

**AN APPRAISAL OF THE CONCEPT AND PRACTICE OF
EXTRADITION UNDER INTERNATIONAL LAW**

BY

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DECLARATION

I, **Bashir Mohammed CHALAWA** hereby declare that the work in this dissertation titled: “**An Appraisal of the Concept and Practice of Extradition under International Law**” has been carried out by me. The information derived from other literatures have been duly acknowledged. No part of this thesis has been previously presented for another Degree or Diploma at this or any other institution.

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CERTIFICATION

This dissertation titled: “**An Appraisal of the Concept and Practice of Extradition under International Law**” by **Bashir Mohammed CHALAWA** meets the regulations governing the award of the Degree of Master of Laws (LL.M) of the Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This work is dedicated to my late father Alh. Mohammed Chalawa may the Almighty Allah (SWT) grant him Aljanat-Firdaus, Amen.

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LIST OF ABBREVIATION

&	-	-	-	-	-	And
AGF	-	-	-	-	-	Attorney-General of Federation
ALL FWLR	-	-	-	-	-	All Federation Weekly Law Report
Anor	-	-	-	-	-	Another
CA	-	-	-	-	-	Court of Appeal
Cap	-	-	-	-	-	Chapter
Ed	-	-	-	-	-	edition/Editor
Eg	-	-	-	-	-	Example
Etc	-	-	-	-	-	and so on
FSC	-	-	-	-	-	Federal Supreme Court
Ibid	-	-	-	-	-	In the same source as previously cited
JCA	-	-	-	-	-	Justice Court of Appeal
LFN	-	-	-	-	-	Laws of the Federation of Nigeria
LTD	-	-	-	-	-	Limited
MJSC	-	-	-	-	-	Monthly Judgment of the Supreme Court
No	-	-	-	-	-	Number
NRNLR	-	-	-	-	-	Northern Region of Nigerian Law Report
NWLR-	-	-	-	-	-	Nigerian Weekly Law Report
Op. Cit-	-	-	-	-	-	Opere Citato (In the work already cited)

Ors	-	-	-	-	-	Other
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Pt	-	-	-	-	-	Part
SC	-	-	-	-	-	Supreme Court
SCNJ	-	-	-	-	-	Supreme Court of Nigeria Judgment
UK	-	-	-	-	-	United Kingdom
USA	-	-	-	-	-	United States of America
V	-	-	-	-	-	Versus
Vol	-	-	-	-	-	Volume
WACA	-	-	-	-	-	West African Law Report
WNLR-	-	-	-	-	-	Western Nigeria Law Report

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ABSTRACT

Customary international law and treaties have evolved over the centuries by the willing and active commitments of nations to subdue criminals tendencies by punishing fugitive offenders who attempt to escape from justice by seeking refuge in another nations. Extradition has been adopted to effectively prosecute fugitive offenders without offending the sovereignty of a sister state, and without compromising the doctrine of inviolability under international law. One of the problems of this research is that political offence is an exception to extraditable offences, and a concept which is troublesome in the determination of extraditable offence. It is disheartening to learn that some fugitives hide under this exception to escape the wrath of the law. Another problem of this research is the reluctance of some countries to subscribe to the principle of reciprocity and international morality in considering a request for extradition. The attitude of these states has made their territories a Haven for fugitive criminals. Another problem of this research is the inherent loop holes in the laws of extradition with particular reference to political offence exception. It is disheartening to learn that bilateral and multilateral treaties, and municipal extradition laws of state parties have made political offence as an exception to extraditable offences, but contain no provision geared towards the ingredients of a political offence that are of universal application. This legal challenge made different nations to ascribe diverse meanings to political offence. The research, therefore, traced the history and development of the practice of extradition in international. It also appraised the nature, scope and principles of extradition in order to ascertain whether the original philosophy behind the birth and practice of extradition amongst sovereign states still exists. It also identified the definitive inadequacy of the concept of political offence, and how it has hampered the smooth practice of extradition. The methodology used in achieving this aim is doctrinal method, which is a library oriented research. It also dwelled on the practice of extradition amongst some sovereign states like England, United States of America and Nigeria. The practice of extradition from the Nigerian dimension of certain instances, like Umaru Dikko, Enahoro and Ojukwu, etcetera, were analyzed and some positive lessons discovered. The research found that political offence exception is an obstacle in the determination of extraditable offences. It has also been found that state parties to extradition agreements take undue advantage of the inherent loop holes in the laws of extradition to avoid their international obligation. It has also been found that domestic extradition laws of state parties empower the Attorneys-Generals or Foreign Ministers who are political appointees to determine which offence is of political character. The research also finds that extradition proceedings are conducted by the requested state, who is the complainant, the prosecutor and the judge. This is difficult to be reconciled with the fair hearing principle of Nemo Judex in Causa Sua. The research recommended that only the courts would be in a better position to determine whether or not a particular offence is political, and not Attorneys-Generals or Foreign Ministers who are political appointees and their judgment is likely to be influenced by politics or other extraneous considerations. The research also recommended that there is need for establishment of a neutral international judicial body to sit in a neutral state to conduct extradition proceedings. It has also been recommended that in the interest of all humanity, municipal legislation on extradition should expressly provide the ingredients that constitute the political offence and the political offence exception should not always be treated like a sacred veil because it is many times used as a shield to protect fugitive criminals.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

There is a universal righteous indignation against crimes as constituting a clog in the wheels of peace, security and progress of society. Consequently, the fight against international crimes have over the years become a subject of concern amongst sovereign states. This is more particularly because these sovereigns dearly desire to develop a mechanism either in the form of bilateral or multilateral treaty that will effectively prosecute international criminals without offending the sovereignty of a sister state and without compromising the doctrine of inviolability under international law. This is the primary philosophy behind the birth of the concept and practice of extradition under international law. The word “extradition” is derived from the Latin words “*ex*” and “*traditum*” which means to “deliver from”¹. It basically, involves the process whereby, under a treaty or on reciprocity, one state surrenders to another state, at its request, a person accused or convicted of a criminal offence committed against the law of the requesting state for trial or sentence². The practice of extradition is in the interest of all nations; **Lord Russell**, in **Re-Arton**³ captures the philosophy behind the practice of extradition in the following terms:

The law of extradition is founded upon the broad principle, that it is in the interest of civilized communities that crimes should not go unpunished, and it is part of the comity of nations that one state should afford to another every assistance towards bringing persons guilty of such crimes to justice.

1. Hingorani, R.C. (1969). *The Indian Extradition Law*. Asia publishing House, London, p. 5

2 Umzorike, U. O. (2010). *Introduction to International Law*. Spectrum books, Ibadan, Nigeria, p.160

3 (1896) 1Q. B 108 page 11

Fundamentally, the concept and practice of extradition under International Law was a mechanism developed by the conference of sovereign states, predicated on the notions and basic principles of neighborliness and reciprocity with the aim of combating international crimes and apprehension of fugitive offenders⁴. The concept and practice of extradition dates back to the ancient middle age and far eastern civilization. It was perceived as a matter of courtesy and goodwill between sovereigns⁵. The subject of extradition is much older than modern International law⁶ and pre-dates even the origin of modern concept of nation-state based on organized rules of international behavior. Without extradition, international criminal offenders would be able to escape justice by moving from one country to another as it not possible for foreign authorities to arrest a fugitive offender in another country without extradition. Extradition allows countries to make request for another country to arrest and transfer a fugitive offender in order to prosecute, convict, sentence or enforce an already imposed sentence on them.

The reality on ground is that if the ills associated with the practice of extradition internationally are not curbed in good time, diplomatic relations are most likely to become unhealthy amongst sovereign states; international criminals will surely make head-way in their nefarious activities; and the original philosophy behind the concept and practice of extradition which is to curb international crimes will be lost. This research appraises the concept, practice and procedure of extradition under International Law. It is, therefore, a modest effort to delve into the slippery legal terrain governing the trend and the various manifestations of the intricacies associated with extradition, especially in our contemporary era where there is high tendency

4 Ibid

5 Okeke, C.N. (1986). *The Theory and Practice of International Law in Nigeria*: Fourth Dimension Publishing Co. Ltd, Enugu, p.103.

6 Ibid page 103

among our world leaders and some prominent individuals to abuse public office or commit some nauseating crimes and attempt to seek for asylum elsewhere.

1.2 Statement of the Problem

This research work has identified the following as problems associated with the concept and practice of extradition under international law.

The obligation of state parties to extradition agreements has been hampered by the political offence exception under the law of extradition. Political offence exception has a firm root and history under the law of extradition. It is good that offences with characterization of politics should not be within the extraditable offences. This is because they are not naturally or traditionally core offence with all the ingredients of what constitutes an “offence” or “crime”. However, political offence is an exception, and a concept which is troublesome in the determination of extraditable offences. It is disheartening to learn that some fugitives hide under this exception to escape the wrath of the law.

The reluctance of some countries to subscribe to the principle of reciprocity and international morality in considering a request for extradition is another challenge facing the practice of extradition. There is a misconception as to the fact that the doctrine of reciprocity is the foundation upon which a successful practice of extradition resides. As it is, the doctrine of reciprocity has less potency and minimal viability due to the reluctance of some states to subscribe to its practical operation. It is, at best, effective only in theory. The attitude of these states has made their territories a Haven for fugitive criminals. We have seen this attitude in the United Kingdom and Ivory Coast, on the extradition requests by Nigeria over Umaru Dikko⁷,

⁷ Daily times, July 12, 1984

and Ojukwu⁸. The recent one, is that of Buruji Kashamu, where the Nigeria government, under Jonathan administration was reluctant to extradite the fugitive to the United States of America, despite the extradition treaty between Nigeria and the United States of America⁹.

Another major challenge is the inherent loop holes in the laws of extradition with particular reference to the doctrine of political offence exception. It is disheartening to learn that bilateral and multilateral extradition treaties, and municipal extradition laws of state parties have made political offence as an exception to extraditable offences, but contain no provision geared towards the ingredients of a political offence that are of universal application.¹⁰ As it is, an offence of a political character is determined by a requested state. As a result of this legal challenge, different nations ascribe diverse meanings to political offence.

Another problem facing the practice of extradition is Jurisdictional Matters. Whether extradition proceedings are to be conducted domestically or internationally have seriously hampered the development of this area of law. Extradition proceedings are conducted by the requested state who is the complainant, the prosecutor and the judge. This is difficult to be reconciled with the fair hearing principle of *memo judex in causasua*, especially where the fugitive is a national of that requested state. In this circumstance, prosecution hardly yields positive results, if the legal process of prosecution and sanction is often controlled by the fugitive's sympathizers.

⁸Ojukwu, E.O. (1989). *Because I am involved*, fourth Dimension, Enugu

⁹ *Op. Cit.* P. 62

¹⁰ Example, section 3, Nigerian Extradition Act Cap E25 .L.F.N. 2004 provide that the fugitive shall not be surrender if the Attorney General or a court dealing with the case is satisfied that the offence in respect of which his surrender is sought is an offence of a political character. However the Act does not define what political offences are, but only leaves same to be determined by either the Attorney General or the Court. Even the Interpretation section 8 of the Act does not define political offence.

1.3 Aim and Objectives of the Research

This research work seeks to achieve the following aim and objectives.

This research work aim at tracing the history and development of the practice of extradition under International Law and appraising the nature, scope and principles of extradition with the following objectives:

1. To ascertain whether the original philosophy behind the birth and practice of extradition amongst sovereign states still exists;
2. To trace the basis of the political offence exception. In order to identify those who have a historic claim to the political offence exception under the law of extradition,
3. To identify the definitive inadequacy of the concept of political offence and how it has hampered the smooth practice of extradition internationally;
4. To critically examine the concept of political offence exception under the law of extradition in order to determine its relevance in today's international relation with a view to ensuring that the doctrine does not become a shield to perpetrators of crimes and other illegal activities.

1.4 Justification of the Research

The research envisages a better understanding of the law and practices of extradition. It will therefore be of help and great benefit to students of law, law teachers, lawyers, legislators, governments, international and regional organizations such as the United Nations and the African Union as well as the international community at large.

1.5 Scope and Limitation of the Research

This researchwork examines the concept, practice and procedure of extradition under international law. Consequently, the research work is limited to identifying the problems associated with the practice of extradition internationally, such as the definitive inadequacy of the concept of political offence and failure of the existing legal instruments to address same. Instances will however be limited to the Nigerian experience in the practice of extradition under international law.

1.6 Research Methodology

The methodology used, is doctrinal which, is a library oriented research. Materials consulted include primary and secondary sources. The primary sources include: information obtained from relevant statutes and case laws, such as the Nigerian Extradition Act¹¹ and the Pinochet's Case¹². Secondary sources consist of information obtained from books of both foreign and local authors, journals, articles published and unpublished, conferences and resolutions of international organizations.

1.7 Literature Review

There are several contributions on the concept and practice of extradition. It is imperative at this point to review some of these contributions as follows:

Umozurike¹³, in his contribution on the concept and practice of extradition, define extradition as the process where, under a treaty or on reciprocity, one state surrenders to another state, at its request, a person accused or convicted of a criminal offence committed against the law of the requesting state. He opines that the rationale for extradition is that a serious crime should not go unpunished even if the criminal escapes from the jurisdiction where the crime was

11 Cap. E25 L.F.N. 2004

12 (1999) 2 W.L.R. 827

13Umozurike, U. O. (2010) Introduction to International Law. Spectrum Books, Ibadan, Nigeria, p.104

committed. He also discusses the procedure for extradition and holds that for an application to be made, there must be an extraditable person and an extradition crime, that states extradite for serious crimes only and for offences that are punishable in both the requesting and the requested states. However, he submits that a request for extradition would be turned down if the prosecution is on political, racial or religious grounds. On the principle of specialty, he opines that it presupposes that the requesting state must try only for the offence for which the offender was extradited.

The author's contribution is commendable having discussed the meaning and some principles of extradition. However, he did not discuss extraditable and non-extraditable offences and other principles of extradition, such as the doctrine of political offence exception, which is the focus of this research work.

Okeke¹⁴ In his work discussed extradition in international law with particular reference to some events in Nigeria. He traced the history of extradition and the position of extradition in contemporary international law. The author discussed extraditable offences, extraditable persons, and procedure for request of extradition, specialty principle, and offences of a political, military and religious character. He also discussed the concept of extradition in the light of the applicable law in Nigeria. The author extensively discussed the political offence. According to the author, political offences have given rise to difficulties of interpretations which different countries have tried to solve in different ways. It is therefore left to the country to which a request for extradition is made to determine which offences fall within the political category. However, the author failed to provide a way forward in solving the problem of what amounts to political offences in universal basis, which is the focus of this research work.

¹⁴Okeke, C.N. (2005)*The Theory and practice of International Law in Nigeria*. Fourth Dimension Publishing Ltd, Enugu, Nigeria. pp.103-135

Shaw¹⁵, in his contribution to the subject of this research, defines extradition as the practice that enables one state to hand over to another, suspects or convicted criminal who have fled abroad. He also states that extradition is based upon bilateral treaty law and does not exist as an obligation upon state in customary international law. He also mentioned the principle of double criminality and offence of political character and extradition of nationals. There is need for a concept of extradition under international law.

Nggada¹⁶, in his research work on the concept and practice of extradition, discussed the meaning and procedure for extradition. He discussed extraditable and non-extraditable offences, rule of double criminality, rule of specialty and the exceptions to the rules. He discussed the practice of extraction in the light of the commonwealth and the ECOWAS. He also distinguished the concept of extradition from deportation and rendition. He examined extradition treaties among the ECOWAS States and the commonwealth. The author's research work is beneficial. However, he did not discuss the concept of expulsion. Perhaps an approach wide enough to examine the practice of extradition under international law may have been more beneficial.

Bedi¹⁷, in his research work on the concept and practice of extradition, discussed extradition as a subject which involves municipal law as well as international law. He examined the four basis for a claim to extradition, which are treaties, national laws, reciprocity and morality. His research has also covered extraditable offences, objects of extradition and practice in common law countries. Under the procedure for extradition, he discussed the request for extradition, concurrent demands by various states, judicial intervention, conditional competence with request and grounds for refusal of extradition. The author examined some bilateral and multilateral treaties on extradition, like the Arab Convention, 1952, the European Convention

¹⁵ Shaw, M.N. *International Law*, fourth edition, Cambridge University Press, Cambridge, pp.482-483

¹⁶ Nggada, Op cit.

¹⁷ Bedi, S.D. (1968). *Extradition in International Law and Practice*. Dennis & Co., Sukkur

1975, the inter-American second Draft Convention of 1975. The Afro-Asian Convention of 1961 and the Benelux Convention, 1962. The author opined that:

Though under the existing rules of international law no state, in the absence of treaty, is under any legal obligation to surrender a fugitive found within its jurisdiction to the requesting state. Yet, to meet the urgent needs to humanity and to achieve international solidarity, states should not decline to surrender persons charged with or convicted of criminal offence as affecting the general wellbeing and happiness of society.

The author's research work is highly commendable. However, the concepts of rendition, expulsion and deportation are not distinguished from extradition which is the focus of this research work.

Hingorani's¹⁸ research work on the concept and practice of extradition, did trace the history of extradition. That the concept of extradition was first used in a French Decree in 1971 and later again by France in a treaty in 1828, after which the word has been uniformly used. The author posited that extradition is practiced among nations mainly for two reasons. Firstly, to warn criminals that they cannot escape punishment by fleeing to a foreign territory. Secondly, it is in the interests of the territorial state that a criminal who has fled from another territory, should not be left free, because he may again commit a crime and run away to some other state. The author distinguished the concept of extradition from deportation, kidnapping and mistaken declared extradition. His work also captured the procedure of extradition under the commonwealth countries. The author examined some bilateral and multilateral treaties on extradition, like the Extradition Act of 1962, Indo-Nepalese Extradition Treaty, Indo-American Extradition Treaty, and etcetera. He also discussed extraditable offences, the doctrine of double criminality, the rule of specialty and the Political offence exception. However, he did not discuss

18 Hingorani, R.C. Op. Cit.

expulsion and rendition, and the work is limited to the practice of extradition among the commonwealth countries. There is need for a wider and thorough examination of the concept under international law.

Mackarel and Nash¹⁹ in their research on the concept and practice of extradition, did examine the meaning, basis and practice of extradition. They also opined that reciprocity and comity formed the basis for the practice of extradition across jurisdictions. Their research also extends to examining the traditional procedure for the practice of extradition which according to them is rested on judicial cooperation in the fight against crimes, protection of fundamental rights of individuals and the sanitation of the international arena from trans-border crime. The author also discussed the double criminality principle, principle of specialty, principle of double jeopardy, the range of extraditable offences, conspiracy and association, political offence exception, fiscal offences extradition of nationals and entry into force.

Without doubt the authors did make substantial contribution on the subject of this research. However, it can be readily observed that their research work was based on the European Union Convention of 1996 and thus limiting their research to the concept and practice of extradition in Europe. There is need for a wider and thorough examination of the concept under international law.

Parry²⁰ in his contribution to the subject of this research examined the concept and practice of extradition under International Law. His research centered on the importance of Habeas corpus, doctrine to the practice of extradition, the rule of non-inquiry and the rule of sovereign theory. His research work was predominantly under the American jurisprudence with

19 Mackarel, Mark and Nash, Susan. *“Extradition and the European union”*. In the International and Comparative Law Quarterly, Cambridge University Press, p.150

20 Parry, J.T. (1973). *“International Extradition, the Rule of Non- Inquiry, and the Problem of Sovereignty*. Boston University Law Review, volume 90.

respect to the practice of extraction. He also examined the American judicial attitude to the rule of limited inquiry and non-inquiry. An appraisal of his contribution reveals that a thorough understanding of the concept and practice of extradition needs to be limited to the American experience. The rule of non – inquiry and limited inquiry are features that are peculiar to the American conception of extradition. The author ought to have been wider and comparative. The author lacks comparative focus and depth. His work is lopsided,inform of the American jurisprudence.

Jones²¹ in her examination of the research subject identified extradition as a branch of international law which occupied considerable attention in international community after the First World War. Her work is premised on considering features of extradition law in the light of British and European opinion and experience. Her study raises four basic questions: firstly, the test for extradition, secondly, the principle of non-extradition in respect of political offences, thirdly, the principle of non-extradition in respect of nationals, fourthly the judicial control over extradition procedure. The contribution of this author is, of course, of intellectual benefit to this area of research. However, the following are identified as the shortcomings of her contribution: non-consideration of the concept of rendition, the concept of deportation, the principle of double jeopardy, the principle of double criminality and the doctrine of specialty, which is the focus of this research work.

