CHAPTER- 1

INTRODUCTION& METHODOLOGY

1.1 CONCEPTUALIZING THE PROBLEM:

The term ‘Extradition’ means a procedure followed between nations where it enables one State to hand over to another State suspected or convicted criminals who have fled to the territory of the former. It implies the legal duty to either prosecute or extradite which is contained within a several multilateral instruments aimed at securing international co-operation in the suppression of certain kinds of criminal conduct. The laws of extradition have been derived wholly from treaty sources which have resulted in considerable uniformity in respect of certain important matters within the bilateral treaties and municipal extradition statutes. International law allows states substantial flexibility to set up their municipal legal structure for extradition, because of diverse customs and approaches followed by both civil and common law systems. In spite of these different approaches the laws of extradition has still been able to develop a body of common principles, as follows:

- The requesting State is required to present a official extradition demand ;
- Extradition being made subject to fulfilling the requirement of being an ‘extraditable offence’;
- The principle of double criminality [PODC];
- Evidence of guilt;
- The rule of speciality [RoS].

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2 IVAN ANTHONY SHEARER, EXTRADITION IN INTERNATIONAL LAW, 22, (1971)
Basic principles of laws of extradition have gone through further changes by regional developments. One of such watershed development has been the FDEAW\textsuperscript{4}, which has precluded the application of PODC under certain kinds of offences\textsuperscript{5}.

The laws of extradition in spite of the developments, has not failed to safeguard the individuals’ interests. A number of exceptions to the obligation to extradite primarily related to the personal circumstances of the alleged offender, existing peculiarities with regard to criminal proceedings in the requesting nation and to certain categories of offences, are to be found in most extradition treaties and are reflected in national extradition acts. The situations where an individual can be exempted from being extradited are as follows:

- Principle of non-extradition of nationals;
- Principles of fundamental justice and fairness;
- Possibility of being subjected to death penalty;
- Humanitarian exceptions;
- Military offences;
- Political offences.

In the light of the aforesaid information, the researcher would like to look into the very fundamental question, as to, if states are under any duty to extradite or not, before discussing the challenges to be overcome by the laws of extradition. ‘ADAJ’, is considered as one of the important philosophy behind the concept of extradition, which is considered to be the contemporary version of the phrase ‘ADAP as originally proposed by Grotius. The modern discourse is more focussed on the kind of obligation, treaty based or customary, that states have under international law, with relation to international crimes, like WCs; CAH; actions which may fall within the contours of terrorism; and trans-national offences. Applying principles of \textit{erga omnes and jus cogens}, the nations under obligation to prohibit CAH and such international concurrence among nations to assist commission of such


\textsuperscript{5} Id. Art. 2, para 2
offences would be void. The concept of universal jurisdiction under ICL has led many to believe that every nation is possessing right to take legal action or engage in civil suits against the person responsible for committing jus cogens crimes, who are later found on their territory, which would also consequently lead to a duty to extradite or prosecute those who have committed such crimes. However, the state practice of giving way to amnesty agreements or asylum to individuals indicted for committing CAH, have made it more difficult to say conclusively that nations have an obligation to extradite, for the commission of international offences.

Over centuries, extradition has become one of the key factors to deliver justice to the victims of international crimes. The scope of international crimes has also been expanding over centuries with more focus on seeing that no individual can get away with impunity. To that extent we have even witnessed significant developments made in the branch of ICL, with active support from the office of the Security Council and the comity of nations on a whole. All the international or semi-international forums that have been created post UN for addressing punishment of individuals, have primarily focussed on the breaches of IHL. IHL also has kept up with the challenges that are faced in the modern conflicts, which are again mostly NIAC in nature. It is in this respect, the author must delve into the changing methods of fighting in NIACs, which over the last few decades have mostly comprised acts, which are popularly called ‘acts of terrorism’. Terrorism comprises offences which are defined both in international conventions as well as in municipal legislations. When an offence has been committed which can be categorised as a terrorist act, it becomes important to the get the accused to face prosecution in the domestic courts, incorporating at

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times both international law and municipal laws, making extradition a very important aspect.

It is in this light, the researcher wishes to study the extradition laws in the light of International treaties under the UN as well as Regional Arrangements.

The researcher would now shift focus on the member nations of the ‘SAARC’, specially on India and its relation with the SAARC members\(^7\), focusing more on the ways they cooperate to meet the challenges of the modern nature of crimes and if extradition as a tool has emerged as effective or not. One of the key objectives\(^8\) behind establishing SAARC was to improve the quality of life for people in south Asia; to work towards mutual trust and understanding of one another’s problems. In the light of such objectives SAARC as an organization has taken up quite a few initiatives to fulfill them, especially in building mutual trust, for example, by establishing SAARC Terrorist Offences Monitoring Desk (STOMD)\(^9\), SAARC Drug Offences Monitoring Desk (SDOMD)\(^10\), and discussions are on establishing SAARCPOL\(^11\). In addition to the said efforts some of the SSARC nations have also committed themselves to conventions on terrorism\(^12\). For the past many decades South Asia has been witnessing internal unrests and upheavals arising from a range of destabilizing factors like religious fundamentalism, ethnic conflicts and intense political polarization and the most disturbing fact remains that many states continue to provide

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\(^7\) Nepal, Bangladesh, Sri Lanka Bhutan, India, Pakistan, Maldives, and Afghanistan. See http://www.saarc-sec.org. The SAARC Charter was adopted on 8\(^{th}\) day of December, 1985.


