of these deaths are a direct consequence of torture in custody. These deaths reflect only a fraction of the problem with torture and custodial deaths in India. Not all the cases of deaths in police and prison custody are reported to the NHRC. The NHRC does not have jurisdiction over the armed forces under Section 19 of the Human Rights Protection Act. Further, the NHRC does not record statistics of torture not resulting into death. Torture remains endemic, institutionalised and central to the administration of justice and counter-terrorism measures. The Asian Centre for Human Rights (ACHR) has consistently underlined that about 99.99% of deaths in police custody can be ascribed to torture and occur within 48 hours of the victims being taken into custody.

- Torture remained widespread and integral to law enforcement. Deaths in police custody are reported at regular intervals. These deaths were often passed off as suicides, sudden medical complications, self-inflicted injuries and natural deaths.

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46 Maharashtra recorded the highest number of deaths in police custody with 250 deaths; followed by Uttar Pradesh (174); Gujarat (134); Andhra Pradesh (109); West Bengal (98); Tamil Nadu (95); Assam (84); Karnataka (87); Punjab (57); Madhya Pradesh (55); Haryana (45); Bihar (44); Kerala (42); Jharkhand (41); Rajasthan (38); Orissa (34); Delhi (30); Chhattisgarh (24); Uttarakhand (20); Meghalaya (17); Arunachal Pradesh (10); Tripura (8); Jammu and Kashmir (6); Himachal Pradesh (5); Goa, Chandigarh and Pondicherry (3 each); Manipur, Mizoram and Nagaland (2 each); and Sikkim and Dadra and Nagar Haveli (1 each).
For example, out of the total 84 cases of death in police custody recorded by the National Crime Records Bureau (NCRB) of the Ministry of Home Affairs during 2009, deaths in 80 cases were attributed to hospitalisation/treatment (9 cases); accidents (4 cases); by mob attack/riot (2 cases); by other criminals (3 cases); by suicide (21 cases); while escaping from custody (8 cases); and illness/natural death (33 cases).  

- On 9 March 2010, Mr. Ajay Maken, then Minster of State in the Ministry of Home Affairs, Government of India stated in the Lok Sabha that the National Human Rights Commission registered 39 cases of rape from judicial and police custody from 2006 to 2010 up to 28 February 2010. These included 9 cases, including 2 in judicial custody and 7 in police custody, in 2006-2007; 17 cases, including 2 in judicial custody and 15 in police custody, in 2007-2008; 7 cases, including 2 in judicial custody and 5 in police custody, in 2008-2009; and 6 cases, including 1 in judicial custody and 5 in police custody in 2009-2010 up to 28 February 2010. In July 2010, the Allahabad High Court directed the Central Bureau of Investigation to inquire into the alleged gang rape of two minor girls inside the Kubristhan Police Station in Kushinagar district of Uttar Pradesh on 19 April 2010. In her petition to the High Court, the victims’ mother alleged that her daughters were raped by five persons including four police personnel and a gram pradhan (village head).

- Illegal detention and torture of juveniles in conflict with law were common place. Torture was so cruel that it resulted in the deaths of a number of children in custody. On 9 March 2010, Mr. Ajay Maken, then Minister of State in the Ministry of Home Affairs, Government of India stated in the Lok Sabha that 592 children died in Juvenile Home and Children Home from 2006 to 2010 up to 28 February 2010. These included 4 deaths in Juvenile Home and 179 in Children

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47 2009 Annual Report of the NCRB
48 Ibid
49 Gang rape inside police station: HC orders CBI inquiry, The Hindustan Times, 10 July 2010
50 Complaint of Asian Centre for Human Rights to National Human Rights Commission, 27 August 2010

- The members of the military and para-military forces deployed in insurgency situations continue to be responsible for torture. It is extremely difficult to prosecute members of the armed forces accused of human rights violations as they enjoy impunity including under Section 6 of the Armed Forces special Powers Act of 1958 applicable in armed conflict situations in North East and Jammu and Kashmir. The NHRC registered only a total of the 25 cases of death in the custody of the military/para-military forces from 2001-2002 to 2009-2010 up to 28 February 2010. These included 2 cases in 2001-02; nil cases in 2002-2003; 1 case in 2003-20047 in 2004-2005; 1 4 in 2005-2006; 1 case in 2006-2007; 14 cases in 2007-2008; 4 cases in 2008-2009; and 2 cases in 2009-2010 up to 28 February 2010.51

6.7 INDIAN EXPERIENCES 52

Of late, requests of India for extradition of fugitive criminals are experiencing resistance from the requested countries on account of India’s track record of the employment of torture methods in the administration of criminal justice. In the following pages an attempt is made to examine the impact of prohibition of torture under CAT and other international instruments on the requests made by India for extradition of fugitive criminals from other countries.

In examining the implications of CAT with regard to India, those cases where India’s request for extradition is rejected by applying Art 3 of European Convention on Human

51 Asian Human Rights Report, 2011
52 The Analysis of Indian Experiences is largely drawn from the Article of Prof. V. Rajyalakshmi, entitled ‘CAT & Its Friends Entry into Extradition Domain – Implications to India’ submitted as a panelist in International Conference on Emerging Concerns of International Law, conducted by Indian Society of International Law, 25th Feb. 2012.
Rights and Fundamental Freedoms which is substantially in tune with CAT are also taken into consideration.

6.7.1. Purulia Arms Drop Case

On 17th December 1995 a Latvian air craft flew into India from Karachi and dropped large number of Rifles including several hundred AK 47 rifles many and cases of magazines and high explosives in villages of Purulia District on the Bengal Bihar border. Several days later when the aircraft reentered Indian airspace, the aircraft was intercepted by Indian Air Force and was forced to land in Mumbai from where Kim Davy (real name, Neils Holck), the mastermind of this operation, a Danish citizen, escaped. In 2007 Kim Davy was traced by Denmark authorities and on April 9, 2010 Danish government decided to extradite Kim Davy to India but Danish authorities failed to successfully defend their decision in the Danish High court. Court, therefore, refused extradition of Kim Davy to India. Further, Danish authorities decided not to appeal the high court judgement in the Supreme Court. 53

The true motive behind this operation is shrouded in mystery and the same is not important for the purpose of this article. Suffice to know the reason behind the refusal to extradite Kim Davy. The lower court refused extradition because in its judgment the accused stands the risk of torture and inhuman treatment in India. The five judge Panel of Danish High Court remarked that “India has not become party to Convention against Torture”54. From the information it had elicited from among other independent human rights organizations and government sources, the court arrived at the conclusion that” there is continued, widespread and systematic use of torture and inhumane or degrading treatment of people in police and prison custody”55 and “as charges against Neils Holck are rebellion against Indian authorities, there is real risk that he would be subjected to treatment that contravenes the Article 3 of European Human Rights Convention.”56 Both

53 Sachin Parasher, The Times of India., TNN,9th July, 2011
54 Staff Reports, ‘Danish Appeals Court Rejects Gunrunner’s India Extradition’, Copenhagen (AFP),June 30, 2011 available at http://www.spacewar.com/reports/Danish_appeals_court_rejects_gunrunners_India_extradition_999.html
56 Supra note 53
the lower court and High Court took the stand that extradition cannot take place if there is danger that person, after being extradited risks Torture, inhumane or degrading treatment.

