KAMPALA INTERNATIONAL UNIVERSITY

AN ANALYSIS OF THE LAW OF EXTRADITION

(THE CASE STUDY OF KENYA)

BY

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DECLARATION

I, declare that this thesis is the work of NGIGI RACHEAL.W alone except where due acknowledgement is made in the text. It does not include materials for which any other university degree or diploma has been awarded.

Signature: ______________________

Date: 21st May 2011

APPROVAL

I certify that I have supervised and read this study and that in my opinion; it conforms to acceptable standards of scholarly presentation and is fully adequate in scope and quality as a dissertation in partial fulfillment for the award of Degree of Bachelors of Law of Kampala International University.

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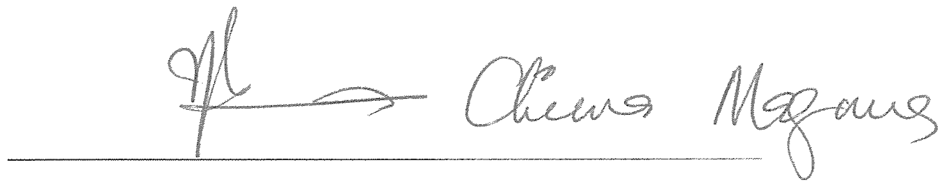

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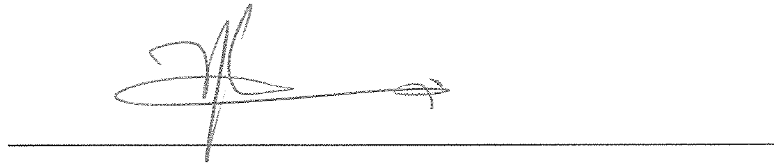

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ABSTRACT

This study was mainly concerned with various aspects of extradition including its history, development, nature and the shortcomings of the law and practice of extradition. The study covered the law and practice of extradition in Kenya.

The objective of this study was to bring out the challenges faced by the law of extradition, specifically why States prefer other methods such as rendition as opposed to extradition and what reforms can be made in the law and practice of extradition. Several books and articles by different writers were utilized in writing this dissertation.

The findings of the study show that the challenges exhibited in the practice of extradition have forced most states to apply other methods of rendition in attaining justice.

LIST OF CASES

Alvarez – Machain (1992)13HUM RTS L.J. 3 QS

Ker v.Illinois 119 U.S. 436

Ktir case, (1961) 34 I.L.R. 143

Republic v.Wilfred Onyango Nganyi & another [2008] KLR (www.kenyalaw.org) High Court of Kenya at Nairobi.

Sneed v. State of Tennessee 872 S.W. 2d p. 933

Soering v. United Kingdom (1989)11 Eur. Ct.H.R161-217

United States ex rel. Karadzole v.Artukovic, 170 F. Supp. 383, (S.D. Cal. 1959)

U.S. v. Yunis (1988) F. SUPP 681; CD.C.C. 896

U.S. v. Orsini, (1976) F. Supp. 424. ; F.D.N.Y. 229

U.S. v. Toscanino (1974), F. 2d 500; 2d Cir. 267

LIST OF STATUTES

Regional Instruments

Extradition (Commonwealth Countries) Act Chapter 77 of the Laws of Kenya.

Extradition (Contiguous and Foreign Countries) Act Chapter 76 of the Laws of Kenya

Fugitive Offenders Pursuit Act (Cap. 87)

International Instruments

Argentine Extradition Treaty, (2000)

Extradition Act 1962, India

Extradition Treaty with the United Kingdom, (2007)

Hungarian Extradition Treaty, (1997)

Jay's Treaty of 1794

Model Law in Extradition (2004)

Montevideo Convention, 1933

U.S.-EU Extradition treaty of 2010.

United Nations (UN) Torture Convention

1974 treaty between the United States and Denmark

The1852 treaty with Prussia

General Assembly and the UN Commission on Human Rights1970, 1990

The preambles to the 1999 Terrorist Financing Convention and the Draft UN Comprehensive Convention

U.S.-Canadian extradition treaty (1976)

UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Parlemo Convention)

LIST OF ACRONYMS

CIA – Central Intelligence Agency

CIB - Criminal Investigation Branch

DEA - Drug Enforcement Administration

EU - European Union

ETA – (Euskadi Ta Askatasuna), Basque for Basque Homeland and Liberty

FBI – Federal Bureau of Investigation

FLN – Front de Liberation Nationale

ICJ - International Court of Justice

IRA – Irish Republican Army

OAS - Inter American Judicial Committee of the Organization of American States

UK – United Kingdom

UMNO - United Malays National Organization

UN – United Nations

U.S. – United States

CHAPTER ONE

1.0. Introduction: Food for Thought in the Practice of Extradition.

The Law of extradition is a branch of international criminal law and is considered the principal mechanism of dealing with transnational fugitive offenders.[1] Extradition is defined as the surrender of any person who is sought by the requesting state for criminal prosecution for an extraditable offence or for the imposition or enforcement of a sentence in respect of such an offence.[2]

The law of extradition in contemporary society is mainly governed by bilateral or multilateral treaties known as extradition treaties made between states and which codify the principles of extradition. However, states do sometimes extradite without a treaty or without keeping to the exact stipulations of a treaty.

The law of extradition is important in the exercise of the criminal jurisdiction of a state which is one of the tests of the sovereignty of a state. Therefore it is a crucial component of international law.

1.1. Background of the Problem

Extradition is a concept that has existed for thousands of years. Provisions for extradition can be traced through various civilizations and different times ranging from ancient

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[1] Geoff Gilbert, Transnational Fugitive Offenders in International Law (M. Nijhoff Publishers, 1998) (hereinafter Gilbert -Transnational Offenders)

[2] Id at 12.Section 1 Model Law on Extradition (2004), United Nations Office on Drugs and Crime [Hereinafter MLE (2004)].; see also Gilbert-Transnational Offenders at 12

Egypt, to ancient Israel, to Hindu civilization, to Rome, to medieval Europe and today. The basic characteristic of extradition is physically removing a person from a host country to a requesting country; however the philosophies surrounding that transfer have changed significantly. For instance, up to about the nineteenth century, extradition treaties and practice were mainly aimed at securing the transfer of political offenders to the home country; in contrast today, one of the principles of extradition is that political offences are not extraditable. The other principles of extradition also developed over time and will be outlined later. [3]

The jurisprudence of extradition is perplexing and quite fragmented; at least if case law is anything to go by.

Therefore, in spite of the concept and law of extradition having developed over a long period of time, to date it is still a controversial topic and is weighed down with numerous conflicting positions. Further, as discussed in the fourth Chapter of this dissertation, extradition is not always the chosen method by States in rendition of transnational fugitives. [4]

Let us look at examples of some of the conflicts and problems briefly.

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[3] See Chapter 2 on restrictions or barriers on extradition

[4] Gilbert - Transnational Offenders at 13.Transnational fugitive offender can be defined as a person who is convicted of a crime in one state, and is now to be found in another State; or one whose crime has an effect in one State though he was not present in that State at the material time or one who commits a universal crime

1.1.1 Uncertainty in Case Law

A random look at any ten cases on extradition from different or the same state will reveal flaws in the law of extradition. For instance, in the Ktir case,[5] a Swiss court granted the extradition of the appellant, a French national who was a member of the Algerian Liberation Movement (FLN) and who was responsible for the murder of another member of the FLN while in France. The court held that although his act had a predominantly political character due to its motive and factual background, the damage was not proportional to the aim sought. It had to be shown that the murder was the sole means of attaining the political aim.

Compare this with the Artukovic case.[6]Artukovic was sought by the Yugoslav government for the murder of over 1,200persons killed on his orders when he was the Minister of the Interior for Yugoslavia during World War II. He was charged with war crimes including mass murder during World War II. The district court denied extradition of this war criminal because the crimes were political being, committed during a struggle for political power between Serbs and Croats.

