Extradition and the Death Penalty: Reconsidering the Margin of Appreciation under Article 2 of the European Convention on Human Rights

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This thesis is submitted in fulfilment of the requirements for the degree of Doctor of Philosophy in the University of Lancaster

September 2020

Lancaster University
Law School

Declaration

I declare that this thesis is my own work and has not been submitted in substantially the same form for the award of a higher degree elsewhere.

Acknowledgment

It had been a long journey to the completion of this thesis, which would not have been possible without the support of my supervisors and my family.

I would express my gratitude to my supervisor Professor James Sweeney. I am deeply indebted to him for what he has done for me in the last four years. It was my honour to have his invaluable encouragement, illuminating supervision and all academic support. I would also like to thank my second supervisor Professor Steven Wheatley, for his significant feedback at each appraisal stage of my PhD progress. I am extremely grateful to my internal examiner Dr Noel McGuirk and external examiner Professor Kanstantsin Dzehtsiarou of the University of Liverpool, for their invaluable comments during my *viva voce*. The help from the staff at the Law School and the University is also greatly appreciated.

I owe my sincere thanks to my mom, Li Lan, who passed away at the very early stage of this research. I would like to dedicate this thesis to her, and I believe she would be proud. I am also truly grateful to my dad, Jia Xin, who has been doing the utmost to support my study in the UK.

Special thanks go to my wife, Wang Shaochen, who has always been with me over the years, and to my little daughter, Jia Qingyi, who likes picking up my 'international law' books at home.

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Abstract

In today's globalised world with much easier and more ubiquitous cross-border movement, physical state borders are becoming more 'invisible'. States confront increasing threats, which are no longer delimited by borders. While states' enforcement jurisdiction is essentially territorial, in order to combat transnational crime and eliminate security threats, they have to expand their national interests across borders by resorting to international judicial cooperation.

Extradition is a formal legal process by which states could bring the accused or convicted criminals who have fled abroad back to justice. Nevertheless, extradition is subjected to a range of impediments among which the death penalty has been a controversial one that seems not to be reconciled. This thesis argues that by absolutely prohibiting to extradite people to face the death penalty, the European Court of Human

Rights is actually exporting a non-universal abolitionist value. However, the legal basis for this standard is not tenable, nor the current approach of seeking assurances. In fact, the standard is even not fully shared by its own States Parties.

This thesis offers a critical correction and reaffirmation on the lawfulness of the death penalty in international law and proposes a different relationship between extradition and the death penalty within the *European Convention on Human Rights*. This means, its Contracting Parties should be conferred a margin of appreciation under Article 2 to respond to the death penalty—extradition dilemma, where at present it does not seem to apply. If the margin of appreciation is allowed, extradition would be permitted to retentionist states in cases where the death penalty is 'lawfully carried out' and the test of proportionality is met. The underlying cause of the suggested approach is that there needs to be greater international cooperation against transnational criminality. In certain cases, the repression of transnational crime on behalf of many outweighs the rights of the one person to be extradited.

Contents

Extradition and the Death Penalty: Reconsidering the Margin of Appreciation under Article 2 of the European Convention on Human Rights

1. Introduction

We live in challenging times for international criminal justice. The greater international cooperation is especially needed in this new global context, which is characterised by the great availability of cross-border movement, the globalised criminality and states' expanding interests in responding to transnational crime and safeguarding the public security and national interests. Extradition is a formal legal process by which a 'person'[1] is surrendered by one state to another to either stand a trial or serve a sentence. Generally speaking, when the 'human rights—extradition nexus' is concerned, it refers to the issue of whether extraditing a person to the requesting state would be consistent with the extraditee's human rights or namely, for the requested state, whether granting the extradition complies with its human rights obligations.[2] Although it is required to pursue a reconciled or balanced relation between these two aspects,[3] it is a fact that

[1] According to the definition of extradition, the person subjected to an extradition request formally refers to 'extraditee', who is either charged with committing a crime or a convicted criminal that falls within the jurisdiction of the requesting state. In this thesis, such difference is relevant in cases when the extraditee is charged with or convicted of a capital crime and the requested state is assessing whether impose him to the risk of the death penalty is legitimate, necessary and proportionate. That is to say, those two kinds of extraditee would suffer a different level of risk of the death penalty upon being extradited. This issue will be discussed in Chapter 4.3.5 in detail. In addition, its relevance is also expressed in the use of assurances against the death penalty. The applicability and effectiveness of the assurance are slightly different in cases involving two types of extraditees, which will be further explained in Chapter 4.1.4.

[2] In fact, human rights concerns trigger from as early as the extradition treaty is negotiated until the requested person's return. However, the due process and the extraditee's potential treatment upon the return to the requesting state is particularly concentrated here.

[3] John Dugard and Christine Van Den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 92 American Journal of International Law.

extradition is not getting proper attention at this stage, especially when those fundamental human rights are concerned. In other words, it is fair to say that in some cases, the 'overemphasis' on the human rights of extraditees has made extradition less effective.

This thesis is going to recalibrate the relationship between extradition and human rights, with a particular focus on the death penalty and its obstructive status in extradition. It argues for a more flexible approach to facilitate the international criminal cooperation, *inter alia*, extradition in combating transnational crimes by finding a way in which the discrepancy between abolitionist states and retentionist states could be dealt with. By examining the lawfulness of the death penalty in international law, it comes to the reality that there is not a universal treaty that legally binding states to prohibit the death penalty. Furthermore, it is premature to say that the prohibition of the death penalty does or would attest to be a rule of customary international law. Admittedly, the use of the death penalty is regulated and restricted to a large extent.

For these reasons, on the one hand, it is arguable to say the European standard of the absolute prohibition of extraditing people to retentionist states to face the death penalty is actually exporting the non-universal abolitionist values. On the other hand, it is imperative to find out a defendable approach which could help to circumvent the conundrum to 'extradite to retentionist states'.[4] In other words, to make it possible and

[4] It is not just about extraditing people to retentionist states, but sending people to retentionist states where the extraditee is subjected to a death sentence or execution. Throughout the thesis, I will use the expression 'extradite to

easier for European states to extradite to states that retain the death penalty—China in particular. The difficulties for China to succeed extradition are illustrated by the long-running saga of the suspected murderer Kyung Yup Kim. At the time this thesis was submitted, Kim was continuing to reside in New Zealand after a court, for the second time, quashed the extradition order against him on the basis that China retains the death penalty. We shall return to this example in the next chapter. In order to achieve the aims set out above, this thesis is attempting to reconsider the application of the 'margin of appreciation doctrine'[5] under Article 2 of *the European Convention on Human Rights* and then, arguing to recognise its role in extradition cases involving the death penalty, where at present it does not apply. That is to say, in certain especially serious cases, there should be a test of proportionality which would be able to allow extradition to places where the death penalty is 'lawfully carried out'[6].

The main focus in this thesis will be placed on the European standard/values and via the general practice of the Contracting Parties to *the European Convention on Human Rights*, which is for the following concerns. The European Court of Human Rights conducts the highest standard against the death penalty; it has robust case law in relation to extradition (to face the death penalty); and it established and develops the margin of appreciation doctrine, which is the significant 'vehicle' to arrive at the purpose of this

retentionist states' for brevity, which will implicate the issue of extradition to state that could impose the death penalty for the crime in question or enforce the death sentence upon the extraditee.

[5] This concept is outlined below in Section 1.3 and discussed in detail in Chapter 4.

[6] The lawful application of the death penalty refers to the death penalty that is carried out in keeping with a set of substantive and procedural safeguards as will be examined in Chapter 3.4, especially those are guaranteed in customary international law.

thesis. Nevertheless, it is not saying that the contribution from other international and regional systems to the argument in this thesis is negligible, particularly considering the revolutionary mechanism of the European Arrest Warrant,[7] and while identifying the lawfulness of the death penalty in international law. Furthermore, the output from the Human Rights Committee and other UN-based bodies is also indispensable.

This thesis is composed of five chapters. The remainder of this introductory chapter (Chapter 1) will set out the problems that the thesis is designed to address and briefly outline the main arguments in favour of making the change to afford states with a certain degree of flexibility, via the margin of appreciation, in response to the death penalty—extradition dilemma. After that, the second chapter sets up a general context of extradition law by mainly focusing on its various legal basis and substantial requirements. In the meanwhile, Chapter 2 also expounds the reasons that extradition is impeded, particularly on human rights grounds. Chapter 3 provides a detailed analysis with respect to the death penalty. It will be looking at the prevalence of the death penalty in state practice, as a component of the enquiry into its international lawfulness. In this regard, particular attention will be paid on the question of whether customary international law expressly prohibits the death penalty. In addition to the death penalty *per se*, an important concomitant topic concerned is that to what extent the death penalty is regulated and restricted substantively and procedurally. Based on

[7] The European Arrest Warrant cannot be completely detached from the *ECHR*, while the latter serves as the bottom line of the operation of the former. The EAW could not authorise an 'extradition' that would go against the *ECHR*. The European Arrest Warrant will be further discussed in Section 2.2.1.1.

the conclusion from Chapter 3, Chapter 4 will demonstrate how the existing legal framework could be recalibrated to achieve the purpose of the repression of transnational crimes. This chapter attempts to reconsider the European standard on dealing with the extradition request from retentionist states, followed by the argument to introduce the doctrine of the margin of appreciation, which is arguably applied to the cases where the abolitionist states could assess whether to extradite people to retentionist states on their own, based on the test of proportionality. In the end, Chapter 5 aims to summarise the whole thesis.

1.1 Extradition in states' response to transnational criminality

> 'Extradition is the means by which states cooperate in the prevention, control, and suppression of domestic and international criminality. In the age of globalization, in which individuals cross territorial boundaries or conduct business in multiple states at unprecedented rates, the obligation to extradite or prosecute has gained greater importance and acceptance.'[8]

It is asserted that 'the law of extradition is related to the law of jurisdiction in criminal matters.'[9] In general, jurisdiction has established its relationship to extradition from two perspectives. For one thing, the primary concern with respect to extradition may fall into the relevance of the requested state's jurisdiction over the crime that the wanted

[8] M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (6th edn, OUP 2014) 2.
[9] Jan Wouters and Others, *International Law: A European Perspective* (Hart Publishing 2019) 774.

fugitive commits.[10] When a person committed a crime and fled to another state, it seems self-evident that the state, which has sufficient and appropriate competence to him or his perpetration,[11] has legitimate interests to bring that person to justice before its national courts. Furthermore, the requesting state's alleged criminal jurisdiction must be recognised by the requested state before considering further conditions and requirements.[12]

For another, what underpins extradition is the fact that both in theory of international law and practice, states' enforcement jurisdiction is essentially and strictly territorial, with few exceptions of extraterritoriality.[13] The direct effect of this characteristic is much more salient than ever in the context of globalised criminality. As the late Cherif Bassiouni prescribed, state borders play a multifaceted role in the international legal order and are interpreted differently in various regimes of international law. In today's globalised world with much easier and more ubiquitous cross-border movement, the physical state borders are becoming much more 'invisible'. It is reputed that states are confronted with increasingly severe internal and external security threats from various aspects,[14] which are no longer delimited by state borders and challenges would arise when the perpetrator or the crime is of a transnational nature.[15] What is more, criminals

[10] Alan Jones and Anand Doobay, *Jones and Doobay on Extradition and Mutual Assistance* (3rd edn, Sweet & Maxwell 2005) 36-7.
[11] Matthew Henning, 'Extradition Controversies: How Enthusiastic Prosecutions Can Lead to International Incidents Notes' (1999) 22 Boston College International and Comparative Law Review 350.
[12] Geoff Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* (Martinus Nijhoff 1998) 86; Geoff Gilbert, *Responding to International Crime* (Martinus Nijhoff 2006) 75-6.
[13] James Crawford, *Brownlie's Principles of Public International Law* (OUP 2019) 462.
[14] Christopher Michaelsen, 'The Cross-Border Transfer of Dangerous Persons, the Risk of Torture and Diplomatic Assurances' in Saskia Hufnagel and Others (eds), *Cross-border Law Enforcement: Regional Law Enforcement Cooperation--European, Australian and Asia Pacific Perspectives* (Routledge 2013) 212-8.
[15] Gerhard Mueller, 'Transnational Crime: Definitions and Concepts' in Phil Williams and Dimitri Vlassis (eds),

are offered much more opportunities than before to escape from justice by getting to other countries. This is the fact that Neil Boister describes as 'for criminals engaging in trans-national crime in the unembellished sense of cross-border crime, borders are part of their business.'[16] Against this background, states increasingly recognise that crimes with transnational nature and effect call for a transnational solution to respond in a high-efficiency, straightforward and universally applicable manner. The necessity of combating transnational crime, promoting justice as well as eliminating the security threats and safeguarding the national interests has propelled states to embark on bilateral and multilateral judicial cooperation in various forms.

As has been extensively discussed in the literature, state cooperation is a broad concept involving various measures. It plays an indispensable role in every stage of international criminal justice.[17] It can be divided into vertical cooperation and horizontal cooperation.[18] The former primarily refers to states' cooperation with international institutions, particularly international criminal courts and tribunals.[19] Extradition, as an important approach in horizontal cooperation operated between two sovereign states, is 'expected to gain in prominence as transnational criminality spreads with increased opportunities of international exchange and commerce.'[20] Such kind of cooperation equips states to overcome the difficulties of the oversea enforcement of criminal law so

Combating Transnational Crime: Concept, Activities and Responses (Routledge 2001) 13.
16 Neil Boister, *An Introduction to Transnational Criminal Law* (2nd edn, OUP 2018) 3.
17 Carsten Stahn, *A Critical Introduction to International Criminal Law* (CUP 2019) 230.
18 See ibid, 230-8; Ilias Bantekas, *International Criminal Law* (4th edn, Hart Publishing 2010) 366-82.
19 This issue, although not being discussed in this thesis, is very important in the field of international criminal cooperation.
20 Wouter and Others (n 9) 780.

as to fight against the criminality of transnational nature.[21] The examination of the importance and the value of extradition is to be continued in Chapter 2.1.

It has to admit that extradition has never been a perfect method,[22] which is often criticised for its complicated process[23] and also political-motivated application.[24] States that facilitate negotiation and conclusion of extradition treaties is often treated as a trade-off for diplomatic, business and economic benefits.[25] Nevertheless, its role in international criminal cooperation to combating transnational crime should by no means be underestimated. Simply put, extradition is seen as a win-win choice for both participating states. Extradition provides a formal channel whereby the fugitive criminal can be legitimately brought to the state enforcing its criminal jurisdiction. For this reason, extradition serves as a useful tool in fighting against impunity, and then, the objectives of the suppression of crime and the guarantee of criminal jurisdiction of the commitment state can be largely realised. To a large extent, extradition itself also plays

[21] Kimberly Prost, 'No Hiding Place: How Justice Need not be Blinded by Borders' in Steven Brown (eds.) *Combating International Crime: The Longer Arm of the Law* (Routledge 2008) 124.
[22] For example, see, Boister (n 16) 12, 389.
[23] It oversteps the scope of this thesis to discuss the procedure of extradition in different regimes, bilateral or multilateral treaties and domestic legislation. For discussion on this point, see Ivor Stanbrook and Clive Stanbrook, *Extradition: Law and Practice* (2nd edn, OUP 2000); Edward Grange and Rebecca Niblock, *Extradition Law: A practitioner's Guide* (2nd edn, Legal Action Group 2015); David Sadoff, *Bringing International Fugitives to Justice: Extradition and its Alternatives* (CUP 2016) 153-66; Bassiouni, *International Extradition* (n 8) 818-999; Extradition Law of the People's Republic of China 2000 (Extradition Law of China), Articles 7-51; Official Journal of the European Union, *Handbook on How to Issue and Execute a European Arrest Warrant, Official Journal of European Union* (2017).
[24] Boister (n 16) 389, 'the key to resolving many of the problems with extradition is primarily political, and only secondarily legal; similar opinion can also be found in Helen Duffy, *The 'War on Terror' and the Framework of International Law* (2nd edn, CUP 2015) 162, 'most problems with international cooperation relate to variable degrees of political will to cooperate.' See also Stahn (n 17) 231. 'The success of cooperation depends largely on the national and international political commitments in the respective context.'Sadoff (n 23) 24. Extradition law is 'so deeply suffused with politics…and the law itself at times can be difficult to isolate as an independent variable.'
[25] Sabrina Choo, 'Circumventing the China Extradition Conundrum: Relying on Deportation to Return Chinese Fugitives Notes' (2017) New York University Journal of International Law and Politics 1379-80; Asif Efrat and Marcello Tomasina, 'Value-Free Extradition? Human Rights and the Dilemma of Surrendering Wanted Persons to China' (2018) 17 Journal of Human Rights 606.

the role of controlling and deterring the international movement of criminals. In the meantime, granting extradition is for more than reciprocal interests. There are a number of reasons motivating the host state to remove the person from its territory. On the one hand, as the then Home Secretary of the UK Theresa May reflected on *Öthman* (*Abu Qatada)* case, 'the right place for a foreign terrorist is a foreign prison cell far from Britain.'[26] In fact, the confrontation of global security threats makes the host state more favourable to remove those unwelcome individuals who reside in its territory threaten its national security.[27] On the other hand, states are unwilling to be labelled as the 'safe haven'[28] for criminals or provide the refuge for fugitive criminals, either of which would not only destroy the international reputation on the suppression of transnational crime, but also attract more criminals to arrive.[29] For these reasons, the host state *per se* has desirability to expel the fugitives in whatever methods.

Extradition is one of the oldest methods of international criminal cooperation,[30] virtually all aspects of it have been researched by various government authorities, legal scholars and commenters. Extradition law has considerably evolved in the past decades, especially since the 9/11 attack, and many signs of progress have been made to

[26] House of Commons, 'House of Commons Debate 07 February 2012' <https://publications.parliament.uk/pa/cm201212/cmhansrd/cm120207/debtext/120207-0001.htm#12020774000003> accessed 20 March 2019.
[27] The host state's desire to remove the fugitives for other related concerns will be revealed in Chapter 2.1.
[28] For the definition of 'safe haven', see Sadoff (n 23) 20.
[29] For example, see Reuters, 'Western Countries have Promised not to be Haven for Corrupt Chinese Fugitives, Says Beijing' 2016 <https://www.scmp.com/news/china/policies-politics/article/2039843/western-countries-have-promised-not-be-haven-corrupt> accessed 4 April 2019; Xinsheng Qiao, 'China's Hunting for Corrupt Fugitives is Justifiable' (*China Daily,* 2016) <http://www.chinadaily.com.cn/opinion/2016-12/01/content_27533392.htm> accessed 23 March 2018.
[30] For a historical background of extradition law, see Bassiouni, *International Extradition* (n 8) 2-7; Stanbrook and Stanbrook (n 23) 1; Ivan Shearer, *Extradition in International Law* (Manchester University Press 1971) 1-18.

streamline its procedure and strengthen its application.[31] In recent years, a serious of controversial high-profile extradition cases, such as *Edward Snowden* case, *Julian Assange* case, *El Chapo* case and the case of Meng Wanzhou,[32] have once again brought extradition into the spotlight of international attention.[33] In essence, extradition is a kind of approach to help to get the suspected or convicted fugitive back to justice. It might sound abstract to say uphold justice and the rule of law in international criminal cooperation, but in every extradition case, bringing fugitive back is indeed the first step to bring the justice back. After that, it is equally important that the extraditee would face a fair trial or a proper punishment.

In such circumstances, it seems necessary to reexamine some unsettled issues in relation to extradition law in the new global context, in particular on why extradition has not played effectively in achieving what it was set out to do. Although extradition is considered as one of 'the most legally and politically preferred' approach of inter-state cooperation on fugitives transferring,[34] the universality of its application is still a big concern. For example, the establishment and existence of extradition treaties do not necessarily result in the successful operation of extradition. In practice, many factors weaken its potential effectiveness. The situation has been exacerbated by the limited legal basis of extradition and also numerous refusal grounds. The increasing prominence and scope of human rights law are chief amongst those impediments that

[31] Sadoff (n 23) 174-83.
[32] Meng is the CFO of the Chinese technology company Huawei.
[33] For the reference to more notable extradition cases, *see* Stefano Maffei, *Extradition Law and Practice: Concept and Famous Cases* (Europa Law Publishing 2019).
[34] Sadoff (n 23) 129.

constrain states' effort to combating transnational crime.

1.2 Human rights barriers to extradition: sketching the problems

Gary McKinnon,[35] a British computer hacker, broke into the US government's confidential computer system between 1999 and 2002, alleging that he did it to search for the UFO information. McKinnon was sought for extradition by the US government, and the struggle had been running for over ten years before the Home Secretary of the UK eventually objected the extradition request due to the considerations of McKinnon's medical conditions[36] and his potential human rights treatment in the US. To be more precise, according to the medical assessment from the appointed psychiatrist, Gary McKinnon was diagnosed as a patient of Asperger's syndrome. Granting his extradition would put him into serious and depressive suffering, which may probably make him commit suicide after the surrender. The UK's decision not to extradite was mainly on account of human rights protection of the individuals, namely, the physical and mental conditions of McKinnon would make his extradition unjust and his future treatment upon return oppressive.[37] For this reason, human rights advocators appraised the result as a triumph of the 'rights, freedoms and justice in the United Kingdom',[38] despite the strong dissenting opinions of the politicians and lawyers from both the UK and the

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[35] See Theresa May, *Statement by Home Secretary Theresa May on extradition made on 16 October 2012* (Home Office 2012); BBC News, 'Gary McKinnon Extradition to US Blocked by Theresa May' <https://www.bbc.co.uk/news/uk-19957138> accessed 3 April 2017.

[36] Considerations on the extraditee's physical and mental conditions in extradition trial is traced to Sections 25 and 91 of Extradition Act 2003 of the United Kingdom (Extradition Act 2003).

[37] ibid, Sec 91. See also, House of Lords, *Selected Committee on Extradition Law, 2nd Report of Session 2014-15, 'Extradition: UK Law and Practice'* (2015).

[38] See Liberty, 'Liberty Welcomes Home Secretary's Decision not Extradite Gary McKinnon to US' <https://www.libertyhumanrights.org.uk/news/press-releases/liberty-welcomes-home-secretary's-decision-not-extradite-gary-mckinnon-us> accessed 3 April 2017.

US.[39]

Gary McKinnon case is only one of the cases involving the impact of human rights law on extradition. Human rights, over the past decades, especially after the Second World War, have gradually been prescribed as an essential principle of international law, and today, the protection of individuals' human rights has become one of the common pursuance of the civilised society.[40] This transformation influences and collides almost all aspects of human life and meanwhile, reaches different parts of international law. How to deal with the conflicts between states' human rights obligation with other aspects of international legal obligation is a bone of contention.[41] Under such circumstances, while the judicial cooperation was bringing about complex human rights issues, extradition is not a self-governed and impervious doctrine without any limitation in practical application. Nowadays, it is not difficult to find an extraditions case that litigates human rights concerns or impeded by the potential violation of the extraditee's human rights. In fact, extradition might not be granted due to a variety of reasons, among which international human rights concerns are of particular public focus with quite a lot of controversies.[42] For example, the operation of extradition is becoming much more complicated because, in addition to its function in the area of criminal justice, extradition law *per se* also provides the extraditees with a variety of substantive

[39] BBC News, 'Gary McKinnon Extradition to US Blocked by Theresa May; Alan Travis and Owen Bowcott, 'Gary McKinnon Will not be Extradited to US, Theresa May Announces' <https://www.theguardian.com/world/2012/oct/16/gary-mckinnon-not-extradited-may> accessed 3 April 2017.
[40] Lin Feng, *The Human Rights Review of Chinese Citizens* (Economic Daily Press 1998) 2.
[41] Erika De Wet and Jure Vidmar, *Hierarchy in International Law: The Place of Human Rights* (OUP 2012).
[42] Geoff Gilbert, 'Undesirable but Unreturnable: Extradition and Other Forms of Rendition' (2017) 15 Journal of International Criminal Justice 55.

and procedural safeguards, which in return, suspend or block the extradition.

There is an argument that extradition has been attached a dual function in operation that is supposed to be proportionately reconciled. As Helen Duffy asserts, '[a] state's obligations in respect of extradition must therefore be understood not only by reference to extradition treaties, but also to other provisions of international law, including human rights law.'[43] This is backed by Sharon William, who agrees that 'extradition law performs the function of protecting a fugitive, through legal safeguards, from being returned to the extradited state.'[44] In reality, the extradition process may frequently contradict and compromise various factors relevant to international human rights law.[45] The fugitive's human rights conditions upon return to the requesting state have increasingly been focused as an important consideration before the extradition decision is made. Helen Duffy claims that 'the sending state's responsibility for the rights of the person continued after extradition, by virtue of the act of expulsion.'[46] Some commentators allege that a potential or *de facto* risk of violation of the requested individual's human rights would definitely be a legitimate ground for denying the extradition request.[47]

[43] Duffy (n 24) 161-2.
[44] Sharon Williams, 'Extradition to a State that Imposes the Death Penalty' (1991) 28 Canadian Yearbook of international Law 117.
[45] For the purpose of this thesis, only the post-extradition human rights treatments by the receiving state are considered, although it should be noted that the human rights protection of extraditees runs through the whole extradition proceedings, including those pre-extradition rights and guarantees in the requested state.
[46] Duffy (n 24) 168.
[47] Christine Van Den Wyngaert, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?' (1990) 39 International and Comparative Law Quarterly 212.

Although there has not been a specific human rights treaty regarding extradition until now, provisions concerning the human rights of the extraditee have been indispensable parts in virtually every bilateral and multilateral extradition treaties. To be more precise, a template is often set up as the mandatory and discretionary human rights grounds for states to refuse the extradition request. For example, in the UN Model Treaty on Extradition, mandatory grounds refusal and optional grounds for refusal are embodied in Article 3 and 4 respectively, which will be examined in detail in Chapter 2.2.2.2. The Extradition Law of China imposes the basis to reject the request if 'the person sought has been or probably be subjected to torture or other cruel, inhuman or humiliating treatment or punishment in the Requesting State'.[48] The UK's Extradition Act 2003 contains provisions related to the human rights bar to extradition.[49] Apart from being written in extradition treaties and domestic legislation, human rights' restrictive impact on states' extradition is more clearly manifested in case law, particularly the jurisprudence of the ECtHR and the Human Rights Committee. Although both the understanding of human rights and the level of human rights protection vary in different countries and regions, it is acknowledged to be important to reconcile extradition with human rights or namely,[50] at least to seriously take the protection of human rights into consideration of extradition and combating transnational crime.[51]

[48] Extradition Law of China, Art 8(7).
[49] Extradition Act 2003, Sec 21.
[50] The development of 'extraditions with assurances' is one of the most common approaches in this regard. See Duffy (n 24) 165-8. 'States may seek to reconcile their commitment and obligations in respect of cooperation with human rights protection in various ways.' See also, Dugard and Van Den Wyngaert (n 3).
[51] Human Rights Joint Committee, *Fifteenth Report: The Human Rights Implications of UK Extradition Policy* (2011).

Concerns on the extraditee's human rights protection run through the whole extradition process, involving rights in both two participating states before and after the transfer. This thesis only focuses on the extraditee's potential risk of the death penalty in the requesting state. Within the broad sphere of human rights—extradition nexus, the right to life that is exemplified by the death penalty has gained significant concerns. The division between abolitionist states and retentionist states is not only one of the most distinct penological differences, but also considered as an 'almost insurmountable'[52] impediment to the international extradition regime. Namely, many abolitionist states are prohibited to extradite individuals to retentionist states where there is a serious risk of being subjected to the death penalty. In many cases, abolitionist states are even not willing to negotiate a permanent extradition treaty with retentionist states.[53] As Rosalyn Higgins points out, a problem that both the European Court of Human Rights and the Human Rights Committee face is that 'the legality under their respective human rights instruments of the extradition of a person from a State Party (which had abolished the death penalty) to a non-party State which retained the death penalty.'[54]

It is not unusual that extradition is refused based on the possibility of the extraditee's confrontation of the death penalty upon return unless sufficient assurances are provided, guaranteeing the death penalty would either not be imposed or if imposed, would not be carried out. Under such circumstances, what matters in relation to the paradox

[52] Boister (n 16) 376.
[53] For example, the decision to sign or ratify an extradition treaty with China has aroused huge controversies in countries such as Canada, Australia and the United States.
[54] Rosalyn Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (OUP 2009) 667.

between human rights and extradition usually is not the human rights violation itself, but whether the requested state's approval to extradite will put the extraditee in a real risk of the death penalty. William Schabas believes that 'developments in international extradition practices reveal that capital punishment is incompatible with effective international cooperation in criminal law matters.' [55] Admittedly, the continual movement of the death penalty abolition unquestionably punches extradition. The foreseeable risk of the death penalty upon extradition has developed into an essential concern by which the abolitionist state denies the extradition request. Simply put, 'extradition or execution' seems not to be a confusing problem today, and many academics and government officials have taken the death penalty exception for granted. However, the inherent problems, especially the dilemma those retentionist states face in the context of combating transnational crime, have not been appropriately resolved.

When sketching the problems regarding extradition and fundamental human rights, *inter alia*, the death penalty, it has to admit that there are limitations of the core argument this thesis argues. On the one hand, the main problem that this chapter observes is that human rights law is presented as being obstructive in facilitating extradition requests from abolitionist states to retentionist states. It is acknowledged that in any development of the law on this area, including the changes this thesis suggests, there should be recognition of the need for movement by both abolitionist states and retentionist states so as to resolve the death penalty—extradition dilemma.

[55] William Schabas, 'Indirect Abolition: Capital Punishment's Role in Extradition Law and Practice' (2003) 25 Loyola of Los Angeles International and Comparative Law Review 582.

This thesis does not attempt to argue that only the abolitionist states need to compromise by 'lowering' their standard while retentionist states are waived from any responsibility. In contrast, the latter is under the universally recognised obligations to guarantee the lawful use of the death penalty substantively and procedurally. For example, suspending the death penalty for those non-violent crimes or crimes do not meet the 'most serious crime' standard, which would circumvent the death penalty—extradition dilemma to a large extent, particularly involving economic crime in the anti-corruption campaign. Under current circumstances, this might be the biggest step for the administration of the death penalty that could be realised. Having said that, as will be explained in Chapters 2.1 and 4.3.5, the argument for changes and flexibilities is more convincing in extradition cases involving terrorism and other serious transnational crimes where the refusal of extradition would pose foreseeable security threats to the requested state.

On the other hand, both the subject of the death penalty and its relevance to extradition are ongoing topics. Rosalyn Higgins describes that 'the law in this area will clearly continue to develop and to be refined.'[56] It has to admit that the arguments raised in this thesis are only based on the current status, with respect to the lawfulness of the death penalty in particular, which does not indicate any evolution in the future. Furthermore, within the current legal framework, it might be really hard for the retentionists to persuade the abolitionists completely. However, it is not reasonable to

[56] Higgins, *Themes and Theories* (n 54) 678.

say that the retentionist states have no legal ground for remaining it or the death penalty should or could be totally abolished.

1.3 The arguments in favour of making the change

The increasingly serious transnational criminality is indeed an incontestable fact, which is also a challenge that most of countries have to respond to. Judge Kimberly Prost concedes that 'almost no part of the world is left untouched by the rise of the transnational component of crime, though its manifestations may vary widely.'[57] As will be outlined in Chapter 2.2.1.2, a number of international conventions aiming at combating transnational crimes have gained universal recognition and ratification,[58] which to a certain degree reflects the common interests and the shared value of the international community. This also indicates that the increasingly severe threat from those transnational crimes has attracted international concerns. In addition to transnational crimes, those crimes perpetrated domestically also have increasing transnational features, particularly considering the convenience of the cross-border movement. In this regard, the importance of international cooperation (extradition) in combating crimes also could be drawn out from the Interpol and the use of its Red Notice. Although there is uncertainty regarding the legal status of the Interpol,[59] and the use of the Red Notice sometimes attracts criticism,[60] a great deal of value has been

[57] Kimberly Prost, 'Foreword' in Neil Boister and Robert Currie (eds.), *Routledge Handbook of Transnational Criminal Law* (Routledge 2014) xvi.
[58] For example, the UN Convention against Transnational Organized Crimes has 147 signatories and 190 parties; the UN Convention against Corruption has 140 signatories and 187 parties.
[59] For example, see Amy Mackinnon, 'The Scourge of the Red Notice: How Some Countries Use Interpol to Go after Dissidents and Debtors, <https://foreignpolicy.com/2018/12/03/the-scourge-of-the-red-notice-interpol-uae-russia-china/> accessed 29 May 2020.
[60] This thesis neither attempt to defend the need of Interpol, nor deal with the operation-related issues.

recognised in the context of combating transnational crime. For example, in some bilateral extradition relations, states are able to initiate provisional arrest on the basis of the Red Notice.[61] More specifically, the increasing number of issues of the Red Notice undoubtedly signifies the threat of those serious crimes that the international community confronts as well as the states' collective commitment to strike back.[62]

In the opinion of Ilias Bantekas, 'the procedure [of extradition] is subject to a variety of human rights considerations, but these cannot be used to challenge the legitimacy of the process of surrender.'[63] As has been revealed in the above sections, it is true that there should always be sufficient guarantees of human rights safeguards of all individuals involved in international criminal justice. In the meantime, it is equally important or even more important that the protection of fugitives' human rights does not undermine the core value of extradition, ensuring its role in fighting against transnational crime is adequately served. That is to say, in some instances concerning certain rights (right to life for example), extradition should not be blocked without any exception or proportionality consideration.[64] As Geoff Gilbert reaffirms, 'protection should not equate to impunity.'[65] It is widely agreed that criminals should not be able to evade justice by crossing state borders. However, excessive barriers from human rights law indeed largely increase the chance of 'delay in justice enforcement, and

[61] For example, Extradition Treaty between China and Italy, Art 9.
[62] Although we do not exclude the cases where the Red Notice is issued 'improperly', the figures of the currently valid Red Notices (around 62,000, including 7,000 are public) are impressive. In 2019, 13,377 Red Notices were issued. See https://www.interpol.int/How-we-work/Notices/Red-Notices accessed on 27 May 2020.
[63] Bantekas, *International Criminal Law* (n 18) 374.
[64] This will be examined in Chapter 4 in detail.
[65] Gilbert, 'Undesirable but Unreturnable' (n 42) 55.

potentially denial of justice'.[66] This section aims at giving an explanation of the necessity to prioritise extradition in certain circumstances where the extraditee is facing the death penalty. That is to say, it will explain a number of reasons in favour of the call for flexibilities.

To begin with, part of the reasons that the ECtHR should make the suggested change of being more flexible in relation to extradition to retentionist states is substantiated by political arguments supported by the fact that there is no international legal prohibition of the death penalty *per se*. In spite of the difference, political arguments are highly relevant both in legal analysis generally and in relation to the main arguments raised in this thesis. There are many examples of the governments or politicians of the States Parties kicking against the Court or its decisions. In practice, the political backlash could affect or delay the compliance with the Court's judgment as we already seen in many cases. For example, in the former Prime Minister David Cameron's response to the judgment of *Hirst v. the United Kingdom* case in 2005,[67] which concerned the prisoners' voting rights in the UK, he initially said implementing the judgement of the ECtHR makes him feel 'physical ill'.[68] Successive UK governments had refused to enforce that judgement until September 2018 when the case was formally closed by the Council of Europe based on the UK's revised proposal of 'compromised' implementation.[69] The UK's reluctance to execute the ECtHR's judgements has set a

[66] Duffy (n 24) 162.
[67] *Hirst v. the United Kingdom* App no 74025/01 (ECtHR, 6 October 2005).
[68] Alex Aldridge, 'Can 'Physically Ill' David Cameron Find a Cure for His European Law Allergy?' <https://www.theguardian.com/law/2011/may/06/david-cameron-european-law-allergy> accessed 15 July 2020.
[69] Neil Johnston, Prisoners' Voting Rights: Developments since May 2015' <https://commonslibrary.parliam

'deleterious' example to the other States Parties. In Russia and Turkey, for instance, the implementation of the ECtHR's judgments has been a continually topical issue.[70] In *Trabelsi v. Belgium* case,[71] in addition to the controversial issue of the compatibility of '*de facto* irreducible' life imprisonment and Article 3, it was notable that Belgian authorities extradited the Tunisian terrorist to the US disregarded the ECtHR's interim measures with a view to suspending the extradition. Although Belgium's decision was mainly based on the guarantee it received from the US, it was believed that the danger and potential security threats to Belgium caused by the applicant did help it made the decision much easier.[72] It was the revolt by some Contracting Parties like the UK and Belgium that promoted the proposed reform of the ECtHR,[73] the essence of which has also been reflected in Protocol No. 15.

Since the 9/11 attack, the considerable changes in the political sphere has put the 'war on terror' into the frontline of states' priority, which inevitably affects states' policies especially regarding the law enforcement. Although extradition or the interests served via extradition is not just about terrorism or public security, we can still draw some

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ent.uk/research-briefings/cbp-7461/>accessed 15 July 2020.

[70] For example, see Bill Bowring, 'Russia's Cases in the ECtHR and the Question of Implementation' in Lauri Mälksoo and Wolfgang Benedek (eds.), *Russia and the European Court of Human Rights: The Strasbourg Effect* (CUP 2017); European Implementation Network, 'Turkey' <http://www.einnetwork.org/turkey-echr> accessed 15 July 2020.

[71] *Trabelsi v. Belgium*, App no 140/10 (ECtHR, 4 September 2014).

[72] Laurens Lavrysen, 'Belgium Violated the ECHR by Extraditing a Terrorist to the USA despite an Interim Measure by the Strasbourg Court: Trabelsi v. Belgium' <https://strasbourgobservers.com/2014/09/12/belgium-violated-the-echr-by-extraditing-a-terrorist-to-the-usa-despite-an-interim-measure-by-the-strasbourg-court-trabelsi-v-belgium/ accessed 15 July 2020; Luk Vervaet, 'Belgium: Possible Extradition of Nizar Trabelsi to the United State : Another Act of War?' <https://www.statewatch.org/news/2010/august/belgium-possible-extradition-of-nizar-trabelsi-to-the-united-state-another-act-of-war/> accessed 15 July 2020.

[73] For example, in the Speech on the European Court of Human Rights, David Cameron put forward that 'the role of the Court has never been more challenging'. Among which, he raised doubts regarding the increasingly limited scope of the margin of appreciation and that 'not enough account is being taken of democratic decisions by national parliaments.'

inspirations from the debate on security *v.* human rights in the context of the war on terror.[74] As Andrew Ashworth points out,

> 'Growing public and political concern about security in general, and specifically about what is described as the 'terrorist threat', has brought calls for more intrusive investigative power, for revisions of criminal procedure, for new and wider criminal laws and for harsher penalties.'[75]

On the one hand, political arguments, to which the discussion in this thesis will refer, overlap and are applicable to the legal argument that I present for several reasons. Precisely, the ongoing global changes of transnational criminality are directly reflected in political views and decisions, which provide the overarching reasons for looking for a legal solution to provide European states with some flexibility to extradite to the retentionist, via the margin of appreciation. In other words, those political points are reasons behind the proposed alteration of the ECtHR's legal standard. It is undeniable that the priority on public interests held by the politicians and governments is often contradicting with individuals' human rights. There are many examples of the apparent willingness, or at least acquiescence, of abolitionist states,[76] from political perspectives, to extradite or deport 'unwanted people' to other states, regardless of the death penalty, for the sake of their own national interests. In addition, there were many complaints

[74] Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights' in Benjamin J Goold and Liora Lazarus (eds.), *Security and Human Rights* (Hart Publishing 2007). The main point of Andrew Ashworth will be explained in Chapter 4.3.4.
[75] ibid, 210.
[76] Examples will be set out in Section 4.1.2.

from some politicians in some States Parties against the inflation of the protection under the ECHR and calls for its reform. For example, the indeterminate relation between individuals' human rights and national security and public interests has been a continuously debatable focus of the UK's successive governments. As the then Prime Minister Tony Blair maintained on his speech on criminal justice reform in 2006,

> '…the human rights of these individuals, if considered absolute, would militate against their deportation. But surely if they aren't deported and conduct acts of terrorism, their victims' rights have been violated by the failure to deport. And even if they don't commit such an act or they don't succeed in doing so, the time, energy, effort, resource in monitoring them puts a myriad of other essential task at risk and therefore the rights of the wider society. This is not an argument about whether we respect civil liberties or not; but whose take priority. It is not about choosing hard line policies over an individual's human rights. It's about which human rights prevail. In making that decision, there is a balance to be struck. I am saying it is time to rebalance the decision in favour of the decent, law-abiding majority who play by the rules and think others should too.'[77]

Nearly a decade later, in 2015, in the UK's Conservative Party's proposal for human rights reform, David Cameron insisted that the European Court of Human Rights has developed 'mission creep'. In other words, human rights are given too much priority,

[77] See Tony Blair, 'Prime Minister's Speech on Criminal Justice Reform' <https://www.theguardian.com/politics/2006/jun/23/immigrationpolicy.ukcrime1> accessed 7 July 2018.

and human rights law is overused 'with little regard for the rights of wider society'.[78] For example, under the current interpretation of the *ECHR*, those foreign terrorists and other criminals whose remaining would pose a severe threat on the national security are able to make a number of human rights arguments against their extradition or deportation, or at least postpone their removal. In the opinion of those politicians and those human rights sceptics, individualistic European human rights law is inhibiting the collective action from tackling transnational crimes for the greatest good of the public.[79] Until the time of writing, the UK's relationship with the European Court of Human Rights is still an indiscernible issue.[80] Nevertheless, no matter which government is concerned and no matter what specific circumstances are taken into account, the choice should be in favour of the greatest interests of the greatest number of people. It is noteworthy that the core value of the above political decisions is corresponding to the essence of proportionality calculus to a certain degree, which accommodates the idea that more flexibilities could be conferred to states in dealing with the conflict of interests between the public and the individual. That is to say, the margin of appreciation could be applied in assessing the extradition request for people facing the death penalty sentence or execution. I admit that it would be a big change for the Contracting Parties to the *ECHR*, they might be unlikely to accept. But that does not alter the validity of

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[78] See The Conservative Party, Manifesto 2015 <http://ucrel.lancs.ac.uk/wmatrix/ukmanifestos2015/localpdf/Conservatives.pdf> accessed 9 August 2018, p.73; The Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Law* p.3.

[79] Ashworth (n 74) 205-6.

[80] For example, see Merris Amos, 'The Value of the European Court of Human Rights to the United Kingdom' (2017) 28 European Journal of International Law 763-85; see Anushka Asthana and Rowena Mason, 'UK must Leave European Convention on Human Rights, Says Theresa May' <https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum> accessed 7 July 2018; James Sweeney, *Theresa May's Call for UK to Exit European Convention on Human Rights will Delight Human Rights Abusers* (2016).

the argument that I raise in this thesis that they are exporting the non-universal value and allowing the proposed flexibility would not contradict general international law. More importantly, the examples of political observations or opposition against the ECtHR explains why the change should be made and how likely those changes would find support from the political or governmental aspects.

On the other hand, as Steven Greer claims, 'drawing lines between Convention rights and legitimate public interest limitations inevitably involves weighing difficult and controversial political questions, rather than addressing narrow technical legal issues.'[81] Interpreting and implementing the Convention are complex, in which political concerns or political motivations are unavoidable. For any Contracting Parties, respect the human rights under the Convention is definitely an indispensable obligation but clearly not the only one in its decision-making process. This is particularly apparent in the context of the margin of appreciation, as will be illustrated in Chapter 4.3, the essence of which is to resolve the conflict between the individual human rights and other collective interests. Applying the doctrine to varying circumstances in different states is influenced by their diverse political backgrounds, particularly concerning those morally, culturally, religiously sensitive issues.

On top of that, extradition law itself, as David Sadoff describes, 'is deeply suffused with politics to the point where the two often become inseparably co-mingled and the

[81] Steven Greer, 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation' (2010) 3 *UCL Human Rights Review* 3.

law itself at times can be difficult to isolate as an independent variable.'[82] Although the 'political offence exception'[83] has been widely acknowledged, in reality, it is really hard to eliminate the political influence on extradition cases. As discussed in the first section of this chapter, political factors are embedded in the whole process of extradition cases.[84] Additionally, in many states, the political or administrative authorities and the court are closely involved in making the decision on extradition cases. In other words, extradition has rarely been an issue that purely determined by courts. For example, in China, both the judicial departments and the Ministry of Foreign Affairs are entitled to examine at different stages of the extradition proceeding.[85] In Canada, extradition cases are proceeded by three phases while the Minister of Justice has the power to make the final decision whether or not to extradite, albeit subjected to judicial review.[86]

Secondly, an issue that is frequently reviewed is the alternatives to extradition. This means, if the role of extradition could be replaced by other kinds of approach to get the same result, the problem caused by extradition could be easily resolved by abandoning the use of extradition at all. However, that has not been the case. Alternatives to extradition refer to those 'legal and extralegal rendition devices that do not fall within

[82] Sadoff (n 23) 24.
[83] For further discussion, see Sadoff (n 23) 199-210; Boister (n 16) 368-70; Bassiouni, *International Extradition* (n 8) 669-738; Julia Jansson, *Terrorism, Criminal Law and Politics: The Decline of the Political Offence Exception to Extradition* (Routledge 2019).
[84] Sadoff (n 23) 24-5.
[85] Extradition Law of China, Arts 16-29.
[86] See Canada's Extradition Act 1999, Art 40; General Overview of the Canadian Extradition Process, <https://www.justice.gc.ca/eng/cj-jp/emla-eej/extradition.html> accessed 16 July 2020.

the framework of formal extradition.'[87] Since human rights law might render the fugitive impunity from justice, an important derivative issue here is whether there are sufficient backup measures to secure those accused or convicted fugitives to be brought to justice, when the extradition is unsuccessful.[88] In other words, whether it could be guaranteed that the alternatives to extradition are legitimate, sufficient and effective enough to realise the interests that the extradition is supposed to serve.[89] In practice, several alternatives to extradition have been employed by states and governments to secure the wanted fugitives are brought to their territory either when the extradition is unavailable on a number of grounds which will be discussed in Chapter 2, or states are unwilling to resort or deliberately circumventing the formal extradition procedure. Those alternatives are differentiated from each other, mainly according to their lawfulness and applicability in particular cases. Nevertheless, we can observe that extradition is not replaceable and in reality, the unavailability or failure of extradition are able to be fully offset by sufficient alternatives. Extradition still 'serves an indispensable function, operates reasonably well in most instances, continues to represent the generally preferred means of bringing fugitives to justice, and its very threat can have powerful, even mortal, consequences.'[90]

For example, one of the most common alternatives is the reliance on the host state's

[87] M. Cherif Bassiouni, 'Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition' (1973) 7 Vanderbilt Journal of Transnational Law 26.
[88] Either 'unavailable' or 'undesirable'. See Sadoff (n 23) 3-4.
[89] For example, see Sadoff (n 23) chapter 9-12; Bassiouni, *International Extradition* (n 8) Chapter IV and V; Boister (n 16) 387-9.
[90] Sadoff (n 23) 5-6. We will continue to discuss the significance of extradition in Section 2.1.

national immigration law to deport non-national fugitives from its territory. In many cases, deportation has been proved to be an effective way by which the *de facto* result of extradition can be achieved.[91] However, compared with extradition, taking deportation as an alternative has its weakness, especially concerning the procedural safeguards of the fugitive. Most importantly, even though deportation works well as an alternative to extradition by achieving the same result in certain cases, it does not and would not overcome the conundrum that many retentionist states confront in extradition where the fugitive is wanted for capital offences. This is because the Member States of the Council of Europe are legally obliged to prohibit the removal of individuals to another where the death penalty is possible, irrespective of extradition, deportation or exclusion.[92] The relevance of deportation will be further analysed in Section 2.5. For this reason, the alternatives are not satisfactory in overcoming the barrier that retentionist states face in getting extradition from the Contracting Parties to the *ECHR*.

Thirdly, within the current framework, when extradition cases involving the death penalty, the insistence on the assurance seems to be a normative practice in international law.[93] However, does the use of assurances really resolve all problems arise from the gap between the abolitionist and retentionist states in international criminal cooperation? What is the essence of the use of assurances, and does it cause any side effects? Also, is there any better alternative to respond to this 'stand-off'? The answers to the above

[91] Choo (n 25) 1381-96.
[92] For example, Preamble (13) of the European Arrest Warrant upholds that 'no person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty…'
[93] For example, see UN Model Treaty on Extradition, adopted by General Assembly Resolution 45/116, amended by General Assembly Resolution 52/88, Article 4(g)(d).

questions require further debate, which will be looked into in Chapter 4.

