CHAPTER 6
CONCLUSION AND SUGGESTIONS

6.1. OVERVIEW

937 Supra Note 788, at p. 44.
938 Supra Note. 904
The present study has looked into the concept of extradition, focusing on the international and Indian perspective in the background of terrorism. Over the last few decades the world community has been living under the scourge of terrorism, which has spread its tentacles beyond the geographical boundaries of a country. Such acts of global terrorism require global mechanisms to deal with it, such as efficient means of extraditing fugitive criminals. To that end international community has adopted international laws as well as structures to implement such laws, both universal and regional in nature. As a result of these developments, extradition which was earlier only limited to States, has now involved international as well as supra-national Organizations, restricting the principle of State sovereignty under public international law. The study has therefore looked into the growth of extradition under public international law; the challenges faced by judicial forums in initiating prosecution of such accused and interpreting the governing laws; the issues which hinder speedy extradition; and the way the Indian laws have responded to the concerns of global terrorism vis-à-vis extradition. This chapter summarises each of the previous chapters and thereafter focuses on the conclusion and finally makes the recommendations.

6.2. SUMMARY

6.3. GROWTH OF EXTRADITION UNDER INTERNATIONAL LEGAL REGIME

The chapter focuses on the general principles of law or the essential elements of law related to extradition and how it has been expressly recognised under international treaties. It explores the development of extradition law under international law by adopting a historical perspective, tracing right from ancient practices to the most recent times, while stressing more on the developments post 9/11 terror attacks. It also explains the way the phenomenon of global terrorism has left its imprint on shaping the development of extradition. It focused on two regional organizations, like European Union and SAARC and examines the way these organizations have responded to the challenge of terrorism and shaped their extradition laws. In spite of the hindrances faced in implementation of these regional mechanisms, they have proved to be largely successful in bringing criminals to
justice in considerably less time without any political interference. However, the existing structure for extradition under the SAARC regime is affected by the lack of mutual trust and severe political differences. Lastly it examines, if the states have any obligation to extradite or prosecute under CIL in addition to treaty obligations. The duty to extradite or prosecute is yet to be established under CIL, supported by widespread practice of states of granting amnesties and exile arrangements, to those who commit crimes against humanity during the past thirty years. It is worth noting that pursuant to constant efforts of the UN, the nations have come together in drafting a Comprehensive Convention against International Terrorism\textsuperscript{939}, which is yet to be adopted by the nations in its present form. Under the present circumstances, the states have obligation to ensure the personal security of individuals under their jurisdiction where a threat is known or suspected to exist, which includes terrorist threats too. In the absence of terrorism being treated as an offence attracting universal jurisdiction, rather the quasi-universal jurisdiction which has been put firmly in place by the anti-terrorism treaties needs to exercised more often without political interference.

6.4. INTERNATIONAL LEGAL REGIME: ANALYSIS OF CASES RELATING TO GLOBAL TERRORISM

This chapter lays its primary focus in understanding the roots of terrorism, its features and its wide scope. The multiple actors involved in different kinds of acts of terrorism, ranging from State terrorism to Narco – terrorism, where each of them has their own peculiarities, have made terrorism global in nature. The acts terrorism, as perpetrated by both State and Non-State actors, has led to globalization of political violence, and it will not be an exaggeration to conclude that “international terrorism represents one of the defining elements of politics on the world stage today.”\textsuperscript{940} The violence involved in such acts of terrorism is often in violation of international humanitarian and criminal law as well. The entire justice delivery mechanism faces varying levels of challenges in its effort to counter


\textsuperscript{940} See Supra Note. 197
terrorism, while these difficulties can be related to different legal systems, their growth, institutional complexity and other circumstances.\textsuperscript{[941]} Although the UNSC has perceived long enough, terrorism to be posing threat to international amity and safety\textsuperscript{[942]}, but it still doesn’t within the contours of “core international” offences, leaving it to be dealt under the domestic laws which must conform to with various aspects of international law.\textsuperscript{[943]}

In this premise the research helps locating the term terrorism under the GC and its Additional Protocols as well. It can be conclusively said that the entire body of IHL along with CIL prohibits terrorist attacks in both IAC & NIAC where such violations entail obligation on States to bring the alleged offender to justice before their own courts, the courts of another State party or an international criminal court. CIL has so far made WCs only as terror violence inviting criminal action.\textsuperscript{[944]} Effects of grave breaches and acts of terrorism are dealt by either legal or extra-legal methods, differing extent of participation by international elements, trials for persons, reparation, truth commissions, a combination thereof. Reasons for not including it as a crime range from overburdening the courts; existence of separate treaty structure; belief that including crimes of terror would politicize the forum; all of which has been countered. It is apparent that international society tried its best to avoid “acts of terrorism” within majority of the documents and when it has incorporated, it is to be interpreted either in reference to the municipal law of the country or has left its interpretation upto the Chambers.