Arguably there is a contradiction somewhere between the Ktir case and the Artukovic case as the courts had different perceptions of what a political offence is. The above two cases illustrate one of the problematic areas in extradition that is the inconsistencies in classifying offences as extraditable or otherwise, secondly from the below case we note how a person is extradited is a problematic and contradictory issue in

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[5] 34 I.L.R. 143 (1961)

[6] United States ex rel. Karadzole v.Artukovic, 170 F. Supp. 383, (S.D. Cal. 1959)

Ker v.Illinois,[7] the facts were that Ker was a U.S. citizen who had fled to Peru and was wanted for larceny charges in the U.S. The messenger sent to retrieve him did not present the extradition papers to the Peruvian authorities but instead abducted Ker. The Supreme Court of the United States held that it may exercise jurisdiction over a defendant who appears in that forum regardless of the circumstances under which he was brought. It further found that abduction was a viable alternative to extradition. However in Sneed v. State of Tennessee,[8] the court characterized State sponsored abductions as conduct so outrageous as to shock the conscience of the court and hence held that it had no jurisdiction over the case.

1.1.2 Jurisprudential Flaws

Besides the inconsistencies in decisions, there are also inconsistencies in classifying the offences themselves according to the principles of extradition. One of the most perplexing areas is in defining a political offence and determining whether it is a non-extraditable offence or not.[9] Very many fragmented tests have come up and these will be examined in Chapter 3.

Another controversy is should someone get away with crime on the grounds that it is political? What is the rationale behind this? Why is terrorism classified as anon-political offence while it is politically motivated? How does this fit in with the concepts of criminal justice? Also, should a state be denied jurisdiction over offences committed

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[7] 119 U.S. 436

[8] 872 S.W. 2d p. 933

[9] See Chapter 2.

within its territory? How does this relate to the legal doctrine of sovereignty? These are questions that have given rise to serious controversies in extradition law and practice. This dissertation will show that the above issues have caused States to sometimes choose alternative methods to extradition to secure a transnational fugitive.[10]

1.1.3 Variations in the Law

The major basis of extradition is treaty law [11](others being comity and informal agreements). Different extradition treaties have juxtaposed provisions for the same issue. An easy example is that provided in Section 11 of the Model Law on Extradition which, on the question whether to extradite nationals or not to, provides that:

Option1

[Extradition [shall not be granted] [may be refused] on the ground that the person sought is a national of [country adopting the law]].

Option2

[Extradition shall not be refused on the ground that the person sought is a national of a country adopting the law]. This provision is based on the conflicting position of States in extraditing nationals. Such obvious variations in the law are a cause for concern and are a barrier to harmony in the international legal regime.

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[10] See Chapter 4.

[11] Section 2 Model Law in Extradition (2004)

1.1.4 Conflict in State Practice

Sometimes state may extradite inconsistently with an extradition agreement between them e.g. by kidnapping wanted persons as in the cases of Ker v. Illinois and Sneed v.State of Tennessee mentioned above.

Why do such things happen? Is it because of inadequacies in extradition agreements? Why did Turkey, Greece and Kenya have to engage in lure and trickery to obtain the removal of Abdullah Ochanan from Kenya to Turkey about a decade ago?[12] Couldn't these sovereign nations find a legal means to bring an alleged criminal to trial? Such are the intricacies we will seek to examine and propose solutions for in this dissertation.

1.2. Statement of the Problem

Having looked at the background of our areas of concern in extradition law, we can briefly describe our problem to involve examining the role of extradition in international and municipal criminal law and to investigate whether it unduly interferes with established doctrines of international and municipal jurisprudence and whether this is the cause of the conflicts in the law of extradition, with a view to recommending pragmatic solutions.

We will also analyze the special challenge posed by terrorism to the established doctrines of the law of extradition with a view to understanding whether those doctrines are suitable to deal with terrorism or whether they should be reconsidered.

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[12] See Chapter 4 ;or an exposition on alternative methods to extradition

1.3. Justification of the study

This study is vital for a number of reasons;

1. Globalization is a present-day reality e.g. aviation law is devoted to achieving a global village. Such a goal can only be achieved by having increasingly integrated systems of societal co-existence including a cohesive legal regime. Therefore an exposition of the international extradition regime, which is part of the discussion of this study, is of importance in creating this understanding so as to create uniformity in future practice of extradition.

2. Kenya being part of the global village is automatically affected by the preceding argument. Kenya has had and increasingly continues to have encounters with matters of extradition e.g. in the aforementioned case of Abdullah Ocalan.

3. The growth of international crime and especially terrorism has caused many countries to further develop their extradition laws to deal with the issues. This is a particular concern for Kenya especially since the August 7th 1998 U.S.embassy bombings in Nairobi. Lack of a contemporary position or law on extradition has led to much complaint with the government being accused of being a puppet of western powers when it hands over Kenyan citizens to be tried or interrogated abroad. What law provides for these renditions and extraditions? There is a great need for Kenya to have a legitimate and modern regime on extradition. This dissertation will provide arguments and insights that can be of use in developing an extradition law for Kenya that

is both modern and futuristic and capable of dealing with the legal hurdles that confront the law of extradition.[13]

4. Handling of extradition matters does have a bearing on national politics and international relations. The handling of extradition requests can have significant ramifications nationally.

For example, the then President of Bolivia, Jamie Paz Zamora personally approved the deportation of the former interior minister under a different regime, Luis Arce Gomez , to the United States in 1989. This was in contradiction to the principle of non-extradition of nationals by Bolivia. This led to a series of events of national consequence culminating in impeachment proceedings against Zamora in Bolivia's Congress on the grounds that he had violated the constitution with his deportation order.

However he narrowly survived the impeachment proceedings.[14] International relations are also affected by extradition e.g. in the case of Alvarez - Machain, in which the U.S.government authorized the abduction of the defendant, a Mexican national, wanted for injecting an undercover Drug Enforcement Administration (DEA) agent with drugs to revive him so that his captors could further interrogate and torture him. The DEA had been engaged in formal negotiations for Machain's extradition under the U.S. – Mexican extradition treaty which negotiations failed. The Mexican government responded by threatening to terminate U.S. – Mexican law

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[13] See Chapter 3, an example of such hurdles is the classification of terrorism as a non-political offence.

[14] Ethan Avram Nadelmann, Cops Across Borders, (1993) [books.google.co.ke] (Nadelmann – Cops Across Borders) 452-453

enforcement programs and suspended all governmental cooperation with DEA agents. Mexico also demanded and got a re-negotiation of the extradition treaty between it and the U.S.

Inter American Judicial Committee of the Organization of American States (OAS) issued an opinion that characterized the abduction as a serious violation of international law and an impermissible transgression of Mexico's territorial sovereignty.[15] Canadian leaders also protested, questioning the status of the U.S. – Canadian extradition treaty.

Canada threatened criminal prosecution for persons participating in trans-border abductions from Canada.

In November 1992, participants at the Ibero - American Summit (includes 14 Latin-American countries plus Portugal and Spain) which took place in Madrid, formally requested the United Nations General Assembly to submit the issue to the International Court of Justice (ICJ) for an advisory opinion.

Surely, with repercussions of such magnitude, it is important that extradition matters be handled prudently and be based on reasonable and legitimate jurisprudence.

5. It is therefore clear that the law of extradition is no longer a latent or futuristic

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[15] Legal opinion of the Inter AmericanJudicial Committee on the decision of the USSC in the AM Case, reprinted in 13HUM RTS L.J. 3 QS (1992)

component of the Kenyan legal system but a waking spanner in the works that must be engaged as early as possible.

1.4. Objectives Of The Study

In this dissertation, we shall be looking at some of the challenges faced by the law of extradition, specifically why States sometimes prefer other methods of rendition as opposed to extradition, and what reforms can be made to the law and practice of extradition to make it a more suitable regime for States in the transfer of transnational fugitive offenders.

In this study it is going to be a major concern to try and find the golden thread of logic running through all those apparently conflicting positions and theories in extradition law and practice. Is it the thread of politics, philosophy or perhaps jurisprudence? Many of the explanations for the positions on extradition may be found in non-legal fields like politics.

