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EXTRADITION AND DEATH PENALTY: AN UNRESOLVED DILEMMA IN ABOLITIONIST STATES

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The conflict of obligations on the state, on one hand to protect the human rights of the fugitive and the other the obligation to extradite the fugitive so that he can be prosecuted for the offence which he committed, created unresolved dilemma in majority of abolitionist states. It is a moral obligation of the abolitionist state not to be instrumental for a punishment which they cannot impose themselves. On the contrary administration of criminal justice warranted that any person who committed a crime should be prosecuted. An attempt is being made to find out the extent of extra-territorial obligation of the abolitionist state and whether such extra-territorial obligation compel the state not to extradite any fugitive to retaintionist states. This article aims at exploring the alternative options to balance the conflicting obligations. The author suggests that it will be a duty on such state to prosecute the offender for such offence which he/she might have committed at requesting state if the requested state declines to extradite the fugitive.

INTRODUCTION

In the age of growing international crimes, more particularly post Sep, 11 scenarios brought an obligation on the states to take all appropriate measures for suppression of crimes such as terrorism[1]. It obliges a state to extradite the fugitive by narrowing down the scope for refusal of extradition on certain grounds[2]. On the other hand powerful human rights movement has turned its attention towards

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[1] Several measures were taken by world community. One of such example is the Security Council resolution 1373 under Ch. VII passed on 28th September, 2001. This resolution calls upon states not to refuse the extradition of terrorist on the ground of political motivation. U.N. doc. S/RES/1373 (2001).

[2] See Art. 1 of the European Convention on the Suppression of Terrorism which explicitly excluded certain category of offences from political offence clause. Similarly other treaties have narrowed down the scope for denial of extradition and call for international co-operation to suppress terrorism.

extradition in the last few decades. Indeed, almost all extradition treaties incorporated some form of human rights protection[3]. The Institute de Droit International has suggested that;

> '*In cases where there is a well founded fear of violation of the fundamental human rights in the territory of the requesting state, extradition may be refused, whosoever the individual whose extradition is requested and whatever the nature of the offence of which he is accused'*[4]

The increasing demand for inclusion of human rights into the extradition process created tension between the need of effective international cooperation in the suppression of crime and human rights approach of criminal justice[5]. The challenge to the extradition on the ground of human rights protection leap forward for ensuring the Right to life and protection from inhuman degrading treatment[6], adherence to fair trial at requesting state[7] etc. In this essay, my concern is about the right to life. Hence this study will focus on death penalty and its impact on extradition, more particularly in abolitionist states.

Extradition of people who face death penalty now attracts worldwide attention and opposition[8]. On numerous occasions during last two decades issue has been raised in the abolitionist states that whether extradition can be refused if the fugitive faces death penalty in the requesting state. Initially it was challenged on the ground of process of execution as violation of human rights but the mounting abolition movement made it possible to stall extradition *per se* on the ground of death penalty in different national and international forum[9]. In Roger Judge Case[10], Human Rights Committee held that

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[3] The political exception clauses, principle of speciality, principle of double criminality are well established human rights component incorporated in almost all extradition treaties.

[4] Extradition resolution No IV, 68-11, ANN. IDI, *Session de Cambridge*, at pp 304-306 (1984) quoted in Geoff Gilbert, *Transnational Fugitive Offenders in International Law : Extradition and Other Mechanisms,* (Martinus Nijhoff Publishers, The Netherlands, 1998), P 149.

[5] John Dugard and Christine Vanden Wyngaert, Reconciling Extradition with Human Rights*, American Journal of International Law,* vol, 92:187 (1998).

[6] *Soering* v. *United Kingdom*, Series A, No. 161, ECHR, *Kindler* v. *Canada*, U.N. Human Right Committee, 14 HRLJ307 (1993), *Charles Chitat NG* v. *Canada*, Communication No 469/1991/U.N. Doc./CCPR/C/49/D/469/1991, *Roger Judge* v. *Canada*, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003), *Joy Aylor Davis* v. *France*, Appl. No 22742/93, decision dated 20th January, 1994, *K. M Mohammad* V. *South Africa*, Constitutional court of South Africa, decided on 28th May, 2001. *Venezia* v. *Ministero di grazia E. Giustizia*, Judgement No 223.79, Italian Constitution Court, etc.

[7] See *Wright* v. *Jamaica*, Doc. CCPR/C/55/D/459/1991, *X & Y* v. *Ireland*, 24 Yb. ECHR 132, *Galdeano, Ramirez and Beiztegui case*, 26 Sep 1984, Rec 307, (1985) Public Law 328.

[8] See, Alan Clarke, "Terrorism, Extradition, And The death Penalty", William Mitchell Law Review, vol. 29:3 [2003], P 783.

[9] Initially death row phenomenon and the way of execution made were declared as inhuman degrading treatment at regional and international level but now in several domestic jurisdictions in the abolitionist states as well human

the state party which has abolished the death penalty, irrespective of whether they have ratified optional protocol[11] or not violate the right to life if it deports him where he is under sentence of death, without ensuring that the death penalty will not be carried out. The main challenge imposed on such situation is as to how to balance both the interests. The state parties are on the one hand bound by the different bilateral and multilateral treaties as well mandates of the security council for effective international cooperation to suppress crime in general and terrorism in particular to extradite the fugitive. On the other hand the human rights protection of the fugitive obliges the abolitionist state not to extradite if there is well founded fear of imposition of death penalty and other human rights violations.

The death penalty is still valid punishment under international law[12]. It is still not mandatory for all abolitionist state to refuse extradition on the ground of death penalty *per se*[13]. But abolitionist state may refuse extradition as margin of appreciation and discretion is available to them. The law relating to death penalty and refusal of extradition by the abolitionist state under international law is in the stage of transition[14]. The per se rule is still not absolute under international law. Though, different domestic judicial interpretations impose obligation on some states not to extradite the offender if there is chances of death penalty but it does not create an uniform international norm. Indeed, the opinion of the Human Rights Committee in Roger Judge case[15] has brought such obligation nearer to the uniform international norm for abolitionist countries. However, issue is still unresolved and further progress is needed to completely deny the extradition of the persons who may face death penalty in the requesting state.