The research further refers to some landmark cases as decided by international/ hybrid and domestic courts to showcase their contribution in establishing the emerging norm of finding individuals criminally responsible committing breaches of jus in bello, treaty

\textsuperscript{[941]}Supra Note. 369.
\textsuperscript{[943]}Universal legal instruments (16 in total as of 2008), together with several Security Council resolutions relating to terrorism (most notably, resolutions 1267 (1999), 1373 (2001) and 1540 (2004),
\textsuperscript{[944]}Supra Note 394
crimes, irrespective of their official capacity while committing those crimes. Over the last six decades the ICJ has rendered its judgment on matters related to extradition touching upon several issues like state immunity, the power of the Security Council, and other issues. The researcher has through case discussions highlighted the lack of cohesion with respect to immunity being granted to incumbent ministers and others in criminal matters, in both disciplines of public international law in general and of ICL.

International criminal tribunals\textsuperscript{945} have laid down the elements of terrorism under the humanitarian law structure, like actual causing of terror/fear isn’t an essential ingredient for offence of terror, although evidence of such terrorization may be used to establish other elements of the crime; the prosecutor has to give evidence to prove that dissemination of fear was the prime objective, not only purpose; intent can be inferred from the actual infliction of terror and the indiscriminate nature of the attacks; have effectively maintained a distinction between terror related things done peacetime and war situations, and thereby not accepting the CIL with respect to terrorism in peacetime, as laid down by the Appeals Chamber of the Special Tribunal for Lebanon.\textsuperscript{946} These forums have through decisions\textsuperscript{947} given rise to three modes of criminal liability, i.e., direct responsibility; Indirect Command Responsibility and Joint Criminal Enterprise.

In the light of the above-discussions it is clear that acts of terrorism can be committed by both State and Non State actors. The IHL and ICLs are applicable on the State actors in a very straight forward manner, as it is not subject to any conditions. However, when it comes to identifying certain individuals as members of non-state actors, difficulties may arise because of conditions being attached as under AP II are rather higher than those of the Rome Statute. The AP II focuses more on the facts like the Non-State actor must actually control territory, while being “State-like”, even if it lacks all of a sovereign State’s attributes, and does not enjoy recognition by other States, or membership in international organizations. The Rome Statute defines NIACs slightly differently, as “armed conflicts may happen within a member country’s jurisdiction among government force and

\textsuperscript{945} Only the ICTR; SCSL; and Statute of the EAC.
\textsuperscript{946} See Supra Note. 478.
\textsuperscript{947} Supra Note. 471, at p.196; Supra Note 475; Supra Note. 476; Supra Note. 477; Supra Note 460;
organized armed group or among the groups.”  

In spite of such distinctions, individual criminal responsibility for non-state actors has not eluded too long, as evidenced by the landmark ruling of the Appeals Chamber which recognized that contravention of the jus in bello could be committed during IAC & NIAC. It is now beyond any doubt that WCs and crimes against humanity are punishable as crimes of international law when committed in NIAC by Non-State actors, who may be members of guerrilla activities, armed bands, and even interim governments, who are subject to prosecution on this basis.

Therefore the non-state actors can be prosecuting for acts of terrorism, in the following situations, i.e,

a. if the governing Statute incorporates the crime of terrorism committed during war; or

b. under all sectoral treaties governing acts of terrorism under the UN, i.e. in times of peace.

Municipal courts have made significant contributions which have further strengthened the principles like lifting the veil of immunity of head of states and other ministers from criminal prosecutions, including serious crimes. The municipal courts have affixed different kinds of charges either by applying provisions of waging war; or crimes as defined under the municipal penal laws. The municipal courts have adopted harmonious construction of the municipal laws in relation to the emerging principles of criminal liability under international criminal liability. Adoption of international norms in interpreting municipal provisions has increased chances of putting an end to impunity.