Further in this study we shall seek to understand the interplay between extradition and other theories in law especially sovereignty and criminal justice and investigate whether this is the reason why extradition is not the most popular means of rendition.[16] In this way, sound legal arguments can then be made for or against the law and practice of extradition.

In light of the foregoing, this study is dedicated to:

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[16] See Chapter 4.

1. Examining the history and philosophies on which extradition is based in order to understand their relationship with long established doctrines and principles of international and municipal law e.g. sovereignty and State jurisdiction.
2. Understanding the nature and role of extradition in international mutual assistance in criminal matters and international criminal law.
3. Questioning the concepts behind non-extraditable offences and especially political offences to understand whether they are unnecessary burdens to the practice of extradition.
4. Making recommendations from the foregoing on how extradition can be made more useful for the international criminal justice system especially by removing unnecessary barriers to extradition and proposing more solid grounds on which courts should base their decisions in extradition matters.
5. Providing information that can be a resource to Kenya in developing a position or a law of extradition.

1.5. Research Questions and Hypotheses

In order to meet the objectives of the study, the following research questions will be answered and hypotheses tested.

1.5.1Research questions:

1.What is the function of the law of extradition?

2. What are the challenges to extradition in international and municipal criminal law and how can they be over come?

3. How has the proliferation of terrorism affected the jurisprudence and practice of states in extradition?

1.5.2Hypotheses:

1.Some aspects of the law of extradition interfere with the criminal jurisdiction of States hence leading to States opting for alternative methods of rendition.

2. The law of extradition contravenes fundamental norms of municipal and international law e.g. sovereignty by denying states the right to prosecute persons who have committed crimes within the jurisdiction of such states.

1.6. Methodology

The methodology of study will include:

1. A study of primary documents especially extradition agreements and case law.
2. Studying written works on extradition sourced from libraries and the internet to help develop an understanding of the jurisprudence and practice of extradition.
3. Discussions with learned persons and fellow students for their opinions on the law and practice of extradition.

1.7. Organization of the Study

This study is comprised of five Chapters that cover a discussion on various aspects of extradition including its history, development, nature and practice in addition to this there is also a study of the shortcomings of the law and practice of extradition and recommendations on how these shortcomings can be addressed. The breakdown of the Chapters is as follows.

Title: The Law of Extradition: A Critical Analysis of the Jurisprudence And Practice of Extradition.

Chapter1: Introduction: Food for Thought in the Practice of Extradition. This comprises the proposal outlining the topic, objectives and methodology of the study.

Chapter2: The Anatomy and Barriers to Extradition:

This will involve a study into the historical development of extradition and the philosophical postulates that have affected its character. The aim of this is to gain an understanding of the jurisprudentially fragmented field of extradition which is impossible to logically comprehend without having a general scope of its sources in addition to this there will be a study of the when and why an extradition request will be denied. It will involve an analysis of the principles of extradition and a critique on the irrelevance and inconsistency of some of the principles.

Chapter3: Recent Changes in the Law of Extradition: Terrorism and the Political Offence

This chapter will analyze whether extradition law as it is can effectively aid in the transfer of terrorism suspects to countries where they should be tried and the developments that terrorism has necessitated in the law of extradition. This Chapter will be a study on the controversial classification of terrorism as a non-political offence. There will also be an analysis on the changing positions in the jurisprudence of extradition that have been occasioned by terrorism. Chapter4: Alternatives to Extradition: Why do States Opt Out? States sometimes use alternative methods of rendition to secure transnational fugitive offenders. This Chapter will analyze the failure of extradition to be the preferred method of

rendition by States, and some reasons why it is so. It will focus on examining the failures of extradition in aiding international criminal justice and the cause of these failures. We will also investigate whether the theory of sovereignty and criminal justice have influenced its failures.

Chapter5: Recommendations and Conclusion: The Need for Reform in the Law and Practice of Extradition. This will make recommendations on how the flaws in the law and practice of extradition can be reduced or eliminated by there-conceptualization of extradition.

1.8. Literature Review

Several books and articles have been utilized in the writing of this discussion. Works by Geoff Gilbert, transnational fugitive offenders in international law were very insightful in providing an introduction to extradition.

Works by other writers have also been studied to gain a thorough understanding of the whole concept and practice of extradition in order to have a rich discussion and make informed recommendations.[17]

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[17] See bibliography.

CHAPTER TWO

THE ANATOMY AND BARRIERS TO EXTRADITION

2.0. Introduction: An overview of the historical development of extradition

"Extradition" is the formal surrender of a person by a State to another State for prosecution or punishment. Although extradition as we know it is of relatively recent origins, its roots can be traced to antiquity. Scholars have identified procedures akin to extradition scattered throughout history dating as far back as the time of Moses.[18] The history of extradition can be divided into four periods:

(1) Ancient times to the seventeenth century—a period revealing an almost exclusive concern for political and religious offenders;

(2) The eighteenth century and half of the nineteenth century—a period of treaty-making chiefly concerning military offenders characterizing the condition of Europe during that period;

(3) 1833 to 1948—a period of collective concern for suppressing common criminality; and

(4) Post 1948 developments which ushered in a greater concern for protecting human rights of persons and revealed an awareness of the need to have international due process of law regulate international relations.

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"

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[18] Extradition To and From the United States: Overview of the Law and Recent Treaties by Michael John Garcia, Legislative Attorney & Charles Doyle ,Senior Specialist in American Public Law,p.1

and the absence of intricate extradition procedures has been attributed to the predominance of this simple principle of international law.[19]

Whether by practice's failure to follow principle or by the natural evolution of the principle, modern extradition treaties and practices began to emerge by the middle 18th and early 19th centuries. For instance, the first U.S. extradition treaty consisted of a single terse article in Jay's Treaty of 1794 with Great Britain, but it contained several of the basic features of contemporary extradition pacts. Article XXVII of the Treaty provided in its entirety: It is further agreed, that his Majesty and the United States, on mutual requisitions, by them respectively, or by their respective ministers or officers authorized to make the same, will deliver up to justice all persons, who, being charged with murder or forgery, committed within the jurisdiction of the other, provided that this shall only be done on such evidence of criminality, as, according to the laws of the place. where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed. The expense of such apprehension and delivery shall be borne and defrayed, by those who make the requisition and receive the fugitive.[20]

The United States has relied almost exclusively upon bilateral agreements as a basis for extradition. However, the United States has entered into several multilateral agreements that may also provide legal authority for extradition. Such agreements take two forms. One form is a multilateral agreement that exclusively concerns extradition.

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[19] Extradition To and From the United States: Overview of the Law and Recent Treaties,p.2

[20] Ibid p.2

The United States is currently a party to two such agreements: the 1933 Montevideo Convention on Extradition, which apparently has never served as a basis for extradition, and the Extradition Agreement between the United States and the European Union, which entered into force in February 2010.

The provisions of the U.S.-EU (United States-European Union) extradition treaty are implemented via bilateral instruments concluded between the United States and each EU Member State. These instruments amend or replace any provisions, contained in earlier treaties between the United States and individual EU Member States which conflict with the requirements of the multilateral agreement.[21]

The United States is also a party to several multilateral agreements that generally aim to deter and punish transnational criminal activity or serious human rights abuses, including by imposing an obligation upon signatories to prosecute or extradite persons who engage in specified conduct. Although these agreements are not themselves extradition treaties, they often contain provisions stating that specified acts shall be treated as extraditable offenses in any extradition treaty between parties.

2.1. Types of Extradition Treaty

There are two types of extradition treaties

i) List Treaty: - The most common and traditional is the list treaty, which contains a list of crimes for which a suspect will be extradited.

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[21] M.Cherif Bassiouni,International Extradition: United States and Practice(Bassiouni)1-7(5th ed 2007)

ii) Dual criminality Treaty: - used since the 1980s, generally allow for extradition of a criminal suspect if the punishment is more than one year imprisonment in both countries.

Under both types of treaties, if the conduct is not a crime in both countries then it will not be an extraditable offense.[22]

2.1.1. Purpose of Extradition Treaty

a) No criminal should go unpunished

b) Country does not have extra-territorial jurisdiction except in some serious offence.

c) It works as a warning for the criminals.

d) To remove crime from the society.