This article will look into aforesaid two conflicting aspects and try to find out the ways in which both the conflicting interests can be balanced. In the part I have discussed about the legal obligation on the requested state to extradite and availability of discretion within extradition treaties for protection of right to life. In part II, I have explained the status of death penalty under international law. Part III deals with the issue relating to extraterritorial obligation on abolitionist states. Can abolitionist states impose

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right committee recognises death penalty per se ground for refusal of extradition for abolitionist state. I will discuss those cases in later part.

[10] *Roger Judge* v. *Canada*, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003).

[11] Second Optional Protocol to International Covenant on Civil and Political Rights, 1990, G.A. Resolution 44/128, U.N. Doc. A/44/49 (1989), aiming at the abolition of death penalty.

[12] See, William A. Schabas, *The abolition of death penalty in International law*, 3rd Edition, (Cambridge University Press, 2002) p. 377.

[13] Indeed, judiciary at domestic level in some jurisdiction made it mandatory for state to refuse extradition. See *K. M Mohammad* v. *South Africa*, Constitutional court of South Africa, decided on 28th May, 2001. *Venezia* v. *Ministero di grazia E. Giustizia*, Judgement No 223.79, Italian Constitution Court. *United States* v. *Burns*, [2001] 1 SCR 283. However, in this case Canada Supreme Court has kept open the option for extradition without assurance in exceptional cases.

[14] Alan Clarke, note 8, p.783.
[15] *Roger Judge* v. *Canada,* note 10.

their notion of human rights on other retaintionist states for whom death penalty is absolutely valid punishment under international law? In part IV, I have tried to find out the ways in which conflicting interests, obligation to protect life of the fugitive and obligation to bring the fugitive before justice with the aim of suppression of crime, can be balanced.

STATE OBLIGATION TO EXTRADITE THE FUGITIVE

Extradition[16] is one of the means to bring the fugitive before justice. In order to outlaw mounting national as well as transnational crimes and bring the fugitive before justice the international community responded positively by creating new institutions[17] and expanded the scope for extradition and mutual assistance by entering into bilateral[18], multilateral treaties[19] and other mechanisms[20]. Such aim of bringing fugitive before justice is one of the basic tenets of international relations[21]. Moreover, no country is willing to become heaven for fugitive and criminals. It is in the common interest of the countries that the fugitive be prosecuted[22]. Under customary international law a state is not, *per se,*

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[16] Black Law Dictionary define Extradition as, '*the surrender by one state to another to an individual accused or convicted of an offence outside its own territory and within the territorial jurisdiction of another, which, being* competent to try and punish that individual, demands the surrender.

[17] For example, Europol. See European Council Act on the Establishment of a European Police officer. See further, John Dugard, note 5.

[18] United Kingdom and United State of America entered into new extradition treaty which will replace the 1972 Extradition Treaty. For details pertaining to treaty see, http://www.state.gov/p/eur/rls/fs/34885.htm, India and U.S entered into extradition treaty on 25-06-1997. It narrowed down the definition of political offence and diluted the principle of speciality.

[19] Common Wealth Scheme for Rendition of Fugitive Offenders prescribes the procedure for extradition among common wealth countries. European Convention on Extradition obliges the member states to extradite fugitives for extraditable offences. Two subsequent conventions modify the 1957 Convention. European Union Extradition Regulation intended to simplify the extradition process among members. Inter-American Convention on Extradition paves ways for extradition among member states.

[20] Such as formation of committee for planning relating to suppression of terrorism at International level as for example Counter Terrorism Committee established at International level under Security Council. For detail pertaining to formation of Counter Terrorism Committee see, http://www.un.org/Docs/sc/committees/1373/index.html. Similarly in Europe Gijs de Vries was appointed as Counter-terrorism co-ordinator on 25 March 2004. For further information see,

http://www.euractiv.com/Article?tcmuri=tcm:29-136504-16&type=News.

[21] International co-operation among states in the suppression of crime go back to very beginnings of formal diplomacy. Oldest diplomatic document, the peace treaty between Rameses II of Egypt and the Hittite prince Hattusili III (c. 1280 B.C) had provision for return of fugitive. For detailed discussion about evolution and development of extradition law, see, I. A. Shearer, *Extradition in International Law*, University of Manchester (1971).

[22] See for discussion on mutual legal assistance in criminal matter, Matti Joutsen, "International Cooperation Against Transnational Organized Crime: Extradition and Mutual Legal Assistance In Criminal Matters", available at http://www.unafei.or.jp/english/pdf/PDF_rms/no59/ch19.pdf, last visited on 16/03/05.

bound to extradite fugitive as it is closely connected with the principle of state sovereignty[23]. However, in order to maintain world public order and to achieve the goal implicit in the principle of extradition[24], the states entered into bilateral, multilateral extradition treaties, thereby voluntarily accepting limitation on their sovereignty. Moreover, several international instruments impose obligation on the states to extradite the fugitive in the absence of any agreement[25].

The various treaties while imposing obligation for extradition of fugitive, also empower abolitionist states to refuse extradition if there is apprehension of death penalty in the requesting states. The Common Wealth scheme gives a discretionary right to the state to decline extradition if fugitive would likely to be faced with death penalty and for such offence death penalty is not prescribed in requested state[26]. The European Convention further expanded the scope for refusal, though discretionary, for not only the states which have abolished death penalty but also the states which though having death penalty in statute are not normally carrying it out[27]. U.N. Model treaty also prescribes the guidelines according to which states may decline extradition if the offence for which extradition is requested carries the death penalty[28]. Indeed, Inter-American Convention mandates, by using the term shall, to refuse extradition if the request is made for the offence for which death punishment is prescribed[29]. Almost all bilateral agreements also provide similar provisions which grant discretion to requested state to decline extradition. As for example, the recently entered bilateral agreement between United State and United Kingdom give discretionary power to requested state to decline extradition if the crime for which extradition is sought, carry capital punishment[30]. All the aforesaid denial rights are subject to realization of satisfactory assurance from requesting state that the death penalty shall not be imposed and if imposed shall not be carried out.