\(^9\) The objectives of the Desk are to collate, analyze and disseminate information on terrorist offences, tactics, strategies and methods. [Available at http://www.saarc-sec.org/areaofcooperation/detail.php?activity_id=24 (last visited on 21.06.2013)]

\(^10\) The objectives of the Desk are to collate, analyze and disseminate information on drug related offences in the region. [Available at http://www.saarc-sec.org/areaofcooperation/detail.php?activity_id=23(last visited on 21.06.2013)]

\(^11\) The Police Conferences have deliberated on a number of important matters relating to Networking arrangements among Police Authorities in the Member States, Concept Paper on the establishment of ‘SAARCPOL’, Prevention of organized crimes, combating corruption, drug abuse, drug trafficking and money laundering and training requirements of police officers and networking among Police authorities. [Available at http://www.saarc-sec.org/areaofcooperation/detail.php?activity_id20 (last accessed on 21.06.2013)]

direct or indirect support to terrorist organizations.\textsuperscript{13} Despite these initiatives, regional efforts to counter terrorism continue to face significant challenges.\textsuperscript{14} As early as 1987, the region’s political leaders agreed on the SAARCCRCST, which obliged parties to criminalize the acts under the Convention as terrorist acts, and for this purpose called for cooperation among its member States on extradition, evidence sharing and other forms of information exchange and cooperation to prosecute individuals who have allegedly committed such grave crimes.\textsuperscript{15}

In the light of the above-mentioned circumstances, it becomes for all the SAARC members to work in cooperation and adopt measures, like frequent intelligence sharing; having extradition treaties among themselves; and also ratifying the said regional terrorism conventions\textsuperscript{16} by all the members. The researcher, would after doing a comprehensive study of the situation prevailing in the SAARC countries, solely focus on India with respect to the its security concerns; its relation with the SAARC members with respect to mutual legal assistance\textsuperscript{17}.

1.2. THE ISSUES AND CHALLENGES OF EXTRADITION

The issues and challenges related to extradition practices are multi-fold. These challenges exist primarily because of lack of political will on the part of the states to fulfill their treaty

\textsuperscript{13} Gen. V.P. Malik, The Need for Enhanced Regional Responses to Terrorism in South Asia, Centre On Global Counter-Terrorism Cooperation (2009), [Available at http://www.globalct.org/wp-content/uploads/2009/12/malik_policybrief_095.pdf (last accessed on 21.06.2013)]. See also Eric Rosand, N C Fink, And Jason Ipe, Countering Terrorism In South Asia : Strengthening Multilateral Engagement, Centre For Global Counterterrorism Cooperation, (2009), [Available at www.globalct.org/wp-content/uploads/2009/05/south_asia.pdf (last accessed on 22.06.2013)]

\textsuperscript{14} Global Survey of the Implementation of Security Council Resolution 1373 (2001) [www.un.org (last accessed on 22.06. 2013)]. See also Sri Lanka calls for international action to stem glorification of terrorism, Asian Tribune, June 16, 2013, [Available at http://www.asiantribune.com/node/62858 (last accessed on 22.062013)]

\textsuperscript{15} id. at 36.

\textsuperscript{16} The SAARCMACM was signed during the 15th SAARC meeting, August 2008. This Convention has so far been ratified by Bangladesh, Bhutan, India, the Maldives and Sri Lanka.

\textsuperscript{17} India at present has bi-lateral extradition treaties, with 28 nations, among which there are only two SAARC nations, namely, Nepal and Bhutan. India also has extradition arrangements with ten nations, among which Sri Lanka, a SAARC member, is one of them, available at, http://cbi.nic.in/interpol/extradition.php#et [accessed on 26th June 2013]. Recently both India and Bangladesh have expressed their satisfaction over signing of the Extradition Treaty and the Revised Travel Arrangements (RTA) between the two countries available at http://pib.nic.in/newsite/erelease.aspx?relid=91863 [accessed on 26th June 2013].
obligations, which require them to either extradite or prosecute. The states have in the past come up with legal tools to protect their own nationals from being prosecuted in foreign jurisdictions. Such measures hinder the treaties from fulfilling their objective. However, extradition in the backdrop of global terrorism presents different set of challenges. Global terrorism is necessarily transnational in nature making extradition processes very important to bring perpetrators to justice. Due to lack of agreement over the components to define terrorism, the judicial forums have been constantly trying to re-interpret the existing treaty provisions to include terrorism as an offence even during armed conflict situations. The researcher would study each of these issues individually in the following chapters.

1.3. REVIEW OF LITERATURE:

The researcher here wishes to undertake literature review of primary documents, like legal instruments, as well as secondary sources like journal articles; reports prepared by UN and other international organizations; books, etc.

In ‘Aut Dedere Aut Judicare: An Overview of Modes of Implementation and Approaches’\(^{18}\), the principle is examined to find out if it has attained the status of CIL and also the way the uncertainties surrounding the status of this principle under international law directly affect both the scope of its application and its effectiveness. The implementation of the principle is studied in the backdrop of OAS; polish legislations, while drawing reference from its constitution law and criminal legislations. Thereafter the author proposes newer approach to the principle as against the traditional approach. To establish ADAJ as an universal rule of extradition, the author suggests that, efforts should be made to gain the acceptance of the proposition that: first, such a rule has become an indispensable element of the suppression of criminality and bringing offenders to justice in an international arena, and second, that it is untenable to continue limiting its scope to international crimes (and not even all of them) as defined in international conventions. He

concludes by saying that attempts should be made to determine the scope of application of this rule in relation to the grounds for refusal of extradition.