2.1.2. Essential conditions for extradition

The essential conditions for extradition are;

i) The relevant crime is sufficiently serious.

ii) There exists a prima facie case against the individual sought.

iii) The event in question qualifies as a crime in both countries.

iv) The extradited person can reasonably expect a fair trial in the recipient country.

v) The likely penalty will be proportionate to the crime.

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[22] International Law and Human Rights by Dr. S. K. Kapoor- www.manupatra.com

2.2: The restrictions or barriers imposed on extradition.

Extradition is a cumbersome process and involves a lot of technicality and politics in it. Extradition of the accused may be restricted due to the following reasons.[23] Common bars to extradition include:

i) The accused person is a military or a Political criminal

ii) Dual criminality i.e. the act should be a crime in both the countries

iii) Extradition in case, where the country which is being requested for extradition of the accused apprehends human rights violation, avoids surrendering its own nationals. For example Soering v. United Kingdom,[24] in this case UK did not allow the extradition because of inhuman condition, in this instance torture, which is prevalent in the requesting state.

iv) Rule of Speciality – an accuse is extradited for particular crime, and the country which gets back the criminal is entitled to prosecute that person only for the crime for which he was extradited

v) Extradition of own nationals- Some countries, such as France, Russian Federation, Germany, China and Japan, have laws that forbid extraditing their respective citizens. According to Extradition Act 1962, India allows the extradition of its own national in certain cases. This is also referred to as Jurisdiction over a crime and this is a

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[23] Global Democracy and its Difficulties -International Legal Theory: Essays and Engagements 1966-2007 By Nicholas Onuf's http://en.wikipedia.org/

[24] (1989)11 Eur. Ct.H.R161-217

ground that can be invoked to refuse extradition. In particular, the fact that the person in question is a nation's own citizen causes that country to have jurisdiction.

vi) Lapse of Time

vii) No treaty- As between nations, extradition is regulated by treaties. Absence of one may warrant a nation's refusal to extradite.

viii) No Treaty Crime- the crime for which extradition is sought should be embodied within the treaty.

ix) Double Jeopardy.

We now look at them in a broader sense.

1) Military and Political Offenses

In addition to an explicit list of crimes for which extradition may be granted, most modern extradition treaties also identify various classes of offenses for which extradition may or must be denied. Common among these are provisions excluding purely military and political offenses.[25] The military crimes exception usually refers to those offenses like desertion which have no equivalents in civilian criminal law. The exception is of relatively recent vintage. In the case of treaties that list specific extraditable offenses, the exception is unnecessary since purely military offenses are not listed. The exception became advisable, however, with the advent of treaties that make extraditable any misconduct punishable under the laws of both treaty partners. With the possible exception of selective service cases arising during the Vietnam War period, recourse to the military offense exception appears to have been infrequent and untroubled.

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[25] Extradition To and From the United States: Overview of the Law and Recent Treaties,(ibid) p.7

The political offense exception, however, has proven more troublesome. The exception is and has been a common feature of extradition treaties for almost a century and a half. In its traditional form, the exception is expressed in deceptively simple terms. Yet it has been construed in a variety ways, more easily described in hindsight than to predicate beforehand. [26]

As general rule American courts require that a fugitive seeking to avoid extradition "demonstrates that the alleged crimes were committed in the course of and incidental to a violent political disturbance such as a war, revolution or rebellion. Formerly, the political offense exception prevented a number of extraditions of suspected terrorists, for example members of the Irish republican Army (IRA). However, this barrier diminishes as treaties are renegotiated to eliminate the exception or to depoliticize certain terrorist acts that endanger civilians or inflict harm out of proportion to the political objectives of the alleged terrorists.

2) Dual criminality

Also known as the rule of double criminality is one such important limit. Dual criminality exists when parties to an extradition treaty each recognize a particular form of misconduct as a punishable offense. Historically, extradition treaties have handled dual criminality in one of three ways: (1) they list extraditable offenses and do not otherwise speak to the issue; (2) they list extraditable offenses and contain a separate provisions requiring dual criminality; or (3) they identify as extraditable offenses those offenses

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[26] See generally BASSIOUNI,

condemned by the laws of both nations. Today, under most international agreements ... [a] person sought for prosecution or for enforcement of a sentence will not be extradited ... (c) if the offense with which he is charged or of which he has been convicted is not punishable as a serious crime in both the requesting and requested state...."[27]

Although there is a split of authority over whether dual criminality resides in all extradition treaties that do not deny its application, the point is largely academic since it is a common favors the view that treaties should be construed to honor an extradition request if possible. Thus, dual criminality does not "require that the name by which the crime is described in the two countries shall be same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions." [28]When a foreign country seeks to extradite a fugitive from the United States dual criminality may be satisfied by reference to either federal or state law. Especially with respect to complex and recently defined crimes, such as those concerning inchoate offenses, extraterritorial crimes, and the financing of terrorist activities, perfect congruence between the criminal laws of the requesting state and the requested state maybe lacking. Generally the act, for which extradition is sought, must constitute a crime punishable by some minimum penalty in both the requesting and the requested parties.[29]

3) Capital Offenses and Torture

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[27] Extradition To and From the United States: Overview of the Law and Recent Treaties,(ibid) p.9

[28] Ibid,p.10

[29] International Law and Human Rights by Dr. S. K. Kapoor-www.manupatra.com

A number of nations have abolished or abandoned capital punishment as a sentencing alternative.[30] Several of these have preserved the right to deny extradition in capital cases either absolutely or in absence of assurances that the fugitive will not be executed if surrendered. More than a few countries are reluctant to extradite in a capital case even though their extradition treaty with the United State has no such provision, based on opposition to capital punishment or to the methods and procedures associated with execution bolstered by sundry multinational agreements to which the United the capital punishment is seen as a violation of one's human rights. [31]

States is either not a signatory or has signed with pertinent reservations. Additionally, "though almost all extradition treaties are silent on this ground, some states may demand assurances that the fugitive will not be sentenced to life in prison, or even that the sentence imposed will not exceed a specified term of years. Many countries, such as Mexico, Canada, and most European nations, will not allow extradition if the death penalty may be imposed on the suspect unless they are assured that the death sentence will not subsequently be passed or carried out. For example, India accepted to sign the Extradition Treaty between India and Portugal after talks between Prime Minister Manmohan Singh and visiting Portuguese President Anibal Cavaco Silva in January 2007.The treaty with Portugal comes after India accepted its two main conditions that the extradited person would not face either a death sentence or life imprisonment beyond 25

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[30] WILLIAM A. SCHABAS, THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT, 239-45 (1997);

[31] Extradition To and From the United States: Overview of the Law and Recent Treaties,(ibid) p.9

years.[32] Also, the United Nations (UN) Torture Convention specifies that no signatory state shall expel, return, or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. The Convention is so strict in its prohibition of torture that it allows no exceptions under which any such transfer may be justified.

4) Rule of Specialty

The rule of specialty also limits the charges upon which an extradited suspect may be tried, preventing the requesting state from prosecuting crimes not included in the warrant of extradition, even if evidence of those crimes is available.[33] Under the doctrine of specialty, sometimes called speciality, "a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings." The limitation, expressly included in many treaties, is designed to preclude prosecution for different substantive offenses but does not bar prosecution for different or additional counts of the same offense. And some courts have held that an offense whose prosecution would be barred by the doctrine may nevertheless be considered for purposes of the federal

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[32] UN list of extradition information by country (1996) - http://www.uncjin.org/Laws/extradit/extindx.htm

[33] Extradition To and From the United States: Overview of the Law and Recent Treaties,(ibid) p.29

sentencing guidelines, or for purposes of criminal forfeiture. At least where an applicable treaty addresses the question, the rule is no bar to prosecution for crimes committed after the individual is extradited.[34]

The doctrine may be of limited advantage to a given defendant because the circuits are divided over whether a defendant has standing to claim its benefits. Additionally, one circuit has held that a fugitive lacks standing to allege a rule of specialty violation when extradited pursuant to an agreement other than treaty. Regardless of their view of fugitive standing, reviewing courts have agreed that the surrendering State may subsequently consent to trial for crimes other than those for which extradition was had.[35]

5) Nationality

The right of a country to refuse to extradite one's own nationals is probably the greatest single obstacle to extradition.[36] Some countries, such as France, Germany, Austria, China, and Japan, have laws that forbid extraditing their respective citizens. Some others stipulate such prohibition on extradition agreements rather than their laws. Such restrictions are occasionally controversial in other countries when, for example, a French citizen commits a crime abroad and then returns to his home country, perceived as to avoid prosecution. These countries, however, make their criminal laws applicable to citizens abroad, and they try citizens suspected of crimes committed abroad under their

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[34] Extradition To and From the United States: Overview of the Law and Recent Treaties,(ibid) p.29

[35] Ibid,p.31

[36] Ibid, p.13

own laws. Such suspects are typically prosecuted as if the crime had occurred within the country's borders.