6.7.2 Mohammad Hanif Case

India has to gulp another embarrassing experience with regard to its request made to UK for extradition of Hanif who is a prized catch for India’s security agencies as it is expected that he would be a vital link in Daewood Ibrahim-Lashkar e Toyabbe network. UK Court dealing with the issue of extradition of Hanif to India decided that it would inspect the Gujarat jails in India before finally deciding over the issue of handing over the custody of Mohammad Hanif Umarjit Patel alias Tiger Hanif who is allegedly involved in Surat blasts.\(^\text{57}\) Our Union Home Minister, Mr. Chidambaram agreed to meet this condition set by UK Court but said “reciprocal approach” would be adopted towards UK.\(^\text{58}\)

6.7.3 Abu Salem Case

India had to hand over the custody it gained over Abu Salem, the most wanted accused in Bombay’s serial bomb blasts of 1993. Portugal Court initially conceded the extradition request of India relying on the assurance of reciprocity as applicable in international law and the International Convention for Suppression of Terrorist Bombings. He was extradited by Portugal for being tried in India for eight offences including the Bombay Blast case subject to certain conditions and the sovereign assurance given by Indian Government. Under Portuguese Law, an offender cannot be extradited the requesting state if the offence or offences committed attract the visitation of either death penalty or imprisonment beyond 25 years. As the offences with which Abu Salem is charged attract death penalty and life imprisonment under Indian law, a solemn sovereign insurance was given by India to the effect that Abu Salem would not be visited by death penalty or imprisonment beyond 25 years. Based on this Salem was extradited in 11\(^{th}\) November, 2005 to India. Upon further enquiries India added new

\(^{57}\) *Times of India*, 18\(^{th}\) July, 2011  
\(^{58}\) *The Asian Age*, 23\(^{rd}\) Oct, 2011
charges against Abu Salem under TADA and also IPC. Filing of these new charges subsequent to his extradition was contested by Abu as amounting to violation of sovereign assurance of India as well as a violation of Rule of Specialty, a long standing general principle of extradition law. Indian Supreme Court did not agree with Abu Salem’s contention for the reason that the new or additional charges framed against Abu Salem cover offences which are lesser offences than those for which he has been extradited. However, Lisbon Court of Portugal rewound its order authorizing the extradition of Abu Salem. The Lisbon High Court on Sept 19th, 2011 said the gangster be sent back to Portugal as India is slapping charges against him that will attract death sentence. 

India appealed to Supreme Court of Portugal to stay the order of Lisbon High Court. The matter at present is pending to be disposed of by the Supreme Court of Portugal.

This is not similar to Kim Davy case where the court downright refused at the very first instance to authorize extradition to India on the basis of bad track record of India regarding the employment of torture or other inhuman and degrading treatment. In the case of Abu Salem the Portugal court initially allowed extradition to India by relying on its diplomatic assurance that the offender will not be visited with death penalty or life imprisonment beyond 25 years of imprisonment. Extradition is revoked more on the ground of principle of specialty since in its judgment the diplomatic assurance would not be able to extend the protection for the offender from the possibility of subjecting to death penalty or life imprisonment with reference to new charges. The Portugal Court refrained from making about statement about general state of affairs in India regarding employment of methods of torture and inflicting other inhumane and degrading treatment. But yet, the act of revocation of extradition would throw bad signals to the world at large about Indian state of affairs relating to administration of criminal justice.

Even though CAT is silent about whether or not death amounts to torture, there is settled jurisprudence via the European Convention on Human Rights where death row phenomenon is taken as a ground for refusal of extradition. In India which retains death penalties, 

penalty on its penal statutes despite strong appeals\textsuperscript{60} to abolish the same, death row phenomenon is prevalent in India.\textsuperscript{61} As recently as on September 18, 2009, the Supreme Court specifically reminded the government of its obligations with regard to the 26 mercy petitions that were then pending with the President. The fact that Portugal Court did not hesitate even on consideration of comity of nations to revisit its decision to extradite Abu Salem because the new charges filed against him could lead to imposition of death penalty on him gives a serious signal to India that its requests for extradition of criminals alleged of grave crimes that could attract death penalty would meet stiff resistance from state parties to European Convention on Human Rights.

6.7.4 Harinder Singh et al Vs Switzerland\textsuperscript{62}

Another very crucial determination which reflects the external perceptions about internal state of affairs of India so far as its use of torture and other cruel, inhumane and degrading methods in the administration of criminal justice, is the decision rendered very recently on 26\textsuperscript{th} May 2011 by Committee against Torture given under the provisions of CAT.\textsuperscript{63} This involved the question of deportation of four Indian Sikhs by Switzerland to India.

Mr. Harinder Singh, an Indian Sikh allegedly involved in hijacking incident that took place in 1981 and his family members filed complaints before Committee against Torture of CAT against the decision of Switzerland in to deport them to India. According to them such deportation would be violation of Art 3 of CAT because they would face serious threat to their health and lives in view of their involvement in hijacking incident. They submitted evidence like the letters of Human Rights Watch(28\textsuperscript{th})

\footnotesize{\textsuperscript{60} Decision of the Committee against Torture under Art 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Forty-Sixth Session)Amnesty International Report in association with PUCL titled ‘Lethal Lottery-The Death Penalty, A Study of Supreme Court Judgments in Death Penalty Cases 1950-2006, released on 2\textsuperscript{nd} May, 2008

\textsuperscript{61} An inordinate delay of 11 years occurred in considering the mercy pleas of the three death-convicts in the Rajiv Gandhi assassination case, Murugan, Santhan and Perarivalan, with their pleas being ultimately rejected on August 11, 2011 by the President of India. This is only one instance of the inhuman, unconscionable and arbitrary manner in which mercy pleas of convicts condemned to death are kept pending by the government for years on end. See, T.R.Andhyaruji, ‘A Thousand Deaths’ The Hindu, 11\textsuperscript{th} Sept 2011 available at http://www.thehindu.com/opinion/lead/article2418776.ece

\textsuperscript{62} Communication No.336/2008, date of Complaint 18\textsuperscript{th} February 2008 (initial submission)