Onyeneke's²² study on extradition x-rayed the subject from the international law and domestic law view points. His work captured the development of the legal parameters of law

21 Jones, J.M. *“Modern Development in the Law of Extradition”*. In the Transaction of the Grotius Society volume 27, Cambridge University Press on behalf of the British Institute of International and Comparative Law. Extracted from <http://www.jstor.org/stable/742877>, accessed: 22/10/2012,03:55.

22 Onyeneke, O.H.C. *“Extradition: International Law and Domestic Law: Gary McKinnon v. Natwest Three”*. Extracted from [http://www. blackstonechambers.com/application/dynamic/category.rm?id=1557](http://www.blackstonechambers.com/application/dynamic/category.rm?id=1557) content type=papers, accessed:23/11/2009

dealing with extradition internationally and domestically. He explained what international law and domestic law connote, the doctrine of dualism and monism under international law. According to him extradition is a municipal legal procedure often subject of treaty obligation, by which the criminal justice authority of one state (the requested state) arrests and surrenders to those of another (the requesting state) a suspect or fugitive convict present in the territory of the former state and wanted by the later. He holds that extradition as a rule is an internalization of jurisdiction and is effected by bipartite treaty. He also considered the concept of double criminality and human rights vis-a-vis extradition. The author's work is however limited to the concept and practice of extradition between the United Kingdom and the United States of America. The work also failed to capture issues such as rendition, expulsion, deportation, extraditable and non extraditable offences, political offences, extradition of national, principle of double criminality, basis for the practice of extradition and the Nigerian extradition regime.

Honig,²³ in his appraisal of the concept of extradition explained that multilateral convention provides the footing for the effective practice of extradition. According to him such convention required the general acceptance of the community that they seek to govern and therefore certain basic principles and agreements should be achieved. This rotates around the following issues: (i) whether the parties to the convention are to be under a legal duty, in prescribed circumstances, to grant a request for extradition, or whether the decision concerning such request is to be left to their discretion, viz whether extradition is to be mandatory or permissive; (ii) whether political offences shall be defined, or whether it shall be left to the requested state to define such offences by references to municipal law, and whether the duty to refuse the extradition of political offenders shall be absolute or whether discretionary power shall

²³Honig, G. (1956). "*Extradition by multilateral convention*". In the international and comparative law quarterly journal, Cambridge university pres on behalf of British institute of international and comparative law, volume 5 No.4, pp. 549-569, extracted from <http://www.jsotr.org/stable/755826>, accessed: 22/10/12012,03:50.

be vested in the requested state; (iii) whether the parties to the convention shall be allowed to differentiate between their own and foreign nationals, or whether request for extradition shall be determined without regard to the nationality of the persons whose extradition is sought; (iv) whether the rule of specialty is to be strictly observed, alternatively whether its observance may be waived by the requested state and/or the person concerned; etc.

In the light of the above issues, the author discussed extraditable offences, political offences, extradition of nationals, the rule of specialty, time barred offences, offences punishable by death, conflicting request for extradition, transit in course of extradition and offences subject to and exempt from extradition. One important contribution of this author is the identification of the reality that multilateral convention is not intended entirely to supersede existing bilateral treaties but designed to exist side by side with the later. This author's research work is commendable though not entirely infallible.

Stein's²⁴ research effort on the concept and practice of extradition is directed towards examining the notion, historical evolution of legal rules and current legal situation on the subject. In his opinion, extradition connotes the surrender of an alleged offender from justice, regardless of his or her consent, by the authorities of the state of residence to the authorities of another state for the purpose of criminal prosecution or the execution of a sentence. Thus, mutual legal assistance in criminal matters between states formed the core of the concept and practice of extradition. According to the author, the historical evolution of extradition dates back to the ancient time of 1648. Even though recent extradition practices embodied more legal rules. Other issues considered by this author include: extraditable offences, the double criminality rule, evidence of guilt, reciprocity doctrine, the specialty rule, circumstances precluding return,

24 Stein T. (2012). *Extradition. Max Planck Institute for Comparative Public Law and International Law*, Heidelberg and Oxford University Press, pp.1-15

citizens, capital punishment, procedural defects, bilateral and multilateral treaties, and evaluation of the concept of extradition under international law. The immense contribution of this author allays any fear of misconception that may arise from assessment and understanding of the concept and practice of extradition under international law. However, concept such as rendition, expulsion deportation, extradition of nationals extraditable persons and even the challenges associated with the implementation of international law on extradition were not considered by the author.

Plachta's²⁵ research work examined the contemporary problems of extradition, human rights and extradition, grounds for refusal and the principle of *aut dedere aut judi care* (all states are obliged to prosecute any offence committed in any place by any person found in their territory, unless an offender is extradited). The author is of the opinion that mutual relationship between human rights and extradition are often characterized as a tension between protective and cooperative function. This form of international legal assistance of the concept of extradition and human rights in the opinion of this author is based on the understanding that out of all human rights, a group has been recognized as non-derogable in all universal and regional instruments and, therefore, has to be granted protection notwithstanding the law of extradition. He also submitted that fair trial rights are relevant to the classification of exception against the law of extradition. However, the author did not distinguish the concepts of rendition, deportation and expulsion from the concept of extradition.

²⁵Plachta, M. (1998). "*Contemporary Problem of Extradition: Human Right Grounds for Refusal and the Principle OPF AUT Dedere, AUT Judicare*". Resource Material Series No. 57, Gdansk University, Faculty of Law.

Cebeci²⁶ in her research discussed International Extradition Law and the Political Offence exception. She considered the traditional incidence test as a workable reality in matters of extradition. In her opinion, recent episodes in international extradition law reveal that the application of the political offence exception in extradition have allowed the United States of America to become a haven for international terrorists. Her work also considered the meaning and historical origin of extradition law. She perceives extradition as the process by which person charged with or convicted of crime against the law of a state who are located in a foreign state are returned by the later to the former for trial or punishment. According to her the historical origin of the first recorded extradition treaties dates back to 1280 BC. The Peace Treaty between Ramses II of Egypt and Hittite Prince Hattusilli III provided for the return of one party criminal who was found in the territory of the other party. It is the opinion of the author that international extradition law developed with the need to preserve internal order of the respective states. She opined that extradition was a gesture of friendship and cooperation between sovereigns. That in international law, the duty to extradite another country's criminal has generally not been looked upon as an absolute duty. Therefore countries must enter into bilateral treaties in order to ensure the return of their own alleged criminals. Other issues examined by the author include: the doctrine specialty, the political offence exception, the incidence test to the doctrine of extradition, criticism, abolition of political offence as exception to extraditable offences and the reform of traditional incidence test. The work of this author is commendable. However, other issues and principles relating to extraditions are not discussed by the author.

²⁶Cebeci, R.A.(1988) "*International Extradition Law and the Political Offence Exception: the Traditional Incidence Test as a Workable Reality*" Loyola of Los Angeles International and Comparative Law Reviews, 629 extracted from: <http://digitalcommons.imu.edu/i/r/vol.10/iss3/7>

Murphy:²⁷ in his research work on the Concept and Practice of Extradition considered the meaning of extradition, why extradition is necessary, why states refuse to apply the penal laws of other states, historical justification for extradition, necessity for domestic extradition, need for asylum, practical inconveniences associated with the practices of extradition. He also considered the concept of rendition, habeas corpus and extradition, the place of fugitive in the practice of extradition, probable cause as a basis to justify fugitive retrieval and burden of proof in the practice of extradition. Murphy's work is largely motivated by the American jurisprudence and thus does not provide an in-depth analysis of the concept of extradition under international law. He has been able to capture the American experience.

Rebane²⁸ in his contribution to the study of the concept and practice of extradition, discussed the law of extradition vis-à-vis the individual right and the need for International Criminal Court to safeguard individual rights. The writer argued that states in their zeal to prosecute terrorists and pursue fugitives, are trampling on the same fundamental human rights they espouse in the international forum. The work traced the birth of international human rights and extradition, the roots of extradition, extraterritoriality and irregular rendition, the state of modern extradition law and practice, the formalization of extradition through treaties, the development of multilateral and bilateral agreements, the work also discussed the common features of civil and common law extradition treaties, exception and limitation of extradition, dual criminality principle, the principle of specialty and the development of a political offences

27 Murphy, J.J. "Revising Domestic Extradition Law". University of Pennsylvania Law Review, Volume 131 No.5, 1983. Extracted from: <http://www.jstor.org/stable.3311935>, accessed: 22/10/2012, 03:37 <http://ir.lawnet.fordham.edu/ilj>

28 Rebane, K.I. (1995). "Extradition And Individual Rights: The Need For An International Criminal Court To Safeguard Individual Rights" Fordham International Law journal. Vol. 19 issue 4 1, Article 11 <http://ir.lawnet.fordham.edu/ilj>

exception. The author's work is however limited to the concept and practice of extradition between the United Kingdom and United States of America.

1.8 Organizational Layout

The research work is divided into the following five chapters:

Chapter one is the introductory chapter. It deals with background to the study, statement of the problem, aims and objectives of the research, scope and limitation of the research, method of data collection, literature review and justification.

Chapter two examines the conceptual discourse on extradition. In specific terms, it discusses the meaning and nature of the following concepts: municipal law, treaty, extradition, rendition, expulsion and deportation.

Chapter three analysis the nature, scope and principals of extradition. It traces the history of extradition, nature of extradition, extraditable and non-extraditable offences.

Chapter four considers the practice of extradition under international law. It discusses the basis for the practice of extradition, some bilateral and multilateral treaties on extradition and the Nigerian extradition regime.

Chapter five deals with summary, findings and recommendations.

CHAPTER TWO

CONCEPTUAL DISCOURSE ON EXTRADITION

2.1 Introduction

The foundation of a research work of this nature is largely dependent on the clarification of some vital concepts. The necessity of this chapter is rested on the fact that some concepts have semblance with the subject of this research work. Concepts such as rendition, deportation and expulsion have often been used interchangeably without regard to the distinctions among them for practical purposes. Similarly, these concepts of rendition, deportation, and expulsion have semblance with the concept of extradition, although they are not the same, and thus, require clarification. Importantly too, the concept of extradition, which is the subject of this research work, is practiced within the concurrent dominion of international law and municipal law. There is, therefore, the need to clarify the overlapping nature of these laws. It is also paramount to examine and clarify the concept of treaty because it is the major instrument upon which the practice of extradition is sustained.

2.2 International and Municipal Laws

The necessity of examining the meaning, nature and interrelationship between international law and municipal law stems from the fact that the pendulum of extradition which is the core subject of this research work, swings within the legal precincts of international and domestic laws. There is, therefore, the need to have an insight into the overlapping nature of these concepts. It is, however, worthy to state that the synergy between international law and domestic law is evident from the fact that a state has the mandate to extradite due to treaty obligation that works in tandem with the state's domestic extradition law¹.

¹Onyeneke, O. H. C. "*Extradition: International Law and Domestic Law*: Gary Mckinon v. Northwest Three. Accessed from <http://ssrn.com>. at 10/3/2013, 9:25 am

International law implies a collection of those rules and norms that regulate the conduct of states and other entities which at any time are recognized as being endowed with international personality, example, international organizations and individuals, in their relations with each other². Domestic or municipal law on the other hand, refers to those rules, laws or norms that regulate the conducts of individual members of a particular state³.

The platform that provides for the interrelationship between international law and municipal law is the very attribute that the reception of international law by a state and its internal effect are matters of municipal law⁴. In other words, state's perception of international law determines how international law forms part of its municipal law. The relationship between international law and municipal law is full of theoretical problems. The international legal literature on the subject records majorly two theories, which are the dualism and monism.

2.2.1 Dualism

The proponents of the dualist theory point out that the essential difference between international law and municipal law is that while international law essentially regulates the relationship between states, municipal law applies within the territory of a state and regulates the relationship of its citizens with each other and with the executives⁵. According to this point of view, neither of the two legal orders has the power to create or alter the rules of the other and, should there be a conflict between international law and municipal law, the dualist would hold the view that the courts should apply municipal law⁶. Dualism is closely connected with the

2 Wallace, R.M.M. et al. (2009).*International Law*.(6th Edition), Sweet and Maxwell, London, p.2.

3Onyeneke, Op. cit. p.2

4Wallace, Op. cit.p.3.

5Okeke, C.N. (1986)*The Theory and Practice of International Law in Nigeria*. Fourth Dimension Publishers, Enugu, p. 3.

6 Ibid

positivist doctrine of law, which tends to deny the validity of the sources of international law apart from the practice of state⁷.

2.2.2 Monism

The proponents of monism are said to be disinclined to a unitary concept of law. They view international law and municipal law as an integral part of the same law. However, they subscribe to the superiority of international law over municipal law. They opine that where conflict ensued between international law and municipal law, international law should prevail.⁸ The monists hold the view that international law and municipal law must be considered as a single concept of law. They submit that both laws are geared towards subjects.⁹ Countries of civil law jurisdiction strongly believe in this theory, like France.

2.2.3 Harmonization Theory

According to this theory, neither monism nor dualism provides an answer on the true relationship between international law and municipal law. The starting point is that man lives not in one jurisdiction but in both. International and municipal laws are concordant bodies of doctrines autonomous but harmonious in their aim of basic human good. When faced with an actual problem a municipal court applies the rules operative within its jurisdiction and may in fact, apply international law to the exclusion of municipal law or vice versa¹⁰. There is no watertight compartmentalization between the two systems of laws, they are not, strictly speaking, exclusively independent of each other because they reinforce and sustain each other. Municipal laws give effect to international law through judicial activism. While international law, on the other hand, expands the frontiers of municipal laws by opening new vistas of legal reasoning due

⁷Ibid.

⁸ Wallace, R. M. International law Sweet and Maxwell, London, P.37

⁹Ibid.

¹⁰Umozurike, U. O. (2010). *Introduction to International Law*. Spectrum Books Limited, Ibadan, p. 31.

to certain constantly evolving novel trends in international relations, which are at best, manifestation of national interests of various nations.

2.2.4 Transformation and Specific Adoption Theories

The positivists argue that the rules of international law can only be applied within the municipal area by a process of specific adoption or incorporation for they are separate systems. For treaties, there must be a transformation into domestic law a substantive requirement that validates the application of treaty provisions to individuals¹¹. *Lord Denning made a fine distinction between incorporation and transformation in Trendtex Trading Corporation v. Central Bank of Nigeria*¹² to the effect that by incorporation, “the rules of international law are incorporated into English automatically and considered to be English law unless they are in conflict with the Act of Parliament.” In transformation:

“the rules of international law are not to be considered as part of English law except in so far as they have been already adopted and made part of our law by the decision of judges or by act of parliament or by established customs...under the doctrine of incorporation, when the rules of international law change, our English law changes with them. But under the doctrine of transformation, the English law does not change, it is born by precedent...”¹³

Consequently, Lord Denning gave a judgment that was in accordance with a developing customary rule of international law, but in conflict with English stare decisis. Critics see their distinction as artificial. Others suggest that a delegation theory is more appropriate whereby to each state is delegated the right to determine which treaty provision comes into force and how to apply them. All of these are part of the unitary mechanism for law creation. Whatever the merits or demerits of these theories actual states practices are revealing.

¹¹Ibid. p. 30.

¹²(1977) 2 Q.B 529 (CA) 55, 3-4.

¹³Ibid.

International law is primarily a collection of laws that regulate the affairs of states, individuals and international organizations and institutions. Municipal laws are the domestic laws of sovereign states. It must also be noted that the synergy between international law and municipal law is very important to the practice of extradition because the making of treaties is the very fulcrum upon which the practice of extradition rests and of importance is the fact that these treaties must not be offensive to municipal laws. As far as the practice of extradition is concerned, there seems to be a marriage between international law and municipal law. In the words of Hingorani:

The law of extradition is a dual law. It is ostensibly a municipal law yet it is part of international law also, inasmuch it governs the relations between two sovereign states over the question of whether or not a given person should be handed over by one sovereign state to another sovereign state. This question is decided by national courts or decision-makers, but on the basis of international commitments as well as the rules of international law relating to the subject. It has, therefore, national as well as international implications¹⁴.

2.3 Meaning and Nature of Treaties

Without doubt, the functionality of international law is largely resident on the instrumentality of treaties. Thus, treaties lie at the center of international legal relations and the capacity to enter into treaty relations with other subjects of international law is a very important personality in international law¹⁵. International transactions are normally carried out through treaties. Treaty-making powers and their implementation constitute essential avenues through which government participates or demonstrates international life.

The law of treaties is contained principally in the Vienna Convention on the Law of Treaties which was signed on May, 1969 and entered into force in 27th January, 1980. It is mostly

¹⁴Hingorani, R.C. (1969). *The Indian Extradition Law*. Asia Publishing House, London, pp.6-7
¹⁵Okeke, Op.cit. p. 187.

a codification of existing customary law but in part represents progressive development. The commentary of the International Law Commission which prepared the draft provides a helpful explanation to the provisions. Any gap in the Convention is to be filled by reference to customary international law¹⁶. Article 2 (1) of the Vienna Convention on the Law of Treaties¹⁷ defines a treaty as ‘an international agreement concluded in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whether its particular designation’. Treaties are known by the variety of different names, ranging from convention, charter, covenant, protocol, agreement, declaration, pact, act, statute, concordat, modus vivendi, exchange of notes (or letters), process verbal, final act, general act, or one of quite a number of other appellations¹⁸.

If it amounts to an agreement within the definition above, it is a treaty and establishes rights and obligations governed by international law. The definition above refers to treaty within the meaning of ‘an international agreement concluded between states in written form and governed by international law’. However, international customary law does not prescribe the form of treaties, for a treaty may be oral. The International Court of Justice ruled that a verbal undertaking made by the Norwegian Foreign Minister of his Danish counterpart was held to be legally binding¹⁹. States may, at times, conclude written agreements that are not legally binding but are rather morally or politically binding, as was the case with Cairo Declaration of 1943 and Helsinki Declaration of 1975²⁰. This goes to say that it is not every agreement between states that can be a treaty.

16Umozurike, Op. cit. p.163

17The Vienna Convention of 1969

18 Gardiner, R. K. (2003). *International Law*. Pearson Longman, London, p. 58

19Legal Status of Eastern Greenland (Denmark V. France) ICJ (1933) Ser A/B No. 53; Nuclear Tests Case, (Australia V. France) ICJ Rep. (1974).

20Umozurike, Op. Cit.

Treaties can be classified into “law making treaties” which are intended to have universal or general relevance and “treaty-contracts” which apply only as between two or a small number of states and simply purport to lay down special obligations between the parties only²¹. Treaty-Contracts are not directly a source of international law, but they can also lead to the formation of international law through the operation of the principles governing the development of customary rules. In contrast, the provisions of a law-making treaty are directly a source of international law in that they enumerate rules of international law for universal application, example, the United Nations Charter. They also provide a framework convention imposing duties to enact legislations and offering areas of choice within the ambit of which states are to apply the principles therein²². Such a distinction is intended to reflect the general or local applicability of a particular treaty and the range of obligation imposed. It cannot be regarded as hard and fast and there are many grey areas of overlap and uncertainty.

The nature of a treaty is either bilateral (between two states) or multilateral (between more than two states). A treaty, whether bilateral or multilateral, creates legally binding obligations for the states that are parties to the treaty only²³. Although multilateral treaties, such as the Charter of the United Nations, may develop international law for all, as do international conventions adopted at world congress like that of the law of the sea²⁴. In such cases even non-parties are, in effect, required to observe the law of the convention.

The role of treaties, as the major source of international law in dispute resolution between sovereign states, is captured under Article 38 (1) of the Statute of the International Court of

21 Starke, J. G. (1977) *An Introduction to International Law*. (8th edition) Butter Worths, London , p. 48

22 Shaw, Op. Cit. P. 92

23Ladan, M. T. (2007). *Materials and Cases on Public International Law*. Ahmadu Bello University Press, Zaria,p.11

24Castel, J. G. (1976).*International Law Chiefly as Interpreted and Applied in Canada*. Butterworth’s, Toronto, p.11

Justice which is to the effect that when state parties are in dispute over the subject matter of a specific treaty between them, the provisions of that treaty concerning the rights and obligations of the parties will serve as the primary source of law for the settlement of the dispute.

