Abstract

The thesis has been taken up in the light of the ever increasing acts of terrorism across jurisdictions, like in countries like Afghanistan, Pakistan, India, Iraq, Yemen, Syria, Nigeria, and many others. In the recent times these terrorist attacks have invited worldwide condemnation as well as military action against such non-state actors. There have been demands on behalf of the victim nations to prosecute the masterminds of such attacks, before their courts. However these efforts often face obstacles as the accused are often located in other jurisdictions, mostly under the protection of that government. It is in such context the thesis undertakes to understand the complexities that lies ahead in comprehending concepts like terrorism, extradition and how both interact in the backdrop of international and national legal regimes, focusing especially on the efforts of SAARC.

The thesis will be primarily testing the hypothesis, if international and national legal regimes are sufficient to deal with the extradition of those who have been indicted for acts of global terrorism in order to be prosecuted. The hypothesis is tested by adopting the doctrinal method of research, focusing on primary and secondary materials.

The development extradition and terrorism related laws has been directly influenced by events in history, like establishment of LON, UN, cold war, NAM, rise of NIAC, rise in civilian targets during armed conflict, mushrooming of religious cum terrorist outfits, and refugee crisis. With the unprecedented rise in terrorist attacks now it has come to be treated as a threat to international peace and security which has in turn mobilized states from sending forces to foreign soil to engage in counter-terrorist activities. Such acts of terror are now accepted within the realm of IHL violations by the progressive interpretation given by judicial bodies like ICTY, and others. However in spite numerous resolutions, UN approved terrorism related conventions, the world is yet to accept the new Convention against International Terrorism. The study aims to understand if multi-lateral and regional treaties have provided adequate measures for nations to prosecute such individuals. The thesis certainly comes to the conclusion that the extradition laws have gradually expanded in scope, by covering a range of offences; it has also guaranteed more human rights protections for the accused, and most importantly the efforts have been to clearly de-politicize the process. The nations have also created legally binding obligations for themselves by adopting treaties on extradition, and mutual legal assistance. These efforts have yielded mixed results like where the arrangements have seen wide acceptance, on the other hand the wide European laws have brought forth the problem of disproportionate use of EAWs, like, retrospective proportionality, prospective proportionality, differing application of proportionality tests throughout the Member States. At times extradition procedures also suffer when nations enter reservations which directly defeat the purpose or objective of the law, however, which is a flaw which must be addressed while drafting a
treaty. The objectives of such treaties can be realized in true spirits when the member states have a zero tolerance policy towards the terror elements and gradually be guided solely by the concept of *aut dedere aut judicare*.

The third chapter further tests the hypothesis to explore terrorism as a crime within the scope of IHL and ICL, and thereby if it can lead to complying with the principle of *aut dedere aut judicare*. After explaining ‘global terrorism’, the thesis looks within the branch of humanitarian law and international criminal law, as they have greater acceptance among the nations, to the extent that IHL principles have emerged as customary international law. So the thesis tries to explore if nations can use IHL and ICL to prosecute individuals, for terrorist acts, and if it would lead to emerge on behalf of the nation’s a duty to extradite or prosecute. The nations have rejected the idea of including acts of terrorism as an international crime under the ICC Statute, however it has not deterred the judicial forums to lay down the elements of terrorism under the humanitarian law structure, like actual threat, not to be an essential indicator for terror related crimes, although evidence of such terrorization may be used to establish other elements of the crime; the prosecutor’s office must prove that dissemination of fear as a prime purpose 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 terrorist attacks done peace time and war situations, and thereby not accepting the CIL with respect to terror offences, as laid down by the Appeals Chamber of the Special Tribunal for Lebanon. There is a possibility that with such interpretation terrorist attacks can be understood to be a prohibited method under IHL along with customary international law. The summarization of the cases helps in establishing the emerging norm of finding individuals criminally responsible committing breaches of jus in bello, and as treaty crimes, irrespective of their official capacity while committing those crimes. The thesis concludes that there is serious lack of cohesion with respect to immunity being granted to incumbent ministers and other in criminal matters, in both disciplines of public international law in general and ICL. The jurisprudence as developed by the International Law Commission (hereinafter referred to as ILC) is also consistent with the arguments as forwarded by the ICJ in the Belgium v. Senegal case. Such acceptance of terrorism in international crimes discourse has definitely opened the doors to more of such prosecutions. Cases of Pinochet, Eichman, Julian Assange, Fujimori, have made significant contribution to the literature related to torture, terrorism, and immunity as head of state, etc. The thesis notes that Financing of Terrorism Convention defines terrorism, applying to both state/ non-state actors, addressing both *acts reus* and special *mens rea*, where former requires causing bodily injury to civilians not participating hostilities, and latter indicates terror related actions as against “mere” unlawful behavior, done with the objective to orchestrate political transformation, as well as frightening populace. In given state of affairs the issue comes to if ‘terrorism’ can be included within
ICL. Even though all kind of acts which come within them are already prohibited, the thesis is of the opinion that the present body of laws under IHL is sufficient.