\textsuperscript{63} Article 22 (7)
Apr. 2003), Letter of Amnesty International (2nd May 2003) expressing concern regarding their safety if returned to India, evidence about the arrest and detention of another co-accused, one Mr. P.S. Singh, in appalling conditions, evidence that showed Harminder Singh being wanted by Head of Terrorist cell. They maintained that torture and ill-treatment in police custody and extra-judicial killings continued to be widespread in India and in that regard they produced US Country Report: Human Rights Violations 2007 in India.64

Switzerland however defended its decision to deport the complainants on the following grounds. It maintained that complainants have not alleged that they have been tortured in India; that the present situation is very much different from the situation in which hijacking took place which was about eighteen years ago and now Punjab is a stable state; TADA is abolished; enquiries are getting conducted in India about any excesses. Overall Switzerland considers there is no real, personal and serious risk of torture to the complainants in India if deported.65

The Committee having heard both sides and recalling the General Comment on the implementation of Art3 of CAT in which it is stated that the risk of torture “must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the risk of being highly probable”, took the stand that the evidence produced by the complainant provided sufficient evidence that their profile is sufficiently high to put them at risk if arrested in India. While arriving at this conclusion the two weighty factors which the Committee brought into focus are,

a. India is not a party to CAT
b. Available information about bad torture situation in India. According to the Reports of Special Rapporteur of Torture and other Cruel, inhumane or Degrading Treatment or Punishment, and the Special Rapporteur on Extrajudicial, Summary or Arbitrary executions, ill treatment and torture of individuals held in custody as

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65 General Comment No.1 Implementation of Article 3 of the Convention in the context of Article 22 (Refoulement and Communications. A/53/44. annex IX, paragraph 8
well as deaths in custody\textsuperscript{66} or following detention\textsuperscript{67} continue to be a problem in India. The Committee pointed out that the concerns of Special Rapporteur about the reports of alleged impunity for criminal acts committed by officials.

The Committee ultimately felt that complainants have personal, present and foreseeable risk of torture if they were to return to India and hence decision of Switzerland to deport them to India constitutes violation of Article 3 of CAT.

This determination of course does not deal involve any request from India for extraditing the complainants to India. It involves decision of Switzerland in exercise of its sovereign authority to deport them back to their country. Nevertheless, going by the line of reasoning adopted by the Committee to negate the decision of Switzerland about deportation the determination would not have been any different even if the case involved the issue of extradition and not that of deportation to India. What is crucial is the general idea which the Committee held about the torture situation in India and non desirability of sending alleged criminals to India.

The above described case situations sufficiently indicate the negative image which India carries about its administration of criminal justice. Such a negative outlook would be a great barrier for India to secure the custody of fugitive criminals in spite of strong evidence of their indulge in serious crimes against India and hampers the public interest in the eradication of grave crimes like terrorism, high end financial misappropriations and the like.

\textbf{6.7.5 Diplomatic Assurances & Rule of Non Enquiry}

Political practice of relying on diplomatic assurances and the application of traditional rule of non enquiry by the requested state are the two possible means through which India might possibly bypass the difficultly of non extradition of wanted accused/convicted on the ground of bad home situation relating to torture.

\textsuperscript{66} A/HRC/4/33/Add.1.paras 76 and 83; E/CN.4/2005/62/Add1.paras 727, 733,736,762, E/CN.4/2005/7/Add 1,para 298
\textsuperscript{67} E/CN.4/2006/6/Add 1. para 84 and E/CN.4/2005/62/Add.1 paras 724,725,726,737,756

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So far as diplomatic assurances are concerned, it is not very clear whether they are contemplated in the scheme of CAT. Article 3 does not provide guidelines for how the a state’s assurance that it will not torture an individual will be weighed in determining whether substantial grounds exist to believe a person would be tortured in the proposed receiving state. It however appears from the approach of the Committee on Torture of CAT adopted in Agiza Vs Sweden\(^68\) that diplomatic assurances which provided no mechanism for their enforcement did not suffice to absolve a sending state from its responsibility under Article 3 of CAT could perhaps be interpreted to mean that if diplomatic assurances are accompanied by an enforcement mechanism, the same could be a weighty consideration in deciding against the existence of substantial ground for believing the concerned individual would be tortured. So, when India successfully enacts its Bill on Torture, perhaps its diplomatic assurances are likely to enjoy better strength in procuring extradition if the statute is viewed by the requested as sufficient enforcement mechanism of diplomatic assurance.

So far as the rule of non inquiry is concerned, it is the traditional approach that emanated from the concept of respect for sovereignty. The principle of non inquiry prohibits questioning of soundness of the judicial system of another country. Also, this rule takes into consideration the political reality that if a state is willing to enter into extradition treaty with another state, its political departments would have already made the policy decision that surrender of fugitives to that state is compatible with the overall notions of fairness. It was then consider for the courts to make second guess the decisions of political branches.\(^69\) Therefore, if the requested country adheres to the rule of non inquiry and detains itself from probing into the torture situation in India, the chances for India would be high in successfully procuring extradition from countries concerned about reciprocal advantage or other political benefits. However, the rise in protection for the fugitive has also battered the rule of non inquiry.\(^70\) In fact, our own Supreme Court conceded that rule of non inquiry is not an absolute principle. In its own words, “in a

\(^70\) Ibid p 380
given situation the requested state may question the procedures in the requesting state if they are prima facie contrary to the fundamental principles of justice and there is a risk the fugitive being prejudiced by the process of extradition” and “…obligations entered by many countries of the world including India in the form of Covenant on Civil and Political rights and the Convention against Torture and Other Cruel, Inhuman and degrading Treatment and Punishment (to which India is a signatory) would preclude a total and unconditional observance of non inquiry.”

This change of trend with regard to the traditional rule of non inquiry is very much visible from recent experiences of India relating to its requests for extradition. Thus the case which stands in stark contrast to the recent Hanif case\(^{72}\) and Harminder case\(^{73}\) from the point of non inquiry, is, the decision given by FCC of Germany in the ‘Extradition to India Case’\(^{74}\) in earlier years (decided on 23\(^{rd}\) June 2003). In this case extradition of the fugitive accused of economic offence\(^{75}\) was granted by the court in spite of his objection that if he is extradited he would run the risk of exposure to torture in India Even though the judgment did not expressly mention about the application of non inquiry approach, the limited importance which it gave to the reports produced by the accused as evidence about Indian situation relating to torture, clearly depict its priority to the principle of non inquiry.

In this case, FCC (Federal Constitutional Court) had to deal with the crucial question of human rights adjudication: can an accused be handed over to a country where the police force is accused of “using torture as a regular instrument during the interrogation of apprehended persons” and whose correctional institutions are described as “keeping prisoners and detainees in custody under conditions which resemble a cruel, inhuman and

\(^{71}\) Abu Salem Abdul Qayoom Ansari Vs State of Maharashtra and Another, CDJ 2010 SC 792

\(^{72}\) Supra note 57


\(^{74}\) Case no. 2 BvR 685/03. The court’s decision is published on its website www.bverfg.de (under Entscheidungen).