It is important to note .however that there have been objections against this nationality issue as a basis for barring extradition. For instance, The United States has long objected to the impediment and recent treaties indicate that its hold may not be as formidable as was once the case. U.S. extradition agreements generally contain three types of nationality provisions:

The first does not refer to nationals specifically, but agrees to the extradition of all persons. Judicial constructions, as well as executive interpretation, of such clauses have consistently held that the word "persons" includes nationals, and therefore refusal to surrender a fugitive because he is a national cannot be justified. The second and most common type of treaty provision provides that "neither of the contracting parties shall be bound to deliver up its own citizens or subjects...." [Congress has enacted legislation to overcome judicial construction that precluded the United States from surrendering an American under such provisions. The third type of treaty provision states that "neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have the power to deliver them up if, in its discretion, it be deemed proper do so.

These three types of treaty provisions have been joined by a number of variants. A growing number go so far as to declare that "extradition shall not be refused based on the nationality of the person sought." Another form limits the nationality exemption to nonviolent crimes. A third bars nationality from serving as the basis to deny extradition when the fugitive is sought in connection with a listed offense. Another variant allows a

conflicting obligation under a multinational agreement to wash the exemption away. Even where the exemption is preserved, contemporary treaties more regularly refer to the obligation to consider prosecution at home of those nationals whose extradition has been refused.[37]

6) Lapse of Time

Lapse of time or statute of limitation clauses is also prevalent in extradition treaties. Many [states] ... preclude extradition if prosecution for the offense charged, or enforcement of the penalty, has become barred by lapse of time under the applicable law. Under some treaties the applicable law is that of the requested state, in others that of the requesting state; under some treaties extradition is precluded if either state's statute of limitations has run.[38] When a treaty provides for a time-bar only under the law of the requesting state or only under the law of the requested state, United States courts have generally held that time- bar of the state not mentioned does not bar extradition. If the treaty contains no reference to the effect of a lapse of time neither state's statute of limitations will be applied.

Left unsaid is the fact that some treaties declare in no uncertain terms that the passage of time is no bar to extradition. In cases governed by U.S. law and in instances of U.S. prosecution following extradition, applicable statutes of limitation and due process

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[37] Extradition Treaty with the United Kingdom, art. 3, entered into force Apr. 26, 2007, S. TREATY DOC. 108-23

[38] Argentine Extradition Treaty, art. 7, entered into force June 15, 2000, S. TREATY DOC. 105-18, TIAS 12866

determine whether pre-indictment delays bar prosecution and speedy trial provisions govern whether post-indictment delays preclude prosecution.[39]

7) No treaty

This impediment has been controversial as it has also been subject to objection.[40] For some countries extradition is not recognized where there is no treaty to that effect. For instance, Ottavio Quattrochi Case.[41] Quattrochi, a man of Italian origin, was accused of Bofors commission Bribery case. Presently he is living in Malaysia. India made a formal request to Malaysia to extradite Quattrochi so that he could be tried in India. The lower Court of Malaysia rejected the request for extradition and set Quattrochi free. He had been on bail since his arrest in September 2002. India filed an appeal against this order in the High Court there. India sent an advocate to argue the case and sought the permission of Attorney General there for the appearance of the advocate on behalf of India. But the High Court did not allow the advocate to appear.

Problem of extradition of Quattrochi became difficult because India have no extradition treaty with Malaysia. However a two member Criminal Investigation Branch (CIB) team was sent to Malaysia to assess the Malaysian lawyer but they too sent back home in 2004, this is because in 2004 United Malays National Organiztion (UMNO) came into power and Sonia Gandhi being an Italian had good terms with Quattrochi. Thus when a government goes to such an extent there is no possibility of such case to come to its logical conclusion. However it must be noted that there is no recognized

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[39] Extradition To and From the United States: Overview of the Law and Recent Treaties,p.16

[40] Ibid,p.3

[41] International Law and Human Rights by Dr. S. K. Kapoor-www.manupatra.com

practice that there can be no extradition except under a treaty, for some countries grant extradition without a treaty. For example, Abu Salem, the prime accused in the Mumbai bomb blast case 1993, was extradited to India from Portugal in Dec 2005 in absence of any Extradition Treaty between India and Portugal. However, finally the treaty was signed after talks between Prime Minister Manmohan Singh and visiting Portuguese President Anibal Cavaco Silva in January 2007. No country in the world has an extradition treaty with all other countries; for example, the United States lacks extradition treaties with over fifty nations, including the People's Republic of China, Namibia and North Korea.

Another example is the United States, where the United States attempted to surrender a resident alien to the International Tribunal for Rwanda.[42] Initially, a federal magistrate judge for the Southern District of Texas ruled that constitutional separation of powers requirements precluded extradition in the absence of a treaty. The government subsequently filed another request for surrender with the district court, and the presiding judge certified the request, holding that an extradition could be effectuated pursuant to either a treaty or an authorizing statute. In a 2-1 panel decision, the Fifth Circuit Court of Appeals upheld this ruling, concluding that "although some authorization by law is necessary for the Executive to extradite, neither the Constitution's text nor ... [relevant jurisprudence] require that the authorization come in the form of a treaty." The Supreme Court subsequently declined a petition for writ of certiorari to review the appellate court's ruling.

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[42] Extradition To and From the United States: Overview of the Law and Recent Treaties,p.4

8) No Treaty Crime

Extradition is generally limited to crimes identified in the treaty. It is generally regarded as an abuse of the principal of extradition for a state to secure the surrender of a criminal for an extraditable offense and then to punish this person for an offense not included in the treaty. If surrender is demanded for an offense not on the list, it is as if the treaty did not exist.

Early treaties often recite a list of the specific extraditable crimes. For example Jay's Treaty mentions only murder and forgery; the inventory in the1852 treaty with Prussia included eight other; and 1974 treaty between the United States and Denmark identified several dozen extradition offenses.[43] While many existing U.S. extradition treaties continue to list specific extraditable offenses, the more recent ones feature a dual criminality approach, and simply make all felonies extraditable (subject to other limitations found elsewhere in their various provisions).the extradition treaty signed between Rwanda and Kenya covers sixty five(65) crimes, which include crimes against humanity, war crimes, treason, cyber crimes, bribery and corruption, as well as genocide and related offences including denial and revisionism of genocide. The provision of an exclusive list of offenses in a treaty authorizes extradition on those offenses only.