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[23] See, Kathryn F. King, "The Death Penalty, Extradition And the War Against Terrorism: US Response to European Opinion About Capital Punishment", *Buffalo Human Rights Law Review*, vol. 9, (2003), p. 161.

[24] The following are the basic goals of extradition. (1) to obtain reciprocal return of fugitive offenders; (2) to effect the punishment of wrongful conduct, thereby promoting justice; (3) to avoid becoming safe heavens for fugitives; and (4) to avoid the international tensions caused by one country's refusal to return a fugitive. *See*, Matthew Henning, "Extradition Controversies: How Enthusiastic Prosecutions Can Lead to International Incidents", 22 B. C. Int'L. & Comp. L. Rev. 347, (1991), p. 350-51.

[25] See, Art 8 (2) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, (hereinafter CAT). Art. 8(2) of the Convention for the Suppression of Unlawful Seizure of Aircraft [Hijacking Convention], 860 UNTS 105, entered into force Oct. 14, 1971.

[26] See, Annex. 2 of the Common Wealth Scheme of the Rendition of Fugitive Offenders.
[27] See Art. 11 of the European Convention on Extradition.
[28] Art. 4 (d) of the U.N. Model Treaty on Extradition, U.N. Doc.A/RES/45/116 dated 14th December, 1990.
[29] See, Art. 9 of the Inter-American Convention on Extradition, 1981, available at http://www.oas.org/juridico/english/treaties/b-47(1).html.

[30] See Article 7 of the treaty, note 18.

Most of the bilateral, multilateral treaties as well as numerous conventions which aim to suppress terrorism oblige states for mutual cooperation in criminal matters[31]. Though extradition treaties permit denial of extradition in the case of death penalty but it is still not mandatory as in most circumstances it is only a discretionary right. The state is not bound *per se* by extradition treaty unless some other human rights instrument obliges it in mandatory terms. It is precisely due to this reason that in most cases fugitives have to get protection through human rights instrument. State in some circumstances is bound by two sets of treaty obligations as in the case of The Netherlands versus Short. In this case the Netherlands was bound by the Protocol 6 of the European Convention and on the other hand the other treaty requires it to handover fugitive to United States. In this case the Dutch Court decided that the direct interest of Short not to put to death took precedence over the interest of the State to fulfil its obligations under the NATO Status Treaty[32].

Thus treaty provisions have still not made the rule absolute for abolitionist countries to decline extradition even if there are chances of execution of the fugitive. However, judicial interpretations have made it mandatory in some jurisdictions. In other jurisdictions it is on the discretion of the executive which is not even subject to judicial scrutiny.

ABOLITION OF DEATH PENALTY UNDER INTERNATIONAL LAW

The death penalty has existed since antiquity[33]. Even six decades back the international tribunal had the provision for imposition of death penalty[34]. Domestic judiciary on such reference held that the death penalty prescribed by international law can be imposed even though domestic law did not lay down death penalty[35]. The idea of abolition of death penalty gained momentum in following decades. The United Nation has increasingly favoured an abolitionist view. Efforts to delegitimize death penalty began with the General Assembly resolution in 1977 that affirmed the objective of restricting the number of offences where the death penalty could be imposed[36]. Abolition has been made a prerequisite

[31] Such as European Convention on the Suppression of Terrorism. See also Security Council Resolution 1566 (2004) which call upon states to take more appropriate measures for bringing fugitive to justice through prosecution or extradition.

[32] See, Alan Clarke, note 14.

[33] Anthropologists claim that the drawing at Valladolid by prehistoric cave dwellers show an execution. In positive law, capital punishment can be traced back as early as 1750 BC, in the *lex talionis* of the Code of Hammurabi. See, William A. Schabas, note 12, p. 3.

[34] See, Art. 27 of the Charter of the International Military Tribunal,1945.

[35] Norwegian court ruled that the death penalty was actually prescribed by international law, and thus could be legitimately imposed despite the fact that it was inapplicable under the country's ordinary criminal law. *Public Prosecutor* v. *Klinge*, (1946) 13 Ann. Dig. 262 (Supreme Court, Norway), See also William A. Schabas, note 12, p. 1.

[36] Coroline Keller, "The United States, International Law, and the Death Penalty: Human Rights Hypocrisy", *Justice and Peace Studies Thesis*, April 07, 2003.

for EU membership[37]. In principle and in practice the European governments are unequivocally opposed to capital punishment[38]. Four international instruments were drafted, that proclaimed the abolition of death penalty[39]. Moreover, several other international human rights instruments aimed at its restrictive application or progressive abolition[40]. International community have excluded the death penalty even for the heinous international crimes such as war crime and crime against humanity[41]. Because of growing movement towards abolition the number of abolitionist countries is increasing continuously[42]. Some states basing upon judicial interpretation of life and by treating it as inhuman degrading punishment have made death penalty inapplicable[43].

Though there are growing movement against death penalty but it is still a valid punishment under international law and still it is not fully abolished from democratic world[44]. Human Rights Committee recognising such legality suggested for its restrictive use and progressive abolition[45]. A decade back international bodies were hesitant to declare death penalty per se as inhuman degrading

[37] Kathryn F. King, note 23, p. 171.
[38] *Ibid.*

[39] Second Optional Protocol to the International Covenant on Civil and political Right aiming at the abolition of the death penalty, GA Res. 44/128, (1990), Protocol No 6 to European Convention for the Protection of Human Rights and Fundamental freedoms (hereinafter ECHR) concerning the abolition of death penalty, ETS 114, Protocol No 13 to the ECHR concerning abolition of death penalty in all circumstances, ETS 187, Additional Protocol to the American Convention on Human Rights to Abolition of Death Penalty, OASTS 73. Apart from these the American Convention on Human Rights, (1979) 1144 UNTS 123, OASTS 36 can also be considered as abolitionist instrument because Art 4 (3) prohibit reestablishment of death penalty in abolitionist country.