Last but not least, the primary suggestion put forward in this thesis is determined by the underlying legal argument that the death penalty itself is not universally prohibited in international law. As will be thoroughly explored in Chapter 3, on the basis of the assessment on the lawfulness of the death penalty in international law, which comes out that the death penalty is not universally prohibited in treaty law or customary international law, although international human rights law forcefully regulating how the death penalty is carried out and against whom. The ECtHR is, in effect, unjustifiably exporting a non-universal legal standard that affects the sovereignty of retentionist states to regulate criminal justice in the way that they themselves consider appropriate or legitimate.

Against this background, this thesis argues that the ECtHR's approach in determining extardition of people to retentionst states should be adjusting by conferring its States Parties with more flexibilities. In other words, in certain circumstances, extradition is supposed to be prioritised against the conflciting interests of the extarditee's right under Article 2. In order to achieve the above target, a greater use of the doctrine of the margin of appreciation in relation to Article 2 *ECHR* in extradition and expulsion cases is advocated. This means states should be given limited discretion to decide whether or not extradition should be processed. The margin of appreciation is a European concept allowing for flexibilities in the restriction of certain human rights. Although there has

been a minimum application of the doctrine in regard to Article 2, it has not so far been applied in such a way as to allow extradition to face the death penalty. Admittedly, this thesis attempt to provide reasons to rethink the margin of appreciation in relation to the death penalty, regardless of the ECtHR's willingness to accept. The main discussion on this issue will be conducted in Chapter 4.

2. The Operation of Extradition Law

As illustrated in the mandate of the National Crime Agency,

> [s]erious and organised crime is a transnational threat. No single agency or country working in isolation can combat sophisticated organised crime groups operating across borders. Collaboration with international partners is vital to combat serious and organised crime threats at source.[94]

Extradition, which is delicately defined by David Sadoff as:

> a cooperative law enforcement process by which the physical custody of a person: (i) charged with committing a crime or (ii) convicted of a crime whose punishment has not yet been determined or fully served, is formally transferred, directly or indirectly, by authorities of one State to those of another at the request of the latter for the purpose of prosecution or punishment, respectively.[95]

Extradition originates from and reflects the common interests and the shared values in combating transnational crime and there are several reasons that states need to obtain extradition as well as to extradite.[96] It has shown growing significance in international

[94] National Crime Agency, 'Fugitives and International Crime' <https://www.nationalcrimeagency.gov.uk/what-we-do/how-we-work/providing-specialist-capabilities-for-law-enforcement/fugitives-and-international-crime> accessed 26 April 2019.
[95] Sadoff (n 23) 43.
[96] Miguel João Costa, *Extradition Law: Reviewing Grounds for Refusal from the Classic Paradigm to Mutual*

criminal justice,[97] and some states are parties to a large number of extradition agreements. For example, there are approximately over 1000 extradition treaties in effect all over the world.[98] Through the EU's European Arrest Warrant scheme, the UK has expedited extradition arrangements with the other 27 EU Member States and has further individual agreements with over another 100 states or territories. The US has signed more than 100 extradition treaties with other sovereign states.[99] The widespread presence of extradition treaties indicates those state parties have accepted to engage in extradition to respond to transnational crime as long as the request is in accordance with the treaty provisions. In transnational criminal law, extradition is an essential approach in combating cross-border crime and international crime. It serves as one of the most indispensable parts of the integrity of the international judicial cooperation framework. Furthermore, extradition is a direct and effective approach for the state willing to remove individuals who are believed to threaten the national security and public order within its territory.

The main orientation of this chapter is beginning with the observation that extradition could have significantly helped states in bringing international fugitive back and performing the law enforcement function. However, its values have not been fully realised as expected. The exercise of extradition is impeded by various factors. Firstly, states have no inherent obligation to extradite; most extradition practice has relied on

Recognition and Beyond (Brill 2020) 8-23.
[97] ibid, 19-22.
[98] Bassiouni, *International Extradition* (n 8) 52.
[99] See US Department of Justice <https://www.state.gov/documents/organization/71600.pdf> accessed 18 August 2019.

the extradition treaties. Secondly, extradition law itself has a number of requirements or unavoidable conditions. Thirdly, extradition is increasingly affected by international human rights law where the latter has become a core strand within the former, particularly involving the Contracting Parties to the *ECHR*. As will be explored in the following sections, there has been continuing attempts to address the first two aspects, mainly by simplifying or standardising the extradition procedure, so as to facilitate the international cooperation in combating crimes. However, the relation between extradition and fundamental human rights has not been properly dealt with. The death penalty is a specific one that, it is argued here, interferes the extradition values disproportionately. The discussion in this chapter denotes the increasing reliance upon international cooperation, which will provide evidence that much more significance should be placed upon extradition in considering the refusal grounds deriving from human rights (the death penalty). In other words, extradition should and could be performed in a more dedicated and human rights-compliance way.

To be specific, this chapter is going to set out some of the key terms and issues regarding 'extradition law', particularly focusing on international human rights law, *inter alia*, the death penalty, as a ground for refusal. Before we get into the discussion on why the nexus between extradition and the death penalty is imbalanced or disproportionate and how it could be reformed with the suggested mechanism, it is necessary to firstly corroborate what extradition is, why it is particularly important in light of the present-day global context, how it works and how it is restricted to perform its role.

2.1 The rationale of extradition and the realisation of its values

The society we live in is witnessing enormous changes in almost every aspect of life. Some of those changes are what we can exploit and get benefits from. However, those changes also bring about various challenges that we have to face and respond to. Among which the way of communication and movement is one of the most considerable ones. People and people's activities are by no means delimited by state borders, which includes those perpetrators and crimes. In the age of globalisation with convenience in cross-border movement in multiple forms,[100] the status of national borders in the criminality is changing.[101] These changes are speedily reflected in criminal law and the transnational crime in particular, which is perpetrated and propagated at unprecedented degrees.[102] As Vesna Stefanovska asserts, 'even common crime, has lost its primarily territorial'.[103] The fact is that crime is now committed in an increasingly borderless sphere, but in the meantime, the state's criminal jurisdiction is still quite territorial and restrained by national borders.[104] Against the is background, criminals are much easier to escape justice by exploiting the weakness of boundaries, they make use of the national borders which in this situation, providing illegal impunity from the states' enforcement jurisdiction to arrest, prosecute and punish those criminals based on their

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[100] Phil Williams, 'Organizing Transnational Crimes: Network, Markets and Hierarchies' in Phil William and Dimitri Vlassis (eds), *Combating Transnational Crime: Concepts, Activities and Responses* (Routledge 2001) 57-61.

[101] Boister (n 16) 3.

[102] For a general discussion of the transnational crime, see ibid, Chapter 1.

[103] Vesna Stefanovska, 'Extradition as A Tool for Inter-State Cooperation: Resolving Issues about the Obligation to Extradite' (2016) 2 Journal of Liberty and International Affairs 38.

[104] According to the principle of sovereignty, a state 'may not exercise its power in any form in the territory of another State.' See S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (series A) No. 10 (7 September 1927), para. 45. For a general analysis on the jurisdiction and sovereignty, see Boister (n 16) Chapter 16; Bassiouni, *International Extradition* (n 8) Chapter VI; Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015).

own domestic criminal law. In the meantime, states are highly threatened by the increasing severity of global security. For example, the war on terror has been deemed as a significant matter that proliferated all around the world, which is also acknowledged in successive jurisprudence of the ECtHR. Extradition has always been highly valued by states since it provides a formal legal channel of transnational criminal cooperation whereby the requested state surrenders the fugitive offender who is presenting or captured in its own territory to the requesting state for the only purposes[105] of trial or executing sentences, in which the requested person is convicted of or alleged to have committed a specific crime.[106] In this situation, the objectives of the suppression of crimes and the guarantee of criminal jurisdiction enforcement of the requesting state can be largely realised.

The extradition law is indeed underpinned by the rationale that seeking to carry out the effective cooperation in criminal matters, particularly when the offence falls within the category of terrorism or other transnational crimes. As outlined in Chapter 1, governed by the principle of sovereign equality, states are only able to fulfil their exclusive enforcement jurisdiction within their own territory.[107] However, when the offender is not in the territory of the state, according to the extraterritorial criminal jurisdiction,[108]

[105] John Jones and Rosemary Davidson, *Extradition and Mutual Legal Assistance Handbook* (2nd edn, OUP 2010) 3-4.
[106] Bantekas, *International Criminal Law* (n 18) 373; Ronale Hedges, *International Extradition: A Guide for Judges* (Federal Judicial Center 2017) 1.
[107] Fannie Lafontaine, 'National Jurisdictions' in William Schabas (ed), *The Cambridge Companion to International Criminal Law* (CUP 2016) 160.
[108] For example, the universal jurisdiction is now only applied to specific circumstances, such as the international crimes or crimes against *jus cogens* norms. The debate on enlarging the applicable scope of universal jurisdiction is still ongoing.

although the state is competent to criminalise particular offences,[109] its direct extraterritorial enforcement jurisdiction would be hampered because of its strictly territorial nature[110] and the concerns of sovereignty principle.[111] Typically, one state cannot exercise its judicial power to 'arrest and detain, to prosecute, try and sentence, and to punish persons'[112] within the territory of another state without relevant permission or cooperation otherwise it would be deemed as an infringement to the state sovereignty.[113] For this reason, states often have very limited options except for transnational criminal cooperation so as to enforce its jurisdiction extraterritorially and prosecute or punish the offender according to the domestic criminal law.[114] This is likewise regarded as the legal and practical foundation of the exercise of extradition law.

In the second, the establishment of an extradition relationship, either bilateral or multilateral, is essentially based on the shared values and mutual interests of both participating states.[115] Although the designation of extradition mechanism is to fulfil the requesting state's enforcement of criminal law, it does also meet the demand of the requested state, at least from the following perspectives. Without regard to the political, diplomatic or economic motivations behind the fulfilment of the extradition request as

[109] Dan Stigall, 'Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law' (2013) Notre Dame Journal of International and Comparative Law 19.
[110] Derek Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' (1983) 53 British Yearbook of International Law 1.
[111] Malcolm Shaw, *International Law* (7th edn, CUP 2014) 469-71.
[112] Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 Journal of International Criminal Justice 736-37.
[113] Stigall (n 109) 653.
[114] Lafontaine (n 107) 161.
[115] Hugh Stephens, *Why an Extradition Treaty with China is a Good Idea* (2016).

revealed in Section 1.1, and also without regard to the reciprocal incentives which will be discussed in Section 2.2.2.2, extradition is by no means just for the interests of the requesting states. In cases where the requested fugitives are involved in terrorism-related crimes or other transnational crimes, which pose a serious security threat to the national interests of the requested state, fulfiling the extradition request is the best way to remove those undesirable people and eliminate the unpredictable risks. This can be found in continual argument from the UK government in extradition, deportation cases. Furthermore, taking China's global anti-corruption campaign as an example, Canada, Australia and New Zealand are some of the most popular countries to which the criminals, particularly corruption suspects, flee from China. Those countries, to a certain extent, have become *de facto* safe havens for criminals escaping from China, which has given rise to an alarming issue. The money stolen from taxpayers immensely damages the state's economy as well as the public's confidence of justice, fairness and the rule of law. In the meantime, the large amount of hot money brought by those corrupt officials undermines the economic order of the host state. For instance, they use the illegal proceeds to buy estates, which inflates the financial market, and results in the middle class cannot afford to buy a house.[116] With respect to the points raised in this section and Chapter 4, it is fair to say extradition serves the interests of both participating states. Simply put, it serves the interests of the collective. Therefore, the argument made in this thesis is equally applied to extradition cases involve terrorism or other transnational crimes, and those 'normal' extradition cases. However, it is

[116] Christine Duhaime, *An Extradition Treaty with China Sends a Message about Corruption* (2016).

particularly compelling in relation to the former.

Thirdly, everyone must take responsibility for their acts (or omissions) that breach the law. It is widely agreed that criminals should not be able to evade justice by crossing state borders. In this regard, extradition helps those fugitives get their 'just deserts'. It relates to the issue of pursuing the justice of law by making it possible for the requesting state to bring the fugitive criminals to their territory and impose the due trial or penalty on the offenders for their misdeeds. As a matter of fact, extradition has become a significant approach of inter-state cooperation in criminal matters, and it has been a direct approach to fight against impunity otherwise the national physical border would become the boundaries between guilt and innocence. Without the platform of extradition, criminals may escape from justice and never have to face trial or punishment, due to the unavailability to getting them in custody and all those barriers to performing the jurisdiction abroad.[117] In this case, the accused fugitives' impunity from the criminal law is in breach of the principle of legality and the justice of law.

In summary, the establishment and exercise of extradition law are intrinsically for the purpose of conferring the requesting state with relevant judicial power to enforce its domestic criminal law on those alleged offences and convicted offenders, by prosecuting them, making a sentence or executing the corresponding penalty.[118] In

[117] Claire De Than and Edwin Shorts, *International Criminal Law and Human Rights* (Sweet & Maxwell 2003) 46.
[118] Xiaoyan Liu, 'The Relations Between the Sovereignty of State and Human Rights in Extradition Process ' (2012) 3 Legal System and Society 11.

essence, the extradition law is undoubtedly in accordance with not only the principles and the development tendency of international criminal law, but also the needs of the reality. This means, ultimately removing the safe haven for fugitives and combating crimes, especially the severe transnational crimes that violate the interests of the whole international community. The existence of an operative extradition treaty, or a successful completion of an extradition case, is not only meaningful for that specific case, but more importantly, it explicitly sends a clear and firm message to other fugitives and those who attempt to escape from justice by fleeing abroad that this way does not work and no matter where they flee to, there is no safe haven. Under such circumstances, it is not difficult to understand that extradition is attracting increasing international concerns and states are inclined to cooperate or remove specific individuals via this kind of approach,[119] even at the expense of violating their human rights obligations.

2.2 The legal basis of extradition

Considering the increasing importance of extradition, it seems plausible to presume that states are obliged to extradite in the context of crime-fighting. However, that is not the case. Being the most indispensable subject of international law,[120] according to the principle of territorial sovereignty,[121] states should have the exclusive right to their own domestic affairs, including the criminal offences perpetrated within their territory.[122] Furthermore, they should be endowed the judicial discretion either to grant or refuse to

[119] Prost, No Hiding Place (n 21) 126.
[120] Shaw (n 111) 142-44.
[121] ibid, 354-55.
[122] Michael Hirst, 'Jurisdiction over Cross-Frontier Offences' (1981) 97 Law Quarterly Review 80.

surrender the arrested to another state or on what condition to surrender.[123] In international law, it has been 'universally accepted'[124] that the state has neither an inherent binding obligation to extradite[125] nor the right to have its wanted fugitives extradited from other states, despite its potential necessity.[126] In this case, the legal basis of extradition law definitely deserves our prior examination before getting to further extradition-related issues. That is to say, it largely determines not only the extent to which the exercise of extradition would be successful, but also the state's interests in bringing international fugitives back for prosecution or punishment.

2.2.1 Treaty-based extradition

2.2.1.1 Comprehensive extradition treaties

In international law, the legal basis for extradition is traditionally and generally derived from a variety of bilateral and multilateral extradition treaties.[127] Building up a treaty-based extradition relation is for the sake of states' interests to fight against crime with the guarantee of legal certainty and predictability.[128] For some states, common law countries in particular such as the UK, the United States and Canada,[129] the executing of extradition is strictly derived from the premise of an extradition treaty. In other words,

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[123] Joanna Harrington, 'Extradition of Transnational Criminal' in Neil Boister and Robert Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2014) 154.
[124] It was once a controversy that whether extradition exists as a legal or moral obligation. See Shearer, *Extradition in International Law* (n 30) 23-4.
[125] As for the obligation to extradite people involved international crimes or *jus cogens* crimes, especially refer to the principle of *aut dedere aut judicare*, it has different and debatable interpretation. See Bassiouni, *International Extradition* (n 8) 7-13.
[126] M. Cherif Bassiouni, *International Extradition and World Public Order* (A.W. Sijthoff 1974) 3-4; Bantekas, *International Criminal Law* (n 18) 374.
[127] Duffy (n 24) 107.
[128] Harmen Van Der Wilt, 'Extradition and Mutual Legal Assistance in the Draft Convention on Crimes Against Humanity' (2018) 16 Journal of International Criminal Justice 3.
[129] Bassiouni, *International Extradition* (n 8) 8, 22.

if a state is willing to secure the wanted person being returned from those countries, it has to engage an extradition relation with them first. In fact, there have been many cases in which the vacancy of a valid extradition treaty giving rise to the barrier to extradition or the impunity.[130]

Over the past decades, a large number of bilateral agreements have been concluded with states, particularly in the post-World War Two period.[131] Most states are bound by a series of bilateral and multilateral extradition agreements. They have entered into international conventions which also impose an obligation on member states to extradite the offender who is convicted or alleged to have perpetrated certain extraditable crime. These bilateral, regional and international instruments constitute the primary legal foundation of extradition in the current framework, regulating the rights of fugitives and the responsibilities of states in the extradition process. For instance, the UK signed an extradition treaty with Sweden, the US and France in 1963, 1972 and 1978 respectively, Canada and the US signed in 1971, Germany and Austria did it in 1975. Although China does not maintain extradition relations with most countries where offenders are keen to flee to, such as the US, Canada, New Zealand and Germany, it still has operative extradition relationships with 37 states. These bilateral treaties, on the basis of mutual negotiation and respect, provide the participating countries with the legal foundation and procedural requirements for extradition. The bilateral treaty is probably the most common form of the extradition basis. It supplies the contracting

[130] Sadoff (n 23) 271-5.
[131] Bassiouni, *International Extradition* (n 8) 42-3.

states with more space and freedom, and thus can be more easily to be negotiated and determined by the two participating states based on their own legal, political, diplomatic and social concerns.[132] And also, it works better in accommodating the difference between only two states.[133] However, the prevalence of bilateral approach also negatively affects the extradition law's uniformity reform and adds a lot of unnecessary complexities. Due to the lack of a universal standard, each bilateral treaty may have distinctiveness and flexibility. If this continues to be the main source of legal basis, the vast number of bilateral treaties concluded and continuously amended by the 193 UN Member States will definitely make the international extradition scheme more complicated and cumbersome.

Apart from bilateral treaties, multilateral extradition treaties including regional and sub-regional ones are equally important in performing the legal foundation of extradition.[134] For example, in regional context, *the Inter-American Convention on Extradition*, *the Arab League Extradition Agreement*, and *the European Convention on Extradition*,[135] these arrangements regulate the relevant issues about extradition such as the scope, procedures, conditions and limits, and instruct the extradition process among the States Parties in the American, Arab League and European area respectively. Besides,

[132] Gilbert, *Transnational Fugitive Offender* (n 12) 9-10,33; see also, M. Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn, Martinus Nijhoff Publishers 2013) 504.
[133] Gabriella Blum, 'Bilateralism, Multilateralism, and the Architecture of International Law'(2008)' 48 Harvard International Law Journal 323, 357.
[134] Ivan Shearer, 'The Current Framework of International Extradition: A Brief Study of Regional Arrangements and Multilateral Treaties' in M. Cherif Bassiouni and Ved Nanda (eds), *A Treatise on International Criminal Law: Crimes and Punishment* (OUP 1973) 326.
[135] The European Convention on Extradition was replaced by the European arrest warrant mechanism. See Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/582/JHA).

multilateral arrangements can be recognised as the functional guidance for member states to institute bilateral treaty relations, and also can be applied as supplements for the lack of bilateral extradition agreements by whose states that cannot extradite without a treaty.

In this regard, the supranational European Union has gone perhaps the furthest with the establishment of the European Arrest Warrant (hereinafter the EAW). This is a must-mentioned regional legal framework in the context of extradition law reform,[136] which was introduced to simplify and standardise the judicial arrest and surrender process within the jurisdiction of the European Union.

> The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.[137]

The EAW builds up a streamlined but comprehensive legal mechanism for European Union Member States to cope with the practical issues in judicial cooperation in criminal matters. From the legislative level, the implementation of the EAW is a response to the complicity of the escalation of extradition arrangements within EU, and

[136] The EAW is a Framework Decision rather a treaty or a convention. See EU Monitor, 'Framework Decision' <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh7dotmxlyyu> accessed 19 December 2019.
[137] European Arrest Warrant, Art 1(1).

at that time, the weakness of the extradition framework as well as the needs of the suppression of crimes. The EAW makes extradition obligatory within the EU. On the one hand, it reduces the substantive and procedural obstacles to extradition by reaching an agreement of a new supranational scheme that undoubtedly provides a relatively standard and flexible mechanism based on a high degree of mutual recognition and trust in judicial decisions among Member States.[138] On the other hands, it 'marked an attempt to replace extradition in the traditional sense with a system of surrender without the involvement of the executive and with the minimum of formality.'[139] This means, as one of the most immediate impetuses to enhance the cooperation, the whole process of arrest and surrender has been an exclusively judicial issue and accordingly, the administrative and political influence would be largely minimised.

The adoption of the EAW would neither destroy the Member States' pre-existing extradition relations nor ban them from setting up further bilateral or multilateral extradition instruments.[140] As for the extradition with non-EU states, EU Member States' conclusion of extradition agreements and the engagement of extradition relations should always be in accordance with the inherent principle of the EAW. For these accounts, this scheme is respected as an expression of the trend of the future extradition reform. The other bilateral and multilateral level of extradition operation is

[138] It should be noted that the mutual recognition and mutual trust *per se* are under attack. It is argued that the cornerstone of them does not exist, and even within the EU, there are huge differences of standards pf justice and human rights for example.
[139] Scott Baker and Others, *A Review of the United Kingdom's Extradition Arrangements* (2011) 116.
[140] The EAW, Art 31; See also Gjermund Mathisen, 'Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond' (2010) 79 Nordic Journal of International Law 16-7.

also supposed to be as uniform and standard as possible to reduce the complexity and bureaucracy so as to effectively fight against grave crimes that infringe the common interests of the international society.[141] For example, another initiative to streamline the extradition process in Nordic states was inspired by the EAW and established the Nordic Arrest Warrant in 2005 and entered in force for all Member States[142] in 2012.

The EAW's establishment and operation have not only achieved unprecedented improvements and a lot of positive results with regard to the law enforcement,[143] but also attracted extensive discussion with great controversies; a number of problems have emerged. To be more precise, the legal basis *per se*, upon which the EAW was initially introduced and subsequently implemented, is questioned. The high level of mutual trust and recognition across the Member States of the EU actually has a little foundation in practice.[144] The gradual harmonisation of extradition proceedings within the EU is still a hard mission even after the adoption of the EAW. Because the pivotal problems of extradition law are the variability of its application as well as the discrepancy of the national law on which its operation relies.[145] It is too early and 'idealistic' to say that the harmonisation or reconciliation of those *sui generis* characteristics of criminal justice systems have been reached or can be reached.[146] In fact, neither the conflicts

[141] Geert-Jan Knoops, 'International Terrorism: The Changing Face of International Extradition and European Criminal Law' (2003) 10 Maastricht Journal of European and Comparative Law 167.
[142] Denmark, Finland, Iceland, Norway and Sweden.
[143] Annex to the Report from the Commission on the Implementation of the European Arrest Warrant and the Surrender Procedures between member States in 2005, 2006 and 2007, Brussels, 11 July 2007, COM (2007).
[144] Massimo Fichera, 'The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?' (2009) 15 European Law Journal 70-97.
[145] Ben Saul, 'Terrorism as a transnational Crime' in Neil Boister and Robert Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2014) 395.
[146] Susie Alegre and Marisa Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step too Far too soon? Case Study—the European Arrest Warrant' (2004) 10 European Law Journal 201.

nor the distinctions of different states' substantive and procedural law as well as the structure, standard, effectiveness, fairness and reliability of their political and judicial systems, at the European Union's level, are unlikely to be eliminated or harmonised to the same or similar degree, at least not possible to realise at this time.[147] For these reasons, absolute trust and recognition of each other's judicial competence and decisions is indeed unrealistic and non-existent.[148] In some cases, states would be reluctant to assume these risks of uncertainty at the cost of comprising their state sovereignty.[149]

In addition, another principal criticism of the EAW is that both the Framework Decision *per se* and some of its Member States' practice have placed too much emphasis on the procedural simplicity and accordingly, the fundamental rights of the people subjected to the arrest warrant are not fully regarded.[150] The presumption of the equivalence of the standard of justice, particularly in the human rights sphere, might exist in theory, but indeed cannot be realised in reality. This also undermines the practical basis of the principle of mutual trust and recognition. The Convention obligations have not been fulfiled by its Contracting Parties at a same or similar degree. The fact that all Member States of the EAW are bound by the *ECHR* or any other multilateral human rights treaties does not restrain them from violating extraditees' human rights in practice.[151]

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[147] Ilias Bantekas, 'The Principle of Mutual Recognition in EU Criminal Law' (2007) 32 European Law Review 365.
[148] Bassiouni, *International Extradition* (n 8) 27-9. See also, Human Rights Joint Committee, *Fifteenth Report* (n 51) para. 132.
[149] Boister (n 16) 230-32.
[150] For example, see Thomas Hammarberg, *Overuse of the European Arrest Warrant – A threat to Human Rights* (Council of Europe 2011).
[151] Report from the Commission to the European Parliament and the Council on the Implementation since 2007 of

For example, there are indeed a large number of cases against the EU Member States' violation of the *ECHR*.[152] Against this background, it is argued that the assumed mutual trust and recognition are ill founded in relation to human rights protections. As Alegre and Leaf argue, 'there is a long way to go before mutual recognition can be said to be based on a genuine mutual trust.'[153] It should also be noted that the EAW has also been doubted for its overuse or disproportionate use for minor offences, which is mostly due to the lack of the proportionality test requirement.[154] This means, national legislation play a determining role in this regard, which is obviously varying in different Member States.[155]

2.2.1.2 Extradition provisions in suppression conventions

It is noteworthy that extradition provisions are well established in a number of conventional schemes aiming at combating certain types of crime. The shared value and the collective commitment to combating transnational crimes and safeguard the rule of law at both national and international level are expressly embodied in those suppression conventions. These extradition-related terms not only serve as an indispensable part for of integrity of the extradition basis, but also manifests an increasing reliance on extradition in response to the globalised criminality. Normally, those agreements contain the clauses regarding extradition as a means of international

the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2011. See also, *M.S.S. v. Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011), para. 353.

[152] Fair Trials International, *The European Arrest Warrant Seven Years on – The Case for Reform* (2011), p. 8.

[153] Alegre and Leaf, *Mutual Recognition in European Judicial Cooperation* (n 146) 201.

[154] Human Rights Joint Committee, *Fifteenth Report* (n 51) para. 143-52.

[155] Joanna Dawson and Others, *Briefing Paper: The European Arrest Warrant* (2017), p. 11-5.

cooperation in fighting against a specific category of crimes[156] and eliminating the safe haven. For example, Article 16(4) of *the UN Convention Against Transnational Organized Crime* identifies that:

> If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

This article provides an alternative legal basis in relation to the crimes to which it applies for those Contracting Parties that are not already bound by a comprehensive bilateral or regional extradition treaty, which makes up the insufficiency of extradition application that is solely built on a treaty. Similar provisions on extradition can also be found in Article 44(5) of *the United Nations Convention Against Corruption* and Article 6 *the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*. Regionally, a list of Council of Europe treaties incorporates specific extradition-related provisions dealing with international cooperation to fight against serious transnational crimes.[157]

[156] Including terrorism, economic crimes, aircraft crimes and crimes related to illegal medicine. See Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95; United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41; Shanghai Convention Combating Terrorism, Separatism, Extremism (adopted 15 June 2001, entered into force 29 March 2003).
[157] See Council of Europe, *Extradition in the Treaties of the Council of Europe Note for Practitioners* (2015).

Unlike 'international crime' to which specific international criminal courts and tribunals have jurisdiction,[158] combating transnational crimes under most of the above suppression conventions, there are no supranational judicial bodies to impose criminal responsibility directly on individuals.[159] Prosecution and punishment of those offenders are predominantly replied on the law enforcement at the domestic level.[160] However, a state cannot succeed in doing it by itself.[161] As Robert Cryer, Darryl Robinson and Sergey Vasiliev claim, it 'requires cooperation among government and among law enforcement agencies.'[162] 'To facilitate effective domestic prosecution, States have concluded international agreements providing for cooperation among States which otherwise might have few law enforcement concerns in common.'[163]

Valerie Eggs stresses that 'the need to tackle crime at the international level has necessitated these treaties, while extradition has provided the key to enforcement.'[164] These multilateral or international suppression conventions aiming at combating a wide range of transnational crimes reflect not only the international community's confrontation of the common threat, but also different states' shared values in response to those challenges so as to safeguard the national interests.

2.2.1.3 Quest for a universal extradition regime

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158 Robert Cryer and Others, *An Introduction to International Criminal Law and Procedure* (4th edn, CUP 2019) 4.
159 ibid, 319.
160 ibid, 320.
161 Boister (n 16) 19.
162 Robert Cryer and Others (n 158) 319.
163 ibid, 320-21.
164 Valerie Epps, 'The Development of the Conceptual Framework Supporting International Extradition' (2002) 25 Loyola of Los Angeles International and Comparative Law Review 383.

The UN Model Treaty on Extradition is generally acknowledged as an achievement of the template with a relatively comprehensive extradition framework, 'because of both its contents and structure'[165]. On the one hand, the UN Model Treaty reiterates the necessity of an integrated, effective and streamlining mechanism of international criminal cooperation. It serves as both the guidance and catalyst for states to either negotiate and enter into bilateral and multilateral extradition relations or enact national extradition legislation.[166] On the other hand, it provides a set of useful instructions with respect to core requirements of extradition law and also, relevant technical issues in arrest and surrender procedures are also incorporated. Notably, it contains a number of mandatory grounds (Article 3)[167] and optional grounds (Article 4)[168] in which the extradition is considered as inappropriate and should be denied by the requested state. Those refusal grounds have been adopted and reflected in many extradition treaties and cases,[169] nevertheless, in practice, they are not universally interpreted and applied at the same standard.[170]

As we can see, although the UN Model Treaty has made its own contribution, its non-binding nature indeed blocks itself becoming the legal basis of extradition law. It should be noted that despite the existence of extradition provisions in a number of international

[165] The Revised Manuals on the UN Model Treaty on Extradition (The Revised Manuals).
[166] Harrington (n 123) 163.
[167] Including issues of political offence; discrimination; military offence; *ne bis in idem*; immunity; torture and other ill-treatment; judgment *in absentia*.
[168] Including issues of nationality; the requested stated declining to prosecute; pending prosecution of the requested crime; the death penalty; extraterritorial jurisdiction; concurring jurisdiction; extraordinary and *ad hoc* trials; humanitarian concerns.
[169] Ilias Bantekas and Susan Nash, *International Criminal Law* (3rd end edn, Routledge 2007) 311.
[170] The Revised Manuals, para. 35.

conventions aiming at the repression of specific crime[171] as well as some regional extradition treaties, there is no universally applicable extradition treaty with binding force at this moment.[172] Thus, the state practice in the context of extradition cannot be widely, consistently and uniformly obligated. Yet states keep the power not only with respect to whether or not to engage in extradition relations with other states, but also the conditions and contents of the extradition treaties; it is also the states themselves to determine to what extent their exercise of extradition is permanently treaty-based or *ad hoc* due to reciprocity. All of these uncertainties will negatively affect the obligation to extradite gaining the characteristic of customary international law.[173] For these concerns, a universal extradition treaty of general application is indeed necessary although it seems not to be established in the short term.

2.2.2 Extradition in the absence of treaties

2.2.2.1 Domestic legislation

The extradition treaty constitutes the dominated part of its legal basis and it is welcomed by most participating states, regardless of whether it is bilateral, multilateral or international. However, the problem frequently arises in the absence of an existing treaty. It is true that the unavailability of extradition treaties does not equate the unavailability of extradition, and states in certain cases are able to extradite

[171] For example, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, Art 7; United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2255 UNTS 209, Art 16; United Nations Convention against Corruption, Art 44.
[172] Stanbrook and Stanbrook (n 23) 18.
[173] As for the detailed discussion on the material facts or threshold to qualify as customary international law, see Shaw (n 111) 51-63; Ian Brownlie, *Principles of Public International Law* (OUP 2008) 6-12.

unilaterally.[174] In limited cases, the domestic legislation can formulate the legal basis of extradition and propose *ad hoc* extradition based on the principle of reciprocity.[175] As Helen Duffy observes, '[s]tates may, and increasingly do, extradite on the basis of national law without a treaty or arrangement, in accordance with the desire to improve international cooperation in respect of serious offences.'[176]

Domestic laws have a number of functions in actuating extradition. Firstly, it is the supplement to the lack of relevant pre-existing treaty. Certain states have either specific legislation on extradition, or penal code contains the extradition provisions, which lawfully draws the state into extradition relations in particular cases and impose the obligation to extradite on certain conditions. Secondly, for those dualist states in particular, the obligation stemming from extradition treaties has to be translated into national legislation.[177] The domestic implementing legislation in this situation is required to bring the treaty obligation into force. Finally, it conducts as an instruction to the courts and executive organs regarding the cases when the requirement, procedure and efficacy of extradition are not explicitly stated in the relevant instruments.[178] That is to say, domestic legislation interprets how extradition should be carried out in practice.[179] In spite of the above relevance, it has to admit that the quantity and quality

[174] Robert Cryer and Others (n 158) 90.
[175] Christopher Blakesley, 'The Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond—Human Rights Clauses Compared to Traditional Derivative Protections such as Double Criminality' (2000) 91 Journal of Criminal Law and Criminology 1.
[176] Duffy (n 24) 161.
[177] Jordan Paust, 'Self-Executing Treaties' (1988) 82 American Journal of International Law 760.
[178] Xiudong Gao, 'The Prior and Direct Application of Bilateral Treaty of Extradition in China' (2013) 12 Research on the Rule of Law 23.
[179] Choo (n 25) 1366.

of domestic legislation with respect to extradition is 'unevenly distributed across the world'[180] and the mere existence of domestic law is not adequate to trigger extradition in practice.

2.2.2.2 Reciprocity in extradition law

Reciprocity is a mutual concession of advantages to get particular interests, which is a sort of courtesy that one state confers to other states of its own accord.[181] It is carried out of concerns on diplomatic relations or foreign policies, and also on the presumption that the recipient countries will bestow the equivalent courtesy in similar cases. In general, reciprocity is embodied in states' recognition, adoption or enforcement the legislation or judicial decision of other states, which is built on mutual respect and deference rather than originated from a legal obligation. In the context of extradition, reciprocity is of major significance, which is simply read as one state agrees to extradite on the condition that the requesting state undertakes to extradite in equivalent situations.

Reciprocity is particularly indispensable in the non-treaty based *ad hoc* extradition cases. On the one hand, it is the cornerstone and also the driving force behind the operation of extradition law.[182] Whenever the reciprocity is absent, states would lose the enthusiasm to engage in extradition relationships. More broadly, almost all judicial

[180] Robert Cryer and Others (n 158) 90.
[181] See Elisa D'Alterio, 'From Judicial Comity to Legal Comity: A Judicial Solution to Global Disorder?' (2011) 9 International Journal of Constitution Law; Joel Paul, 'The Transformation of International Comity' (2008) 71 Law and Contemporary Problems.
[182] Williams (n 44) 117.

cooperation and legal assistance are dominated by the principle of reciprocity.[183] This means, reciprocity is seen as not only the legal basis but also the requirement of extradition. In Cherif Bassiouni's words, reciprocity stands as the 'underpinning of substantive requirements'[184] of extradition. The substantial requirements, which will be discussed later, are all based on reciprocity 'in the sense of equivalent mutual treatment deriving from the mutuality of legal obligations.'[185] On the other hand, in cases where the two engaged states have no permanent treaty relations, under the current extradition law, the success of extradition surrender is largely rested on states' reciprocity.[186] Extradition may succeed based on reciprocity. It reflects not only the mutual respect for the independent sovereignty, but also the pursuit of real benefits of states. The former may be the prerequisite for further cooperation,[187] since without the independent and equal existence of state sovereignty, the international community and international public order would be utopian. While real interests motivate states to interact to a higher level mutually. For instance, Article 3 of the Extradition Law of China stipulates that China is willing to cooperate with other states in extradition based on the principle of equality and reciprocity. This provision reflects not only China's determination to join the campaign in combating transnational crime, but also manifests the backbone of the inter-state cooperation, which comes down to states mutual interests.

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[183] All stages of state cooperation are 'governed by the principles of sovereign equality, reciprocity and mutual interests.' Stahn (n 17) 230.
[184] Bassiouni, *International Extradition* (n 8) 496.
[185] ibid, 497.
[186] Gilbert, *Responding to International Crime* (n 12) 42-4.
[187] Bassiouni, *International Extradition and World Public Order* (n 126) 571.

Taking *David Price* case as an example,[188] which manifests the role of reciprocity in extradition cases and also the implementation of the *ad hoc* arrest and surrender. It was the first extradition case between China and the UK, although there was no formal extradition treaty between the two countries and the extradition cannot be proceeded on a regular basis. Price was a dangerous paedophile arrested in 2003, with hundreds of indecent pictures, showing his perpetration of appallingly sexually abusing the very young and vulnerable children. Moreover, he was accused of producing and propagating those pictures.[189] Price skipped the bail in the investigation process and fled to China via Kenya and Tanzania, on the presumption that he would not be brought back to the UK to stand trial. As the Chief Crown Prosecutor of CPS Mersey-Cheshire inferred, Price believed he could escape justice because of the lack of extradition agreement between China and the UK. However, after six-year immense efforts of the two countries to negotiate the cooperation, the extradition was finally secured.

The UK government submitted the formal extradition request to China in August 2010, two months later, the request was approved by the Chinese authorities. Price was arrested and detained by the Chines authorities in May 2011. On 7 November 2011, he was transferred to the Merseyside Police officers and brought to the UK under escort, and finally sentenced to seven years and eight months imprisonment. As the Detective

[188] Crown Prosecution Service <http://www.cps.gov.uk/news/latest_news/first_uk_citizen_extradited_from_china_jailed/> accessed 18 March 2018.
[189] Tom Murphy, 'Extradited Paedophile Jailed' <https://www.independent.co.uk/news/uk/crime/extradited-paedophile-jailed-6292451.html> accessed 20 March 2018.

Inspector in this case Steve Jones stressed, everyone should be responsible for what he did. At the same time, eliminating the possible safe haven and bringing the offender to justice are not only the victims but also all innocent people's deserved entitlement. Although Price was not prosecuted for his more severe sexual assault crime due to the terms of the extradition agreement,[190] this case can still be taken as a precedent of extradition in the absence of a treaty. It had taken the first step and made progress in the extradition relations between the two countries, which convincingly proved that the treaty precondition could not be an absolute obstacle to extradition in the modern globalised society. Extradition law is expected to be fitted with more flexibility to meet the demand for suppression crimes.[191] In fact, following the release of *the Joint Statement on the Global Comprehensive Strategic Partnership* and the coming into effect of *the Treaty between the UK and China on Mutual Legal Assistance in Criminal Matters*, China and the UK held the first 'High-Level Security Dialogue' in Beijing in June 2016.[192] The Dialogue affirmed the significance of the bilateral cooperation of the two states in 'counter-terrorism, cybercrime, organised crime, illegal migration'[193] and other serious international security issues. China and the UK reached an agreement on strengthening the cooperation via extradition in combating transnational organized crime on a case-by-case basis.[194] The above David Price case and the bilateral dialogue between China and the UK were indeed a reiteration of the greater importance of the

[190] The details of the terms are unknown to the public and difficult to obtain.
[191] BBC News, 'Paedophile David Price Jailed after China Extradition' <https://www.bbc.co.uk/news/uk-england-merseyside-16655833> accessed 20 March 2018.
[192] UK Government, 'China-UK High Level Security Dialogue: Communique' <https://www.gov.uk/government/publications/china-uk-high-level-security-dialogue-official-statement/china-uk-high-level-security-dialogue-communique> accessed 27 October 2018.
[193] ibid
[194] ibid

international criminal cooperation and more importantly, the practicability of extradition in the absence of available extradition treaties.

2.3 Substantial requirements of extradition

In spite of its well-designed functions in combating transnational crime, in practice, extradition by no means secures an easy return of the fugitives. A number of conditions could be used by the requested person to challenge the extradition decision so as to avoid being extradited. Some of the substantial requirements of extradition themselves are self-evidently constituting the refusal grounds by which both the requested state and the extraditee can invoke. It is not possible to address all related aspects exhaustively in this section, but some of the most commonly mentioned accounts will be delineated.

2.3.1 Double criminality

A range of substantial requirements has been widely acknowledged, which constitute an indispensable part of nearly all extradition treaties and national legislation in a similar way.[195] Double criminality might be the most widely recognised rules with the customary nature.[196] The principle derives from the maxim *nullum crimen sine lege* and the principle of legality,[197] which can be read as no one should be subject to prosecution or punishment for any act or omission that has not been unambiguously

[195] Bassiouni, *Introduction to International Criminal Law* (n 132) 501 (It should be noted that '[e]ven though both of these requirements are found in the extradition laws of almost all states and in almost every extradition treaty, their application in national judicial practice varies.')
[196] ibid; Shearer, *Extradition in International Law* (n 30) 138; Sadoff (n 23) 189.
[197] Dugard and Van Den Wyngaert (n 3) 188.

criminalized by the domestic law or international law.'[198] It is accepted that the crime for which extradition is requested must constitute a crime in both the requesting state and the requested state[199] at the time of commitment.[200] Double criminality, on the one hand, is a pursuit of the justice of criminal law and definitely protection of the fugitive, since the requested individuals cannot be surrendered, prosecuted or punished for the acts that are not defined as criminal in any extradition engaged state. That is to say, the designation of double criminality could also safeguard against the extradition of people on spurious or questionable grounds. On the other hand, this requirement is an expression of the reciprocal respect for state sovereignty and its penal system, because states are allowed to reasonably refuse to grant the extradition request for the conduct that is not culpable in their own legal system.[201]

In spite of the wide acceptance, the practice of double criminality is sometimes complicated and fragmented,[202] which is interpreted and applied differently according to different countries and extradition treaties. In general, there are two approaches to examine whether the offence conforms to double criminality, namely, *in concreto* and *in abstracto*. According to *in concreto* rule, whether the offence falls within the double criminality is rigorously assessed by its exact name, constituting elements and severity of punishment in the penal code of the two states.[203] Unlike *in concreto*, the approach

[198] William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (OUP 2012) 47.
[199] Gráinne Mullan, 'The Concept of Double Criminality in the Context of Extraterritorial Crimes' (1997) Criminal Law Review 17.
[200] R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3) [1992] 2 All ER, HL.
[201] Susie Alegre and Marisa Leaf, *European Arrest Warrant: A Solution ahead of its Time?* (Justice 2003)34.
[202] Boister (n 16) 218.
[203] Geoff Gilbert, *Aspects of Extradition Law* (Martinus Nijhoff 1991) 47-50.

of *in abstracto* is far more flexible. It is a 'fact-driven approach'[204] based on the inherent act and criminality of the offence, regardless of its superficial or external characteristics. In other words, double criminality will be satisfied when the given offence is substantially equivalent in two states rather than totally identical.[205] Adhere to the *in abstracto* method, the crime underlying the extradition request enjoys the priority in the assessment. The requested state is capable of evaluating the sufficiency of immanent elements and determining the specific cases in terms of the severity of the offence or the minimum level of penalty. This helps to avoid examining the judicial system in other states' jurisdictions[206] and prevent the crime from being defined as non-extraditable only because of the different labels or interpretation of the crime between the requesting and requested countries.[207] The *in abstracto* approach, to some degree, will presumably remove the barriers to extradition that are solely based on the divergent legal systems in various countries, and also provide a more open-ended standard to crimes which avail itself to be satisfied for the purpose of extradition. For these reasons, *in abstracto* is more appropriate in the context of responding to cross-border crime in a globalised world.

Nevertheless, no matter what approach is adopted, double criminality itself exists as an obstacle to extradition. The absence of a uniform standard in evaluating this requirement inevitably makes the extradition process more inculpates. This results in

[204] Bassiouni, *International Extradition* (n 8) 506.
[205] Hedges (n 106) 21.
[206] Bantekas and Nash (n 169) 296.
[207] Bantekas, *International Criminal Law* (n 18) 375.

the debate on the extent to which this requirement is inappropriate and unnecessary. The opponent is of view that this requirement provides the fugitive with extensive protection. Complying with double criminality, the requested state's domestic criminal law will *in facto* influence the result of extradition. However, it is not reasonable to exclude the requesting state's accessibility to prosecution or punishment of the offenders merely because of the law of the requested state. If that were the case, the legality of the requesting state's criminal decision would be destroyed. The fugitive is able to easily refrain from the justice of the commitment by the effort to justify the dissatisfaction of double criminality. In specific situations, for example, the perpetrator of a criminal offence is likely to gain illegal impunity by fleeing to a state in which his previous conduct is not criminalized or there is no analogous crime. However, the above situation might only exist in theory. In practice, the crime for which the requested fugitive commits is normally the common crime that is widely proscribed. For this reason, it is argued that double criminality requirement is no longer necessary and removing it will not impair the integrity of extradition, particularly the interests of both the requesting and requested states.[208]

As a matter of fact, double criminality has already been mitigated in practice and more flexible reforms have been adopted. For example, under the EAW framework, this traditional extradition requirement is fundamentally changed, which impels states to cooperate in a more convenient approach, irrespective of the existence of hurdles and

[208] Duffy (n 24) 136-37; See also, United Nations Convention against Corruption, Art 46.9(c).

controversies.[209] To be precise, it removes the double criminality requirement for 32 categories of offences provided the offence meets the three-year imprisonment assessment according to the criminal law of the issuing state.[210] This means, for the listed crimes, on the one hand, the actual threshold of the requirement is lowered, and the requested state's criminal law is irrelevant in this process. On the other hand, so long as the crime in question meets the penalty threshold, it will be regarded as an extraditable offence. Therefore, the extraditability test is not required. Furthermore, an ultimate example can be found in the Nordic Arrest Warrant, where this requirement is completely repealed. In other words, the criminal law of the requested state will be irrelevant to the result of extradition and will not be justified to refuse the extradition request. This advanced measure makes the NAW goes one step further than other mechanisms at mutual trust and enhancing extradition procedure, which is attributed to the far more similar penal systems among the Nordic countries.[211]

2.3.2 Extraditability

Double criminality is not the only requirement for the crime *per se*. When the crime for which extradition is requested is criminalized in both the requesting and requested state,[212] it will then be subjected to a certain criterion regarding extraditability. In its

[209] Knoops (n 141) 161-66.
[210] Although this list is not exhaustive, and it can be revised by the Council by adding other types of crime. For the offences that fall outside the list, the double criminality test still needs to be employed. See the EAW Art 2(3)(4).
[211] Mathjsen (n 140) 7-10, 24-7. See also Karri Tolttila, 'The Nordic Arrest Warrant: What Makes for Even Higher Mutual Trust?' (2011) 2 New Journal of European Criminal Law 370-7.
[212] Double criminality and extraditability are interrelated. See Bassiouni, *International Extradition* (n 8) 507-9. Double criminality can be seen as a part of the assessment of extraditable offence. See Sadoff (n 23) 186. 'To qualify as an extraditable offence, a State must both have criminalized the conducts at issues and recognise it as extradition-worthy.'

colloquial sense, extraditable offence means that the crime underlying the extradition request has to be grave enough in both participating states so as to be extraditable. Simply put, the fugitive should be worthwhile to extradite.[213] The threshold to qualify as extraditable is normally determined by states according to the legal basis of their extradition relationship. Differences in what crime is extraditable are also influenced by various legal, political and social considerations of states or their special interests in certain period of time.[214]

Nevertheless, a general approach in deciding the extraditable offence can be found in a series of bilateral or multilateral extradition treaties and domestic legislation.[215] Normally, it is either assessed by a severity threshold or expressed by an enumerative list. More specifically, the former formula evaluates whether the offence is extraditable or not by the degree of severity of its deserved penalty. Only the offence, for which the extradition seeks, be punished by the given level of punishment can the extradition request granted. For example, *the Inter-American Convention on Extradition* requires the crime for which the extradition seeks to be punished 'by a penalty of not less than two years of deprivation of liberty under the laws of both the requesting State and the requested State'[216] and ' [w]here the extradition of an offender is requested for the execution of a sentence involving deprivation of liberty, the duration of the sentence

[213] Stanbrook and Stanbrook (n 23) 8.
[214] Sadoff (n 23) 187.
[215] For example, see UN Model Treaty on Extradition, Art 2; UN Convention against Corruption, Art 16(7); Inter-American Convention on Extradition 1981, Article 3; Australia International Extradition Treaty with the United States 1974, Art 2; Extradition Act 2003, Arts 10(2), 78(4) (b).
[216] Inter-American Convention on Extradition, Art 3(1).

still to be served must be at least six months'[217]. The Extradition Law of China conditions the extradition request as

> 'where the request for extradition is made for the purpose of instituting criminal proceedings, the offence indicated in the request for extradition is, under the laws of both the People's Republic of China and the Requesting State, punishable by a fixed term of imprisonment for one year or more or by any other heavier criminal penalty; where the request for extradition is made for the purpose of executing a criminal penalty, the period of sentence that remains to be served by the person sought is at least six months at the time when the request is made.'[218]

The eliminative method is more appropriate because it abolishes the limited border of extraditable crimes and it is more sensitive to the development of international law as well as the changes of international and transnational crimes.[219] This approach thus is more proper to generalise the range of extraditable crime and more likely to incorporate as many serious crimes extraditable as possible.