\(^{75}\) The accused, a former Indian and later a Vanuatuan citizen, was arrested on 15 December 2002 at Munich airport. The arrest was based on an arrest warrant of the First Special Court in Alipore/ Calcutta from May 2002. In this arrest warrant the accused is charged of having obtained, by fraudulent means, in the years 1994 and 1995 an amount of 10,840,000 Indian Rupees (approx. 2,143,000 Euros) from the Allahabad Bank.
humiliating treatment or punishment”?

In this case the fugitive produced evidence about the state of affairs in India relating to practice of torture. The accused quoted two reports of the German Foreign office itself in the years 2001 & 2003 which mentioned frequent incidents of torture during police interrogation in India and inhuman conditions in prisons. The accused also presented the annual reports of Amnesty International according to which torture and maltreatment are daily occurrence in India. Despite this evidence, FCC (Federal Constitutional Court) took the stand that these reports do not actually indicate imminent danger to the accused. The Court did not show any enthusiasm whatsoever to further probe the situation in India State. In fact, the two dissenting judges commented that the Oberlandesgericht (Higher Regional Court) has violated the fact finding duties flowing from the Constitution and observed that the evaluation is not done seriously and intelligibly.

This case\textsuperscript{76} may be contrasted with Harminder Singh case which is decided (in 2011) by Committee against Torture of CAT which took a serious note of the Reports on Indian situation. Hanif case is the extreme example where the UK courts in complete derogation of the Rule of Non Inquiry has opted to determine the issue of extradition only after visits made by official representatives to the Gujarat jails in India. Though on reciprocal basis, Indian Government did accept the condition.

6.8. INDIAN RESPONSES

6.8.1 Death Penalty

With regard to the imposition of capital punishment to the extradited fugitive, Indian statute on extradition provides an exemption clause. Section 34C of Indian Extradition Act says “Notwithstanding anything contained in any other law for the time being in force, where a fugitive criminal, who has committed an extradition offence punishable with death in India, is surrendered or returned by a foreign state on the request of Central Government and the laws of that foreign state do not provide for a death penalty for such an offence, such fugitive criminal shall be liable for punishment of imprisonment for life only for that offence.” This exemption

is made keeping in view the human right dilemmas surrounding the death penalty as a mode of punishment.

By virtue of this clause India is in a position to defend its extradition requests on the ground that though it retains capital punishment, it has exempted such possibility with regard to extradited individuals.

6.8.2. Indian Bill on Prevention of Torture, 2010 – Does it Promise any Scope for Positive Response towards Extradition Requests of India?

India holds a negative image regarding its approach towards the practices of torture. According to the Reports of Amnesty International, torture is a daily occurrence as a matter of systematic practice. As the human rights safeguards, particularly those relating to torture, are gaining more and more space in extradition arrangements, India seems to be paying price for its indifference to internally accommodate these international standards of human rights. The recent instances of negative responses for the requests for extradition of even those fugitives who are most wanted by India from the point of view of national security and public concern, indicate the necessity of India for making adequate attempts to build up a positive image. Shashi Tharoor, Member of Parliament and Former Minister in External Affairs, in his introductory and concluding remarks at the time of discussion in Loksabha on the Bill on Prevention of Torture, 2010 said “I have often felt that the issues here go to two fundamental problems in our country. The first is, how we treat our own people; and the second is the image of our country in the world at large” 77

There are many international instruments which address the issue of torture. Amongst them, CAT stands out for its exclusive focus on the problem of torture. India is signatory to CAT in 1987. It has not yet ratified. Currently India is taking steps to have an enabling legislation 78 that supposedly contributes to the fulfillment of obligations of

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78 A press release issued by the government on 8 April 2010 claims that “ratification of the Convention [against Torture] requires enabling legislation having provisions that would be necessary to give effect to
India as and when it becomes a full-fledged party to CAT. India has drafted a Bill on Prevention of Torture in 2010\textsuperscript{79} (originally drafted in 2009). It is passed in Lok Sabha.\textsuperscript{80} It is yet to go through Rajya Sabha approval.

The lower house of the Indian Parliament, the Lok Sabha, passed the Bill, Prevention of Torture Bill, 2010 on 6 May 2010 after a short debate. However, a simple reading of the debate shows how ill-informed the country's law makers are concerning the question of torture, a crime against humanity. The debate about this important bill in the lower house of the worlds largest democracy hardly lasted two hours, of which considerable time was spent by members who mostly repeated opinions already made by others. The triviality with which most members approached one of the most important pieces of legislation in independent India was crystallised in a members speech in which he claimed that he is a victim of torture and a lawyer by training, but wasted time lamenting about Guantanamo Bay detainees and American imperialism.

Almost all of the members who participated in the debate were ill-prepared and apparently oblivious to the developments in jurisprudence on the subject globally during the last two decades. The Indian legislators competed to demonstrate their illiteracy about the subject and the serious adverse impact that the use of torture has upon democracy, democratic institutions and the space democracy provides for dialogue. Most of them viewed the legislative exercise as an unwelcome and superimposed precondition for ratifying the UN Convention against Torture and Other Inhuman and Degrading Treatment or Punishment (CAT)\textsuperscript{81}

\textsuperscript{79} Text of the Bill available at http://www.prsindia.org/uploads/media/Torture/prevention%20of%20torture%20bill%202010.pdf
\textsuperscript{80} The Bill was passed in Lok Sabha on 6\textsuperscript{th} May 2010. Pitifully, the debate about this important bill in the lower house of the worlds largest democracy hardly lasted two hours
Prevention of Torture Bill, 2010 in a Nut Shell

➢ Torture committed by government officials is punishable.
➢ Torture is defined\(^{82}\) as grievous hurt or danger to life, limb or health. According to the Bill, a public servant or any person with public servant’s consent or acquiescence commits torture,\(^{83}\) if all three conditions are met,
  a. An act results in (i) grievous hurt to any person (Grievous hurt is defined in the Penal Code-includes damage to limbs or organs); or (ii) danger to life, limb or health (mental or Physical) of any person, and
  b. The act is done intentionally, and
  c. The act is done for the purpose of extorting…any confession or any information which may lead to the detection of an offence…and on the ground of a person’s religion, race, place of birth, residence, language, caste or community or any other ground.\(^{84}\)
➢ Sanction of Appropriate Government is essential for lodging any complaint against torture.\(^{85}\)
➢ Complaint has to be lodged within six months\(^{86}\)