[40] See, Art 6 (2) & (6) of the International Covenant on Civil and Political Rights (hereinafter referred as ICCPR), Art. 2 of the ECHR, Art. 4 of the American Convention on Human Rights, 1979. Universal Declaration of Human Rights, 1948 and American Declaration on the Rights and Duties of Man, 1948 also declare rights to life in absolute fashion.

[41] The Security Council has excluded use of death penalty by the two international *ad hoc* tribunals created to deal with war crimes in former Yugoslavia and Rwanda: Art. 24 (1) of the Statute of International Tribunal for the Former Yogoslavia, UN Doc, S/RES/827 (1993), Art. 23 (1) of the Statute of the International Tribunal for Rwanda. Furthermore, Art. 77 of the Rome Statute of International Criminal Court, UN Doc A/CONF.183/9, and Art. 19 of the Statute of the Special Court for Sierra Leone also exclude death penalty.

[42] Till now 117 countries, *defacto* or *dejure*, have abolished death penalty and the number of retentionist countries is 78. See for further information, http://www.deathpenaltyinfo.org/article.php?did=127&scid=30#ar, last visited on 19/03/05.

[43] *S* v. *Makuranyane*, 1995 (3) SA 391 and *K. K. Mohammed*, CCT 17/01 dated 28th May, 2001(Constitutional Court of South Africa, Ruling 23/1990 (X.31) *AB*, Constitutional Court of Hungary dated 24th Oct, 1990, Ukraine Constitutional Court ruling dated 30th Dec. 1999; Albania Constitutional Court ruling dated 10th Dec. 1999. see for further details, William A. Schabas, note 33, p. 3.

[44] United State of America and India are two major democracies of the world still prescribed execution for several crimes.

[45] Human Rights Committee, General Comment 6, Article 6, UN Doc. HRI\GEN\1\Rev.1 at 6 (1994). Committee said that States parties are not obliged to abolish the death penalty totally but they are obliged to limit its use and, in particular, to abolish it for other than the "most serious crimes".

punishment even for abolitionist countries on the question of extradition[46]. The situation changed slightly in last one decade and several domestic and international bodies, though recognising death penalty a valid punishment under international law, impose obligation on the abolitionist state not to become instrumental to any such punishment which they them selves can not impose[47]. It created conflict of obligation as well as forcible imposition of one's notion of human rights on other sovereign states that are legally entitled to impose death penalty.

EXTRATERRITORIAL OBLIGATION ON THE ABOLITIONIST STATE

Are the abolitionist states absolutely barred from extraditing fugitive to reatintionist countries where he may face execution and for such countries the death penalty is a valid punishment under international law? In effect when a country declines to grant extradition on the ground of death penalty, it imposes its notion of human rights protection on other countries; although for them such punishment is not violation of human rights principle. In part 1, we have seen that the right to denial extradition is a discretionary right in most circumstances. However, the human rights instrument on some occasions obliges state not to become instrumental in any foreseeable violation of human rights[48]. But no such explicit obligation under international instrument is being prescribed for the death penalty. A decade back, neither international bodies agreed to accept that death penalty *per se* is violation of human rights and the abolitionist have an obligation to obtain satisfactory assurance before extraditing the accused nor the regional bodies were geared up to accept such notion[49]. In Kindler case[50] where extradition order was passed without obtaining any assurance that the fugitive will not be executed and the order was duly affirmed by Canada Supreme Court, Human Rights Committee declined to accept such extradition as violation of right to life of the author. In this case the author argued that the death penalty *per se* constitutes inhuman treatment and punishment[51]. It was further argued that since Canada has abolished the capital punishment in non-military law, the principle applies that one cannot do indirectly which one cannot do directly[52]. Committee affirmed the extradition of Mr. Kindler and held that the terms of Art. 6 of the Covenant do not necessarily require Canada to refuse to extradite or seek assurance[53]. However, Mr. Bertil Wennergren and three other members in their separate dissenting opinion held that Canada had violated Art. 6 (1) by consenting to extradite Mr. Kindler to the United

[46] See, Kindler, note 6, NG, note 6, Soering, note 6.
[47] See the case of Roger Judge, note 10.
[48] See Art. 3 of the CAT.
[49] See, Kindler, NG, Soering, note 46. In all these cases death row phenomenon or the way in which execution will be carried out were challenged.

[50] Kindler, Ibid.
[51] *Ibid*, Para 3.
[52] *Ibid,* Para 10.1.
[53] *Ibid,* Para 14.6.

States without having secured assurances that he would not be subject to execution of death sentence[54]. The statement made by Mr. Bertil Wennergren is noteworthy;

> *"The value of life is immeasurable for any human being, and the right to life enshrined in the article 6 of the Covenant is the supreme human right. It is an obligation of state parties to the covenant to protect the lives of all human beings on their territory and under their jurisdiction. If issues arise in respect of the protection of the right to life, priority must not be accorded to the domestic laws of other countries or to bilateral treaty articles. Discretion of any nature permitted under an extradition treaty cannot apply, as there no room for it under Covenant obligation"*[55].

Mr. Faust Poker opined that under the Covenant abolition is the rule, and the retention of death penalty is exception. Art. 6 Para 2 refer only to countries in which the death penalty has not been abolished and thus ruled out the application of the text to the countries which have abolished the death penalty[56]. In NG case[57] also the issue was involved relating to extradition to United State from Canada and the bilateral agreement provides discretionary rights on the part of Canada to seek assurance as to non-execution of death penalty[58]. Canada has been ordered for extradition without obtaining any assurance as to non execution of the death penalty at requesting state[59] and the order was duly affirmed by higher judiciary[60]. In this case neither author argued that the death penalty per se violates rights to life nor committee considered it; rather argument was placed that the way execution takes place in the state of California constitutes cruel and inhuman treatment or punishment[61]. Committee found that execution by gas asphyxiation constitutes cruel and inhuman treatment and violates Art. 7 by extraditing the author without obtaining assurance[62] Thus this also fails to analyse the right to life of the author in positive terms. Indeed, five members in their separate dissenting opinion held the extradition

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[54] Mr. Bertil Wennergren, Mr. Rajoomer Lallah, Mr. Fausto Pocar and Mr. Francisco Jose Aguilar Urbina opined separately that extraditing Kinder without obtaining any assurance will be violation of Art. 6 of the European Convention. The dissenting opinion of Mr. Bertil Wennergren appended in subsequent opinion of Roger Judge case, note 47.