Treaties have been perceived as a more modern and deliberate method of law creation process. They are express agreements and are a form of substitute legislations undertaken by states. They bear a close resemblance to contracts in a superficial sense in that parties create binding obligations for themselves but they have a nature of their own which reflect a character of the international system²⁵. Treaties have been seen as superior to custom which is regarded in any event, as a form of tacit agreement²⁶. It flows from the essence of an international treaty that like a contract, it sets down a series of propositions which are then regarded as binding upon the parties.

2.4 Meaning and Nature of Extradition

There are various definitions of the term extradition by legal writers, organs and constitutions of various states. O'Higgins defines extradition as "the process whereby one state delivers to another state at its request a person charged with a criminal offence against the law of the requesting state in order that he may be tried or punished".

In the words of Oppenheim²⁷, extradition is "the delivery of an accused or convicted individual to the state on whose territory he is alleged to have committed or to have been convicted of a crime by the state whose territory the alleged criminal happens to be for the time".

The Harvard Research Draft²⁸ of 1935 defines extradition as "the formal surrender of a person by

25Shaw, Op. Cit. P. 89

26Umozurike, U. O. Op. Cit. P. 16

27Oppenheim (1951).*International Law*. (8th edition) p.696

28Harvard Research Draft, 1935, P. 66

a state to another for prosecution or punishment”. In the Nigerian Extradition Act²⁹ of 2004, the definition of the term is not express but its purpose is discernible from section 1 of the Act, which refers to extradition as “the surrender by each country to the other of persons wanted for prosecution or punishment”.

This definition in the Act seems similar to that in the Harvard Research Draft. Umozurike³⁰, defines extradition as “the process whereby, under treaty or on reciprocity, one state surrenders to another state, at its request, a person accused or convicted of a criminal offence committed against the law of the requesting state”. Another definition worth mentioning here is that proffered by the Supreme Court of the United State of America, in *Terlindem V. Amens*³¹. The court defines extradition as “the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory and within the territorial jurisdiction of another, which being competent to try and punish him, demands the surrender”.

Though variously couched, one golden thread that glitters and runs through these definitions is the fact that one state surrenders to another, at the request of that other, an accused person or convict to answer for his criminal conduct or punishment in the jurisdiction of the requesting state. Furthermore, from the definitions above, it is possible to make two assumptions namely, that the state where the accused or convict is seeking refuge has power under its law to surrender the fugitive criminal to the requesting state; and there exists between the requested state and the requesting state an extradition treaty which enables the requested state to accede to the request of the latter. Under international law, there exists no duty placing an obligation upon a state to extradite in the absence of treaty provision for extradition. Although states sometimes

²⁹Section 1, Schedule II, Cap. E25, L. F. N. 2004

³⁰Umozurike, U. O. Op. Cit. P.160

³¹(1959) 184 U. S. 270 P.289

extradite fugitive criminals relying either on their municipal laws, or on the principle of reciprocity, or on moral grounds, extradition still retains its principal basis in treaty³². Extradition has serious human right implication, for there exists, in fact, a close relation between the two concepts. Because the extradition process is designed to ensure that the human rights of a fugitive are protected³³.

Extradition is seen as the technique more commonly used in which a state surrenders a person within its jurisdiction to another state through a formal legal process outlined in legislation and extradition treaty³⁴. It is said to be triggered by a request submitted through diplomatic channels, for example, through the department of justice and state as in the case of the United States of America³⁵.

The practice of extradition is said to be made realistic through the instrumentality of extradition treaties. These treaties are in the nature of a contract and by the operation of international law, a state party to an extradition treaty is obligated to comply with the request of another state party to that treaty to arrest and deliver a person duly shown to be sought by that state either for trial on a charge of having committed a crime covered by the treaty within the jurisdiction of the requested state or for punishment after being convicted of such a crime and flees from that state, provided that none of the grounds for refusal to extradite set forth in the treaty is applicable³⁶.

32 Bedi, S. D. Op. Cit. P. 19

33 Ibid. p.350.

34 Bernard, L. (2008) "*Extraordinary Rendition: International Law and the Prohibition of Torture*". Congressional Research Service, USA, p. 1

35 Garcia, M. J. (2009). "*Rendition: Constraints Imposed by Laws on Torture. Congressional Research Service*", USA, p.1

36 Garcia, M.J. (2010). "*Extradition To and from the United States: Overview of the Law and Recent Treaties*". Congressional Research Service, USA, p. 3.

Extradition has also been perceived as a legal device by which a state requests from another the surrender of a person accused or convicted of a crime³⁷. It is one of the modes of cooperation in penal matters between states. One rationale for extradition is that all states have an obligation to cooperate in the suppression of criminality and must therefore surrender to each other accused and fugitives³⁸. Extradition law and practice have been slow to recognize the right of those persons who are the subjects of its proceedings. In fact, the whole process of extradition is considered as a relationship between states in which the individual has no right other than those conferred on him or her by the requested or the requesting state³⁹.

From the above discussion, all the definitions have similar elements except the definition by the U. S. Supreme Court which is distinct from and more accurate than the others. That the requesting state must have jurisdiction to try or punish the fugitive criminal if surrendered. This element of competence to try or punish the offender by the requesting state did not receive expression in the other definitions noted above, and this makes them deficient compared with the definition by the U.S. Supreme Court. The general inadequacy of all the definitions including the one by the U. S. Court is their failure to take into consideration the fate of the individual being extradited, that is, by way of guaranteeing his safety. It is therefore submitted that extradition should be defined to mean a process based on a treaty or on reciprocity, involving the surrender of persons accused or convicted of an offence by one state to another, within the territorial jurisdiction of the requesting state, with such state having the jurisdiction to try and punish the offender in a way that the interest of the accused will not be unduly prejudiced during trial.

37Bassiouni, M. C. (1968). *International Extradition in American Practice and World Public Order*. 36 Tenn. L. Rev.1, p.12.

38Bede, S. D. Op. Cit. P. 17

39Bassiouni, M. C. *Unlawful Seizure and Irregular Rendition Devices as Alternative to Extradition*.
www.heinonline.com.org.

2.5 Meaning and Nature of Rendition

The Black's Law Dictionary⁴⁰ defines rendition as the return of a fugitive from one state to the other where the fugitive is accused or convicted of a crime. In the opinion of this writer, the Black's Law definition of rendition is defective because it does not distinguish rendition from extradition. And the definition also implies that rendition is a legal process which, in practical reality, is not the case.

In the words of Barnett⁴¹, Rendition is seen as the extra-judicial transfer of suspects from one state to another outside the realm of law which generally implies that the transferred suspects have no access to the judicial system of the sending state to challenge their transfer. In the view of this researcher, this definition seems appropriate in that it is reflective of the nature of rendition as an extra-legal procedure.

According to Starke⁴², rendition is a more generic term which covers instances where an offender may be returned to a state to be tried there under ad-hoc special arrangement, in the absence of an extradition treaty, or even if there be such a treaty between the states concerned, and irrespective of whether or not the alleged offence is an extraditable crime. From this definition, it can be inferred that the rules of rendition are liberal in that there is no need to make a formal request for the handing over of a fugitive from justice, or to show that the offence with which an alleged criminal is charged is a crime in both the requesting and the requested states.

Gracia⁴³ sees rendition as the transfer of persons suspected of terrorist or criminal activities from one state to another to answer charges against them. Gracia's definition seems to be similar with

408th Edition 2004.

41 Barnett, L. (2008). "*Extra-ordinary Rendition: International Law and the Prohibition of Torture*". Law and Government Division, Rev. p.2.

42 Starke, J. G. (1963). *An Introduction to International Law*, Butterworth, London, pp.308-309.

43 Garcia, M. J. (2009). "*Renditions: Constraints Imposed by Laws on Torture*". Congressional Research Service, United State of America, p. 1.

that of the Black's Law Dictionary, for it does not bring out the distinctive elements of rendition. The preceding scholar posited that the term rendition can also be irregular rendition or extraordinary rendition and has been used to refer to the extra-judicial transfer of a person from one state to another generally for the purpose of arrest, detention and or interrogation by the receiving state⁴⁴.

This thinking suggests that there can be "regular rendition". However, this researcher is of the stand that there is no such term or concept as "regular rendition". This is because primarily in international law parlance, extradition is the recognized means of transferring a criminal from one jurisdiction to the other for trial.

Unlike in extradition cases, persons subject to rendition have no access to the judicial system of the sending state which they may challenge their transfer. Sometimes persons are rendered from the territory of the sending state itself while other times they are seized by the rendering state in another country and immediately rendered without ever setting foot in the territory of the rendering state⁴⁵. Sometimes rendition occurs with the consent of the state where the fugitive is located; other times they do not⁴⁶. Over time, rendition became associated with kidnapping and forceful abductions but still for the purpose of bringing someone to trial.⁴⁷

From the discussion above, it is therefore being submitted that rendition is an extra-judicial transfer of suspects from one state to another outside the realm of law which implies that the transferred suspects have no access to the judicial system of the sending state to challenge their transfer.

44Ibid.

45Ibid

46 Ibid

47 Fisher, L. (1956). "*Extraordinary Rendition: The Price Secrecy*". College of Williams and Mary, U.S.A. p.1407

2.6 Meaning and Nature of Expulsion

Many attempts have been made to define the term expulsion. Thus, according to the Black's Law Dictionary⁴⁸, expulsion is an ejection or banishment, either through depriving a person of a benefit by forceful eviction. However, according to traditional definition, expulsion is generally regarded as the exercise of state power which secures the removal forcibly or under threat of force of an alien or a stateless person from national territory⁴⁹. This definition is not adequate enough for some reasons. Firstly, it is not necessary to employ force to secure expulsion, as expulsion can be secured without the use of force or threat of it. Secondly, expulsion is not limited to aliens and stateless persons. Recent practice amongst states has shown that states sometimes expel their own citizens⁵⁰.

However, the position of international law on the expulsion of nationals is captured by Weiss⁵¹ as follows:

As between national and state of nationality the question of the right of sojourn is not a question of international law. It may, however, become a question bearing on the relations between states. The expulsion of nationals forces other states to admit aliens, but, according to the accepted principles of international law, the admission of aliens is in the discretion of each state.... It follows that the expulsion of national may only be carried out with the consent of the state to whose territory he is to be expelled, and the state of nationality is under a duty towards other states to receive its nationals back on its territory.

According to Jean-Marie⁵² expulsion is "*an act, or failure to act by an authority of a state with the intention and with the effect of securing the removal of a person or persons against their will from the territory of that state.*" This definition seems to be silent on the category of

488th Edition.

49Jean-Marie, H. (1995) "*Mass Expulsion in Modern International Law and Practice*". Kluwer Law International, Hague.

50 Starke, J. G. (1963). *An Introduction to International Law*. Butterworth, London, p.302

51Okeke, C. N. Op. Cit. P. 92

52Jean-Marie Op. Cit. p. 1

persons that can be expelled. However one must applaud the definition for introducing the element of constructive expulsion. In effect, the practice of constructive expulsion by states is recognized and accepted under international law although with some qualifications as expressed by Chamber Three of the Tribunal in *International Technical Products Corp. v. Iran*⁵³, as follows:

Such cases would seem to presuppose at least (1) that the circumstances in the country of residence are such that the alien cannot reasonably be regarded as having any real choice, and (2) that behind the events or acts leading to the departure there is an intention of having the alien ejected and this acts, moreover, are attributable to the state in accordance with principles of state responsibility.

Every independent state or nation is at liberty to admit the subjects and citizens of foreign states. States also reserve the same right to exclude from its territory any foreign nationals, unless it has entered into any agreement by treaty on the subject, and the treaty must, of course, prescribe the rules to be observed. In the case of *Attorney General for Canada v. Cain*⁵⁴, the judicial committee of the Privy Council said:

One of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that state to annex what conditions it pleases to the permission to enter it, and to expel or deport from the state, at pleasure even a friendly alien especially if it considers its presence in the state opposed to its peace, order and good government to its social and material interest.

However, under the generally accepted principle of international law, a state must not expel in an arbitrary manner, such as by using brute force to effect the expulsion or by otherwise mistreating the alien⁵⁵.

⁵³Harris, D. (2010). *Cases and Materials on International Law*. (7th edition) Thomson Reuters, London, p. 470

⁵⁴(1906) A. C. 542 at p. 546

⁵⁵Article 7, of the International Convention on Civil and political Right.

Goodwill-Gill⁵⁶ suggests that there are substantive as well as procedural limitations upon the power to expel. Although state practice accepts that expulsion is justified for:

- (a) Entry in breach of law ;
- (b) Breach of the conditions of admission ;
- (c) Involvement in Criminal activities ; and
- (d) Political and security considerations on the part of the expelling state.

Furthermore, according to Gasiokwu and Oche⁵⁷, expulsion is the termination of the legal entry and the right to remain of any alien whose conduct has become inimical to the government of the realm. As assertive as this definition may sound, it is submitted that the authors have misconceived the context in which “expulsion” operates in the current regime of International Human Rights Law. This definition is not adequate because it suggests that a state is at liberty to terminate the legal rights of aliens within its territory. While it is true that sovereign states enjoy the prerogative to regulate the presence of foreigners on their territory, however, this power is not unlimited and International Human Rights Law places some restrictions on when and how to exercise this power. Thus, Article 7 of the International Covenant on Civil and Political Rights⁵⁸ has been interpreted by the Human Rights Committee which states that: *“State Parties must not expose individuals to the danger of torture, or cruel inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement”*.

The several definitions proffered above are no doubt helpful. In the context of this research work, it is submitted that expulsion means an act or failure to act by the authority of a

⁵⁶Harris, D. Op. Cit.

⁵⁷Gasoikwu, M.U. and Oche, P. (2011). *“The Politics of Extradition in International Law”*, p.15. Accessed from <http://www.findlaw.com>. At 15/2/2013, 11: 23am

⁵⁸See General Comment 15/27 of 3rd April 1992, para.9.

state which secures the removal of an alien, a stateless person or a national from the territory of that state.

2.7 Meaning and Nature of Deportation

The Black's Law Dictionary⁵⁹ defines deportation as “a permanent exile of condemned criminal involving loss of citizenship and usually forfeiture of property”. As authoritative as this definition is, it seems to give rise to the following suggestions. Firstly, that deportation is a permanent exile. This may not be true as the basis for deportation is want of permission to reside in a country. If deportation is permanent, it means a deported person can no longer return even upon subsequent compliance with the requirement which rendered his stay illegal. Secondly, that deportation involves loss of citizenship. This assertion is faulty. Citizenship is a right which can only be determined by a state to which an individual claims nationality⁶⁰. The loss of citizenship presupposes its denial and this can constitute another offence on the part of the state authorities effecting the denial and this offence is known as *civicide*. Therefore, a balance needs to be struck between curtailing a crime through a process that may lead to the commission of another offence. In the words of Karamanidou⁶¹, “deportation is the physical removal of persons against their will from a state's territory and transporting them to their presumed country of origin, or habitual residence, or a country they have transited or to which they have agreed to be removed rather than being returned to their country of origin”. This definition has serious implication because it suggests that a national of a country can be deported. Under international law, deportation

59 8th edition, p.623

60 Oppenheim, (1955). *International Law: A Treatise*. Vol. 1, p. 642

61 Karamanidou, L. et al. (2008). “*Deportation in International and Regional Law*”. Department of Sociology, City University, London, p.2

applies to aliens who are guilty of an offence in accordance with the municipal law of the deporting state⁶².

According to Gasiokwu and Oche⁶³, deportation is “the act of removal of persons whose initial entry into a country has been illegal”. Thus, the legal consequence of deportation is the correction of illegality and the removal of the alien from the territory of the deporting state⁶⁴.

Deportation has also been defined as the exercise of the sovereign right of the territorial State to expel any alien whose presence is not considered desirable within its territory⁶⁵. It goes to say that the right of a state by reason of its territorial supremacy to deport or expel an alien from its jurisdiction is generally accepted in customary international law.⁶⁶

The reception of an alien is a matter of discretion of the state concerned. It is one of the attributes of sovereignty, therefore, the supreme power in every state has the right to refuse to permit an alien to enter that state if it considers his presence in the state opposed to its peace, order, and good government or to its social or material interests; even where entry is permitted, deport or expel at pleasure even a friendly alien from the state. Moreover, it makes no difference whether the alien is only on a temporary visit or has acquired his domicile in the deporting state the receiving state can circumscribe his activities or liberties so long as he remains in its territory⁶⁷. The executive is further vested with absolute and unfettered discretion to deport or expel at pleasure even a friendly alien from the state. It is essentially a unilateral act on the part of the state and the main motive behind it is to protect its interests⁶⁸.

62Okeke, C. N. Op. Cit. P. 94

63Gasiokwu, M. U. and Oche, P. Op. Cit. P. 15

64 Ibid

65Hingorani, R. C. (1969) *Indian Extradition Law*. Asia Publishing House, London, p.12.

66Bede, S. D. Op. Cit. P.18

67 Ibid

68Attorney-General for Canada V. Cain and Gilhulla. (1906) A. C. 542 at P. 546

Deportation Procedures vary greatly between states and are usually classified according to a number of factors such as the extent to which force is used, the type of means of restraint employed, and number of persons escorting the deportee. Subjects of deportation are individuals who do not have any legal right to stay in the departing state. These include: persons who enter, or attempt to enter illegally; persons who overstay their period of legal right to remain in the departing state; persons who breach their conditions of leaves; and persons who have been refused asylum. From the above discussion, it is submitted that deportation is the exercise of the sovereign right of a state to remove any alien whose presence is not considered desirable within its territory.

2.8 Conclusion

The definitions proffered above, by this researcher are meant to guide the entirety of this research work. Therefore, the relationship between International Law and Municipal Law as it concerns the practice of extradition discussed in this chapter will form a guide in further discussion of subsequent chapters. Treaties have also been discussed in this chapter, and the spirit with which same has been discussed will run through this research work. It must also be noted that the meaning and nature of extradition, even though *prima facie*, resemble concepts such as rendition, expulsion and deportation, there are clear lines of distinctions between the concepts as discussed in this chapter, and same will form the context in which these concepts are to be understood in this research work.

CHAPTER THREE

SCOPE AND PRINCIPLES OF EXTRADITION

3.1 Introduction

Having distinguished the concept of extradition from other related concepts in the preceding chapter, it is germane, in this chapter, to discuss the historical evolution, scope and principles of extradition. Consequently, this chapter shall in relation to the analysis of the principles of extradition consider: significance of extradition, extraditable offences, exception to extraditable offences, principles of double criminality and specialty, extraditable persons and extradition of nationals in order to ascertain the proper evolutionary and operational contexts that shaped the phenomenon of extradition, and guided nations in their relation with each other regarding extradition, which is a trend with a universal dimension.

3.2 History of Extradition

Every historical period has its peculiar practice and events. In the same way, events and developments, most of which can be seen in terms of evolution, also applies to the historical account of extradition. The practice of extradition in various forms has existed for thousands of years¹. Its roots can be traced to antiquity². Scholars have identified procedures akin to extradition scattered throughout history dating back to the time of the Biblical Moses. The historical origin of the first recorded extradition treaty dates back to 1280 B. C. between Ramses II of Egypt and King Hattusili III of the Hittites. This treaty provided for the return of one party's criminals who were found in the territory of the other party³.

1Bassiouni, M. C.(1974) International Extradition and World Public Order 1 Professor Bassiouni reported that “the practice originated in earlier non-Western Civilizations such as the Egyptian, Chinese, Chaldean and Assyro-Babylonian civilizations.”(citing Luis Kutner, World Habeas Corpus and International Extradition. L.J. 525 (1964)
2 Ibid

3Shearer, I. A. (1971).*Extradition in International Law*,p.5

Originally, international extradition developed with the need to preserve the internal order of the respective states. It was a gesture of friendship and cooperation between sovereigns. This gesture in matters of extradition was also witnessed in Western Europe in 1174 A. D., between Henry II of England and William the King of Scotland. However, there is a controversy as to whether or not the practice of extradition in ancient times was only restricted to surrender of political offenders. As Professor Shearer points out that “treaties including provision for the surrender of criminals are recorded in succeeding eras of history, but the actual extent to which regular surrender of common criminals conducted before the Seventeenth Century A. D., is a matter of some controversy”.⁴ Although, it has also been argued that a critical study of ancient treaties on extradition of culprits was not limited to political crimes alone, persons surrendered often included those charged with Murder, Theft, Robbery, Rape, Abduction, and other serious non-political crimes⁵. By 1776, a notion had evolved to the effect that “every state was obliged to grant extradition freely and without qualification or restriction, or to punish a wrongdoer itself” and the absence of intricate extradition procedures has been attributed to the predominance of this simple principle of international law⁶.