By comparison, the enumerative approach is much more direct by making a list of all specific offences when drawing up the extradition agreements. In other words, if the requested crime cannot be categorised into this list, it may be deemed as non-

[217] ibid, Art 3(3).
[218] Extradition Law of China, Art 7(2).
[219] Shearer, *Extradition in International Law* (n 30) 136-7.

extraditable, and extradition may not be successful. This kind of method is more commonly accepted in the suppression conventions. For example, Article 6(1) of *the Drug Trafficking Convention* stipulates that the extradition clause can only be valid in relevance to the offences listed in Article 3.[220] Although this approach seems straightforward at first glance, less ambiguous in interpretation and application, the number of states that adopting this approach is continually reduced for its apparent weakness. The content of the enumerative list is determined when the extradition agreement is signed up. However, the means and natures of crime are increasingly and significantly changing from day to day, and the demand for extradition as an effective method of transnational criminal cooperation is also virtually promoting. In this situation, the rigid list cannot be so flexible and convenient as to keep pace with the changing transnational criminality, and in practice, the procedure of its revise and augment is quite cumbersome and time-consuming.

The designation of the extraditability requirement can explicitly regulate the extradition process operated only for offences of significant interests of criminal justice of the requesting state, avoiding the misuse of extradition for the ordinary and minor offences such as theft, burglary, forgery and affray.[221] However, despite the rationale of defining extraditable offences, there are still flaws that can be reformed. To be more precise, the formula of clarifying unpermitted crimes could be more unified. For example, adopting the enumerative method to exclude all crimes that are internationally or universally

[220] Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Arts 3 (1), 6 (1).
[221] Sadoff (n 23) 188.

proscribed from the non-extraditable list, which reduces the possibility of dispute in given cases and automatically prevents offenders of those gross crimes from gaining exemption. And after that, a standard minimum level of criminality test shall be employed, which could be assessed by severity of the harm or threat to the victim and public interests, thus the specific minimum penalty in this case is still subject to be negotiated and ascertained.[222]

2.3.3 Specialty

It is an important requirement of extradition to guarantee the crime for which the extraditee will be charge or the sentence which the extraditee will serve in the requesting state is identical to that listed in the extradition request. This is incorporated in the specialty requirement,[223] which still reflects the esteem of reciprocity and mutual trust.[224] Specialty refers to the notion that the requesting state must comply with its extradition request and only prosecute or punish the offence or offences for which the extradition is sought unless gaining either the consent of the requested state or the extraditee's waiver. Furthermore, any limitation or assurance set in the extradition requested must be observed by the requesting states. In other words, the entire content of extradition request including all potential prosecution and punishment as well as the treatment of extraditees should be openly informed and agreed in advance; the real purposes and foreseeable results of the extradition should be precisely in accord with

[222] Bassiouni, *International Extradition* (n 8) 513.
[223] Scholars and commenters also argue for the customary nature of the principle. See ibid, 538; Bantekas and Nash (n 169) 184.
[224] Hedges (n 106) 22-4.

the prior request. Therefore, the extradition law will not be indiscriminately abused for deceptive purposes. Theoretically, extraditees' treatments after return to the requesting state can be guaranteed with definiteness, and they may not suffer from potential discriminatory custody, prosecution and sentence for any offence any than those in the aforehand extradition request. The overall extradition process can be ensured with a general degree of certainty and clarity.

For example, the bilateral extradition treaty between the United State and Italy[225] incorporates the rule of specialty, although with exceptions:

> 1. A person extradited under this Treaty may not be detained, tried or punished in the Requesting Party except for:
>
> (a) the offense for which extradition has been granted or when the same facts for which extradition was granted constitute a differently denominated offense which is extraditable;
>
> (b) an offense committed after the surrender of a person; or
>
> (c) an offense for which the Executive Authority of the United States or the competent authorities of Italy consent to the person's detention, trial or punishment…
>
> 2. A person extradited under this Treaty may not be extradited to a third State unless the surrendering Party consents.

The above clauses explicitly define that the requesting state's power over the wanted

[225] Italy International Extradition Treaty with the United States 1983, Art XVI.

person is limited after the surrender.[226] Or rather, what crime for which the extraditee can be prosecuted or punished is subjected to the agreed extradition requested. Additionally, the rule of specialty also prohibits the requesting state to detain and re-extradite the fugitive to a third state,[227] with the exception where the requesting state gets the extraditee's consent or the extraditee once leaves the jurisdiction of the requesting state after the surrender.[228]

Generally speaking, specialty can be taken as a precautionary requirement for post-extradition considerations, set out in permanent or *ad hoc* extradition agreements. It not only prevents states from misusing or prosecutorial abuse of extradition, but more importantly, greatly protects extraditees' fundamental human rights from potential unfair and prejudicial treatments after their surrenders, especially when the political offence is in question.

2.3.4 Other requirements of extradition

Apart from the above requirements, extradition is also subject to many other conditions. For example, the nationality of the fugitives affects the result of extradition in many cases. Article 8(1) of the Extradition Law of China provides that no Chinese shall be extradited to other states.[229] The rationale of this exemption is mainly based on a state's exclusive criminal jurisdiction over its own nationals and the protection of their human

[226] Bassiouni, *International Extradition* (n 8) 541.
[227] Alegre and Leaf, *European Arrest Warrant* (n 201) 47.
[228] See UN Model Treaty on Extradition, Art 14; Inter-American Convention on Extradition, Art 13; EAW, Art 13.
[229] For a longer list of states that prohibit extraditing its nationals according to either the constitutions or national statutes, see Sadoff (n 23) 236-39.

rights, on the assumption that its own nationals might be subjected to unpredictable mistreatment either in prosecution or in punishment in foreign states.[230] The nationality exception might be one of the most controversial exceptions to extradition, which is hard to get over. It raises many substantial issues concerning its rationale as well as the remedial approach. It deviates from the fundamental values of extradition, namely, mutual trust and combating crime. It provides with the requested state a possibility to refuse the extradition request by conferring nationality to someone concerned.[231] This exception does provide a privileged opportunity for those whose nationality state adheres to this exception as a protection of its nationals. They are able to get impunity by returning to the state of nationality after committed crimes abroad, or if they were never leaving the state of their nationality. Moreover, states have different domestic regulation on nationality. In some places where there are flexible policies in terms of conferring citizenship to naturalized nationals or rather, nationality has been a tradable item that might be acquired for certain purposes.

A series of measures have been taken to eliminate the possible safe haven caused by applying the nationality exception, which might enable criminals to go unpunished for what they perpetrated.[232] Of those, the issue that is particularly focused and highly debated is the principle of *aut dedere aut judicare*.[233] This mean, when the requested

[230] Neil Boister, 'The Trend to 'Universal Extradition' over Subsidiary Universal Jurisdiction in the Suppression of Transnational Crime: Transnational and Organized Crime' (2003) 2003 Acta Juridica 299; Stanbrook and Stanbrook (n 23) 133.
[231] Sadoff (n 23) 240.
[232] Boister (n 16) 371.
[233] See, the International Law Commission's work on obligation to extradite or prosecute (*aut dedere aut judicare*); Kriangsak Kittichaisaree, *The Obligation to Extradite or Prosecute* (OUP 2018); Sadoff (n 23) 371-86.

state refuses to extradite its own national to other countries, it has the duty to prosecute on its own. For example, both Article 16 (10) of *the United Nations Convention against Transnational Crim*e and Article 44 (11) of *the United Nations Convention against Corruption* include that if a State Party does not extradite solely on the nationality exception, it 'shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution.' Theoretically, *aut dedere aut judicare* could be adopted as a remedial measure or alternative to extradition and apply to cases wherever any impediment prevent extradition so as to eradicate the loophole and guarantee the fugitive is brought to justice. However, the principle *per se* has its limitations which obstruct its normalised and universal application. It is of ambiguity and dispute particularly in relation to the legal basis and applicable standard. In practice, the host state is also facing the difficulties of no appropriate jurisdiction and the evidence-related matters in prosecution.

Deriving from the Roman law maxim *bis de eadem re ne sit actio*, which is known as double jeopardy in English. *Ne bis in idem* is a basic principle of international criminal law,[234] and also being taken as fundamental human rights.[235] The operated of extradition is well affected by this general principle of law[236] and almost in every

[234] Antonio Cassese, *Cassese's International Criminal Law* (3rd edn, OUP 2013) 315-7.
[235] For example, the principle of *ne bis in idem* is contained in International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Art 14 (7) ; Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 117, Art 4; American Convention on Human Rights, Art 8(4).
[236] Stanbrook and Stanbrook (n 23) 137.

extradition agreement related provision is contained.[237] At first, *ne bis in idem* protects a person from being prosecuted or punished for the same offence twice. Thus, when it is applied to extradition, a request can be reasonably refused if the fugitive has previously been convicted or acquitted for the same offence upon which the extradition relies.[238] Secondly, in accordance with the doctrine of *res judicata*,[239] *ne bis in idem* is an expression of the respect for the legal validity, veracity and completeness of the court's final judgment in criminal proceedings.[240] When the offence concerned is of transnational nature, it is also the mutual respect and trust for other states' sovereignty as well as the criminal system. Finally, under the protection of *ne bis in idem*, the whole criminal trial will not be disrupted or extend by interminable repetition caused by transferring the defendant and shifting jurisdictions, the authority and effectiveness of law can be ensured to a certain degree.[241]

The guarantee of the principle of *ne bis in idem* within the criminal system of the same state might be a bit easier to define. However, it seems that the difficulties in observing this rule may be inevitable when it involves adjudications from the courts of various countries. This is exactly the challenge what the practice of extradition is facing. The legal system of different states is more or less incompatible, and the understanding and recognition of a specific crime are neither comprehensive nor unanimous. Transnational

[237] For example, see UN Model Treaty on Extradition, Art 3 (d), (e); Extradition Law of China, Art 8 (2).
[238] See UN Model Treaty on Extradition, Art 3 (d); EAW, Art 3(2); Inter-American Convention on Extradition, Art 4(1).
[239] Gerard Coffey, 'Resolving conflicts of jurisdiction in criminal proceedings: interpreting Ne Bis In Idem in conjunction with the principle of complementarity' (2013) 4 New Journal of European Criminal Law 59.
[240] Gerard Conway, 'Ne bis in idem in international law' (2003) 3 International Criminal Law Review 222-3.
[241] 'It pursues several objectives: to encourage diligent prosecution, uphold public confidence in the justice system…' See Stahn (n 17) 247.

application of *ne bis in idem* still keeps its inconsistent status. In the current practice of extradition, *ne bis in idem* is mainly rested on the national law of the participating states as well as the provisions in the extradition treaty and therefore needs to be bilaterally negotiated on a case-by-case basis.[242]

On the whole, a variety of impediments or refusal grounds have been fully reached in literature, including but not limited to political offence exception, military and fiscal offence exception. The Revised Manual on the Model Treaty on Extradition provides a five-category method to sort the impediments/refusal grounds.[243] Cherif Bassiouni established an advanced way of classification, which categorises into grounds relating to the offences charged, the special status of the fugitives, the criminal charge and also the potential treatment of the fugitives in the prosecutorial process and punishment.[244] While David Sadoff's approach is analogous but is more comprehensive.[245] It absorbs the requirements of extradition as its obstacles and also extends to political as well as international relation concerns.[246]

Since the practice of extradition implicates the issues in both international law and national law.[247] There is no doubt that the actual extradition application, in particular the procedural issues, is varying according to each extradition agreement and different

[242] Boister (n 16) 374.
[243] The Revised Manuals, para. 36.
[244] Bassiouni, *International Extradition* (n 8) Chapter VIII.
[245] Sadoff (n 23) Chapters 5-7.
[246] ibid, 275-79.
[247] Wouter and Others (n 9) 774.

legal basis applied. Nevertheless, the above discussed common features of extradition law still could be concluded, which are indispensable in the integrity of extradition law.[248]. However, it is more important that the existence of the above requirements or impediments deriving from extradition law *per se*, even they do not obstruct the extradition at the end, the assessment and compliant indeed suspend the extradition and make it less efficient. In such cases, it might be more feasible to reform rather than to abolish. Under such circumstances, it has to admit that even if the lawful application of the death penalty should not be a barrier to extradition, as this thesis argues, these conditions would still need to be applied, and the state requesting extradition has to circumvent these impediments.

It is also noteworthy that extradition law itself is an evolving subject, which witnessed notable changes in the past decades, as David Sadoff encapsulates,[249] there has been continuously more emphasis on the use of extradition in combating transnational crime. On the one hand, there is an increasing number of both new established bilateral extradition treaties and cases that extradition is successfully applied. On the other hand, the scope of exceptions to extradition is narrowed, particularly when a serious international crime is concerned.[250] This means, the requested state may have increasingly limited grounds to refuse the extradition request for those crimes.[251] There is indeed a progressive tendency that the extradition process is designated to be more

[248] Bassiouni, *Introduction to International Criminal Law* (n 132) 502.
[249] Sadoff (n 23) 174-83.
[250] Sadoff (n 23) 232-33.
[251] As confirmed in the Revised Manual, para. 35, 'the modern trend is to reduce the impediments to extradition to the greatest degree possible.'

flexible, harmonised, simplified and efficient. Domestically, specific extradition legislation is established to pave the way for advanced criminal cooperation. Regionally, a more reinforced multilateral legal framework is built up to promote states' judicial cooperation. While the European Arrest Warrant can be seen as one of the most remarkable reforms in this regard and many other examples could also be found in the Nordic Arrest Warrant and the CARICOM Arrest Warrant.[252]

2.4 The conflict between extradition and human rights

The over-long and tangled process of extradition as well as its low efficiency in operation is partly due to a variety of requirements of extradition law *per s*e, as discussed in the section above. Notably, it is also ascribed by the dominance of international human rights law, in which the issues of the death penalty and torture and other ill-treatment are most vigorous. In contemporary society, states are bounded by various human rights treaties, both regionally and internationally, and they are easy to find themselves in conflicting obligations. As demonstrated in Chapter 1.2, human rights terms are directly expressed in extradition agreements. For example, the EAW sets out the provision in its Preamble: 'This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union…'[253]

At the early time, it was not the purpose of extradition law to address the rights of the

[252] Sadoff (n 23) 183.
[253] EAW, Preamble para. 12.

extraditee, which was only a more recent addition. As Cherif Bassiouni stated, extradition was considered as a relation between states where the rights of extraditees did not get adequate concerns. 'This situation permits the violation of human rights and only recently has been challenged.'[254] The human rights movement in past decades has 'turned its attention to extradition'[255] and placed the individual extraditee at the centre of the whole extradition process. Under such circumstances, states are more or less confronted with the conflict between human rights and extradition.

Kyung Yup Kim is a Korean-born New Zealand resident, who was accused of murdering a 20-year-old Chinese young woman named Peiyun Chen and discarded her body in a wasteland in Shanghai on 11 December 2009. Kim fled to New Zealand via South Korea after the homicide. New Zealand received the request from China for extraditing Kim to face the charge, and in no time, it ordered the warrant to arrest Kim in June 2011. Kim has already been in custody since then while fighting against the extradition decision on human rights grounds and striving for bail. In December 2015, the then Minister of Justice Amy Adams approved the extradition request with China's prior assurance that Kim would get sufficient access to a fair trial and would not be subjected to torture and the death penalty once convicted. The assurance was followed by a permitted channel of monitoring the extraditee's treatment in China subject to the *ex ante* promise.[256] The New Zealand government was thus satisfied with the assurance

[254] Bassiouni, Unlawful Seizures (n 87) 25.
[255] Dugard and Van Den Wyngaert (n 3) 187.
[256] The Chinese government totally provided over ten pieces of assurance regarding Kim's human rights protection. See Kim v Minister of Justice [2016] NZHC 1490 (1 July 2016).

that there would be no risk of human rights violations resulting from the extradition.

However, the decision was blocked by the New Zealand High Court in the judicial review process that was applied by Kim's counsel.[257] Although there was significant opposition to the use of the assurance, particularly regarding the torture and other ill-treatment, it was accepted as a relevant factor in evaluating the extraditee's prospective suffering upon return.[258] In this case, Justice Jillian Mallon explained the Court's disbelief in the credibility and adequacy of the assurance in protecting Kim's human rights in China with a series of justifications. She called for the Minister to reconsider the extradition order.[259] The High Court's judgment left the long-drawn case in a pending stalemate once again, and Kim had to wait for further reviews and decision.[260] There has been a second decision of the then Minister of Justice in favour of extradition in 2016, with a further undertaking given by the Chinese government. The High Court did not block the New Zealand government's decision this time.[261] However, until recently on 11 June 2019, the New Zealand Court of Appeal quashed the government's decision to extradite once again and asked the current Minister of Justice Andrew Little to reconsider the extradition request, particularly the alleged human rights concerns.[262] Therefore, this extradition case has again been halted and currently is pending at the

[257] ibid; See Radio New Zealand, 'Court Tells Minister to Reconsider Kyung Yup Kim Case' <https://www.rnz.co.nz/news/national/307884/court-tells-minister-to-reconsider-kyung-yup-kim-case> accessed 29 November 2018.
[258] ibid
[259] ibid
[260] See Mike Douglas, 'Case Note: The Extradition Relationship between New Zealand and China: Kim v Minister of Justice' (2017) 7 New Zealand Criminal Law Review.
[261] Kim v Minister of Justice [2017] NZHC 2109 (31 August 2017).
[262] Kim v Minister of Justice of New Zealand [2019] NZCA 209 (11 June 2019).

New Zealdn Supreme Court.[263]

This unclosed case has just shown one of the ways in which human rights connect the issue of extradition. More importantly, it sketches one of the human rights dilemmas in enforcing the extradition cooperation, manifesting that the priority in the established case was not correctly and proportionately given to human rights when it collides with extradition. Seemingly, it indicates the New Zealand judicial authorities' distrust on the credibility of the Chinese government's assurance and creating the blockage, which also shows that the inhibiting power of human rights law even when there is political agreement to extradite.[264] In this case, it should admit that the position and opinion of the political authorities (successive Justice Ministers) and judicial authorities (domestic courts) might be different, even opposite.[265] Nevertheless, the Ministers' assessments and decisions are neither purely political nor in breach of law (nationally or internationally).[266] Instead, the Ministers' power to determine whether or not to surrender is entrusted by the Extradition Act 1999 and their decisions, in this case, are not made without legal basis.[267]

If we diagnose it in depth, it could be seen as overuse of exceptions to extradition, and

[263] Minister of Justice and Attorney General v. Kyung Yup Kim [2019] NZSC 100 (20 September 2019).
[264] It is alleged that the judicial authorities in New Zealand was using human rights law to interfere with the political calculation which the government denied.
[265] As discussed in Chapter 1.3, it is true that legal arguments should be treated differently from the so-called political arguments. However, in practice, there is little doubt that the decision of extradition is rarely immune from political concerns and extradition cases are often controversial.
[266] Admittedly, a decision could be made in breach of national law, for example a decision in favour of extraditing someone to face torture. However, in Kim's case, the threat of the death penalty should not be considered as being in breach of the law.
[267] Extradition Act 1999, Part 3, S 30.

also impels us to reconsider the role of human rights law in extradition. In this case, Kim and his lawyer were accused by the Chinese government of hyping up the human rights law, particularly the issue of torture and fair trial, to escape from justice and punishment.[268] It did impede the criminal cooperation between China and New Zealand, notwithstanding the fact that there was no operative extradition treaty between the two states;[269] and stand in the way of the pursuit of the effective suppression of the homicide crime that Kim was suspected of perpetration. This drawn-out case also reveals the predicaments and embarrassments that many states, including China encounter in extradition cooperation while dealing with the person's human rights appeal. The Chinese government has made every effort to negotiate with New Zealand including providing a number of assurances.[270] However, it still has failed in persuading the New Zealand's courts who own a high level of discretion. It is noteworthy that in the proceedings over the last decade, whether or not Kim is guilty of the intentional homicide was of little concerns. This means, the relationship between an individual's human rights and combating crime was not proportionately dealt with. It also should be noted that this case has set a bad example for those people who commit serious crimes in China and given them a hint that New Zealand might be a place where they can escape the justice.[271]

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[268] See Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on July 5, 2016* (2016).
[269] The two countries do not have any extradition treaty. However, New Zealand, according to Part 3, S 16 of its Extradition Act 1999, does not strictly require the pre-existence of an effective extradition treaty with a particualr states to proceeding the request.
[270] Kim v Minister of Justice [2017] NZHC.
[271] See Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Geng Shuang's Regular Press Conference on June 11, 2019* (2019).

In both theory and reality, extradition is a quite complex process because it involves various fields of law and in particular, it has to accommodate and coordinate the differences in criminal justice between two participating states. The complicity is amplified when the human rights of the fugitive criminal are added as a critical concern in extradition. This means, extradition has no longer been a pure criminal issue. Instead, it is crucial to search for a way to better deliver the needs of combating serious transnational crimes without sacrificing the fundamental rights of individuals.[272] The growing concerns on human rights law are affecting the extradition law in many ways, and there are certain specific rights can be invoked as the bar to extradition or at least limiting states' obligation to extradition. Some scholars even claim that the system of human rights does contain rights of a customary international law character and thus should enjoy priority in the extradition practice.[273] The discussion firstly comes to the question on does a general human rights exception exist in extradition law? As has been richly illustrated by a number of scholars and commentators,[274] the answer is unquestionably negative; not all human rights qualify as insuperable barriers.

To be precise, in *Soering* case, the UK faced a conflict of obligations. According to the bilateral extradition agreement with the US, it was obligated to extradite; while on the basis of *the ECHR*, it was also liable to decline the extradition for the protection of the

[272] Stefanovska (n 103) 40.
[273] Theodor Meron, 'On a Hierarchy of International Human Rights' (1986) 80 American Journal of International Law 17-8.
[274] For example, Harmen van der Wilt, 'On the Hierarchy between Extradition and Human Rights' in Erika De Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012) 148-175; Van Den Wyngaert (n 47) 757-79; Dugard and Van Den Wyngaert (n 3) 187-212.

fugitive's human rights.[275] The Court explained that the States Parties' human rights obligation does not mean all Convention rights are applicable as the barriers to extradition.[276] As Harmen van der Wilt points out, 'not all violations of every right'[277] could be taken as barriers to extradition. There is no inherent hierarchy between general human rights and extradition. In such cases, the question that matters here should be which human rights will be the barrier to extradition and to what degree of violation of those rights is required to be considered as the refusal grounds. But undoubtedly, resolving either of the above two questions would unavoidably add to the already lengthy and complex extradition process.

More importantly, different human rights are varying not only in their nature and status,[278] but also in their application by different states and regions. With regard to the former point, it is important for the state to carry out a case-to-case assessment on the conflicting interests involved and determine whether limiting one for the sake of another is lawful, necessary and proportionate. This is in essence what the margin of appreciation confers and will be looked at in Chapter 4. As for the latter, it is the fact that different states and regions might take different measures to deal with the conflicts between human rights and other interests while it is admitted that the European standard has advanced further than other places, which is particularly compelling regarding the

[275] Michael Shea, 'Expanding Judicial Scrutiny of Human Rights in Extradition Cases after Soering' (1992) 17 Yale Journal of International Law 104-7,111-13.
[276] *Soering* case, para. 86.
[277] Harmen Van Der Wilt, 'Après Soering: The Relationship Between Extradition and Human Rights in the Legal Practice of Germany, the Netherlands and the United States' (1995) 42 Netherlands International Law Review.
[278] Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (CUP 2010) 64-87.

question of the death penalty. The above discrepancy regarding the death penalty does set the general context of this research. While there are many other human rights barriers to extradition, the death penalty is one of the biggest and the most controversial obstacles. Although retentionist states, in international law, are not explicitly obliged to abolish the death penalty, the fact that the existence of the death penalty has been a *de facto* exception to get people extradited from most of the abolitionist states.[279]

As a matter of fact, many extradition agreements explicitly incorporate the provision with respect to the death penalty exception. For example, the death penalty has been written in the extradition treaties between China and France and between China and Spain as an agreed ground for refusal unless sufficient assurances are provided.[280] The EAW protects people from being 'removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty…'[281] In the Agreement on Extradition between the European Union and the United States of America, it reads as

> Where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State may grant extradition on the condition that the death penalty shall not

[279] The death penalty is put in the context of the conflicts between human rights and extradition here and will be further discussed regarding its human rights nature in Section 3.3.1. However, it should be noted that the death penalty is not solely a human rights issue. The issues of its application, abolition or resumption are all subjected to various non-human rights law considerations, which will be outlined in Section 3.2.
[280] Extradition Treaty between the People's Republic of China and the French Republic, Art 3(7); Extradition Treaty between the People's Republic of China and the Kingdom of Spain, Art 3(8).
[281] The EAW, Preamble, para. 13.

be imposed on the person sought, or if for procedural reasons such condition cannot be complied with by the requesting State, on condition that the death penalty if imposed shall not be carried out. If the requesting State accepts extradition subject to conditions pursuant to this Article, it shall comply with the conditions. If the requesting State does not accept the conditions, the request for extradition may be denied.[282]

Unlike the above two regional extradition agreements, which unambiguously ban the death penalty as the consequence of extradition, it is intriguing that the UN Model Treaty lists the death penalty exception in the category of 'optional grounds for refusal' instead of 'mandatory grounds' that include, for example, the protection against torture and other ill-treatment.[283] This difference could be considered as indicating a certain degree of manoeuver for states to deal with the death penalty problem as it will be argued in this thesis. In other words, theoretically, the terms of the death penalty bar could be renegotiated by the participating states.

However, in practice, the death penalty barrier has scarcely been overstepped without the use of assurances. The death penalty exception is also contained in the extradition treaty between two abolitionist states. For example, Germany and Canada have agreed as follow:

[282] The Agreement on Extradition Between the European Union and the United States of America 2003, Art 13.
[283] The UN Model Treaty, Art 4(d).

> Extradition may be refused where the offence for which extradition is requested is punishable by death under the law of the requesting state and the law of the requested state does not permit such a punishment for that offence, unless the requesting state gives such assurances as the requested state considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be executed.[284]

Even if there is no provision in a particular extradition treaty expressly prohibiting the death penalty[285] or in cases where there is no extradition treaty at all, the relevant national legislation would likely play a role as it did in the above *Kyung Yup Kim* case. However, to a great extent, those bilateral agreements or national approaches to deal with human rights issues, *inter alia*, the death penalty, in extradition process have been influenced by international human rights law. Despite this, the next chapter will show that there is in fact no international legal prohibition on the death penalty. This means that it is not strictly and internationally legally necessary for states' domestic legal system to prohibit extradition of people to face the death penalty, even though many states have done so.

2.5 The interrelation of deportation and extradition

Article 3 of *the Convention against Torture* states, '[n]o State Party shall expel, return

[284] Treaty Between Canada and the Federal Republic of Germany Concerning Extradition, Art XI.

[285] For example, there is no specific 'death penalty related' provision in the Treaty on Extradition between the People Republic of China and the Republic of Italy. However, its Article 10 states that 'the requested state shall decide the outcome of the request for extradition in accordance with the procedures provided for by its national law…' Similar provisions could also be found in the Italian Code of Criminal Procedure, either of which empowers Italy to determine the death penalty issue in specific extradition case with China based on its national (human rights) law.

("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' Similar provision can also be found in the Refugee Convention[286] and the European Arrest Warrant:

> No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.[287]

Furthermore, as can be found in a number of cases from the jurisprudence of the ECtHR,[288] it is indeed that extradition is sometimes depicted together with other approaches of removing people from one state to the other,[289] especially deportation. In the context of combating transnational crime, the use of deportation is occasionally confused with extradition, particularly in the case where the person involves terrorism or serious transnational crimes and poses a significant national security threat to the requested state. In both situations, the host state has desirability to remove the person from its territory and for its own goods, to get rid of the potential threat on its territory.

It is necessary to briefly sum up some of the critical differences between extradition and deportation, which lie as follow: (i) deportation is an immigration based approach

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[286] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), Article 33.
[287] European Arrest Warrant, Preamble para. 13.
[288] For example, see *Soering* case; *A. and Others v. The United Kingdom* App no 3455/05 (ECtHR, 19 February 2009); *F.G. v. Sweden* App no 43611/11 (ECtHR, 23 March 2016); *Al-Saadoon and Mufdhi v. The United Kingdom* App no 61498/08 (ECtHR, 2 March 2010).
[289] Sadoff (n 23) 402. ('[The terms of expulsion or deportation and extradition] are often used interchangeably in the media, case law, and government reports alike.')

which reflects states' sovereign power and comply with the requirements of domestic legislation, while extradition is a concept derives from criminal law as a means of strengthening international judicial cooperation; (ii) executing a deportation order is a unilateral act by the host state of which the deportee is not or is no longer a national. Deportation is primarily based on the personal conduct of the deportee, which could be the deportee's presence is 'unconducive to the public good' or others,[290] but *stricto sensu*, all of which are irrelevant to the cooperation from other state (receiving state),[291] while extradition is a bilateral act initiated and solely based on a request from the receiving state; (iii) as to the purpose, deportation is for the host state's own national interests, particularly keeping the person outside its territory and safeguarding the security within its territory, whereas extradition aims to help the requesting state to bring the suspected or convicted to justice to face the trial or punishment, namely, help the requested state to enforce its criminal jurisdiction;[292] (iv) generally speaking, deportees are aliens or denaturalized nationals only, while in extradition cases, citizenship does not matter as much as that in deportation. This means the host state's nationals are not always absolved unless the domestic legislation or treaty provision stipulates the opposite.[293]

The most significant observation regarding the difference lies in the fact that there are

[290] Gina Clayton says the use of deportation 'should only be considered when the person's continued presence in the country impinges on the life of the public in a way that is contrary to the public interests.' See Gina Clayton, *Textbook on Immigration and Asylum Law* (6th edn, OUP 2014) 537.
[291] See Bassiouni, *International Extradition* (n 8) 232. The author listed six grounds upon which the deportation order would be triggered.
[292] As demonstrated in Section 2.1, in many cases, the presence of the fugitive on the requested state is deemed as undesirable, and extradition also fulfil the interests of the requested state.
[293] For a further discussion on the differences, see Sadoff (n 23) 403-6.

different interests at play, and the proportionality of a deportation's impact upon human rights might not be the same as for an extradition. Therefore, while we are looking at the potential proportionality calculation about whether extradition should go ahead in the conflicts with the individual's human rights protection, the calculation would be different from that of deportation cases. More specifically, the extradition calculation is about the interests of the requesting state (versus those of the individual; with particular consideration of the collective interests in transnational criminal cooperation). Whereas the deportation calculation is about the interests of the expelling state (versus those of the individual; with some respect for whether the national state of the deportee is willing to receive them).

At first glance, it seems that extradition and deportation are two very different legal institutions that are conducted in parallel. However, a closer look reveals that, particularly in the context of this research, many aspects of deportation cases play a crucial role and are illustrative to the main argument set up in this thesis. More relevantly, the effects of deportation and extradition, to a certain extent, have a similarity. The issues and principles in deportation cases can be reasonably transplanted into extradition practice. For example, *Chahal* case is one of the most leading cases dealing with deportation in relation to Article 3 of the *ECHR*. Strictly speaking, it is not an extradition case, but the Court' assessment and the decision of *Chahal* case is adopted virtually in every discussion involving extradition where there is a real risk in

the requesting state that falls within the scope of Article 3.[294] We will examine the ECtHR's cases concerning Article 3 as a barrier to extradition or deportation in more detail in Chapter 4.

On the one hand, states could use the deportation as a disguised alternative to sending someone to another state when they cannot use extradition for that purpose, either because extradition is extremely burdensome or because it is unavailable for various reasons.[295] In Cherif Bassiouni's words, deportation is 'resorted to as a way of avoiding extradition…if extradition is deemed unlikely and the authorities of the host states are unwilling to accept such a legal outcome, they seek other means more likely to procure the desired outcome.'[296] Even in some cases, as David Sadoff opines,[297] deportation could be assumed as a practical approach that satisfies the aims of 'securing the physical custody of a fugitive and bringing him within a pursuing State's judicial system to be prosecuted or punishment',[298] which 'functionally approximate the end result of extradition.'[299] In reality, deportation has been used as a straightforward way to 'address terrorist related activity which cannot be evidenced in the criminal courts.'[300] For example, under UK's immigration rule, the Home Secretary has the power to deport

[294] For example, see *Babar Ahmad and Others v. The United Kingdom* App nos 24027/07, 11949/08, 36742/08, 66911/09, 67354/09 (ECtHR, 10 April 2012); *Harkins and Edwards v. The United Kingdom* App nos 9146/07, 32650/07 (ECtHR, 17 January 2012); *Aswat v. The United Kingdom* App no 17299/12 (ECtHR, 16 April 2013); *Mamatkulov and Askarov v. Turkey* App nos 46827/99, 46951/99 (ECtHR, 4 February 2005).
[295] Boister (n 16) 387.
[296] Bassiouni, Unlawful Seizures (n 87) 213-14. ('Disguised extradition is a means by which states achieve jurisdiction over a person without going through official extradition processes.')
[297] Sadoff (n 23) 391.
[298] ibid.
[299] ibid.
[300] UK Government, *The Government Response to the Report on Deportation with Assurances by the Independent Reviewer of Terrorism Legislation*

any foreign national in cases where 'his deportation is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature.'[301] In short, the use of deportation is legally justified to realise the outcome that cannot be served by extradition in certain situations.

On the other hand, many grounds for refusal, especially those deriving from human rights law, are not exclusively applicable to extradition.[302] It has been acknowledged that states are fully entitled to enact and implement their own immigration policies on entry, remain and expulsion of non-nationals within their territory.[303] This is viewed as an exclusive privilege of the sovereignty of states and processing internal affairs without interference.[304] However, this right is not exercised in an unrestrained way, its enforcement to remove aliens from its territory or send them back to other countries may give rise to issues under international human rights law.[305] Under this circumstance and concerning the principal objective of this thesis, the principles of human rights law, particularly related to the European standard on the prohibition of extradition, deportation, expulsion or any transferring measures that expose the person to a real risk of being subjected to the death penalty as well as the principle of *non-*

[301] Immigration Act 1971, Section 15 (3); see also Immigration Rule part 13, para 363.
[302] Costa (n 96) 88. ('In the context of human rights, extradition and other forms of removal of a person from a given territory tend to be treated somewhat uniformly, allowing for the assumption that, where one of them is prohibited, so are the others.')
[303] *Ahmed v. Austria* App no 25964/94 (ECtHR, 17 December 1996), para 38; *Vilvarajah and Others v. The United Kingdom* App nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR, 30 October 1991), para 102.
[304] Nicola Rogers, 'Immigration and the European Convention on Human Rights: Are New Principles Emerging?' (2003) European Human Rights Law Review 53.
[305] Francesca Pizzutelli, *The Human Rights of Migrants as Limitations on States' Control Over Entry and Stay in Their Territory* (EJIL: Talk! 2015).

refoulement, are fully and equally applied to the above two subjects. More specifically, the requested state's willingness to extradite (either resulting from an extradition treaty or solely reciprocity based) and the need to deport are subjected to similar refusal grounds based on human rights concerns.[306] That is to say, in the current legal framework, neither extradition nor deportation is lawfully allowed (i) to a state where the extraditee or deportee is at a real risk of torture or other ill-treatment prohibited under Article 3 of the *ECHR* or (ii) to a retentionist state where there is a risk that the extraditee or deportee will be sentenced to the death penalty and that will be carried out. In short, human rights law provides similar impediments to deportation as to extradition. In both areas of law, we have seen a growing use of assurances to get around those problems. Even if deportation is used as a substitute in a certain case to bring fugitives to justice, it is still subjected to the death penalty dilemma, which does not get rid of the necessity of this thesis. In states' commitment to combating transnational crime and bringing international fugitives to justice via either extradition or deportation, the controversies and problems in relation to the death penalty are analogous.

2.6 Conclusion

In this chapter, we sketched the contour of extradition law, with respect to its significant role in international criminal justice, particularly in the context of globalised criminality; its various legal basis upon which states are obliged to extradite; some of the major requirements of extradition and also, the relevance of deportation and other types of

[306] Sadoff (n 23) 413.

expulsion for the purpose of this thesis. More importantly, we have briefly revealed how the emergence and enlargement of the influence of human rights law have become a significant impediment to extradition. As we can see, the conflict between human rights and extradition does exist in reality, and then, the linchpin falls into the question that how we can understand this conflict or what is the essence of this conflict. Literally, either of the matters deals with the priority of the state's two obligations, or rather, the human rights obligation, irrespective of where it derives from, and the treaty obligation to extradite. But on a deeper level, the underlying issue can be construed as the conflict of the interest of the individual's human rights protection and that of the state/collective in combating crime. It is the main purpose of this thesis to resolve or mediate the conflict and ensure that the relationship between extradition and human rights is proportionate. Nevertheless, the conflict does not mean an automatic priority on human rights.

One of the issues that is particularly focused in this thesis is the death penalty and its role in extradition between the Contracting Parties to the *ECHR* and the non-Parties that retain the death penalty. Admittedly, neither the death penalty *per se*, nor its use as a ground for refusing extradition has been universally accepted without divisions. The death penalty, which has been a disputable issue for decades, extends the controversies from the domestic sphere to the context of international criminal cooperation, extradition in particular,[307] from an issue of criminal justice to the one governed by

[307] Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) 159.

human rights law. Many states, particularly those Contracting Parties to the *European Convention on Human Rights*, not only prohibit the death penalty within their own penal systems, but also spread out their dedication to the death penalty abolition beyond and indirectly affect the use of the death penalty by other retentionist states. States that retain the death penalty are compelled to undertake to suspend the application of the death penalty or considerably restrict its use in the specific case in order to bring the fugitive back to their territory.[308] However, no matter what decisions the retentionist state makes in response to the requested state's demand, the effectiveness of the criminal law enforcement will, in the view of this thesis, be disproportionately reduced. For these concerns, this thesis argues that the importance of extradition in the repression of transnational criminality on behalf of the interests of the collective should be given more degree of priority.

[308] Schabas, Indirect Abolition (n 55) 583, 602.

3. The Death Penalty in International Law

10 October 2019 was the 17th World Day against the Death Penalty.[309] This annual observance marks the apparent trend toward the worldwide abolition of the death penalty. In this information era that people quickly get access to news regarding what takes place all over the world, it is easy to find reports on the death penalty cases. For example, on 20 January 2018, two Belarusian convicted of murder were sentenced to death,[310] which were regarded as the first two people reported to be sentenced to death in 2018. As reported on 13 June 2019, a death row prisoner was being executed in secret,[311] which should not be acceptable under any circumstances. Nevertheless, the strong objection from both national and international levels was not able to halt the execution or compel Belarus to make a moratorium.[312]

In the United States, 25 people were reported being executed in 8 states in 2018.[313] By the end of November, 20 criminals have been executed in 7 states in 2019,[314] and further 65 executions have been scheduled.[315]

In the beginning of 2020, after the Supreme Court rejected the last appeal, India

[309] For further details, see the website of the World Coalition Against the Death Penalty.
[310] See Amnesty International, 'Two Men Sentenced to Death Penalty in Belarus' <https://www.amnesty.org/download/Documents/EUR4977972018ENGLISH.pdf> accessed 7 October 2018.
[311] See Amnesty International, 'Belarus: Amnesty International Condemns another Death Sentence Execution' <https://www.amnesty.org/download/Documents/EUR4905352019ENGLISH.pdf> accessed 3 September 2019.
[312] See Council of Europe, 'PACE Rapporteur Condemns Execution in Belarus' <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=7526&lang=2&cat=5&fbclid=IwAR29xoygEEBeFHfCBCeHXczGOIrx5ib0uh0d4UI0Z-iabX7auENjZ9qLBQo> accessed 1 October 2019.
[313] See Death Penalty Information Center, 'Execution List 2018' <https://deathpenaltyinfo.org/executions/2018> accessed 19 December 2019.
[314] See Death Penalty Information Center, 'Execution List 2019' <https://deathpenaltyinfo.org/executions/2019> accessed 19 December 2019.
[315] See Death Penalty Information Center, 'Outcomes of Death Warrants in 2019' <https://deathpenaltyinfo.org/stories/outcomes-of-death-warrants-in-2019> accessed 19 December 2019.

executed four criminals of the 2012 New Delhi bus gang-rape and murder case.[316] These are only three examples exactly disclosing the challenge that the abolitionist campaign is confronted with and also, the reality of the optimistic declaration of the so-called overall trend toward abolition. What is more, in recent years, the issue of resumption has come into focus, which will be discussed below.

The death penalty is indeed a controversial and well-discussed topic in both international treaty law and customary international law. Its legality has been long debated by people in various fields. It is not only a legal issue of criminal justice but also concerns the political, cultural, religious and social factors.

In order to pave the way for substantiating that the ECtHR's approach has become very restrictive but could, in theory, be changed,[317] it is imperative to establish that there is no other international legal prohibition utterly impeding extradition of people to retentionist states. In other words, the death penalty could be lawful, and there could be some flexibilities in extradition to face the death penalty. More specifically, the core argument is established in three aspects. The primary task is to invalidate the so-called 'universal abolitionist consensus' by analysing various figures which are most frequently used to advance the abolitionist discourse. Secondly, the discussion on a number of most controversial issues about the death penalty which lead to the view that

[316] Hannah Ellis-Petersen, 'India Executes Four Men Convicted of 2012 Delhi Bus Rape and Murder', <https://www.theguardian.com/world/2020/mar/20/india-executes-four-men-convicted-of-2012-delhi-bus-and> accessed 10 June 2020.
[317] This is what Chapter 4 would focus on.

it cannot, and will not, be abolished in a number of retentionist states. Due to the prediction that the death penalty will not be universally prohibited anytime soon, a substantial disagreement between abolitionist and retentionist states will persist, but it can be narrowed. Lastly, the most decisive issue is about the lawfulness of the death penalty. The death penalty is not subjected to a universal international legal prohibition either under treaty law or, more controversially, under customary international law. Therefore, it remains the case that as a matter of international law, the prohibition of the death penalty is far from universally accepted. The conclusion of the above issues, although some would argue for the contrast, serves as the precondition for the main argument of this thesis.

3.1 Unpicking the apparent trend towards abolition

As we shall see in this section many scholars and commentators have made a similar argument that the death penalty will almost inevitably become abolished universally. However, this is the idea that this thesis does not share. This section will firstly examine what is often taken to be the orthodox views, followed by a demonstration that the trend towards abolition is not as straightforward as some might say.

Julian Knowles holds that '[t]he abolition of capital punishment represented perhaps the most important policy change during an era of marked social liberalisation and enlightened thinking.'[318] Specifically, as William Schabas comments, '[p]erhaps no

[318] Julian Knowles, *The Abolition of the Death Penalty in the United Kingdom: How it Happened and Why it Still Matters?* (Death Penalty Project 2015).

single issue better illustrates progress in the protection and promotion of human rights than the progressive limitation and abolition of capital punishment.'[319] To a large extent, the global campaign against the death penalty has been accepted as a human rights discourse[320] and marked as an essential part of the development of international human rights law.[321] In the past decades, the abolition of the death penalty has become a global focus of attention. Although it is still on its way, we have to admit that some achievements have already been made. Roger Hood and Carolyn Hoyle are of the opinion that,

> '[t]he situation on the global plane has undoubtedly moved towards universal abolition. Instead of abolitionists being on the weaker flank, constantly being called upon to justify their position, it is now the retentionists that are on the back foot.'[322]

There are primarily four international treaties and protocols that explicitly prohibit the use of the death penalty,[323] which will be explored shortly. In the meantime, the death penalty has been abolished in the domestic law of many states. In Germany, Iceland

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[319] William Schabas, 'The Death Penalty: A Worldwide Perspective (Review)' (2009) 31 Human Rights Quarterly 537.

[320] It is advised that the death penalty has no longer been a solely domestic issue regarding criminal justice and the use of the death penalty indeed involves a number of human rights concerns. However, the opinions are divided on the question of whether it is persuasive to say the death penalty is entirely a human rights issue and is free from the discretionary power of states. This will be discussed in Section 4.3.1.

[321] See UNCHR, General Comment No.6 in Article 6 (Right to Life), adopted on 30 April 198, para. 6, 'all measures of abolition should be considered as progress in the enjoyment of the right to life.' See also, UNCHR, Human Rights Resolution 2005/59: The Question of the Death Penalty, E/CN.4/RES/2005/59, 20 April 2005, 'the abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights.'

[322] Roger Hood and Carolyn Hoyle, *Progress Towards World-Wide Abolition of the Death Penalty* (2015).

[323] For example, Second Optional Protocol to the *ICCPR* is now binding to 88 Contracting Parties; all 47 Contracting Parties except Russia have ratified Sixth Protocol to the ECHR and all but Armenia, Russia And Azerbaijan have ratified the Thirteenth Protocol; while Protocol to the American Convention on Human Right to Abolish the Death Penalty totally has 13 State Parties.

and Portugal, the death penalty is even forbidden with constitutional guarantees.[324] Following the Resolutions in 2007, 2008, 2010, 2012, 2014 and 2016, the General Assembly adopted its Seventh Resolution on a moratorium on the use of the death penalty, in which states have not yet abolished the death penalty are asked to 'establish a moratorium on executions with a view to abolishing it'[325]. The number of states voted in favour of this Resolution reached a majority of 121 out of the 193 UN Member States.[326] According to Saul Lehrfreund's standpoint, the increasing number of states supporting the moratorium resolution (104 votes in favour the First Resolution in 2007) 'provides incontrovertible evidence of a dynamic towards the universal abolition of the death penalty.'[327] Amnesty International views the compelling advocate of the Resolution as 'a further indication that a global consensus is building to consign the death penalty to the history books.'[328] This is because the moratorium is deemed as the impetus to 'respect for human dignity and to the enhancement and progressive development of human rights'.[329] As it asserts,

> The adoption of these ground-breaking resolutions has set the death penalty clearly within the human rights priorities of the international community and has generated a new

[324] Basic Law of the Federal Republic of Germany, Art 102; Constitution of the Republic of Iceland, Art 69; Constitution of the Portuguese Republic, Art 24.
[325] UNGA, Resolution on Moratorium on the Use of the Death Penalty, A/RES/73/175, 17 December 2018, Preambular para. 4.
[326] UN Digital Library, 'Voting Summary' <https://digitallibrary.un.org/record/1656169?ln=en> accessed 3 December 2019.
[327] Saul Lehrfreund, 'The Impact and Importance of International Human Rights Standards: Asia in World Perspective' in Roger Hood and Surya Deva (eds), *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion* (OUP 2013) 25.
[328] Amnesty International, *Report on The Death Sentences and Executions 2018* (2019) 8.
[329] UNGA, A/RES/73/175 (n 325) Preambular para. 7.

momentum among civil society and governments in all regions towards ending executions and repealing this punishment from national legislation.[330]

According to the most updated annual report from Amnesty International, by the end of 2019, 106 countries have abolished the death penalty for all crimes and in all circumstances. The death penalty for ordinary crimes is prohibited in 8 states, and there are 28 *de facto* abolitionists.[331] That is to say, the total number for abolitionist in law or practice arrived at 142.[332] In particular, the recorded number of executions in 2019 (657 in 20 states) fell to the lowest number in the past ten years.[333] Compared to 2018, the number of the death penalty sentence also has a decrease from 2,531 to 2,307,[334] nevertheless, the number of states imposing the death sentence has increasing from 54 to 56.[335]

In light of the above numbers and facts, it appears to be widely recognised that we are facing steady and continual progress toward the universal abolition with an average two to three new countries abolishing the death penalty annually in the past decade.[336]

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[330] Amnesty International, *Death Penalty: UN Call for Moratorium on Executions Gains Record-High Support at Committee Vote* (2018).