[55] *Ibid*, See last Paragraph of the dissenting opinion.
[56] *Ibid*.
[57] NG, note 49.
[58] Art. 6 of the Extradition Treaty between Canada and the United States. See Ibid, Para 2.3.
[59] *Ibid*, Para 2.4.
[60] Queen's Bench ordered the author's extradition and Supreme Court of Canada held that the author extradition without assurance as to imposition of death penalty did not contravene Canada's Constitution nor the standard of international community. See, *Ibid.*

[61] The author submit that the execution of the death sentence by gas asphyxiation, as provided for under California statutes, constitute cruel and inhuman treatment or punishment per se. See Ibid, para. 3.

[62] *Ibid.,* Para 16.4.

as violation of right to life of the author as protected under the covenant[63]. According to them obtaining assurance as to non-execution of death penalty is mandatory under the covenant for abolitionist countries and extradition without such assurance is violation of right to life[64].

The most cited[65] authoritative case was the case of Mr. Jens Soaring on the issue associated to death penalty and extradition[66]. However, in this case the issue of death penalty per se was not examined partly because the European Convention on Protection of Human Rights did not abolish capital punishment and the United Kingdom had not ratified Protocol 6 of the ECHR at such time[67]. European Court of Human Rights held referring to death row phenomenon that extradition under these conditions would constitute inhuman or degrading treatment under Art. 3 of the European Convention[68]. Relating to death penalty per se it was held as not an absolute bar to extradition, with or without adequate assurances[69]. Indeed, court imposed extraterritorial obligation on state if it found the chances of violation of human rights. Court held that the fact that the actual human rights violation would take place outside the territory of the requested state did not absolve it from responsibility for any foreseeable consequences of extradition suffered outside its jurisdiction[70].

However, the concurring opinion of Judge De Mayer in Soaring case advanced the stronger position that the death penalty itself constitutes a bar to extradition unless the requesting state provides satisfactory assurances that the death penalty shall not be imposed or if imposed shall not be carried out[71]. He opined that the applicant's extradition to the United States of America would not only expose him to inhuman or degrading treatment or punishment, it would also, and above all, violate his right to life. In his view, 'the most important issue in this case is not 'the likelihood of the feared exposure of the

[63] The following members held that the extradition of author to the United States without obtaining assurance as to non-execution of death penalty is violation of Art. 6 of the Convention. (1) Mr. Fausto Pocor, (2) Mr. Rajsoomer Lallah, (3) Mr. Bertil Wenergren, (4) Mr. Franciso Jose Auguilar Urbina and (5) Mr. Christine Chanet.

[64] Mr. Fausto Pocar opined that the fact that Canada had abolished capital punishment except for certain military offences required its authorities to refuse extradition or request assurances from the United State to the effect that the death penalty would not be imposed.

[65] See, Alan Clarke, note 32, F.N. 15.
[66] Soering, note 49. In this case United State of America requested for extradition of Mr. Jems Soering on capital charges where he may face death penalty. On the other hand Germany requested for extradition. United Kingdom agreed to extradite to United State on the assurance from U.S that the prosecutor would advice the judge on the United Kingdom view on the issue of death penalty.

[67] Indeed, Art. 2 of the ECHR expressively reserve the capital punishment under certain circumstances. Protocol 6 of ECHR aim at abolition of capital punishment except at the time of war.

[68] Soering, note 66. Few years before the Soering Case, the European Commission on Human Rights in Kirkwood case (Appl. No 10479/83, 6 EHRR 373), on similar claim relating to death row phenomenon held that since the applicant not yet been convicted, the risk of him suffering the death row phenomenon was not serious enough to constitute violation of Art. 3.

[69] *Ibid,* See also Alan Clarke, note 65, p. 792.
[70] Soering, note 68, referred in John Dugard, note 5, p. 191.
[71] Soering, *Ibid,* See also, Alan Clarke, note 69.

applicant to the "death row phenomenon," but the very simple fact that his life would be put in jeopardy by the extradition[72]. He went further and held that when a person's right to life is involved, no requested State can be entitled to allow a requesting State to do what the requested State is not itself allowed to do[73]. In another case, Aylor-Davis v. France[74] which involved a country which ratified the Optional Protocol 6, but United State had, in that case, given adequate assurances that the death penalty would not be imposed, European Human Rights Commission ruled that the extradition would not violate Art. 3 of the Protocol 6[75]. However, commission explicitly acknowledged the extraterritorial responsibility of the abolitionist state by conveying that extradition of person to a state where he runs a serious risk of being sentenced to death and executed may engage the responsibility of the state from which extradition is requested[76].

It is apparent from the earlier two cases before Human Rights Committee and the case of Soaring that the death penalty per se did not bar extradition from the abolitionist countries and it was not mandatory for the state to obtain assurance under international law. It was anticipated by scholars that the concurring opinion of Mr. De Meyer J will become the accepted norm in the court reasoning in future[77]. Such anticipation of scholars becomes reality now at different national and international forum. In Roger Judge case Human Rights Committee explicitly recognised the obligation of the abolitionist countries not to extradite fugitive if there is a risk of death penalty[78]. Committee recalled its earlier opinion in Kindler and NG Cases and by analysing the development towards abolition in different jurisdiction, said that the Covenant should be interpreted as living instrument and the rights protected under it should be applied in context and in light of present day condition[79]. Committee imposed extra-territorial obligation on the abolitionist countries. In committee's view the countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. They may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be

[72] *Ibid.*

[73] *Ibid.*

[74] Joy Aylor-Davis, note 6.

[75] Peter Hodgkinson, "Europe A-Death Penalty Free Zone: Commentary and Critique of Abolitionist Strategies", 26, *OHIO N.U. L. Rev*. 625, 661 (2000), referred in Alan Clarke, note 71, p. 793.

[76] Aylor-Davis, note 74.

[77] Geoff Gilbert in his book expressed his opinion that De Meyer J's view will be taken up again in future cases and may in time come to be the accepted reasoning of the court. See Geoff Gilbert, note 4, p. 163.