In ‘Extradition and International Law’\textsuperscript{19}, it is stated that extradition as matter of concept is not regulated by international law but rather municipal laws of each country. It is submitted that the international legal society cannot prosper or survive unless there is international co-operation insofar as it affects the punishment of criminal offenders. In furtherance of principles as set forth under UN charter as enunciated in article 1 (2) and article 2(3), international societies should do everything conducive to international peace and justice. Lastly, the author calls for an era of greater co-operation amongst states.

In ‘The Law and Practice of Extradition: Recent Developments’\textsuperscript{20}, the author focuses on the developments that has been brought about by the Extradition Act 1989, which had replaced the Extradition Acts 1870-1932. The author speaks about the change in the definition of extradition as brought about by the new legislation and the effects of it. The article also highlights the changes brought about in the law of extradition after UK has ratified ECE in the year 1991 and the ECHR. Author examines limits that are faced by English courts to be bound by the Convention with reference to the issue of abuse of process and the exercise of a statutory discretion to exclude evidence.

In ‘Current Developments’\textsuperscript{21} the authors have primarily focused on the specialized treaties as entered by UK, governments of Caribbean dependencies, United States, Cayman Islands on matters relating to drug trafficking activity. The author initiates by highlighting the tight banking confidentiality laws in the Cayman Islands which help in the act of money laundering, as being the primary obstacle for the United States to pursue for evidence and eventually prosecuting individuals for drug trafficking and other activities. The Cayman Islands agreement has apparently functioned to the satisfaction of the United States Drug


Enforcement Agency and the prosecuting authorities without causing the feared decrease in banking business.\textsuperscript{22}

In, ‘Some Problems of Extradition’\textsuperscript{23} the author says that the restrictions on extradition do not derive from the general aim of extradition, but rather from independent considerations of policy. The article studies the following principles like role of reciprocity; requirement of double criminality; the position of political, fiscal, and military offenses; the principle of \textit{non bis in idem}; the character of the evidence required to support a request for extradition; and the relationship between extradition and other practices, particularly that of expulsion.\textsuperscript{24}

In, ‘Double Criminality in Extradition Law’\textsuperscript{25}, the author identifies the PODC as the most important applied in the basic institutions of ICL and further explains the principle in abstracto and in concreto; double criminality in genre and the double standard of criminal policy.

In, ‘Historical and Legal Perspectives of the Right of Asylum and Extradition until the 19th Century’\textsuperscript{26}, the author discusses historical right of international asylum through the practices of Middle-East; Roman Empire and European monarchies which again has seen the development of treaties for extradition, till 19\textsuperscript{th} century.

In, ‘Extradition in International Law’\textsuperscript{27}, the author questions if law of extradition be capable of being considered as part of Public International Law or not. Author has also placed attention to the relevance of the nationality of the fugitive, to the degree of proof of criminality required, to the characterization of political offences, and to the procedural problems of extradition. The author calls for the urgent need in harmonizing and rationalizing the procedural aspects of extradition.

\textsuperscript{22}id at p.956.
\textsuperscript{24}Id at p. 709.
\textsuperscript{26}Katalin Siska, “\textit{Historical and Legal Perspectives of the Right of Asylum and Extradition until the 19th Century}”, 1 Miskole J. Int’l L. 188 (2004).
\textsuperscript{27}Supra Note. 3
In, ‘Extradition, Human Rights, and the Public Order – The “Extradition to India” - Decision of the FCC’\textsuperscript{28}, the author looks into the question, if 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 humiliating treatment or punishment”, to which the court answered in positive. The author critically analyses the case and concludes that the judgment is in breach of elementary doctrines belonging to German legal order, while accusing for lowering standards of judicial scrutiny to a critical degree.

In, ‘Extradition - Recent Developments in European Criminal Law’\textsuperscript{29}, the author identifies the four-tier extradition framework available to European countries in its relations with various other countries. The article is primarily dedicated to the EAW and its application up to day. It also identifies the questions on conflict can possibly arise.\textsuperscript{30} The article concludes by saying that extradition in the space of the EU has been essentially simplified by the introduction of EAW.

In, ‘The European Arrest Warrant’\textsuperscript{31}, the author traces the development of the process of EAW. The article thereafter focuses as to how the UK Extradition Act, 2003 had incorporated the requirements of the FD and where it has diverged (e.g. Legal bars to extradition).

In, ‘International Extradition and Global Terrorism: Bringing International Criminals to Justice’\textsuperscript{32}, two methods are identified to deal with counter-terrorism, like used armed force or practice a law enforcement approach as well. It speaks about nature of terrorism, extradition, and the customary bases of founding jurisdiction required for implementing

\textsuperscript{30}Id at, p. 233.
within international extradition process. Part III, summarize the interim structure for extradition within the U.N. instruments and evaluate the way every instrument contributes to international extradition law. The author identifies that apart from the legal obligations which are created on the states; even then the most important ingredient is political will.

In, ‘Terrorism, Extradition and Death Penalty’, the article reviews international extradition law regarding the surrender of fugitives from countries that do not have capital punishment to countries that do. The author among other things focuses on the administrative difficulties posed with death penalty by referring to Soering case, and the gradual consolidation and expansion of it.

In, ‘The Development of the Conceptual Framework Supporting International Extradition’, the article shows how the changes in the concept of state are reflected by the historical practice of extradition. It further studies the role of the state in the light of the recent developments in the field of, multi-lateral treaty system; ICL; and the weakening concept of state sovereignty.