It is worthy to note that extradition in ancient times did not follow any legal rules. Extradition was considered as a highly political act left to the unfettered discretion of sovereign state⁷. This goes to say that sovereign states were at liberty to grant asylum or oblige each other by surrendering those persons who were most likely to affect the political order within the requesting state.

4 Clarke, E.A (1903). *Treatise Upon the Law of Extradition*. 4th ed.

5 Okeke, C. N. (1986). *The Theory and Practice of International Law in Nigeria*, Fourth Dimension Publishers, Enugu.

6 Ibid

7 Stain, T. Extradition: Historical Evolution of Legal Rules and Current Legal Situation. Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, London. Accessed from www.mpepil.com

Modern extradition treaties and practices began to emerge by the middle of 18th century. By the 18th century the practice of extradition was formalized through treaties. The formalization of extradition took place through bilateral agreements, multilateral and regional conventions on one hand, and the national extradition Acts on the other hand. Common features and procedures of extradition also developed. Both Common and Civil law nations developed formal extradition procedures. Although differences arose between Civil and Common law practice and provisions, the basic form of extradition agreements was the same⁸. Shearer further re-emphasizes the features of modern extradition in the following words:

...because each nation had different standards concerning the treatment of criminals, a complex web of procedural requirements surrounding modern extradition arose to ensure that a fugitive would not be prosecuted for an act not considered criminal by both nations or for acts not falling within the scope of an extradition treaty. These requirements began blooming in the late eighteenth century and continued to develop throughout the nineteenth century⁹.

Thus, these ancient practices constitute the seminal basis upon which the wheels of extradition laws and treaties grind, though slowly but steadily, to this modern state. With respect to the genesis of national extradition laws, it is difficult to state precisely when and where the first enactment on extradition by a state was promulgated. However, what is on account is that as early as 1803 a law on extradition was passed by the state of Belgium¹⁰. Over three decades later, the United Kingdom of Great Britain and Northern Ireland promulgated its own extradition law in 1870¹¹. Later in the 19th and 20th centuries most states gradually but steadily enacted their own

⁸ Ibid

⁹ Shearer, Op. Cit.

¹⁰ Ibid

¹¹ Ibid

local laws on the subject which later formed the basis of extradition treaties. Nigeria is not an exception to the aforesaid as she enacted the Nigerian Extradition Act of 1960¹².

From a historical view point, the absence of a concise and universally accepted rules of international law governing extradition, resulting from the diverse state practices on the issue, made states to conclude either bilateral or multilateral agreements on extradition. States from a particular geographical region whose criminal laws were grounded upon identical basis were known to have concluded extradition treaties. Prominent among the earliest extradition conventions of a multipartite nature was that of 1933 between members of the Organization of American States¹³. In 1952, the Arab States also concluded extradition agreements¹⁴. The Asian-African Legal Consultative Body also prepared a Draft Convention on Extradition at its Colombo meeting of 1960¹⁵. Down home, a practical example of modern extradition treaty is that signed between Nigeria, Ghana, Togo and Benin on the 10th of December, 1984¹⁶.

The emergence of bilateral and multilateral extradition treaties can be historically traced to multipartite convention on extradition.

3.3 Principles of Extradition

The effective practice of extradition rests upon certain basic principles. The absence of which will render the realization of the philosophy behind the practice of extradition far from reality. In other words, these principles jointly form the core of extradition practice. They are meant to test whether an act of sending back an international criminal for prosecution by another state constitute extradition or not.

¹²Okeke, Op. Cit. p.103-104

¹³Nggada, Op. Cit. P.37

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Drafted and Ratified in Lagos on the 10th day of December, 1984.

3.3.1 Principle of Double Criminality

One of the most fundamental requirements or principles of extradition is that the offence charged by the state requesting extradition should be considered criminal by both the requesting and the requested states. This is the most contentious aspect of the principle of double criminality. The justification for this principle as evidenced in most nineteenth century extradition practices is to prevent a requesting state from engaging in unjust prosecution. The principle also serves the function of ensuring that a person's liberty is not restricted as a consequence of offence not recognized by the requested state. Also, the social conscience of a State is also not embarrassed by an obligation to extradite a person who would not, according to its own standards, be guilty of acts deserving punishment. The principle of double criminality usually appears in treaties and is sometimes considered as a part of customary international law. The principle also ensures that no state is obliged to extradite a person to an act not fundamentally recognized as crime by its own standard. It also serves the principle of reciprocity according to which a state is not required to extradite a category of offenders which it, in turn, will never have occasion to demand¹⁷.

Historically, the dual criminality requirement in the United States extradition jurisprudence has its roots in the Jay Treaty of 1794¹⁸. This treaty concerned extradition requests between the United States and Great Britain, but its provisions were substantially adopted in other treaties. The standardization of dual criminality began with Britain's Extradition Act of 1870. Following the adoption of this treaty statute, many other nations passed legislations

¹⁷ Stein, Op. Cit. p. 14

¹⁸ Ibid.

patterned after the British statute. Today, some form of the dual criminality requirement is found in nearly all the bilateral and multilateral treaties¹⁹.

The almost universal recognition of dual criminality has made it a well-settled part of customary international law. Therefore, any state wishing to request extradition must indicate compliance with the dual criminality requirement. The requested state bears the burden of ascertaining whether the conduct considered criminal in the requesting state is also criminal in the requested state.

It is essential to note that the principle of double criminality does not strictly imply that the offence in question must be directly similar to each other. What the principle requires, importantly, is that, the act constituting the crime or offence must at least be able to constitute a charge for the offence in question, it is enough if the particular act charged is criminal in both jurisdictions.

The principle of double criminality has long received judicial pronouncement in some locus classicus cases. In *Wright v. Henkle*²⁰ the Supreme Court of the United States of America held: “the general principle of international law is that, in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties.” Similarly, in *Collins v. Loisel*²¹, the Court also held that: “it is true that an offence is extraditable only if the acts charged are criminal by the laws of both countries.” Reinforcing the aforementioned position, Moore, is of the view that: “It is an accepted principle that the act for which extradition is demanded must constitute an offence according to the laws of both countries”.

19 Ibid

20 (1903) 190, U. S. 40, P. 52.

21 (1922) 259, U. S. 309, P. 3.

Practically, an exception to the principle of double criminality plays out in the case of a convict. Thus, it is generally sufficient that a fugitive has been convicted of a crime in a demanding state. It is not necessary that his act constitute a crime in the state where he is later apprehended.

Some treaties and laws add certain embellishments to the dual criminality requirement which expand or limit the scope of the doctrine. For example, a treaty or law may require that the conduct of the individual facing extradition be not only criminal but also rise to the level of a serious crime. Other treaties and laws require a showing that the conduct constitutes an extraditable crime, that is, a crime which is listed in the treaty as one justifying extradition. Obviously, a firm grasp of all of the possible dual criminality subtleties may be difficult to obtain. With the wide variety of possible dual criminality requirement, generalization is difficult, nevertheless, Whiteman made the following attempt at capturing the essential ingredients of the principle of dual criminality. In his words:

A common requirement for the extradition is that the acts which form the basis for the extradition constitute a crime under the law of both the requesting and the requested states. This requirement exists whether the request is made under a treaty or apart from a treaty and whether a list of offences or a minimum penalty provision is involved. In the case of a treaty or a law providing for extradition for offences punishable by at least a certain minimum penalty, specific provision is usually made that the offence must be a crime in both states. Where a list of offences involved is in the treaty or the law, a specific one on the point is less common, however, even in the absence of a specific provision, the requirement is generally imposed. The question whether the requirement has been met generally arises with regard to the law of the requested state, and where the requirement is covered by a specific provision in the law or treaty it is often cast only in terms of the law of the requested state, since, if a state requests extradition, it must base its request on an alleged violation of its law. It might be supposed that if two states agree, in a treaty to a list of offences for which extradition shall take place, they would include only those acts which are crimes in both states. However, question nevertheless

may arise, certain acts may, under the law of the requesting state, constitute a listed treaty offence while under the law of the requested state the same acts may constitute no crime or, more frequently, one not listed in the treaty²².

3.3.2 Doctrine of Specialty

The principle of specialty is the second complimentary ingredient in the effective practice of extradition. The requirement for specialty prevents an extraditing country from prosecuting an individual for crime other than those specified in the extradition request. The principle of specialty has been said to represent the proposition that the requesting state must specify the offence or crime for which it seeks the relator's return, and that upon his return, it may only try him for the offence covered in the request and the treaty authorizing that request. The justification for this principle is that it supports the doctrine of dual criminality and thus, prevents the relator from being prosecuted for an act that will not be a crime in the requested state²³.

Similarly, the principle of specialty is designed to safeguard against a requesting state's breach of trust to a requested state and to avoid prosecutorial abuse against the relator after the requested state obtained in *personam* jurisdiction over the relator.²⁴

Comparatively, the rule of specialty is usually embodied in extradition treaties, but there is no universally recognized rule of customary international law in this matter and state practice is widely divergent. The extradition laws of some countries such as the United Kingdom do not permit the trial of the person extradited on fact other than those on which the surrender is based. Section 19 of 1870 Extradition Act of the United Kingdom provides that: "a person shall not be tried for any offence committed prior to the surrender other than such crimes described in the

22 Whiteman, M. M. (1968)6 *Digest of International Law*, quoted in Bassiouni, *Supra*.

23 *Ibid*

24 STEIN, *Op. Cit.* P.19.

(First Schedule) as may be proved by the facts on which the surrender is grounded”²⁵. German law, on the other hand, permits the consideration at the trial of new facts which have subsequently been revealed, provided that these new facts leave unaffected the general factual situation underlying the offence when as a whole²⁶. Belgian law permits the prosecution of the person extradited for all offences committed prior to extradition, provided such offences fall within the category of extraditable crime within the treaty in question. At the Cairo Session, India, Burma, Ceylon, Indonesia, Japan and Iraq were of the opinion that a person may be tried only for the offence in respect of which extradition was granted. Burma observed that international custom seems to be that when extradition is requested by the requesting states for a particular offence, then the person can be tried only for that offence and cannot be tried for an offence other than that mentioned in the extradition report unless there was a lapse of time and permission was obtained from the requested state. Indonesia and Iraq stated that their extradition laws contained no provisions relating to this matter and Japan observed that theoretically the person must be tried in respect of which extradition was granted. The United Arab Republic agreed that treaties and custom usually prevent trial for any offence other than that for which extradition was granted but rest the question of certain exception to this rule of specialty²⁷. Most treaties provide that the rule may be waived with the consent of the requested state.

There are slight modifications in the observance of the principle of specialty. In the United States of America, the principle of specialty is observed to the extent that an extradited person is not immune from being prosecuted and punished on the basis of penal provision for an offence other than that for which he has been extradited. In England the reverse seems to be the

25 Article 9, Articles Containing the Principles Concerning Extradition of Fugitive Offenders between Iraq, Burma, Ceylon, India, Japan, Pakistan, Indonesia and the United Arab Republic.

26 Ibid

27 Ibid

case in that the principle of specialty is strictly adhered to without any modification. Thus, the very offence for which a fugitive is extradited must be the same offence for which he is to be tried and convicted. The Indian position is similar to the stand point of the British jurisdiction thus, section 31(6) of the Indian Extradition Act²⁸ provides that a fugitive shall not be tried or detained for any offence other than the extradition offence proved by the fact on which surrender or return is based. The British position is also recapitulated in section 15 of the Nigerian Extradition Act²⁹ which is to the effect that fugitive surrendered to the Nigerian government for prosecution are not triable for any previous crime.

3.4 Extraditable Offences

As to what constitutes extraditable offences, the situation has always been one similar to a question of a fact. This is principally because the definitions of extraditable offences have always been treaty based. This has brought to fore two noticeable approaches, namely, the Enumerative or List Approach and the Open Ended Approach³⁰.

Under the enumerative approach extradition treaties usually specified offences for which extradition can be granted, for example the Amien Treaty of 1802 specified that extradition should only be granted for offences of Murder, Forgery, Fraudulent and Bankruptcy. Similarly, the Western Ash Burton Treaty of 1842³¹ between the United States of America and Great Britain listed Murder, Piracy, Arson, Robbery, Forgery and the Utterances of Forged Paper as extraditable offences. The justification behind this approach has been that the fugitive offender is not prosecuted for any offence other than the ones specified in the treaty. This notion is reflective of the doctrine of specialty. It must, however be noted that this approach has certain

28 Ibid

29 Cap. E25, Laws of the Federation of Nigeria, 2004.

30 Okeke, Op. Cit. P.110

31 Ibid

challenges, in that difficulty usually arises where the circumstance and fact of a case is such that an offence envisaged or not specified in the treaty is in question. This renders the extradition treaty impotent or incapable of providing a basis for prosecution. Does this then mean that the fugitive criminal shall be left unprosecuted because the extradition treaty has not specified the offence, particularly, the emergence of more sophisticated crime such as cyber crime? It must not be forgotten that the original philosophy behind the practice of extradition is to cope with international crimes irrespective of their sophistry and the law should develop measures capable of addressing the modern crimes emerging in the society. Another disadvantage of the enumerative approach is that, it elongates the process of prosecution in that an amendment must be effected to incorporate the offence sought to be prosecuted. This gives room for delay and in some cases, non prosecution³².

The enumerative approach can, for example, be found in the Nigerian Extradition Act³³ which adopted the British system of enlisting extraditable offences in their extradition treaties. Thus, under the Nigerian Act the following offences are extraditable offences:

Murder of any degree, manslaughter, abortion, malicious or willful wounding or inflicting bodily harm, rape or unlawful sexual with a female or young person for immoral purposes, bigamy, kidnapping, adoption or false exposure or unlawful detention of a child, bribery, perjury or subordination or conspiring to defeat the cause of justice, arson and offence concerning to forgery, embezzlement, fraudulent conversion, false accounting, obtaining stolen property or any other offence in respect of property involving fraud. Others include burglary, house breaking or any other similar offences, robbery, blackmail, extortion by means of threat or abuse of authority, malicious or willful damage of property, acts done with the intension or endangering vehicles, vessels or air craft and offence against the law relation to dangerous drugs or narcotics or piracy, revolt against the authority of the master of a ship or the commander of an aircraft and

³²Ibid

³³ Cap. E25, L. F. N. 2004.

contravention of import and export prohibition relating to precious stones, gold or metal³⁴.

Section 18(2) of the Nigerian Extradition Act³⁵ expressly empowers the Attorney General of the federation when necessary to amend schedule II of the Act either by inserting further offences or by deleting any offence or by altering the designation of any offence by an order under the federal gazette. This provision undoubtedly is designed to meet the exigencies of time and new types of offences arising from social and economic development in the society.

The other approach to the definition of extraditable offences is the open ended approach which implies that offences that will be considered extraditable are those the national or domestic extradition laws of a nation consider as extraditable. For example, the American Draft Convention on Extradition³⁶ define extraditable offences as that for which the law of the requested state in force when the act was committed as extraditable offence. The Latin and Central American countries adopt the non-listing of the offences for which the request for extradition can be granted. This is evident in the Bustamante Code of 1928³⁷, the Montevideo Convention of 1928³⁸, and the Central American Convention of 1923 and 1934³⁹. In cases where the offences are not listed, an acceptable assumption would be that all crimes which are punishable in both the requesting and the requested states that are parties to a treaty may be regarded as extraditable offences. It is also evident that the Nigerian Extradition Treaty between the Republics of Ghana, Benin and Togo also adopted the Open Ended Method. This method has been criticized on the basis that same is likely to offend the principle of dual criminality in that an act may not concurrently constitute a crime in two jurisdictions. Some treaties are, however, a

34 Schedule II, Cap E25, Laws of the Federation of Nigeria, 2004.

35 Cap, E25, L.F.N, 2004

36 Extradition, United Kingdom Department Territories, Order 1973.

37 Stein, Op. Cit. P. 13.

38 Ibid

39 Ibid

combination of the enumerative and the open ended approach. This is aimed at providing a wider scope of extraditable offences.

3.5 Exceptions to Extraditable Offences

3.5.1 Nature and Basis of the Political Offence Exception

The point of departure from the general principles of extradition is the stage of invocation of the doctrine of political offence exception. As it is the doctrine of political offence exception is a defence to extradition⁴⁰. This is because the requesting state having established the three basic requirements of extradition, that the offence is extraditable, it is a crime in both jurisdictions and be the only criminal basis of trial and not another offence. Yet, the requested state may still refuse extradition on ground of political exception⁴¹. The exception provides that those who commit crimes of a political nature, in the context of a political struggle, should not be extradited as though they had committed ordinary crimes and fled the country to avoid being brought to justice⁴².

The original purpose of the political offence exception to extradition was to protect revolutionaries from being returned to their home countries to face prosecution for crimes committed against their governments. Since the political offence exception's noble beginnings in the 1700s, the world has changed greatly⁴³. As a result, the policy rationales for allowing the political offence exception have become more complicated. Historically, the exception's functions were to protect revolutionaries and to prevent excessive involvement in the political

⁴⁰ Buckland, A. J. (2006) Offending Officials: Former Government Actors and the Political Offence Exception to Extradition, Vol. 94, California Law Review, P.423. Available at: <http://scholarship.law.berkeley.edu/califonialawreview/vol.94/iss/4>

⁴¹ The refusal of England to extradite Castioni, a Swiss national who took active part in the revolutionary movement in the Canton of Tinaco during which he had shot and killed a member of the Government and escaped to England.

⁴² Buckland, A. J. Op. Cit.

⁴³ Ibid.

affairs of countries requesting extradition. Today, the exception encompasses a greater range of actors.

Courts grapple with circumstances involving armed conflict, war criminals, asylum seekers, former government officials, and terrorism⁴⁴. In demonstrating these circumstances two cases are worth considering. The first is the case of **Augusto Pinochet**,⁴⁵ who led Chile, a Latin American country between 1973 and 1990, but left a scar on the human rights records of that country because of his brutal genocide and torture against Spanish citizens, Chileans of Spanish descent and some aboriginal Chileans who were against his dictatorship. In May 1996, a complaint was made against General Pinochet for the deaths and disappearances of Chileans and Spaniards, was accepted for investigation by Judge Manuel Garcia. A request for extradition of Pinochet was made when he arrived London for medical treatment. The two House of Lords decisions⁴⁶ were to the effect that there was no former Head of State immunity for certain international crimes, such as torture and genocide. The extradition request was granted, but the Court reduced the number of extraditable charges to those alleging torture committed after 1988, the date the United Kingdom passed legislation for the Convention against Torture⁴⁷. The Law does not limit prosecution to Spanish citizens, but applies to victims of any nationality. The Court further agreed with characterization of the crimes committed as genocide because it was aimed at destroying part of a national group. The Court found that the lack of express authorization for Universal Jurisdiction in the 1948 Genocide Convention did not mean that such Jurisdiction was barred, as it was consistent with the intent of the drafters⁴⁸

⁴⁴ Ibid, p.424

⁴⁵ Regina V. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, (1999)2 W.L.R. 827 (H.L.) {hereinafter House of Lords Decisions}

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Ibid

The second case is that of **Edward Snowden**⁴⁹ who is facing trial at the U. S. District Court of the Eastern District of Virginia for espionage charges for his unauthorized leaks of classified national security data⁵⁰. His conduct is a contravention of the Intelligence Community Whistleblower Protection Act, the U. S. Patriot Act⁵¹ and Foreign Intelligence Surveillance Act⁵². The request by the United States of America for his extradition from Hong Kong did not yield any positive result, but almost leading to diplomatic row between U.S.A. and China.

To the United States of America, his extradition is necessary to protect her national interest, to Snowden, he feels he would be persecuted. It is an honest contention of this research work that Snowden's conduct is grave threat to U.S.A. security and his trial should not be a problem because U.S.A. practices the Jury System, which is a check on government and a check on prosecutors.