[331] It is argued, however, for those *de facto* abolitionists, the death penalty does still remain as a 'theoretical punishment' until it is fully abolished. More importantly, even though the death penalty has been *de jure* abolished, there is still a chance that it could be resumed, which will be looked at in this section.

[332] Amnesty International, *Report on the Death Penalty and Execution 2019*.

[333] ibid

[334] It should be noted that all these numbers are recorded by Amnesty International based on their own methodology and access to the information in various states. For such reasons, the accuracy may not be guaranteed in certain cases especially in those countries where the death penalty-related statistics are not fully disclosed.

[335] Amnesty International, *Report on the Death Penalty and Execution 2019*.

[336] Amnesty International, 'Abolitionist and Retentionist Countries as of July 2018' <https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf> accessed 20 February 2019. Based on the list summarising the states that have abolished the death penalty since 1976, '[i]t shows that in the past decade, an average of over three countries a year have abolished the death penalty in law or, having done so for ordinary offences, have gone on to abolish it for all offences.'

Scholars, William Schabas for example, even optimistically argued in 2014 that the ultimate abolition would become a reality in the next decade.[337] Similarly, Amnesty International alleges that the death penalty will be 'consigned to history' in less than 40 years.[338] However, this is not as certain as it might at first seem. To be specific, Sir Nigel Rodley clearly recognised that while identifying the status or lawfulness of the death penalty in international law, the fact that over 50 states that retain the death penalty should be given equivalent consideration, particularly those are major global players including China, the US and India.[339] In addition to the consideration of the political influence of those retentionist states, as a matter of fact, when the abolitionist states argue the death penalty as a violation of human rights, it should be borne in mind that the protection of human rights should begin with human beings *per se* and focus on human beings.

Under such circumstances, the numbers gathered and published by Amnesty International in their annual Death Penalty Report unavoidably have limitations.[340] The number of people (population) facing the death penalty should be given more attention, rather than merely focusing on the increasing number of abolitionist states. More specifically, if we look at those figures from the perspective of the number of people who live in those minority of retentionist states and thus are subjected to the potential

[337] See William Schabas, *Universal Abolition: Only a Decade Away, Inner Temple, London* (2014).
[338] Amnesty International, 'Death Penalty: Abolitionist Reflections' <https://www.amnesty.org/download/Documents/ACT5076102017ENGLISH.PDF> accessed 15 March 2018.
[339] Nigel Rodley and Matt Pollard, *The Treatment of Prisoners Under International Law* (3rd edn, OUP 2009) 279.
[340] Similar report is also conducted and published by other NGOs who have made the death penalty abolition as their primary target. For example, the World Coalition against the death penalty and the Hands off Cain.

death penalty, a totally different result will come out. It is a fact that 'the minority of countries which retain the death penalty are also among the most populous,'[341] which is the fact that particularly reflected in Asian countries such as China and India. That is to say, countries with the world's largest population including China, India, the United States of America,[342] Indonesia, Pakistan and Nigeria are retentionists, along with many other states such as Japan, Vietnam, Iran, Singapore, Egypt, Thailand and Saudi Arabia. This roughly comes out the *status quo* that over half of the world's population is by far living in the above countries and thus, potentially facing the death penalty legally.[343] Additionally, counting the number of abolitionist states is frankly meaningless taking into account the contemporary proliferation of small states in the late 20th century. For example, the separation of Czechoslovakia and the dissolution of Yugoslavia and the USSR. For these reasons, it is fair to say that the alleged achievement on the progress of global death penalty abolition based on the number of abolitionist states does not reflect the truth.

Furthermore, those figures could also be interpreted in different ways. For example, some interesting statistics recorded by Amnesty International also go against the above

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[341] Fredman (n 307) 153.

[342] Up to now, the death penalty is still legal in 29 states of the USA, see ProCon.org, 'States with the Death Penalty and States with Death Penalty Bans' <https://deathpenalty.procon.org/view.resource.php?resourceID=001172> accessed 13 July 2019.

[343] See UN Department of Economic and Social Affairs, 'World Population 2019' <https://population.un.org/wpp/Publications/Files/WPP2019-Wallchart.pdf> accessed 2 November 2019. According to the most updated statistics (2019) published by the Population Division of the Department of Economic and Social Affairs of the United Nations, the world population is about 7,713 million. The approximate figures of some retentionist states' population (millions) are as follow, China (1,434), India (1,366), Indonesia (270), Pakistan (217), Nigeria (201), Bangladesh (163), Japan (127), Ethiopia(112) , Egypt (100), Vietnam (97), DR Congo (87), Iran (83), Thailand (70), Sudan (43), Iraq (39), Afghanistan (38), Saudi Arabia (34), North Korea (26), Malaysia (32). The above numbers can easily come to a conclusion that the majority of world's population are living in the retentionist states, even without the calculation of the number of people living in the retentionist states of the USA.

idealistic prediction made by the abolitionist group. At first, in 2018, several states witnessed an increase in the number of the death penalty sentence[344] and the number of the execution[345]. Similar increase in executions and death sentences were also recorded in 2019.[346] Secondly, in general, the death penalty is taking place against the backdrop of the 'abolitionist trend'. In spite of a decrease, the total number of known executions and the death penalty sentences in 2019 still accounted for 657 and 2,307 respectively. By the end of 2019, there were at least 26,604 people in the death row.[347] It is not to argue that all of these executions and sentences that have taken place would meet the strict standards that will be examined and advocated, for the use of the death penalty, later in this chapter. For example, the above-mentioned Belarusian case which involves secret executions.[348] However, it remains an undeniable fact that the death penalty is still being used in many countries. Thirdly, although the number of States Parties to the Second Optional Protocol is increasing, it is far from being accepted as 'universally ratified'.[349] Fourthly, the result that there are a huge number of states voting for the Resolution on Moratorium on the Use of the Death Penalty in 2018 is understood differently or even oppositely. To be more precise, the adoption of this resolution runs counter to the essence of the global campaign on abolishment. 'On a philosophical level, the decision to establish a moratorium rather than endorse outright

[344] For example, Egypt, Iraq, Ghana, Kuwait and the United Arab Emirates.
[345] For example, the USA and Belarus. Both Japan and Singapore got their highest number in the past decades.
[346] For example, increase in executions took place in Iraq, Saudi Arabia, South Sudan and Yemen. A large number of states had more death sentences imposition in 2019, including Indonesia, Kenya, Lebanon, Pakistan, Sierra Leone, Sudan, Tunisia, Yemen and Zambia.
[347] Amnesty International, 2019, 11.
[348] Further examples including mandatory death sentences, public executions, executions of people under 18 years old and people of mental or intellectual disabilities, and the death sentences do not meet the fair trial standards. Amnesty International, 2019, 12-3.
[349] We will return to this point in Section 3.3.1.2.

abolition may indicate that the administration of the death penalty, and not the punishment itself, is defective.'[350] According to this argument, the reason why the use of the death penalty is called for suspension is that its application in practice is not appropriately and sufficiently regulated, rather than the death penalty *per se* is illegal in general international law. Namely, the problem is that those provisions in the Resolution are not fully observed by the retentionist states. It is deduced that if the regulation of the death penalty, particularly those are rules of customary international law, could be recognised by all states and coherently carried out in practice, the use of the death penalty should be allowed at this stage, regardless of worldwide trend on the abolition.[351]

Lastly, unlike the death penalty execution, the trend of abolition or imposing momentum is not irreversible. The reintroduction in the global abolitionist movement indeed reflects the variability and uncertainty of states polices on the death penalty. In other words, neither *de jure* nor *de facto* abolition absolutely guarantee the death penalty permanently vanish in a particular country. Therefore, it is worth stressing that not all retentionist states are getting increasingly closer to the alleged 'ultimate abolition'. A number of recent setbacks in the abolition trend are exceptionally noteworthy, and the reintroduction of the death penalty is indeed an issue that should

[350] Cornell Center on the Death Penalty Worldwide, 'Moratoria' <http://www.deathpenaltyworldwide.org/moratoria.cfm> accessed 9 May 2018.

[351] It also should be noted that there are differences of the imposition and execution in difference regions. While Europe and America step further in the abolition, the death penalty is still a potent existence in many Asian and African states. For full regional review, see Amnesty International, *2018*, 13-45. This point will be looked at in Section 3.3.2.2.

not be ignored. Recalling paragraph 2 and paragraph 6 of Article 6 of the *ICCPR*,[352] it is true that, theoretically, international law does not allow states to step back once the death penalty has been abolished.[353]

However, state practice has run opposite to it. For example, in the United Kingdom, since its last execution in 1964 and completely abolished the death penalty in 1998, there have been several attempts to reinstate the death penalty.[354] Although those attempts in the UK has thus far failed, we have already noted that several states either lifted their moratoria or reintroduced it. For example, Jordan and Pakistan resumed executions after a moratorium of eight and six years respectively. In 2015, Chad had its first execution since 2003.[355] States including Sudan, Thailand and Botswana resumed execution in 2018 and six countries recommenced to impose new death penalty imposition.[356] In 2019, the U.S. Department of Justice announced its resumption of the death penalty against 'the worst criminals' since the nearly two-decade moratorium.[357] Five death row prisoners have been confirmed of the scheduled executions,[358] despite the intense condemnation.[359] In October 2019, Indonesia's new-appointed Attorney

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[352] Rodley and Pollard (n 339) 305.
[353] For example, Article 4 (3) of the *ACHR* explicitly prohibits the reintroduction of the death penalty. Similar provision is found in the General Assembly's 7th Resolution on Moratorium on the Use of the Death Penalty, para. 8; As stated in the General Comment No. 36, para. 34, 'state parties to the Covenant that have abolished the death penalty…are barred from reintroducing it.'
[354] For example, see Knowles (n 318) 56-7.
[355] Amnesty International, 'The Impact of the Resumption of the Use of the Death Penalty on Human Rights' <https://www.amnesty.org/download/Documents/ACT5002412019ENGLISH.PDF> accessed 27 October 2019.
[356] Including Chad, Mauritania, Oman, Papua New Guinea, South Korea and Uganda.
[357] Department of Justice of the United States, 'Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse' <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse> accessed 3 August 2019.
[358] ibid
[359] For example, see Stephanie Nebehay, 'U.S. Move to Resume Death Penalty Bucks Trend: U.N' <https://www.reuters.com/article/us-usa-justice-un/us-move-to-resume-death-penalty-bucks-trend-un-idUSKCN1UP1MW> accessed 8 August 2019.

General declared that execution would be resumed.[360] Actually, according to Amnesty International's calculation, 80 people had been sentenced to death in Indonesia in 2019.[361] It is intriguing to pay attention to Philippines, which is a State Party to the Second Optional Protocol,[362] is also struggling to reintroducing the death penalty for certain crimes.[363] At the time of writing, Sri Lanka, where there has been an execution-free country since 1976, is experiencing the potential reintroduction of the death penalty executions of drug-related criminals.[364] President Maithripala Sirisena announced he has signed the execution order for four drug criminals without further details. Furthermore, it is also reported that at least 1,299 prisoners were on death row in Sri Lanka.[365]

To sum up, taking all these facts into account, we can by no means insist that we are on a positive trend toward the universal abolition of the death penalty, which will be realised in the near future. The answer is definitely not what it seems at first. There is abundant convincing evidence that go against the situation as presented by the abolitionists.

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[360] See Death Penalty News, 'New Indonesian Attorney-General Flags Resumption of Death Penalty' <https://deathpenaltynews.blogspot.com/2019/10/new-indonesian-attorney-general-flags.html> accessed 1 November 2019.

[361] Amnesty International 2019, 25.

[362] Philippines signed on 20 September 2006 and ratified on 20 November 2007.

[363] See Philippine News Agency, 'Duterte Asks Congress to Restore Death Penalty for Drugs, Plunder' <https://www.pna.gov.ph/articles/1075720> accessed 8 June 2020.

[364] For details, see Amnesty International, *Sri Lanka: Halt Preparations to Resume Executions* (2019); for further updates of the case, see Amnesty International, 'Supreme Court Suspends All Execution Warrants' <https://www.amnesty.org/download/Documents/ASA3706802019ENGLISH.pdf> accessed 27 July 2019.

[365] Human Rights Watch, 'Sri Lanka: Resuming Death Penalty a Major Setback' <https://www.hrw.org/news/2019/06/30/sri-lanka-resuming-death-penalty-major-setback> accessed 9 June 2020.

3.2 Controversial issues regarding the death penalty

Having an overview of the global 'progress' of the death penalty abolition from two voices in opposite directions, we can now get that although the number of retentionist states has shifted from the overwhelming majority to a minority, the worldwide abolition of the death penalty may not be realised in a short period of time because quite a lot of obstacles are standing in the way of it. In this section, four particular issues will be discussed, including deterrence, discriminatory execution, miscarriage of justice and public opinion. The focus will be moved to the pro and con behind the death penalty *per se*. It is obvious that the death penalty raises serious unsettled debates in relation to not only the protection of specific human rights, such as the right to life, the right to a fair trial and the right to be free from torture, inhuman or degrading treatment or punishment,[366] but also the penological concerns, including the necessity and effectiveness of this kind of punishment *per se*. In reality, the debate on either of the issues will result in the debate on the legality of the death penalty. Both the abolitionists and the retentionists have their own arguments. The reasons for supporting or against the death penalty are noticeably diverging in different places of the world.

3.2.1 Deterrence

In many states, the death penalty has been an indispensable part of the integrity of punishment in the penal system for a long time. Until today, in many places, the death penalty is still deeply rooted, and it is applied as a necessary punishment to protect the

[366] Fredman (n 307) 186. 'From a human rights perspective, it seems incontestable that attempts to reconcile the death penalty with human rights standards are doomed to failure.'

fundamental interests of people. More importantly, the death penalty is linked to the social development in some sense and it plays a role in upholding the stability of the public order and governance in certain social conditions. That is to say, in many retentionist states, the existence of the death penalty is required for specific legal, cultural, political and social needs.[367] For example, although the relevant statistics of the death penalty sentences and executions in China sometimes are not fully open to the public, it can still be deduced that China constitutes the biggest part of the worldwide capital execution.[368] In spite of the fact that China is abrogating the death penalty step by step in the past decade,[369] the complete abolition is deemed as improbable in quite a long time.

It is noteworthy that not all theories of punishment are dominated by deterrence and retribution. There are also rehabilitative and restorative functions of the criminal punishment that should also be considered.[370] Nevertheless, deterrence might be the most frequently mentioned word when discussing the function of the death penalty and also, the argument for sustaining the death penalty has largely relied on the presumed deterrent effect.[371] For the retentionists, this kind of extreme penalty directly penalises

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[367] UNGA, 'UN General Assembly Will Call for Moratorium on Executions, with a View to Abolishing the Death Penalty, under Terms of Resolution Approved by Third Committee', UN Doc. GA/SHC/4058, 19 November 2012.
[368] Amnesty International 2019.
[369] See Supreme People's Court of the People's Republic China, *Fewer Crimes to be subject to Death Penalty* (2015); See also, Renwen Liu, 'Recent Reforms and Prospects in China' in Roger Hood and Surya Deva (eds), *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion* (OUP 2013) 107-22; Na Jiang, *China and International Human Rights: Harsh Punishments in the Context of the International Covenant on Civil and Political Rights* (Springer 2013) 119-85; Roger Hood and Carolyn Hoyle, 'Towards the Global Elimination of the Death Penalty: A Cruel, Inhuman and Degrading Punishment' in Pat Carlen and Leandro Ayres França (eds), *Alternative Criminologies* (Routledge 2017) 414-15.
[370] The death penalty indeed completely rules out any possibility of being rehabilitated. Robert Cryer and Others (n 158) 465-69.
[371] *Glossip v. Gross* (2015) 133 S Ct 1885 (US Supreme Court), Justice Breyer Dissenting Opinion. '…the death penalty's penological rationale in fact rests almost exclusively upon a belief in its tendency to deter and upon its ability to satisfy a community's interest in retribution.'

the flagrant offenders, fights crimes and frightens the potential offenders against the commitment. From this perspective, taking the life of criminals is protecting the lives of many others. In Iraq, for instance, 'because of the exceptional circumstances in Iraq and the prevalence of terrorist crimes targeting the right to life, the death penalty had been maintained as a means of deterrence and to provide justice to the families of victims.'[372] For those in favour of the death penalty, it is argued that the death penalty gives rise to more fear and stronger deterrence than any other imprisonment, namely, more execution may result in fewer people commit the capital offences. This is because removing the death penalty for specific crime from the particular penal system would conceptually indicate that the seriousness of that crime is lessened, in other words, the crime cost is lowered.[373]

However, whether deterrence can be sufficiently accepted as a justification for the death penalty has never reached a consensus. For those who oppose the death penalty, especially its effectiveness in the penal system, they insist the death penalty does nothing more than any other less severe punishment in preventing future perpetration. There is no scientific and persuasive evidence proving the existence of the death penalty directly affect the crimes rates, safeguard the public security and make the public feel safer. In this regard, the real figures of the criminal rates before and after the abolition of the death penalty in a particular state seem to be convictive in illustrating the role of the death penalty. For example, the empirical experience in Canada reveals that the homicide rate remarkably declined following the abolition, which can be seen as a

[372] UNGA, Report of the Working Group on the Universal Periodic Review, Iraq (2010), UN Doc. A/HRC/14/14, para.11.
[373] Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, OUP 2015) 394-96.

cogent example against the deterrence of the death penalty.[374]

Similarly, according to the survey, within the United States, states that retain the death penalty do not keep lower crime rates than the abolitionist states and the fact that the reintroduction of the death penalty in a particular state does not give rise to change in crime rates. Both findings evidence the irrelevance between the death penalty and crime rates.[375] Moreover, while evaluating the function of the death penalty, even if there are certain cases where the people count the benefits and costs of their commitment and thus, cease to commit crime out of the fear of the death sentence, what matters is not whether the death penalty *per se* works well, but whether it works significantly better than any other kind of punishment as well as any other means of criminal justice in deterring the potential perpetrator against committing serious crimes.[376] Thus, the analysis on this issue should not only be comparative with the consideration of the role of the alternative punishments such as the life imprisonment,[377] but also take into all relevant concerns especially the delay of execution in the death row, the inevitably wrongful conviction of innocents and the unfairness and discrimination of the death trial.

Additionally, the deterring argument is refuted by the fact that, in some cases, the use of the death penalty sometimes may be counteractive to the original purpose, let alone

[374] UNCHR, *Moving Away from the Death Penalty: Arguments, Trends and Perspective* (2014) 71.
[375] See American Civil Liberties Union, *Briefing Paper: The Death Penalty*, vol 4 (1999).
[376] Hood and Hoyle, Towards the Global Elimination of the Death Penalty (n 369) 407.
[377] See Andrew Coyle, 'Replacing the Death Penalty: The Vexed Issue of Alternative Sanctions' in Peter Hodgkinson and William Schabas (eds), *Capital Punishment: Strategies for Abolition* (CUP 2004) 92-115.

deterrence and prevention. For those who attempt to achieve their goals by atrocious acts and violent means, especially terrorists for example, the death may make them martyrs with honours that they desire.[378] For those people who do not rationally calculate the consequence of crime or even do not care about the probable execution, the deterrent role of the death penalty would not perform.[379] The opponents also claim that the weight of punishment, *inter alia,* the death penalty should not be overstated in deterring or combating crimes. More emphasis needs to be rested on enhancing the effectiveness of the criminal investigation, ensuring a fair and objective functioning criminal system, rather than being confined to a single punishment. For example, quoting the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia's claim, '[i]t is the infallibility of punishment, rather than the severity of the sanction, which is the tool for retribution, stigmatization and deterrence.'[380] The ICTY does not think it is the severity of a punishment that deters people, but the likelihood of being punished at all. This means, it is the people think they will be punished for their perpetration that has the deterrent effect.

As can be seen from the above conflicting opinions as to the deterrent effect of the death penalty, there is no clear evidence pointing to one way or the other. It is well-found to say the discrepancies on this point between the abolitionists and the retentionists would still be considerable. In the meantime, I do admit that remaining the death penalty or

[378] For a general discussion about the question of deterrence and the death penalty, see Hood and Hoyle, *The Death Penalty* (n 373) 389-425; Elizabeth Wicks, *The Right to Life and Conflicting Interests* (OUP 2010) 119-50; Amnesty International, *Not Making us Safer: Crime, Public Safety and the Death Penalty* (2013).
[379] Hood and Hoyle, *The Death Penalty* (n 373) 396-98.
[380] *Prosecutor v. Anto Furundzija* (Judgment in Trial Chamber) ICTY-95-17/1-T, (10 December 1998), para. 290.

replacing it by lifetime imprisonment is only one of the aspects in deterring crimes. The role of a specific punishment in one's penal system should not be so exaggerated. We should not expect to use the death penalty to resolve all crime-related issues, which is definitely not what the criminal law requires. In other words, when the retentionists are asked whether the death penalty works or why it is not working, the question just simplifies the complex problem and equates it with the role of the death penalty.

3.2.2 Discriminatory execution

The 15th anniversary of the World Day against the Death Penalty has paid particular attention to the issue of the discriminatory execution on impoverished and marginalised groups.[381] It attempted to raise public awareness on the fact that in many cases, 'poor and economically vulnerable persons and foreign nationals are disproportionately subjected to the death penalty […] and that persons belonging to religious or ethnic minorities are disproportionately represented among those sentenced to the death penalty.'[382] According to the report of the International Commission against the Death penalty, for example, approximately 75% of people subjected to the death penalty in India belong to the economically vulnerable group, and the number in Malaysia amounts to 90%.[383] Those disadvantageous people are much more vulnerable in a death penalty trial and their right to a fair trial are more risky, particularly in the country where the criminal system is not democratically and legitimately guaranteed.[384]

[381] See World Coalition against the Death Penalty, *Poverty and Justice: A Deadly Mix* (2017).
[382] UNGA, Human Rights Council, Thirty-sixth session, UN. Doc. A/HRC/36/L.6, 22 September 2017.
[383] See International Commission against the Death Penalty, *Statement by the International Commission against the Death Penalty on the Occasion of the World Day against the Death Penalty* (2017).
[384] In countries including but not limited to India, Malaysia, Saudi Arabia, Iran and Pakistan.

Referring to the words of the Assistant Secretary-General for Human Rights Ivan Šimonović, 'there is a correlation between the death penalty and discrimination and unequal treatment against vulnerable groups. In most cases, people who end up getting executed are poor, belong to vulnerable groups or socially disadvantaged minority groups or have mental disabilities.'[385] The focus on the discriminatory use of the death penalty was brought to the Human Rights Committee. In its recently adopted General Comment No. 36 affirms that the death penalty is prohibited to 'be imposed in a discriminatory manner contrary to the requirements of articles 2(1) and 26 of the Covenant….'[386] In the latest Seventh Resolution on a moratorium on the use of the death penalty, the same problem is included:

> poor and economically vulnerable persons, foreign nationals, persons exercising their human rights and persons belonging to religious or ethnic minorities are disproportionately represented among those sentenced to the death penalty.[387]

To a certain extent, the vulnerability of the indigent people in the death penalty case is attributed to the unavailability of legal knowledge and resources. This means, the procedural safeguards for those poor people cannot be guaranteed, particularly in support of the legal assistance.

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[385] See UN News, 'No Room for Death Penalty in 21st Century, Says UN Official, Citing Decline in Support for Capital Punishment' <https://news.un.org/en/story/2015/11/514592-no-room-death-penalty-21st-century-says-un-official-citing-decline-support#.WnX1d4XXJ2V> accessed 9 September 2018.
[386] UNCHR, General Comment No.36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, adopted on 30 October 2018, para. 44.
[387] UNGA, A/RES/73/175 (n 325) Preambular para. 12.

The above paragraph reveals only one of the perspectives upon which the death penalty is alleged to be discriminatorily applied. In fact, in the death penalty proceedings, the factors of race, gender and social status all influence the outcome of the case; bias and discriminations are not uncommon.[388] Nevertheless, those problems are not exclusive to the death penalty, albeit intolerable. Reduce and eliminate the discrimination and ensure equality before the law is not only the principle of criminal law, but also a fundamental right of all people.[389] Specific safeguards to make sure the death penalty is impartially carried out is actually a universally acknowledged rule in international law, which will be discussed in the 4th section of this chapter.

3.2.3 Miscarriage of justice

Considering the finality and irreversibility of the death penalty, once executed, people's life was deprived and there is no possibility of remediation. Therefore, this kind of punishment should have left no room for the miscarriage of justice. Any inaccuracy may result in unimaginable result for innocence and their families. However, the wrongful convictions are inevitable in practice, and there have been many cases that innocence was subjected to incorrect sentence or execution. The root causes could be attributed to a number of factors in almost every aspect of the criminal justice system.[390] For example, the lack of the access to the fair trial, misconduct of police in the

[388] Hood and Hoyle, *The Death Penalty* (n 373) 368-80.
[389] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), Arts 1 and 2.
[390] See Death Penalty Information Center, 'DPIC Analysis: Causes of Wrongful Convictions' <https://deathpenaltyinfo.org/stories/dpic-analysis-causes-of-wrongful-convictions> accessed 12 July 2019.

investigation process particularly the false evidence and confession, unequipped legal counsels, and the specific social context should also be considered.[391] In reality, as the President of the International Commission against the Death Penalty Federico Mayor said, all criminal systems are designed and run by people who cannot get around the possibilities of making mistakes. It is effortless to find a case concerning the execution of innocents.[392] The miscarriage of justice is unavoidable even in the most advanced criminal jurisdiction, and all potential injustices exacerbate the cost of wrongful death penalty imposition or execution.[393]

In some cases, it took decades for the judicial authorities to correct the 'irretrievable mistakes', in which the innocents had been executed, and the posthumous pardon did nothing for their life. For example, in *Huugjilt* case,[394] which is one of the most typical cases of wrongful execution in China over the past decades, Huugjilt was sentenced to the death penalty for rape and murder of a woman in a public toilet in 1996. He was executed in the same year. It took 18 years for the courts to correct the judgment and in 2014, Huugjilt was eventually acquitted in a judicial review after the real murderer of this case confessed. Similar, in *Nie Shubin* case,[395] the young man was wrongfully

[391] Hood and Hoyle, *The Death Penalty* (n 373) 326-27.
[392] Office of the High Commissioner for Human Rights, '*Moving away from the Death Penalty: Lessons from the National Experiences*'.
[393] Hood and Hoyle, *The Death Penalty* (n 373) 267.
[394] See Megha Rajagopalan, 'China Exonerates Teen Executed 18 Years ago for Rape, Murder' 2014 <https://www.reuters.com/article/us-china-crime-death/china-exonerates-teen-executed-18-years-ago-for-rape-murder-idUSKBN0JT0X220141215> accessed 3 June 2019; See the reports from the Higher People's Court of the Inner Mongolia of China who made the final judgment of acquittal: Higher People's Court of the Inner Mongolia Autonomous Region, 'Decision on the State Compensation' <http://nmgfy.chinacourt.gov.cn/article/detail/2014/12/id/1526790.shtml> accessed 3 June 2019; Higher People's Court of the Inner Mongolia Autonomous Region, 'Decision of the Judicial Review on Huugjilt Case' <http://nmgfy.chinacourt.gov.cn/article/detail/2014/12/id/1506487.shtml> accessed 3 June 2019.
[395] See Yin Cao, *Top Court Explains Pardoning of Nie Shubin* (China Daily 2016); See the reports from the Supreme People's Court of China who made the final judgment of acquittal: Supreme People's Court of the People's Republic

executed for rape and killing in 1995. After his families' successive appeals for reviews and investigations, the judgment was finally overturned and Nie was exonerated in 2016. The figures of the conviction of innocence are also persuasive. For instance, according to the project of Innocence Database of the Death Penalty Information Center, since 1973, 166 wrongfully convicted people have been exonerated from the death row, where they had stayed for 11.3 years in average.[396] Admittedly, it is not difficult to find the real story of those innocents' experiences in death row and also their life after the exoneration.[397] Being detained and waiting for the final execution, their physical and mental affliction is beyond imagination. These cases, in Hood and Hoyle's words, 'disturb the public's sense of injustice', which also lead to the public's reconsideration of the administration of the death penalty.[398] The abolitionists argue that there will be innocents being sentenced to the death penalty or executed as long as the death penalty remains. The only or at least the best way to avoid those wrongful convictions is not to use the death penalty at all. In other words, the issue of the wrongful conviction/ execution has been taken as one of the primary concerns against the death penalty.

We cannot deny the wrongful convictions that have already been made in the past and also, the potential risk of the wrongful convictions in the future, even in the most advanced criminal justice system secured with presumed sufficient procedurals. Life

China, 'Decision of the Judical Review on Nie Shubin Case' <http://www.court.gov.cn/zixun-xiangqing-32091.html> accessed 3 June 2019.

[396] See Death Penalty Information Center, 'Innocence Database' <https://deathpenaltyinfo.org/policy-issues/innocence-database> accessed 5 June 2019.

[397] See Death Penalty Information Center, 'Description of Innocence Cases' <https://deathpenaltyinfo.org/policy-issues/innocence/description-of-innocence-cases> accessed 5 June 2019.

[398] Hood and Hoyle, *The Death Penalty* (n 373) 324.

imprisonment, which is often taken as the replacement to the death penalty. Even if the death penalty is abolished, the miscarriage of justice would still not be completely avoided. For an innocent person, spending decades in prison is by no means much better than wrongful execution. With respect to this problem, it is considered by the retentionists from a totally different perspective. Unlike the abolitionists, they attach more importance to the reasons that cause to the miscarriage of justice, the measures to prevent further wrongful convictions and also, the remedies for wrongful convictions. It is believed that the deep reform of the criminal justice system, particularly in regard to procedural safeguards, could reduce the possibility of wrongful conviction/ execution to the largest extent.

3.2.4 Public opinion

In many retentionist states, the death penalty is not only existing as a sort of punishment in the penal code, but also demanded, to a large extent, by the public. In those places, public support is a moral expression of people's indignation to criminals and their conducts.[399] Public support is quite an emotional and sensitive issue,[400] which is often labelled as the functioning of an important shield of the states in favour of the death penalty. It might be easy to understand people's desire for retaliation, abhorrence for a brutal crime, sympathy on victims and also the irritation on the insecure atmosphere. In fact, the death penalty is indeed profoundly entrenched in the traditional culture and

[399] William Schabas, 'Public Opinion and the Death Penalty' in Peter Hodgkinson and William Schabas (eds), *Capital Punishment: Strategies for Abolition* (CUP 2004) 326-27.
[400] *Council of Europe, Death is not Justice - The Council of Europe and the Death Penalty, 2015)*, p.7.

ethic of many states where the public opinion is antagonistic to abolition. This is largely dominated by the retributive culture where more or less, the death penalty is regarded as a 'taken for granted result' of certain outrageous crimes and also a way to show respect for those victims. In many occasions, people may think that it will be the shame of criminal law if the criminal who committed a serious crime could get impunity from the death penalty.[401] Taking murder for example, when someone deprives the life of a person, which is the most fundamental right, only when the life of him is deprived is a proportionate or an equivalent punishment. In the above-mentioned India's 2012 bus gang-rape case, in spite of oppositions,[402] the execution was welcomed by the victim's mother who said '[t]oday, justice has been done after seven years.'[403] India's Prime Minister Narendra Modi also commended that 'it is of utmost importance to ensure dignity and safety of women.'[404]

In addition, the death penalty is regarded as the most direct and effective means of punishment that incapacitate the serious criminals, which is able to not only enhance the public's sense of safety, but also reinforce the rule of law in public's awareness. For example, in China, this is peculiarly evident in corruption or bribery cases involving government officials where the public might indignant to the criminals, but also the

[401] Borge Bakken, 'Capital Punishment Reform, Public Opinion, and Penal Elitism in the People's Republic of China" in Roger Hood and Surya Deva (eds), *Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion* (OUP 2013) 193-97.
[402] For example, see Ruhi Khan, 'To Hang or Not to Hang: India's Feminists Wary of the Media Spectacle caused by Capital Punishment for Rape', <https://blogs.lse.ac.uk/medialse/2020/02/07/to-hang-or-not-to-hang-indias-feminists-wary-of-the-media-spectacle-caused-by-capital-punishment-for-rape/> accessed 10 June 2020.
[403] AL Jazeera, 'India Hangs Four Men over 2012 Delhi Bus Gang Rape and Murder', <https://www.aljazeera.com/news/2020/03/india-hangs-men-2012-delhi-bus-rape-murder-200320033644808.html> accessed 10 June 2020.
[404] ibid.

whole government functioning.[405] In such a situation, this kind of harsh punishment is essentially required for conciliating the string resentment rather than punishing the individual criminal.[406] The Japanese government also claims that

> whether to continue or abolish the death penalty should be determined by each country at its discretion based on public sentiment, actual conditions of crimes, criminal policies, and other factors. As to whether or not we should continue or abolish the death penalty, it is a critical issue… and therefore needs to be carefully examined… with the fullest attention given to the people's opinion. Presently, the death penalty is believed to be unavoidable by a large number of Japanese people in cases of extremely malicious or atrocious crimes.[407]

To a large extent, governments and politicians in retentionist states are likely to consider retaining the death penalty as a 'political necessity'[408] that reflects the value of democracy and legitimacy of their acts, which is in accordance with the so-called will and choice of the majority.[409] However, it needs to concede that some would argue the whole point of human rights law is to prohibit popular but inhumane practices and by so doing to posits itself as counter-majoritarian.

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[405] ibid
[406] ibid
[407] UNCHR, Human Rights Committee, 'State Party Report to the Human Rights Committee: Japan', CCPR/C/JPN/6, 9 October 2012, para. 104.
[408] Hood and Hoyle, Towards the Global Elimination of the Death Penalty (n 369) 406.
[409] Penal Reform International, *The Abolition of the Death Penalty and Its Alternative Sanction in Eastern Europe: Belarus, Russia and Ukraine* (2012).

Even in those countries where the death penalty has been abolished for many years, the public's view on the death penalty is still positive, and a sizeable part of the population consistently want the death penalty back, which deserve a further exploration. For example, in the United Kingdom, according to the YouGov research in 2014, 45% people in favour of the reintroduction of the death penalty,[410] and 42% British think it was a bad thing that the death penalty was abolished in the UK.[411] The numbers of people support reinstating the death penalty in Australia and Brazil are 52.3% and 55% respectively.[412] In the states where the death penalty is lawfully used, Japan for example, a large majority of people (85.6%) advocate the death penalty.[413]

In regard to the public opinion *per se*, a very important and disputable issue is whether and to what extent the public opinion concerning the death penalty is relevant to its abolition. Cousin Zilala, Executive Director of Amnesty International Zimbabwe, said, 'abolition is necessary to the protection of human rights, but human rights are independent of public opinion.'[414] As to public opinion, Roger Hood and Carolyn Hoyle also mentioned an interesting point that is sometimes overlooked. It is that 'where abolition has come about it has not been as a result of the majority of the general

[410] See YouGov, '50 Years on, Capital Punishment still Favoured' <https://yougov.co.uk/topics/politics/articles-reports/2014/08/13/capital-punishment-50-years-favoured> accessed 10 August 2019.
[411] See YouGov, 'Survey Results' <http://cdn.yougov.com/cumulus_uploads/document/0cxrbmqn06/InternalResults_140812_death_penalty_W.pdf> accessed 10 August 2019.
[412] See Death Penalty Information Center, 'International Polls and Studies' <https://deathpenaltyinfo.org/facts-and-research/public-opinion-polls/international-polls-and-studies> accessed 10 August 2019..
[413] ibid
[414] UNCHR, *Moving away from the Death Penalty: Lessons from the National Experiences* (2012).

public demanding it'[415], for this reason, whether or not all public or an absolute majority of the public are demanding to repeal the death penalty is not in direct relevance to the death penalty abolition. Many abolitionists allege that public opinion should neither be the reason for non-abolishment nor the justification for changes in criminal policy. The weight and strength of the public support are supposed to be tested prudently.

On the one hand, the formation and reinforcement of public opinion are not always in accordance with the rule of law and justice. What is popular is not always the same as what is right. This is because the existence and emerging public opinion do not consistently and factually reflect the inherent attitude of the public. Instead, it is now and then shaped and affected by the mainstream advocacy and people are apt to follow what is popular rather than what is absolutely right.[416] On the other hand, public opinion as a factor in favour of the death penalty has its limitations, particularly in the cases where the public's preference is based on misguided or non-transparent information. The public may not know the reality of how the death penalty trials work or how the death penalty is carried out.[417] As for the death penalty, people back it because they stand with the victims and those who are suffering the disastrous consequence of crimes. What they see is the evil of crimes and criminals, but the procedure of convictions as well as the aggravating circumstances surrounding the

[415] Hood and Hoyle, *The Death Penalty* (n 373) 426.
[416] ibid, 427. The abolitionist state may argue that 'public opinion is shaped by the use made of capital punishment, not vice versa, so that when capital punishment is abolished and is no longer legitimated by the state, public support for it begins to wither away as expectations of what is the most severe punishment change.'
[417] For example, the ubiquitous unfairness and discrimination in the death trials and also, the inhumane death row and execution methods, which are in breach of international human rights law.

crimes are often overlooked. That is to say, it is argued in some circumstances the public support for the death penalty is the real public opinion but, in some cases, it is not. There is also an argument that the more the people are truly informed of the real fact of the death penalty, for example, the conviction of innocents and arbitrarily or discriminatory uses, the less they will favour the death penalty.[418] In those cases, the public's will and psychology do have a shift from outrage and revenge to sympathy to the vulnerable people in the death penalty trial.

In response, a kind of counter-majoritarian argument is often raised,[419] albeit debatable. Where a (human rights) court or any other authorities prohibit a practice, either the imposition of the death penalty or extradition to retentionist states, that is supported by the public, it would put itself above and against the majority. The point is that striking down the death penalty might protect the human rights of certain people to a certain extent, but it is inherently undemocratic when the death penalty is popular and supported by the public. From this perspective, the will and perception of the public cannot be disregarded in assessing the legitimacy of the government's policies and acts.[420]

3.2.5 Conclusion to Chapter 3.2

[418] Mai Sato, *The Death Penalty in Japan: Will the Public Tolerate Abolition?* (Springer 2013).
[419] For example, see Barry Friedman, 'The History of the Countermajoritarian Difficulty, Part Four: Law's Politics' (2000) 148 University of Pennsylvania Law Review 971-1064; Or Bassok and Yoav Dotan, 'Solving the Countermajoritarian Difficulty?' (2013) 11 International journal of constitutional law 13-33.
[420] Mai Sato, 'Vox Populi, Vox Dei? A Closer Look at the "Public Opinion" Argument for Retention' in UNCHR (ed), *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (2014), 252-3.

Generally speaking, the above discussion presents a sketch about several most controversial issues regarding the death penalty. Nevertheless, on the one hand, the death penalty is a subject of complexity, and none of the above-mentioned perspective, can individually determine the remaining, abolition or resumption of the death penalty. On the other hand, the death penalty is not supposed to be debated in a purely abstract or theoretically way. It should be discussed in the light of the specific circumstances of particular states. It is not the exact purpose of this section and chapter to join the debate and take one's stand in regard to whether the death penalty should be abolished or not, and the reasons backing those arguments, which have been explored in a wide variety of literature by scholars, politicians, governments and international organisations. Instead, it is acknowledged that there are strong arguments against the death penalty from different aspects, which is evidenced by the global movement toward the abolition. However, those voices from the abolitionists do not overwhelm the presumed rationality and benefits of the death penalty advocated by certain retentionist states. There are also legitimate arguments in favour of the death penalty. The paradoxical views regarding the death penalty, particularly on its deterrence and public opinion, indeed proves that a broader consensus or a shared understanding of the essence of the death penalty have not been established.

It should be noted that no matter what reasons the death penalty is alleged to be remained or abrogated, and no matter what argument should be put forward in respond to the above controversies, it is the lawfulness of this kind of punishment in

international law that should always be the primary concern in the debate. In other words, what matters here is to identify the *status quo* of the death penalty in international law, and its relation to the discussion on the European standard, which prohibits to extradite people to retentionist states. It is a non-universal value and thus, should be recalibrated to a certain degree. The lawfulness serves not only the precondition but also one of the main justifications for the argument in the whole thesis, which will be thoroughly expounded.

3.3 The international lawfulness of the death penalty

3.3.1 Reframing the death penalty in human rights law

Before attempting to ascertain the status of the death penalty in international law, it should be noticed that there is an unsettled issue that is still frequently raised. Namely, whether and to what extent the death penalty is a human rights issue? There has always been an argument that the death penalty abolition is merely a matter of domestic criminal law that is exclusively subjected to the sovereignty of states. Each state should have the right to retain the death penalty for whatever grounds, such as 'purported deterrent utility or the cultural preferences and expectations of its citizens.'[421] For example, some states' response to the General Assembly's call for moratorium on the use of the death penalty shows their repulsion of being interfered with respect to the domestic use of the death penalty, which is a subject of legislation.[422] It was alleged that the issue of the death penalty abolition had been politicised with a certain degree

[421] Hood and Hoyle, Progress Towards World-Wide Abolition (n 322).
[422] For example, see UN Doc. GA/SHC/4058 (n 367).

of international political pressure.[423] For example, the representative of the US insists that whether or not to retain the death penalty should be decided based on 'domestic democratic practices within countries, consistent with international law' that does not completely exclude the death penalty in all circumstances.[424] China is standing firm against the international intervention in its use of the death penalty, which is deemed as the internal affair of China based on the specific social conditions and therefore, needs to be respected.[425] The delegates from other retentionist states such as Japan, Singapore and Egypt also present similar opinion to justify their legitimate use of the death penalty.[426] The argument for the death penalty as a matter of domestic criminal justice rather than international human rights is one of the main barriers against the global abolitionist movement.

Indeed, there was a shift in the past decades for the debate of the death penalty being embedded in human rights course, along with 'a broadening and deepening human rights consciousness that moved from marginality onto the center stage of international politics…'[427] Roger Hood and Carolyn Hoyle have devised a phrase of 'new dynamic' to generalise the evolving process of the acceptance of reframing the death penalty abolition in human rights law.[428] It is evidenced by the fact that increasing number of states have abolished or restricted the use of the death penalty; the establishment of

[423] ibid
[424] ibid
[425] ibid
[426] ibid
[427] Nigel Rodley, 'The Death Penalty as a Human Rights Issue' in UNCHR (ed), *Moving Away from the Death Penalty: Arguments, Trends and Perspective* (2014), 204.
[428] Hood and Hoyle, Towards the Global Elimination of the Death Penalty (n 369) 408-12.

international human rights treaties and protocols with the commitment to abolish the death penalty; the jurisprudence of the Human Rights Committee and that of other regional human rights bodies, particularly the European Court of Human Rights.

3.3.1.1 Some reflections on retentionist states' practice

The difficulty that retentionist states confront is mostly prominent not only in their international reputation on human rights records, but also the barrier in their attempt to cooperate with other abolitionist states in criminal matters. Taking China for example, it is putting every effort to negotiate and establish the full extradition relations with more states particularly the Western states so as to build an active international network with legally binding agreements to combat transnational crime. However, it did not progress swimmingly. The decision to sign or ratify an extradition treaty with China has aroused huge controversies.[429] The practice of extradition with China has also been criticised. For example, in the China-Spain joint operation (*Great Wall* Operation) targeting 1.2 hundred million *RMB* telecom scam,[430] the Chinese government made an extradition request to Spain in January 2017 based on their bilateral extradition treaty signed in 2005.[431] In the following two years and a half until 07 June 2019, Spain has arrested 237 suspects and extradited 225 suspects to Mainland China. The Spanish government's decision to extradite causes excessive denunciation. The UN High

[429] See Philip Wen, 'Ratification of Extradition Treaty with China Delayed as 'Real Doubts' Emerge' <https://www.smh.com.au/politics/federal/ratification-of-extradition-treaty-with-china-delayed-as-real-doubts-emerge-20161122-gsuu8p.html> accessed 24 December 2018; Jonathan Manthorpe, *An Extradition Treaty with China is a Dangerous Idea* (ipolitics 2016).

[430] For case details, see Ministry of Public Security of the People's Republic of China, 'Success of the China-Spain Joint Pperation' <http://www.mps.gov.cn/n2253534/n2253535/c6523928/content.html> accessed 10 August 2019.

[431] Furthermore, both China and Spain are state parties to UN Convention against Transnational Organized Crime, which provides further legal basis for their bilateral criminal cooperation.

Commissioner for Human Rights recently released a statement to urge the Spanish government to stop further extradition. A number of 'human rights experts' also commented that extraditing those suspects to China to face the fraud trial 'contravenes Spain's international commitment to refrain from expelling, returning or extraditing people to any State where there are well-founded reasons to believe that they might be in danger of being subjected to torture.'[432] In practice, it is not difficult to find some Western human rights groups and legal scholars have long delivered condemnation and doubt to the Chinese legal system's independence, transparency and impartiality. To be more precise, the human rights records,[433] among which the high rate of death penalty execution and the associated human rights violations constitute the primary target of the denouncement.[434] In spite of this fact, it is interesting and necessary to mention that China's value of extradition has already been backed up by many of the European Union member states through ratifying the extradition treaty, including France, Spain, Italy, Portugal, Lithuania, Romania and Bulgaria. More than 260 fugitives have been extradited to China from states in different regions, which 'fully testifies to the international community's confidence in China's judicial system.'[435] It goes out of the scope of this thesis to either savage or defend the judicial system of China, but only to

[432] See UNCHR, *UN Human Rights Experts Urge Spain to Halt Extraditions to China Fearing Risk of Torture or Death Penalty* (2018).
[433] For example, in above Spain-China extradition case, the UN human rights experts' only concern is that the extradition would subject those suspects to the threat of torture and the death penalty. However, according to Article 266 of *the Criminal Law of the People's Republic of China*, as for fraud, the maximum punishment for those involving extremely large amount money or property and in the most serious cases is ten years or life imprisonment, rather than the death penalty. And also, they do not provide any evidence to prove the risk of torture or other ill-treatment in this specific case, where the burden of proof is on the fugitives concerned, rather than the Chinese government.
[434] It is beyond the purpose of this thesis to make comments on those appraisals about human rights in China.
[435] See Ministry of Foreign Affairs of the People's Republic of China, 'Foreign Ministry Spokesperson Geng Shuang's Regular Press Conference on July 9, 2019' (2019)

demonstrate that the human rights, *inter alia*, the death penalty dilemma of China's effort to engage in international extradition.

It is undoubtedly true that sovereign states are empowered with the right to determine their own legal system and policies, to retain and enforce particular kinds of punishments in their national criminal justice on the grounds of their discretion. However, as has been reaffirmed in Resolution on Moratorium on the Use of the Death Penalty, [436] such right is not unrestrained. It must be consistent with general international law, and the issues of the death penalty cannot be investigated at the national level only without considering states' human rights obligations regarding the most fundamental human rights of criminals.[437] The use of the death penalty implicates people's fundamental human rights and human dignity with the backup of international human rights law, which is also the legal basis and driving force of the international campaign of the death penalty abolition. In such cases, those human rights treaties involving the prohibition of the death penalty, in essence, are limiting states' internal power regarding criminal justice. In the meantime, the abolitionist states take the agreement of treaties prohibiting the death penalty as a sign that abolition is becoming an international obligation. However, even if it is becoming so, it has not yet.