In, ‘Recent Development In The Law Of Extradition’, the article recognizes the importance of the international legal structure that has surfaced with the intent to improve answer to organised crimes. Author notes that ‘political offence’ exception has been weakened, and efficiency of RoS, has been gradually compromised.

In, ‘Refusal of Mutual Legal Assistance or Extradition’, the group has looked into the issue of refusing to extend mutual legal assistance on the grounds of political crimes; non-extradition of nationals; death penalty in the requesting state; insufficiency of a case. The group recognizes the following points as reasons for refusal, like, mistrust among states; lack of confidence in another’s justice system; human rights; sovereignty; tradition; notions of fundamental justice and fairness embodied in domestic legal system; and

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33 Id at p. 495.
34 Id.
discrepancies between legal systems. The study concludes by making valuable recommendations.

In, ‘Extradition: A Treatise on the Laws Relevant to the Fugitive Offenders within and with the Commonwealth Countries’, the chapters touch upon the general practices adopted by the Commonwealth countries, like UK, India, and others while extraditing, by referring old judgments. The author even compares the changes in the Indian approach both pre and post Extradition Act, 1962. The book lays out the chronological development of the concept of extradition through bilateral and multilateral treaties of the commonwealth countries.

In, ‘Extradition in Multilateral Treaties and Conventions’, a comprehensive compilation of Inter-American multilateral extradition treaties is provided through careful organization and insightful commentary. This book contributes to this balance and constitutes a fundamental tool for judicial cooperation in the Inter-American context.

In, ‘Transnational Terrorism in the Post-Cold War Era’, the author reveals proof, that by the end of the Cold War, it has provided a dividend in terms of reduced transnational terrorism. He substantiates his claim by showing less of state-sponsorship of terrorism by the Commonwealth of Independent States and other states, as well as the result of measures taken by industrial states to thwart terrorist attacks. He concludes by saying that there has been virtually no upward trend in transnational terrorism, as opposed to media reports. The terrorist incidents have displayed short-lived cycles.

In, ‘Acts of terror, “terrorism” and IHL’, the author concludes, that the existing IHL prohibits terrorism committed in an armed conflict and that there is no cause to amend 1949 GC’s. It concludes that the actions to fight terrorism and to bring alleged terrorists to justice must fulfill with IHL whenever such acts are perpetrated during armed conflict. The article concludes that although International law guarantees humane treatment for persons who

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have committed a crime, be they military or civilian, but does not obstruct criminal justice in the accomplishment of its task.

‘Responding to Terrorism: Crime, Punishment, and War’44 is explores the novelty of U.S.A anti-terrorism policy in the light of 9/11 attacks. It finds that the responses to arise from particular kinds of social trends and effects. It further offers explanations for changes in its policy based on the economic analysis and later on the favored rationales for criminal punishment. The note concludes that the new policy on terrorism, with a caveat that the fundamental shift in policy it represents, if it is indeed to be under-taken, must be undertaken deliberately.

In, ‘Terrorism as War’45, the author studies the concept of terrorism from the lens of crime; aggression; and thereafter studies as to how the courts have dealt with acts of terrorism. It further explores the objectives of the said branches of law with several examples and also lastly focuses on the reliance being placed on criminal prosecution to combat international terrorism.

The book ‘Terrorism and International Law: Challenges and Responses’46 is a collection of articles which covers laws related to refugees, human rights, laws to and laws in war, and municipal law as well. Among other things the articles in the book discuss about counter-terrorism measures and its linkages with human rights, refugee, and humanitarian matters from the international perspective.

In, ‘International Terrorism: The Changing Face of International Extradition and European Criminal Law’47, the author concludes that even though EAW will bring about uniformity and few more advantages with it, but on an universal level the international legal shortcomings would remain. It says that international extradition law should be as uniform as possible, particularly when it concerns the underlying ratio of more effective

protection of societal interests in a horizontal relationship (i.e. between States themselves), focusing especially for the suppression of international terrorism, as this crime affects state interests equally.

In, ‘The Relationship between Safeguarding Internal Security and Complying with International Obligations of Protection’\textsuperscript{48}, scholar examines the “exclusion clause” under Art 1 (F) of the CSR, 1951 in relation to war against terrorism. This essay focuses on individuals who, by reason of their alleged involvement in serious crimes have been excluded from refugee status but who for various reasons can neither be expelled or extradited nor be prosecuted by the host state. The essay studies state practices as to how nations fulfill their international obligations in respect of such people who are left to the mercy of the State.

The working paper ‘The European Union and ‘September 11’\textsuperscript{49}, focuses on the role of the European union post 9/11 attacks. It finds that EU took a number of impressive measures, covering policy areas like co-operation in criminal matters. Finally, it concludes that significant progress has been made with respect to civil aviation security, combating the main causes of terrorism, though much has to be done.

In, ‘Amnesty for WC’s: Defining the limits of international recognition’\textsuperscript{50}, looks into the disturbing practice of granting amnesty to those involved in violations of IHL. The author concludes that customary duty to prosecute individuals accused of WC’s must not be equated with a total withdrawal of amnesties for such offences. It suggests that amnesties should be allowed in limited circumstances, when it would not undermine peace agreement or unsettling newly established civilian government. Therefore only those amnesties which are limited to internationally acceptable parameters and which are not inconsistent in relation to fundamental duty of nations under CIL should be accorded validity of international nature.