8) Double Jeopardy

Depending on the treaty, extradition may also be denied on the basis of a number of procedural considerations.[44] For instance, although the U.S. Constitution's prohibition

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[43] Extradition To and From the United States: Overview of the Law and Recent Treaties,p.6

[44] Ibid,p.14

against successive prosecutions for the same offense does not extend to prosecutions by different sovereigns, it is common for extradition treaties to contain clauses proscribing extradition when the transferee would face double punishment and/or double jeopardy (also known as non bis in idem). The more historic clauses are likely to bar extradition for a second prosecution of the "same acts" or the "same event" rather than the more narrowly drawn "same offenses." The new model limits the exemption to fugitives who have been convicted or acquitted of the same offense and specifically denies the exemption where an initial prosecution has simply been abandoned.[45]

2.2.1. Critique

Though restrictions are normally clearly spelled out in the extradition treaties that a government has agreed upon, they are, however, controversial in a number of countries. For example, in the United States, where the death penalty is practiced in some U.S. states, it is seen by many as an attempt by foreign nations to interfere with the U.S. criminal justice system. In contrast, pressures by the U.S. government on these countries to change their laws, or even sometimes to ignore their laws, is perceived by many in those nations as an attempt by the United States to interfere in their sovereign right to manage justice within their own borders. Also Countries with a rule of law typically make extradition subject to review by that country's courts. These courts may impose certain restrictions on extradition, or prevent it altogether, if for instance they deem the

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[45] Extradition Treaty with the United Kingdom, art. 5 entered into force Apr. 26, 2007, S. TREATY DOC. 108-23 ("1. Extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested. 2. The Requested State may refuse extradition when the person sought has been convicted or acquitted in a third state in respect of the conduct for which extradition is requested).

accusations to be based on dubious evidence, or evidence obtained from torture, or if they believe that the defendant will not be granted a fair trial on arrival, or will be subject to cruel, inhumane, or degrading treatment if extradited.[46]

Some countries, such as France, Germany, Austria, China, and Japan, have laws that forbid extraditing their respective citizens. Some others stipulate such prohibition on extradition agreements rather than their laws. Such restrictions are occasionally controversial in other countries when, for example, a French citizen commits a crime abroad and then returns to his home country, perceived as to avoid prosecution. These countries, however, make their criminal laws applicable to citizens abroad, and they try citizens suspected of crimes committed abroad under their own laws. Such suspects are typically prosecuted as if the crime had occurred within the country's borders.

It is also important to note the inconsistencies within certain restrictions. For example, while, it has been established that there is no recognized practice that there can be no extradition except under a treaty, some countries refuse extradition of their citizens by reason of absence of treaty. Another inconsistence is observed in the nationality principle, whereby in contrast to the United States and the Great Britain, France, Germany, Austria, China, and Japan, most nations of the European continent will surrender a fugitive upon simple demand and will try their own nationals domestically for crimes committed abroad.

2.3. Extradition treaties between Kenya and other countries

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[46] International Law and Human Rights by Dr. S. K. Kapoor-www.manupatra.com

The consensus in international law is that a state does not have any obligation to surrender an alleged criminal to a foreign state, as one principle of sovereignty is that every state has legal authority over the people within its borders. Such absence of international obligation and desire of the right to demand such criminals of other countries has caused a web of extradition treaties or agreements to evolve; most countries in the world have signed bilateral extradition treaties with most other countries.

Kenya as a member of the Commonwealth of Nations is among many Countries with which the United States has a Bilateral Extradition Treaty.[47] The citations of the treaties are as follows; 47 Stat. 2122 (U.S.-U.K. treaty) which came into force on the 24th of June, 1935 and the 16 UST 1866 (Exchange of notes concerning continued application of U.S.-U.K. treaty), which came into force on the 19th of august, 1965. Kenya also signed an extradition treaty as between Kenya and Rwanda on the 30th day of September, 2009.[48] The treaty was signed by the Minister of Justice and Attorney General; Tharcisse Karugarama signed the treaty on behalf of Rwanda, while Amos Wako, the Kenyan Attorney General, gave Kenya's approval. The key objective of the treaty was aimed at putting in place measures to fight crime and strengthen the diplomatic relations between the two nations. In Karugarama's words, "This treaty is a promotion of justice in general. It is a step towards fighting criminality and achieving peace. Persons responsible for crimes in both countries shall be accountable," .It is the first treaty of the kind in the region. The pact, which covers sixty five (65) crimes, is expected to curb crime rates in

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[47] Extradition To and From the United States: Overview of the Law and Recent Treaties, Appendix A. Countries with Which the United States Has a Bilateral Extradition Treaty p.38

[48] Extradition treaty signed between Rwanda and Kenya -Posted by The Rwanda Focus

the region. Some of the crimes covered by the agreement are crimes against humanity, war crimes, treason, cyber crimes, bribery and corruption, as well as genocide and related offences including denial and revisionism of genocide. The treaty provides means of tracking down criminals in both countries and the procedures to effectively deal with them.

Other countries with which Kenya has extradition treaties are as follows;[49]

-Uganda 95/1966;

-Tanzania 95/1966;

-Fed. Rep. of Germany 184/1969

-U.S.A. 185/1969

-Italy 206/1969

-Greece 210/1969

-Polish People's Rep. 211/1969

-U.K. 219/1969

-Rep. of Liberia 220/1969

-Australia 126/1969

-Singapore 45/1970

-Rep. of Finland 51/1970

-Falkland Islands and Dependencies 260/1971

-St. Helena and Dependencies 260/1971

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[49] Extradition (Commonwealth) Act (Cap. 77) –Laws of Kenya(Countries with which Kenya has Extradition Treaties Country Legal Notice)

-Seychelles 260/1971

-Gibraltar 182/1971

-Gilbert and Ellis Islands 182/1971

-Hong Kong 182/1971

-New Hebrides 182/1971

-Pitcairn, Ducie and Oeno Islands 182/1971

-Lesotho 183/1971

-Malawi 136/1972

-The Bahama Islands 15/1973

-Bermuda 15/1973

-British Honduras 15/1973

-The British Indian Ocean Territory 15/1973

-The British Solomon Islands Protectorate 15/1973

-The British Virgin Islands 15/1973

-The Sovereign Base Areas of Akrotiri 15/1973
and Dhekelia

2.4 The legal framework that governs the practice of extradition in Kenya

Kenya has a number of statutes that govern extradition processes.[50] The first statute is the Extradition (Commonwealth Countries) Act Chapter 77 of the Laws of

[50] Kenya laws on extradition-MUTUAL LEGAL ASSISTANCE & EXTRADITION(a summary on the Extradition (Contiguous and Foreign Countries) Act Cap. 76 & Extradition (Commonwealth) Act Cap . 77(Kenya)

Kenya. It basically that provides that Kenya surrender to other Commonwealth countries on a reciprocal basis persons accused or convicted of offences in those countries and to regulate the treatment of persons accused or convicted of offences in Kenya who are returned to Kenya from such countries. Some of the commonwealth countries are Lesotho, Singapore, Malawi and Papua New Guinea. In addition, the Extradition (contiguous and Foreign Countries) Act Chapter 76 of the Laws of Kenya consolidates the law concerning the extradition of criminals and related matters, to the extradition of criminals and related matters where Kenya has an agreement with another country. Some of the countries that have mutual assistance agreements with Kenya include Uganda, Tanzania, Rwanda, United Kingdom, Canada, and Mauritius (Suppression of Bombings) Act (Cap. 103). The third legislation on extradition is the Fugitive Offenders Pursuit Act (Cap. 87). All contain provisions for arresting, detaining and deporting suspected criminals.

2.5 Instances in which extradition has been exercised in Kenya

There are a few known instances where Kenya has attempted to exercise extradition of its own nationals to other countries for various crimes. The first instance is seen in the case of Republic v Wilfred Onyango Nganyi & another[51], where the Attorney filed an appeal in the High Court seeking to set aside orders to have Wilfred Onyango and Patrick Ayisi Ingoi extradited to Tanzania for criminal trial. They were wanted by law enforcement agencies in Tanzania for allegedly stealing money in excess of Tshs. 5

[51] Republic v Wilfred Onyango Nganyi & another [2008] KLR (www.kenyalaw.org) High Court of Kenya At Nairobi.

billion from the National Bank of commerce at Moshi on 21st May 2004.this appeal was made against a magistrate's ruling anchored on the grounds that the alleged criminals were not guaranteed to receive a fair hearing in Tanzania and the supposition that subsidiary legislation governing the extradition had not been laid before the National Assembly after publication.

The court dismissed the assumption that the suspects would not receive a fair hearing in Tanzania because of doubt placed on the witnesses' statements. The court noted that trial and the dispensation of justice, in the first place, is the remit of the Courts, and not of witnesses. Such witnesses are themselves subject to Court procedures, and stand checked by the Court's exercise of the contempt jurisdiction, in a proper case; and at the very minimal level, the Court is bound to determine, during the hearing, which witnesses have told the truth, from those who may had lied.