\(^{82}\) Clause 3 of the Bill
\(^{83}\) Clause 3. Whoever, being a public servant or being abetted by a public servant or with the consent or acquiescence of a public servant, intentionally does any act for the purposes to obtain from him or a third person such information or a confession which causes,—
(i) grievous hurt to any person; or
(ii) danger to life, limb or health (whether mental or physical) of any person,
is said to inflict torture:
\(^{84}\) Clause 4 of the Bill-Where the public servant referred to in section 3 or any person abetted by or with the consent or acquiescence of such public servant, tortures any person —
(a) for the purpose of extorting from him or from any other person interested in him, any confession or any information which may lead to the detection of an offence or misconduct; and
(b) on the ground of his religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, shall be punishable with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.
\(^{85}\) Clause 6 of the Bill-. No court shall take cognizance of an offence punishable under this Act, alleged to have been committed by a public servant during the course of his employment, except with the previous sanction,—
(a) in the case of a person, who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;
(b) in the case of a person, who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;
(c) in the case of any other person, of the authority competent to remove him from his office.
No doubt, it is laudable that a good beginning is made through the introduction of the Bill on Prevention of Torture. However, the important question that has to be examined is, whether the Bill as it stands today would stand up to the expectations of securing enough confidence in India about its commitment to prevent torture. Well, it does not exhibit such a promise.

**Shortcomings of the Bill**

- The Statement of Objects and Reasons of the proposed legislation which basically be expressing the need to enact a piece of legislation says the Bill is only towards the ultimate aim of ratifying the UNCAT. While ratification is clearly a political aim of the passing of an anti-torture law, the Government at least could have primarily acknowledged the responsibility of the State to take all measures to prohibit, prevent, and redress torture in all contexts of state custody or control; as well as situations where the State’s failure to intervene, or to act, enhances the danger of harm inflicted by torture.

- The very definition of torture provided by the Bill is not in tune with the definition of torture. Clause 4 of the Bill lays down that even if an act qualifies as “torture”, it will be punishable only if it was committed “for the purpose of extorting ... any confession or any information which may lead to the detection of an offence...; and on the ground of [a person's] religion, race, place of birth, residence, language, caste or community or any other ground...”.

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86 Clause 5 of the Bill Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no court shall take cognizance of an offence under this Act unless the complaint is made within six months from the date on which the offence is alleged to have been committed.


In the UNCAT, the purposes for torture included in the definition laid down in Article 1 include four broad categories: (1) obtaining information or a confession, (2) punishment for a committed act or suspected act, (3) intimidation or coercion, and (4) “for any reason based on discrimination of any kind”. Thus the Bill is in contradiction to the formulation in the UNCAT which prohibits torture “for any reason based on discrimination of any kind” as an independent, rather than an additional, ingredient of torture. In effect, the Bill would only punish those acts of torture which result in a very serious injury, were motivated by a desire to extract a confession or information, and were discriminatory.\(^8\)

- The Bill does not try to define what is ‘danger to life or limb’. It remains to be vague phraseology. The definitional clause in the bill 'danger to life, limb or health' is a loosely worded construct that will be subject to wild interpretations depending upon the judicial officer called upon to decide a claim. At the moment, the term 'danger' does not have a definition in the Penal Code, the basic law from which the proposed law derives explanations.’

- Grievous hurt does not include mental suffering or pain. The term 'grievous hurt' is defined in section 320 of the Indian Penal Code, 1861. It is limited to emasculation; or acts that cause permanent privation of the sight of either eye; permanent privation of the hearing of either ear; privation of any member or joint; destruction or permanent impairing of the powers of any member or joint; permanent disfiguration of the head or face; fracture or dislocation of a bone or tooth; or any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits. In other words beating, oral abuse, threats and other forms of intimidation do not amount to torture in the proposed Indian law.

The Bill calls for sanction for any alleged offence by public servant only when committed “during the course of his employment”.\(^{89}\) This is very wider protection offered to public servants than is provided for them under Cr.P.C.\(^{90}\)

It is another gaping omission that command responsibility has not been addressed at all in the Bill. The Committee against Torture has interpreted the absolute prohibition of torture to include command responsibility. Article 2(3) of the UNCAT holds that “an order of a superior or public authority can never be invoked as a justification of torture”. In parallel, the Committee has also held that senior officials are criminally liable for acts of torture committed by juniors. The prevalence of torture at the behest of superior officers is rampant but little known. In spite of their role, superior officers escape all accountability because they are not actually involved in the acts, and the hierarchies in security forces are so entrenched that it is unthinkable for a junior officer to implicate his senior for wrongful orders. The inclusion of a provision codifying senior officers’ criminal liability for torture will act as a tremendous deterrent, and also better ensure that the law is upheld.\(^{91}\)

The Bill does not incorporate the offences in the Indian Penal Code which constitute acts of torture - even those which specifically set out custodial crimes by public servants. The Law Commission in 1994\(^{92}\) described the types of custodial crimes being perpetrated in “alarming dimensions” – torture, injury, extortion, sexual exploitation and death in custody.\(^{93}\)

The Bill addresses only torture. It does not address the problem of cruel, inhuman and degrading treatment or punishment.

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\(^{89}\) Clause 6 of the Bill states that “no court shall take cognizance of an offence punishable under this Act, alleged to have been committed by a public servant during the course of his employment, except with the previous sanction” of the central or state government, as the case may be.

\(^{90}\) Section 197 Cr.P.C.


\(^{92}\) Law Commission of India, “Custodial Crimes”, August 1994

➢ It adds a requirement of proving the intention of the accused person to commit torture.

➢ No minimum punishment prescribed for the guilty. This would effectively result in the imposition of shorter sentences violating the spirit of the legislation. An absolute minimum sentence is thus crucial and should in any case be more than that which applies to the most serious crimes.

➢ Time limitation of six months within which complaint should be made is unreasonable. Such riders will seriously hamper even the limited scope of the law since often victims of torture require more time to be willing to speak about it. Why should there be a limitation clause fastened to a crime that the world considers a crime against humanity? The proposed law also lacks any provisions for important elements required for the effective implementation of the law, like witness protection and independent investigation.

➢ Requirement of prior permission for lodging complaint creates a very discouraging situation for those who are subjected to torture. Section 6 of the proposed law requires prior government sanction to initiate prosecution under the law. This is a redundant provision since a crime, irrespective of the manner in which it is committed, must not save the accused from punishment. Public servants are already provided protection against prosecution in the form of prior executive sanction under Section 197 of the Code of Criminal Procedure. In reality, the prosecution of a public servant has become virtually impossible due to the existence of section 197 Cr.P.C, as sanction is never granted, or the requests for sanction just languish with the executive unduly delaying prosecution. This in turn has established a culture of impunity.