\textsuperscript{48} Nina Larsaeus, ‘The Relationship between Safeguarding Internal Security and Complying with International Obligations of Protection’, Faculty of Law University of Lund. [available at http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1559379&fileOId=1564966 (last accessed on 20\textsuperscript{th} June, 2014)]


In, ‘Terrorism and Unilateralism: Criminal Jurisdictions and International Relations’\textsuperscript{51}, finds that international political features of international terrorism have significantly limited the scope and efficacy of the international mechanisms. Therefore the author concludes that more reliance has to be placed on domestic courts for prosecuting individuals for committing terrorism related offences.

In, ‘The Role of International Criminal Law in the Global War on Terrorism’\textsuperscript{52}, the focus is mainly on the United States response to dealing with global war on terrorism, by trying them before ‘military commissions’, which have been criticized as providing unfair trial, as they lacked procedural safeguards. The article argues that most of problems that U.S.A faces in global war against terrorism can be solved through international cooperation and support. It also proposes that since states have failed to prosecute terrorist within their national laws, so other means should be explored. The author states that trying terrorists under federal or international courts would ensure better protection of their human rights than trying them under military tribunals.

In, ‘Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation’\textsuperscript{53}, the author concludes that ‘terrorism’ has moved beyond state conduct and now it includes actions of sub-state actors as well. It is no more just an act to be morally condemned and now it is subject to legal definition. The author finds that the sectoral approach of the international community in proscribing different kind of criminal acts, does lead us to a discernible core definition of terrorism. It identifies some basic conditions which states must comply with, like; definition of terrorism under the municipal laws must comply with the international law standards; development of customary law requiring states to criminalize terrorism.

In, ‘Global War on Terrorism’ Be the New Cold War?’, the author explores the idea as to if the global war on terrorism declared by U.S.A will turn to be an experience similar to the Cold War. The article speaks about the strength and durability of that belief, and if as a social fact it can be used to create a new political framing for world politics. He further distinguishes between a traditional materialist analysis of threat (whether something does or does not pose a specific sort of threat and at what level) and a so-called securitization analysis (whether something can be successfully constructed as a threat, with this understanding being accepted by a wide and/or specifically relevant audience.

In, ‘Terrorism as a War Crime’, the article proposes that IHL must be seen to furthering international efforts to suppress terrorism and the branch of humanitarian law should be seen as an integral part of the framework dealing with the issue of international terrorism. It suggests that the approach undertaken by IHL improves the general discourse on international terrorism in the following ways, like, under IHL, the question of terrorism does not remain tied to the issue of the legitimacy of using force to sustain international relations, an issue of disagreement between developed and developing States concerning the characterization of certain acts as licit or illicit in international law; and, IHL defines terrorism in a prima facie apolitical manner. The article proposes that adopting the IHL approach towards terrorism can put an end to rhetoric like global war on terrorism.

In, ‘Attempts to Define ‘Terrorism’ In International Law’, the paper analyses the unsuccessful attempts to define terrorism since 1920’s, which has indicated the normative importance of generic definition as given by the international community. The paper enumerates the disadvantages of such definition.

54 Barry Buzan, ‘Global War on Terrorism’ Be the New Cold War?’, International Affairs (Royal Institute of International Affairs 1944), Vol. 82, No. 6, 1101-1118, (2006)
55 Id, at p.1102.
57 Id, at p.108-109.
In, ‘Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes’ 59, author proposes a core definition of terrorism based on basic rights of civilians which can never be violated by terrorist methods. The definition which is proposed does not consider the perpetrator’s motivation to be of any material relevance; rather importance is given to the infringement of the value, which can gradually become part of the CIL. The paper also explores the possibility of including terrorism under international criminal law, by, either interpreting crimes against humanity to include terrorism; or to wait for the gradual emergence of a discrete international crime of terrorism. the author suggests an express inclusion of terrorist crimes within the ICC Statute, which could possibly help in avoiding discrepancies both in the sphere of national level, and solve issues of criminal policy as adopted by international community.

In, ‘War on Terror or Terror Wars: The Problem in Defining Terrorism’ 60, it is suggested that the lack of definition of terrorism, even after the 9/11 attacks and the response by the U.S.A, would lead both sides to assert an ethical angle for orchestrating terror wars. This kind of divergent opinion raises the issue to determine, if terrorism exists as cause or effect. The author proposes that any definition of terrorism should take into account the terrorist activities undertaken by failed states, non-state actors, and powerful states. Such definition would create a lawful foundation for international agreement to censure a nation or a group, engaging in terrorism related actions. 61

In, ‘The Prosecute/Extradite Dilemma: Concurrent Criminal Jurisdiction and Global Governance’ 62, the author writes in the backdrop of the complex issues which come up in relation to extradition issues in global governance. The article offers a conceptual framework to assess effective global norms, which is essentially based on when a state

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61 Id, at p.679.
should or should not further their domestic norms, when multiple countries are entitled to apply their own norms to address a particular conduct. The article further examines the U.S.A’s application of its laws to protect its own interests abroad. The article suggests in bringing forth such framework which would balance competing assertions of criminal jurisdiction by multiple countries, and it must settle the norms regarding extradite or prosecute in the light of global governance.