3.3.1.2 The death penalty in international human rights treaties

[436] UNGA, A/RES/73/175 (n 325) para. 1. It is the 'sovereign right of all countries to develop their own legal systems, including determining appropriate legal penalties, in accordance with their international law obligations.'
[437] Lehrfreund (n 327) 23. See also, Hood and Hoyle, *The Death Penalty* (n 373) 16-7.

The death penalty and its application are clearly dealt with in a number of international conventions. In this section, international human rights treaties will be particularly focused. Recalling Article 6(1) of the *ICCPR*, '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' This paragraph unequivocally underlines the supreme and fundamental status of the right to life that is inherently conferred on all human beings.[438] Its importance is not only embodied in the right *per se*, but also reflected in its association with all other human rights of every human being. Because the existence and guarantee of the right to life are 'prerequisite for the enjoyment of all other human rights and whose content can be informed by other human rights.'[439] Furthermore, the acknowledgement of the right imposes not only the negative but also the positive obligation on states parties to protect all individuals'' right to life.[440] However, Art 6(2) of the *ICCPR* indirectly lists the death penalty as a legitimate exception to the right to life so long as the protection of those facing the death penalty is fully ensured. That is to say, based on the Covenant *per se*, states are not obliged to completely abolish the death penalty although the use of it is supposed to be narrowly restricted.[441]

Nevertheless, it is noteworthy that, as Martin Scheinin asserts, Article 6 of the *ICCPR* does imply its inclination to abolition and provides a 'programmatic obligation' for those retentionist states to abolish the death penalty.[442] If we dig into the essentially

[438] General Comment No.36, para. 2.
[439] ibid.
[440] ibid, para.18-31.
[441] These limitations are categorised into the regulation of the death penalty, which will be discussed later.
[442] Martin Scheinin, 'Death Penalty' (2008) MPEPIL 772

logical order and combine Article 6(2) and Article 6(6), we could find the existence of the death penalty exception is just an interim compromise and the abolition is suggested as the goal of the Covenant. 'Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.'[443] This paragraph is indicative. It expressly suggests that the restrictive requirements set out in paragraph 2-5 should only be referred in accordance with the goal of universal abolition, which is considered as a desirable course of the whole international community. It also serves as the guidance for those states where the death penalty is lawfully applied.[444] In William Schabas's view, it is this paragraph that affords the Human Rights Committee with a legal basis to engage in the abolition campaign.[445] Nevertheless, the willingness of the *ICCPR* or the Human Rights Committee toward the future worldwide abolition is not in relevance to this topic. What matters here is the *ICCPR* leaves space for retentionists states, or the *ICCPR per se* cannot be taken as an international human rights treaty which endorses the absolute death penalty abolition.

Adopted 23 years after *the ICCPR, the Second Optional Protocol to the International Covenant on Civil and Political Rights*[446] is by far the only universal human rights treaty which directly aiming at the death penalty abolition. The Protocol does not

[443] ICCPR, Art 6(6).
[444] William Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, CUP 2002) 138.
[445] ibid.
[446] Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414 (Second Optional Protocol).

exclude every possibility of carrying out the death penalty. Reservation on the use of the death penalty 'in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime' is admissible. This means that even if the *Protocol* were universally ratified, it would not guarantee an absolute prohibition of the death penalty in all cases for all crimes. Moreover, it should be aware that while the *ICCPR* has 172 State Parties but the number of which to the *Second Optional Protocol* is only 88 with Angola ratified on 2 October 2019 and Armenia signed on 26 September 2019 but has not ratified.[447] From this aspect, it can be easily seen that the gap between the ultimate target at the complete abolition of the death penalty and the current progress is still apparent at the international level. The existence of the gap is the primary cause of the divided approach in dealing with the death penalty issues. In other words, if all states were to ratify the *Second Optional Protocol* or any other universally binding convention and utterly abolish the death penalty, the discussion in this research would be different. However, it is still premature to anticipate that. The *Second Optional Protocol*, as the 'additional provisions to the Covenant',[448] does not play its role as what the abolitionists expected.

It is also worth noting that regionally, *the European Convention on Human rights*,[449] *the American Convention on Human Rights*[450] and *the Arab Charter of Human*

[447] See UN Treaty Collection, 'Chapter IV, 12' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&lang=en> accessed 12 October 2019.
[448] Second Optional Protocol, Art 6.
[449] European Convention on Human Rights, Art 2.
[450] American Convention on Human Rights, Art 4.

Rights,[451] all initially admit the death penalty as a lawful exception to the right to life in spite of certain limitations.[452] Admittedly, while we were examining these treaties, the background conditions at the time of adoption, as well as the considerable evolution on the death penalty abolition in each regional, have to be considered. More specifically, with the establishment of the Protocols to those treaties, including the Sixth and Thirteenth Protocol to *the European Convention on Human Rights* adopted in 1983 and 2002 respectively, *the 1990 Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, as well as the other regional human rights treaties,[453] the death penalty has become increasingly unfitted and incompatible. The death penalty abolition has been taken as a 'legal reality'[454] in certain regions, Europe and Latin America particularly. Nevertheless, taking into account the number of states ratifying the abolition Protocols[455], we can neither draw a conclusion that the death penalty-related provisions in those original human right treaties have been substituted, nor the death penalty has explicitly excluded *de jure*.

At the present stage, it is clear to work out that the death penalty is not completely prohibited in international human rights treaties, although there are protocols do

[451] Arab Charter of Human Rights, Arts 5, 10-2.
[452] African Charter of Human and Peoples' Rights only recognises the right to life in Article 4 as 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.' It does not mention the death penalty nor its relation to the right life. It does affirm that children are protected against the death sentence in the African Charter on the Rights and Welfare of the Child; The Resolution on urging the State to envisage a Moratorium on Death Penalty adopted by the African Commission on Human and Peoples' Rights in 2008 indeed gives a push to the abolition movement in African states.
[453] For example, Article 2 of the Charter of Fundamental Rights of the European Union stipulates that '[n]o one shall be condemned to the death penalty, or executed'.
[454] Schabas, *The Abolition of the Death Penalty* (n 444) 368.
[455] Including one international treaty—Second Optional Protocol, and three regional treaties: Sixth and Thirteenth Protocol to the ECHR, Protocol to the ACHR.

proscribe its application. In other words, there are certain international and regional treaties prohibiting the death penalty for their member states only, general international treaty law does not, in a legally binding way, prohibit the death penalty in all circumstances. Nevertheless, the death penalty's applicability is largely restricted and regulated from different aspects, which will be examined later in this chapter.

3.3.1.3 The death penalty in human rights case law

If we put the death penalty into the international sphere, rather than solely focusing on its domestic application, it is a very fact that refusing to extradite a person to a retentionist state to face the death penalty trial or execution is a robust and prevailing approach by which the abolitionist states put pressure on retentionist states in the context of so-called global abolitionist movement.[456] This is extensively reflected in the jurisprudence of the Human Rights Committee, which looks at the death penalty and extradition both in its case law and its General Comments.[457] Nevertheless, a particularly relevant point is that the Committee is not in consistency with its standard on extradition to the death penalty. As the Committee stated, 'the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.'[458] In this subsection, we will see

[456] Hood and Hoyle, *The Death Penalty* (n 373) 35.

[457] General Comments are issued by the Committee regarding its interpretations of contents of human rights provisions (the *ICCPR*), which are meant to be aimed at all states. Nonetheless, the Committee cannot bind states through General Comment, and it cannot necessarily change the status of law. For further details, see Nisuke Ando, 'General Comments/Recommendations' (2008) MPEPIL 1730

[458] *Roger Judge v. Canada*, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998, (2003), para. 10.3. The phrase of 'living instrument' could also be found in the *ECHR* system, where the ECtHR recognised the evolutive and dynamic nature of the Convention rights which 'must be interpreted in the light of present-day condition.' For example, see *Tyrer v. The United Kingdom* App no 5856/72 (ECtHR, 25 April 1978), para. 31.

that it was move form more permissive to more restrictive.

In *Kindler v. Canada* case,[459] before he escaped to Canada and was arrested there, Kindler had been convicted of first degree of murder and kidnapping in Pennsylvania, the United States, where the death penalty was punishable. The US requested his extradition in July 1985, which was granted one month later. Canada extradited Kindler to the US on 26 September 1991 without seeking any assurance against the use of the death penalty, which led to Kindler's claim of violation of his rights under the *ICCPR*.[460] Under such circumstances, the case was about whether an abolitionist state (Canada), under its Covenant obligations, is legitimate to extradite a person to a retentionist state (the US) where he faces the death penalty. In such case, whether Article 6 *ICCPR* requires Canada to request an assurance against the imposition or execution of the death penalty.

In this case, the Human Rights Committee observed that, as Article 6 does not prohibit the death penalty, albeit in limited circumstances for the most serious crimes, the only situation that engages Canada's violation of Article 6(1) is that extraditing Kindler to the US would expose him to a real risk of a violation of Article 6(2).[461] The Committee was of the opinion that the obligations under Article 6 do not definitely require Canada, which had abolished the death penalty with exceptions, to refuse the extradition request

[459] *Kindler v. Canada*, Communication No. 470/1991, U.N.Doc. CCPR/C/48/D/470/1991 (1993)
[460] Before the case was brought to the Human Rights Committee, Kindler's appeals against the Minister of Justice's decision to extradition had been refused in domestic courts (the Federal Court, the Court of Appeal and the Supreme Court of Canada), see ibid, para. 2.4
[461] *Kindler* case, para. 14.3.

from a state where the death penalty is remained, or to seek assurances against the imposition or execution of the death penalty upon the requested individual's return.[462] This means, as the Committee noted, the decision to extradite or seek assurances fall within State Parties' discretion. As Canada's decision on not to seek assurances from the US was not taken in an arbitrary or summary manner, there was no violation of Article 6 in this regard.[463] With respect to Kindler's right under Article 7, the Committee observed the death penalty was permitted under Article 6(2), which did not contradict Article 7,[464] and no other potential aspects of the death penalty in this case, constituted a violation of Article 7 by Canada.[465]

However, in *Roger Judge v. Canada* case, the Human Rights Committee entirely overturned its own decision in *Kindler* case, which was made almost a decade ago and was deemed as cannot accommodate the evolving need of life protection.[466] It is considered that abolitionist states have more obligations under Article 6 than the states where the death penalty is remained.[467] As an abolitionist State Party to the *ICCPR*, Canada cannot invoke the exception to the right to life incorporated in paragraphs (2) to (6) of Article 6 to justify its decision to deport Judge to suffer the risk of the death penalty.[468] In this case, before issued the deportation order, Canada did not take any measures to assure the non-execution of the death penalty upon Judge's arrival at the

[462] ibid, paras. 14.5, 14.6.
[463] ibid, para. 14.6.
[464] ibid, para. 15.1.
[465] ibid, paras. 15.2-3.
[466] *Judge* case, para.10.3.
[467] ibid, para. 10.5.
[468] ibid, para. 10.4.

United State,[469] and thus can be seen as directly subjecting Judge to the foreseeable threat of the right to life. Under this circumstance, whether the death penalty was executed by Canada itself was irrelevant to its breach of the Covenant. According to the Committee's statement, as a state had abolished the death penalty, Canada's approval to deport Judge to the United States without obtaining the assurance that the death penalty would not be carried out, indeed '[…] established the crucial link in the causal chain that would make possible the execution of the author.'[470] This is because that Judge's life might not be in immediate threat or consequently deprived without Canada's permission to remove. Namely, the deportation greatly facilitated the completion of the death penalty in this case. Against this background, deporting or removing by any other means a person to a retentionist state where he will face the death penalty can be simply understood as the breach of an abolitionist state's obligation under Article 6, unless sufficient assurances are guaranteed to secure the execution would not be enforced. As the Committee observed:

> For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.[471]

[469] ibid, para. 5.2.
[470] ibid, para. 10.6.
[471] ibid, para. 10.4.

The Committee justified the discordance of its jurisprudence as 'an inevitable consequence of the wording of the provision itself'[472] by manifesting the exceptional changes concerning the death penalty since the judgment of *Kindler* case. On the one hand, there have been increasing global highlights on the right arising from Article 6 and 'a broadening international consensus in favour of the abolition of the death penalty'. On the other hand, the Committee recognised that Canada itself had experienced considerable legal developments in terms of the death penalty issue. It did make it clear the necessity to guarantee the people under the extradition or deportation order to any other retentionist states where the people concerned are subjected to the death penalty and in particular, sufficient assurances are required in most of the cases.

From *Kindler* case to *Judge* case, it can be found that the substantial changes in the jurisprudence of the Human Rights Committee had exactly indicated an evolving or dynamic development of the mainstream attitude toward the death penalty. Nevertheless, this evolutive approach cannot settle down the doubt concerning the doubled standard that the Committee adopts in dealing with the death penalty cases. Namely, when the case is brought to the Human Rights Committee, the abolitionist and retentionist states are treated differently as regards their obligations under Article 6 and the gap is still there. Taking together with Article 6(1) and Article 6(2), the lawfully carried out the death penalty still remains a legitimate exception to the right to life, the

[472] ibid, para. 10.5.

Committee's view in *Judge* case should only be taken as a compromise rather than a resolution to the problem. To be more precise, although the description on how international judicial authorities' standpoints on this similar issue have changed can also be found in the case law of the European Court of Human Rights,[473] considerable distinctions should be noted. Unlike the European system, the legal basis for the Human Rights Committee to determine its State Parties' obligation in extradition to the death penalty is primarily Article 6 of the *ICCPR* and *the Second Optional Protocol*. However, considering the latter's insufficient number of State Parties, it is plausible to argue that the Human Rights Committee does not have a solid legal basis, as the ECtHR has, to prohibit its States Parties from extraditing to a retentionist state, at least not at this stage.

3.3.2 The death penalty in international custom

3.3.2.1 A brief note on customary international law identification

This section will inquire the legal status of the death penalty in customary international law and demonstrate that it is not conclusively prohibited. Nevertheless, the use of the death penalty is strictly subject to regulation. Customary international law, with limited exception,[474] 'have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will

[473] Since *Soering* case, the Court's attitude to the death penalty has considerably changed until *Al-Saadoon and Mufhdi* case. Details concerning the European standard on the death penalty will be further discussed in the extradition context in Chapter 4.

[474] Unless a state is a persistent objector to a rule of customary international law. There are rigorous requirements for states to express the objecting arguments in terms of the timing and the way to object. See James Green, *The Persistent Objector Rule in International Law* (OUP 2018); Brian Lepard, *Customary International Law: A New Theory with Practical Applications* (CUP 2010) 229-42. It also should be noted that, unlike general customary international law, particular customary law might have limited scope of application to specific states only. See also ILC Draft Conclusion 15 with commentaries.

by any one of them in its own favour.'[475] For the purpose of this research, customary international law is highly relevant since if it were ascertained, the customary nature would equip the death penalty abolition with the most forceful and irresistible backup and also the driving force behind the international campaign against the death penalty. In the other words, at this stage, in the absence of a universally legal binding treaty that absolutely prohibiting the death penalty in all circumstances, it is very important to identify whether there is a plausible argument that the death penalty is prohibited in customary international law.[476] The rules of custom would justify the abolitionists' allegation against the retentionists' use of the death penalty.

As an important constituent of the sources of international law listed in Article 38(1) of *the Statute of the International Court of Justice*, the rule of international custom is regarded 'as evidence of a general practice accepted as law.'[477] The wide recognition of this well-known extraction and the derived two-element approach has not helped to settle the huge debates. Identifying the existence and content of customary international law is still an area of great controversies and obscurities, with many other competing methodologies to do so.[478] For the specific issue concerned in this thesis, it is disputed whether the two-element approach is applied to all fields of international law. Namely,

[475] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969,* p. 3, para. 63.
[476] Wouter and Others (n 9) 137.
[477] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986,* p. 14, para. 184.
[478] For example, it is questioned that whether the approach is still valid today? Whether one element predominates over the other? Whether the two elements method should be replaced by the one element theory? See Hugh Thirlway, *The Sources of International Law* (2nd edn, OUP 2019) 64-70; Maurice Mendelson, 'The subjective Element in Customary International Law' (1996) 66 British Year Book of International Law 177-208; Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems' (2004) 15 European Journal of International Law 523-53.

does it equally apply to the death penalty-related or other human rights norms?[479] In response, Michael Wood has explained the point that the general two-element approach is applied to all fields of international law, without exception to human rights law.[480] Nevertheless, the specific context of different rules in cases may be varying and should be taken into consideration, which leads to a case-to-case analysis.[481]

It beyond the purpose of this thesis to go that far to address all those controversies regarding the methodology itself. In this section, the orthodox and 'conservative' two-element approach will be followed, with reference to the International Law Commission's recent work on Identification of Customary International Law, which supplies abundant empirical experiences and theoretical elucidations in terms of this topic.[482] Nevertheless, it has to admit that identifying the existence and content of rules of customary international law is extremely complicated and the application of this methodology also involves a large number of issues upon which the agreement is very hard to be reached.[483] Before getting to the main argument, the section will start with a brief explanation of the methodology, which is also exemplified, for example, by the

[479] For example, see Hugh Thirlway, 'Human Rights in Customary Law: An Attempt to Define Some of the Issues' (2015) 28 Leiden Journal of International Law 497-50; Steven Wheatley, *The Idea of International Human Rights Law* (OUP 2019) 130-3.

[480] Michael Wood, *Distinguished Lecture of the Academy of European Law: Customary International Law and Human Rights* (European University Institute 2016) 4, 11 ('the standard approach…is perfectly possible in the fields of human rights just as it is in all other fields of international law.'; 'both the two-element approach and the other considerations… are flexible enough to encompass the field of customary international human rights law.')

[481] Hugh Thirlway, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (Springer 1972) 145.

[482] See International Law Commission, *Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur* (2015); International Law Commission, *Draft Conclusions on Identification of Customary International Law, with Commentaries*, 2018).

[483] For example, it is argued that the ILC Draft Conclusions produce more questions than answers. See Christian Delev, 'Throw Custom to the Wind: Examining the Life Cycle of Customary International Law in the Absence of a Custom-Making Moment'.

International Committee of the Red Cross's study of customary international law on armed conflict, albeit in dispute.[484]

Based on the two-element approach, customary international law is generally accepted as being consist of general practice and *opinio juris,*[485] which is a combination of objective and subjective requirements.[486] In other words, a customary rule is only formulated by the 'sufficiently widespread and representative, as well as consistent practice'[487] with indications that the practice is derived from a legally binding rule. A new rule of customary international law will not be created unless both two requirements are established. In the landmark *North Sea Continental Shelf* case, the interrelation between state practice and *opinio juris* is elucidated as

> [n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitua1 character of the acts is not

484 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol I: Rules (CUP 2005) xxxvii-xlvii.
485 'A rule of customary international law is one which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future.' See International Law Association, Committee on Formation of Customary (General) International Law, 'Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law' 2000, p. 8.
486 Crawford (n 13) 21-5.
487 See ILC Draft conclusion 8 with commentaries. Technically, not only the practice of states, but also the practice of other actors should be taken into account. For example, the other actors include international organisations, non-governmental organisations and private individuals. See ILC Draft conclusion 4 with commentaries.

in itself enough.[488]

In ascertaining and abstracting the general practice and *opinion juris*, various kinds of materials are of relevance and significance.[489] In Michael Wood's view, treaties and resolutions of international organisations are two types of materials that particularly relevant in relation to the identification of customary human rights rules.[490] Nonetheless, it by no means say other materials such as judicial decisions are not important. The intricate relationship between treaty[491] and customary international law is crucial. On the one hand, treaty and custom are two sources of international law listed in Article 38 of the ICJ Statute. On the other hand, treaty plays a highly significant role in identifying the existence, content and evolvement of customary international law, particularly in human rights law. Nevertheless, treaty law indeed complicates the identification of custom. As Hugh Thirlway claimed, 'acts by a party subsequent to, and consistent with, the treaty must be taken to have been performed pursuant to the treaty, and thus cannot constitute practice in support of an asserted costmary rule.'[492] In contrast, in James Crawford's opinion, '[n]on-parties may by their conduct accept the provisions of a convention as representing customary international law.'[493] The response to the treaty norms from non-state parties or between parties and non-parties is relevant.[494]

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[488] *North Sea Continental Shelf* case, para.77. See also, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012,* p. 99, para. 55.
[489] ILC Draft Conclusion 11(4).
[490] Wood, *Distinguished Lecture* (n 480) 8.
[491] For law-making treaties, see Crawford (n 13) 29-30.
[492] Thirlway, Human Rights in Customary Law (n 479) 501.
[493] Crawford (n 13) 29.
[494] ILC Draft Conclusion 11, Commentary (7).

Treaties are capable of reflecting or codifying the pre-existing rules of customary international law and more importantly,[495] treaties contribute to the creation and development of new rules of customary international law. According to the ICJ's judgment in *Continental Shelf (Libyan Arab Jamahiriya/ Malta*) case,

> '[i]t' is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinion juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.[496]

Although treaty cannot by itself create customary rules,[497] states' behaviours associated with treaties, such as negotiation, signature, ratification and implementation of treaties, not only provide evidence of general practice, but also manifest states' underlying view of practice and identify the existence of *opinio juris*.[498]

In spite of the importance of customary international law, sometimes it is argued that that along with the spread of the codified treaties, there may be less resort to the

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[495] For a discussion on the codified treaties and their relevance to customary norms, see Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989) 90-1.
[496] *Continental Shelf (Libyan Arab Jamahiriya/ Malta), Judgment, I. C.J. Reports 1985,* p. 13, para. 27.
[497] Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007) 262; see also, Oscar Schachter, 'Entangled Treaty and Custom' in Yoram Dinstein and Mala Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff 1989) 723.
[498] However, abstracting customary rule from the treaty provisions is not straightforward.

customary rules.[499] For example, international human rights law is regarded as treaty law in essence. Issues discussed, controversies resolved, and violations determined are largely based on the applicable human rights treaties.[500] Nonetheless, custom still plays its indispensable role.[501] As Michael Wood explains 'customary international law remains the bedrock of international law'.[502] It will continue to be applied especially to the issues that are not regulated by treaties,[503] to the relations and conflicts with and between non-parties.[504] While treaty norms and customary rules are concurrent, custom is referred in interpreting and applying the treaty provision.[505]

Resolutions of international organisations and intergovernmental conferences alone are not capable of creating customary international law,[506] which is still needed to identify that the contents of resolution are responding to the two-element standard.[507] Nevertheless, resolutions, especially those adopted by the United Nations General Assembly, are of values of evidencing the existence of customary international law.[508] In the situation where a unanimous consensus is reached and reflected in many

[499] For example, see Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 11.
[500] Wood, *Distinguished Lecture* (n 480).
[501] For example, see Wouter and Others (n 9) 137.
[502] Michael Wood, 'Foreword' in Brian Lepard (ed), *Reexamining Customary International Law* (CUP 2017) xiii.
[503] For example, see the last paragraph of the Preamble of Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[504] For example, see Tullio Treves, 'Customary International Law' (2006) MPEPIL 1393 para. 91; Michael Wood, 'International Organizations and Customary International Law' (2015) 48 Vanderbilt Journal of Transnational Law 611; EW Vierdag, 'The law governing treaty relations between parties to the Vienna Convention on the Law of Treaties and states not party to the Convention' (1982) 76 American Journal of International Law 779-801.
[505] Meron, Human Rights and Humanitarian Norms (n 495) 79-80.
[506] See Third Report on Identification of Customary International Law, 31-41.
[507] ILC Draft Conclusion 12, Commentary (1); see also, Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 28.
[508] ILC Draft Conclusion 12, Commentary (2); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 226, para 70. (''General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.')

resolutions on the same topic, there is an argument that it will serve as evidence of states' acceptance of a rule of conduct and a recognition that observing that rule of conduct is legally required. As the International Court of Justice stated in *Nicaragua* case, '[t]he effect of consent to the text of such resolutions…may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.'[509]

However, it also should be noted that while evaluating the weight of the resolution adopted either by international organisations or international conferences, the authentic and inherent motivation behind it is difficult to examine. This is primarily due to the political influence over the states' decision on certain issues. That is to say, to what extent it is the legal concerns that result in the particular decision on the resolution is the question deserved to disclose in specific cases.

Briefly speaking, in determining customary international law of human rights, what matters is still whether there is sufficient evidence presented and recognised as state practice and simultaneously, whether that practice implies the *opinio juris* of the state involved.[510] For example, as Steven Wheatley observes,

> 'we have to point to its acceptance by the international community, invariably in the form of a law-making treaty or General Assembly resolution, we must be able to observe

[509] *Nicaragua* case, para. 188.
[510] Thirlway, Human Rights in Customary Law (n 479) 502.

repeated invocations of the norm in diplomatic communications or domestic measures of implementation, and show the norm is accepted as a benchmark for evaluating the conduct of states by other states.'[511]

3.3.2.2 The death penalty in customary international law

In order to demonstrate whether or not the death penalty *per se* is customarily prohibited, it is necessary to evaluate whether the issue concerned is backed by general practice that is accepted by law. However, referring to either the ILC's long-term work on the identification of customary international law or the immense amount of literature on this topic, identifying whether a specific rule is of customary nature is neither straightforward nor unified.[512] Prohibitive rules in particular,[513] for example, the rule of prohibition of the death penalty, it is problematic either to establish an extensively general, uniform and consistent practice of the non-use of the death penalty, or to verify that any abstention or inaction is stemming from a sense of legal right or obligation, which will be explored in turn.

With respect to the assessment of generality of the death penalty (abolition), a number of facts should be taken into account. Necessarily, it is required that the state practice on death penalty abolition needs to be 'sufficiently widespread and representative, as

[511] Wheatley (n 479) 158.
[512] For example, see Pierre-Hugues Verdier and Erik Voeten, 'Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory' (2014) 108 American Journal of International Law 415.
[513] Wheatley (n 479) 130-1. As the ILC Draft Conclusion 3, commentary (4) points out, 'it may sometimes be difficulty tom find much affirmative State practice (as opposed to inaction); cases involving such rules are more likely to turn on evaluating whether the inaction is accepted as law.'

well as consistent'[514]. To be more precise, although universal participation is not necessary, the state practice still needs to be extensively general, particularly concerning those 'specially affected States'[515]. Considering the nature of the death penalty in criminal law, it should be equally relevant to virtually all states, who may have a legal interest to use or not use the death penalty domestically. Nevertheless, a qualitative method does place much importance upon the size of the population that those retentionist states represent rather than the number of abolitionist states.[516] Under such case, although the number of abolitionist states has outweighed that of retentionist states, and an increasing number of states are adopting the moratorium on the death penalty, it is very important that the number of people living under the threat from the lawful death penalty in those minority retentionist states is overwhelming.[517] By calculation, at least 4.85 billion people are living in 56 retentionist states,[518] not including those who live in *de facto* abolitionist states and are still suffering the risk of potential resumption.

Furthermore, in contrast to Europe[519] and Americas[520], Asia notably remains a

[514] ILC Draft Conclusion 8.
[515] *North Sea Continental Shelf* case, para. 74.
[516] Henckaerts and Doswald-Beck (n 484) xliv.
[517] As the ILC Draft Conclusion 8 commentary (4) clarifies, 'the term "specially affected States" should not be taken to refer to the relative power of States.' Although it is not directly supporting the identification of customary international law prohibiting the death penalty, it is at least relevant, from the political level, the two of permanent members of UN Security Council are in fact consistently carrying out the death penalty.
[518] Worldometer, Countries in the World by Population (2020), <https://www.worldometers.info/world-population/population-by-country/> accessed 19 August 2020.
[519] The European states' stringent opposition to the death penalty and extradition to retentionist states will be specifically discussed in the next chapter. (it might be argued that, at best, the prohibition of the death penalty qualifies as a regional or particular custom in Europe, following the requirement set out in the ILC Draft Conclusion 16 for example, but that does not mean that there is a wider universal custom rule. However, this is not the focus of this chapter).
[520] See Amnesty International, *Report on the Death Penalty and Execution*. In 2018, the United States was the only executed state in Americas with 25 recorded execution, stood as the world's 7th biggest executioner. Only The two countries imposed the death penalty the US (45) and Guyana (2). See also, Hood and Hoyle, *The Death Penalty* (n

retentionist region with the largest number of executions.[521] Many other executions are recorded in African and Caribbean states as well. In total, there are still 56 retentionist states. In 2019 only, according to the statistics given in the above section, the numbers of the use of the death penalty, either death sentences or executions, were still remarkable. For the above reason, it is fair to say current state practice on the death penalty abolition does not qualify itself as extensively widespread and representative.

In regard to the consistency of the death penalty (abolition), a pertinent issue is that breaking a rule does not necessarily negate it. It is saying that the non-observation of a particular rule does not necessarily imply the non-existence of the customary nature or the emergence of a new rule, which is unequivocally explained by the International Court of Justice in *Nicaragua* case:

> The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.[522]

373) 70-4.

[521] According to the report from Amnesty International, 87% of all executions were recorded in four Asian states except China. In 2019, there were at least 29 recorded executions and 1,227 new death sentences imposed in 17 states. See Amnesty International 2019, 22.

[522] *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986,* p. 14, para. 186.

It is true that 'completely uniformity of practice' is not required for ascertaining the customary status, but 'virtual and substantial uniformity' is necessary.[523] For the subject of this chapter, while ascertaining the general practice in the matter of the death penalty abolition, it is a question that whether and to what extent retaining the death penalty is qualified as a breach of a rule, the non-existence of that rule or the creation of a new rule. That is to say, states' practice 'should have been both extensively and virtually uniform' in the death penalty abolition. If the opposition or non-observation of a particular rule (prohibiting the death penalty) were found in the practice of numerous states, the requirement for being a rule of customary international law would not be satisfied. Obviously, as analysed in the above section, it has not been the fact. This is further defended by the 'setbacks' of the death penalty abolition trend, as revealed in Section 3.1. Many *de facto* or *de jure* abolitionist states had reintroduced the death penalty, lifted the moratorium or made some attempts to that. In those states, it has always been a debated issue that whether the death penalty should be taken as an option in responding to the extremely notorious crimes,[524] particularly in the context of globalised criminality.

Treaties, which have been explored as regards the death penalty and its abolition in the previous section, largely demonstrate the status of the death penalty in international

[523] *Nicaragua* case, para. 186; *North Sea Continental Shelf* case, para. 74-7.
[524] For example, a Conservative MP John Haynes claimed that the death penalty should be brought back as an appropriate and fitting punishment to people committing violent crime. According to the YouGov poll in 2015, about 45% people are in favour of reintroducing the death penalty in the UK.

human rights law. Several points related to those treaties are worth mentioning for the purpose of custom identification. At first, the only universal treaty prohibiting the death penalty, Second Optional Protocol to the *ICCPR* plays a very limited role in demonstrating the rule of custom. On the one hand, considering the 'degree of ratification',[525] the Protocol itself has not been widely accepted based on the number of State Parties. Furthermore, the practice outside the Protocol is undoubtedly contradictory, which could be easily proved by the number of the death sentence and execution in different states. On the other hand, the Protocol *per se* does not absolutely prohibit the death penalty in all cases, unlike Protocol No.13 to the *ECHR*, the Protocol set out the exception which allow State Parties to make a reservation for the use of the death penalty 'in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.' [526] Although reservations do not necessarily mean the non-existence of customary rule, it indeed lessens the weight to this abolitionist treaty in the identification of customary international law.[527]

More importantly, it is not difficult to find that the number of treaties or legal instruments concerning the regulation or restriction of the use of the death penalty is much more than that of treaties or legal instruments on the death penalty prohibition. While assessing the prohibition of the death penalty in customary international law, its relevance to the regulation of the death penalty, which will be discussed later, is worthy

[525] *North Sea Continental Shelf* case, para. 73.
[526] Second Optional Protocol, Art 2(1).
[527] ILC Draft Conclusion 11, commentary (5).

of being noted, which directly manifests the *status quo* of the death penalty. Simply put, the existence of a great deal of regulation on the death penalty is indeed the persuasive evidence that it has not been customarily prohibited, at least yet. Because if the death penalty were absolutely prohibited, there would be no such regulation to limit its application and safeguard those people subjected to the death penalty. Nevertheless, I would advocate in favour of those retentionist states abiding by the regulation to the greatest extent if they are to remain retentionist.

As examined in Section 3.1, although the successive Resolutions on Moratorium on the Use of the Death Penalty, do not themselves create a rule of customary international law, they have often been taken as the important evidence supporting the death penalty abolition and its legitimacy. However, from the perspective of customary international law, they are not so decisive as to whether there is a universal customary norm to the same effect. To be more precise, considering the negative votes and abstentions,[528] as well as the practice of those states that did not vote in favour of the resolutions, there were not any persuasive evidence arising out of those resolutions.

Admittedly, it is the fact that no contemporary international criminal court and tribunal uses the death penalty as a possible punishment,[529] irrespective of the jurisdiction and the crime concerned. The major international criminal tribunals, including the

[528] As for the 7th Resolution, 35 states voted against, 32 states voted abstentions and 5 states did not present.
[529] The death penalty was applied in the Nuremburg and Tokyo trials against war criminals in World War II. See Schabas, *The Abolition of the Death Penalty* (n 444) 236-41; Robert Cryer and Others (n 158) 465.

International Criminal Court,[530] the International Criminal Tribunal for Yugoslavia,[531] the International Criminal Tribunal for Rwanda,[532] the Special Tribunal for Lebanon[533] and the Special Court for Sierra Leone,[534] all preclude the death penalty. From William Schabas's view, the exclusion of the death penalty from the statute of the international criminal courts and tribunals indicates that this kind of punishment is in contradiction with contemporary values of international criminal law where human rights has been a critical concern.[535] To a limited extent, the above fact delivers a message of the inappropriateness of the death penalty. In other words, it runs counter to the international criminal justice, especially in the development of international criminal cooperation including extradition.[536] The death penalty is prohibited by the international criminal courts even for most hateful and outrageous crimes, *a fortiori* for a less serious petty crime.[537] However, evaluating the weight of this exclusion, which can also be taken as the decision of international courts, should be in keeping with the methodology adopted in identifying the customary international law. That is to say, this exclusion can only be accepted as one relevant factor in determining whether the death penalty is prohibited in customary international law while many other elements are required for evidence. Nevertheless, the non-use of the death penalty by the international courts also raises the problem of the double standard. As Carsten Stahn

[530] Rome Statute of the International Criminal Court 1998, Art 77.
[531] Statute of the International Tribunal for Former Yugoslavia 2009, Art 24(1).
[532] Statute of the International Tribunal for Rwanda 1994, Art 23(1).
[533] Statute of the Special Tribunal for Lebanon 2006, Art 24(1).
[534] Statute of the Special Court for Sierra Leone 2000, Art 19(1).
[535] Schabas, Indirect Abolition (n 55) 581-82.
[536] See UNCHR, 'Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, Bacre Waly Ndiaye, UN. Doc. E/CN. 4/1997/60 (24 December 1996), para. 73-6.
[537] Eric Prokosch, 'The Death Penalty versus Human Rights' in Council of Europe (ed), *Death Penalty: Beyond Abolition* (Council of Europe Publishing 2004) 28.

points out, while the high-level criminals are exempted from the death penalty before the ICTR, the mid- and lower-level prisoners are still suffering the death sentence or execution in Rwanda before the domestic court.[538]

With respect to the subjective element of *opinion juris*, even in those *de jure* or *de facto* abolitionist states, it needs to evaluate the extent to which their decision is stemming from a sense of legal obligation. For example, considering the relevance of the death penalty in extradition and deportation cases, the receiving state's undertaking against the use the death penalty is undoubtedly attributed to the requirement or precondition set by the extraditing or deporting state, rather than the rule of law, which are two different beliefs that should be distinguished. Besides, the fact that European states have chosen to sign the regional treaty prohibiting the death penalty cannot necessarily indicate that they are under a wide international legal obligation, as it is required as a precondition for joining either the Council of Europe or the European Union, which will be discussed in Chapter 4.

In a similar vein, it is not convincing that all abolitionist states who abolished the death penalty because they think they are legally binding to do it. Instead, various reasons might be taken into account. For example, some states abolish the death penalty because they think it is not useful or effective in deterring serious crime. Some states might care more about their international reputation and retaining the death penalty will bring more

[538] Stahn (n 17) 243.

difficulties to their attempts to international relation and cooperation. Furthermore, from the economic perspective, many states might merely think the application of the death penalty is not necessarily a cheap option. Simply put, in many jurisdictions, criminals may spend a very long time on the death row. Because of the finality of this kind of punishment, there will typically be a protracted process of appeals and judicial reviews, which is very expensive to get through and cost a lot of money.

To sum up, taking all above factors together, it does not suffice to demonstrate that there is 'sufficiently widespread and representative as well as consistent practice accepted as law' that the death penalty is prohibited in all circumstances, at least not at this stage. In other words, lawfully carrying out the death penalty remains an exception to the right to life in customary international law. Until the complete abolition is realised all over the world, or the abolition qualifies as a rule of customary international law, the application of the death penalty is still a topical issue and the regulation of the death penalty is essential. Therefore, the primary issue is not whether international law unequivocally prohibits granting extradition to a retentionist state, arguably it does not, but instead, whether rules regulating the death penalty are observed by the state seeking extradition. Simply put, it is imperative to address the international regulation of the death penalty in those retentionist countries, rather than merely to oblige them to abrogate the death penalty which has been proved unrealisable in the short term.

3.4 International regulation of the death penalty

The death penalty is not an isolated issue, which is not just about the death and the right to life. More importantly, it associates with a wide range of collateral rights, for example, the right to a fair trial and the right to be free from torture, inhuman or degrading treatment or punishment.[539] These rights from various perspectives are well incarnated in the international regulation of the death penalty, which is a concept put forward to determine the legitimacy of the use of the death penalty in specific cases or to qualify the death penalty as 'lawful application'.

As discussed above, the death penalty is neither prohibited in universal treaty law nor prohibited in customary international law. In practice, it is not universally abolished by all states in law or practice. Nevertheless, states' power to impose and execute the death punishment is not unconfined. It has to be substantively regulated by a number of requirements. International law does explicitly set out various restrictions on the use of the death penalty and prohibitions for certain categories and situations. That is to say, it is required to guarantee that 'all the procedures for applying the death penalty from arrest to final appeal'[540] are consistent with the minimum international substantive and procedural safeguards for people facing the death penalty. Against this background, this thesis claims that the issue of the death penalty *per se* and the issue of the international regulation of the death penalty are intertwined. The necessity of the regulation is primarily attributed to the status of the death penalty in international law. While the

[539] Amnesty International, *Death penalty: Ten Years since First UN Call for Moratorium on Executions, Case for Abolition Stronger than Ever* (2017).
[540] Roger Hood, 'Striving to Abolish the Death Penalty: Some Personal Reflections on Oxford's Criminological Contribution to Human Rights' in Mary Bosworth and Others (eds), *Changing Contours of Criminal Justice* (OUP 2016) 189.

former also justify the fact that, as discussed above, the death penalty is not yet prohibited in international law.

International regulation of the death penalty has been a prevalent subject in a number of treaties. Article 6 of the *ICCPR*, which leaves a room for the application of the death penalty in limited cases as 'a quite exceptional measure'[541]. In spite of a view of total abolition, Article 6 sets out a variety of strict restrictions only under which the death penalty could be carried out in those countries the death penalty still lawfully exists. The regulation of the death penalty embodied in Articles 6 and 14 of the *ICCPR* is further specified and extended in the UN Economic and Social Council Resolution 1984/50, *the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty* (hereinafter *the Safeguards*).[542] The *Safeguards* is deemed as one of the most significant instruments, which provides the procedural protection of people who are subjected to the death penalty in current retentionist states.[543] *The Safeguards* is composed of a set of internationally recognised standards. It incorporates almost all related aspects of the regulation of the death penalty, from the fundamental procedural safeguards of the criminal trial to the exemption of specific categories of offenders, and the most controversial issues regarding 'the most serious crimes' to which the death

[541] General Comment No.6, para. 7.
[542] Followed by the Economic and Social Council's Resolution 1989/64 of 24 May 1989 on *Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty* and its Resolution 1996/15 of 23 July 1996 on *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*.
[543] The importance of the *Safeguards* has been constantly reaffirmed in Human Rights Resolution 2005/59; UNGA, Resolution on Moratorium on the Use of the Death Penalty A/RES/62/149, 18 December 2007, Art 2(a), UNGA, Resolution on Moratorium on the Use of the Death Penalty A/RES/65/206, 21 December 2010, Art 3(a), UNGA, Resolution on Moratorium on the Use of the Death Penalty A/RES/67/176, 20 December 2012, Art 4(a), UNGA, Resolution on Moratorium on the Use of the Death Penalty A/RES/71/187, 19 December 2016, Art 7(a).

penalty is allowed to be applied. Furthermore, it is applied to all Contracting Parties, including those are not state parties to relevant treaties.[544]

In fact, regulation deals with a large number of issues and involves almost every aspect of the death penalty case. This section is intended to briefly examine some of the most important regulation, which is primarily categorised into three aspects: the type of crimes punishable by the death penalty; protected categories of offenders against the death penalty; procedural safeguards of the people facing the death penalty.[545] Unequivocally, many other aspects of regulation are involved in the death penalty, which might not fit into these three categories but are equally important. For example, the legality of the death penalty is often appraised in the context of the right to be free from torture, inhuman or degrading treatment or punishment under Article 7 of the *ICCPR*, albeit under heated debate. The regulation in relation to Article 7 also takes place in the whole process of the death penalty trial, the pre-trial investigation and obtaining evidence for example, but with particular significance in the following two areas: the condition of the death row detention and the execution methods.[546] Besides, it has always been a contentious issue on whether the death penalty *per se* constitutes torture or other ill-treatment, which will be analysed in Chapter 4, with an evolutive standard interpreted by the European Court of Human Rights.

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[544] UNCHR, 'Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', UN. Doc. E/2015/49 (13 April 2015), para. 61. 'That the safeguards may be considered the general law applicable on the subject of capital punishment, even for those States that have not assumed any treaty obligations whatsoever with respect to the imposition of the death penalty…'

[545] This approach is not unfamiliar in academic literature in terms of the death penalty. For example, see Rodley and Pollard (n 339) 283.

[546] ibid, 318-21.

3.4.1 The most serious crimes

It is the general principle of criminal law that the penalty must not be disproportionately imposed.[547] As for the death penalty, it should only be applied to crimes that are severe enough so as to qualify the most extreme punishment. The principle is definite, but the scope to which the death penalty can be used in practice is always contentious. The most commonly used phrase 'the most serious crimes' is summarised without any explicit definition or enumeration and thus has not reached an agreement on it application.[548] Nevertheless, it is accepted that this standard is established for the purpose of progressively restricting the application[549] from the nature of the offence or namely, the gravity of the offence, with a view to eventually abolish the death penalty. Ideally, this is supposed to be the most straightforward way to limit the use of the death penalty by reducing the number of death penalty-punishable offences. However, it does not settle the dispute upon capital punishable crimes in different jurisdictions.

This standard *per se* has been long accepted by the international community and widely embodied in a number of human rights treaties, General Assembly Resolutions, decisions of human rights bodies and retentionist states' domestic legislation. For example, both Article 6(2) of the *ICCPR* and Article 4(2) of the *ACHR* restrict the death penalty to the most serious crimes only, without any further clarification on either the

[547] For details, see 'retributive justice', Stanford Encyclopedia of Philosophy, 'Retributive Justice' <https://plato.stanford.edu/entries/justice-retributive/> accessed 7 August 2019.
[548] Schabas, *The Abolition of the Death Penalty* (n 444) 373.
[549] General Comment No.36, para. 35; See also, Hood and Hoyle, *The Death Penalty* (n 373) 26, 151-54.

meaning or the scope of the standard. The *Safeguards* did a bit more in this regard as stating that the scope of the most serious crimes 'should not go beyond intentional crimes with lethal or other extremely grave consequences.'[550] Furthermore, the Human Rights Committee stresses that retentionist states have an obligation to make sure their domestic use of the death penalty is only for the most serious crimes,[551] which 'must be read restrictively and appertain only to crimes of extreme gravity, involving intentional killing.'[552] Crimes that do not directly and deliberately lead to the loss of life would not warrant the death penalty. Therefore, certain offences are automatically excluded based on this criterion, including but not limited to corruption and other economic crimes, political crimes, abduction, drug and sexual crimes.[553] The scope of capital offences is also remarkably shrinking, which could be seen in China, the number of the death penalty punishable crimes in its criminal law has declined from the highest 73 in 1995 to the current 44.[554] In Vietnam, the number of capital crimes was declined from 44 to 29 in 1999, and further seven types of crimes were repealed in 2009, which resulted in 22 death-eligible crimes in total in the Vietnam Penal Code.[555]

However, the above observation does not mean crimes other than intentional murder are not publishable by the death penalty. Substantial differences in punishment for the same or similar crime in different states is an undeniable fact. In practice, crimes are

[550] The *Safeguards*, para. 1.
[551] General Comment No. 6, para. 6.
[552] General Comment No. 36, para. 35.
[553] ibid
[554] Criminal Law of the People's Republic of China 1997, the Amendment IX, made and promulgated by the National People's Congress Standing Committee of the PRC on 29 August 2015.
[555] See Cornell Center on the Death Penalty Worldwide, 'Death Penalty Database: Vietnam' <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Vietnam> accessed 29 March 2018.

still understood and interpreted differently in varying time and places.[556] What crimes fall into this range of crimes is different in places with various cultural, religious, political and social grounds. Therefore, in some cases, 'what may seem by some to be a disproportionate penalty in such serious offences and odious conduct may be seen by others as appropriate and just punishment.'[557] For example, as regards some categories of offence, particular terrorism that is lack of a definitive scope and may contain a number of different specific 'collateral' crimes, to what extent a terrorism-related crime qualifies 'the most serious crime' cannot always reach an agreement. Besides, in some states, the result of the crime is not the only way to decide whether the death penalty should be applied. As maintained by Martin Scheinin, the attention should not be merely placed on the gravity of the consequence, in practice, the evaluation of the severity of a crime can be determined by the intention and means of commitment and the consequence followed the perpetration.[558]

Although international law explicitly prohibits the death penalty for specific categories of crimes, which has not been fully complied with and responded at the domestic level. For many retentionist states, they do not go along with the suggested threshold and applying the death penalty based on their own discretion. For instance, the application

[556] Schabas, *The Abolition of the Death Penalty* (n 444) 106-7.
[557] See Nigeria's response to the Report on extrajudicial, summary, or arbitrary executions, submitted by Philip Alston, delivered by Joseph U Ayalogu, Ambassador/Permanent Representative of Nigeria. UNCHR, 'Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, Philp Alston', UN Doc. A/HRC/8/3/Add.3 (14 May 2008), para. 77.
[558] Martin Scheinin, 'Capital Punishment and the International Covenant on Civil and Political Rights: Some Issues of Interpretation in the Practice of the Human Rights Committee' in Jarna Petman and Jan Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff 2003) 54.

of the death penalty in Sharia law is quite different from that of the others.[559] The extent of violence or the consequence of crimes, namely the loss of life is not the sole criterion in determining the serious nature. In Muslim majority states, such as Afghanistan, Iran, Sudan and Saudi Arabia, adultery committed by married men or women which is otherwise not so serious to qualify the death penalty, is one of the Hudud crimes in Islamic legal traditions that is serious enough to be punishable by the death.[560] According to the report from the Hands off Cain, there is an instance that a woman was sentenced to death for adultery in December 2017 in Tehran, Iran.[561] A very recent example about the introduction of the death penalty to non-fatal crimes could be found in Brunei, a South-East Asian state with the labels of 'Muslim majority' and '*de facto* abolition since 1957'. Brunei brought into effect a Sharia-based Islamic penal code in 2013 and in April 2019, it implemented the second phase which prescribed gay sex and adultery publishable by stoning to death.[562] Unsurprisingly, the new enactment since proposed has been hugely and consistently condemned by the international community. For example, the UN High Commission for Human Rights Michelle Bachelet states that the new law, if implemented, 'would enshrine in legislation cruel and inhuman punishments that seriously breach international human rights law…[and] mark a

[559] See M. Cherif Bassiouni, 'Death as a Penalty in the Sharia' in Peter Hodgkinson and William Schabas (eds), *Capital Punishment: Strategies for Abolition* (CUP 2004); Penal Reform International, *Sharia Law and the Death Penalty: Would Abolition of the Death Penalty be Unfaithful to the Message of Islam?* (2015).