Moreover, in case law on prior sanction, the Supreme Court of India has established that the requirement of prior sanction is not applicable in every case involving a public servant, in other words, there is no blanket requirement for prior sanction in every case. Allegations of torture, and thereby the requirement of prior sanction, indisputably fall outside the scope of Section 197, as no act amounting to torture can be “connected” to official duty.
The rider brought in by section 6 has to be viewed as a limiting clause to delay or even deny prosecutions. Basic criminal jurisprudence warrants that it is for the court to decide whether a crime has been committed and a punishment is to be awarded. This jurisdiction of the court must not be taken away from the court and placed with the discretionary authority of a bureaucrat who acts on behalf of the government. In addition, government sanctions often take more than a decade in India to materialise as they are cost- and time-intensive. There is nothing to indicate that there has been any improvement in the manner in which the bureaucracy works today compared to how it functioned a decade before.

In spite of the high numbers of custodial deaths in India, many of them obviously resulting from torture, the Bill is totally silent on deaths in custody.

There is no independent authority to investigate complaints of torture.

The Law Commission in its 113th report on custodial violence suggested that a change in the law of evidence was needed to prosecute custodial crimes. The Commission recommended the insertion of a new section in the Indian Evidence Act 1872 to give courts the power to draw a presumption that injuries caused to a person while in police custody were caused by the police officer(s) with custody over that person.

Anti-torture legislation has to be accompanied by amendments to existing criminal law, namely the Code of Criminal Procedure and the Indian Evidence Act.

The Bill remains silent on the issue of evidence obtained through torture. No statements or evidence obtained by torture can be used in legal proceedings. To address the problem, any discovery of evidence entered in court, if found through the use of torture, should ideally be excluded in proceedings. Admittedly it is probably more appropriate to include this requirement through amendment of the Evidence Act.

6.8.3 Prevention of Torture Bill, 2011 Version- Merits and Flaws

Prevention of Torture Bill (PTB) 2010 has been significantly improvised in eight areas of the 2010 Bill. They are,
Revision of the definition of torture, bringing it more in line with the Article 1 definition in the CAT.

The revised PTB definition introduces three additional purposive elements into the definition of torture, two of which are enumerated in article 1 of the CAT. The 2010 PTB enumerated only one purposive element in its definition of torture. Further, the 2010 PTB only punished acts of torture where two purposive elements were present conjunctively: (i) obtaining information or a confession; and (ii) discriminating against a person on the ground of religion, race, sex, place of residence, birth, language, caste, sect, colour or community. The revised PTB definition adds the two missing purposive elements enumerated in article 1 of the CAT: (1) punishing a person for an act committed or suspected of committing; (2) intimidating or coercing. Additionally a residuary element also is added namely, ‘for any other purpose.’

- Inclusion of rape and gender-based violence as a form of torture. This is in tune with the UN approach to condemn gender based violence.94
- Elimination of the defence of justification in times of war or emergency which is in tune with UN appeal not to use ‘national security’ as a justification for infliction of torture.95
- Elimination of the defence of superior orders again brings India closer to fulfilling its obligations under the CAT.96
- Providing a minimum sentence for torture.
- Establishing a protection mechanism for complainants and witnesses as sought by the CAT.97

94 In the most recent consensus based United Nations General Assembly (UNGA) resolution for which India joined as well as in previous resolutions, States were called upon “to adopt a gender-sensitive approach in the fight against torture and other cruel, inhuman or degrading treatment or punishment, paying special attention to gender-based violence see, UNGA resolution 65/205, para 10; UNGA resolution 64/153 para 9; UNGA resolution 63/166, para 9; UNGA resolution 62/148, para 2; UNGA resolution 61/153, para 2; UNGA resolution 59/182, para 3; UNGA resolution 57/200, para 4; UNGA resolution 54/156, para 13.
95 UNGA’s most recent resolution of which India joined, that called upon States to eliminate any justification for torture on the basis of national security. See, UNGA resolution 65/205, para 5.
96 Art 2, paragraph 3 of the CAT.
97 Art 13 of the CAT: “steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of [their] complaint or any evidence given.”
• Imposing a mandatory medical exam for all persons remanded in custody. It further requires the medical report to be transmitted to the concerned trial court. It would be a good start in monitoring and preventing torture and other cruel, inhuman or degrading treatment
• Providing compensation for victims of torture. The compensation scheme is significant progress towards meeting State obligations under the CAT\(^98\). It is also progress towards meeting the requirements of ICCPR,\(^99\) for which India is a party.

These revisions bring India closer to fulfilling its obligations under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and the *International Covenant on Civil and Political Rights* (ICCPR) and upholding its general obligation to prohibit torture and other cruel, inhuman or degrading treatment or punishment (CIDTP) under international law.

Despite these improvements, there remain several areas of concern in the revised PTB. The revised PTB, while adhering too many of the obligations under the CAT, falls short of others and in some instances altogether misses obligations in the CAT.

(1) Section 3 – the definition of torture and cruel, inhuman or degrading treatment or punishment;
(2) Section 4 (4) – (6) – reparations and remedies;
(3) The principle of non-refoulement;
(4) Jurisdiction and the obligation to extradite or prosecute;
(5) Preventive measures;
(6) Due diligence – the obligation to prevent torture committed by private individuals;
(7) The exclusion of evidence obtained by torture;
(8) The prohibition of detention incommunicado or detention in secret places.

\(^{98}\) Art 14
\(^{99}\) Art 2
Definitional Problem

As a State Party to the ICCPR, India must ensure that any proposed domestic legislation relating to the prevention and prohibition of torture and CIDTP complies not only with the CAT but also with the provisions of the ICCPR. The prohibition of torture and CIDTP under the ICCPR is wider than the provisions of the CAT in several respects, most notably in prohibiting both torture as well as Cruel Inhuman Degrading Treatment and Punishment and requiring State parties take legislative, administrative, judicial and other measures to prevent and punish both of them.

Definition of torture is problematic in four respects: (1) it fails to criminalize instigation of acts of torture; (2) it uses a stricter definition of cruel, inhuman or degrading treatment rather than “severe pain and suffering, whether physical or mental” as per Article 1 of the CAT; (3) it fails to criminalize cruel, inhuman or degrading treatment; (4) it potentially allows corporal punishment as well as punishment that constitutes cruel, inhuman or degrading punishment to be carried out where it is in accordance with procedures established by the law.

Reparations and Remedies:

CAT obligates\textsuperscript{100} State Parties to ensure victims of torture obtain redress and have an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.

The general consensus of international community to such proposal is visible even in UNGA resolution 65/205, issued in March 2011\textsuperscript{101} and previous resolutions of which India joined, to the effect that “national legal systems must ensure that victims…receive appropriate social, psychological, medical or other relevant specialized rehabilitation

\textsuperscript{100} Art 14
\textsuperscript{101} UNGA Resolution 65/205, para 19; UNGA resolution 64/153, para 18; UNGA resolution 63/166, para 18;
UNGA Resolution 62/148, para 13; UNGA resolution 61/153, para 10; UNGA resolution 59/182, para 9;
UNGA Resolution 57/200, para 4.
The limitation of two years from the infliction of torture beyond which the victim is barred to move is a denial of access to justice.