In, ‘Prosecuting Terrorism in International Tribunals’63, the author investigates every possibility of taking legal action against terrorism under through forums like International criminal tribunals. The article explains how terrorism comprises acts of hostility targeting civilians with objective to spread terror, and use it as an instrument to threaten the government or other groups into surrendering to demands of political and religious in nature; discredits the opinion that any noble cause has the potential to legitimize terror violence; and finally that the crime of terrorism can still be implied within the defined crimes within ICC’s jurisdiction.64

In, ‘Terrorism and International Criminal Justice: Dim Prospects for a Future Together’65, the author notes that given the inconsistent and competing definitions of terrorism, the ICC would have to develop a consensus definition and finds it to be sufficiently foreseeable. The author concludes that terrorism because of its transnational nature is fundamentally different from crimes committed during war, Therefore moving terrorism to the status of “crime of crimes” would disregard responses, which since 2001, have resulted in the infringement of IHR encouraging an “us versus them” attitude.66

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64 Id. at p.527-528.


66 Id, at p 49.
In, ‘Should Terrorism Be Subject to Universal Jurisdiction?’ the author comments on the work of Professor Naomi Norberg’s belief that terrorism still doesn’t merit within the ICC jurisdiction as it is yet to be defined which is held up due to political differences. The comments touch upon four themes, like, distinctions between international and transnational crimes; defining terrorism for purposes of universal adjudication; how governments with totalitarian leanings have used the occurrence of terrorist acts to promulgate legislation that could be construed as oppressive and in violation of human rights, and; how terrorism is being fought with immigration law.

In, ‘The Age of Impunity: Using the Duty to Extradite or Prosecute and Universal Jurisdiction to End Impunity for Acts of Terrorism Once and For All’ the author after referring to the recent events provides a concise definition of terrorism; calls for terrorism to be included as CAH or WC depending on situations; describes the international legal obligation to extradite or prosecute, and its elevation to a non-derogable, *jus cogens*, norm in international law; describes how terrorism could be subject to universal jurisdiction; proposes a novel legal framework which the international community could adopt to combat impunity for the crime of terrorism.

In, ‘Terrorism and International Criminal Law: Questions of (In)Coherence and (Il) Legitimacy’, the author assesses the state of anti-terrorism law and finds it to be lacking coherence and legitimacy, as caused by historical growth, new threats and political exigencies. He finds these laws to be often subordinating individual rights to abstract security interests. Such laws will at times be successful in bringing peace, while at other times it will not, but still possessing some instrumental value.

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68 Id, at p 88.
70 Id, at 77,101.
In, ‘Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts’\textsuperscript{72}, the author concludes that International courts lack ability to act against all international crimes; mostly efforts to try foreign state officials for crimes of international nature before domestic courts have usually met with no success; officers of the state usually end up enjoying immunity from being tried before foreign courts, for acts committed in their official capacity. Author refers to substantial facts, only to find exemption not applying to criminal trials of former officials for committing international crimes, while holding an official position.

In, ‘Terrorism and Universal Jurisdiction: Opening a Pandora’s Box?’\textsuperscript{73} The author finds that a greater amount of understanding is required between domestic and international forums to elevate crime of terrorism to invite universal jurisdiction. The author hopes that pending such development nations must seek to fight terrorism by drafting and enforcing anti-terrorism legislation that is tough on terrorists but remains accountable to all members of a civil society.

In, ‘The Domestic Politics of International Extradition’\textsuperscript{74}, the author traces the development of the concept of extradition; examines the reasons behind as to why states overwhelmingly depend on bi-lateral extradition treaties. It further explains as to how the citizenship immunity, the rule of non-inquiry, and political offense exception initiated and the interests so furthered by their addition in extradition treaties. Part IV dwells on the reason behind any nations compliance with extradition while describing the outcome of “compliance uncertainty,” or the difficulty of determining what counts as compliance, on compliance decisions.\textsuperscript{75}

\textsuperscript{72} Joanne Foakes, Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts, November 2011 IL BP 2011/02, pp1-16 [www.chathamhouse.org (visited on 17.06.2013)].

\textsuperscript{73} Nagle, Luz E. “Terrorism and Universal Jurisdiction: Opening a Pandora's Box?” Vol. 27: Iss. 2, Georgia State University L. R., 346. (2010) [available at http://readingroom.law.gsu.edu/gsulr/vol27/iss2/13/ (visited on 17.06.2013)].


\textsuperscript{75} Id, at p 839-840.
In, ‘Prosecuting Terrorists at the International Criminal Court: Re-evaluating an Unused Legal Tool to Combat Terrorism’\textsuperscript{76} the author among other issues mainly focuses on the question as to why acts of terrorism are not being tried by the permanent international criminal court. The author finds the problem to be more of an issue involving considerations of policy and real politik than being solely a issue involving legal questions.\textsuperscript{77} The article finds that, in spite of all the differences existing between nations to arrive at a definition of terrorism, the definition as provided in the Financing Convention to be most comprehensive, for it covers modern day threats, for e.g., acts of terrorism as perpetrated by non state actors, and cyber terrorism as well.

In, ‘The Rome Statute and Legal Limitations to the International Surrender Regime’\textsuperscript{78}, the author views the surrender system under the ICC Statute as a significant contribution to both the procedural and considerable progress of the ICL, overall the international justice system as well. The system has been able to eliminate all traditional grounds of refusal, like political and military offences; double criminality requirement; non-extradition of nationals; lapse of time or amnesty; and finally human rights issues, present in inter-state assistance in criminal matters, which makes the regime relatively close to what scholars call the ideal of vertical cooperation.