[560] ibid. See also, UNCHR, 'Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, Situation of human rights in the Sudan', UN. Doc. E/CN.4/1999/38/Add.1 (17 May 1999), para. 91; UNCHR, 'Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Asma Jahangir, UN. Doc. E/CN.4/1999/39/Add. 1 (6 January 1999), para. 103.

[561] See Hands Off Cain, 'Iran: Another Women Sentenced to Death for Adultery in Tehran' <http://www.handsoffcain.info/notizia/iran-another-women-sentenced-to-death-for-adultery-in-tehran-30316090> accessed 15 March 2018.

[562] Under the global pressure, the Brunei authorities have announced publicly that the new revised law would not be enforced. See BBC News, 'Brunei Says It won't Enforce Death Penalty for Gay Sex' <https://www.bbc.co.uk/news/world-asia-48171165> accessed 13 July 2019

serious setback for human rights protections for the people of Brunei…' [563] Unquestionably, the Brunei example may not turn the global abolition tendency around, but it still reflects the fact that the death penalty has not lost its popularity in some places. Just as the Sultan of Brunei defended, once the misperceptions about the new law are clarified, 'the merit of the law will be evident'.[564]

It is beyond the purpose of this section to dig into the crimes and penalties under the Sharia law. The example is purported to explain the differences in understanding and implementing the standard of the most serious crimes. In this case, it might be difficult to come to an agreed list of crimes that are punishable by the death penalty. In contrast, certain specific crimes are discussed and determined to be excluded according to the criterion of intention, means and consequence of the offence. This can be demonstrated in multiple aspects.

Apart from adultery, another noteworthy example of the non-observance of the standard of the most serious crimes is 'drug offence'. It is not unfamiliar to find that states resort to the death penalty for those serious drug-related crimes. According to the report from the Harm Reduction International, the death penalty is used for drug offences in at least 35 states, and over the last decade, there were at least 4,366 people being executed for

[563] UNCHR, *Bachelet Urges Brunei to Stop Entry into Force of "Draconian" New Penal Code* (2019). Other example can be seen at Amnesty International, 'Brunei Darussalam: Heinous Punishments to Become Law Next Week' <https://www.amnesty.org/en/latest/news/2019/03/brunei-darussalam-heinous-punishments-to-become-law-next-week/> accessed 13 July 2019.

[564] For the full speech, see Star TV, 'Brunei's Sultan says Gay Death Penalty will not be Enforced after Backlash' <https://www.youtube.com/watch?v=9WgnNus7rdA> accessed 13 July 2019.

drug offences, among which Iran represented the majority (3,975).[565] The commitment of drug-related offences such as manufacturing, importation, possessing or trafficking certain large amount of drugs is subjected to the death punishment in many countries, Iran, Singapore, Saudi Arabia and China for example.[566] In 2018, at least 149 people were sentenced to the death penalty for drug offences in at least 13 states, among which not less than 91 were executed.

The death penalty for drug offences is alleged to be a violation of international law. The international community has always taken a firm stand against it as the drug-related offences do not meet the threshold of the most serious crimes.[567] This has been acknowledged by the UN Secretary General, the Human rights Committee and the UN Office on Drugs and Crime have stressed the exclusion of drug offences from the death penalty.[568] Dating back to 1984, successive Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions have raised this issue. For example, Bacre Waly Ndiaye did conclude that economic crimes and drug-related offences do not belong to the most serious crimes and thus should be free from the death penalty.[569] Christof Heyns, in his report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, claimed that the use of the death penalty must be justified to be

[565] Harm Reduction International, *The Death Penalty for Drug Offences: Global Overview 2018* (2019). For the full report, see Giada Girelli, *The Death Penalty for Drug Offences: Global Overview 2018* (Harm Reduction International 2019).
[566] ibid
[567] UNCHR, 'Report by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, UN. Doc. A/HRC/10/44 (14 January 2009), para. 66.
[568] UNCHR, 'Concluding Observations of the Human Rights Committee: Thailand', CCPR/CO/84/THA (8 July 2005), para.14; UNCHR, 'Concluding Observations of the Human Rights Committee: Sudan', CCPR/C/SDN/CO/3 (29 August 2007), para. 19.
[569] UN Doc E/CN. 4/1997/60, para. 91; See also, Prokosch (n 537) 23-7.

proportionate to punish the most serious crimes that involve intentional killing.[570] As regard combating drug offence, all state efforts should be human rights based.[571] This conclusion has also been reaffirmed by the UN Secretary General in the state where the death penalty is still lawfully remained, 'it should not be imposed for drug-related offences and any other ordinary crime that does not meet the threshold of most serious crimes.'[572]

To sum up, as to the 'most serious crimes' phrase, which indicates a trend moving towards the death penalty abolition through restrictions. Although it is not indisputable, the concept *per se* is virtually the most frequently adopted standard to express the strong argument to strictly limit the use of the death penalty by reducing the number of crimes to which the death penalty is applicable. However, there has not been a clear and universally recognised scope of crimes. As can be seen from the above findings, although the threshold of 'intentional killing' is suggested, it has not been uniformly observed. The drug offence and adultery are just two highlighted examples.[573] Until the scope of the most serious crimes is widely agreed, it cannot come to a conclusion that the principle of the most serious crimes is universally accepted.

Under such circumstances, it has shown that customary rules are limiting the types of

[570] UNCHR, 'Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution Christof Heyns', UN. Doc. A/67/275 (9 August 2012), para. 66.
[571] ibid, para. 84.
[572] UNCHR, Report of the Secretary-General: Question of the death penalty, A/HRC/24/18 (1 July 2013), para. 78.
[573] Further examples of the violations of the most serious crimes standard could be found in UNCHR, 'Concluding Observations of the Human Rights Committee: Kenya' CCPR/C/KEN/CO/3 (31 August 2012), para.10; UNCHR, 'Concluding Observations of the Committee against Torture: Cuba CAT/C/CU/CO/2 (25 June 2012), para. 14.

crime for which the death penalty is appropriate and legitmate. Namely, the most serious crime. Yet the problem is that beyond that there is some disagreement on those crimes themselves. Therefore, it might not indicate sufficient evidence of state practice and *opinio juris* in ascertaining 'detailed customary rules' in this regard. Nevertheless, it has to admit that the driving force behind the most serious crime regulation is to 'lead retentionist countries along the path to the last stage before complete abolition is achieved.'[574]

3.4.2 Protected categories of offenders

In addition to defining the scope of the death penalty-punishable crime, prescribing certain categories of criminals against the imposition of the death penalty or its execution is another essential aspect of the death penalty regulation. It not just promotes the restrictive application of the death penalty pending the ultimate abolition, but also provides the vulnerable people with specific protections in criminal justice.[575] Children and juvenile offenders are widely accepted as a category of people that are protected against the death penalty. There has been a consistent practice of both the threshold of the age and the timing of assessing the age. In general, people under 18 years old at the time of commitment of the crime is broadly recognised as the threshold, while the person's age 'at the time of sentencing or at the time foreseen for carrying out the sentence' is irrelevant in this context.[576]

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[574] Hood and Hoyle, *The Death Penalty* (n 373) 154.
[575] ibid, 223.
[576] General Comment No. 36, para. 48.

The prohibition of imposing the death penalty on people under 18 years old has been acknowledged in major international human rights treaties. Recalling Article 6 (5) of *the ICCPR*, 'sentence of death shall not be imposed for crimes committed by persons below eighteen years of age…' A similar provision can also be found in *the Convention on the Rights of the Child*, which has been ratified by all states but the United States.[577] It contains the provision that goes along with the above standard. It stipulates that '[…]Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age.'[578] The Contracting Parties to the *American Convention on Human Rights* are also obliged to refrain from imposing the death penalty for crimes perpetrated by people who are under 18 years old.[579] The acceptance of this standard can also be found in several UN General Assembly Resolutions where a universal consensus has been established. The 18 years old threshold has been reaffirmed in the General Assembly's successive Resolutions on moratorium on the use of the death penalty.[580] Paragraph 3 of *the Safeguards* also states that 'persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death…'

In practice, states consistently adhere to this prohibition, although it cannot be denied

[577] See Un Treaty Collection, 'Chapter IV, 11' <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en> accessed 3 March 2019.
[578] UNCRC, Art 37(a).
[579] ACHR, Art 4(5).
[580] See A/RES/67/176, para.4 (c); A/RES/69/186, para.5 (d); A/RES/71/187, para.7 (d); A/RES/73/175 (n 325) para.7 (d).

that there are reports of juvenile execution in some jurisdictions, especially where Sharia law is applied.[581] For example, in Iran, Abolfazl Chezani Sharahi, who was sentenced to death for the convictions of murder committed when he was 15 years old, is due to be executed.[582] This is definitely a breach of the death penalty regulation and also international human rights law. However, the fact that some states may occasionally violate the rule of this prohibition will not affect the status of this rule *per se* in customary international law, as the majority of states have been consistently observed this rule. In brief, there is a strong argument that it is a rule of customary international law that children under 18 years old at the time of committing crime are protected against the death penalty.

Another category of person that is incontestably exempted from the death penalty is pregnant women. It is not defensible to say that the death penalty on pregnant women is utterly wiped out. For example, there was a case that a pregnant woman was accused of armed robbery and sentenced to death by a military court in the Democratic Republic of Congo, which was recorded almost 20 years ago.[583] In the Democratic Republic of North Korea, it is speculated and believed that some pregnant women are compelled to

[581] According to the report from Amnesty International, compared to the total number of executions, the use of the death penalty upon the crimes committed by people below 18 years old is much fewer, there are still some countries imposing or executing. Since 1990 more than 100 children or juvenile offenders were recorded being executed in states including Iran, Yemen, Sudan, Saudi Arabia, Pakistan and so forth. See Amnesty International, 'Executions of Juveniles since 1990 as of March 2018' <https://www.amnesty.org/download/Documents/ACT5038322016ENGLISH.pdf> accessed 11 October 2018.

[582] For further disclosure of the execution of children and juvenile offence in Iran, see UNCHR, *UN Rights Experts Call on Iran to Halt Execution of Second Juvenile Offender in as Many Weeks* (2018); UNCHR, *Zeid Urges Iran to Stop Violating International Law by Executing Juvenile Offenders* (2018); Amnesty International, *Growing Up on Death Row: The Death Penalty and Juvenile Offenders in Iran* (2016); Amnesty International, 'Iran: 17-Year-Old Boy at Risk of Imminent Execution' <https://www.amnesty.org/en/latest/news/2017/10/iran-17-year-old-boy-at-risk-of-imminent-execution/> accessed 8 October 2018.

[583] See E/CN.4/1999/39/Add. 1, para. 68.

have an abortion before the execution.[584] Despite the reported cases, in most retentionist states, it is indeed rare for pregnant women or mothers with a newborn baby to be sentenced to the death penalty or executed.[585] This has been widely acknowledged as a legally binding rule.

However, as pregnant is only a provisional status, which would be changed once the pregnant women delivered the infant, this point has been indicated from the difference of wording used concerning pregnant women, compared to the protection of children. For example, both the *ICCPR* and the *ACHR* specify that the death penalty shall not be 'imposed' on people under 18 years old when the crime is committed, while as to pregnant women, they use 'carried out' and 'applied' to pregnant women.[586] This leads to an ambiguous understanding as to whether the same 'prerogative exemption' should be given to the women just have given birth. The *Safeguards* No. 3 extends this category to mothers with newborn baby, which is gaining wide recognition, albeit the interpretation of the new mother is different in varying treaty bodies. For example, *the Arab Charter on Human Rights* provides new mothers with two years from the date of delivery with the protection against execution.[587]

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[584] International Federation for Human Rights, 'The Death Penalty in North Korea: In the Machinery of a Totalitarian State' (2012)

[585] *See* Cornell Center on the Death Penalty Worldwide, 'Women' <http://www.deathpenaltyworldwide.org/women.cfm> accessed 17 June 2017.

[586] See ICCPR, Art 6(5) and ACHR, Art 4(5).

[587] See Art 7 (2) of the Arab Charter on Human Rights: 'The death penalty shall not be inflicted on a pregnant woman prior to her delivery or on a nursing mother within two years from the date of her delivery; in all cases, the best interests of the infant shall be the primary consideration.' Furthermore, similar provisions are found in Article 76(3) of the Protocol Additional I to the 1949 Geneva Convention and Relating to the Protection of Victims of International Armed Conflicts and Article 6(4) of the Protocol Additional II to the 1949 Geneva Convention and Relating to the Protection of Victims of Non-International Armed Conflicts.

In addition to the above two types of persons, there are also debates regarding whether mental disable or insane people and person over contain age at the time of commitment should be categorically excluded from the potential death penalty.[588] Generally speaking, it seems that while considering the death penalty exception based on the personal status of the criminal, divergences inevitably come out in implementing and interpreting the above international rules. What is undoubtedly tenable is that certain categories of vulnerable persons are safeguarded against the death penalty, which is guaranteed in customary international law.

3.4.3 Procedural safeguards

There is no doubt that states that lawfully retain the death penalty have an obligation to ensure that the minimum procedural safeguards are properly complied within the administration of the death penalty. The observance of the procedural safeguards differentiates the lawful application of the death penalty from arbitrary deprivation of life.[589] This is not only required in capital trials but also the fundamental principle of criminal justice and is expected to be applied to all cases.[590] Procedural safeguards for those people facing the death penalty is particularly significant, given the irrevocable nature of the death penalty. Any absence of them or error at any stage of the death trial may lead to the irreparable consequence for all people involved. For such reasons, procedural safeguards, especially the right to a fair trial,[591] is one of the primary

[588] See Hood and Hoyle, *The Death Penalty* (n 373) 237-63.
[589] General Comment No.36, para. 41.
[590] Meron, Human Rights and Humanitarian Norms (n 495) 96, 'the core of a number of the due process guarantees stated in Article 14 of the Covenant have a strong claim to customary law status…'
[591] Procedural safeguards include but are not limited to the right of appeal, the right to pardon, clemency, or

concerns of international regulation of the death penalty, particularly considering the human rights protection of those people facing the capital trials.

The procedural safeguards have been long recognised. As confirmed in common Article 3 of the *Geneva Convention of 1949*, which has been universally ratified,[592] in the case of armed conflict of an non-international character, it is prohibited to pass sentences and carry out executions 'without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.'[593] There is no doubt that the above standard also applies to the international armed conflict and peacetime as 'a minimum yardstick'.[594] The details of these 'judicial guarantees' or procedural safeguards have since then been reiterated in a number of UN instruments and regional human rights treaties.[595] For example, Article 6 of the *ICCPR* does not set up provisions directly related to the right to a fair trial under Article 14. However, the Human Rights Committee has recognised that a series of guarantees under Article 14 are incorporated into Article 6 and applied to the death penalty cases.[596] For this reason, and by which the fair trial guarantees under Article 14 have attained the nature of non-derogation.[597] This means, it triggers

commutation of sentence and non-execution pending appeal or pardon.

[592] See ICRC, 'Treaties, States Parties and Commentaries' <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> accessed 20 July 2019.

[593] William Schabas, 'International Law and the Death Penalty: Reflecting or Promoting Change?' in Peter Hodgkinson and William Schabas (eds), *Capital Punishment: Strategies for Abolition* (CUP 2004) 54.

[594] *Nicaragua* case, para. 218.

[595] For example, See Art 6 of the ECHR. The ECtHR confirmed in *Öcalan v. Turkey* App no 46221/99 (ECtHR, 12 May 2015), para. 169. See also, Art 8 of the ACHR and the IACHR's opinion in *Fermín Ramírez v. Guatemala*, IACHR Judgement 20 June 2005, para. 79.

[596] General Comment No. 36, paras. 41-2. Rodley and Pollard (n 339) 306. '…an implied obligation not to execute convicted persons who have been denied the benefit of a fair trial must now be read into article 6 by way of ensuring that the deprivation of life not be arbitrary.'

[597] Jiang (n 369) 109; See General Comment No. 6, para. 1. According to Article 4(2) of the ICCPR, Article 6 is non-derogable, even 'in time of public emergency which threaten the life of the nation'. See General Comment

an implied obligation that the procedural guarantees prescribed in Article 14 of the *ICCPR* must be complied with in the imposition of the death penalty otherwise Article 6 of the *ICCPR* would be breached.[598]

It is virtually all UN Member States have accepted that the right to a fair trial should be respected in all death penalty cases as a matter of law, as clarified in *the Safeguards*:

> Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.[599]

In *the Implementation of the Safeguards,* the protection of the rights of those facing the death penalty is required to be strengthened, particularly in terms of defence and appeal. *The Safeguards 1996* further reaffirms that the retentionist states should ensure the people facing the death penalty with a fully guaranteed fair trial.[600] In the Resolution 2005/59 adopted by the UN Commission on Human Rights, all retentionist states are

No.36, para. 2 and General Comment No.29: Article 4: Derogations during a State of Emergency, para. 7.

[598] Rodley and Pollard (n 339) 300-1, 306. See *Little v. Jamaica*, Communication No. 283/l988, U.N. Doc. CCPR/C/43/D/283/l988 (1991), para. 8.6; *Abduali Ismatovich Kurbanov v. Tajikistan*, Communication No. 1096/2002, U.N.Doc. CCPR/C/79/D/1096/2002 (2003), para. 7.7.

[599] The *Safeguards*, para. 5.

[600] Economic and Social Council, Resolution 1996/15, Safeguards guaranteeing protection of the rights of those facing the death penalty, Art.3.

asked to impose the death penalty 'only pursuant to a final judgement rendered by an independent and impartial competent court, and to ensure the rights to a fair trial…'[601] The Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that

> [u]nder international law, the death penalty can only be carried out pursuant to a final judgement of a competent court and only applied to the most serious crimes. The possible safeguards given during legal process to ensure a fair trial in cases in which the death penalty might be imposed should be at least equal to those contained in article 14 of the Covenant.[602]

In the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, which reiterates the procedural regulation on applying the death penalty as the strict and non-derogable guarantee of those people facing the risk of the execution:

> [t]he death penalty is only lawful if imposed after a trial conducted in accordance with fair trial guarantees, including judicial independence, the right to counsel, an effective right to appeal, and the right not to be coerced or tortured to give evidence (A/HRC/11/2/Add.5). When a State's judicial system cannot ensure respect for fair trials, the Government should impose a moratorium on executions (A/HRC/11/2/Add.4, paras.

[601] See E/CN.4/RES/2005/59, para. 7(d).
[602] UNGA, Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/67/279, 9 August 2012, para. 60.

65 and 89).[603]

It has to admit that this is an extremely complicated issue since it involves the protection at all stages of the death penalty case, including a large variety of pre- and post-trial safeguards until the execution-related problems. Furthermore, it is normally very difficult to observe the explicit violation of these safeguards in the practice of those retentionist states. As Roger Hood and Carolyn Hoyle allege, no state would 'blatantly admit' that its failure to meet the universal standards while carrying out the death penalty.[604]

Nevertheless, as discussed in Section 3.2.3, the procedural flaws of the criminal systems, even the 'most advanced retentionist democracy in the world'[605], cannot be completely circumvented, which directly give rise to miscarriage of justice and many innocents being sentenced to death and executed. The gap between what is essentially required in international law and what retentionist states undertake in practice is distinctly apparent.[606] The non-observance of the procedural safeguards or inconsistencies of state practice in this regard are indeed relevant in determining the nature of those rules. To be precise, in practice, retentionist states' failure to adhere to the international standards of due process of law in terms of applying the death penalty is not uncommon.

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[603] UNCHR, Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, UN. Doc. A/HRC/14/24 (20 May 2010), para. 51(a).
[604] Hood and Hoyle, *The Death Penalty* (n 373) 266.
[605] ibid, 267.
[606] As Roger Hood and Carolyn Hoyle claim, 'there may be a wide gap between the aspirations of procedural law and the actual practices of a criminal justice system…' See ibid, 266.

A list of states including Cuba, Japan, Afghanistan, Iraq and Saudi Arabia was recorded in the breach of obligations under the fair trial provisions in the death penalty imposition.[607] Amnesty International also continually warns the seriousness of these issues and call for the cease of violations. For example, Ramin Hossein Panahi, an Iranian who was sentenced to death for his association with the armed Kurdish opposition group after an unfair trial on 16 January 2018, including being interrogated by torture and a number of breaches of procedural safeguards.[608] According to Amnesty International's annual report, in 2018, there were numerous recorded cases where the death penalty was imposed after an unfair trial.[609]

In summary, to a certain extent, procedural safeguards of those people facing the death penalty have been universally recognised, and it may reflect customary international law in general. As it has been repeated in various human rights agreements that have established the universal consensus as a legal requirement, and states have made successive commitment to undertake the protection in applying the death penalty and condemn violations of those rules by any others. However, since procedural safeguards entail a large number of requirements in the death penalty trials, a uniformed state practice could not be ascertained in every aspect of safeguards in detail.

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[607] A/HRC/24/18 (n 572) paras. 45-7.
[608] For the merits of the case and analysis, see Amnesty International, 'Kurdish Man Sentenced to Death Penalty after Unfair Trial' <https://www.amnesty.org/download/Documents/MDE1378272018ENGLISH.pdf> accessed 3 October 2018.
[609] Including Bangladesh, Belarus, China, Egypt, Iran, Iraq, Malaysia, North Korea, Pakistan, Saudi Arabia, Singapore and Viet Nam.

3.5 Conclusion

As Nigel Rodley explicitly suggested, 'to the limited extent that the death penalty may still be permitted, human rights are central to the legitimacy of its application in practice.'[610] It has to be admitted that there has been a growing trend toward the restriction of the death penalty, and international law has established an increasingly higher and more rigorous standard on the application of the death penalty both substantively and procedurally. Furthermore, international awareness of the death penalty abolition is on the rise, and international human rights law has made its attitude very clear as prohibiting the death penalty. Nevertheless, at this time, it is not hard to say that while an ever-greater number of states have abrogated the death penalty either in law or in practice, a majority of the world's population is potentially subject to it. More importantly, as well can see, the death penalty remains lawful in international law, albeit subject to regulation. Taking together the facts that the death penalty is still regularly carried out in a large number of states; there has not been a universal binding agreement that absolutely prohibits the death penalty, and there is no customary rule on the death penalty prohibition. In such situations, it is speculated that states hold their sovereign right to decide their criminal system, namely, whether to retain or abolish certain types of punishment, in the light of their own social circumstances.

However, it is essential to underline that such discretion of states is not unlimited. To be precise, the use of the death penalty should be in keeping with states' human rights

[610] Rodley, The Death Penalty as a Human Rights Issue (n 427) 213.

obligations derived from regional or international human rights treaties and those guaranteed by customary international law.[611] It is acknowledged that with the evolution of international law, especially international human rights law, states remaining the death penalty have increasing obligations with respect to the use of the death penalty in many ways. Although there are universal standards existing in international law, at least in international human rights treaties, the regulation of the death penalty is interpreted diversely from one retentionist state to the other, and the respect and adherence to the requirements of those safeguards are far from consistent. Under such circumstances, it is undoubtedly impractical to ask all retentionist states to abolish the death penalty. Instead, the critical point at this stage should be how to guarantee the application of the death penalty is sufficiently regulated. What the retentionist states are required is to improve the way they impose and carry out the death penalty substantively and procedurally and ensure the international minimum standard of procedural safeguards is secured to the largest extent. For example, abolishing the death penalty for those non-violent crimes or crimes do not meet the 'most serious crime' standard. This would partly circumvent the death penalty—extradition dilemma, particularly involving economic crimes in the global anti-corruption campaign initiated by the Chinese government.

Based on these accounts, it is conclusive to say that the argument proposed in this thesis for the revision of the ECtHR's standard is not inhibited by general international law.

[611] UNGA, High-Level Panel Discussion on the Question of the Death Penalty. Report of the United Nations High Commissioner for Human Rights. UN Doc. A/HRC/30/21 (16 July 2015), paras. 25-6.

It would seem to be perfectly compatible with international law that extraditing individuals to retentionist states should not always be unlawful, so long as the discussed regulation could be guaranteed. This brings about the concept of the lawful application of the death penalty or the qualification to the death penalty in international law. Against this context, next chapter will look at the European standard on extradition to a retentionist sate in a more critical way and then argue that standard should, and could be changed, by employing the margin of appreciation doctrine to a greater scale.

4. Reconsidering the ECtHR's Standard on the Death Penalty in Extradition

It has been over two decades since the death penalty was last used within the Council of Europe where the abolitionist campaign has gained prevailing concerns. However, the controversy is continuing both in and outside of the Council of Europe. Chapter 3 has looked at the lawfulness of the death penalty *per se* in international law as well as its regulation, and this chapter will target at the impact of the conclusion that has reached in the context of requesting extradition by retentionist states. As has been discussed earlier, the death penalty is not prohibited by any universal treaty nor by customary international law—although there was clear evidence of restrictions regulating its imposition and execution. That is to say, lawful application of the death penalty still remains a customary international law exception to the right to life. Therefore, in the view of this thesis, the death penalty should not be an absolute barrier to extradition as long as the requesting state observes the rules regulating its application.

Given that Chapter 3 has shown that there is no universal international legal prohibition on the death penalty, when the ECtHR prohibits extradition of people to face the death penalty without any exception, the Court is in effect exporting a non-universal standard. This chapter argues that a more flexible approach could be adopted so as to promote transnational criminal cooperation. The most detailed analysis in this chapter will be on the European approach, although the previous chapters focus on the death penalty in

international law and other regional instruments. The overall purpose of both this chapter and the whole thesis is to enhance the international judicial cooperation by finding a way in which the discord between abolitionist states, particularly the European states, and retentionist states may be dealt with. In other words, extraditing to retentionist states where the extraditee may face the death penalty should, and could be possible. While the main emphasis in this chapter will be placed on the Council of Europe and the European Court of Human Rights, nonetheless, that is not to say the role and contribution of the European Union and the Court of Justice of the European Union to the abolition in the European continent can be overlooked.[612]

4.1 Exportation of the European standard

4.1.1 The prohibition of the death penalty in the Council of Europe

It is demonstrated that while the Council of Europe was founded and the *ECHR* was drafted and open for signature over half a century ago, the death penalty was not prohibited by the majority of states. Article 2 of the *ECHR* indeed left room for 'the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'[613] It is thus argued that, as have been discussed in the previous chapter, the death penalty was accepted as a lawful exception to the right to life within the *ECHR* framework *per se* at that certain period of time. However, along with the evolution of human rights law as well as the state practice of the *de facto* and

[612] For example, see Charter of Fundamental Rights of the European Union, Art 2(2), and Article 19(2) provides that '[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty'.
[613] ECHR, Article 2(1).

de jure abolition within the Council of Europe and beyond, the abolition of the death penalty has become one of the Council's top priorities. A series of significant cases and the establishment of Protocols have gradually pushed forward the death penalty to be completely abolished in all circumstances.[614] It should acknowledge that the continuing efforts made by the Council of Europe and its Member States to the abolition have made the death penalty prohibition being an accepted legal rule and political policy,[615] which enshrined one of the most important values that underlying the construction of the Council of Europe. Namely, human rights, democracy and the rule of law.[616] There is little doubt that the Council of Europe makes significant contributions to the abolition in Europe. It has indeed achieved the goal of making a *de facto* death penalty-free area covering 47 Member States in total and approximately 830 million people. More specially, from the legal perspective, Protocols No.6 and No.13 to the Convention have in effect amended the Article 2 as prohibiting the death penalty in all circumstances so that there is no longer any room for considering the use of the death penalty under the Convention framework.[617] Specifically, Protocol No.6 was the first international legally binding instrument with the obligation to abolish the death penalty in peacetime. All Member States of the Council of Europe but Russia[618] have ratified the Protocol. About twenty years later in 2002, the Council of Europe made the 'final step'[619] toward the ultimate abolition by adopting the Protocol No.13 to the

[614] See Council of Europe, 'The ECHR and the Death Penalty: A Timeline' <https://www.coe.int/en/web/portal/death-penalty> accessed 7 July 2019.
[615] For a full discussion on the abolition of the death penalty in European human rights law, see Schabas, *The Abolition of the Death Penalty* (n 444) Chapter 7.
[616] Council of Europe*, Death is not Justice* (n 400).
[617] Council of Europe, *Guide on Case-Law of the European Concention on Human Rights: Immigration* (2020) 21.
[618] The Russian Federation actually has implemented a moratorium on executions since 1996.
[619] Protocol No.13, Preamble.

ECHR in which the death penalty was required to be abrogated in all circumstances 'including for acts committed in time of war or of imminent threat of war.'[620] The Thirteenth Protocol has to date been signed by 45 Contracting Parties and ratified by 44 except Russia, Azerbaijan and Armenia.[621]

Furthermore, the Council of Europe has promoted the death penalty abolition by imposing political pressure on the third states where the death penalty is possible. On the one hand, the Parliament Assembly has declared its unswerving stance against the death penalty by making the abolition of the death penalty or establishing an immediate moratorium on execution as the prerequisite for gaining the membership of the organisation since 1994.[622] This is particularly influential on those states which are keen to join the organisation for the political and economic benefits.[623] On the other hand, the Parliamentary Assembly of the Council of Europe has restated its opposition to the death penalty through stimulating the complete abolition or moratorium on executions upon the Observer States,[624] particularly the United States of America and Japan where the death penalty is still in lawful application.[625] Those Observer States are expected to share the same ideals and values with the Council of Europe and make

[620] Explanatory Report to Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, 2002.
[621] See Council of Europe, 'Chart of Signatures and Ratifications of Treaty 187' <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p_auth=aj0dVuFz> accessed 7 October 2019.
[622] Renate Wohlwend, 'The Efforts of the Parliamentary Assembly of the Council of Europe' in The Council of Europe (ed), *The death penalty: Abolition in Europe* (Council of Europe Publishing 1999) 55, 83.
[623] Hood and Hoyle, *The Death Penalty* (n 373) 30.
[624] Including Canada, the Holy See, Japan, Mexico and the United States of America. For example, 'the Council of Europe has made numerous resolutions critical of Japan, even threatening to take away its observer status. However, Japan has… openly and without much (if any) political damage continued to carry out execution.' See Sato, Vox Populi (n 420) 251.
[625] The Death Penalty in Council of Europe Member and Observer States: A Violation of Human Rights, Report on the Committee on Legal Affairs and Human Rights by Rapporteur Renate Wohlwend, Doc. 12456, 3 January 2011.

commitment to respect for human rights, uphold democracy and the rule of law.[626] Till today, Europe's unshakable adherence to the death penalty abolition has been expressly clarified in different legal and political occasions, despite the existence of disputes and disagreements especially in the context of international cooperation with the states outside Europe.

4.1.2 The development of the ECtHR's standard on the death penalty in extradition

Currently, the absolute objection to the death penalty is not only embodied in various legal instruments, but also, we shall see in this section that the contemporary jurisprudence of the European Court of Human Rights recognises that extradition to a retentionist state implicates the requested state's human rights obligation under both Article 2 and Article 3, in relation to not only the death penalty itself but also various aspects of its application.

Nevertheless, the European standpoint on the death penalty in extradition was not invariable. While the *ECHR* was drafted and came into force seventy years ago, and in its early stage of development, the death penalty was neither a breach of international law nor European human rights law. The death penalty was shielded within the explicit exception in Article 2(1) and thus, was not an absolutely proscriptive issue in the jurisprudence of the ECtHR. Since then, the ECtHR's case law in this regard has developed in such a way from very permissive to very prohibitive, endorsed by a

[626] Statutory Resolution No. (93) 26 on observer status, adopted by the Committee of Ministers on 14 May 1993 at its 92nd Session.

number of landmark cases. However, there is a way of relaxing it in theory. That is to say, there is room for some flexibilities that could, although probably will not be accepted, to permit extradition to the death penalty.

In *Ernest Major Kirkwood v. the United Kingdom* case,[627] which concerns the extradition of the applicant from the United Kingdom to the United States. Kirkwood was requested on murder charges that would be punishable by the death penalty in California, the US. Although the US government provided an assurance against the death penalty, it was argued that such assurance was not sufficiently enforceable upon the local authorities who were competent to determine the imposition of the death penalty. Thus, Kirkwood claimed that if extradited, he was highly likely to be convicted and punished by death. Although he did not directly argue the possible death penalty itself violated the Convention (Article 3), he claimed that 'circumstances surrounding the implementation of such a death penalty' constituted the breach of Article 3, including the unexceptional delay of the death penalty cases in California and the suffering in the death row.

At the time around *Kirkwood* case, it was not explicit that extradition of a person to a state to face the death penalty would in itself violate Article 2 or Article 3. As the UK government maintained, 'the second sentence of Article 2(1) of the Convention expressively provides for the imposition of the death penalty by a court, following

[627] *Kirkwood v. The United Kingdom* App no 10479/83 (Commission Decision, 12 March 1984).

conviction for a crime for which that penalty is provided by law.'[628] The European Commission on Human Rights set out that Article 2(1) 'expressly recognises the ending of life through the death penalty following appropriate criminal conviction'.[629] As for the assurance against the imposition or execution, the Commission held that it 'cannot be expressly or implicitly required by the terms of Article 3.'[630] Despite the above concession, the Commission firstly held that the way that the death penalty is carried out could raise issues under Article 3 regarding the prohibition of torture and other ill-treatment.[631] This case was eventually declared inadmissible because of the lack of sufficient evidence upon the death row constituting the mistreatment outlawed by Article 3. Therefore, the extradition was not prohibited either on Article 2 or Article 3 grounds. However, it certainly proved that it could, while *Soering* case made this a step further by substantiating it in the Court's judgment.

As Cherif Bassiouni described, starting from the adoption of the aforementioned Protocol No.6 in 1983, the death penalty has been 'continually scaled back',[632] and the Court's standard on extraditing fugitives sought for capital offences has evolved with particularly increasing rigour since the *Soering* case in 1989. *Soering v, the United Kingdom* case[633] was deemed as one of the most important cases in extradition law as

[628] ibid, para. 183.
[629] ibid, paras. 188-90.
[630] ibid.
[631] The Commission stated that 'notwithstanding the terms of Article 2(1), it cannot be excluded that the circumstances surrounding the protection of one of other rights contained in the Convention might give rise to an issue under Article 3.' ibid, para. 184.
[632] Bassiouni, *International Extradition* (n 8) 601.
[633] *Soering v. The United Kingdom* App no 14038/88 (ECtHR, 07 July 1989).

the first milestone in the evolving relationship of extradition and the death penalty.[634] It expressly opened the 'Pandora's box'[635] for the discussion on State Parties' responsibility of extraditing an individual to another state where there is a foreseeable risk of violations of his Convention rights. As Matthew Bloom asserts, 'the legacy of the *Soering* case is that a requested state should take into account the human rights practices of the requesting state, as well as its own obligations under international human rights law, when deciding whether to extradite.'[636]

This case has been richly analysed in literature and only a very brief summary will suffice the purpose of depicting the evolvement of the Court's stance regarding extradition and the death penalty. Soering, a German national, who was charged with killing his girlfriend's parents in Virginia, the US in March 1985 and then fled to the UK where he was detained in custody. The extradition request upon him from the US was contested by the applicant mainly based on Article 3 of the *ECHR*. He argued that, as the crime with which he was charged was punishable by the death penalty, the extradition would unavoidably expose him to a long-term death row in extreme conditions in Virginia, which would constitute cruel, inhuman and degrading treatment or punishment in breach of Article 3. The ECtHR finally endorsed this claim and stated that upon extradition, Soering would be subjected to a six to eight years suffering in death row, where the threats of homosexual abuse, physical attack and other extremely

634 Van Der Wilt, Après Soering (n 277) 54-5; Dugard and Van Den Wyngaert (n 3).
635 Van Den Wyngaert (n 47) 757-79.
636 Matthew Bloom, 'A Comparative Analysis of the United States's Response to Extradition Requests from China Note' (2008) 31 Yale Journal of International Law 187.

inhuman and degrading treatment were also highly possible,[637] which was by no means compatible with Article 3.

It is noteworthy that in this case, it was not the death penalty *per se* that violated the UK's Convention obligation, for which the extradition should be prohibited. At this time, although Protocol 6 had entered in force, the death penalty was not totally abolished within the Council of Europe, at least not *de jure*.[638] In this case, it was not about Article 2 and the death penalty. Instead, it was a series of auxiliary factors to carrying out the death penalty that amount to the breach of Article 3 and thus made the extradition unlawful in the context of the Convention.[639]

Since *Soering* case, substantial reforms have taken place and twenty years later in the case of *Al-Saadoon and Mufdhi v. the United Kingdom*, the Court's attitude toward the same issue was completely changed. We have already seen, particularly in the above two cases, that Article 3 of the *ECHR* may be brought to bear on the regulation of the death penalty, including the so-called 'death row phenomenon' and inhumane means of execution. As for the Article 2, in the following discussion, we shall see that the ECtHR has now expressly found that imposition of the death penalty, in principle, is no longer accommodated by the provision of the right to life under Article 2. The essential point

[637] This claim was opposed by the UK because it believed that the assurance it gained from the US was capable to prevent those risks from happening. However, similar to the situations in Kirkwood case, the possibility of enforcement of such assurance given by the US government was doubted and debatable.
[638] At the time of the final judgment of *Soering* case (01 July 1989), only 13 Contracting Parties (Austria, Denmark, France, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, San Marino, Spain, Sweden and Switzerland, Germany ratified on 05 July 1989 but it came into force on 01 August 1989) had ratified the Sixth Protocol not including the UK.
[639] Van Den Wyngaert (n 47) 768.

of this issue is that the death penalty exception to Article 2 is obsolete and should be interpreted to be replaced by the abolitionist provision, considering the above-mentioned considerable 'progress' toward abolition since 1950 and the fact that Europe has been an abolitionist region in law and in practice. In this regard, one of the landmark cases from the jurisprudence of the ECtHR is *Al-Saadoon and Mufdhi v. the United Kingdom* case, which is far-reaching because it is the first case that confirms the exception clause in Article 2 is no longer able to justify the death penalty. The second sentence of Article 2 (1) is no longer to stand in the way of interpreting that the death penalty is in breach of Article 3.[640] Nevertheless, it should be stressed that prohibiting the death penalty within the Council of Europe (the *ECHR*) is one thing, but the case law on non-extradition to retentionist states is quite another, which is particularly problematic in this new context of globalised criminality. The examination in this regard will be expanded in the rest of this chapter. Before doing so, I will look in more details at *Al-Saadoon and Mufdhi* case.

In *Al-Saadoon and Mufdhi* case, the Court explicitly stressed the prohibition of the death penalty in all circumstances. More importantly, the Court clarified that states are engaged with the obligation not to extradite or expel people from their jurisdiction to states where they are facing a real risk of the death penalty.[641] It expressly held that the above obligation is based on the Article 2 of the *ECHR per se*, unlike it did in *Soering* case by focusing on whether the risk of suffering the death row phenomenon would

[640] *Al-Saadoon and Mufdhi* case, para. 120.
[641] ibid, para. 123.

breach the protection given under Article 3. Against this background, it is indicated that in such extradition or deportation cases where the individual concerned is subjected to the death penalty in the receiving state, the requested or deporting state' responsibility under both Articles 2 and 3 are directly engaged.[642]

This case mainly concerned the issue of whether the transfer of two Iraqi nationals from the British-run detention Centre to Iraqi authorities would amount to the violation of their Convention rights. Al-Saadoon and Mufdhi were arrested by British forces and detained under the British control, for the charge of killing two British soldiers stationed in Iraq in 2003. The case was subsequently transferred to the Iraqi criminal courts (the Basra Criminal Court and the Iraqi High Tribunal) where the offences constituted war crimes and were punishable of the death penalty. The applicants complained that their transfer to the Iraqi authorities from the British forces without obtaining binding and sufficient assurances would put them at the foreseeable risk of the death penalty,[643] which ran counter to the Articles 2 and 3 of the *ECHR* as well as Article 1 of Protocol No.13 that the UK had ratified in 2003.

Concerning the progress toward the complete *de jure* or *de facto* abolition of the death penalty within the Council of Europe, the Court established that

> the right under Article 1 of Protocol No. 13 not to be subjected to the death penalty, which

[642] ibid, paras. 123-5.
[643] ibid, para. 101.

> admits of no derogation and applies in all circumstances, ranks along with the rights in Articles 2 and 3 as a fundamental right, enshrining one of the basic values of the democratic societies making up the Council of Europe.[644]

Against this background, the Court put forward the 'right to be free from the death penalty' at first and then further established that the death penalty inevitably

> involves the deliberate and premeditated destruction of a human being by the State authorities. Whatever the method of execution, the extinction of life involves some physical pain. In addition, the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering.[645]

Therefore, the Court notably established that the death penalty *per se* is inhuman and degrading, which contravenes the protection under Article 3 of the Convention. That is to say, the death penalty is prohibited on the grounds of both Articles 2 and 3 of the Convention.[646]

The UK government argued that it referred the case to the Iraqi courts was primarily attributed to the fact that the UK forces were physically presenting upon the territory

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644 ibid, para. 118.
645 ibid, para. 115.
646 It should be noted that according to the Court' final decision (paras. 144-5), as there was a violation of Article 3, it was not necessary to decide whether there was a violation of Article 2. Namely, the Court in this decision held the provision in Article 2 no longer permit the death penalty but did not go as far as to explicitly state that death penalty violates Article 2. In Marko Milanovic's opinion, it can only implied that the death penalty in this case constituted a violation of Article 2. See Marko Milanovic, *Al-Saadoon and Mufdhi Merits Judgment* (EJIL: Talk! 2010).

of Iraq and it 'had no option other than to transfer the applicants. It was operating in foreign sovereign State which was demanding the applicants' return.'[647] In response, the Court declared that the UK should not 'enter into an agreement with another State which conflicts with its obligations under the Convention.'[648] In other words, states' obligation in the context of international judicial cooperation should be in accordance with their human rights obligations under Articles 2 and 3 of the *ECHR* and Article 1 of Protocol No. 13. In the present case, before the referral decision was made and the physical transfer of the applicants was taken, the UK government did not attempt to secure the applicants' Convention rights by either purposing an alternative agreement or seeking any assurances from Iraq against the death penalty upon the applicants. The latter was not deemed as infringing the sovereign interests of Iraq.

Consequently, as concluded from this case, the evolution in the past decades since *Soering* case in 1989, evidenced by the fact that the death penalty is virtually eradicated from the jurisdiction of the Council of Europe, strongly indicating that the European consensus against the death penalty in all circumstance has been built up, and Article 2 of the *ECHR* was no longer appropriate to justify the lawful application of the death penalty. European states refusing to extradite to states where the death penalty is still potentially imposed is regarded as an approach to deliver a strong message that the death penalty is firmly opposed in Europe.

[647] *Al-Saadoon and Mufdhi* case, para. 112.
[648] ibid, para. 138.

However, no matter what basis upon which the UK government decided to refer the case to the Iraqi courts without seeking any assurances, it shown that the UK felt it was obliged to cooperate with the sovereign authorities of Iraq to surrender the prisoners, whatever the UK's view of the death penalty. This is indeed the powerful evidence that even within the Council of Europe, some Member States' views on the death penalty are not aligned with those of the Council of Europe itself or the European Court of Human Rights. More specifically, the UK authorities were aware of the availability of the death penalty in Iraqi law and the possibility of the imposition against the applicant upon their transfer and conviction.[649] Nevertheless, it did not make any attempt to eliminate the risk of the death penalty; no assurances were sought or given against the use of the death penalty upon the applicants.[650] In the opinion of the UK government, although itself had put an end to the death penalty, its application by Iraqi authorities was not prohibited in international law.[651] Therefore, it cannot be taken as justification for 'refusing to comply with its obligation under international law to surrender Iraqi nationals, detained at the request of the Iraqi courts, to those courts for trial.'[652]

The reconstruction and confirmation of the ECtHR's approach in *Al-Saadoon and Mufdhi* case made the Court's standard on assessing the States Parties' obligation to protect the people against the death penalty in extradition cases much clearer and more straightforward. Nevertheless, the above standard is not in compliance with general

649 ibid, paras. 133-5.
650 ibid, paras. 141-2.
651 ibid, para. 110.
652 ibid, paras. 141-2.

international law discussed in Chapter 3.

In the recent case of *A.L. (X.W.) v. Russia*,[653] the applicant A.L.[654] was arrested and detained in Russia in 2014 and wanted by the Chinese government for his suspicion of murdering a Chinese police officer in 1996 and thus, facing a capital trial if he was returned to China. China was intended to file an extradition request to Russia at first, but eventually withdrew the request.[655] Nevertheless, having considered several related factors, [656] Russia determined that his presence was undesirable due to his dangerousness to the public order and security. He was thus subject to an exclusion order,[657] and the threat of deportation in the event of non-compliance with that order within a certain time limit.[658] Although this case was essentially about deportation rather than extradition, the issues are of particular relevance for this thesis.

A.L. complained that although China had withdrawn the extradition request for bringing him back, the exclusion order issued by Russia was a *de facto* deportation order or disguised extradition, considering his passport had been seized by the Russian authorities, and he had no other valid identification to get to another country other than China once leaving Russia. A.L. claimed his potential risks of human rights violations

653 *A.L. (X.W.) v. Russia* App no 44095/14 (ECtHR, 29 October 2015).
654 The nationality of the applicant was in dispute as the applicant claimed his is Russian, while the Russia government affirmed that he was a Chinese national with a real name of X.W., and his Russian passport was unlawfully obtained.
655 The withdrawal was attributed to the fact that the Chinese government's failure of submitting the official extradition request within the time limit set in the bilateral extradition between China and Russia came into force in 1997, but further information on the reason is difficulty to obtain. See *A.L.* case, para. 9.
656 ibid, paras. 21,59
657 ibid, paras. 21, 49, 59.
658 ibid, para. 19.

upon return to China had never been assessed by the Russian authorities, which was in breach of Russia's obligation under Articles 2 and 3 of the *ECHR*.[659] The Court followed and reiterated its decision in *Al-Saadoon and Mufdhi v. the United Kingdom* case that the death penalty clause under Article 2 of the *ECHR* has been amended by Protocols Nos. 6 and 13 and the death penalty was not acceptable and lawful within the Convention.[660] This decision unequivocally applied to Russia as the member of the *ECHR*, even though it had not ratified Protocols Nos. 6 and 13.[661] Considering Russia's undertaking to abolish the death penalty as the precondition on becoming a Member State of the Council of Europe, and a *de facto* moratorium on the execution which was affirmed constitutionally, Russia is, according to the Court, under 'an obligation not to extradite or deport an individual to another State where there exist substantial grounds for believing that he or she would face a real risk of being subjected to the death penalty there.'[662]

In this case, the Court observed that Russia did not sufficiently assess the applicant's risk of the death penalty in China followed by the exclusion order. The Court agreed with the applicant that, under the circumstances, the exclusion order would actually result in his forcible return to China, where he was almost certain to stand trial for the crime that is punishable by the death penalty. Therefore, the Court concluded that the applicant's forcible return to China would give rise to Russia's violation of its obligation

[659] There was also an alleged violation of Article 3 regarding the conditions of Mr. A.L.'s detention. See ibid, paras. 68-91.
[660] ibid, para. 64.
[661] Ibid.
[662] ibid.

under Articles 2 and 3 of the Convention.[663]

It is important to point out that this case again shows that, in practice, there are state governments and authorities not committed to preventing the exposure of people to the death penalty. More specifically, the Court found that the Russian courts simply did not consider whether A.L. would be exposed to the death penalty in China.[664] Instead, they presented a flimsy argument that A.L. could have used his Chinese passport to move to a third state.[665] In other words, whilst the Russian authorities may not have been particularly enthusiastic about sending A.L. to potentially face the death penalty they were at least ambivalent about it. This can be seen from the facts that the final exclusion order against A.L. was actually issued after the failure of extraditing A.L. to China, and the attempt to send A.L. to China was via administrate manner.[666]

In addition to this conclusion, there is another notable issue in this case, which is likely to be overlooked. The *A.L.* case indicates and actually materialises the difficulty that the Chinese authorities are facing in the context of international criminal cooperation. As rendered in the Court's judgment, A.L. did not deny the facts that give rise to the exclusion order, which includes the suspicion of murder.[667] In order words, China's interests in pursuing A.L.'s return was convincing, appropriate and lawful. However,

[663] ibid, paras. 64-6.
[664] ibid, para. 65. However, the Russian government claimed the domestic courts had made the assessment of A.L.'s potential ill-treatment upon return to China but it was not accepted. See ibid, para. 58.
[665] ibid, para. 24.
[666] ibid, paras. 7-24.
[667] ibid, para. 21.

even if the Chinese authorities make a legitimate extradition request on time, they would not bring the suspect back to China. In fact, in this case, no matter what methods were taken, his return to China would be impeded on human rights grounds, specifically the right to life under Articles 2 and 3. This can be understood that prioritizing A.L.'s human rights protection against the death penalty would directly make China's interests of pursuing justice and combating crime into a deadlock until certain assurances could be provided and accepted.