In response to criticism that terrorists use the exception as a loophole to avoid extradition, extradition treaties have evolved to exclude terrorist activity from categories of crimes considered to be political offences⁵³. The idea that political offenders should not be extradited is of relatively recent origin. Prior to the French Revolution, it was almost unheard of. Indeed, before this period, the only type of criminals who were subject to extradition were political offenders. States then were preoccupied with protecting their political structures rather than dealing with ordinary crimes. Clarke⁵⁴ quotes the example of a treaty between Rome and Syria

⁴⁹ Ibid

⁵⁰ Accessed from <http://www.cfr.org/united-states/extraditing-edward-snowden>, p.31029, on 29/1/2015

⁵¹ Section 215

⁵² Section 702

⁵³ For example, Extradition Treaty Between U.S.A. – Bolivia, Art. V, June 27, 1995, S. Treaty Doc. No. 104-22, available at <http://www.oas.org/juridico/MLA/en/traites/rand> QUINN v. ROBINSON 783 F.2d 776, 782 (9th cir. 1986, accessed on 11/04/14 at 2:30pm, it was held that the ANGLO-AMERICAN incidence test used to apply the political offense exception also excludes terrorist activity.

⁵⁴ Buckland, A. J. Op. Cit. P.424

which provided for the surrender of *Hannibal*⁵⁵. Other early examples of such treaties are those concluded in 1303 between Edward I and Philip of France in which each agreed to expel the enemies of the other; and in 1496 between Henry VII and the Duke of Burgundy in which each agreed to order rebels and other fugitives from the dominions of the other to leave the realm⁵⁶. Charles II entered into treaties with Denmark in 1661 and with Holland in 1662 for the surrender of regicides⁵⁷.

The first country to enact legislation expressly forbidding the extradition of foreign political criminals was Belgium in 1833⁵⁸, three years after her revolt against secession from Netherlands, an event which Lord Diplock thought may have influenced the passage of legislations⁵⁹. The Nigerian Extradition Act was enacted in 1966 and provides for restrictions on surrender of fugitive criminals on the basis of certain circumstances⁶⁰ which include offences of political character, prosecution on grounds of race, religion, nationality or political opinions, and the likelihood of judicial partiality in the requesting country, if extradited.

The domain of international relations today has been radically altered and the basis of relation between states are many. Extradition, though, not frequently a recurring phenomenon, has affected relations between states, and has the tendency to assume a different dimension, if the concept of political offence exception is not redefined and placed in proper perspective according to the realities of contemporary world political relations. The present operation of the doctrine of political exception is not completely in accord with the original jurisprudence of the

⁵⁵ Gilbert, G. S. (1985) Terrorism and the Political Offence Exception Reappraised, International & Comparative Law Quarterly Journal, Vol. 34, P.696

⁵⁶Ibid

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹Exparte Cheng (1973) A.C. 931, 953 at 943

⁶⁰ Section 3, Extradition Act, Cap. E25, LFN, 2004.

doctrine which was to protect revolutionaries from being return to their home countries to face prosecution for crimes committed against their government.

It is today the most celebrated exception to extradition right from 1833, despite variations and deviations from the central focus of the concept. Sir Edward Clarke in his treatise of 1867 said: “The subject of extradition has been discussed for more in its political than in its legal aspects. National interest, prejudice, or passion has always governed the deliberations of senates, and has sometimes affected the decisions of the courts”⁶¹.

The definition of political offence has been a subject of controversy and has remain a matter of perception, depending on the historical and legal traditions of the various thinkers that attempted to define the concept. Garcia-Mora⁶² defines political offence “as an unlawful act without an element of the common crime, generally directed solely against the sovereign or the power structure, like Treason and Sedition. The actor acts as agent of the political movement and without malice against anyone but the state and the conduct only affects the political structure”. John Stuart Mill in a speech in the House of Commons in 1866 captured political offence as: “any offence committed in the course of furthering of civil war, insurrection, or political commotion”⁶³. This was obviously too wide a definition and was rejected by the court. Sir James Fitzjames Stephen said: “I think...that fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed part of a political disturbance”⁶⁴. Denman J. expanded it somewhat when he said⁶⁵:

⁶¹ Clarke, E.G., A Treatise Upon the Law of Extradition on, Stevens & Haynes, 1867, P. 1

⁶² Garcia-Mora, (1962), “the Nature of Political Offence: A Knotty Problem of Extradition Law”, Virginia Law Review, Vol. 48, P. 126.

⁶³ Ibid, P. 179

⁶⁴ Stephen, J.F. (1883), A History of the Criminal Law of England , London, Macmillan & co., Vol. II, P. 71.

⁶⁵(1891) I O.B. 149, 156.

...it must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the state as to which is to have the government in its hands.

These two tests firstly, there must be a political disturbance and secondly, the political offence must be incidental to or form part of that disturbance – was qualified slightly in **Re-Meunier**⁶⁶. This case involved a French anarchist responsible for several explosions in Paris and the death of a number of innocent bystanders. On an application of the test laid down in **Castioni**, it would be thought that the crimes were political within the meaning of the Act. However, Cave J., seizing on the words of Denman J., held that in order to constitute an offence of a political character there must be two or more parties in the state, each seeking to impose the government of their own choice on the other. In the instant case, this was not so because the party with whom the accused is identified by the evidence, and by his own voluntary statement, namely the party of anarchy, is the enemy of all governments. Their efforts are directed primarily against the general body of citizens. They may, incidentally, commit offences against some particular government, but anarchist offences are mainly against private citizens⁶⁷. Meunier's actions clearly come within the course of acting in a political matter. The decision is noteworthy for its rejection of terrorism as a legitimate means of protest. This rule in *Re-Castioni* and *Re-Meunier* were found to be too narrow in view of the changed political situation following the end of the Second World War.

In *Reg. v. Governor of Brixton Person Ex Parte Kolczynski*⁶⁸, the concept of political offence was liberally construed to be offence of a political character that must be considered

⁶⁶(1894) 2 Q.B. 415.

⁶⁷ Ibid at 419

⁶⁸ (1955) 1 Q.B. 540

according to the circumstances existing at the time when they have to be considered. That means even in the absence of political crisis, a dictatorial or totalitarian regime is enough to justify political offence as an exception to extradition. This was demonstrated in the case of *Schtraks v. Governor of Isreal*⁶⁹, when Lord Reid said:

I do not get any assistance from the statement in some of the cases that there must be disturbance or political disturbance: if this merely means that the political atmosphere must be disturbed that may be so, but it gets one nowhere... But if it means that there must have been some disturbance of public order I would not agree that is an essential element in a political offence.

In the same case, *Viscount Radcliffe* said⁷⁰

In my opinion the idea that lies behind the phrase *offence of a political character* is that the fugitive is at odds with the state that applies for his extradition on some issue connected with the political control or government of the country. The analogy of political in this context such phrase as political refugee, political asylum or political prisoners. It does indicate, I think, that the requesting state is after him for reasons other than the enforcement of the criminal law, what I may call its common or international aspect.

From the above, it can be asked that, is the fugitive going to be punished for his crime or for his politics? If it is for his politics then the political offence exception should avail him, otherwise he should be extradited to face punishment for his crime.

The basis of the political offence exception is to preserve the ancient tradition common to all societies in giving asylum, and that such asylum is only appropriate or required when the country making the request is, at odds with the person who is sought to be extradited, and at odds in some respect other than a simple desire to enforce the criminal law of the requesting country. This basis is deduced from the dictum of Lord Radcliffe in the case of *Schtraks* cited above (Supra page 53). The Nigerian extradition regime is a replica of the English system and has

⁶⁹(1964) A.C. 556.

⁷⁰ *Ibid*, at 591

reflected the political offence exception in her own Statute⁷¹, by prohibiting the grant of extradition for crimes or offences of a political nature or if it is proved that the requisition for the surrender has been made to try the accused for a crime or offence of a political character. There is dearth of case law on extradition in Nigeria because the practice has not developed extensively here. However, a case that is worth mentioning is *Brixton Prison Governor and Another, Ex Parte Enahoro*⁷² which was decided by the English House of Lords. The applicant, a Nigerian politician was involved in attempt to overthrow the Nigerian government of First Republic. He failed and escaped to London. Nigeria sought for his extradition, but he contended that he was needed in Nigeria for a political offence. He however lost the case and was extradited.

Another judicial authority that demonstrates the enormous powers of the Attorney General of the Federation in an extradition request is that of *George Udezor v. Federal Republic of Nigeria*⁷³. In this case, the Court of Appeal, Lagos Division, unanimously granted the request of the Attorney General of the Federation pursuant to Sections 3 and 6 of the Extradition Act⁷⁴ and Section 174⁷⁵ of the Constitution⁷⁶ to extradite the appellant (the fugitive). The court held that it is the duty of the Hon. Attorney General to receive the request for the surrender of a fugitive criminal in Nigeria, and that it is his absolute discretion to signify to the court that such a request has been made after satisfying himself on the basis of the information accompanying the request that the provisions of the relevant statutes have been complied with. It is also interesting to note that the court emphasized the fact that it is not within its province to question the discretion of the Hon. Attorney General in those matters because he does that in amplification of his

⁷¹ Section 3, Extradition Act, Cap. E25, LFN, 2004.

⁷² (1963) 2 ALL E.R. 477

⁷³ (2007) 15 NWLR (pt. 1058) 449

⁷⁴ CAP E25 LFN 2004

⁷⁵ Ibid

⁷⁶ CAP C23 LFN 2004

constitutional duty under section 174, and that the presumption of regularity in the performance of the official duty of the Attorney General was rightly established by the trial court. Section 20 of the Extradition Act reposes the responsibility and powers to ascertain the conditionality for acceding to an extradition request on the Attorney-General and not on the court. Once he has ascertained that there exists an offence which falls within the Extradition Act, and he so orders, the duty of the court is delineated, the court is circumscribed to question the exercise of discretion by the Hon. Attorney General. The role of the court is to issue warrant and undertake such other adjudicatory functions as are required to enhance the statutory powers of the Attorney-General⁷⁷.

The appellant (fugitive) was eventually extradited to the United States of America, where he was charged to be tried for the offences of conspiracy to commit involuntary servitude, harbor an illegal alien and encourage an illegal alien to come to enter and reside in the United States, particularly in the U.S. District of Maryland. The extradition was done on the basis of a treaty between Nigeria and the United States of America⁷⁸ which enumerate the offences the two nations consider extraditable. The general rule is that extraditable crimes must be those commonly recognize as *Malum in se*⁷⁹ and not those which are *Malumprohibitum*⁸⁰. Thus in most cases explains why the type of crime and the punishment prescribed are included in the extradition treaty. By this principle also, it is generally regarded as an abuse of the terms of the treaty for a state to secure the surrender of a criminal for an extraditable offence and then to punish the person for an offence not included in the treaty. The judgment clearly demonstrates the need for nations of the world to make the world a safe place for its people, by agreeing to co-

⁷⁷Udepozor v. FRN, Ibid p.519, paras G-H

⁷⁸Embodied in Legal Notice No.33 of 1967 Published in the official Gazette No.23, Vol.54 of the 13th day of April, 1967, known as Extradition (United States of America) Order.

⁷⁹ Acts Criminal by their very nature

⁸⁰ Acts made crimes by statute

operate in curbing the excesses of suspected miscreants. The courts and law officers must not allow technicalities to frustrate this exercise, as was shown in this case.

There were other cases that followed in which extradition had been requested by the Nigerian Government but which never came before the courts of law. These cases are that of Ojukwu⁸¹, Gowon⁸² and UmaruDikko⁸³.

In **Ojukwu's case**, it was the outcome of the Biafran war of independence in which some parts of the then Eastern Region of Nigeria tried to secede out of Nigeria without success⁸⁴. Ojukwu fled Nigeria and was granted asylum in Ivory Coast. On request for his extradition by the Nigerian Government, the Ivorian Government refused on the ground that Ojukwu was a political offender who could be persecuted in Nigeria.

The *case of Yakubu Gowon* was due to his alleged involvement in the aborted coup that claimed the life of General Murtala Mohammed, the then Head of State. During the trial of the coup plotters, a testimony of one of them indicted Gowon and when Nigeria requested the extradition of Gowon, the British Government refused on the basis of the political nature of the offence⁸⁵.

The case of **UmaruDikko** is notorious. There was allegation that Dikko fled to Britain with huge amount of money belonging to the Nigerian Government meant for the presidential taskforce on the importation of rice and cement which were not allegedly supplied to the government of Nigeria. On request for his extradition to Nigeria, Britain declined to extradite him, classifying the offence as political. Several appeals were made without yielding anything, attempted kidnapping failed. This led to a friction in the diplomatic relationship between Nigeria

⁸¹Ojukwu, E. O. (1989) *Because I am Involved*, Spectrum Books Ltd, Ibadan, P. 48

⁸² *Thirteen Years of Military Rule (1966-1979)* A Daily Times Publication.

⁸³ Daily Times, July, 1984, Centre Page

⁸⁴ Ibid

⁸⁵ Ibid.

and Britain. Britain also asserted that the foreign minister has the final say in extradition matter⁸⁶.

Things took a dramatic dimension when Nigeria returned to democratic leadership in 1999, when the country was needed to extradite persons wanted for the crimes of Money Laundering and Illegal Currency Trafficking against British legislation. The first was the arrest of the then Governor of Plateau State, Chief Joshua Dariye who escaped from the government house following the declaration of state of emergency in 2004. He was arrested in Britain with currency that violated the British Money Laundering Act, held in custody and later granted bail. Dariye jumped bail and returned to Nigeria after the end of the emergency period to resume his position as the Governor of Plateau State. Further attempts by British Government for his extradition was refused by Nigeria on the basis of the constitutional provisions regarding immunity⁸⁷. Dariye is no more the Governor of Plateau State, but political and diplomatic intricacies have engulfed the issue of his extradition. In fact, he is presently a serving Senator representing Plateau Central in the Nigerian National Assembly⁸⁸. In the same vein, the then Governor of Bayelsa State Chief D.S.P. Alamiyiesiegha was also arrested and jailed in Britain but jumped bail to appear in Nigeria wearing female costume⁸⁹. The same immunity provisions shielded him but he later impeached for corrupt enrichment.

Former Liberian leader, Charles Taylor was granted asylum in Nigeria after he was forced to resign due to his indictment by the International Criminal Court for War Crimes and Crimes Against Humanity. The Nigerian Government hosted him in Calabar refusing to hand him over, but the internal and external pressures made the Obasanjo Government to yield to the

⁸⁶ Daily Times, July 12, 1984, Centre page.

⁸⁷ Daily Times, July 12, 1984, centre page

⁸⁸ <http://www.joshuachibidiariye.googlesearch.com> accessed on August 6, 2013

⁸⁹ <http://www.diprietalamiyiesiegha.googlesearch.com> accessed on August 6, 2013

demand for his extradition, despite his attempt to escape, he was arrested along the Nigeria-Chad border and is now facing trial at the International Criminal Court in Hague⁹⁰.

A recent case of extradition involving Nigeria is that of **Aminu Oguche** who was alleged to have masterminded the April 14, 2014 Nyanya bombing in Abuja. He was alleged to have coordinated the bomb blast that killed several persons, after which he fled to Sudan but was extradited back to Nigeria⁹¹,

Although, there is no extradition treaty between Nigeria and Sudan, the International Police relied on United Nations Extradition Treaty, which most countries are signatories to effect the extradition of the fugitive⁹². This is a major breakthrough in the Nigeria's extradition law and practice, and the lesson to derive from this development is that the involvement of international security outfits like INTERPOL or United Nations Peace Keeping Forces should be resorted to in appropriate circumstances to extradite fugitives as a way of contributing to crime-free world.

Another recent case of extradition involving Nigeria is that of Buruji Kashamu who was charged with fourteen others in 1998 by a federal grand jury for their alleged involvement in an international conspiracy to smuggle heroin into the United States of America.⁹³ Kashamu fled to the United Kingdom and was arrested in 1998. He was held in prison custody for five years, but was released due to the inability of British judges to determine that Buruji Kashamu is the same person as Adewale Kashamu, who was wanted in the United States under this name; after which, he returned to Nigeria⁹⁴.

The attempted arrest and extradition of Senator Kashamu by the official of the National Drug Law Enforcement Agency (NDLEA) has generated a lot of issues that are likely to frustrate the

⁹⁰<http://www.i.c.j.org>, Daily sun Newspaper, August 29, 2008

⁹¹ He was extradited on July 16, 2014 to Nigeria

⁹² www.premiumtimesng.com/news, visited on 5th August, 2014, at 11:09am

⁹³ www.premiumtimesng.com/news visited on 16th June, 2015, at 11:30 am

⁹⁴ Ibid

entire exercise. These issues are diplomatic, legal and security. The diplomatic aspect has to do with the fact that it may affect the cordial relationship between Nigeria and the United States of America, if not carefully handled. In the legal aspect, the procedure adopted by the NDLEA to arrest and extradite Kashamu when the matter is in court, is contemptuous of the jurisdiction of the court and it is therefore wrong. This is evidenced in the ruling of Justice Okon Abang of the Federal High Court, Lagos Division, forbidding all the law enforcement agencies from arrest and extradition of Kashamu to the United States of America, for their failure to comply with the Extradition Act⁹⁵. From the security aspect, the fugitive is a politician and he occupies a prominent status in the Nigerian politics. He definitely has sympathizers who may constitute a threat to the security of the country if he is extradited. However, the fugitive is facing charges in the United States of America for criminal conduct, and generally cause of action in a criminal matter or a crime is not subject to limitation period.

The crime alleged was committed long time ago. It presupposes that the fugitive ought to have been extradited long ago, since there is an extradition treaty between Nigeria and the United States of America.⁹⁶ Perhaps, the intricacies of Kashamu's case could be attributed to the fact that he is the major campaigner for President Jonathan in the South West. Because of his political activity and his relationship with President Jonathan, the Nigerian government has made no effort to extradite him. It may also be attributed to the fact that Jonathan administration did not enjoy strong support from the U.S. government, which has been critical on all his policies. Another fact, is that, Kashamu is from the same state with former president Obasanjo, a political rival to Jonathan. Therefore, any attempt to extradite Kashamu will be tainted as political witch hunt for

⁹⁵ Cap. E25 L.F.N 2004

⁹⁶ The extradition treaty between Nigerian and the United States of America is embodied in the legal notice No. 33 of 1967 published in the official Gazette No. 23, vol. 54 of the 13th day of April, 1967 known as Extradition United States of America Order.

being in the PDP working for Jonathan. This fact, we can never deny in Nigeria, and that may be a good defence for Kashamu. His political association has now become the basis for the attempt to extradite him. Discerningly, it will be difficult, because of the nature of Nigerian politics today, for Nigerians to appreciate Kashamu's extradition without associating it with political rivalry.

However, it is the stand point of this researcher that it is better for Nigeria to carry out its international obligation under the Treaty⁹⁷ and extradite the fugitive to stand his trial at the United States of America, than to allow political questions to subsume the request.

Item 27 of the Exclusive Legislative List of the Nigerian constitution⁹⁸ deals with extradition as a matter within the legislative, executive and judicial competence of the federal government. This has also been the trend with our previous constitutions. This gave Nigeria the legal competence to initiate and ratify some extradition treaties, chief of which is the Extradition Treaty between Nigeria, Benin, Ghana and Togo⁹⁹. This extradition treaty was mooted for a long time as the best way to fight against crime in all its forms within the region. Owing to the highly heterogeneous nature of the sub-region arising from political, social, cultural, linguistic and ethnic differences, such ideals and ideas were not initially possible, particularly during civilian regimes in these countries. In recent times, the desire of the countries of Benin, Ghana, Nigeria and Togo to promote peace, security, solidarity and harmony for the economic, social and cultural developments of their respective countries motivated the realization of this wish at a time when the situation of the world economy in general and that of Africa in particular is in a total state of chaos. Thus, after a period of slumber, punctuated with apathy on the part of the

⁹⁷ United State of America Order Op.cit

⁹⁸ 1999 CFRN (As Amended) Cap C23, LFN, 2004.

⁹⁹ Drafted and Ratified in Lagos on the 10th day of December, 1984.

West African States concerned, the execution of this noble and laudable idea became a reality as a result of determined initial moves made by Nigeria and other countries.

Under the treaty¹⁰⁰, extradition is prohibited for crimes or offences of a political nature or if it is proved that the requisition for the surrender has been made to try the accused for a crime or offence of a political nature and for any attempt to try and punish the fugitive for the reason(s) associated with his racial, religious or political affiliations¹⁰¹.