In, ‘Universal Jurisdiction Strengthening This Essential Tool Of International Justice’\textsuperscript{79}, it suggests steps that should be taken at the international level to strengthen universal jurisdiction with regard to crimes under international law; identifies concrete measures states should take to strengthen this essential tool of international justice at the national level through improved legislation regarding crimes under international law, vigorous investigations and prosecutions in fair trials without the death penalty and increased cooperation between states regarding such crimes through extradition and mutual legal

\textsuperscript{76} Aviv Cohen, Prosecuting, Terrorists at the International Criminal Court: Re-evaluating an Unused Legal Tool to Combat Terrorism, Vol. 20:2, Michigan State International L. R., 219-256 (2012)
\textsuperscript{77} id, at p.256.
\textsuperscript{79} Universal Jurisdiction Strengthening this Essential Tool Of International Justice, Amnesty International Publications, United Kingdom, (2012)
assistance. It also refers to some state experiences which have lent further support to impunity.

In, ‘New Frontiers of International Criminal Law: Towards a Concept of Universal Crimes’\(^8\), the author examines the concept of universal crimes vis-a-vis international crimes at length. Finally the author proposes the international community to frame an UN Declaration of Universal Crimes, with the objective to elucidate authoritatively and in a principled manner the status and lawful application of all relevant crimes under general international law.\(^8\)

In, ‘International Criminals: Extradite or Prosecute?’\(^8\) Authors firstly discuss about international crimes and the principle of ADAdj. Thereafter they focus on the difficulty of applying such obligation to extradite or prosecute on the other core crimes. They conclude that the obligation ADAdj is distinct from the principle of universal jurisdiction, which provides a basis for prosecution but does not, in itself, imply any obligation to extradite or prosecute; immunity of state officials, which acts as an obstacle to the exercise by a state of its jurisdiction, could, in practice, preclude the effective application of the duty to extradite or hold trial; for core international crimes a treaty imposing an international duty on states to extradite or hold trial would help to bring perpetrators to justice.

In, ‘Article 98 Agreements: Legal or Not?’\(^8\) The thesis mainly focuses on the legality and what Article 98 of the ICC Statute means for the members and non-members of the said treaty. It finds that member states to the ICC will breach the object of the Rome Statute if their signing an Article 98 agreement leads to an accused escaping prosecution, especially in the backdrop of Articles 86, 87, 89 and 90, which would suggest that signing Article 98 agreements would oppose the statute itself. However the thesis is unable to decide if the act of signing an agreement in itself defeats the purpose of the Rome Statute remains unclear. Member states to both the Rome Statute and the Vienna Convention will


\(^8\)id, at p.21.

\(^8\)MišaZgonec-Rožej and Joanne Foakes, International Criminals: Extradite or Prosecute?, IL BP 2013/01, 1-16 (2013) [available at www.chathamhouse.org (visited on 17.06.2013).]

also have to take Article 31 of the Vienna Convention into account, regulating that a member state to a treaty cannot defeat its purpose. States that are members to the Rome Statute and signatories to the Vienna Convention will also be bound not to counteract the Rome Statute through Article 18 of the Vienna Convention. Concerning non member states to the ICC, its other legal obligations might have an impact on the outcome whether they can sign an Article 98 agreement or not. There is a greater possibility that these states can sign an agreement with the United States than member states to the ICC. There are no laws applicable to the entire world and this kind of legal undertakings depend on the individual state’s other obligations towards themselves, other states and the international community.

1.4. THEORETICAL EXPLANATION OF EXTRADITION AND GLOBAL TERRORISM

The term “extradition”, has its etymological roots in Latin and French language and is supposed to be in use since early nineteenth century in France. It is “apparently a coinage of Voltaire’s, from Latin ex “out/former” + traditionem (nominative traditio) “a delivering up, handing over,” noun of action from tradere “to hand over”.

Ancient concepts like respondeat superior; vicarious liability; noxae deditio, a Roman private law principle has influenced extradition laws. Therefore a state harbouring a foreign criminal was believed to be tainted by the presence of the accused, and if not returned on demand, it could lead to diplomatic talks or even use of armed force. Such pressures lead the states to surrender the fugitive. There has been extensive writing on extradition laws in international and regional perspective and all of them have adopted the legalistic meaning, as mentioned above, without any deviation. International law flows from the fundamental concept of sovereignty of States. The practice of extradition essentially depends upon the notion of

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84 *Supra* Note 84
85 In ancient times family was considered the primary unit, i.e., *paterfamilias* and the subordinate members of the household. When wrongs were done by the subordinates, liability could be avoided by handing over the delinquent, i.e., the paterfamilias could either surrender (noxae deditio) or pay damages like ransom for keeping him. See A Manual of Roman Private Law By W. W. Buckland; see also penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Noxalis_Actio.html
separate sovereign states exercising jurisdiction only within their territorial borders. Practice of extradition is necessitated because of the two concepts of sovereignty and equality of States. Since it essentially involves exercise of extra-territorial jurisdiction by a State, therefore it has to be consensual in nature. Consent can be reached either by treaty or diplomatic processes. Any other means used to get custody of any individual through extra-legal measures are condemned but surprisingly the courts have not shown interest in inquiring into the legality involved in the process to get the person to face trial. However before the turn of the century international developments like setting up of tribunals and courts, wholly or partially international in nature, have challenged the very fundamentals of extradition practices. Through the treaty mechanism, states have willingly compromised on their purely sovereign right to a large extent, to be legally obliged to amend their municipal laws and international pressure is created to prosecute individuals, when extradition is refused.