To sum up, what we can get from the above development path is that, under the current framework, the States Parties are not allowed to put any individual at a foreseeable risk of the death penalty in any territorial, irrespective of the legitimacy of the death penalty in general international law and the criminal system of the receiving state. Nonetheless, while these cases show that the ECtHR has become very clear in its standard, the cases would never have arisen in the first place if all European states at all times had an absolute commitment to preventing people from facing the death penalty. It has to concede that these two cases are outliers but significant nonetheless, as they reinforce that there may be different opinions between the Member States and the Council of Europe and its organs, which will be further discussed in this chapter. However, before doing that, we shall first examine the use of assurances about non-implementation of the death penalty. It is argued that the Member States are under an implied obligation to request sufficient and enforceable warranty against the death penalty. That is to say, such assurances serve as the bridge that meets the gap between the abolitionist states

from the Council of Europe and the retentionist states beyond the jurisdiction of the *ECHR*.

4.1.3 The use of assurances

Considering there is not usually a margin of appreciation given to the abolitionist state to assess the extradition request from a retentionist state, seeking an assurance that the death penalty will not be imposed or executed upon the fugitive's return has become a generally accepted approach.[668] Notably, it is the only 'workable' approach at this stage. From this perspective, resorting to the assurances itself indicates that the precedence of human rights concerns over extradition whenever the conflict arises. Actually, the role of assurances is not limited to the death penalty cases. Instead, it is one of the conventional approaches by which the requested state responds to the potential risk of human rights violation in the requesting state so as to circumvent its human rights obligations.[669] It should be noted that the European standard on prohibiting the extradition to states where the death penalty is available should not be understood as the Council of Europe refuses or is unwilling to participate in the international judicial cooperation via transfer criminals to retentionist states. In essence, the use of assurances is for the purpose of facilitating the extradition process in combating crime without any

[668] It should be noted that the use of assurances cannot bridge the gap between abolitionist states and retentionist states in all circumstances in international criminal cooperation. Taking China for example, the death penalty has been one of the preliminary barriers to China's negotiation of the extradition treaty with some of the Western states, which means, there is no such legal basis to consider whether or not the assurance would be provided by China in extradition case, because there is no such extradition case at all. In this section, we only consider the situation in which the abolitionist state is willing to conclude extradition treaty with retentionist states and proceeding to individual cases to seek for assurances.

[669] For example, the use of assurances in cases involving either Article 3 or Article 6 is more complicated and controversial than the use in relation to the death penalty, as they are very hard to monitor. See Van Der Wilt, On the hierarchy (n 274) 164-5, 174.

concerns about the extraditee's human rights risks. As a matter of fact, the use of assurance is regarded as a means which follows that European policy on the absolute exclusion of the death penalty by expressly clearing any risk that the person could be sentenced to death or executed upon extradition. That is to say, obtaining assurances and ensuring it will be well fulfiled is a way by which the European states to circumvent their obligation under the *ECHR*, preventing from either applying the death penalty on their own or assisting the use of the death penalty by extraditing individuals to other retentionist states to face the death penalty. For this reason, such assurances, in specific extradition cases, are not only considered as a compromise from the retentionist states, but also often seen as a win-win solution which meets the demand of both the European values and the enforcement of the international criminal cooperation.

Coming down to the rationale and role of the assurance, which are undoubtedly profound. In essence, the use of assurances enables the requested state to fulfil its treaty obligation to extradite without engaging with its obligations stemming from human rights treaties.[670] In other words, it is a kind of undertaking that guarantees the conflict would not substantiate in the context of extradition. Harmen van der wilt regards the use of assurances as a technique of 'conflict avoidance'.[671] Since the inevitable conflicts between extradition and human rights obligations would compel states to give up one of its obligations, which is states attempt to avoid in practice.

[670] Yves Haeck and Salvatore Fabio Nicolosi, 'Diplomatic Assurances' (2018) MPEPIL 2174.
[671] Van Der Wilt, On the hierarchy (n 274) 164.

In the case of *Rrapo v. Albania*,[672] based on the bilateral extradition treaty,[673] an Albanian and American national Almir Rrapo was requested to be extradited from Albania to stand trial at the United States District Court for the Southern District of New York, where he had been charged with the capital offence.[674] Rrapo complained that his right under Article 2 would be infringed as a direct consequence of extradition to the US and the assurances provided via diplomatic notes could not sufficiently guarantee his protection against the foreseeable death penalty.[675] Considering the assurances provided by the United States Embassy via diplomatic notes on 8 November 2010, 24 February 2011 and 18 May 2011,[676] the Court held that the death penalty would not be sentenced or carried out against Rrapo on his extraditable charges. Therefore, his right to life would not be in danger upon extradition.[677] The ECtHR reiterated its standpoint in *Al-Saadoon and Mufdhi v. The United Kingdom* case that

> Article 2 of the Convention and Article 1 of Protocol No. 13 prohibit the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there.[678]

Concerning the authorisation of the detention from Albanian domestic courts including

672 *Rrapo v. Albania* App no. 58555/10 (ECtHR, 25 September 2012).
673 ibid, para. 56.
674 ibid, para. 11.
675 ibid, para. 66.
676 ibid, paras. 19, 27-8.
677 ibid, paras. 70-4.
678 ibid, para. 69.

the Tirana District Court, the Tirana Court of Appeal and the Supreme Court, the ECtHR stated that

> […]for whatever reason, it should not detain individuals with a view to extraditing them to stand trial on capital charges or in any other way subjecting individuals within its jurisdiction to a real risk of being sentenced to the death penalty and executed (reference omitted), unless sufficient and binding assurances were sought and obtained from the responsible authorities of the requesting State.[679]

In other words, in the present case, there would have been a violation of Article 2 and 3 of the *ECHR* and Article 1 of Protocol No.13 by extraditing people to face the death penalty. It was the non-execution assurance that circumvented the Albanian authorities from the breach of its Convention obligation under Articles 2 and 3. Regarding the assessment of the credibility and enforceability of the assurances given by the US in this case, a number of factors should be taken into account, particularly the context of the reinforced use of extradition. The ECtHR found that

> the assurances given by the United States Government were specific, clear and unequivocal. […] In the context of an extradition request, there have been no reported breaches of an assurance given by the United States Government to a Contracting State. The United States long-term interest in honouring its extradition commitments alone

[679] ibid, para. 70.

would be sufficient to give rise to a presumption of good faith against any risk of a breach of those assurances.[680]

On the whole, there is strong evidence to affirm that the risk of being subjected to the death penalty would be cleared up and Rrapo's right to life could be well safeguarded based on the given undertaking.[681]

Similar points could also be drawn from the case of *Harkins and Edwards v. the United Kingdom*,[682] which concerned two applicants who were accused of murder and other violent offences[683] and arrested in the UK. The two applicants complained against their extradition to the United States,[684] where they both alleged that the extradition would put them to the risk of the death penalty or life imprisonment without parole for the crime they were accused.[685] Both of the complaints with respect to the death penalty were rejected as 'manifestly ill-founded'.[686] According to the Court's assessment, the assurance given by the United States had sufficiently removed the applicants' risk of being subjected to the death penalty upon extradition to the United States. More importantly, in the context of international judicial cooperation, a presumption of good faith should be taken considering the United States' 'long history of respect for

[680] ibid, para. 73.
[681] Nevertheless, there was a violation of Article 34 of the *ECHR* for Albania's non-observance of the interim measure, see ibid, paras. 75-88.
[682] *Harkins and Edwards v. The United Kingdom* App nos 9146/07, 32650/07 (ECtHR, 17 January 2012).
[683] ibid, paras. 6, 23-4.
[684] Based on the bilateral extradition treaty (para. 33), the US requested the extradition of Harkins and Edwards from the UK in 2003 and 2007 respectively, providing a series of assurances that the death penalty would not be applied in the two cases. See ibid, paras. 7, 9, 12, 14, 25-6, 28.
[685] For the purpose of this thesis, only the alleged risk of the death penalty upon extradition to the US is discussed.
[686] *Harkins and Edwards* case, paras. 86, 91.

democracy, human rights and the rule of law, and which has longstanding extradition arrangements with the Contracting States'.[687]

Conflicts between a state's treaty-based obligation to extradition and obligations under human rights treaties 'emerge whenever the requested person, after been surrendered, faces a real risk that his or her rights will be impaired in the requesting sate.'[688] Whilst sometimes assurances facilitate extradition to retentionist states, there are times when the requesting state finds the demand for an assurance against the death penalty to be unreasonable. To be specific, there are cases in which a state with a jurisdictional basis may not get the fugitive back to its territory to face the capital trial or the death sentence because the state is not willing to relinquish the death penalty and undermine its criminal system for the sake international judicial cooperation.

The Moroccan national Mounir el Motassadeq is a high-profile terrorist associated with Al-Qaeda and he was accused of being involved in planning, financing, preparing and perpetrating the 9/11 terror attacks.[689] Motassadeq was arrested in Germany soon after the attack and after years of trials in Germany, he was sentenced to 15-year imprisonment for his role in the terrorist organisation and the 9/11 attack.[690] The US did have an extradition relationship with Germany,[691] but it is interesting that

[687] ibid, para. 85.
[688] Van Der Wilt, On the hierarchy (n 274) 172.
[689] See UNSC, 'Mounir el Motassadeq' <https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/summaries/individual/mounir-el-motassadeq> accessed 10 October 2019.
[690] Motassadeq was under a deportation order to Morocco in October 2018, but since then, no further updates have been obtained.
[691] Germany International Extradition Treaty with the United States 1978

Motassadeq had never been requested by the US since he was arrested in Germany in 2001, considering the catastrophic damages to the US particularly the death of thousands of people caused by the suicide hijackers as well as the US's resolute and intensive tactics of fighting against terrorism.[692] In fact, the US government's decision to not request the extradition of Motassadeq was primarily based on the concern that Germany, as an abolitionist state, would not extradite people to states where there was a real risk of the death penalty unless sufficient assurance was provided. In this case, the US was 'unwilling to compromise their justice standards and accept something less than the worst-case punishment.'[693]

Apart from the situation when the requesting is unwilling to provide assurances, as Torstein Stein states, there are many other cases in which resorting to the assurances is not possible.[694] What we get from this case is that the protection of an individual's human rights comes before the state interests served only by bringing criminal to justice. In other words, it provides a clear evidence that the strict approach to Article 2 and the death penalty in the Council of Europe may impede international judicial cooperation and, in this case, has led to the US not even requesting the extradition.[695]

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[692] James Finsten, 'Extradition or Execution-Policy Constraints in the United States' War on Terror' (2003) 77 Southern California Law Review 835-37.
[693] Sadoff (n 23) 311.
[694] For example, 'in cases where capital punishment is the only punishment prescribed by law and where under the law of the requesting state the power of pardon lies with the parliament or the Head if State.' Torsten Stein, 'Extradition' (2011) MPEPIL 797 para. 24.
[695] Although this is an individual case and admittedly, in the situation where the requested state is unwilling or unable to extradite, there may be other alternatives available to avoid the safe haven and impunity. For example, the application of *aut dedere aut judicare* or surrendering the fugitive to the third state or competent international criminal court and tribunal with proper jurisdiction.

4.1.4 Criticism of assurances

It is widely acknowledged that seeking assurances is currently one of the most common methods by which extradition to retentionist states could be achieved, at least better than the fugitive going totally unprosecuted or unpunished. However, in some cases, even though it could help the retentionist state get the wanted person back, the use of assurances is indeed problematic. What makes the matter worse is that in many other cases, the assurances are not effective at all.

From the perspectives of retentionist states, the use of assurances is criticised for it would affect the retentionist state's sovereignty and control over its own legal system.[696] In the meantime, its applicability and effectiveness on eliminating the risk of the death penalty has also been challenged by some abolitionist states.[697] To be more precise, for a retentionist state to request extradition from a European state, in order to get the fugitive back to its jurisdiction, it has to make concessions regarding the use of the death penalty. Providing such a non-execution assurance is the most direct and also within the current framework, the only way to bring the fugitive back to stand for trials or sentences. In other words, the requesting state that remains the death penalty has no alternative but to comply with the prerequisite for the completion of the transfer. The retentionist state is compelled to waive the use of the death penalty in particular cases where the suspects flee abroad to the territory of the Council of Europe after the

[696] Boister (n 16) 381.
[697] Feng Huang, 'The Difficulties of the Use of Assurances and the Countermeasures' (2009) 21 *Journal of Law Application* 86-98.

perpetration or in cases where the suspects commit crimes abroad which cause harmful effect on the interests of the requesting state.[698] The consequence of extradition based on the non-execution assurance is apparently a disruption of the integrity of the penal system and enforcement jurisdiction of the forum state where the death penalty still legally in the domestic legislation.[699] For these reasons, meeting the condition of non-execution is a restriction of the supreme sovereignty of the state as well as its independent criminal jurisdiction.[700] In other words, as the retentionist state protests, its criminal policy on punishment is disrupted and it has to be compromised in specific cases due to the request of the other sovereign state, or rather, the requested state indirectly interferes or exerts its own policy on the death penalty to the other state.[701]

In addition to the damage to the retentionist states' criminal justice system, the use of and the reliance on such assurances to meet the difference between states' policy on the death penalty are also criticised for giving rise to different categories of criminals based on where they have been extradited from. This is because the exemption from the death penalty is only available in individual cases, rather than being applied generally around the state. In specific cases, the isolated death penalty bar to extradition serves as an approach to help criminals escape from the death execution by fleeing to an abolitionist state. In other words, different punishments may be applied to different criminals who

[698] States are able to request extradition for extraterritorial offences on the basis of passive personality or protective jurisdiction.
[699] Mingkai Zhang, *The Standpoint of Criminal Law* (China Legal Press 2002) 372.
[700] Gilbert, *Aspects of Extradition Law* (n 203) 100.
[701] Amnesty International, 'United States of America: No Return to Execution – The US Death Penalty as a Barrier to Extradition' (2001)

commit similar offence; criminals who are extradited from abolitionists states are unduly exempted from the otherwise deserved death sentence due to the premised assurance. For example, this approach is advantageous to the wealthy who can buy themselves out from the death penalty. Indeed, it is likely to be the fact that the wealthier criminals that escape to an abolitionist state, and poorer people who have committed the same crime which is eligible for the death penalty are in disadvantaged position because they cannot travel abroad, would be more likely to be executed. Admittedly, it has to concede that this double standard could be addressed by a universal abolition which, in the view of this thesis, could not be realised.

The credibility and enforceability of the assurances are also doubtful, particularly in cases where the requested person has not been convicted. For some states, it is not practical to provide an assurance, in the pretrial stage, that a particular punishment other than the death penalty would be applied. This is far from a sufficiently irrevocable and enforceable decision for the abolitionist state to accept. In other words, the credibility upon those assurances is slightly different in cases involving the extraditee who is convicted or merely accused of committing a crime. In many circumstances, the weight and role of the assurance in extraditing cases are not sufficient enough to eliminate the extraditee's risk of the death penalty.[702]

To sum up, the Member States of the Council of Europe have built up an unequivocal

[702] Huang (n 697) 87.

standard on the issue of the death penalty, which has been explicitly confirmed in various legal instruments, including human rights treaties as well as the successive Resolutions against the death penalty, and persistently reiterated by the ECtHR in its jurisprudence. They expanded the standard via political measures to the new members that wishing to join the organisation as well as its Observer States. When a state abolishes the death penalty, it is obliged to prevent from put anyone to the risk of facing the death penalty in all circumstances. It has to be admitted that the European approach to deal with the extradition request from retentionist states is based on its own identities and values. More precisely, within the Council of Europe, the death penalty is absolute prohibited as the beach of human dignity and human rights, and it contradicts the principle of democracy and civilisation. For states that are neither the Member States of the Council of Europe nor the signatory state of other abolition treaties, it might be unfair for them to abolish the death penalty so as to abide by the requirement in a particular extradition case given that, as we saw in Chapter 3, there is no universal international legal prohibition of the death penalty.

4.2 Reconsidering states' irreconcilable interests

The previous section showed that the use of assurances is not an adequate solution for retentionist states. The following two sections elaborate a different, albeit controversial, approach, which is, however, rooted in existing European jurisprudence.

It has already demonstrated that the ECtHR jurisprudence has come to view Article 2

as a prohibition on extradition to the death penalty, alongside Article 3. However, the recent developments in the UK have brought this issue to a new phase, which has reinforced that some European states are not content with this principle. In the ongoing *ISIS Beatles* case,[703] disclosed from a leaked letter to the US Attorney General,[704] the Home Secretary said the UK government would not seek a diplomatic assurance against the death penalty of the two high-profile ISIS Beatles suspects Alexanda Kotey and El Shafee Elsheikh, upon their removal to the US.[705] The decision was condemned for undermining the UK's longstanding absolute opposition to the death penalty as well as the long-held policy of seeking assurance against the death penalty in extradition or other means of international judicial cooperation. The then Home Secretary Sajid Javid justified that there are strong reasons for not setting the precondition against the application of the death penalty to cooperate with the US in this specific case for the consideration of the determination to fight against terrorism and secure the national interests. Although he had admitted that the suspects would face a potential risk of the death penalty, such risk should be outweighed by the risk of impunity. The then Security Minister Ben Wallace asserted that the assurances would not be necessary when that impedes the attempt to uphold criminal justice.[706]

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[703] *The ISIS Beatles* are four notorious terrorists who are responsible for a series of brutal torture and public beheading of many Western hostages including journalists and humanitarian aid works in Syria and Iraq. They have frequently been referred to Beatles, although some people reject the label for trivializing their conduct.

[704] See Ben Riley-Smith, 'Sajid Javid Tells US: We Won't Block Death Penalty for ISIS 'Beatles'' <https://www.telegraph.co.uk/news/2018/07/22/uk-drops-death-penalty-guantanamo-opposition-opens-door-execution/> accessed 10 October 2019.

[705] Although both of the two suspects were physically present in Syria, and therefore apparently outside the jurisdiction of the ECtHR. By extension of the UK's Human Rights Act 1998, the case in respect of them was proceeded on the basis of the common law.

[706] See Jamie Grierson, 'UK Government Criticised over Change in Death Penalty Stance on ISIS Pair' <https://www.theguardian.com/uk-news/2018/jul/23/uk-will-not-oppose-us-death-penalty-for-isis-beatles> accessed 17 May 2019.

This decision had been criticised by human rights activists and some British politicians,[707] on the basis that it would undermine the UK's long-standing opposition to the death penalty, and it would set a precedent and 'pave the way for further assurances to be abandoned'[708]. Even the mother of journalist James Foley, who was murdered by ISIS, opposed to putting them into death trial. Diane Foley said it is important that the suspects are tried in an open trial where all would know the crime they committed and the death penalty would 'make them martyrs in their twisted ideology' and is too easy for them.[709] In spite of this, the legal challenge to the government's decision in the High Court was rejected in January 2019. The Court stated that

> 'there is no general, common law duty on Her Majesty's Government to take positive steps to protect an individual's life from the actions of a third party and that includes requiring particular undertakings before complying with an MLA request.'[710]

[707] See Parvais Jabbar, 'Sajid Javid has Betrayed Our Values by Giving Way on the Death Penalty' <https://www.theguardian.com/commentisfree/2018/jul/25/sajid-javid-death-penalty-human-rights?CMP=Share_iOSApp_Other> accessed 17 May 2019; Yasmeen Serhan, 'ISIS is Shaking Britain's Anti–Death Penalty Resolve' <https://www.theatlantic.com/international/archive/2018/07/britain-beatles-death-penalty/565928/> accessed 17 May 2019; Lizzie Dearden, 'Isis Beatles: UK 'Must not Let Standards Slip' in Face of Terror, Ken Clarke Warns' <https://www.independent.co.uk/news/uk/home-news/isis-fighters-death-penalty-beatles-law-human-rights-standards-us-slip-ken-clarke-a8460676.html> accessed 17 May 2019.

[708] Jamie Grierson, 'Is the UK Government's Stance on the Death Penalty Shifting?' <https://www.theguardian.com/world/2018/jul/23/is-the-uk-governments-stance-on-the-death-penalty-shifting> accessed 17 May 2019.

[709] Lizzie Dearden, 'UK Government Should not Let Isis 'Beatles' be Made Martyrs through US Death Penalty, says Former Hostage' <https://www.independent.co.uk/news/uk/home-news/isis-beatles-us-death-penalty-james-foley-uk-sajid-javid-trial-jeff-sessions-a8459751.html> accessed 17 May 2019.

[710] El-Gizouli v. SSHD Judgment, Case No. CO/3449/2018, 18 January 2019.

As Richard Walton stated,[711] it was a right decision, and the judgment of the High Court indicated the priority for combating terrorism on behalf of the national interest, which was

> 'welcomed with relief by the detectives working on the case at the counter terrorism command at Scotland Yard, the CPS lawyers and ministers at the Home Office. Had the Government lost, the Home Secretary's decision not to seek assurances on the death penalty from the US would have handed a propaganda victory to Islamic State. It would also have emboldened foreign terrorist fighters across the world and seriously undermined the UK's strategy of tackling terrorism through the rule of law.'[712]

While the case was still awaiting to be heard in the Supreme Court of the UK, the result of which could be further reviewed by the ECtHR, in October 2019, the two terrorists had been transferred to the US custody. This means, they were getting one step closer to be prosecuted by the US court where they are likely to be sentenced to death.[713] The revelation of this case could be interpreted distinctively. According to the High Court's judgement, 'the death penalty remains too widespread around the world to make credible a submission that customary international law treats the death penalty *per se*

[711] Richard Walton is the former head of counter terrorism command at New Scotland Yard.
[712] Richard Walton, 'Sajid Javid Made the Right Call on the Isis 'Beatles' <https://blogs.spectator.co.uk/2019/01/sajid-javid-made-the-right-call-on-the-isis-beatles/> accessed 3 March 2019.
[713] Dan Sabbagh, 'US Moves Two British ISIS Fighters from Syria to Iraq' <https://www.theguardian.com/world/2019/oct/10/isis-britons-held-hostage-in-syria-moved-by-the-us> accessed 2 November 2019; Andrew B uncombe, 'ISIS 'Beatles' Moved from Syrian Prison to Face Trial in US' <https://www.independent.co.uk/news/world/americas/isis-beatles-uk-islamic-state-united-states-custody-trial-trump-a9149801.html> accessed 2 November 2019.

as a cruel or inhuman punishment.'[714] As demonstrated in Chapter 3, which is also indicated in this case, the absolute condemnation of the death penalty is not found in either customary international law or general principles of international law. There should have been no absolute prohibition of the death penalty so long as it is 'properly carried out'[715]. In such cases, it could be argued that there is no legal support for the prohibition of providing mutual legal assistance in circumstances where the individual concerned is at a risk of the death penalty.[716]

Furthermore, this case set another very clear example of the fact that the Member State of the Council of Europe does not, in all circumstances, oppose extradition to states that impose the death penalty. Since *Soering* case, the ECtHR has always attempted to interpret in favour of the death penalty bar to extradition. However, even take that point of view, it might be too far to say that the dispute has been settled. Perhaps there is a difference between the stated aims of the Council of Europe and the jurisprudence of the ECtHR and the practice of certain *ECHR* Contracting Parties. The Council of Europe, which is matched by the jurisprudence of the ECtHR, requires a high level of guarantees against *inter alia* flagrant denial of a fair hearing, infliction of torture, inhuman and degrading treatment, and the imposition of the death penalty. However, it is quite clear that even within the Council of Europe, not all Member States equivalently share the identical standard of the Council of Europe on the death penalty issue at all

[714] *El-Gizouli v. SSHD* case, para. 84.
[715] ibid, para. 85.
[716] ibid, paras. 88-90.

time in practice. There are some states that do not completely share this view, especially when national interest and public security are at serious risk.

The UK has been one of the leading critics of the ECtHR's high standards on the absolute and non-derogable protection under Article 3 of the *ECHR*. It considered the Court's rigorous interpretation of Article 3 unduly interfered with the UK's public policy in safeguarding national interests, particularly involving people who are suspects of representing a security threat. In fact, successive UK governments have argued that it should be allowed to qualify Article 3 in expulsion cases since *Chahal* case. In *Chahal v. the United Kingdom* case, the applicant claimed that his deportation from the UK to India would expose him to the risk of torture and other ill-treatment contrary to Article 3. The UK government justified its decision to deport Chahal based on his involvement of a series of criminal offences.[717] For this reason, 'his continued presence in the United Kingdom was unconducive to the public good for reasons of national security and other reasons of a political nature, namely the international fight against terrorism.'[718] In addition, the UK argued that the protection under Article 3 should not be absolute in cases where states are intended to expel individuals on the grounds of national security.[719] In other words, the national security threat posed by the individual, including the degree and nature of the threat, should be accepted as relevant factors in evaluating the risk of torture and other ill-treatment and whether states' removal would

[717] *Chahal* case, paras. 23-4, 30.
[718] ibid, para. 25.
[719] ibid, para. 76.

engage the responsibility under Article 3.[720]

In response, the Court clarified the confusion resulting from its earlier judgment in *Soering* case.[721] It reaffirmed that Article 3 absolutely prohibits torture and other ill-treatment with no exception or derogation, which is equally applied in expulsion cases[722] where no 'room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 (art 3) is engaged.'[723] For these accounts, the Court held that the UK government's argument on taking the absolute protection of Article 3 into the test of the balance of interests was not acceptable. The priority should be placed in the unqualified protection of an individual's right under Article 3 in its conflict with extradition or national interests concerns. Nevertheless, the Court did explicitly acknowledge in *Chahal* and the following cases that the States Parties are facing growing difficulties in protecting the national security and public interests, particularly in the context of 'war on terror'.[724] It certainly indicates that the Court recognises 'the force of security considerations but declines to give way to them.'[725]

Furthermore, it is intriguing to observe that the Court's conclusion was not reached unanimously.[726] Although the UK's arguments were not accepted by the majority

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720 ibid
721 *Soering* case, para. 89; ibid, para. 81.
722 *Chahal* case, para. 80.
723 ibid, para. 81.
724 ibid, para. 79.
725 Ashworth (n 74) 211.
726 Although the division was not always occurred among judges in the subsequent cases, the contention among the States Parties, politicians and academics had never been subsided.

(twelve out of nineteen), there were still judges giving a different opinion regarding the threshold of assessing the ill-treatment under Article 3.[727] More specifically, the possibility or nature of the risk of torture and other ill-treatment in the receiving state is varying in cases and should have an impact on the determination of states' responsibility of expelling individuals on national security grounds. The joint dissenting opinion, particularly referred to the situation in *Soering* case, where the applicant was requested on the basis of bilateral extradition agreement to face a death penalty trial involving the 'death row phenomenon'. The potential treatment upon extraditing to the US was much straightforward as no national security threat was concerned.[728] As the UK government stated that the alleged violation of Article 3 is an 'uncertain prediction of future event in the receiving state'[729] and includes 'varying degrees of risk of ill-treatment'[730]. A balanced and proportionate approach should be adopted in defining the threshold of what does or does not amount to the mistreatment prescribed in Article 3, which should be weighed against the threat and danger posed by the person concerned if he were not removed.[731]

The Court's decision of *Chahal* case was deemed to exert a profound effect and imialr issue was also raised in the subsequent *Saadi v. Italy* case,[732] *Ben Khemais v. Italy*

[727] Joint Partly Dissenting Opinion of Judges Gölcüklü, Matscher, Sir John Freeland, Baka, Mifsud Bonnici, Gotchev and Levits in *Chahal v. the United Kingdom* [GC], (15 November 1996, Reports 1996-V).
[728] ibid, paras. 3-5.
[729] *Chahal* case, para. 76.
[730] ibid
[731] ibid
[732] *Saadi v. Italy* App no 37201/06 (ECtHR, 28 February 2008).

case,[733] and *Ramzy v. the Netherlands* case.[734] Based on the observations of these cases, it had to admit that while the ECtHR consistently remains committed to the *Chahal* approach, it is clear that several European states have increasingly grave concerns about its impact upon national security as well as international judicial cooperation. That is to say, the legitimacy of the ECtHR's judgments is frequently challenged by its States Parties. It is these states, and also those that have been found in violation of Article 2 in relation to extradition and expulsion cases, that would be most likely to support greater recognition of the margin of appreciation doctrine.

This chapter so far has shown that there are some dissatisfactions with the way that the human rights law is currently restraining states' attempts to extradite or deport people. This is particularly important, taking into account the ever-changing global context. The very recent developments in the *ISIS Beatles* case,[735] suggest that it has brought the controversies into the death penalty cases, which could be viewed to weaken one of the core values of the Council of Europe: the European abolitionism. This section does not intend to exaggerate the impact of this case. However, it indeed shows that the UK has compromised its policy and principle against the death penalty, which could be seen as an unprecedented departure from the British government's longstanding practice of insisting on assurances that an extraditee will not face the death penalty. It might send

[733] *Ben Khemais v. Italy* App no 246/07 (ECtHR, 24 February 2009).
[734] *Ramzy v. The Netherlands* App no 25424/05 (ECtHR, 20 October 2010).
[735] As a matter of fact, prior to this case, it was revealed from the letter of the then Security Minister Ben Wallace to a Green Party MP that there had been two more cases where the assurances against the death penalty were waived, although he did not provide any further details. See Adam Lusher, 'UK Drop ped Death Penalty Assurances in Two Previous Cases before ISIS Jihadis, Home Office Admits', <https://www.independent.co.uk/news/uk/politics/death-penalty-jihadi-beatles-assurances-dropped-other-cases-sajid-javid-elsheikh-kotey-latest-isis-a8577351.html> accessed 3 July 2020.

a message that the absolute objection to the death penalty in international judicial cooperation is not uncompromised. It is irrefutable to argue that the ECtHR's abolitionist policy is not universal and not required by wider international law. More importantly, even its own States Parties do not fully share it.

4.3 Recognising the margin of appreciation in extradition law

If the previous discussion explains the dissatisfactions with the current approach to deal with the death penalty—extradition dilemma and why the ECtHR should make the suggested change, this section aims at setting up a mechanism to meet the particular need for either non-European retentionist states to get their fugitives extradited from the European state without the use of assurances, or the European states to extradite for their own national interests. That is to say, the margin of appreciation doctrine could, in theory, be adopted as the approach.

It should not be omitted that the overall prerequisite for the argument made here is not only the relevant political arguments and the limitations of extradition law illustrated in the first two chapters, but more importantly, as adequately demonstrated in Chapter 3, the lawful application of the death penalty is not prohibited in general international law, notwithstanding its prohibition in certain regional human rights treaties such as Protocol 13 to the *ECHR*. On this basis, it has a more realistic possibility and significance to conduct on further analysis with respect to reconsider the applicability of the margin of appreciation. That is to say, there is potential for a little bit emerging

flexibility, and the margin of appreciation could be brought into extradition cases to deal with the death penalty, where at present it does not seem to fit.

In general, there are significant reasons defending this argument. It could be justified by the rationale of the doctrine *per se* and more importantly, it has been observed that states usually had a relatively wider margin of appreciation their responses to transnational criminality and international terrorism so as to protect the national security and public interests, which were not subjected to the strict scrutiny.[736] While looking at the likelihood of the proposed approach being adopted, there are some, albeit isolated and minimum, instances of European politicians appearing to support this point of view; and there seems to be a greater willingness to try to restrain the ECtHR, as indicated by the reference to the margin of appreciation and subsidiarity in the Brighton Declaration and then in Protocol No. 15. The margin of appreciation, in this thesis, is discussed within the *ECHR* system only, although its application is arguably beyond the *ECHR*.[737]

4.3.1 What the margin of appreciation is

[736] Paul De Hert, 'Balancing Security and Liberty within the European Human Rights Framework. A Critical Reading of the Court's Case Law in the Light of Surveillance and Criminal Law Enforcement Strategies after 9/11' (2005)1 *Utrecht Law Review* 72-3.

[737] For further analysis, See Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP 2012) 3-6, 31-6; Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?'(2006) 16 European Journal of International Law; Dominic McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee' (2016) 65 International & Comparative Law Quarterly 21-60; also UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), 11 August 2005, E/C.12/2005/4, para. 32.

The doctrine of the margin of appreciation in human rights law is a crucial legal construction established and has been widely and explicitly recognised by the ECtHR in its abundant jurisprudence for decades. It provides 'a middle ground' to reconcile for the diversities or 'local variation'[738] of the different States Parties without sacrificing the commitment to protect human rights,[739] especially reflected in cases involving difficult or sensitive legal, political, cultural and social issues in the context of human rights protection. In those cases, it has been proved that states are likely to be conferred a relatively wide margin of appreciation, and thus, the Court's standard of review is less strict.[740]

Nevertheless, neither the *ECHR* nor the ECtHR gives an explicit definition of the margin of appreciation. The essence of the doctrine has been broadly recognised from the academic perspective. For example, James Sweeney refers it to be applied by the ECtHR to 'measure and police states' discretion to interfere with or otherwise limit human rights in specific instances.'[741] He further explains that '[i]n essence it expresses that Contracting Parties have some space in which they can balance for themselves conflicting public goods'.[742] Steven Greer defines the margin of appreciation as 'the room for manoeuvre the Strasbourg institutions are prepared to

[738] Andrew Legg, 'Human Rights, the Margin of Appreciation, and the International Rule of Law' in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Bloomsbury Publishing 2016) 267.
[739] ibid; Douglas Lee Donoho, 'Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights' (2001) 15 Emory International Law Review 91.
[740] See McGoldrick (n 737) 26-7.
[741] James Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era' (2005) 54 International and Comparative Law Quarterly 462.
[742] ibid

accord national authorities in fulfiling their obligations under the European Convention on Human Rights.'[743] In Andrew Legg's view, '[i]t is a doctrine of deference according to which international human rights tribunals grant a degree of latitude to a respondent state's conception of its international human rights obligations in a particular case.'[744] George Letsas put forward an argument that the margin of appreciation has two different uses: the substantive concept and the structural concept.[745] He claims that the limitability of the Convention rights implies an inherent conflict between the interests of individuals and that of the collective, which is what the margin of appreciation and the proportionality test address.[746] Howard Charles Yourow provides a more detail explanation:

> The national margin of appreciation or discretion can be defined in the European Human Rights Convention context as the freedom to act; manoeuvring, breathing or 'elbow' room; or the latitude of deference or error which the Strasbourg organs will allow to national legislative, executive or judicial bodies before it is prepared to declare a national derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention's substantive guarantees.[747]

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[743] Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights* (Council of Europe 2000) 5.
[744] Legg, Human Rights, the Margin of Appreciation, and the International Rule of Law (n 738) 247.
[745] George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 Oxford Journal of Legal Studies 705-32.
[746] ibid
[747] Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff 1996) 13.

Broadly speaking, the effect of the margin of appreciation is regarded to be far-reaching since it opened the door to look at the human rights' relations to state's general interests and we get a sense that the public benefits are concerned in assessing the threshold of the violation of states' human rights obligations. It is a 'tempting' tool designed to coordinate the relationship between the Court and State Parties by conferring the latter the 'room for maneuver', which is a reasonable breadth of leeway or flexibility in carrying out their Convention obligations. *Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms*, reflected by the agreement reached upon the Brighton Declaration,[748] introduced a precise reference to the principle of subsidiarity and the margin of appreciation to the Preamble of the *ECHR* as follows,

> '[a]ffirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.'[749]

By doing so, the doctrine has been framed in the Convention in the way of prominence. It is worth pointing out that according to the above provision and as illustrated in the

[748] See para. 12(b).
[749] Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No.213, Art 1.

Explanatory Report,[750] the margin of appreciation is not limited to particular Convention rights. The reference to it in the amended Preamble appears to apply to all rights in the Convention, even those in respect of which it has not traditionally played a role.[751] For this reason, it indeed enlarges the width of the margin of appreciation in the jurisprudence of the ECtHR. However, it needs to notify that this view is still challenged by commentators, which will be looked at later, and that Protocol No. 15 has not yet come into effect.

It has been extensively acknowledged that the 'tripartite requirements'[752] approach is adopted to justify the interference within the margin of appreciation doctrine, among which the test of proportionality is the final stage of the assessment and often regarded as the predominant one.[753] The test is essential to delimit the margin of appreciation in specific cases and determine the legality of the interference,[754] which most commonly refers to the requirement of a 'reasonable relationship' or a 'fair balance'[755] between

[750] Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms: Explanatory Report, para. 9.
[751] For example, see Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Review 184; McGoldrick (n 737) 23.
[752] The interference should be prescribed by law, be justified by the pursuance of a legitimate aim and be limited to appropriately necessary to the aim. The set of requirements are sometimes described as 'legality', 'legitimacy' and 'necessity' and 'proportionality'. Notably, those different stages of test are not clearly delineated, which overlap each other.
[753] The principle of proportionality is regarded as 'a yardstick for evaluating whether the national authorities overstep the margin or not.' See Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 14; Letsas, Two Concepts of Margin of Appreciation (n 745) 711.
[754] Arai-Takahashi (n 753) 190-205, Janneke Gerards, *General Principles of the European Convention on Human Rights* (CUP 2019) 229-69.
[755] It should be noticed that the use of the term 'balanced' or 'balancing' to deal with the conflicts between two Conventions rights or between individuals' rights and collective goods or public interests is controversial and 'raises deep theoretical problems'. For example, Steven Greer concludes 'while it is not inappropriate for the Court and others to use the balance metaphor when considering, or referring to, the resolution of conflicts between Convention rights and the collective good, a much clearer understanding is needed of the different ways in which the Convention requires priority to be given to rights in reaching an appropriate result.' Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP 2006) 203-213, 227-8. Andrew Ashworth states that both the methodology of the balance approach and the outcome of striking a balance are problematic, which are too simple to capture the complexity. Nevertheless, 'balance' could 'be represented as an all-things-considered, fair and

the interference of the Convention rights (the means) and the reasons justifying that interference (the aims). For example, in *Osman v. the United Kingdom* case, the Court provided a brief explanation on how the proportionality works in the context of the margin of appreciation:

> [in cases where] the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible…if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[756]

However, the balance between the conflicts of the general interests and the interests of the individual is not 'something that is amenable to scientific determination. It is, rather, a matter of judgment, in the fullest sense of the word.'[757] The decision-making process is understood in various forms and applied with different interpretations according to 'the applicable Convention provision, the circumstances of the case, the nature of the

reasonable compromise.' See Ashworth (n 74) 207-10. Janneke Gerards holds that it 'does not always imply an actual choice to be made between conflicting rights and interests, in the sense that one interest or right has to prevail over another one. Instead, it may be important to look for reconciliation or for a middle ground.' See Gerards, General Principles of the ECHR (n 754) 247. For the subject of this thesis, a balanced viewing does not, in its strict sense, require the weight and value given to the interests of the individual and the collective to be exactly same in all cases.

[756] Osman v. The United Kingdom App no 87/1997/871/1083 (ECtHR, 28 October 1998) para. 147.

[757] Fiona de Londras and Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Palgrave 2018) 94.

complaints and the positions of the parties.'[758] For example, in the approach proposed by Andrew Legg, the assessment is composed of two different types of reasons, namely, 'first-order reasons' and 'second-order reasons', both of which involve a combination of various complex factors.[759]

4.3.2 Controversies of the margin of appreciation

The margin of appreciation is not without its controversies and objections. While some commentators oppose its existence at all, most people held that the doctrine is problematic in regard to a number of aspects. A number of the most frequently claimed points will be briefly expounded in this subsection.

To be precise, many commentators contend that it injects too much uncertainty, flexibility, inconsistency, unpredictability and confusion in human rights law.[760] In particular, the scope of applicability of the margin of appreciation is varying in different circumstances, and no clear and consistent standards have been established to regulating the scope, which accounts as one of the most critically debatable issues.[761] Even though the margin of appreciation is established in one case, it does not guarantee the same standard or level of deference is equivalently applied to other cases involving

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[758] Gerards, General Principles of the ECHR (n 754) 231.

[759] For details, see Legg, Human Rights, the Margin of Appreciation, and the International Rule of Law (n 738) 254-6; Legg, *The Margin of Appreciation in International Human Rights Law* (n 737) 194-7.

[760] For discussion on criticisms, see Anthony Lester, 'Universality versus Subsidiarity: A Reply' (1998) 1 *European Human Rights Law Review*; Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 *New York University Journal of International Law and Politics* 843; Letsas, Two Concepts of Margin of Appreciation (n 745) 705; George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007); Jan Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 N*etherlands Quarterly of Human Rights*; Janneke Gerards, 'Margin of Appreciation, Incrementalism and the European Court of Human Rights' (2018) 18 *Human Rights Law Review* 498-506.

[761] Lord Hoffmann, 'The Universality of Human Rights' (2009) 125 The Law Quarterly Review 423.

similar issues. For example, Steven Greer describes its characteristics as 'casuistic, uneven, and largely unpredictable'.[762] In Jeffrey Brauch's opinion, the case-specific analysis of particular rights would give rise to the inconsistency, undermining the authorities and quality of human rights law and also eroding the legal certainty.[763] In Janneke Gerards claims that the margin of appreciation *per se* is of 'flexibility and variability'[764].

The width of the margin of appreciation not only determines the Court's intensity of review or the extent of deference afforded to states, but also affects whether the state involved deals with the conflicting interests proportionately or comes up with a fair balance.[765] However, the breadth of margin conferred to the state in different cases cannot be recapitulated into an explicit and normative criterion. This gives rise to a great deal of scepticism as determining whether the state is overstepping the margin of appreciation, namely, whether the individuals' rights and public interests have been proportionately dealt with.[766] The unclear scope of an applicable margin of appreciation results in the uncertain level of the Court's review. More specifically, the words that are commonly used to describe the deferred margin, including 'wide', 'narrow' and 'certain', are neither explicit nor consistent. For example, in many cases, a declared wide margin did not necessarily result in actual flexibilities or lenient

[762] Greer, *The European Convention on Human Rights* (n 754) 223.
[763] Jeffrey A Brauch, 'The Dangerous Search for and Elusive Consensus: What the Supreme Court Should Learn from the European Court of Human Rights' (2008) 52 Howard Law Journal 277.
[764] Gerards, General Principles of the ECHR (n 754) 172.
[765] A, B and C v Ireland, App no 25579/05, para. 231.
[766] ibid

scrutiny by the Court.[767] Even in some cases, invoking a wide margin did not give rise to any apparent deference at all.[768] That is to say, the Court makes its own assessment irrespective of the applicability of the doctrine, which does not 'bear any real significance for the Court's review of reasonableness, in that it does not have any measurable impact on the standards it uses in assessing that reasonableness.'[769] Furthermore, it has been accepted that a number of factors are relevant to determining the scope of the margin, which will be discussed in the section below. However, how those factors work in the assessment has never unambiguous, particularly when the factors involved pull in the opposite direction.[770]

Secondly, relativism and local variation versus the universality of human rights has been one of the principal debates since the doctrine was introduced. The deference of the margin manifests that the Court has accepted 'human rights obligations can, in certain circumstances, be implemented in different ways in different places.'[771] For such reason, the doctrine is alleged to undermine the universality of human rights law.[772] For instance, Eyal Benvenisti insists that

> The juridical output of the ECHR and other international bodies carries the promise of setting universal standards for the protection and promotion of human rights. These

[767] Kratochvíl (n 760) 337-42; Gerards, Incrementalism (n 760) 502-6.
[768] ibid
[769] Gerards, Incrementalism (n 760) 505.
[770] ibid, 502-3.
[771] Legg, Human Rights, the Margin of Appreciation, and the International Rule of Law (n 738) 247.
[772] It is argued that the doctrine implies 'relativism', which leads to the indetermination of the human rights law's the interpretation and application in different jurisdictions. For a further discussion, see Legg, *The Margin of Appreciation in International Human Rights Law* (n 737) Chapter 3.

> universal aspirations are, to a large extent, compromised by the doctrine of the margin of appreciation.[…] Margin of appreciation, with its principled recognition of moral relativism is at odds with the concept of the universality of human rights.[…]Moreover, its use may compromise the credibility of the applying international organ.[…][773]

In his partly dissenting opinion in *Z v. Finland* case, Judge De Meyer held that 'it is high time for the Court to banish that concept from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies.'[774]

However, James Sweeney believes that the objection in this regard is ill founded. In his opinion, the universality concept *per se* is questionable. Universality is not equivalent to uniformity, and the application of this doctrine does not 'necessarily amount to relativism'[775] or weaken the level of universal human rights.[776] Instead, this doctrine 'plays an important role in mediating between universality and particularism in the Convention system.'[777] James Sweeney states that 'while maintaining 'universal' human rights, there may be some defensible local qualification.'[778] It is undoubted that different places of the world would have different views and understandings of human rights, which is the fact that human rights law needs to recognise in order to be realistic and vibrant. 'It would be highly undesirable to impose the same interpretation of

[773] Benvenisti (n 760) 843-44.
[774] *Z v. Finland* App no 22009/93, (ECtHR, 25 February 1997), Partly Dissenting Opinion of Judge De Meyer.
[775] Sweeney, Margins of Appreciation in the Post-Cold War Era (n 741) 469.
[776] ibid
[777] James Sweeney, 'A 'Margin of Appreciation' in the Internal Market: Lessons from the European Court of Human Rights' (2007) 34 Legal Issues of Economic Integration 31.
[778] Sweeney, Margins of Appreciation in the Post-Cold War Era (n 741) 469.

universally shared values on all peoples. It would also be problematic to insist on a uniform protection of such rights in all the world's many different legal systems.'[779] As Eleni Frantziou states, the margin of appreciation 'ensures that a minimum level of human rights protection is met in all contracting states, while at the same time allowing some scope for differentiation in light of the particularities of each jurisdiction.'[780]

Thirdly, in many cases,[781] the use of the margin of appreciation is alleged to be 'rhetorical'.[782] There is an argument that 'the idea of the margin of appreciation is not used to express a general point about the limitability of rights but to express a final determination as to whether the state has violated a right in some particular case.'[783] According to Jan Kratochvíl's observation, in cases where the margin of appreciation is unrelated to the Court's analysis, the doctrine is redundant. It would get worse if the doctrine actually plays a role in the Court's decision-making process but without explaining what the role exactly is in a specific case.[784]

In summary, in light of the above undeniable problems and criticisms, two specific points need to be stressed here. On the one hand, most of the problems of the margin of appreciation are about its application, rather than the essence or underlying value of the doctrine. As Steven Greer concludes, 'most commentators maintain that greater clarity,

[779] Legg, Human Rights, the Margin of Appreciation, and the International Rule of Law (n 738) 262.
[780] Eleni Frantziou, *The Aargin of Appreciation Doctrine in European Human Rights Law (Policy Briefing)* (2014).
[781] For a list of those cases, see Kratochvíl (n 760) 342.
[782] Gerards, Incrementalism (n 760) 500.
[783] Letsas, Two Concepts of Margin of Appreciation (n 745) 711-2; Kratochvíl (n 760) 342.
[784] Kratochvíl (n 760) 342.

coherence and consistency in its application are required instead.'[785] From this perspective, it should and could be reformed to serve its designed role of serving as an 'instrument to negotiate between the interests concerned with national and supranational decision-making and the interest of protecting fundamental rights on a sufficiently high level.'[786] On the other hand, it is not the purpose of this thesis or chapter to conduct the research on how the doctrine could be reconstructed so as to achieve its target. In contrast, it is worth mentioning that the reference to the margin of appreciation is to prove that it could be used in an extradition case to circumvent the death penalty exception for the sake of combating transnational crimes. In other words, the ultimate purpose here is not just to defend the margin of appreciation against its critics. In contrast, it is about the need to combat transnational crime via international cooperation, while the margin of appreciation is advocated as a vehicle for meeting the difference in the death penalty policies.