6.5. EXTRADITION- EMERGING ISSUES, CHALLENGES AND CASES

With the passage of time, extradition is said to have moved from the sole domain of State relations to international organizations. In spite of indictment of such acts, States are still active in delaying or stalling processes of surrendering individuals to face trials, irrespective of the nature of the forum in the form of immunities, impunity agreements,

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948 Supra Note. 399, Art. 8(2)(f).
949 Prosecutor v. Du [Ko Tadi], Case No.IT-94-1-AR72, at paras. 128-36.
951 Id., at p. 922
exile arrangements, and amnesties, declining requests citing political offence or death penalty. It also examines if the States have developed collective conscience to consider acts of terrorism to attract universal jurisdiction, by referring to jurisprudence as developed by several international tribunals. However, going by the emerging jurisprudence from criminal tribunals, which have referred to the vast literature of humanitarian law, it is abundantly clear that ‘acts of terrorism’ in an armed conflict situation definitely empowers nations to exercise universal jurisdiction. It further investigates the duty to surrender or initiate prosecution with relation to terrorist activities has attained the status of CIL. The obligation to extradite or prosecute has still not attained the status of CIL in respect of acts of terrorism whether in peacetime or during IAC & NIAC, given several kinds of impediments, in the form of immunity to head of States; impunity agreements; amnesty agreements and exile arrangements; political offence exception; and other challenges. All the above-mentioned impediments have been examined individually with the help of judicial decisions; UN Security Council Resolutions; Draft Rules by International Law Commission; and most importantly State practices. In the recent years, we have witnessed alternative procedures develop, like lures and expulsions, instead of extradition.

6.6. EXTRADITION- ANALYSIS OF NATIONAL LEGAL REGIME AND CASES

India’s exposure to laws regulating extradition has been fairly recent, in the sense that there is not much of extradition practices recorded in history from ancient times. Its discourse has developed under the British rule and mostly after years of gaining independence. The chapter highlights the existing challenges and issues in extraditing


953 Supra Note. 924
individuals, with the help of legal provisions; state practices; and judicial decisions. It further discusses and analyses the relevant laws and judicial decisions in the following pattern that includes referring to both pre and post independence laws; terrorism and the Indian experience; counter-terrorism laws; universal jurisdiction and other related developments; landmark judicial decisions and their impact in developing the jurisprudence; and India’s international obligations under the UN treaties and the regional agreements under the aegis of SAARC. Presently there are number of legislations which enable investigative agencies to seek surrender of individuals as well as there is a primary legislation like The Extradition Act, 1962 superseding and amending the law relating to extradition of fugitive criminals as well deals with matters incidental thereto. The core principle of extradition, i.e., ADAJ is established through Section 34 A of the Act. Simultaneously the Indian legislature in pursuance to its international legal obligations, preceded by ratification of treaties, enacted some more specific laws, like The Anti-Hijacking Act, 1982; The Suppression of Unlawful Acts Against Safety of Civil Aviation Act, 1982; The SAARC Convention (Suppression Of Terrorism) Act, 1993; The Suppression Of Unlawful Acts Against Safety Of Maritime Navigation and Fixed Platforms On Continental Shelf Act, 2002 applicable to treaty offences with separate mechanism provisions for extradition. India still faces threat of terrorism, since it gained independence and the challenges have increased by several manifolds given the mushrooming number of terrorist organizations in India and other nations. In the light of the past and present looming terror threats, India has had fair amount of experiments in drafting counter-terrorism laws. The counter-terrorism laws in India can be located in form of Special laws and in a scattered manner. The most significant statute is the The Unlawful Activities (Prevention) Act, 1967, amended significantly in 2008 and 2012 to meet the

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954 The Extradition Act, 1962
955 Id Section 34A
956 Supra Note. 611
957 Supra Note. 722
958 Supra Note. 616
959 Supra Note. 656.
requirements as laid down by the Security Council Resolutions.\textsuperscript{960} Therefore we see India securing extradition of individuals by citing international law through the route of special laws as well as ordinary provisions under the Indian Penal Code. The exposure of Indian courts with matters related to extradition law has been significantly less in the light of terrorist activities. The Indian judiciary has adhered to giving purposive interpretation to the provisions of Extradition Act and the counter-terrorism laws as well, while referring to jurisprudence as contributed by municipal courts of foreign jurisdictions.\textsuperscript{961} The researcher while studying the cases as decided by the Indian courts has failed to see any gap existing between executive commitments and judiciary in India.