The term “terrorism” has its origin in the word “terror” (from the Latin “terrere”—“to frighten”) which entered Western European languages’ lexicons through French in the fourteenth century and was first used in English in 1528. It refers to acts of violence that target civilians in the pursuit of political or ideological aims. It is difficult to identify precisely the time of its induction into penal laws, as it has grown, as will be shown in following chapters, in an accidental manner. The concept, scope, and components of an act of terrorism have been developing through numerous channels, like municipal law, international law, and judicial decisions.

1.5. OBJECTIVES OF THE RESEARCH:
- To study the development of extradition law under international legal regime in the backdrop of global terrorism
- To examine the scope of terrorism and extradition under international humanitarian and criminal law with an objective to identify the underlying challenges.

\[^{87}\] _Supra_ Note. 53; See also ALEX P. SCHMID, _THE PROBLEMS OF DEFINING TERRORISM_, IN _ENCYCLOPEDIA OF WORLD TERRORISM_ 12 (Martha Crenshaw & John Pimlott eds., 1997).
To identify and analyse the issues and challenges stalling the process of apprehending and punishing individuals in the light of cases.

To study and examine the Indian response to issues of terrorism and extradition within its municipal laws with reference to its international commitments.

1.6. METHODOLOGY:
The type of research is analytical and conceptual. Analytical research, involves the use of facts or information already available, and analyzing them to make a critical evaluation of the material. It can be characterized as conceptual, as it involves studying related theories and re-interpreting them in the light of the facts. The research approach is qualitative and deductive in nature, as it concerns subjective assessment of attitudes, opinions and behaviour.

My research methodology requires gathering information about the concept of extradition and the changes it has gone through over the years by referring to scholarly writings, national laws, international treaties, international opinion, judicial decisions and most importantly state practices. It would also require a detailed study into the development and the expanding concept of terrorism and how the laws relating to extradition are being moulded in accordance to them. For which a detailed study would be required into the international conventions both universal and regional, which are dealing with specific kinds of terrorist activities. The persistent problem of terrorism is much felt in Afghanistan, Pakistan, and India of South Asian region, which has created an atmosphere of mistrust among them. It therefore becomes important to understand the state of affairs as existing among the SAARC members and the responses that they have taken or willing to take to tackle the menace of terrorism and meeting with the challenges regarding extradition. Therefore, the researcher would have to take up a doctrinal research and the methodology to be adopted would be analytical, to understand the role of extradition vis-à-vis terrorist activities with special focus on the South Asian region.

1.6.1. PRIMARY SOURCES OF DATA:

1.6.2. SECONDARY SOURCE OF DATA

Books, journals, reports, articles, unpublished thesis works, newspaper reports, judgments, websites.

1.7. HYPOTHESIS:

The arrangements between national and international legal regimes are sufficiently addressing extradition claim in cases of global terrorism.

1.8.CHAPTERORIZATION :

Keeping in view the background and the scope of the present study as delineated above, the work is proposed to be divided into six chapters. The proposed chapters are as follows:

Chapter 1: Introduction & Methodology

Chapter 2: Growth of Extradition under International Legal Regime

Chapter 3: International Legal Regime: Analysis of Cases Relating to Global Terrorism
To understand the significance of the study, one must remember that the concept of extradition has always responded to the demands of the changing times. Extradition laws since the earlier times have primarily been framed to serve and protect the interests of the states. The offences’ for which extradition is allowed is always reflective of the problems faced by the nations. The laws of extradition are primarily governed by the agreements that the countries enter among themselves, which are further enforced by the executive and the judicial branch of the requested country. The general norms of extradition are basically established by state practices and their gradual incorporation in treaties, conventions, municipal laws, arrangements. In spite of these arrangements, the international community has been unable to adopt any universal convention on matters related to extradition. Nevertheless, we are able to find significant developments made in regional level. The way European Union has shaped up the law on extradition has made significant shift from the much accepted general principles on extradition, for e.g., shifting from the PODC. The rise in trans-boundary crimes, have left nations with no other options than to make the list of extraditable offences more exhaustive. In the last few decades, among other things, it is ‘terrorism’, which has redefined the contours of security of nation, allowing states to take unprecedented care to save itself from it. The relationship between international law and terrorism has also developed accordingly, at a very sporadic pace. Many of the instruments demand member nations to proscribe and penalize in municipal law certain acts, e.g. taking of hostages or hijacking—without requiring, as an element of the offence, proof of a political motive or cause behind the act, or an intention to coerce, intimidate or terrorize certain targets.  

The substantive provisions of these treaties never refer to the terms terrorism or terrorist. The author wishes to limit the study to the laws of extradition in the
context of terrorism. The author fully understands the vast expanse of the scope of the study, therefore, proposing it to be mainly focusing on the South Asian region. The people of South Asia are constantly threatened by the specter of terrorist activity and fear that weapons of mass destruction will fall into the wrong hands. Among the eight SAARC nations, countries like Afghanistan, Pakistan, India, Sri Lanka, have been the direct sufferers of terrorist attacks of the gravest nature. While Bangladesh and Nepal, have most often been used as safe havens by the perpetrators of heinous crimes. It is in the light of the above-mentioned state of affairs, the researcher wishes to look into the existing mechanisms which enable the SAARC nations to extradite individuals and evaluate its success. The researcher wishes to finally focus on the practices adopted by India in the past and presently with regard to terrorism and extradition procedure, through its municipal laws and the international obligations.

89 Supra Note. 13.