3.5.3 Military Offences

Military offences are not generally extraditable. This is due to the recognition of the rule under Customary International law, and of which states have signed several bilateral treaties and draft conventions. Some municipal laws have enacted legislations preventing the extradition of asylum seekers who are subject to military laws of the requesting state. But there are still treaties which have failed to expressly preclude military offences in such treaties. Others refuse extradition for military offences by resort to lists of extraditable offences which did not include acts that constitute military offences¹⁰². The treaties have diverse explanation of terms that qualify as military offences. In some instances, it is clearly spelt out that extradition will not be granted if the offence consists solely in the violation of military obligations. Military offences are prohibited conduct committed by a serving soldier on a regular force of a country governed by the appropriate legal instrument. In Nigeria, military offences are codified in the Armed Forces Act¹⁰³, and the Act covers offences like aiding the enemy¹⁰⁴, communicating with the enemy¹⁰⁵, cowardly behavior¹⁰⁶, mutiny¹⁰⁷, failure to suppress mutiny¹⁰⁸, absence without

¹⁰⁰Article 4.

¹⁰¹Ibid

¹⁰²Nggada, S. (1986). *Extradition: An experience of the COMMONWEALTH and ECOWAS*, (Unpublished), p. 26

¹⁰³ CAP. A20 LFN 2004

¹⁰⁴ Ibid Section 45

¹⁰⁵ Ibid Section 46

¹⁰⁶ Ibid Section 47

leave¹⁰⁹, desertion¹¹⁰ and failure to perform military duties¹¹¹. A person who is subject to service law can be extradited if he commits military offences, but most states are not inclined to extraditing military offenders, if her national treaty law is against such exercise. This was demonstrated in the case of Camara Federal De Le Plata of Argentina in 1933¹¹². The soldier refused compulsory military service and fled to Uruguay. The Argentine government sought for extradition of the soldier but the government of Uruguay rejected the application because the crime was a military one and Uruguay was not bound to extradite the Argentine soldier.

The international law basis for military offences exception was encapsulated in the Harvard Research in International Law in Article VI of its draft convention, which empowers a requested state to decline extradition of a person, if the extradition is sought for an act which constitutes a military offence, or if it appears to the requested state that extradition is sought in order that the person claimed may be prosecuted or punished for a military offence¹¹³. The practice currently is to exclude military offences from extradition treaties or fuse them with political offences. The modest thinking of this researcher is to the effect that military offences should not be a ground for declining extradition if the offence or offences are committed during war, and if the offences have to do with communicating or aiding the enemy or cowardly behavior. This is because these offences are grave and they are capable of compromising the defence and security of a nation. Communicating with the enemy or aiding the enemy can lead to passing of vital strategic and classified information to the wrong recipients that could jeopardize national security. If military offences are committed during war, the soldier should be extradited

107 Ibid Section 52

108 Ibid Section 53

109 Ibid Section 59

110 Ibid Section 60

111 Ibid Section 62

112 Ngada, Op.cit P. 27-28

113 Ibid P. 28

notwithstanding the military offences exception. On these two grounds outlined above, extradition should not be denied by the requested state, unless of course, the requested state tends to be hostile to the security of the requesting state, suggesting that the requesting and the requested states can then be considered as belligerents.

3.5.2 Religious Offences

Religious offences are also exempted from extradition but the authorities of a country that the religious offences were committed against can deport the perpetrators of the religious offences. Religious offences are offences that are committed against places of worship and against the tenets or teachings of a particular religion. It includes any conducts that tend to show disrespect or injure the religious sensibilities of adherents of a particular religion. Religious issues are controversial and have the tendency to be given any interpretation, especially by those whose religious interests are adversely affected. This is more so because the 21st century has been attributed as a century where religious misunderstandings and tensions are likely to be on the rise. The Nigerian Penal laws¹¹⁴ have codified religious offences to include insulting or exciting contempt of religious creed¹¹⁵, injuring or defiling place of worship¹¹⁶, disturbing religious assembly and committing trespass on place of worship or burial¹¹⁷. Various punishments have also been prescribed. But can a requested state refuse to extradite a fugitive to a requesting state on the basis of religious offences? It is the opinion of this researcher to answer the question in the affirmative. This is because extradition of such a fugitive to be tried for religious offences is capable of leading to unforeseen circumstance, since the issue has assumed international dimension, involving countries. The fugitive should not be extradited, and if

¹¹⁴ Example, Penal Code Laws of Kano State

¹¹⁵ Section 210, Penal Code Laws of Kano State

¹¹⁶ Section 211, Ibid

¹¹⁷ Section 212, Ibid

extradited, should not be prosecuted but the matter be handled through dialogue and compromise. Religion in our contemporary world is a slippery domain that should be treaded cautiously.

3.6 Extraditable Persons

The object of extradition can be any individual, whether he is a subject of the prosecuting state or of the state which is required to extradite him or of a third state. Extraditable persons are individuals whose conducts have been adjudged to be reprehensible and a violation of a penal legislation of the requesting country, who feels that it is an obligation on its own part to demand for the extradition of the fugitive to be subject to the criminal powers of her municipal courts. The common procedure among states is to the effect that the requesting state may obtain the surrender of its non-national or the nationals of the third state. Most states however, decline the extradition of their national(s) who have sought refuge in their own territory. Although states which observe absolute reciprocity of treatment in this regards, requests for surrender, are sometimes accepted. Example of this is the extradition treaty between Republic of Benin, Ghana, Togo and the Federal Republic of Nigeria¹¹⁸. The essence of extradition is an individual state affair since it involves the release or surrender by one state to the other of an individual who committed an offence against the law of the requesting state. In Nigerian, a fugitive criminal or extraditable person is defined as:

- (a). Any person accused of an extraditable offence committed within the jurisdiction of a country other than Nigeria, or
- (b). Any person who having been convicted of an extraditable offences in a country other than Nigeria, is unlawfully at large before the expiration of a sentence imposed on him

118Okeke, Op. Cit.

for that offence, being in either case, a person who is or is suspected of being in Nigeria¹¹⁹.

These two categories of fugitives must be within the territorial jurisdiction of Nigeria to render Nigeria competent to consider or accede to their surrender to the requesting state and the offence for which the fugitives are being needed must be committed within the territory of the requesting state as to put that state in a position to request for surrender¹²⁰. It also prohibits the extradition of Nigerian citizens unless provided for by the extradition agreement between Nigeria and the requesting state. This same principle also operates in many other states. States reserve the right to punish their own citizens for offences committed abroad for which they have sought and been granted refuge in their country. Countries like the Great Britain and the United States of America do not make any restriction between their own citizens and subjects of their countries alleged to have committed extraditable crimes abroad unless treaties to which they are signatories so provide. These countries are therefore obliged to surrender their citizens upon request unless so barred by an extradition treaty which prohibits the extradition of nationals. In *Valentine v. U.S. Exrel, Neldecker*¹²¹, the Supreme Court of United State of America on the basis of a treaty provision which stipulates that neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention refused the request of the French Government for the surrender of the applicant who was an American national. The personality and the character of the fugitive are important factor to take into consideration in considering whether the requested state should surrender the fugitive or not. Politic has always played a vital role in extradition processes. Many prominent fugitives abound in large number in Great Britain. Great Britain has been so liberal in accommodating fugitives

119 Section 19 (1)(a) (b) of 1990 Extradition Act of Nigeria

120 Ibid Section 3

121 *The Franco-American Extradition Treaty of January 6, 1909* (1963) 299 U.S. 5

because of her influential position as the head of the Commonwealth of Nations. Most deposed political leaders easily seek asylum in Britain. Having established such interest in the fugitives, it is difficult, for Britain to surrender such fugitive on request because of such an established relationship with the fugitives. Moreover, in the case of Britain considering the political intricacies of the law which governs its character and content, it is difficult to perceive matters of extradition as purely legal, due to the discretion of the foreign secretary in determining the extradition of fugitives.

It is an accepted principle of international law that a state should not allow its territory to be used in a manner injurious to the interest of another state. In the Trail Smelter Arbitration Case¹²², the tribunal stated under international law, that no state has the right to use or permit the use of its territory in such a manner as to cause injury in or to the territory of another state. This should guide the extradition of persons between the requesting and the requested states.

3.7 Extradition of Nationals

A sensitive aspect of extradition practice is the request that one country surrender one of its nationals for prosecution or service of sentence to another. Many nations, especially those of the civil law tradition refuse to extradite their nationals on the basis of their constitutional principles¹²³. In other legal systems, it emerged out of a jurisdictional philosophy that suggests that the criminal justice system of one's native land has the authority to punish the illegal behavior of one of its citizens irrespective of where that may occur¹²⁴. However, as an adjunct of this jurisdictional position, many countries following this philosophy adopt the policy of prosecution in the offender's native jurisdiction for crimes committed in other jurisdictions, as to

122 (1941) 3S A.J.I.L 684

123 Grundgesets-Constitution of Germany, Art 16 (2), provides that No German may be extradited to a foreign country.

124 Nadelman, E. A. (1993). *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. Intl Law & Politics 813, 847.

whether to prosecute or extradite (*autdedere, autjudicare*). As might well be anticipated however, this policy is often criticized as one which is more often than not ignored, given to sham and inefficient prosecutions, in that the evidence and witnesses are located elsewhere or as fostering sentences in the case of conviction that don't meet the expectation of the offended state. Little can be done about the constitutional requirements of a requested state relating to its position regarding the extradition of nationals.

The history of the practice of non-extradition of nations can be traced back to ancient times, when the Greek city states did not extradite their own citizens, likewise Rome and Italian cities. The first treaty reflecting this practice was the treaty of 1834 between France and Belgium. France Treaty practice after 1844 uniformly excludes the extradition of nationals of the requested state and this has been a model for other countries¹²⁵. The Nigerian Extradition Act¹²⁶ also prohibits the extradition of Nigerian citizens unless provided for by the extradition agreement between Nigeria and the requesting state. This same principle also operates in many other states, where states reserve the right to punish their own citizens for offences committed abroad for which they have sought and been granted refuge in their country. In the British case of *R V. Wilson*¹²⁷, the request for the extradition of Alfred Wilson, a British national who committed theft in Zurich in 1877 and whose surrender was demanded by Switzerland but refused by Britain on the basis of treaty provision in Anglo-Swiss Treaty of 1874 which the two countries are party to. The British Lord Cockburn who ruled in the case however, expressed regret over such clause and demanded that it be expunged so as to prevent an Englishman who commits an offence in a foreign country from escaping with impunity.

The non-extradition of nationals is predicated chiefly on the following reasons:

125Nggada Op. Cit. P. 29-30

126 Section 3 Nigerian Extradition Act

127 (1877)3 Q.B 42

- i. That a subject ought not to be withdrawn from his natural judges;
- ii. That a state owes its subjects the protection of its own laws;
- iii. That it is impossible to rely on the justice system of a foreign state, especially in regard to the subject of another country;
- iv. That it is disadvantageous to a man to be tried in a foreign language, where he is separated from his friends and his resources, and from those who could bear witness to his previous life and character¹²⁸.

Britain, for instance, has often surrendered her nationals to foreign authorities for prosecution, as was done in *R. v. Godrey*¹²⁹, where the court ordered the surrender of a British subject to the Swiss authorities on a charge under Swiss law of false pretences allegedly committed in Switzerland by the partners of the accused to which he, a resident in England, was an accessory. The United States of America surrenders its nationals when there is no treaty provision. This was laid down by the United States Supreme Court in the case of *Charlton v. Kelly*¹³⁰; by holding that the words “persons” in an extradition treaty includes “Citizens” and that there is no rule of international law by which citizens are exempted from extradition unless such an exemption is made in the treaty itself.

3.8 Conclusion

From the foregoing discourse, the avalanche of authorities and materials examined reveal that though extradition may not be a hotly debated issue in international political and legal relations, it has the tendency to assume the status of a central issue in time to come. This is because criminality is assuming new, complex and diverse dimensions in our contemporary

128Ngada, Op. Cit. P. 33

129(1923) 1K.B 24

130(1913) 229 U.S 447

world. From terrorism to genocide, and from war crimes to crimes against humanity, each with an extra-territorial element, suggesting that the traditional concepts governing the understanding of the doctrine of extradition need to be revisited, reviewed and amended. Issues of extraditable persons, political, military or religious offences, extraditable offences, specialty, double criminality and extradition of nationals cannot continue to operate in their present context in view of our dynamic world that is becoming more integrated and more globalised. The establishment of International Criminal Court is a welcome initiative and it can be better appreciated if its jurisdiction is extended to cover issues that are hitherto not exhaustively dealt with under the various current municipal and international legal regimes on extradition.

CHAPTER FOUR

THE PRACTICE AND PROCEDURE OF EXTRADITION UNDER INTERNATIONAL LAW

4.1 Introduction

International law, traditionally, gives each state the leverage to assume and demonstrate unfettered and exclusive legislative, administrative and jurisdictional powers notwithstanding any objections or reservations from other international actors.¹ This legal postulate is deeply rooted in one of the oldest conceptions of the law of nations, namely, the conception of sovereignty which vests a state, in the absence of any other authority, with complete independence of action in its internal and external activities². It is internal independence that makes a state absolute and supreme authority within its frontiers. This authority is unlimited because it is answerable to no other authority within the state³. Similarly, external independence gives a state absolute liberty of action outside its borders to manage its international affairs according to its own discretion. Due to this internal and external independence, a state is at liberty to adopt any form of government, to enact any law and to follow any policy whichever it likes. Sovereignty is nothing but independence, excluding dependence upon other powers. As a corollary of this internal independence, all individuals and all properties within the territory of a state are under its domain and sway. In other words, a state has the supreme authority over all individuals and properties within its boundaries.

However, this independence does not give unlimited liberty of action to a state to do what it likes without any restriction whatsoever. The mere fact that a state is a member of the

1 Professor Charles Rousseau considers this exclusiveness as the Negative aspect of territorial sovereignty, while the positive aspect consists in the power of the state to exercise legislative, administrative and jurisdictional acts. See Rousseau, Ch, Droit International Public, Paris, 1953, P. 225.

2 Briggs, H.W. (1953). *The Law of Nations*, 2nd Ed, London, pp. 413-47

³ Ibid

international community restricts its liberty of action in regard to other state, because it is bound not to intervene in the affairs of the states. Sovereignty is a territorial concept and has no application outside its territory. This concept of territorial sovereignty leads immediately to another well recognized concept of international law, namely, the equality of states which was introduced by Vattel to the effect that, in law all independent states are regarded as equal, though they differ widely with respect to material strength and political influence⁴.

These two principles make a state the most powerful organ as they invest it with a supreme and overriding authority over all things and persons falling within its territorial limitation vested with these powers. A state has a right to refuse or to grant admission to a foreigner who comes to seek for asylum. This is because the reception and expulsion of aliens is recognized as a fundamental act of sovereignty, as was upheld by the International Court of Justice when it stated that this competence is nothing more than the inevitable result of the normal exercise of territorial sovereignty⁵. This preliminary discourse is intended to set the stage for our subsequent foray into the practical operation and procedural mechanisms of the concept of extradition, which has the potential to either limit or expand the scope of the exercise of the sovereign power of a state, depending, of course, on the foreign policy directions and national interests of the states involved⁶.

4.2 The Basis for the Practice of Extradition

There is no doubt that states are vitally interested in the repression of crime and the punishment of criminals who violate their national laws, and disturb the general peace and

⁴Vattel, E. (1964)*The Law of Nations and the Principles of National Law*, Book 1, Introduction, New York, (reprinted) p. 7, ed by Scott J.B.

⁵ The Colombian-Peruvian Asylum Case, decided by I.C.J., I.C.J Reports 1950, P. 266

⁶ A demonstration of this point can be seen in Section 19, Constitution of the Federal Republic of Nigeria 1999 (As Amended) which is to the effect that the foreign policy objectives of Nigeria shall be for the promotion and protection of the national interest.

happiness of society which is essential for the maintenance of law, order and tranquility within the state's own boundaries. Although, sometimes the states are very nationalistic in their approach, they are also prejudiced, passionate and jealous in dealing with the problems arising within their territorial jurisdiction. No state is ready to be bound by the dictates of a foreign state because it hurts pride and is regarded as contrary to the very concept of sovereignty. Taking into account these practical difficulties, Hugo Grotius has rightly stated that:

...since states are not accustomed to permit another state to enter their territory armed for the sake of exacting punishment, nor is that expedient, it follows that the city where he abides who is found to have committed the offence ought to do one of two things: either itself being called upon to punish the guilty man, or it should leave him to be dealt with by the party who makes the demand, for this is what is meant by giving him up, so often spoken of in history⁷.

On the other hand, Puffendorf denied the right of a state to surrender a criminal who has entered its territory, as is evident from his statement that "... a sovereign state is presumed to have power over its subjects, the liability to war which a state incurs when it receives and protects fugitive criminals arising rather from special compact than from any general obligation."⁸ Similar opinions have been expressed by Voet⁹ and Martins¹⁰, who maintained that the extradition of criminals was not an obligation.

This we find that while some jurists have treated this question of extradition of the fugitive criminals as a matter of strict right, and as constituting a part of the law and usage of nations, other equally distinguished authors explicitly deny it as a matter of right. The weight of authority is in favour of regarding it as a matter of comity, rather than of strict right under the rules of international law as universally received and established among civilized nations.

7 Clarke, E.A. (1903). *A Treatise Upon the Law of Extradition*, London, 4th ed, pp.2-3

8 Ibid, P.5

9 Ibid, P.6

10 Ibid, P.8

However, the common interest of states in the preservation of law and order has led to a certain amount of international cooperation for the promotion of justice. The society demands that criminals should not be left unpunished simply because they escape from the jurisdiction of the crime. Therefore, extradition may be granted when there is no reason to apprehend any injustice on the part of the state which demands it. But there is no breach of comity to refuse such surrender as the giving up of criminals fugitive from justice, is agreed and understood to be a matter in which every state regulates its conduct according to its own discretion.

Consequently, two propositions whose legal validity has long been established may be made. In the first place, the right of a state to confer immunity upon a fugitive so long as he remains within the extent of its territorial jurisdiction. Secondly, that a state may voluntarily limit its liberty of action by the express acceptance of legal obligations. One of such obligations is extradition. This is the self-imposed limitation on the competence of a state to entertain a fugitive and to immune him from prosecution. It operates thus on the assumption that more will be gained by such limitation than by the unrestricted exercise of state competence¹¹ and this limitation may be a result of either a treaty or of a policy applied in the expectation of a similar treatment from the demanding state. In the absence of a treaty, this limitation operates on the basis of reciprocity. The limitations are accepted in order to regulate the relations between independent states or with a view to the achievement of common aims. Because states in this modern era live in an interdependent world free from rigid conceptions of absolute sovereignty. The acceptance of a limitation as indicated by a state is in itself the result of the exercise of international law whereby restrictions upon the sovereignty of states can never be presumed.¹²

11 Schwarzenegger, G. (1964). *Power Politics*, 3rd ed, London, p. 204

12 The S.S Lotus case (France V. Turkey) decided by the Permanent Court of International Justice, P.C.I.J. Series A, No. 10, P.18

A sovereign state is thus fully entitled to put any limitation or restriction on its sovereignty by entering into an international agreement or treaty with another sovereign state or with some international organization enjoying international and legal personality, or by usages generally accepted as expressing principles of law regulating the relationship between these co-existing independent communities. But sometimes the unilateral declarations of a state through its national laws which are not the products of any compact or agreement with other states bind that state in its international relations. It is true that those declarations are not considered as involving a binding legal obligation in the usual sense, but as having rather a moral or political character. This does not, however, mean that such national laws are without real significance and importance and cannot be invoked against the state which made them. No state is understood to be bound by the positive laws of nations to deliver up criminal fugitives from justice, who have sought asylum within its limits, unless the demand is authorized by express treaty stipulation between the asylum state and the requesting state. Yet, the extradition of fugitive offenders charged with heinous crimes may be permitted in the absence of any provision made by treaty, relying basically on the rules of international morality. Thus, the sources of the right to demand the extradition of fugitive offenders from justice of foreign states are not only contingent on conventional stipulation, but on wider and broader principles, on principles of genial morality, of general solidarity and of social convenience, all of which principles stand for the conservation of order, the observation of justice and the repression of crimes through the prosecution and punishment of the presumptively guilty. Therefore, the basis for a claim to the demand for extradition can be summarized as treaties, national laws, reciprocity and morality.