4.3.3 Justifications of the margin of appreciation

The margin of appreciation, especially several principal reasons that justify and underpin this doctrine, has been substantially discussed in the literature with critical comments and suspicions at the same time.[787] Nevertheless, a few points in relation to

[785] Greer, The Interpretation of the European Convention on Human Rights (n 81) 5.

[786] Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 *European Law Journal* 107. See also, Greer, The Margin of Appreciation (n 743) 5.

[787] For example, John Merrills, *The Development of International Law by the European Court of Human Rights* (2nd edn, Manchester University Press 1993); Yourow (n 747); Arai-Takahashi (n 753); Sweeney, Margins of Appreciation in the Post-Cold War Era (n 741) 459-74; Greer, *The European Convention on Human Rights* (n 754); Shany, Toward a General Margin of Appreciation (n 737) 907-40; Legg, *The Margin of Appreciation in International Human Rights Law* (n 737); Philip Leach, *Taking a Case to the European Court of Human Rights* (4th edn, OUP 2017); Pieter Van Dijk and Others (eds), *Theory and Practice of the European Convention on Human Rights* (5th edn, Intersentia 2018); Yuval Shany, 'All Roads Lead to Strasbourg?: Application of the Margin of Appreciation

the main argument of this thesis are still worthwhile to be precisely underlined.

The margin of appreciation, as a judicial self-restraint doctrine,[788] is defended based on the 'subsidiarity principle'[789] and the 'better position'[790] of national authorities. To be specific, the doctrine is the expression of one of the underlying principles of the *ECHR* system, which is 'subsidiary to the safeguarding of human rights at the national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions.'[791] The principle of subsidiarity has been accepted by the ECtHR in its case law dating back to the *Belgian Linguistics* case. It delineates the respective roles of the national authorities and the Court in maintaining effective operation of the Convention, while the primary responsibility lies with the Contracting Parties in both substantive and procedure aspects.[792] Against this background, the interplay and dialogue between national authorities and the Court is a significant issue, albeit contentious regarding interpretation.[793] It is often argued that subsidiarity indicates a certain extent of judicial deference,[794] and the margin of

Doctrine by the European Court of Human Rights and the UN Human Rights Committee' (2017) 9 Journal of International Dispute Settlement 180-98; Gerards, General Principles of the ECHR (n 754) 160-260.

[788] McGoldrick (n 737) 22.

[789] *Handyside v. The United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) para.48; *Ireland v. The United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) para. 207; *Brannigan and McBridge v. The United Kingdom* App nos 14553/89, 14554/89 (ECtHR, 25 May 1993) para. 43. For an academic discussion on subsidiarity, see Arai-Takahashi (n 753) 300; Machiko Kanetake, 'Subsidiarity in the Practice of International Court' in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Bloomsbury Publishing 2016) 269-88; Alastair Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015) 15 *Human Rights Law Review* 313-41; Robert Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 *Human Rights Law Review* 473-94; Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015) 165-7.

[790] Gerards, General Principles of the ECHR (n 754) 177-88.

[791] Explanatory Report on Protocol No. 15 *ECHR*, para. 9.

[792] Dzehtsiarou (n 789) 165-6

[793] Legg, Human Rights, the Margin of Appreciation, and the International Rule of Law (n 738) 247.

[794] Dzehtsiarou (n 789) 165-6

appreciation is deemed as a vehicle for achieving that purpose by assessing the proportionality of limitations on certain Convention rights.[795]

The adoption of the margin of appreciation largely helps the Court to deal with its relationship with State Parties.[796] It is alleged that the State Parties are increasingly demanding respect for their national values and democratic legitimacy in the decision-making process,[797] which was expressed in the successive declarations on the Future of the ECtHR and finally codified in Protocol No. 15.[798] The doctrine makes the Court's scrutiny upon domestic authorities 'tolerable and politically acceptable',[799] and makes it possible for the Court to counterbalance its primary role of safeguarding the minimum standard of fundamental human rights protection, with the respect for its State Parties' sovereign interests,[800] and to a certain extent, the value of democratic decision-making.[801] There is little doubt that the latter is also an essential condition of the effective implementation of the Convention as well as the guarantee of the compliance of the Court's judgment at the national level.[802] In other words, the legitimacy of the

[795] Sweeney, Margin of Appreciation in the Internal Market (n 777) 30.
[796] *A. and Others v. The United Kingdom* case, para. 184. ('The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court'); Andreas Follesdal, 'Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights' (2017) 15 *International Journal of Constitutional Law* 359. ('Human rights courts face a continual challenge: How to honour their mandate to protect human rights of individuals within the signatory states, whilst paying due respect to the sovereign state masters of the treaties')
[797] For example, see Patricia Popelier and Others (eds.), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Intersentia 2016).
[798] The Interlaken Declaration in 2010, the Izmir Declaration in 2011 and the Brighton Declaration in 2012.
[799] McGoldrick (n 737) 33.
[800] Kanetake, Subsidiarity (n 789) 285.
[801] Shany, Toward a General Margin of Appreciation (n 737) 919-21; Legg, *The Margin of Appreciation in International Human Rights Law* (n 737) Chapter 4. The 'democratic legitimacy' is also a factor that determines the width of the margin of appreciation that the Court defers. See Shai Dothn, 'Three Interpretive Constraints on the European Court of Human Rights' in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Bloomsbury Publishing 2016) 237-8.
[802] McGoldrick (n 737) 34-5.

Court and its judgments could be enhanced through this way.[803]

Furthermore, the better position rationale also underpins the doctrine. The deference of the margin 'directs the ECtHR to make decisions that are substantively good' as the national authorities often have the knowledge, the expertise and resources that the Court and its judges do not have.[804] Those qualities equip the national authorities with competence to make a right decision. For example, with regard to some domestic affairs, it is accepted that national authorities are better placed than international courts and judges to make assessments of both the overall situations and the specific issues since the former is 'likely to be more closely acquainted with national problems, (constitutional) traditions, sensitivities and debates.'[805] In other words, states authorities have better knowledge of what kind of measures and policies are needed in different times, and what level of restrictions of individual human rights are required for the sake of the specific national interests.[806]

By distinguishing a wide or narrow margin of appreciation, albeit abstractly, the doctrine provides states with flexibilities in reconciling the value of effective protection of human rights and necessity of the limitation of these rights to a certain degree. Janneke Gerards asserts that the strength of the doctrine lies in the given flexibility,[807]

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[803] Dzehtsiarou (n 789) 165-6.
[804] Dothn (n 801) 231-2.
[805] Gerards, Pluralism, Deference and the Margin of Appreciation Doctrine (n 786) 85.
[806] Yuval Shany considers that 'national authorities enjoy comparative institutional advantages over international courts with regard to fact-finding and fact-assessing exercises, but not in relational to norm-interpretation projects.' Shany, Toward a General Margin of Appreciation (n 737) 911.
[807] Gerards, Incrementalism (n 760) 499.

which could embrace the differences without compromising the essence of human rights protection. The flexibility is directly affected by the width of the margin deferred to the state. A number of relevant factors may determine the scope of the margin of application in diverse circumstances. The Court has tried to explain those factors, for example, in *S. and Marper v. the United Kingdom* case, the Court explained that

> A margin of appreciation must be left to the competent national authorities in this assessment. The breadth of this margin varies and depends on a number of factors, including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights…Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted… Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider…[808]

Although the above general concerns have neither completely clarified the issue nor provided a set of explicit guidance on the extent of applicable margin in practice, we cannot deny the existence and value of the flexibility and adaptability that the doctrine

[808] *S. and Marper v. The United Kingdom* App nos 30562/04 and 30566/04 (ECtHR, 4 December 2008) para. 102. Similar description could also be found in *Evans v. The United Kingdom* App no 6339/05 (ECtHR, 10 April 2007) para. 77 and *Dickson v. The United Kingdom* App no 44362/04 (ECtHR, 4 December 2007) paras. 77-8.

affords. What it needs is an in-depth interpretation of those factors and consistent applications by the Court.

There has not been a straightforward criterion on how the doctrine works. Nevertheless, in theory, a range of factors are relevant to determining the width the margin of appreciation, three of which will be discussed as they are mostly relevant to the purpose of this thesis. At first, the nature of rights is an important factor directly affecting the application of the margin of appreciation.[809] It differentiates the width of the margin or namely, the weight of justification required for restrictions. For example, when the case concerns the fundamental right to life, compared with qualified right under Article 8-11, a stronger level of reasons is needed to justify the interference and more sophisticated circumstances are getting involved.[810]

The doctrine was initially applied to cases referred to derogations in time of emergency,[811] but its relevance has evolved to all substantive Convention rights.[812] 'The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged.'[813] However, this view is not universally agreed. It has in the past been observed that the margin of appreciation

[809] Nevertheless, it is still debatable regarding which is the most dominant factor determining the applicability of the margin of appreciation.
[810] Greer, *The European Convention on Human Rights* (n 754) 241-4.
[811] Fionnuala Ni Aolain, 'The Emergence of Diversity: Diferences in Human Rights Jurisprudence' (1995) 19 Fordham International Law Journal 112; Kratochri, 329; Greer, The Margin of Appreciation (n 743) 8-9.
[812] Yourow (n 747) 15-24; Arai-Takahashi (n 753) 5-8.
[813] High-Level Conference on the Future of the European Court of Human Rights: Brighton Declaration, para. 11.

does not normally apply to Article 2 and its role in Article 3 cases is particularly controversial and complicated.[814] This is indeed a misunderstanding as to the law as it stands today.[815] In regard of Article 2, for example, when defining the scope of life including when it begins and when it is ended, and also when assessing the justification of deaths resulting from lawful acts of war according to Article 15 of the *ECHR*, the margin of appreciation is undoubtedly conferred from the Court. Concerning the absolute right under Article 3, although there is no express recognition of a margin of appreciation, it is not to say that contextual factors never play a role, especially when interpreting the threshold of the violation of Article 3. Namely, the 'minimum level of severity' or the 'likelihood'[816] that any alleged ill-treatment would indeed substantially materialise.[817] For example, in Harmen van der Wilt's opinion, the importance of the value served by extradition should be considered in evaluating the threshold of whether a treatment amount to the violation of Article 3.[818] Nonetheless, a stronger justification is required for states to restrict those fundamental rights, including Articles 2 and 3.[819] For the purpose of this thesis, the doctrine's application in Article 2 cases would be

[814] For example, there are scholars claiming that this doctrine plays no role in relation to them or at least there is no explicitly mentioned practice of the margin of appreciation in these areas. See Fionnuala Ni Aolain, 'The Evolving Jurisprudence of the European Convention Concerning the Right to Life' (2001) 19 Netherlands Quarterly of Human Rights 31; and also in two of the leading monographs on this doctrine written by Yutaka Arai-Takahashi and Howard Charles Yourow, there is no evidence for the margin of appreciation to Article 2 and 3.

[815] For example, in his recent work, Andrew Legg explicitly expounds that the right to life falls with the applicable scope of the margin of appreciation. See Legg, *The Margin of Appreciation in International Human Rights Law* (n 737) 204-10; Janneke Gerards clarifies that 'on rare and very sensitive occasions, the Court has even afforded a margin of appreciation to States on core Article 2 issues.' For Article 3, 'the Court has applied the margin of appreciation doctrine in relation to certain aspects of sentencing policies…' See Gerards, General Principles of the ECHR (n 754) 169-70.

[816] Strictly speaking, it is not just on the likelihood of the alleged treatment, the Court has admitted that the threshold is judged according to the circumstances. It examines the threshold of the treatment against the context of the case, so that treatment that would be inhumane in one context might not be in another.

[817] Helen Fenwick, *Civil Liberties and Human Rights* (3rd edn, Routledge 2002) 44-5; Londras and Dzehtsiarou (n 757) 95, 109.

[818] Van Der Wilt, On the hierarchy (n 274) 157.

[819] Legg, Human Rights, the Margin of Appreciation, and the International Rule of Law (n 738) 254.

specifically focused, the discussion on which will be continued in the next section.

Secondly, the aforementioned better position account is also linked to the factor that affects the scope of the margin of appreciation, namely, 'the type of case'. In Andrew Legg's words, '[t]he type of case is […] an acknowledgement that certain sorts of cases often give rise to stronger reasons for deference than others.'[820] This point is significant not only because it exactly reflects the practical needs of the discretion to restrain certain individual human rights, but also because it explicitly pinpoints the situations in which state parties are more struggling with their human rights obligation in the context of national governance.

Thirdly, the consensus is another indispensable aspect that is closely related to the scope or the existence of the doctrine. Kanstantsin Dzehtsiarou contends that looking for consensus is a legitimate way of judging whether a social trend has become established by the majority of the Contracting Parties to the ECHR. Furthermore, 'a properly identified and coherently applied European consensus is a criterion that determines the breadth of the margin of appreciation in a more objective, transparent and predictable manner than achieved through the application of other criteria…'[821] As a general rule, the existence of widely acknowledged rules or practice leaves a rather narrow margin of appreciation. Conversely, a lack or no consensus justifies a wider margin with a

[820] Legg, *The Margin of Appreciation in International Human Rights Law* (n 737) 216. Legg lists several types of expertise in which national authorities are believed to be a preponderant position, including national security, policing and civil service, economic matters and so forth.
[821] Dzehtsiarou (n 789) 133-42;

higher degree of deference to states. Nevertheless, the application of the consensus has its limitations. The Court has clarified that lack of consensus is not always decisive as it does nor 'automatically leave the issues within the area of state discretion.[822] More importantly, states are still able to defend the inconformity with the established consensus in some instances.

4.3.4 Reconsidering the margin of appreciation under Article 2 of the *ECHR*

There are circumstances in which even the most important rights may need to be considered in the light of other factors. For example, in Andrew Ashworth's points, human rights are both 'fundamental and contestable', which should not be seen as absolute.[823] There are many ways in which public interests can be taken into account to limits human rights. Furthermore, although the anti-majoritarian nature of human rights means that it needs to 'defend the interests of individuals or minorities against those of the majority or the collective',[824] it is imperative to 'capture the true value of human rights' and to draw attention to the interests deriving from *ordre public*.[825]

There are, in legal terms, some signs, albeit very limited, that the margin of appreciation could be applied to Article 2 in the death penalty in the same way as it has applied in relation to other types of end of life decisions. Therefore, the argument raised in this thesis could not be taken as entirely fanciful or unrealistic. To be specific, the ECtHR's

[822] Hirst case, para. 82.
[823] Ashworth (n 74) 224.
[824] ibid
[825] ibid

jurisprudence has sustained the doctrine's relevance to Article 2 in different aspects of the right to life. Two specific cases will be examined as follows. In *Vo v. France* case,[826] which was about the involuntary medical termination of the pregnancy of a Vietnamese French Thi-Nho Vo. Vo attended to hospital for her six-month pregnancy regular check, where she was mixed up with another woman with same surname Vo, who was expected to remove the contraceptive coil. The doctor pierced her amniotic sac, causing the loss of a substantial amount of amniotic fluid, and after further examination, the pregnancy had to be terminated for safety concerns.[827] It was advised by the expert report that at the time of abortion, the baby was between 20 and 21 weeks old.[828]

Vo lodged a criminal complaint against the doctor before the French court on the ground of unintentional injury for herself and unintentional killing of her baby.[829] After her claims were rejected by the French Court of Cassation, the case was finally brought to the ECtHR by Vo against French authorities for their failures to protect the unborn child. Namely, the failure to classify taking the life of the unborn foetus as unintentional killing, and the failure to criminalize such act as a violation of its obligation under Article 2 of the *ECHR*. For these reasons, the issue of whether France was obliged to ensure, in its criminal law, a foetus could be taken as the victim of unintentionally killing and considered as a human being with the protection of the right to life was a bone of contention.[830]

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826 *Vo v. France* App no 53924/00 (ECtHR, 08 July 2004).
827 ibid, paras. 10-2.
828 ibid, para. 14.
829 ibid, paras. 13-22.
830 ibid, paras. 74, 85. Although it was also an issue that whether Article 2 requires state parties to provide criminal

The Court held that when the life begins should be a question determined at national level with certain endemic factors.[831] Furthermore, 'it is neither desirable, nor even possible as matters stand, to answer in abstract the question whether the unborn child is a person for the purposes of Article 2…'[832] In this case, the margin of appreciation was explicitly recognised in relation to Article 2, concerning the start of 'life' or rather, whether the unborn foetus is entitled to the protection of the right to life under Article 2. The Court states that

> […] the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere...The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life.[833]

In the case of *Lambert and Others v. France*,[834] Vincent Lambert was in chronic vegetative status after a traffic accident. One of the main controversies was raised with respect to whether the decision to withdraw the life-sustaining medical treatment

remedy for unintentional homicide of unborn foetus. The Court held that there was no violation of Article 2 on the hypothesis that Article 2 was applicable to unborn foetus. See also Aurora Plomer, 'A foetal right to life? The case of Vo v France' (2005) 5 Human Rights Law Review 311-38.

831 *Vo* case, para. 82.

832 ibid, para. 85.

833 ibid, para. 82.

834 *Lambert and Others v. France* App no 46043/14 (ECtHR, 05 June 2015).

(artificial nutrition and hydration) of Vincent Lambert was incompatible with the French domestic legislation and its positive and negative obligations[835] under Article 2 of the Convention.[836]

In regard to states' negative obligation to refrain from the intentional taking of life, it was accepted that there was a distinction between the intentional taking of life (either euthanasia or assisted suicide) and the therapeutic abstention (withdrawal or withholding the life-sustaining treatment). In this case, as the Court observed, the issue concerned in relation to Lambert was defined as therapeutic abstention, which was legitimate in certain specific cases demonstrating unreasonable obstinacy. The doctor's intention behind the decision to discontinue the treatment was not ending the patient's life. Instead, 'when there is nothing more to be done', it was to 'allow death to resume its natural course and to relieve suffering'[837] 'when there is nothing more to be done'. For these concerns, the Court believed state's negative obligation under Article 2 was not engaged.[838] As for the assessment of whether there was a violation of the positive obligation in relation to the withdrawal of medical treatment resulting to the death of Lambert,[839] a number of factors were considered.[840] By referring to Article 8, the Court held that it was an issue subjected to state's margin of appreciation.[841]

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[835] ibid, para.117.
[836] ibid, para.113.
[837] ibid, para. 122.
[838] ibid, para. 124.
[839] ibid, para. 140.
[840] ibid, para. 143. Briefly, the absence of the common approach in this regard among the States Parties; the patient's interests and wishes in the process of decision making; the existence of domestic legislation regulating the withdrawal of treatment in consistence with Article 2 *ECHR*.
[841] ibid, para. 144.

Compared with the above-mentioned *Vo v. France* case, the issue concerned in this case was the opposite to the beginning of life, namely the end of life. Taking the two cases together, which involve two different aspects or directions of the right to life under Article 2, fall within the applicable scope of the margin of appreciation. As the Court observed,

> in the sphere concerning the end of life, as in that concerning the beginning of life, State must be afforded a margin of appreciation, not just as to whether or not to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as regards the means of striking a balance between the protection of patients' right to life and the protection of their right to respect for their private life and their personal autonomy.[842]

In summary, as the Court opined, in most occasions, the issues raised in relation to the right to life under Article 2 of the *ECHR*, including abortion, euthanasia and the death penalty, are complicated with unsettled legal, cultural ethical debates among different States Parties. Indisputably, the domestic authorities are better equipped to investigate and make a decision. The argument proposed here is that while it may have been said in the past that there is never a margin of appreciation in relation to Article 2, that is not the case now. On this basis, the argument made in this section is only taking one step

[842] ibid, para. 148.

further to one of the specific aspects of Article 2 (the end of life), namely the death penalty. In other words, if it can be shown that neither Article 2, nor even Article 3, is actually absolute in practice, then there is no good reason for rejecting the relevance of the margin of appreciation doctrine in relation to them. Notably, I am not trying to overstate the significance of these kind cases indicating the potential for flexibilities in Article 2. I am merely showing that it is possible to 'open the door', rather than decisively claiming that the current cases absolutely show that there can or should be flexibilities in Article 2. Whether or not the Court would recognise the margin of appreciation in relation to extradition to the death penalty, it nevertheless could. More importantly, this would not disrupt the abolition of the death penalty within the Council of Europe as mandated by Protocols No. 6 and No. 13. As shown above, the emerging margin of appreciation regarding Article 2 cases could be used to facilitate the change of approach that this thesis advocates, the discussion of which will be continued.

4.3.5 Applying the margin of appreciation to extradition involving the death penalty

As has been examined in Section 4.1.2, European human rights law has, in the past decades, become very restrictive and prohibitive against the death penalty and extradition of people to retentionist states to face the death penalty in view of the increasing protection of the Convention rights. It has been argued that the death penalty prohibition had conceptualised as a European consensus and there is a minimum acceptance that the development path of the European standard tends to be consistent

with the 'universal abolitionist trend'.[843] However, such consensus definitely has not been endorsed via international legal prohibitions on the one hand. On the other hand, an absolute consensus against extradition to the death penalty has far from being universally complied with in state practice. From this perspective, although the established standard has narrowed the scope of the margin of appreciation, it is still applicable subjected to strong justifications.

With respect to how the doctrine of the margin of appreciation, to a very limited degree, could work specifically to accommodate the suggested flexibilities that this thesis argues, the essence does not depart from the existing norms regarding the application of the doctrine. Nevertheless, a number of factors needs to be particularly stressed here.

Briefly speaking, in the attempt to attain a balanced relationship in the decision-making process, the general interests of the public should be a focus compared with the right of individuals, on a case-specific basis.[844] More specially, various factors are relevant, including 'the weight of the individual interest affected, the seriousness of the interference, the importance of certain government aims and the need for the interference to achieve such aims.'[845] For the subject of this thesis, the assessment of either the value attached to the requested person's human rights, or the severity of the

[843] Jon Yorke, 'The Right to Life and Abolition of the Death Penalty in the Council of Europe' in Jon Yorke (ed), *The Right to Life and the Value of Life: Orientations in law, Politics and Ethnics* (Routledge 2016) 233-64.
[844] As was affirmed in *Soering* case, '…a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights [is inherent in the whole of the Convention.]' *Soering* case, para. 89.
[845] Gerards, General Principles of the ECHR (n 754) 242.

harmful consequence of the failure of the extradition is variable in different cases.

It is possible to argue international criminal cooperation is an exercise in pursuit of legitimate aims, albeit subjected to further assessments under the margin of appreciation. The driving force behind the restriction are generalised as the collective interests in combating transnational crime, protecting the requesting state's integrity of criminal jurisdiction as well as the requested state's national security and public interests. All of those interests or values could be largely served by a delicate operation of extradition, including those cases where individuals would be extradited to retentionist states in which the death penalty is lawfully carried out, guaranteed by sufficient international regulation. In that sense, in cases when extradition from the European state to a state where the death penalty is a kind of legitimate punishment, the potential death penalty should not be the straightforward ground for refusing the cooperation. Instead, a proportionality test is supposed to be applied to assessing whether placing extraditee to the risk of the death penalty is entirely necessary for the sake of extradition or the interests realised via extradition. In other words, for either the national authorities or the ECtHR, making a proportionate decision and finding a balanced approach are required.

It has been accepted that the realisation of the greatest good for the greatest number, in practice, may inevitably bring about the harm to the few.[846] For example, in those

[846] Hilaire McCoubrey and Nigel White, *Textbook on jurisprudence* (3rd edn, OUP 1999) 30.

'national security' cases, the rights and interests protected by human rights law are often subjected to limitations in governments' concern.[847] From this perspective, certain compromise of the extraditee's human rights, regardless of the qualified or presumed absolute ones, are acceptable. More importantly, the proposed assessment should be conduct in the specific context of globalised criminality, and various surrounding circumstances should be taken into account, in particular considering the threats from terrorism and other severe transnational crimes. To be more precise, if the ECtHR defers its contracting parties a margin of appreciation within which they are able to make their own judgment proportionately and grant the extradition to a non-European state. The proportionality perspective here could be construed as that the repression of transnational crime on behalf of many people outweighs the rights of the one person to be extradited. For example, this would especially fit in the case where the extraditee poses a national security threat to the requested state. In the absence of the ability to allow extradition, the host state may be forced to spend vast sums of public money to incarcerate the person over a long period or have to cumbersomely find out another approach to prevent him from jeopardising the wellbeing of citizens. Under such cases, extraditing the individual to a retentionist state where the death penalty is lawfully carried out would be a proportionate choice that maximises the collective interests of the requested state, in which the dangerous fugitive resides and poses a threat. That is to say, the rights of one person should not be allowed to be more important than the rights of many people to be safe in the expelling state.

[847] Legg, *The Margin of Appreciation in International Human Rights Law* (n 737) 153.

It is worth mentioning that, in this section, while we are addressing the 'number' of people in the assessment, it is not the literal meaning of counting the exact number of people from both sides and weighing up. It is not saying that any interference with one extraditee's human rights is allowed whenever two or more people would benefit from his extradition. On the contrary, it is the scale and quality of benefits for both participating countries in the extradition process that should be valued.

It should also be noted that there a qualitative difference between the 'normal' extradition case when someone whose extradition is sought for a transnational crime; and one where the extraditee sought also poses a national security threat to the requested state. In the latter case, the requested state may have more desirability to comply with the extradition request not only based on its treaty obligation but also for its own state interests of securing its territory. Therefore, at a minimum, extradition to face the death penalty where the extraditee also poses a significant national security threat to the requested state should not be banned without any exception. This might be a stimulative leading to further exceptions in non-national security cases. The above different types of interests at play are also relevant in the decision-making process regarding whether and to what extent the extradition is necessary for the 'press social need'.

In the application of the margin of appreciation in relation to the death penalty—extradition dilemma, various factors could be decisive. That is to say, there are many

occasions where one state may overstep the boundary of the afforded margin of appreciation in dealing with the extradition request from the abolitionist state. At first, it is principal to find out the direct necessity of the restrictions, which means whether extradition is the only way to achieve the purpose and there should be no less intrusive means that could secure same objectives. In other words, it is important to evaluate to what extent the refusal of an extradition request would undermine the criminal justice of the requesting state and whether the failure of extradition would lead to the impunity of criminals.[848] That is to say, it is essential to confirm if there are entirely effective and sufficient alternatives to extradition to ensure the extraditee being prosecuted or facing punishment. While evaluating the alternatives, not only the availability of jurisdiction and evidence for example, in the requested state should be taken into account, but also its willingness to prosecute and punish is also important. The latter will, to a large extent, be determined by whether or not the extraditee poses substantial threats to the national security or other specific national interests of the requested state *per se*. As it was framed in Chapter 1, the alternatives to extradition, including but not limited to prosecuting in the requested state or in a third state and surrendering to an international tribunal, are rarely available or sufficient. This means, unlike in *Soering* case where there was a third option to hand over the applicant to Germany,[849] in many cases, a less intrusive way of reaching the same result does not exist. In other words, extraditing to a retentionist state is the best choice for the requested state to clear up the

[848] At this stage, the interest of the requested state is also an aspect needs to be considered concurrently. For example, whether the presence of the person concerned in the requested state is 'conducive to the public good'.
[849] *Soering* case, para. 111. 'A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.'

potential security risk in its territory in the national security cases, and the only way for the requesting state to bring the fugitive back to perform the criminal justice based on the rule of law. Both of which, in the view of this thesis, would be proportionate.

Secondly, it is absolutely significant to determine that, upon the fugitive's extradition in the retentionist state, whether or not the potential death penalty would be lawfully carried out, namely, in breach of the international regulation as discussed above. Conducting the proportionality test means it does not preclude the result of prohibiting extradition to places. In other words, the justification for the restriction of the individual's right cannot be sufficiently accepted if those procedural safeguards are not fully guaranteed, even in the name of defending the collective interests. Because in such case, the use of the death penalty itself may give rise to the violation of rules of customary international law. More specifically, the requested state is responsible for ensuring that the requesting state abides by rules recognised as regulating the death penalty. The key point here is that the only criterion on deciding whether or not the extradition should be approved is if the death penalty could be 'lawfully applied', rather than the mere fact that the death penalty is existing in the requesting state. For instance, whether the crime upon which the extraditee is suspected or convicted of falls into the most serious crime category for the death penalty; whether the methods of execution and conditions of detention in the requesting state are humane and not contrary to the torture and other ill-treatment under Article 3 of the *ECHR*. In the case of *Jabari v.*

Turkey,[850] the applicant, who had committed adultery in Iran that is punishable by stoning to death under Islamic law, was arrested in Turkey for illegally entering with a forged passport and subjected to deportation. She complained the deportation would put her into risk being stone to death upon return to Iran, which contrary to Article 3.[851] Her complaint was endorsed by the Court as her deportation to Iran, if executed, would violate Turkey's obligation under Article 3.[852] In light of the discussion in Chapter 3, the death penalty upon the applicant' case would not qualify as 'lawful application' as adultery does not meet the 'most serious crime' requirement and stoning to death can never be taken as a legitimate and humane method of execution. For such reasons, the potential death penalty would add no merit to the suggested test of proportionality, irrespective of the reason for expulsion (via deportation or extradition).

Thirdly, deriving from the terminology clarified in Chapter 1, in theory, there should be some differences in the cases where different kinds of subjects are requested, namely, the people charged with a capital crime and the people who has already been convicted of a crime subjected to the death penalty. For the latter, they know the exact penalty they face upon extradition. In contrast, for those people who are requested for prosecution, strictly speaking, they are not criminals based on the principle of presumption of innocence, and there would be more uncertainties regarding the result of the trial especially the penalty. For such reasons, there might be a different level of

[850] *Jabari v. Turkey* App no 40035/98 (ECtHR, 11 July 2000).
[851] ibid, paras. 34-5.
[852] ibid, para. 42.

risk calculation about the death penalty upon return to the retentionist state. Admittedly, in the current framework, it seems that whether or not the requested person is convicted does not matter in the abolitionist state's assessment. This means, the existence of the death penalty or whether the assurance is available is the predominant issue.

Lastly, it is possible to say that while we are talking about the protection of the individuals' Convention rights, the conflicting general interests of a wider scope of people should also be concerned as a reconciliation is supposed to be struck. Nonetheless, it is not saying that the individual's human rights would be restricted on all occasions, but at least, from the legal perspective, having the possibility to consider. In light of the purpose of this thesis, the argument proposed in this section is not saying that the European states are obliged to or should unconditionally agree to extradite to retentionist states. Providing a certain degree of flexibility within the margin of appreciation does not means excluding the supervisory role of the ECtHR partly or completely. As a matter of fact, the margin of appreciation has never been taken as unlimited or discretionary, even a wide margin is applicable. In contrast,

> 'goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.'[853]

[853] Explanatory Report on Protocol No. 15 *ECHR*, para. 9. See also, Brighton Declaration, para. 11. 'The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its ''necessity''…' See Council of Europe, 'Margin of Appreciation' <https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp> accessed 23 June 2018. See also, *A. B and C v. Ireland* App no 25579/05 (ECtHR, 16 December 2010), para. 238, 'margin of appreciation is not

In fact, there were many cases in which the state was deferred with a wide margin of appreciation, but it was still found violated the Convention obligation.[854] As Janneke Gerards concludes, 'the main function of the margin of appreciation doctrine is to allow the Court to vary the intensity of its review of the States' compliance with the negative and positive obligations following from the Convention.'[855] Against this background, extradition of people to face the death penalty would have to be very carefully scrutinised. This argument was backed by the judgment of *McCann and Others v. The United Kingdom* case where the Court affirmed

> the use of the term 'absolutely necessary' in Article 2 para. 2 indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is 'necessary in a democratic society' under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2.[856]

For the above reasons, while interpreting Article 2 and making relevant assessments upon the exceptions to it, the Court must 'subject deprivations of life to the most careful

unlimited…the Court must supervise whether the interference constitutes a proportionate balancing of competing interests involved.' Nevertheless, it is advised that the Court should show self-constraint especially where there are national security concerns about the extraditee.

[854] McGoldrick (n 737) 26.

[855] Gerards, General Principles of the ECHR (n 754) 165. For further discussion of the flexibility and variation under the doctrine, see 165-8.

[856] *McCann and Others v. The United Kingdom* App no 18984/91 (ECtHR, 27 September 1995), para. 149.

scrutiny'.[857] It may well be the case that very strong reasons would need to be put forward regarding extradition to face a trial that could result in the death penalty, it is not to say that there could never be such reasons.

4.4 Conclusion

Based on the examinations and outcomes of the previous chapters, this chapter has conducted a research on the evolving European standard on extradition to retentionist states where the extraditee is facing the death penalty. The Standard has become highly prohibitive and is regarded as exporting its own extreme abolitionist values, particularly against the international lawfulness discussion in Chapter 3. Having re-examined states' conflicting obligations (or interests) in those extradition (or expulsion) cases involving the death penalty, it has found that the current method is problematic and cannot properly address the emerging difficulties the states, including the States Parties of the ECtHR, confront in the context of transnational criminality. This explains not only the reason that states are continuing to challenge the absolute standard that the ECtHR has always employed, but also the necessity and possibilities of main argument raised in this thesis for a certain degree of variable flexibilities in dealing with extradition to retentionist states.

Under such circumstances, an alternative approach was proposed. This means, arguing for the application of the margin of appreciation under Article 2 of the *ECHR*,

[857] ibid, para. 150.

recognising its applicability in relation to the death penalty in extradition cases. The suggested change is based on the inherent rationales of the margin of appreciation itself, in particular expressing and accommodating a certain extend of proportionality. The proportionality calculation affords precedence of the greatest interests of the greatest number that is served by extradition over the human rights of the individual, so far as the proposed proportionality test is met. This subsection just briefly highlights some main points of this chapter and the final chapter will summarise these issues in more detail.

5. Concluding Remarks

This thesis is mainly about why the European Court of Human Rights should permit extradition to face the death penalty under tightly controlled circumstances; and how within the existing interpretative techniques of the Court that objective could be accommodated. The core argument advanced in this thesis is that the ECtHR should loosen its approach to extradition and allow proportionality when considering the extradition requests from states in which the applicant may be subject to a risk of the death penalty. There is a need for considerable legal justification for this argument given that it runs contrary to established and deep-rooted legal principles, approaches and fundamental rights thinking on this area of law. This thesis was attempting to demonstrate that, in theory, there are reasons and possibilities to reconsider the application of the margin of appreciation under Article 2 so as to circumvent the death penalty—extradition dilemma. However, considering the practical reality, it has to admit that the ECtHR might be unwilling to accept the suggested change that this thesis proposed.

Nevertheless, the difficulties of being adopted by the Court or most of the States Parties do not undermine the theoretical validity of the argument in legal terms. In other words, this thesis is not about whether the Court would do in regard to the change that has been presented, but in theory, the Court's approach should change, and the change could be accomplished appropriately. In the meantime, it is equivalently crucial to point out that

in pursuit of the reconciliation, this thesis does not seek to simply support abolitionist states or retentionist states in the death penalty debate. In contrast, a balanced and more proportionate approach is needed for the ultimate purpose of strengthening the use of extradition to eliminate the safe haven and enhancing states' competence to combating transnational crimes.

5.1 Extradition and transnational criminality

The starting point for this thesis was the observation that the relationship between human rights and extradition needs to be reassessed in the context of ever-greater transnational criminality. The ongoing changes in the international environment has bought about unremitting attempts to recalibrate the relationship between extradition and human rights, with a particular focus on the death penalty. As Neil Boister states, 'criminals have long fled across borders to escape justice, or used borders as shields for the commission of crime in other states.'[858] In the meantime, states are confronted with various transnational crimes which threaten not merely its national security, but also the public interests of all people. However, according to the principle of sovereignty and equality, states' enforcement jurisdiction is strictly territorial. It should be admitted that in the previous experience, the national border has undoubtedly blocked states to enforce their criminal law abroad. The criminals who are lucky enough to flee out of state have got a big change to escape from justice. Under such circumstances, it is claimed that both the globalised criminality and the limitation of states' extraterritorial

[858] Boister (n 16) 353.

enforcement necessitate the international judicial cooperation to a greater extent so as to efficiently combat transnational crimes.

Extradition is expected to serve as a legal framework for addressing the states' enforcement of their substantive criminal law, either prosecution or enforcing a sentence. Although states are not under obligation to extradite, they are supposed to be responsible for the suppression of criminality, especially those threaten the interests of the international community. In spite of its importance, it should be noted that extradition has never been a designation without weakness. It is often criticised for the complicated and uncertain procedures which involve miscellaneous case-specific factors; for its over-politicalised or extra-legal applications; and its numerous impediments. Simply put, the effective operation of extradition is actually obstructed by a wide scope of factors. Among which international human rights law has brought it into a new level of debate.

5.2 The death penalty—extradition dilemma

In history, extradition is a purely state-to-state process where the extraditee and his human rights were less concerned.[859] However, along with the remarkably increasing recognition of human rights over the past decades, the rights and interests of the extraditee have been a significant, if not the primary, factor in the operation of extradition. In Chapter 2.4 we have examined that the conflict between extradition and

[859] Bassiouni, Unlawful Seizures (n 87) 25; Boister (n 16) 376.

human rights was put into the forefront particularly since *Soering* case, which opened the door for academic and practical attempts to reconcile extradition with human rights. Namely, to balance the need to bring international fugitives to justice and guarantee their fundamental human rights. However, we can still easily find out that in many cases where the interests served by extradition were not properly treated. Those extradition requests were 'overwhelmingly' refused on human rights grounds, in particular, the death penalty. Notably, the factors that were often overlooked was whether and to what extent the wanted fugitives' accusation or conviction was true and abhorrent, and to what extent the unavailability of putting them to trial or sentence is harmful to not only the criminal justice, but also the interests of all people involved. In other words, there have not been sufficient remedial measures to bring the fugitive to justice when they 'survive' from extradition based on human rights grounds.

The essence of the conflict between extradition and human rights, *inter alia*, the death penalty reflects the human rights law's influence upon criminal justice policy. As discussed in Chapter 3, the death penalty is a subject with enormous complexities and controversies, and it is interesting to find that the debate on either the death penalty *per se* or other related issues has always given rise to opposite results. In reality, the death penalty exists more than a kind of punishment, which involves a variety of concerns from different fields—judicial, political, cultural and religious. Arguably, either being an issue of purely criminal justice or one subjected to human rights concerns, those controversies in related to the death penalty do exist and seems not to be reconciled.

The abolitionists have totally opposite opinions against the retentionists. Those divergences imply the death penalty cannot be indisputable in either political or legal level. More importantly, the debate and discrepancy upon the death penalty have also stretched into international criminal cooperation, *inter alia*, extradition.

The European Court of Human Rights regulates the extradition process among its States Parties and the extradition relation between its States Parties and other non-State Parties. The Court conducts a quite strict criterion on both human rights in general and the prohibition of the death penalty in specific. This criterion is reflected not only from the *European Convention on Human Rights* with a series of Protocols, but also from its abundant case law. Nevertheless, as analysed in Chapter 4.1.2, the European human rights law did ban the death penalty from the outset. The standard on the death penalty has evolved to become very prohibitive, including in extradition cases. The high standard inevitably influences its States Parties to negotiate extradition treaties with retentionist states and to fulfil extradition request from a retentionist state where the death penalty is foreseeable. In current legal framework, it seems to be a normative approach that abolitionist states would not extradite or by other means to transfer people to a retentionist state where they are at risk of the death penalty, unless sufficiently credible assurance is provided against the imposition of the death penalty or execution. However, the 'extradition or execution' has never been an undisputable issue, and the use of assurance has triggered a series of problems, which was discussed in Chapter 4.1.4.

The overall aim of this thesis was to facilitate international judicial cooperation in the suppression of transnational crimes, by justifying a different relationship between extradition and the death penalty. To be precise, European states are supposed to be provided with more flexibilities, via the margin of appreciation, to extradite people to a state where is the death penalty is lawfully carried out and the test of proportionality is met. It is necessary to propose this argument based on a number of reasons. To begin with, the death penalty—extradition dilemma is inherently problematic. As extensively explored in Chapter 3, several issues about the debate on the death penalty, including its controversies as a punishment in criminal justice; the alleged 'universal abolition movement' backed by international human rights law; and its lawfulness in international law, should be recalibrated and reclarified. Firstly, while an ever-greater number of states are abolishing the death penalty, a majority of the world's population is potentially subject to it. Even for those states have already abolished the death penalty, although resumption of the death penalty is prohibited, there has always been continuing attempts to reintroduce it. The public support is not only behind those attempts of reintroduction, but also embedded in the culture and value system of many retentionist states. Secondly, the death penalty is contentious from various aspects, especially with regard to deterrence, discriminatory execution, miscarriage of justice and public opinion. Although those discrepancies do not directly affect the status of the death penalty in international law, particularly customary international law, it provides a rationale for a state's policy regarding the death penalty. Lastly, by reframing the death

penalty in human rights law, it comes to the fact that the death penalty has no longer been a purely criminal justice issue, albeit with distinctive objection. However, by establishing that there is neither universal treaty law nor rules of customary international law absolutely prohibiting the death penalty, it is arguable to say the ECtHR's standard that prohibits extradition to retentionist states where the death penalty is foreseeable is actually exporting an absolute abolitionist policy, which is not universal and not required by international law. The cases have also indicated that it is a policy that not even all its own States Parties fully share, which have been convincingly demonstrated from the cases outlined in Section 4.2. Nevertheless, it does not equate that the use of the death penalty is legitimate in all cases. In fact, to a certain extent, the death penalty is regulated, and its use is significantly restricted. Simply put, the death penalty has to be lawfully carried out in according to those restrictions, including but not limited to those expressed in Section 3.4, particularly those deriving from customary international law.

The lawfulness of the death penalty should not be examined without the considerations of its regulation. This means, the discussion on those restrictions or safeguards is equally or more important than that of the death penalty *per se*. To a large extent, the former is designated to protect the human rights of people facing the death penalty, ensure the death penalty is applied proportionately, effectively and legitimately. As can be seen, the details of some safeguards have not reached a universal consensus, for example, the 'most serious crime' threshold. Many of the safeguards have not been fully

complied by retentionist states, irrespective of the status of them. The use of the death penalty would not be qualified as 'lawfully carried out until those safeguards are guaranteed. Therefore, concerning the main argument of this thesis, what is required for the requested state to determine, is not whether it would subject the extraditee to the death penalty upon the extradition, but whether the extradition would give rise to a death sentence that is lawfully carried out in the requesting state.

Secondly, the current response to the dilemma, namely, the 'absolute' reliance on the use of assurances is inherently problematic. As argued in Section 4.1.4, while extradition with assurances is at least better than the person going totally unpunished, it will interfere the retentionist state's sovereignty and the integrity of its criminal justice. Moreover, it leads to different categories of criminals. These reasons account for why the use of assurances cause great dispute and discount; and also, some retentionist states do not comply with it at all. Thirdly, we acknowledge that there are not sufficient and satisfactory alternatives to extradition from the perspectives of combating transnational crime and protecting human rights. In addition to the above concerns, as established in Chapter 1.3, there are compelling political arguments in favour of loosening the ECtHR's standard regarding this issue. In fact, there have already been signs indicating the change being adopted with the support from some European politicians in the political sphere. The driving force behind that is partly expressed by the suppression of transnational crime on behalf of many people, to some extent, prevails over the rights of one individual extraditee.

5.3 Proposing a different way out

The mechanism established to meet the particular aim of this thesis is arguing for greater use of the margin of appreciation in relation to extradition, which recognising its application to the death penalty under Article 2 of the *ECHR*, where at present it does not seem to apply. This is significant because it has been observed that the scope of the margin of appreciation with respect to other rights tends to be quite wide in relation to states' response to fight against criminality, safeguard the national security and uphold the collective's interests. The importance of this mechanism and a deeper reason to adopt it has been demonstrated by the justifications of the margin of appreciation. It indeed underpins the argument that there needs to be greater international criminal cooperation against transnational crimes, rather than merely affording a higher priority to extradition in its conflicts with the individual's human rights.

Finding a way to circumvent the death penalty—extradition dilemma so as to bridge the gap between abolitionist states and retentionist states is especially needed in the new global context, which is characterised by the great availability of cross-border movement, the globalisation crime and states' expanding interests in respond to transnational criminality and safeguarding the national security and public interests. There is little doubt that prioritising extradition is consistent with the interests of both participating states. That is to say, justice is better served by extradition in those cases,

which meets the needs of both participating countries. Although there might be a qualitative difference between someone whose extradition is sought for a transnational crime; and one where the person sought also poses a threat to the national security and public interests of the requested state. Generally speaking, in cases where the extraditee is wanted by the requesting state and the host state wants to comply, the public interests or the interests of the greatest number of people are served. To be more precise, on the one hand, extradition is definitely for the interests of the requesting state, to guarantee the integrity of its criminal justice and to uphold justice and the rule of law, which also constitute the rationale for extradition law. On the other hand, for the requested state, except for the reciprocity interests manifested in Section 2.2.2.2, there are quite a lot of incentives for it to engage in extradition and other kinds of international judicial cooperation. Firstly, it is a 'display' of the state's value and commitment to the suppression of transnational crime. This would boost the state's international reputation in criminal justice, prevent not only states from being labelled as a safe haven for criminals, but also an influx of potential fugitives to escape justice. Secondly, fulfiling the extradition request may also bring about extra benefits for the requested state, for example, in trade and business areas. Thirdly, assisting the requesting state in bringing fugitives to justice also serves the interests for the requested state itself. The custody of the accused or convicted people in its territory poses potential and unpredictable threats to its national interests, and the host state is always willing to get those undesirable and dangerous people out of the state.

Based on the conclusion on the lawfulness of the death penalty, it is claimed that extradition to retentionist states itself is not unlawful, although extradition to states that carry out the death penalty without regulating it might be resisted. The concept of 'lawful application of the death penalty' is put forward to describe those applications of the death penalty in accordance with the international regulation discussed in Chapter 3.4. For such reasons, there could be possibilities to look into the mechanism of introducing the margin of appreciation into this field. This means, the risk of the death penalty should be taken into consideration within the test of proportionality, not just about the existence of the death penalty in the requesting state, but about how the death penalty is applied by that state in specific cases.

The doctrine of margin of appreciation, although subjected to criticisms, has been extensively applied in the jurisprudence of the European Court of Human Rights. It has been observed that the applicability or role of the margin of appreciation in relation to Article 2 of the *ECHR* was not clear. However, as we have seen in *Vo* case and *Lambert* case, it was indeed relevant with respect to the start of life and the end of life respectively. These cases denote that there is potential for limited flexibility regarding the death penalty under Article 2, which provides us with the foundation for maintaining the presented approach. That is to say, the requested state should be conferred with the margin of appreciation to assess and determine whether extraditing people to facing the death penalty is proportionate or not. If the margin of appreciation was allowed and it is applied properly, there should be a test of proportionality, which should allow states

to extradite people to a retentionist state where it carefully regulates the imposition of the death penalty and its execution. In the meantime, conducting the proportionality tests means it does not preclude the result of prohibiting extradition to places where the death penalty is not lawfully carried out. For example, the offence punishable for the death penalty goes against the 'most serious crime' standard; the death penalty is imposed on children or pregnant women; or the death sentence is followed by a fair trial. It needs to stress that not just how the death penalty would be carried out in the requesting state is relevant in the test of proportionality, as presented in Chapter 4.3.5, factors such as the interests (of both participating states) served via extradition and whether there is an effective alternative.

Furthermore, as advocated in Chapter 4.3, considering the main argument in this thesis, what matters in the death penalty—extradition dilemma is not just the use of the death penalty. More importantly, it involves both participating states' interests that realised by successful extradition, in particular the suppression of transnational crime on behalf of the public or the collective community. For example, those detrimental effects resulting from the unavailability of bringing the fugitive to justice should be regarded as one of the factors in the suggested mechanism, which has been discussed on Chapter 4.3.5.

To conclude, the main argument in this thesis is that the prohibition of extraditing people to face the death penalty in retentionist states is indeed exporting the non-

universal abolitionist values. States should be conferred with a certain degree of margin of appreciation to flexibly make its own decision regarding whether the extradition would be proportionate or not in specific cases. This is particularly necessary in this global context of transnational criminality where greater international criminal cooperation is needed. To a certain degree, combating transnational crime and protecting the interests of the collective community are expected to enjoy a higher priority over the human rights protection of one extraditee in limited situations.

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