**Non Refoulgent**

The principle of non-refoulement is a basic component of the prohibition the principle of non-refoulement is absolute and non derogable. The revised PTB does not contain a provision or in fact any reference at all to the issue of non-refoulement.

**The Obligation to Extradite or Prosecute**

Article 5 of the CAT requires State parties to take measures to establish jurisdiction over offences of torture. The UNGA in its most recent resolution and in previous resolutions called upon, “States parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to fulfil their obligation to submit for prosecution or extradite those alleged to have committed acts of torture.” But in the Bill, there are no provisions establishing that perpetrators of torture and ill-treatment must be prosecuted or extradited.

**Preventative Measures**

A key aspect of the Article 2 obligation is that State parties take “effective legislative, administrative, judicial or other measures to prevent acts of torture…under [their] jurisdiction.” The UNGA emphasized that “States must take persistent, determined and effective measures to prevent and combat all acts of torture and other cruel, inhuman or degrading treatment or punishment” and welcomed the establishment of preventive mechanisms to prevent torture and other cruel, inhuman or degrading treatment or punishment. The Committee against Torture views preventive measures as paramount, transcending the items enumerated specifically in the Convention or the demands of its General Comment.

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102 UNGA Resolution 65/205 (March 2011), para 18; UNGA Resolution 64/153 (March 2010), para 17; UNGA Resolution 63/166 (February 2009), para 17; UNGA Resolution 62/148 (March 2008), para 7.

103 UNGA Resolution 65/205, para 2-3.

104 CAT General Comment 2, para 25.
Article 10 and 11 impose specific obligations on State parties to prevent torture by enacting provisions to promote education and training as well as a systematic review of interrogation rules, instructions, methods and practices relating to custody and treatment of persons in custody. Other preventive mechanisms include: (1) signing and ratifying the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)\textsuperscript{105} (2) Signing and ratifying the International Convention for the Protection of All Persons from Enforced Disappearance;\textsuperscript{106} (3) furthering training or education of trained staff involved in custody;\textsuperscript{107} (4) ensuring that persons who report allegations of torture are not punished;\textsuperscript{108} (5) ensuring that persons who are convicted of torture are prevented from working in custody, interrogation or imprisonment or anything else relating to the deprivation of liberty;\textsuperscript{109} (6) ensuring that persons are brought before a judge or other independent judicial officer regularly and allowed visits from family;\textsuperscript{110} (7) providing for an effective monitoring mechanism, if not the OPCAT then a National Human Rights Institution.\textsuperscript{111}

**Due Diligence – Torture Committed by Private Actors**

The Committee against Torture\textsuperscript{112} as well as the Human Rights Committee\textsuperscript{113} require States to implement measures to prevent acts of torture and other cruel, inhuman or degrading treatment committed by private individuals. The revised PTB is silent on the issue of acts of torture or other cruel, inhuman or degrading treatment committed by private individuals. The ICJ recommends that the revised PTB be amended to recognize State responsibility to prevent torture and other cruel, inhuman or degrading treatment committed by private individuals.

\textsuperscript{105} UNGA Resolution 65/205 para 2-3.
\textsuperscript{106} UNGA Resolution 65/205, preamble
\textsuperscript{107} UNGA Resolution 65/205, para 8
\textsuperscript{108} UNGA Resolution 65/205, para 15.
\textsuperscript{109} UNGA Resolution 65/205, para 12.
\textsuperscript{110} UNGA Resolution 65/205, para 20.
\textsuperscript{111} UNGA Resolution 65/205, para 24.
\textsuperscript{112} CAT General Comment 2, para 18.
\textsuperscript{113} HRC General Comment 31, para 8
The Prohibition of Detention Incommunicado or Secret Detention

Detaining persons in secret places or “incommunicado” is a contributing factor to the commission of torture. But the Bill skips any injunction against such practices.

On an overall analysis, it is obvious that the Bill is a superficial effort to mask the image about torture situation in India. That the drafters of the Bill did not intend to eradicate torture is clearly visible from the very Statement of Objectives and reasons of the Bill114 according to which the purpose of the Bill is for the ratification of the Convention against Torture to which India is signatory. The drafters did not even pretend by at least mentioning therein that the Bill aims to eliminate torture. Further, it also has not designed the Bill in conformity with CAT as mentioned in the Statement of Objects and Reasons. Therefore, it is doubtful if the proposed legislation would be of any help in creating an ambience of credibility for India with reference to those countries who have to consider requests if any of India for extradition in the light of any apprehension of torture expressed by individuals to be extradited to India.

6.9 KASAB EXECUTION ON 21ST NOV, 2012 - WILL IT IMPACT EXTRADITION PROSPECTS ?

Recently, Ajmal Kasab one of the terrorists who attacked and killed many innocent people in India was executed on 21st Nov 2012. Though the instance under discussion does not directly involve the legal aspects of extradition, it is discussed because the incident drew international attention as it is a case of execution of a terrorist and Pakistan Media also leveled criticism against the execution on the principle of fair trial. Since the issue of fair trial also operates as human right barrier to extradition, the scholar deemed it appropriate to examine the possible impact of this on prospects of extradition to India.

114 Statement of Objects and Reasons :- ……..”Ratification of the Convention requires enabling legislation to reflect the definition and punishment for "torture". Although some provisions relating to the matter exist in the Indian Penal Code yet they neither define "torture" as clearly as in Article 1 of the said Convention nor make it a criminal offence as called for by Article 4 of the said Convention. In the circumstances, it is necessary for the ratification of the Convention that domestic laws of our country are brought in conformity with the Convention. This would necessitate either amendment of the existing laws such as Indian Penal Code or bringing in a new legislation…….”
The 2008 Mumbai attacks were eleven coordinated shooting and bombing attacks across Mumbai, India's largest city, by Islamist terrorists who were trained in and came from Pakistan. Ajmal Kasab, the only attacker who was captured alive, later confessed upon interrogation that the attacks were conducted with the support of Pakistan's ISI. The attacks, which drew widespread global condemnation, began on Wednesday, 26 November and lasted until Saturday, 29 November 2008, killing 164 people and wounding at least 308.

Ajmal Kasab disclosed that the attackers were members of Lashkar-e-Taiba, the Pakistan-based militant organisation, considered a terrorist organisation by India, Pakistan, the United States, the United Kingdom, and the United Nations, among others.

On 3 May 2010, Kasab was found guilty of 80 offences, including murder, waging war against India, possessing explosives, and other charges. On 6 May 2010, the same trial court sentenced him to death on four counts and to a life sentence on five counts. Kasab's death sentence was upheld by the Bombay High Court on 21 February 2011. The verdict was upheld by the Supreme Court of India on 29 August 2012. Kasab was hanged on 21 November 2012 at 7:30 a.m. and buried at Yerwada Jail in Pune.