4.2.1 Treaties

A treaty is a written agreement by which two or more states or international organizations create or intend to create a binding relationship between them operating within the sphere of international law¹³. Though international law prescribes no special form or procedure for the making of an international agreement, yet, a treaty which is an international agreement creates certain legal rights and obligations between the parties and obliges them to observe the rules of conduct laid down therein as law. In addition, a treaty serves the purpose of a servitude on the unrestricted competence of a sovereign state, because after concluding a treaty with another state or international organization, that state is under certain legal as well as moral obligations to observe, respect and comply with rules which are specifically provided in that treaty. In the absence of any international authority for the conservation of order, the observation of justice and the repression of crimes, it is the construction of the provisions of the applicable treaty which controls the mutual conduct of the independent political communities in their international relations. The extradition of alleged criminals and escaped convicts are usually made in pursuance of some treaty, which could be bilateral or multilateral depending on the number of states involved in the treaty agreement. Customary international law imposes no obligation upon a state to surrender fugitive accused of crimes unless it has been contacted to do so¹⁴. Moreover, the refusal to grant such request does not involve derogation from the sovereignty of the requesting state. It is a reasonable exercise of its exclusive right of jurisdiction within its own domain, and a state is believed to violate no legal duty, in declining, in the absence of treaty, to surrender a fugitive criminal found within its territory to any demanding state¹⁵. Both Statutory laws and judicial decisions of the various states confirm the principle that a demand for

13 Article 1 of Harvard Draft Convention

14 *Greene V. United States* (1907), 154 Fed, 401-410 (Circuit Court of Appeal, Fifth Division)

15 Oppenheim, L. (1958)*International Law*, 8th Ed, London, Vol.1, p 700

extradition need not be granted unless it is in conformity with the formalities and conditions prescribed in the treaties. A classical statement of this doctrine was clearly expressed by the supreme court of the United States of America when it stated that:

The principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he had fled, and it has been said that it is under a moral duty to do so... the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exists only when created by treaty.¹⁶

The same view was reiterated by the State Department in its reply to the Soviet Union on January 20, 1947, when it refused the extradition of Mr. Alekseev, a former employee of the Soviet Embassy in Mexico on the ground that no extradition treaty existed between the United States of America and the Soviet Union. The State Department made it clear that: "It is a well established principle of international law that no right to extradition exists apart from treaty."¹⁷

The law of Great Britain on the subject is essentially similar to that of the United States of America. There are various isolated opinions expressed by the law officers and the judges, which make it clear that the Crown is not under obligation to surrender an alleged criminal even if it wishes to do so, unless the surrender is made under the provisions of some treaty and under special authority given by Act of Parliament for carrying such treaty into effect¹⁸. The statement of Lord Russell in 1862 made the position quite clear when he said:

England, France and the United States have constantly, either by diplomatic acts or decision of their tribunals, expressed the opinion that, upon principles of international law, irrespective of treaty, the surrender of a foreign criminal who has taking refuge within their territory cannot be demanded.¹⁹

16Factor v. Laubenhimer, U.S. Marshal (1933), 290 U.S 276, 28, Quoted in Bedi, S.D. Extradition in International Law and practice, Rotterdam, Bronder-offset, 1966, P. 35.

17 Department of State Bulletin, Vol. 1947, P. 212, Quoted in Bedi, S.D, Supra, footnote 14

18 Lord McNair, Extradition and Extraterritorial Asylum, 28 B.Y.I.L 1951, PP 172-203

19 Cited by Morgenstern, F. (1949), "*The Right of Asylum*", 26 B.Y.I.L, p. 328

These same principles have found expression in the judicial practice of these countries which form part of the British Commonwealth, including Nigeria, which will be discussed under a separate heading in this chapter. An Indian court refused to surrender one Tasarov to Russia, because there was no extradition treaty between the Soviet Union and India²⁰. On the same plea, Ghana²¹ and Pakistan²² refused to deliver the alleged criminals found within their territory to the demanding states, West Germany and India, because there was no extradition treaty between the asylum states and the requesting states. These instances clearly show that no extradition will be granted unless a treaty imposes an obligation on the relevant Government. The judicial basis of this doctrine is that the constitution creates no executive prerogative to dispose of the liberty of the individual²³. Consequently, no one can be arrested or detained except in conformity with the provisions made in an extradition treaty between the two States.

Treaties are generally non-retroactive and come into operation only after ratification by both parties, as provided therein. Based on this, Anglo-American legal tradition does not allow the surrender of a fugitive on demand for an extraditable offence anterior to an extradition treaty because if the treaty were given retroactive effect, it would result in the infringement of certain constitutionally guaranteed rights to which an individual had a right under the constitutional laws of the signatory powers. On the other hand, the Latin American, as well as the Continental jurists argue that there is no valid reason for restricting the treaties to subsequent cases, except in cases where it were the express wish of the parties to deny the new convention, any application to prior cases, as in their view, a treaty is not creative but merely declaration of international law. This

20 A.I.R 1963, also comments on the same case by Saxena, J.N., A.J.I.L 1963, PP 883-888

21 The Guardian, February 4, 1965, Letter to the Editor by ARONSFELD, C.C, Assistant Director of the Wiener Library.

22 Chandra V. The province of East Bengal, All Pakistan Legal Decisions, Dacca 1962, P. 119

23 Valentine V. U.S.A. Ex Rel Neidecker (1936) 299 U.S.S at P. 18

view should be more preferred because the purpose of extradition treaties is the preservation of society and the repression of crime, matters in which all nations are equally interested²⁴.

4.2.2 National Laws

Sovereign states under classical international law are perfectly free to exercise their rights and even abuse same without having to justify their conduct to anybody except where they have concluded a treaty with another state or an international organization which has got its own international personality. However, some states not satisfied with unqualified discretion of the executive in matters of extradition have, for their own guidance, enacted special municipal laws qualifying extraditable offences, either by enumerating those offences for which extradition shall be granted, or by adopting an eliminative method which defines extraditable offences by reference to the maximum or minimum penalty which will be required to justify extradition. The enumerative system has been adopted in municipal legislation by the United Kingdom²⁵, United States of America²⁶ and Nigeria²⁷, among several others, who have based their extradition Acts on the British model. The eliminative method is common in countries with Civil Law system²⁸.

The role of the national statutes of the state of asylum in extradition proceedings is of a general character and application. These codes and laws either circumscribe the cases in which the requested state may surrender the fugitive offenders even in the absence of treaty arrangements to the requesting state, or prescribe the conditions which must be observed before a surrender takes place. Moreover, under the rule of double criminality no person can be extradited unless the offence, with which the person sought is charged, clearly constitutes a crime under the laws of the asylum state and requesting state - matters like this have been traditionally regarded

24 Moore, J.B. (1891). "*A Treatise on Extradition and Interstate Rendition*", Boston, 1891, Vol. 1, P.S

25 Extradition Act 1870, Schedule 1.

26 United States Code Annotated, Title 18- Criminal Code and Criminal Procedure, CAP 20

27 Extradition Act, CAP E25, LFN 2004

28 Germany Sweden, Norway, Brazil, among others

as falling within the domestic jurisdiction of the state and thus exempted from any external control. In the absence of a treaty or legislative provision, there is no executive discretion to seize a fugitive criminal found within its own territory or jurisdiction and surrender him to a foreign power, as the liberty of an individual is no longer at the mercy of the executive. England supports the same doctrine that in the absence of express legal authority the government cannot send a fugitive out of the country to be tried for an offence committed abroad. The rule is that to make a particular crime extraditable, it must be mentioned in the national extradition Act, before a fugitive can be surrendered by one sovereign to another. It is nothing more than the normal result of the age-old conception of sovereignty under English law, which vests the Crown with the treaty-making power as its prerogative, but does not authorize it to give effect to the provisions of the treaty, if it should conflict with the law of the land²⁹. These national statutes are generally drafted in the absence of treaties to give guidance to the national courts and to furnish the basis for the conclusion of extradition treaties. Even in the United States of America where the so-called self-executing treaties automatically acquire legal force and become the law of the land and, for that purpose, supersede existing laws and existing treaties, it has been found convenient to enact national legislation to implement extradition treaties³⁰.

The question now arises as to how far a national law can bind a country internationally. This question leads us directly to the problem as to whether a unilateral declaration or a statement made by a minister or a representative of a state binds that state in its relations with other states. The problem has been fully discussed and solved by the International Court of Justice in the *Eastern Greenland Case*, where it said:

29A Horney General for Canada V.A Horney General for Ontario & others (1937) A.C 326, 347.

30 Article 6 of the United States Constitution

The court considers it beyond all disputes that a reply of this nature given by the minister for foreign affairs on behalf of his government in response to a request by the diplomatic representative of a foreign power, in regard to a question falling within his province, is binding upon the country to which the minister belongs.³¹

However, the above decision is subject to the fact that the national extradition laws of a state confers the powers on the minister. The Lytton Commission of Inquiry, in its report, to the League of Nations in 1933 upheld the Japanese contention on the main issue, namely, that the minutes of a conversation between the Chinese and Japanese representatives at Peking in 1905 relating to the respective rights of the two countries in Manchuria constituted, from an international legal point of view, a binding commitment upon China, having the force of a formal agreement. The Commission added that the passage concerning parallel railways was a declaration or statement of intention on the part of the Chinese plenipotentiaries and as such it constituted abiding commitment³². Thus, an oral agreement between states is, or may be, as binding upon the parties as if it were recorded in writing, and will be applied by international tribunals whenever the facts as to the agreement may be proved. In other words, whether unilateral declarations constitute legal commitment is determinable only on the basis of the evidence in each case³³. Acts of this type, although unilateral in procedure, bear somewhat more of the characteristics of an agreement, while the demand for extradition of a fugitive criminal by a foreign government, relying on the local laws of the state of asylum, does not give any *locus standi* to that state in the absence of any convention or a treaty between the two states. But it must be noted that these national laws express the intention of the organ of the state which enacted them and brought them into operation to surrender the fugitive criminals if the

31 Text in Publications of the Court, Series A/B No. 53, P.71

32 Garner, J.W, (1933) "*The International Binding Force of Oral Declaration*", 27A.JIL, pp.493-497 at p.497.

33 Status of Eastern Karelia, P.C.I.J 1923, Series B, No. 5, PP. 26-28

conditions have been fulfilled. They create an obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation.

Moreover, the state comes into existence to satisfy the bare needs of life, it continues in existence to make life good. This is the ultimate goal of any human socio-political organization. To meet that end, every state makes certain laws in order to control the conduct and activities of its subjects in the general interest of people and to maintain public security within its domain. Thus, nations no less than individuals have the obligation to perfect themselves through mutual aid and by observance of certain common standards for the furtherance and promotion of justice, goodwill and solidarity of human society. The validity of national laws as unilateral acts under international law has been recognized. Judge Alvarez held that these unilateral declarations have the full force of law when they are related to the matters of sovereign rights of the states, namely, recognition of the new States, admission of aliens, immigration, refugees, expulsion and extradition³⁴.

It can be said that these national laws can be invoked for the surrender of the malefactors, the common enemies of every society, by the demanding state whose socio-economic order has been violated for the preservation of law and order within the society. The law of extradition is an instrument of international co-operation for the suppression of crime, in which all nations have a common interest, because crime constitutes a menace to any human society and weakens the very foundations of social life. If by simply placing himself outside the territory of the state in which he has committed a crime, a criminal places himself beyond the reach of the law which he has violated and if so without any risk he manages to escape penalty attached to his guilt by simply fleeing to a foreign country, there will be a complete failure of justice.

34 Competence of the General Assembly for the Admission to the United Nations- Dissenting opinion of JUDGE ALVAREL, I.C.J REPORTS 1950, P. 14.

4.2.3 Reciprocity

The rules of reciprocity are well-established in international law for a very long time. The practical importance of these rules became evident as the states learnt by experience in their relations with other states, that apart from provision by treaty, they cannot expect certain treatment for their nationals abroad unless they give the same treatment to foreign states and their nationals within their own jurisdiction. No state can claim from other states, as a matter of binding obligation conduct, which it is not prepared to regard as binding upon itself. On the basis of this principle of reciprocity, then failure of one state to perform its obligations in a particular respect, either entitles other states to proceed to a corresponding non-performance in relation to that state or disentitles that state from objecting to such corresponding non-performance³⁵. Schwarzenberger is right when he says that: “...*an international customary law grew up which derived its strength and authority from the automatic working of the principle of reciprocity.*”³⁶

It has an added strength from the incorporation of its rules in the various national statutes and from national courts, sustaining them by literal construction of these statutes. It is true that the authorities of a state are not obliged to grant the extradition of a criminal unless there exists between the two states a formal treaty applicable to the subject, but it is in the common interest of mankind that the offences against persons and property, offences which militate against the general well-being of society should be repressed by punishment, because crimes, or at least the more serious crimes are not merely an infraction of a command which a particular society chooses to give, they sap the foundations of social life, they are an outrage upon humanity at large. It is to the interest of the state into whose territory the criminal has come that he shall not remain at large therein, as no state desires to become a haven for malefactors of other countries,

35 Yearbook of the International Law Commission, 1959, Vol. II, Art 20, Para 102 p.70

36 The Yearbook of World Affairs 1947, International Law and Society p.170

because it would endanger its own internal stability as well as its international reputation. It is obviously in its interest to get rid of them. While in the past there was in existence a principle that extradition would be granted for offences which were grave and condemnable by universal conscience, the growing international interdependence of nations and stricter ties in international relations today impose a duty to co-operate closely in bringing about the punishment of crime in order to advance law and justice everywhere, provided it is based on the principle of reciprocity as the states cannot act alone for the accomplishment of these purposes, and they have to adopt some effective concert of action. The whole history of the law of treaties emphasizes the same principle, as the normal function of international treaties consists in giving concrete expression to the rules of reciprocity in spheres in which, on the basis of mutuality, states are willing to put certain limitations on the exercise of their unfettered national sovereignty.

4.2.4 Morality

This is rooted in our religious teachings that constitute the jurisprudential basis of the doctrine of equity of the general juristic sense. The principles of equity are shaped by morality and their essence is to give a human face by applying religious teachings to determine the scope and substance of criminal legislations³⁷. To this effect, the contention is that a fugitive criminal who has violated the laws of the demanding country should be extradited by the country of asylum on the basis of moral conscience and moral responsibility, since a crime against a state is akin to offending the commandment of God.

4.3 The Practice of Extradition

Under international law, there is no binding procedure for communicating a request for extradition. But a request for the surrender of a fugitive criminal would normally be made by the diplomatic representatives of the country requesting extradition to the country in which the

³⁷Usman, A.K. (2012) *The Law and Practice of Equity and Trust*, Faith International Printers, Zaria, p.2

criminals has taken refuge. In the absence of such a representative, the application may be made through a senior officer of the ministry of foreign affairs of the requesting state, who should not be below the rank of a first secretary in an embassy or High Commission as the case may be. It will be expected that the application will furnish all the necessary details which will facilitate the extradition requested. Such particulars will include certificate of conviction issued by a competent court of the country making the application. Where a fugitive is being sought with the aim of prosecuting him for alleged crimes, it will be necessary that such application will include a collation of evidence of the alleged crimes. Normally, treaties provide that the court of the extraditing state must satisfy itself that there is prima facie evidence against the fugitive before ordering extradition for purposes of trial³⁸.

From the foregoing, it can be deduced that extradition proceedings are initiated only upon formal request, usually communicated through diplomatic channels and supported by those documents specified by the applicable extradition treaty or, in the absence thereof, by the national extradition act of the requested state. Most extradition treaties and statutes provide for the possibility of requesting, for a limited period pending receipt of a formal request, the provisional arrest of an alleged offender, either by means of rapid communication or on the basis of an international warrant of arrest issued by the international police. The extradition procedure itself is usually not the subject-matter of extradition treaties but it is left entirely to the requested state, including the questions if to what extent and at which stage of the proceedings that judicial protection is available to the alleged offender. As extradition treaties create rights and obligations only for the state parties to the treaty. In principle, the alleged offender may consequently not invoke the violation of the extradition treaty by the requesting state or treaty provisions

38Okeke, C.N, (1986).*The Theory and Practice of International Law in Nigeria*. Fourth Dimension Publishers, Enugu, pp.107-108.

precluding his or her return when arguing against surrender. In practice, however, such protection is mostly guaranteed by analogous provisions in national extradition acts³⁹.

While in Common Law countries the lawfulness of extradition may be reviewed in habeas corpus proceedings, Civil Law countries make surrender dependent upon a prior criminal court's ruling on its admissibility, if extradition is declared inadmissible. This decision is usually final, otherwise surrender is left to the executive's discretion. As a rule, the requesting state has no standing in any of these judicial proceedings⁴⁰. Most extradition Acts governing extradition procedure provide for return by consent-simplified extradition, informal surrender - in case where the alleged offender, duly instructed, waives formal proceedings either in writing or before a court or commissioned judge. In so doing, the alleged offender in some countries also loses the protection under the specialty rule, in others; the specialty rule may be waived separately. A validly declared waiver is usually irrevocable. Expenses resulting from return proceedings in the requested state are met by that state. Some treaties provide that exceptional expenses, like air transport, are to be borne by the requesting state. A variety of rules provide for extradition treaties for cases where extradition is requested by more than one state. If requests are made for the same offence, the requested state has to give precedence to the request of the state in which the offence was committed. If requests are made for different offences, the requested state should make its decision with regard to the alleged offender, the respective dates of the requests, and the possibility of subsequent extradition to another state⁴¹.

39<http://www.mpepil.com> , pp7-8, accessed on August 6, 2013, 2.15pm

40 Ibid, p.8

41 Ibid, p. 8, this also happened in the case of Augusto Pinochet whose extradition was sought for by more than one country like Spain and Chile.

4.4 Existing Bilateral/Multilateral Extradition Treaties

There is no reliable figure for existing bilateral extradition treaties, due to the unknown number of unregistered treaties and treaties that have become inoperative or obsolete. It has been estimated that there are around 1500, which all follow, with slight variations but the same pattern. In regard to multilateral treaties, it can be correctly asserted that up to now, a world-wide extradition convention does not exist. Recently, however, the International Law Commission started working on such a convention⁴². However, the similarity of international extradition treaties is supported by the United Nations Model Treaty on Extradition, which restricts the exception for political offences. The large amount of new and of amended multilateral treaties shows their primary importance in the field of extradition. Sometimes provisions regarding extradition are embodied in a more comprehensive treaty on legal assistance between the states in criminal matters in general or even legal assistance in the broader sense, including assistance in civil, family and criminal matters. An example of a multilateral treaty is The Convention on Extradition Initiated by Economic Community of West Africa States (ECOWAS) of August 6, 1994, signed by 15 member states⁴³. It is necessary to stress that treaties, whether bilateral or multilateral, are drafted and implemented in the context of the requirements of the Vienna Convention on the Law of Treaties, which requires a treaty to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose⁴⁴. Thus, conventions are not to be interpreted narrowly, but should be viewed in context and interpreted in good faith.

42 See UN-ILC special Rapporteur Z Galicki's Preliminary and second Report, cited with approval in <http://www.mpepil.com>, Supra p.9

43 <http://www.mpepil.com>, p.10. The treaty was to come into force upon ratification by nine members of the community.

44 Article 31(1)

All developed and most developing countries are parties to at least some bilateral treaties. Meanwhile, the importance of bilateral treaties has been seriously questioned on the grounds of reluctance and resistance to vary the existing ones with supplementary treaties. This is chiefly due to the difficult nature of negotiating and ratifying a treaty. More so, states have often disregarded bilateral treaties in preference of their municipal extradition laws⁴⁵. This was done by Brazil and Sweden. There were several diplomatic relations between Brazil and United States of America for about fifty years, and Brazil became a refuge for fugitives from the United States of America until a treaty was signed in 1964⁴⁶. War also has a negative effect on treaties as was held in *Argentin v. Horn*,⁴⁷ that despite the revival of extradition treaty between the United States of America and Italy before World War II, the treaty has been abrogated by the war and can only be replaced by a new one. There is the problem of succession to bilateral extradition agreement in cases of emergence of a new government in the states concerned and it is difficult to answer whether to recognize the new arrangement to have impliedly emerged with all former structures including treaties⁴⁸.