The fact that the Tanzanian Courts, shared one appellate structure in the shape of the East African Court of Appeal, have always been guided by the principles of common law and equity which are the heritage of the common law countries, as well as by constitutional and legal principles associated with membership of the Commonwealth, the court had no doubts that the trial procedures adopted in the Tanzanian Courts would be the same mould as those applicable in the Kenyan Courts.

Accordingly the court ordered the each of the suspects to be extradited to United Republic of Tanzania, to be tried in a criminal court, in accordance with the laws of that country.

The second instance was when Kenya secretly sent four terrorism suspects to Uganda after the World Cup bomb blasts in violation of Kenyan law.[52] The Federal Bureau of Investigation (FBI) agents interrogated three of them in a manner that broke Ugandan law, human rights officials say. The four Kenyans — Hussein Hassan Agade, Idris Magondu, Mohamed Adan Abdow, and Mohamed Hamid Suleiman — were arrested from different locations in Kenya following the July 11 attack that killed 76 people as large crowds watched the World Cup final on television. The officials said that Kenya circumvented its own extradition laws to send the four suspects to Uganda, where they can be interrogated for a lengthy period without scrutiny. Further, there was no indication that Uganda made formal extradition requests of the individuals. Lawyer Mbugua Mureithi, who represents the families of suspects, said no attempts were made by the Kenyan government to follow extradition procedures.Mureithi said the FBI and Kenyan police interrogated three of the suspects in Uganda after they were charged in court on July 30, violating their rights of a fair trial under Uganda's constitution. Mureithi said he had visited the three last week who told him that they also have been interrogated by the FBI at least three times.

A U.S. Embassy spokesman said the U.S. was aiding the investigation. Americans were among the casualties, which is most likely why the FBI was involved. The individuals may face possible extradition to the U.S., but only if the U.S. government makes a formal extradition request.

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[52] Rendition and Extradition in Kenya Posted on March 10, 2011by Ole Mapelu Zakayo (an practicing advocate, commissioner of oaths and notary public

It was clear that Kenya had committed an act of illegal extradition which violates protection offered by Section 2 of the Extradition (Commonwealth Countries) Act.[53] It defines a fugitive as any person who is in Kenya and whose surrender is requested under the Act on the ground that he is accused of an offence or has been convicted of an extradition offence committed within the jurisdiction of the requesting State. The Kenyan Government had surrendered the alleged fugitives without any formal request by the Ugandan Government.

[53] Cap. 77(Kenya)

CHAPTER THREE

RECENT CHANGES IN THE LAW OF EXTRADITION: TERRRRORISM AND POLITICAL OFFENCE

3.1. Introduction: What is Terrorism?

Terrorism is generally defined as politically motivated violence by clandestine groups or individuals against civilians or noncombatant personnel. [54]It's notable though that there is no universally agreed definition of terrorism, however. Through bombings, assassinations, hijackings, hostage taking, and other violence, terrorists usually seek to intimidate nations into changing their policies or their leaders or surrendering parts of their territory. It wasn't until 2002 that the EU had a collective definition of the concept. Activities deemed as "terrorist" included those with the objective of "seriously intimidating a population" and "seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a society."

3.2. The rationale of criminalizing terrorism within the precincts of international law

In particular, the international community has expressed is disapproval of 'terrorism', as such, on a number of grounds since the early 1970s. First terrorism is a serious human rights violation. It infringes values protected by human rights law, without proclaiming those values directly. Numerous resolutions of General Assembly since the

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[54] Terrorism - Microsoft ® Encarta ® 2008. © 1993-2007 Microsoft Corporation.

1970s, and of the UN Commission on Human Rights since the 1990s, have asserted that terrorism threatens or destroys fundamental human rights and freedoms.[55]

Secondly, terrorism undermines democratic governance, or at a minimum undermines the State and peaceful political processes. In the 1990s, the General Assembly and the UN Commission on Human Rights frequently described terrorism as aimed at the destruction of democracy, or the destabilizing of 'legitimately constituted Governments' and 'pluralistic civil society'. Some resolutions state that terrorism 'poses a severe challenge to democracy, civil society and the rule of law'. A plausible basis for criminalizing terrorism is that it directly undermines democratic values and institutions, especially the human rights underlying democracy such as political participation and voting, freedom of speech, opinion, expression and association. Terrorists violate the ground rules of democracy, by coercing electors and candidates, wielding disproportionate and unfair power through violence, and subverting the rule of law.

Terrorist violence may also undermine legitimate authority; impose ideological and political platforms on society; impede civic participation; subvert democratic pluralism, institutions and constitutionalism; hinder democratization; undermine development; and encourage more violence.[56]

Thirdly, another compelling rationale for criminalizing terrorism is the threat it presents to international peace and security. Resolutions of the General Assembly since the 1970s, and of the Commission on Human Rights since the 1990s, have stated that

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[55] MC Bassiouni, 'A Policy Oriented Inquiry into the Different Forms and Manifestations of "International Terrorism"', in MC Bassiouni (ed), pg 5

[56] Ibid,p.6

international terrorism may threaten international peace and security, friendly relations among States, international cooperation, State security, or UN principles and purposes. The preambles to the 1999 Terrorist Financing Convention and the Draft UN Comprehensive Convention take a similar position, while various regional instruments also highlight the threat to international peace and security presented by terrorism.

Most explicitly, from the early 1990s, the Security Council increasingly acknowledged in general or specific terms that acts of international terrorism may, or do, constitute threats to international peace and security. After the terrorist attacks of 11 September 2001, the Council shifted to regarding 'any' act of international terrorism as a threat to peace and security— regardless of its severity or international effects—and abandoning its previously calibrated approach to examining the impact of specific acts. In addition, the Council now involves itself in domestic terrorism—such as the Madrid bombing (wrongly attributed to ETA) in Spain, and Chechen terrorism in Russia. To the extent that terrorist acts do threaten peace and security, criminalization is an appropriate means of suppressing it. Even where terrorism is directed against an authoritarian State, criminalization may be justified if it helps to avert more serious harm to international peace or security, such as the escalation of regional violence.[57]

Each of these grounds is considered in turn as a basis for supporting international criminalization of terrorism.

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[57] See generally C Van den Wyngaert, 'The Political Offence Exception to Extradition: How to Plug the Terrorist's Loophole' (1989) Israeli Yearbook on Human Rights 297; C Van den Wyngaert, The Political Offence Exception to Extradition (Kluwer, Boston, 1980)

3.4 The controversial classification of terrorism as a non-political offence

Contemporary extradition treaties, often seek to avoid misunderstandings in a number of ways.[58] They expressly exclude terrorist offenses or other violent crimes from the definition of political crimes for purposes of the treaty. Treaties between countries for the extradition of fugitives from justice have traditionally not applied to individuals charged with crimes of a political character.

This classification of terrorism as a non-political offence is controversial because terrorism is by nature political as it involves the acquisition and use of power for the purpose of forcing others to submit, or agree, to terrorist demands. Terrorists attempt not only to sow panic but also to undermine confidence in the government and political leadership of their target country. The definition 'Terrorism is generally politically motivated violence by clandestine groups or individuals against civilians or noncombatant personnel clearly illustrates its political nature.

In broad terms the causes that have commonly compelled people to engage in terrorism are grievances borne of political oppression, cultural domination, economic exploitation, ethnic discrimination, and religious persecution. Perceived inequities in the distribution of wealth and political power have led some terrorists to attempt to overthrow democratically elected governments. To achieve a fairer society, they would replace these governments with socialist or communist regimes. Left-wing terrorist groups of the 1960s and 1970s with such aims included Germany's Baader-Meinhof

[58] Hungarian Extradition Treaty, art. 4(2), entered into force Mar. 18,1997, S. TREATY DOC. 104-5 ("For purposes of this Treaty, the following offenses shall not be considered to be political offenses: placing or using an explosive, incendiary or destructive device capable of endangering life, of causing substantial bodily harm, or of causing substantial property damage; and f. a conspiracy or any type of association to commit offenses as specified in Article 2, paragraph 2, or attempt to commit, or participation in the commission of, any of the foregoing offenses")

Gang, Italy's Red Brigades, and the Weather Underground (see Weathermen, or Weather Underground a revolutionary group organized in the United States in 1969. Numbering only a few hundred young men and women, the Weathermen sought to overthrow the U.S. government. They preached and practiced a doctrine of armed struggle) in the United States.