[78] Roger Judge, note 47, See for comment on the judgement, "Returning Prisoner to Face the U.S. Death Penalty: Limitation Under International Law", available at http://www3.sympatico.ca/aiwarren/return.htm last visited on 27-02-05.

[79] Roger Judge, Ibid, para. 10.3.

reasonably anticipated that they will be sentenced to death[80]. The Committee finally held that Canada, as a state party which has abolished death penalty, irrespective of whether it has not yet ratified the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty, violated the author's right to life under Art. 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out[81]. Thus this opinion of the human rights committee made mandatory for the abolitionist countries what was discretionary a decade back.

There are significant developments at domestic level in large number of countries. Judiciary in several jurisdiction including Canada[82], South Africa[83], Italy[84], Netherlands[85], and France[86], imposed extraterritorial obligation by interpreting constitutional or other international human rights provisions. The most noteworthy jurisprudential development, by cases at domestic level, was made by the decision of the Constitutional Court of South Africa. Though the decision is binding at domestic jurisdiction only but the court's extensive discussion of international law placed the case a step closer to an

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[80] *Ibid*, para. 10.4. The Committee recognised that Canada did not itself impose the death penalty on the author. But by deporting him to a country where he was under sentence of death, Canada established the crucial link in the casual chain that makes it possible the execution of author.

[81] Ibid, para. 10.6

[82] *United State* v. *Burns*, (2001) 1 SCR 283. In this case Minister of Justice ordered for extradition without assurance from United State. Though court has not created absolute bar on extradition of the death eligible person without obtaining sufficient assurance but it brings such restriction very close of it. Court by analyzing its earlier jurisprudence and international development towards abolition of death penalty held that such assurances are constitutionally required in all cases except some exception circumstances. Court did not define or speculate what might be 'exceptional circumstances', saying, 'in the absence of exceptional circumstances which we refrain from trying to anticipate, assurance in death penalty cases are always constitutionally required'. See for detail analysis of this case and earlier jurisprudence, Alan Clarke, note 71

[83] *Mohamed & Another* v. *President of RSA & Others*, 2001 (7) BCLR 685. This case created absolute bar on extradition or deportation without obtaining satisfactory assurance from requesting state. Court said that the South African government agents acted inconsistently with the constitution in handing over the Mohammad without an assurance that he would not be executed. (Para 69 of the judgment)

[84] Andrea Bianchi, International Decision, *Venezia* v. *Ministero di Grazia E Giustizia*, Judgment No 223, 79 Rivista di Diritto Internazionale 815 (1996). Italian Constitutional Court, June 27, 1996, 91 AJIL. 727 (1997). The Court in this case refused to extradite despite assurance from United State that the death penalty shall not be executed.

[85] *CDS* v. *Netherlands*, 93 INT'L L REP 383. In this case the Dutch Supreme Court held that under Art. 1 and 6 of the Protocol 6, the Dutch Government was bound under the ECHR to refrain from acts which could 'result in someone within the jurisdiction being imposed to the death penalty, even if the penalty is imposed or carried out elsewhere. See also, Geoff Gilbert, note 77. p. 167

[86] *Fidan Case,* 100 INT'L L REP 662. In this case the French *Conseil d' Etat* goes one step further on sufficiency of assurances and held that it would be contrary to *ordre public* to extradite Fidan since any guarantees given by the Turkish government under the typical treaty clause would not be binding on the independent court. See also Geoff note 77, p. 167

international rule absolutely barring extradition of death-eligible in the absence of adequate assurances that the death penalty will not be imposed or executed[87]. Even on commenting this decision one scholar said, 'the South African Constitutional Court dropped a potential bombshell[88]. We can anticipate that the court reasoning is likely to influence the decisions of the other domestic as well as international tribunals[89].

Though it is established from earlier discussions that significant developments were achieved under national and international law towards per se rule to bar extradition from abolitionist countries without satisfactory assurance, it has no uniform impact on all abolitionist countries. On the one hand landmark opinion of Human Rights Committee in Roger Judge case[90] leap the international law towards absolute bar of extradition without adequate assurance, it did not carry uniform binding obligation for all abolitionist countries. On the other hand the development at different domestic jurisdiction through judicial interpretation did not create uniform obligation in each country. As we have seen, the South African Constitution Court[91] creates absolute prohibition on extradition without obtaining satisfactory assurance on the other hand Canada Supreme Court[92] have left the option open for extradition without assurance in exceptional circumstances. There are opinions like Italian court which absolutely bar the extradition to the retentionist countries even though assurance was provided by the requesting state[93]. Thus the issue of extradition from the abolitionist countries to the retaintionist countries in the cases where there is chance of capital punishment is still not uniform. Certainly, in most of the countries the obtaining of assurance which was discretionary has become mandatory and other abolitionist countries will probably follow the same steps.

We can anticipate that in near future the regional judicial bodies like European Court of Human Rights, Inter-American Court and African Court of Human Rights will give authoritative opinion which will be binding in such jurisdiction and growing state practice will make it customary international law and thus, per se rule will become binding uniformly in abolitionist countries.

[87] See, Alan Clarke, note 71. p. 803.
[88] *Ibid,* Alan Clarke in his article made such comment about the decision.
[89] See Bruce Zagaris, "South African Constitutional Court Rules Deporting Alleged Terrorist to U.S. Violated Rights", *INT'L ENFORCEMENT LAW REP.*, Section: International Terrorism (Dec. 2001) Vol. 17, No. 12. 'On the one hand, the ruling has limited solace for Mohammad since he has been deported, tried and convicted by U.S. On the other hand, his case has importance for future situations in South Africa and the Common Wealth countries, since the decision will noted and may be precedent in other cases….' Quoted in, Ibid, Foot Note 116.

[90] Roger Judge, note 79.

[91] See note 83.
[92] See note 82.
[93] See note 84.