On the international front India has ratified majority of the terrorism specific UN conventions, without any major reservation, but at the same time has not become a member of Rome Statute of ICC. Despite these initiatives,\textsuperscript{962} regional efforts to counter terrorism continue to face significant challenges as caused by gaps in institutional capacities and limited resources; shortage of counter-terrorism legislation conforming to international standards; and lack of regional cooperation at the operational level. The failure of the SAARC region in matters of co-operation in respect to internal security is also patent in the fact that India has extradition treaties only with three members of SAARC\textsuperscript{963} and one extradition arrangement with Sri Lanka which came into effect back in 1978. SAARC as a regional organization has been a failure in matters of combating terrorism as they are yet to be executed or put into motion by the executive wings of the respective governments.

\textbf{6.7. CONCLUSIONS}

In the age of global terrorism, the greatest challenge facing the world community lies in bringing the accused individuals to face trial. Accordingly countries have developed State practices with respect to extradition and gradually shaped laws both in domestic and


\textsuperscript{961}Supra Note. 695; Supra Note. 696; Daya Singh Lahoria v. UOI and Others (2001) 4 SCC 516 ; Supra Note. 709; Supra Note. 708; Supra Note. 714; Supra Note. 602

\textsuperscript{962}Supra note 12.

\textsuperscript{963}Supra Note. 737
international (universal/ regional) on those lines. International extradition laws are majorly based on the doctrine of mutual legal assistance, which essentially makes the process more dependent on the executive wing of a State. In fact to make these treaties effective, nations have become members to treaties governing mutual assistance in criminal matters. However the success of such measures is essentially dependent on the political will, of the concerned State to fulfill its treaty obligations, due to lack of definite measures of sanction under international law. Therefore it is further examined if States feel otherwise obliged under CIL to extradite or prosecute generally and specially in relations to acts of terrorism. The existing jurisprudence as developed from State practices; practices by international organizations; conflicting judicial decisions, clearly point towards no presence of such obligation under CIL. On the other hand regional organization like European union, have now been able to replace extradition laws between the members with the introduction of EAW, which depends on principle of mutual recognition, which allows municipal courts to recognize the warrants so issued and surrender such individuals to the issuing nation. These mechanisms have to a considerable extent done away with traditional element, like, principle of requirement of double criminality, for a good number of crimes.

Terrorism too, because of its varying kinds can be dealt under separate discourses like ICL; humanitarian law; trans-national criminal law; and sectoral treaties drafted on acts of terrorism. Therefore offences related to terrorism can occur both during peace time and even during situations of IAC & NIAC. The fact that terrorism was not finally adopted in the ICC Statute and many more international tribunals’ charters has come as a setback in interpreting such acts as violations of humanitarian law as well as CIL. In the backdrop of the afore-mentioned problem the courts, confirmed that acts of terrorism are often resorted as an unlawful warfare strategy in armed conflicts and thereby qualified them as WCs entailing individual criminal responsibility under customary law. The following can be considered as ingredients for terrorist acts, i.e., causing fear targeting individuals, their belongings; intentionally making them object of terrorism; and done for primarily disseminating fear.
The other kinds of impediments, those prevent extradition of fugitive criminals, arise because of State practices (e.g. granting exile); laws recognizing such measures (e.g. amnesty); impunity agreements (e.g. under Article 98 of ICC Statute); lack of certainty in respect of law governing immunity as a result of *ratione personae* or *ratione materiae*. However cases of Pinochet; Fujimori, have dispensed justice to the victims by putting an end to immunity of former head of State. In Fujimori the municipal court had applied the municipal penal law while drawing parallel between the crimes committed and ‘crimes against humanity’ by referring to the jurisprudence as developed by multiple international criminal tribunals and chambers, till then; and by importing the German doctrine of indirect participation. While the Pinochet case has been a watershed judgment as a principle of *jus cogens* [i.e. prohibiting acts of torture] triumphed over established principles of immunity *ratione materiae*. The emerging jurisprudence from criminal tribunals makes it clear that an act of terrorism in an armed conflict situation empowers the nations to exercise universal jurisdiction. Lack evidence on the part of states in implementing extra territorial jurisdiction doesn’t prove of the existence of any obligation to surrender or initiate trial for international offences. That the obligation to extradite or prosecute has still not attained the status of CIL in respect of terrorist activities whether peacetime or war.

India, on other hand, has one basic law on extradition in addition to provisions related to extradition as found in other special laws. The fundamental law covering all kinds of acts of terror is found in The Unlawful Activities (Prevention) Act, 1967, which meets all the standards as set in UN treaties.