The thesis thereafter examines the extent to which India is prepared to adhere by the principle of *aut dedere aut judicare* by referring to the municipal law, international obligations, as well as some judicial responses. The India law on extradition has adopted all the best practices of extradition laws. However, it remains a fact that the only Schedule, in the Act which lays out the crimes not to be given political colour, is not exhaustive in nature and has been unable to keep up its pace with international development of extradition norms/ offences established through treaties. However the thesis finds that courts in India have mostly taken the path of purposive interpretation of the provisions of the Act, which has helped the nation in bringing fugitive criminals to justice. The thesis suggests that the Schedule be updated with the obligations that India has taken upon itself internationally. India has been a victim of terrorist activities for decades, and often its effort to extradite the accused back to India faces problem like sheltering of the fugitive by the requested country, non-existence of extradition treaties, non-recognition of terrorist organizations as in the requested nation, and even not recognizing fugitive as a terrorist. India has expanded the scope of ‘terrorist act’ by amending its existing legislation and come to terms with international terrorism specific treaties and Security Council Resolutions. The thesis while exploring cases in India found that judicial decisions have been primarily concerning situations where the fugitive criminal is either required to be surrendered; have already been surrendered to India; or where a fugitive criminal is required to be surrendered to a requesting nation. Judgments in respect of both elements of extradition and terrorism have been significantly less. The courts have taken an inclusive approach and referred to the prevalent international law and state practices as related to extradition and in the light of its findings interpreted Extradition Acts provisions, as witnessed in the 2011 Abu Salem decision. The 2013 Abu Salem judgment has further settled the line of approach the court shall take in future too. However there have been disappointments too, in the sense that the government has not been able to secure the extradition of Chahal Singh; Hafeez Sayeed; David Headley; Dawood Ibrahim; and many more terrorists.

The thesis then unravels more impediments in the implementation of *aut dedere aut judicare*, in the form of immunities, impunity agreements, exile arrangements, and amnesties, and declining requests citing political offence. The thesis tests the phrase *aut dedere aut judicare* in the light of international crimes; terror-specific treaties; and jus cogens perspective. In relation to terror specific treaties, that lack of common practice on behalf of states, point to the fact that they don’t feel obliged to exercise extra-territorial jurisdiction for penalizing international offences. The thesis is of the opinion that 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 war. The concept of ‘immunity’ is not defined...
in international instruments, leaving its scope to be determined through an analysis of practice and, State practice. Under CIL a foreign national can be granted immunity from criminal prosecution, either for the official status of the person concerned (ratione personae), or if it is based on subject-matter immunity (ratione materiae). It is notable that with respect to Heads of government and foreign ministers, when they face trials in municipal courts of other jurisdiction, most of them have been dismissed on the basis of diplomatic or special mission immunity. The thesis finds that functional immunity should not be attached to any commission or omission of such crimes. The thesis also examines the effect of impunity agreements on the extradition procedure, and finds it to be defeating if finally the accused is not prosecuted seriously in its own country. Amnesty and exile agreements can be tricky too, as they are often entered with the hope of brokering peace between the warring parties. The thesis finds such agreements to be against the spirit of Geneva Conventions, and defeating the very idea behind international criminal law. Application of political offence exception has also been an obstacle to extradition, and there has been no uniform way to deal with it, leading to different tests being adopted. Municipal courts have developed various tests, like the Swiss “proportionality” or “predominance” test, the French “objective” test, and the Anglo-American “incidence” test, for determining whether “the nexus between the crime and the political act is sufficiently close for the crime to be deemed not extraditable”. The political offense exception is marred by the tension between its values of political self-determination and the discomfort in applying its protection to acts committed by terrorists. The focus should be more on ensuring that offenders receive a fair trial if extradited based on regular executive findings evaluating the general fairness of the judicial system of a requesting country.

The thesis finally takes the stand that although extradition and terrorism have been covered more or less adequately under both international and national legal regimes, and made it almost mandatory for member parties to adhere by the rule of aut dedere aut judicare. However, often countries fail to fulfill this obligation as there is yet to be consensus on the definition of acts of terrorism and the corresponding duty to extradite or prosecute, citing several defenses. This shortcoming can only be addressed by strict adherence to treaty laws and state practice. Therefore the hypothesis stands invalid.