BALANCING THE OBLIGATIONS: BRINGING THE FUGITIVE BEFORE JUSTICE AND PROTECTION OF THE RIGHT TO LIFE

While growing menace of terrorism and other trans-national crimes imposed obligation on states to bring the fugitive before justice, the human rights movement towards abolition of death penalty imposes extraterritorial obligation on the states not to become instrumental in imposition of death penalty on any fugitive which they cannot carry out directly. The thrust on bringing fugitive to justice may lead to circumstances where fugitive may be extradited without any assurance or with inadequate assurance[94]. On the other hand thrust on the protection of right to life of the fugitive may lead to circumstances where fugitive will be scot-free from the clutch of the law, which itself creates unjustifiable circumstances for criminal justice system[95]. The main challenge before the legal fraternity is how to balance these two obligations.

In order to balance both the obligations, the abolitionist states have two main options. First option is the conditional extradition; extradition after obtaining adequate assurance from the requesting state that death penalty shall not be imposed and if imposed shall not be carried out. Most of treaties explicitly provide such option, though in discretionary terms in most circumstances. In order to fulfil both the obligations the discretionary rights of the requested states require to be clothed with mandatory obligation. In fact, the judicial interpretation at domestic level and Human Rights Committees' view at international level bring such obligation nearer to the absolute requirement for adequate assurance. Now the issue on the first option for the abolitionist countries that lies is the determination of adequacy of assurance. In Venezia case[96] court suggested that such executive assurance was not satisfactory as they are not binding on judiciary[97] . However, in this case Constitutional Court went on further and held that 'very concept of 'sufficient assurance'….is constitutionally inadmissible'[98]. In Dharmarajah case[99]

[94] It is apparent from preceding discussion that it is still not mandatory in all jurisdictions among abolitionist state to obtain adequate assurance. Even in some circumstances if executive obtain assurance, as in the case of Soering, the executive authority at United Kingdom were satisfied with the Unite States assurance but in reality the assurance was inadequate. Sufficiency of assurance become issue in several cases as discussed earlier.

[95] If a state decline to extradite on the plea of assurance or sufficiency of assurance without taking any further action for finding alternative mechanism for bringing fugitive to justice, it will lead to making accused free from any charges. As example, in much cited case of Soering, European Court of Human Rights, rightly, in order to protect the fugitive from human rights violation decline extradition, in result the judgment made Mr. Soering free from any charges and he can live in United Kingdom without any trial for the serious crime which he had committed.

[96] Venezia, note 84.

[97] See, John Dugard, note 70, Footnote 143.

[98] Andrea Bianchi argued that constitutional court has not fully ruled out the extradition in capital crime. Though the expression of the court reflects that court intend to bar extradition in cases relating to death penalty. See, Andrea Bianchi, note 84

[99] See Geoff Gilbert, note 77, p. 167

Switzerland obtained assurance from Sri Lanka that Dharmarajah shall not be executed along with several other assurances. However, still Dharmaraja has not been extradited on the apprehension of human rights violation[100]. In Fidan[101] case France refused extradition on the ground of in-sufficiency of assurance. Thus determination of sufficiency varies from case to case. Under international law assurance should be satisfactory and hence gives clear undertaking that the death penalty shall not be imposed or if imposed shall not be carried out. It should be the prerogative of requested state to determine sufficiency and such determination should be open for judicial scrutiny.

The second option which may be used by the abolitionist states is to prosecute the fugitive. The question of prosecution for offence arises when state refuse to extradite the fugitive either on the ground of lack or sufficiency of assurance or otherwise. The principle *Aut Dedere Aut Judicare* creates 'alternative obligation'[102] either to extradite or prosecute. With intent to secure international cooperation in the suppression of certain kind of crimes; several international treaties contained such principle[103]. Some extradition treaty also prescribe such alternative remedy such as European Convention on Extradition provides, *'if the requested party does not extradite its national, it shall at the request of the requesting party submit the case to its competent authorities in order that the proceedings may be taken….'*[104]. There are significant developments towards actualization of this principle but still it is not applicable in all circumstances. It is mostly based on treaty and by and large applicable for international crime. It has not acquired the status of customary international law[105].

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[100] *Ibid.*

[101] Fidan, note 86.

[102] The obligation to extradite or prosecute is 'alternative' in the sense that a state is subject to this obligation is bound to adopt one of two possible courses of action: it must extradite if it does not prosecute. See, M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law,* (Martinus Nijhoff Publishers, 1995), p. 3, Footnote 2.

[103] As example, Art. 7 of the Convention for suppression of Unlawful Seizure of Aircraft (Hijacking Convention) provides for prosecution if state refuse to extradite the fugitive. There are other several instruments which incorporated such principle, though with little variation, starting from 1929 Counterfeiting Convention like 1973 Montreal Convention, 1936 Convention on Illicit Traffic in Dangerous Drugs, 1950 Convention on Traffic in Person, 1961 Convention on Narcotic Drug, 1973 New York Convention on Crime Against Internationally Protected Persons, 1973 Montreal Convention, 1984 Torture Convention, 1988 Vienna Convention on Traffic in Narcotics Drugs, 1988 Convention on the Safety of Maritime Navigation, 1989 Mercenaries Convention and several other international convention aimed at suppression of terrorism. See for detail discussion, M. Cherif Bassiouni and Edward M. Wise, Ibid, p. 3-19.

[104] Art. 6 (2) of the European Convention on Extradition, 1957. Similarly, Art. 2 of the Inter-American Convention on Extradition, obliges state that if the requested state denied extradition on the ground that it is competent to try the accused, it shall submit the case to competent authority.

[105] See for argument, both in favour of its status as customary international law as well otherwise, M. Cherif Bassiouni and Edward M. Wise, note 103.

Hence, it will raise the issue of jurisdiction in some circumstances and competency of the state to prosecute.

There are several offences which have got the status of international crime and provide Universal jurisdiction and the ambit is expanding continuously. Professor Randall argues that universal jurisdiction has expanded to allow any nation to prosecute those charged with hijacking, terrorism, torture, apartheid, genocide, and other offences that the community of nations widely condemns[106]. The state where accused person is found has got a responsibility to bring the fugitive before justice. If such aim is not going to fulfil because of non-extradition, irrespective of its reasons, the principle of *Aut Dedere Aut Judicare* provides jurisdiction to the state. Though it's not mandatory but state can acquire jurisdiction on the basis of the applicability of this principle[107]. Moreover, fight against crime is a common task of all civilised states which provides Universal jurisdiction to the requested state to prosecute the fugitive[108].