The question here is whether this execution is likely to impair the prospects of conceding extradition requests of India? Even though there is a possibility that this could be adding further to the reservations of requested states who ascribe greater importance to human rights ideology, particularly with reference to capital punishment, at least there are two considerations that must outweigh their negative approach towards India so far as this particular case is concerned.

1. India is a consistent victim of terroristic attacks. There is strong public outrage against Kasab for his merciless indulgence in indiscreet killing of innocent people and a great demand for severe punishment of Kasab.
2. A very weighty consideration must be given to the fact that despite the direct and visual proof of Kasab’s involvement in the attack and a very demonstrable national anger against his attack, the trial process is anything but fair and according to due process. Though there is a minor criticism to the effect that Kasab should have been informed that even after his mercy petition is rejected he has still further opportunity to seek judicial review of the decision of the President to reject mercy petition, the overall trial process is anything but fair. Few of the following chronological facts illustrate this.

- Several Indian lawyers refused to represent Kasab citing ethical concerns. Even a resolution was passed unanimously by the Bombay Metropolitan Magistrate Court’s Bar Association, which has more than 1,000 members, saying that none of its members would defend any of the accused of the terror attacks. But, in December 2008, the Chief Justice, K.G.Balakrishna said that for a fair trial, Kasab needed a lawyer. Towards the end of December 2008, Ujjwal Nikam was appointed as Public Prosecutor for trying Kasab.

- Indian investigators filed an 11,000 page Chargesheet against Kasab on 25 February 2009. Due to the fact that the charge sheet was written in Marathi and English, Kasab requested an Urdu translation of the charge sheet.

- His trial was originally scheduled to start on 15 April 2009 but was postponed as his lawyer, Anjali Waghmare was dismissed for a conflict of interest. It resumed on 17 April 2009 only after Abbas Kazmi was assigned as his new defence counsel.

- The trial took substantial time and all levels of judicial bodies up to the Apex Court have been utilized unhindered by the accused. Only after the due

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115 His conviction was based on CCTV footage showing him striding across the Chhatrapati Shivaji Terminus with an AK-47 and a backpack.
117 The trial concluded on 31 March 2010 and he was sentenced to the death penalty. Bombay High Court heard Kasab’s appeal against the death penalty and upheld the sentence given by the trial court in their verdict on 21 February 2011. Later when Kasab moved to Supreme Court of India it stayed the orders of the Bombay High Court so as to follow the due process of law, and it heard the case. The death sentence was finally confirmed on 29th Aug 2012 even by the Supreme Court of India.
hearing the death sentence was confirmed on 29th Aug 2012 even by the Supreme Court of India.

- The avenue of mercy seeking also was availed by Kasab. Kasab's plea for clemency however was rejected by President Pranab Mukherjee on 5 November 2012. The Indian Government duly informed their decision about execution to the Pakistani Foreign Office.

- On the night of 18–19 November, a senior prison official at Arthur Road Jail in Mumbai read Kasab's death warrant to him, informing him at the same time that his petition for clemency had been rejected. Kasab was then asked to sign his death warrant, which he did.

- After the government contemplated burial at sea, the decision was finally made to bury Kasab at Yerwada Jail. Following his execution, Kasab's body was given to a maulvi for burial in accordance with Islamic rites.

- Ansar Burney, a human rights activist in Pakistan, later offered to help repatriate Kasab's body to Pakistan citing humanitarian reasons. The Indian government stated it would consider a formal application if offered. Shinde later stated that Kasab's body was buried in India because Pakistan had refused to claim it.

- Crores of rupees in fact have been spent by India towards the security of Kasab.

In the light of above facts and further taking into consideration the effective contribution of Indian judiciary in upholding the spirit of fair trial, India can defend any opposition to its request of extradition on the ground of possible violation of fair trial rule.

6.10 ICC AND INDIA

India is one of the countries which abstained from voting in favour of establishment of ICC. Subsequently, there is no further move from India to become party to ICC Statute. A principal objection is that ICC impinges the notion of sovereignty. The Indian Government demands during Conference centred around four issues.
That first use of weapons of mass destruction (particularly nuclear weapons) ought to be considered as war crime and must be adjudicated by ICC.

That terrorism—particularly cross border terrorism and terrorism externally inspired, aided and abetted should be included within the jurisdiction of ICC.

That provisions facilitating the Security Council to refer cases which constituted a threat to international peace and security ought to be omitted.

That ICC jurisdiction ought to be restricted to exceptional circumstances.

Though India’s demands for inclusion of terrorism within the jurisdictional ambit of ICC, considering the first use of weapons of mass destruction as war crime, avoid the prospects of politicization of ICC through involvement of Security Council are justifiable, solution however does not lie in abstaining from being a party to ICC. It is unfortunate that India is amongst the very few countries that remained outside ICC. It gives a very negative image about its commitment to the cause of justice. Particularly, its abstinence gives an indication that it wants to provide impunity to the errant state officials even when they might have committed grave crimes. The argument that is made by India time and again is that it has effective laws to deal with human rights abuses, an efficient law enforcement machinery and an active judiciary, hence dismissing the need for ICC. However, India’s human rights profile indicates that political unwillingness has been a vicious obstacle in the path of justice.118 It is true that Indian Judiciary is contributing significantly in enforcing and even developing further the human rights jurisprudence and fair justice norms but the same is inadequate because judiciary acts only when the case comes before it. Much water has to flow before the judiciary gets the opportunity to try the case. Political and other negative factors can block the same.

It is time that India should do its best to improvising its image to the outside world that it stands truly for the human right oriented justice. In this regard, it is very essential that it must become party to ICC and lend its support for the effective

118 Soumya Uma, The International Criminal Court & Its Implications to India in Combating Impunity (2003) p.61
administration of criminal justice by ICC and get the benefit that flows out of it. By being a party it will enjoy better moral and legal ground to seek further fortification of ICC by enlarging its jurisdictional ambit by including terrorism and other serious crimes like drug and human trafficking which are adversely impacting India. Since ICC has only complementary jurisdiction and the issue of surrendering the criminals is subject to other international arrangements, India should have nothing to worry about losing the advantage of bilateral or multilateral agreements on extradition.

6.11 SUMMARY:

India is a victim of various criminal activities like terrorism, drug trafficking. However, the emerging human right barriers to extradition, particularly with reference to torture, have sent enough signals that India which maintains a bad profile of torture would continue to encounter resistance to its extradition requests. The legislative response of India which is in the form of Bill on Prevention of Torture is a good beginning but rather an inadequate one. Similarly, India not being a party to ICC also sends bad signals about its commitment to human right sensitive administration of criminal justice. It is important that India should brace itself to make concrete and practical moves to develop a positive image so far as its profile of human rights is concerned.