A multilateral extradition treaty creates a sort of common law of extradition among the parties to it.⁴⁹ This is because, of the involvement of more than two states and thus less likely to suffer attrition. It has been suggested by Bassiouni that a universal extradition convention signed by all civilized states should be given a serious thought⁵⁰. Nations with common social, political and economic peculiarities and common penal jurisprudence have often concluded multilateral extradition treaties like the Arab League Extradition in 1952 by Saudi Arabia, Iraq, Egypt,

45 Bassiouni, M.C. (1980). "Extradition and International World Order", Springfield, Illinois, p. 15

46 O'Connell, O.P, (1970). *International Law*, Sweet & Maxwell, London, p.286.

47 (1957) 355 U.S 818

48 Bassiouni, M.C. Ibid, p.19

49 Ibid

50 Ibid

Jordan and Lebanon;⁵¹ the Benelux Extradition Convention between Belgium, Luxemburg and Netherlands,⁵² and the European Extradition Convention⁵³ between the member states of the Council of Europe⁵⁴. The Inter-American Convention concluded first in the Montevideo Convention of 1889, and then in Mexico 1902, signed by seventeen States on 7th February, 1973, the Organization of American States proposed a draft of Inter-American Convention on Extradition⁵⁵.

The Commonwealth Scheme of 1966 also shows an example of multilateral agreement on extradition after which most Commonwealth Countries including Nigeria enacted their municipal legislations on extradition. Back home there is a multilateral extradition treaty between Nigeria, Republic Of Ghana, Republic of Benin and the Republic of Togo, and all countries in the West African Sub-region⁵⁶.

4.5 The Nigerian Extradition Regime

Countries of the world are not satisfied with only treaty arrangements, and thus, have resorted to enacting municipal extradition laws to give treaties more legal impetus. This municipal extradition laws is normally framed to conform to the extradition treaties of the states. It is not uncommon that states have had to suspend their treaties when making new municipal extradition laws. This was responsible for the break in the relationship between Brazil and Sweden for fifty years⁵⁷. Municipal extradition laws form the foundation of extradition understanding. It provides the process of the practice and what should constitute extraditable offences, but this area has always generated conflict because what can be seen as serious

51 British and Foreign papers 1959, P. 606, quoted in Bassiouni, Ibid.

52 Ibid

53 Ibid

54 European Treaty Series No. 24, quoted in Bassiouni, Ibid.

55 Ibid P. 22

56 Signed and ratified in Lagos on 10th December, 1984

⁵⁷Nggada, Op.cit. p.40

offences differ from country to country. That is why; it is difficult to have a universal extradition treaty. The first municipal extradition law was enacted by Belgium in 1833. The Nigerian municipal extradition law came into being in 1966, called Extradition Act of 1966 which is contained in the present collection of Laws of the Federation of Nigeria 2004⁵⁸. The substantive requirements deal with rules which distinguish extradition from other modes of surrendering a person to a jurisdiction that is competent to try him. That means, the offence for which a person is sought must constitute an extraditable offence as enumerated or designated by a treaty or other practice between the states concerned that the offence must be a crime in both the requesting and the requested states-double criminality rule.

The Constitution of the Federal Republic of Nigeria is the grundnorm, the fountain and the living spring from where every other laws, actions persons and authorities in the country derive legitimacy and sustenance. Any law, action or authority that is not in peaceful marriage with the provisions of the constitution obtains automatic divorce without much ado⁵⁹. There is no doubt that extradition of wanted persons from Nigeria, generally, constitutes an infringement on their rights to personal liberty and freedom of movement. However, the constitution, in its own wisdom realizing that freedom without limit is in itself more dangerous than an armed lunatic, subjected these rights to certain limitations. Consequently, by the tone and tenor of sections 35 (1) (f) and 41 (1) and (2) (b) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) the Siamese-like rights, that is the rights to personal liberty and freedom of movement can be lawfully curtailed in certain circumstances, and the person or authority causing such lawful violation would not be liable in damages.

58 CAP E 25, LFN, 2004.

59 S. 1 (3) CFRN 1999 (as amended)

Section 35 (1) of the Constitution provides as follows: ‘every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law: (f) for the purpose of preventing the unlawful entry of any person into Nigeria or of effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto.

In like manner, and in the spirit of internal harmony, the constitution also provides in Section 41 (1) and (2) thus:

1. *Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto or exit therefrom.*
2. *Nothing in subsection (1) of this section shall invalidate any law that is reasonably justifiable in a democratic society;*
3. *Providing for the removal of any person from Nigeria to any other country to.*
 - (i) *Be tried outside Nigeria for any criminal offence, or*
 - (ii) *Under imprisonment outside Nigeria in execution of the sentence of a court of law in respect of a criminal offence of which he has been found guilty:*

Provided that there is reciprocal agreement between Nigeria and such other country in relation to such matter.

It is worthy of note that the operative words in section 35(1) of the Constitution is “every person”, while section 41 of the Constitution dwells more on “every citizen of Nigeria”. It follows, therefore, that both Nigerian citizens and non-citizens alike who are wanted outside the

shores of the country in connection with crimes committed in any other country, can be extradited, provided there is a reciprocal agreement between Nigeria and that other country. Such removal under the Nigeria Extradition Act would be valid as the above provisions of the Constitution constitute the basis upon which the legitimacy of the Extradition Act is rested.

Nigeria has very few extradition arrangements with other countries. However, the Nigerian Extradition Act, like the British extradition Act of 1989, is applicable to every Commonwealth Country,⁶⁰ and otherwise the Act is applicable with the consent of the Federal Executive Council. In regard to making of treaties, to the researcher's discovery through this research, the only recorded extradition treaties to which Nigeria is a party are those between Liberia and Nigeria, and the United States of America and Nigeria. The two treaties are those signed between Britain and Liberia on 6th December, 1892⁶¹ and between Britain and the United States of America on 22nd December, 1831⁶², both being binding on Nigeria by virtue of the then colonial rule, but subject to modifications as required by the 1966 Nigerian Extradition Act. The only positive move towards extradition treaty came as late as 1984 between Nigeria, Ghana, Togo and Republic of Benin signed in Lagos on 10th December, 1984⁶³. The Act replicates most of the requirements in extradition practice as contained in the extradition Act. However, an important change can be seen in the definition of extraditable offences. The treaty used the designation method by providing for minimum punishment of two years for an offence to be extraditable thereby excluding trivial offences. This marks a departure from the previous enumerative method of listing offences as contained in the Act⁶⁴.

60Section 2 (1) (2) and (4) Nigerian Extradition Act.

61Okeke, Op. Cit. P. 130.

62 Ibid

63 Ibid

64 See Schedule II items 1-28 Cap E 25, LFN, 2004.

The treaty further provides that extradition shall be granted in respect of participation in the crime, if such participation is punishable by the laws of the contracting parties,⁶⁵ and for extradition of a convicted criminal whether he has served a part of his sentence or not⁶⁶. The treaty also makes restrictions on extradition by providing for time limit⁶⁷. The classical restriction in respect of race, religion, nationality and offences of political character is also provided for⁶⁸. The specialty rule under which the criminal should be prosecuted or punished for the offences for which extradition is granted only is also entrenched in the treaty⁶⁹. The Act also lays down the procedure to be observed in extradition proceeding through diplomatic channels, and it is substantially in line with the procedure laid down by the 1966 Act. The Act provides that the requested party shall bear expenses incurred by reason of extradition except cost of land, sea and air transportation to the requesting state⁷⁰. The treaty is binding on the parties for as long as they consent to be bound, and any state interested in withdrawing from the treaty may notify the other parties within six months⁷¹.

Nigeria is a federal state with a written, rigid constitution, and to that effect, extradition matters are dealt with at the federal level⁷². Nigeria requires the existence of treaty before extradition can be practiced between parties to it and the municipal Extradition Act⁷³ provides the Nigerian situation in extradition matters. It specifies the procedure to be followed, the substantive requirement, the restrictions to the extradition and all other matters relating to the practice and it is from this Act that the Nigerian practice would be examined at length.

65 Article 2(2) of the Nigerian Extradition Treaty with Ghana , Togo & Benin

66 Article 2 (3)

67 Article 3

68 Article 4

69 Article 5

70 Article 7

71 Article 8

72 Exclusive Legislative List, items 18 & 25, with Section 12 , 1999 CRFN (As Amended)

73 Section 1, Extradition Act, CAP E 25, LFN, 2004.

4.6 The Nigerian Extradition Act, 1966

The Nigerian Extradition Act of 1966 was the product of the intricacies surrounding the Enahoro's case in 1963. Before this Act, extradition was regulated by the 1881 Fugitive Offenders Act, the Extradition Acts of 1873, 1895, 1906, 1917, and the African (Fugitive Offenders) Order in Council of 1932. All of which were colonial legislations applicable to Nigeria by its virtue of being a British colony at that time. The inadequacies of this enactment sooner or later came to public attention and moves were made for change. In 1965, a meeting of law ministers of all Commonwealth countries was held to discuss the reforms needed in extradition and fugitive offenders legislation, and to secure uniformity of these laws. The following year, a further meeting of the law ministers was held in London and the meeting produced a Draft Scheme which set out in details the principles on which each country was to base its laws on fugitive offenders⁷⁴. The result was the promulgation of the 1966 Extradition Act which came to force in 1967.

The Act set out the conditions to be satisfied in extradition proceedings which are as follows:

1. That a request for surrender must have been communicated in writing to the Attorney General by a diplomatic representative or consular officer of a state requesting extradition⁷⁵;
2. Such request must be duly authenticated accompanied by a warrant of arrest or certificate of conviction as the case may be.⁷⁶
3. The fugitive must be a person extraditable under the Act.
4. His surrender must be subject to restrictions under the Act; and

74 Commonwealth Law Minister Conference Papers 1966

75 Section 3 Cap E 25 LFN 2004

76 Ibid

5. Request must not be for persecution and or punishment on account of race, religion, nationality or political opinion or made contrary to the principle of good faith⁷⁷.

The request will not be granted if he is likely to be prejudiced in his trial or punishment,⁷⁸ if the offence is of trivial nature,⁷⁹ if the fugitive criminal has been convicted and punished⁸⁰ or acquitted⁸¹ of the offence for which extradition is sought or the passage of time since the commission of the offence will make it unjust or oppressive to punish him⁸². The Attorney General of Federation must be satisfied that the offender will not be tried or punished for any offence other than one which extradition is sought, in order to comply with the specialty principle⁸³. This is so because the offence is the only one which evidence is available to Nigeria and derogation from this rule will only amount to a breach of trust and abuse of the administrative process of the Nigerian agreement.

The procedure for extradition has a kind of standardized requirement at least for all Common Law Countries and even in the Civil Law Countries. It involves the administrative process of a state; the only difference in the process is the personnel involved. As an element of International Law, extradition is within the exclusive competence of the central authority of a state only.

In Nigeria, the Act makes provision for the procedure to be followed in extradition cases. It had been mentioned earlier that a request has to be made. The most important element of extradition is that, a criminal having committed a crime in the requesting state has made away from its jurisdiction and is found to reside in another state from which his surrender is requested.

77 *ibid*

78 Section 3 (4) *ibid*

79 Section 3 (4) (9) *ibid*

80 *Ibid*

81 *Ibid* Section 3 (3) (6)

82 *Ibid* section 3 (7)

83 Section 5 (1) Cap E 25 LFN 2004

Hence, it is normally a formal process not conducting by just anybody. The process is instituted by the Attorney General who on confirmation of competent court communicates the necessity for an extradition request to the Nigeria diplomatic representatives or consular officers of the requested state in writing the desire for extradition⁸⁴. The request must be accompanied by duly authenticated warrant of arrest issued in Nigeria and in case of a convicted criminal the request must be accompanied by a certificate of conviction issued in Nigeria. The particulars of the person and the fact upon which he is convicted or accused and evidence sufficient to justify the issue of warrant should also accompany the request⁸⁵ to avoid refusal to extradite because the requested state also has the right to asylum. Where more than one state is claiming extradition the Attorney General will determine which of the state to be accorded priority having regard to the relative seriousness of the offence if the offences for which extradition is sought by the countries are different,⁸⁶ the dates on which extradition request were communicated and the nationality of the offender or the place where he is resident.

Section 6 (1) of the Act provides for the power of the magistrate to issue warrant of arrest of fugitives when he deems it just to do so and on arrest the fugitive must be brought before the magistrate as soon as practicable. The magistrate can also issue provisional warrant without the order of the Attorney General, but must furnish the Attorney General with information on the circumstances for which the warrant was made⁸⁷. The fugitive arrested under these circumstances may be taken in custody until the request for his surrender is made to the Attorney General⁸⁸.

84 Section 5 (1) Cap E 25 LFN 2004

85 Ibid Section 5 (2)

86 Ibid Section 5 (3)

87 Section 7 (1) (2) and (3) Cap E 25 LFN 2004

88 Section 7 (5)

However, if after thirty days of his arrest no order is received from the Attorney General, the fugitive must be released⁸⁹. In addition, the magistrate is empowered to commit the criminal to trial and to determine whether it is just to grant his extradition⁹⁰. The Act also permits testimony of any witness in Nigeria to be obtained in relation to any matter pending in court, or under any law in force in any part of Nigeria, but subject to a guaranteed reciprocity⁹¹. Any person to whom a fugitive criminal is surrendered on the order of the Attorney General, may receive and hold him in custody as well as convey him out of Nigeria in pursuance of the order⁹². As regards release and transit, the Attorney General is given a wide power to deal with the matter depending on what circumstances demand⁹³. In relation to property of the extradited person, a police in pursuance of a warrant of arrest is empowered under the Act to seize and detain any property found in possession of the fugitive at the time of arrest⁹⁴.

4.7 Challenges for Implementation of Extradition Instruments

Both municipal and international legal instruments are not implemented without challenges. The most important challenges are not *strictusensu*, legal in nature, but rather political and economic which are reflected in the notion of national interest. The national interest of a state at any given time determines the success or otherwise of any extradition request. Because it is the national interest that dictates the nature of a state's relation with other international actors. The mere existence of an extradition treaty between the requesting state and the requested state does not provide the assurance that the requested fugitive offender will, in fact, be extradited. What appears to weigh decisively is the degree of good relationship existing

89 Section 7 (6)

90 Section 8

91 Section 16

92 Sections 9 (2) and (3)

93 Sections 12, 14 (1) and (2)

94 Sections 11 (1) and 13

between the parties at the time of a request. A case in point is that of Gowon who was sought for and received refuge from the British authorities. He was refused to be extradited on the ground that the charge for which he was wanted was political. That of Ojukwu in which the Ivory Coast authorities refused is also understandable. The case of **UmaruDikko** is notorious. There was allegation that Dikko fled to Britain with huge amount of money belonging to the Nigerian Government meant for the presidential taskforce on the importation of rice and cement which were not allegedly supplied to the government of Nigeria. On request for his extradition to Nigeria, Britain declined to extradite him, classifying the offence as political. Several appeals were made without yielding anything, attempted kidnapping failed. This led to a friction in the diplomatic relationship between Nigeria and Britain. Britain also asserted that the foreign minister has the final say in extradition matter. The recent one in that of BurujiKashamu where the Nigerian government under Jonathan administration was reluctant to extradite Kashamu, despite the extradition treaty between Nigerian and the United State of AmericaGovernment. Such personalities have significant supporters and sympathizers who are capable of jeopardizing national security, if their heroes are to be tried and sentenced. But what if the conduct of the fugitive had resulted to the dismemberment of Nigeria?

In a country as diverse as Nigeria, with deep religious and ethnic cleavages, the politics and law of extradition should be experimented with utmost caution, because actions of government can be interpreted differently. In fact, naively by those who belong to the same ethnic or religious group as the fugitive.

The legal dimension of the challenge is that the extradition Act has given the Attorney General of the Federation and magistrate wide powers⁹⁵. The powers of the Attorney General can be abused by him and it is capable of affecting the interest of a fugitive that he has sympathy for.

4.8 Conclusion

The discussions undertaken in this chapter clearly reveal an avalanche of question that are not yet answered in regard to the questions of extradition. What may be regarded as the general international law standard on the matter does not offer a uniform practice of states. This stems from the fact that so far the issue of extradition is left to the municipal laws of individual states for determination, alternatively, conflicts are resolved in reliance on existing extradition treaties and agreements between the parties. One of our disagreements has been the doctrine of political exception in determining whether to extradite a fugitive or not because different criteria have been adopted in ascertaining what constitute political offences depending on the character or psychology of the ruling elites. These were demonstrated in the cases of Enahoro, Gowon, Dikko, Ojukwu and Alamiesegha.

95 Sections 6 and 14 of the Extradition Act Cap E25 LFN 2004

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Summary

This study has been a foray into the legal regime governing the practice of extradition in the contexts of British, American and substantially, the Nigerian experience. There is substantial similarity between the practice of extradition in the above three legal systems examined, despite minor variations in the judicial mechanisms, enforcement and the substantive legal provisions. At the beginning, we introduced the topic by delineating the methodological approach. This was followed by highlight of some conceptual issues. The historical evolution of the concept as well as the nature and indices of the concept of extradition, including points of deviation from the invocation of the doctrine were thoroughly examined. The operational use of the concept from the perspectives of bilateral and multilateral treaties constitutes the crux of the later discussions, which also focused on the Nigerian dimension and obstacles towards its implementation.

5.2 Findings

From the avalanche of materials consulted in this study, certain salient issues and trends have been discovered to be central and key in the law and practice of extradition among nations. Hence, the following are the findings of this research:

1. It has been found that political offence exception is an obstacle in the determination of extraditable offences. This is because to the researcher's knowledge, the international and municipal legal instruments contain no provision on the ingredients of the political offence exception that are of universal application. Different nations ascribe diverse meanings to political offence. Also, state parties to extradition agreements take undue advantage of the inherent loop holes in the laws of extradition to avoid their international

obligation by hiding behind the judicial declaration that the fugitive should not be surrendered because his is of a political character.¹

2. It has been found that the basis of the exception, apart from the traditional practice of according hospitality to strangers, was associated with the need to consolidate liberal democracy in Europe and to protect only revolutionaries from being returned to their home countries to face prosecution for crimes committed against their governments which is not in accord with the basis for its operation today.
3. That nations use the exception as a tool of diplomacy by using it to advance their national interest. The degree of a nation's observance of the political offence exception depends on its national interest. This is because the commonly noticeable trend among international actors is to see countries that have enjoy cordial relation to be willing and ready to extradite fugitives notwithstanding any defence that is based on political offence, while countries that do not enjoy very good diplomatic relations are reluctant in extraditing fugitives.
4. It has also been found that extradition proceedings are conducted by the requested state, who is the complainant, the prosecutor and the judge. This is difficult to be reconciled with the fair hearing principle of *nemo iudex in causa sua*.

¹ Example, Section 3, Nigerian Extradition Act provides: A fugitive shall not be surrendered if the Attorney-General or the court dealing with the matter is satisfied that the offence for which his surrendered is sought, is of political a character. In Nigeria, the Attorney General also determines offence of political character, while in Britain it is the Foreign Minister.

5.3 Recommendations

The research humbly recommends as follows:

1. It is therefore recommended that the courts only would be in a better position to determine extradition matters, and whether or not a particular offence is of a political character, and not the Attorney General or Foreign Minister who are political appointees and their judgment is likely to be influenced by politics or other extraneous considerations. As members of the government, their judgment at any particular time may be influenced by the government's political position towards the requesting state. Also, it is in the interest of all humanity, municipal extradition laws of state parties should expressly provide the ingredients that constitute an offence of a political character and no fugitive should be allowed to escape from justice under the political offence exception. This is because the exception is a threat to national interest if allowed to continue to shield criminals from justice.
2. In conformity with the foreign policy objectives of Nigeria in section 19 of the 1999 Constitution (as Amended), which, inter alia, provides for the promotion of national interest, Nigeria should not encourage strict operation of the political offence but insist on extradition for prosecution and punishment, or empower the ECOWAS court of justice as a neutral body to adjudicate, if it occurs within the West African region.
3. There is need for an international convention on extradition that will be binding on all countries, because crime prevention, investigation, prosecution and punishment should be of common concern to all humanity. Also, extradition should be effected even in the absence of a treaty provided it is established that there is a *prima facie* case against the

fugitive offender. This will sustain the philosophy behind the practice of extradition and uphold the principle of international morality.

4. There is need for the establishment of a neutral international judicial body to sit in a neutral state to conduct extradition proceedings. This will ensure fair trial and justice to the fugitive, the requested state and the requesting state.

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