In Universal Jurisdiction case, where accused challenged the jurisdiction of the court to conduct trial, Austrian Supreme Court held that as the offence charged were offences which would have been punishable under Austrian law if committed in Austria, the Austrian courts were entitled to exercise jurisdiction which permitted the prosecution of a foreign national for common crime committed in a foreign state[109]. Austrian law permits prosecution of the offender if concerned state refuses to undertake prosecution[110]. The court referred the comment made by Lammasch, who said that, 'extradition is not merely an act of lending assistance…. but also an act of administration of justice by extraditing state itself, which, by taking an accused into custody, investigating his case and extraditing him, exercises a right of administering criminal justice against him. Every extradition therefore presupposes a right of the extraditing state to impose punishment'[111]. By referring to above observation court held that the Austrian courts are entitled to exercise jurisdiction in pursuance to Section 40 of the Criminal Code where extradition cannot be effected for reasons other than the refusal of a foreign state to take over the prosecution[112]. In another Austrian case, where Austrian authority refused the extradition request from Hungary, Austrian Supreme court held that Austrian courts have jurisdiction to try the offence which

[106] Randall, "Universal Jurisdiction Under International Law", 66 *TEXAS L. REV*. 785 (1988).
[107] The presence of the fugitive at the territory of the requested state creates relationship between fugitive and state from the jurisdiction point of view and such presence may give rise to quasi territorial jurisdiction. Moreover, the requested state may in some circumstances prosecute the fugitive following representational jurisdiction principle.

[108] See, Universal Jurisdiction case, Austria, Austria Supreme Court, 28 *Int. Law Rep*., 341
[109] *Ibid.*
[110] Section 40 of the Austrian Criminal Code provides for prosecution if home state of state where crime was committed refuse to undertake the prosecution. See Ibid, p 341-342.

[111] Lammasch, *The Duty of Extradition and the Right of Asylum,* at p 42, referred in *Ibid*.
[112] note, 110.

was committed in Hungary[113]. In similar direction the Argentina Supreme Court also while declined to grant extradition request made by United States, directed for the trial of the fugitive in Argentina[114].

The perfect example of the fulfilment of the principle 'extradite or punish' is the Italian Criminal Code which made obligatory on the part of state to prosecute on refusal of extradition[115]. Venezia committed capital crime in United State and fled to Italy, an abolitionist country. Even though assurance was provided by the United State, Constitutional court ruled out the extradition in capital offences[116]. Court indeed ordered that Venezia be tried in Italy[117]. Andrea Bianchi on the aspect of balancing of obligation by alternative prosecution said, 'refusal to extradite by Italy in the name of a constitutional principle that imposes an absolute prohibition on the death penalty, when combined with the subsequent prosecution of the fugitive in Italy, can be seen as a way to reconcile the needs of international judicial cooperation with the constitutional tradition of the forum state[118].

The principle of *Aut Dedere Aut Judicare* is in practice at several jurisdiction, some time to fulfil the international treaty obligation, some time to fulfil extradition treaty and in other circumstances on the basis of domestic legislation. *Aut Dedere Aut Judicare* is best available option to the state to balance its obligation of bringing fugitive to justice and protecting the right to life of the fugitive. Once a state specifically provides by virtue of its domestic legislation for prosecution on the denial of extraction, it will solve all jurisdictional argument as it was experienced in earlier cases.

CONCLUSION

The study makes it abundantly clear that extradition treaties and other international instruments oblige the states to extradite the fugitive. One of the main purpose of extradition is to protect and strengthen the criminal justice administration and thereby the rule of law which is imperative to maintain order and peace in a given society. The right to life is the most basic, fundamental and inalienable right guaranteed to human being in civilised society. Most of the human rights treaties explicitly recognise right to life. It is in order to ensure this basic human right more than half of the world's states have

[113] *Hungarian Deserter (Austria) Case*, 28 Int. L. Rep. 343, In this case also court find jurisdiction through Section 40 of the Austrian Criminal Code.

[114] In *Re Milazzo, alias D'Amore* (1956) Int' L. Rep. 404, referred in, I. A. Shearer, *Extradition in International Law,* (Oceana Publications, 1971).

[115] Art. 9 (3) of the Italian Code of Criminal Procedure provides that, in case extradition is not granted, on the request of Ministry of Justice, a fugitive shall be prosecuted in Italy for the crime he committed abroad if for such crime a sentence of at least three years of imprisonment is provided. See, Andrea Bianchi, note 84, Footnote 22.

[116] The wording of the constitutional court was strong enough to presume the complete bar on extradition on capital offences. However, scholars rightly argued that court has not completely ruled out extradition in capital offences. See, Andrea Bianchi, note 84.

[117] Kathryn F. King, note 37.

[118] Andrea Bianchi, note 116.

abolished capital punishment. Thus a state is oblige with additional obligation to protect the life of the fugitives while fulfilling its obligation of international cooperation to suppress crime by extraditing them. The extradition obligation then becomes subservient to the human rights obligation.

It is apparent from preceding discussion that it is not always mandatory for abolitionist states to decline extradition under extradition treaties but the human rights protection of the accused obliges a state to refuse extradition in the absence of adequate assurance against death penalty. The obligation is not uniform in all abolitionist state. The opinion of Human Rights Committee and the decisions of various domestic courts completely bar the extradition without adequate assurance. Although decisions of the domestic courts are not internationally binding and the decisions of the Committee are mere opinion, they may help in developing a customary rule in this regard in future.

The principle of *Aut Dedere aut Judicare* can be an effective instrument to balance the two conflicting obligations. The administration of criminal justice would be better served if, first, the extradition treaties expressly incorporate the human rights guaranteed protection in general and right to life in particular in a way which can effectively protect life of the fugitive; secondly, in the case of denial of extradition the requested state prosecutes the fugitive so that accused can not escape punishment for the wrong he has committed.