6.8 RECOMMENDATIONS

In order to deal with the difficulties as summarised above, the researcher would suggest some recommendations as follows. They are as follows:

6.9 INTERNATIONAL –

- The world community should encourage the adoption of the draft Comprehensive Convention against International Terrorism, in its present form, to be given it a full treaty
status. Till then the nations should be persuaded to ratify the existing UN Conventions related to specific kinds of acts of terrorism. It is also submitted that simply engaging in treaty making is not sufficient when there is lack of intention to observe Treaties. The countries should abide by the principle of *Pacta sunt servanda*, as embedded in CIL and in VCLT\(^{964}\). The treaty members must also strictly abide by Article 27 of VCLT, which obliges the parties to not invoke provisions of municipal laws justifying its failure to observe a treaty.

- The pre-existing sectoral treaties on acts of terrorism should be amended to be made applicable even during war, similar to extending jurisdiction as done by Convention for the Suppression of the Financing of Terrorism.

- The comity of nations should in future make efforts to make a transition from the principle of mutual assistance to mutual recognition, which can be possible only when there is no trust deficit among the concerned States.

- Till the consensus is formed, judicial forums must interpret the language of IHL as prohibiting acts of *terrorism* in IAC & NIAC, as practiced by existing forums. Criminal tribunals must where allowed by its constituting document, adjudicate based on the principles like, real terrorization shouldn’t be a necessary part terrorist activities, although evidence of such terrorization may be used to establish other elements of the crime; the prosecution must prove that spreading terror has been the primary purpose, not the only purpose; intent should be inferred from the actual infliction of terror and the indiscriminate nature of the attacks; while effectively maintaining a distinction between terrorist activities done peacetime and war situations.

- With respect to amnesty agreements also, the ICC Statute should incorporate provision which would prohibit it. While given the exhaustive jurisprudence that has developed around international crimes and the efforts to punish individuals for it since Second World War, functional immunity should not be attached to any commission or omission of such crimes.

\(^{964}\) *Supra* Note. 741.
• The researcher would also suggest that countries must refrain from engaging in foreign policies which require them to engage in promoting dictators which eventually lead to acts violating human rights. International relations must not be established on the foundations of grave violations of human rights.

• The SAARC nations must engage in frequent meaningful dialogues to mitigate suspicion among them and work collectively to achieve the goals as set in the terrorism related SAARC conventions. The SAARC must gradually start the journey towards the concept of mutual recognition and make immediate efforts to establish SAARCPOL, at the earliest.

6.10. DOMESTIC --

• India should initiate the process of mainstreaming terrorist offences by
  a. enacting one comprehensive legislation covering all kinds of terrorist activities, naming it ‘Terrorist Activities (Preventive) Act’;
  b. the above suggested legislation can be modelled on the existing Unlawful Activities (Preventive) Act, 1967, while incorporating the following points like:
     i. define the term ‘terrorism’ in the light of the Unlawful Activities (Preventive) Act, 1967;
     ii. Including the offences as sourced from the international treaties, which India has ratified, and thereafter implemented through domestic legislations, e.g., Anti-Hijacking Act, 1982; The Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982; The SAARC Convention (Suppression of Terrorism) Act, 1993.
  c. Recommended legislation should also repeal the other legislations which are in force to implement the individual terrorism related Conventions.
  d. The suggested legislation should be assisted by the National Investigative Agency, as per its statute.

\[965^{Supra} \text{ Note.659.}\]
\[966^{Supra} \text{ Note. 611}\]
\[967^{Supra} \text{ Note. 722}\]
• The Criminal Procedure Code can be amended to the extent of enabling speedy hearing by special courts, assigned only with the task of disposing terror terrorism related cases. The procedure to make appeals and other ancillary things can be made uniform with respect to such offences.

• Given the wide acceptance by courts that acts of terrorism are caused even under the offences defined under IHL, India must too come forward and exercise universal jurisdiction by enforcing The Geneva Convention Act, 1960. The said statute must also include situations covered under Common Article 3 of the 1949 GC, i.e. NIACs. In the recent years there have examples of several protracted NIACs in South Asian region, which have been much condemned by UN.\textsuperscript{968}

• India must strengthen its diplomatic relations especially with the non-treaty States, for exercising the principle of reciprocity without any hindrance as witnessed in the Abu Salem case.