Terrorists typically attempt to justify their use of violence by arguing that they have been excluded from, or frustrated by, the accepted processes of bringing about political change. They maintain that terrorism is the only option available to them, although their choice is a reluctant even a regrettable one.[59]

The so-called political crimes exception has attracted considerable attention because it enables individuals who are charged with politically motivated airplane hijackings or terrorist activities to escape extradition. On August in1976, for example, a Greek court refused, on the basis of the political crimes exception, to permit the extradition to the Federal Republic of Germany of a convicted West German terrorist. He had fled to Greece after being freed from a West German jail in exchange for the mayor of West Berlin, who had been kidnapped by the group to which the terrorist belonged.

The decision of the Greek court prompted strong support for a proposed Western European treaty designed to ensure the extradition of terrorists. The treaty was later drawn up by the Council of Europe, a regional organization of nineteen (19) Western European nations. If ratified by the member states, the treaty would require them to extradite individuals charged with airplane hijackings, kidnappings, and bombings

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[59] Terrorism - Microsoft ® Encarta ® 2008. © 1993-2007 Microsoft Corporation.

notwithstanding the political motivations of these acts. Similar provisions are being included in many new bilateral treaties. Among them is a U.S.-Canadian extradition treaty that entered into force on this particular year.

It is important to note that extradition treaties play a particularly important role in the cooperative efforts to combat terrorism. Yet their effectiveness has been hampered by the fact that the political offense exception, contained in all extradition treaties, protects from extradition political offenders of all types, nonviolent and violent alike, including terrorists. In response to this dilemma, the United States and the United Kingdom recently signed a Supplementary Treaty exempting a number of violent crimes from the protection of the political offense exception.[60]

This treaty has been severely criticized for effectively abolishing the political offense exception and, with it, the values it embodies, such as protecting the right to political self-determination. The dilemma created is that between the proven effectiveness of extradition treaties in the suppression of terrorism and the desire to protect the venerable principle of the political offense.

3.5 The effectiveness of the extradition laws in the suppression of terrorism

In an increasing global world in which we live, when we face terrifying threats of terrorism and unwittingly become hapless victims of crime, whether domestic or international, the legal and international concept of the law of extradition assumes relevance, significance and importance. Counterterrorism has therefore, through law enforcement used policies and other methods to deter and defeat terrorism.

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[60] Extradition To and From the United States: Overview of the Law and Recent Treaties, p.7

Most governments have used law enforcement as the primary weapon against terrorism. The United States and other countries have passed many laws that criminalize terrorism in all its varieties. In the 1990s the United States expanded its antiterrorism laws to make them "extraterritorial," meaning that terrorist crimes against Americans abroad can be prosecuted in U.S. federal courts. Sometimes foreign governments choose to prosecute suspects under their laws. At other times, they transfer suspects to U.S. authorities, using extradition through their courts, or informal transfers known as rendition. Many such transfers of terrorist suspects to the United States have occurred in recent years, including that of Ramzi Yousef and his collaborators, who were ultimately convicted of the 1993 bombing of the World Trade Center.

Governments also rely on international law, especially treaties that obligate them to criminalize, prosecute, or cooperate with other governments concerning terrorist crimes. Eleven of these treaties have been negotiated within the UN since 1963. They deal with terrorist crimes such as aircraft hijacking, hostage taking, maritime terrorism, terrorist bombings, and fundraising for terrorism.

The law of extradition also provides for rendition and extraordinary rendition. Where extradition is compelled by law, it is known as rendition. Rendition is surrender or handing over of persons or property, particularly from one jurisdiction to another. Extraordinary rendition is an extra-judicial procedure and policy, in which criminal suspects, generally suspected terrorists or supporters of terrorist organizations are sent to countries for imprisonment and interrogation.[61] The procedure differs from extradition as

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[61] Global Democracy and its Difficulties -International Legal Theory: Essays and Engagements 1966-2007

the purpose of the rendition is to extract information from suspects, while extradition is used to return fugitives so that they can stand trial or fulfill their sentence. Critics of the procedure have accused the Central Intelligence Agency (CIA) of rendering suspects to other countries in order to circumvent U.S. laws prescribing due process and prohibiting torture.

Renditions are only legal when they coincide with internationally accepted coincide with internationally accepted rules of law and are regulated by treaties. In extraditions, governments are culpable. Renditions disclose cooperation between intelligence services. The participation of the Executive ranges from limited knowledge to full complicity, resulting in presidential oversight and responsibility.

The US Attorney General opined in the aftermath of 9/11 that the Presidential had a broad constitutional mandate to take military action in response to terrorism. In Kenya, the High Court in Mohamed Aktar Kana vs the Attorney General [62]has ruled the extraordinary renditions impugn the oath of office by the President to uphold and obey the Constitution, including the Bill of Rights. The court ordered that the applicant should not be extradited to Uganda and that the President should be served with the ruling through the office of the Secretary to the Cabinet.

National courts have held that a person abducted in violation of international law may be tried in the courts of the abducting State.

By Nicholas Onuf's - http://en.wikipedia.org/

[62] Constitutional Application N0.544 of 2010

Kenya has routinely carried out extraordinary renditions. Examples include the 1976 extradition of two Palestinian suspected terrorists handed over to Israel. The suspects were arrested near the Jomo Kenyatta International Airport in Nairobi for attempting to bomb a plane. Some terrorist attack suspects of the US Embassy in Nairobi were extradited to US in 1998. Two prominent alleged, Al Qaeda operatives, Abu Zubaydah and Ramzi Bin al Shibh were reportedly captured in Pakistan with the cooperation of Pakistani officials and later transferred to U.S. detention in an unknown location. Some Guantánamo captives were possibly seized in Pakistan and U.S. Government controversially asserted its right to cross into Pakistani territory in "hot pursuit" of Taliban or Al Qaeda fighters. International terrorism has therefore made extradition an increasingly important law enforcement tool.

CHAPTER FOUR

ALTERNATIVES TO EXTRADITION

4.1 Why do States opt out?

Methods of securing a transnational fugitive for prosecution in a requested State may generally be referred to as rendition. Scholars sometimes term rendition which does not involve extradition as alternatives to extradition or "extraordinary or irregular rendition".[63] The U.S. justice department however says that the term irregular rendition is a misnomer as it is neither irregular nor unusual.

Despite the many benefits afforded by extradition to all the parties involved in extradition proceedings, extradition is still not the most utilized method of rendition. It has been said that,

'Extradition may be the established method of rendition, but it is by no means a convenient method or indeed a popular method. In a recent study of 231 instances of rendition of persons charged with international terrorist offences, it was found that only 6 out of 87 extradition requests were granted: on the other hand, 145 terrorist were expelled by 28 States'.[64]

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[63] Ethan Avram Nadelmann, Cops Across Borders, (1993) [books.google.co.ke] (Nadelmann – Cops Across Borders), these alternative methods of rendition are also sometimes referred to as de facto extradition, informal expulsion and extradition – Mexican-style- the latter was developed in the US after the practice of U.S. and Mexican law enforcement officials where fugitives are pushed over the border by Mexican police into the hands of U.S. law enforcement agents. See Ass'n of The Bar of N.Y. Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions" (2004), in James R. Silkenat & Peter M. Norman, Jack Bauer and the Rule of Law: The Case of Extraordinary Rendition, Fordham ILJ Volume February 207, Number 3., another definition of 'extraordinary rendition' refers to the process by which alleged terrorists are captured by the U.S. Government, transferred to another country, interrogated, and possibly tortured – all without judicial involvement – so the U.S. Government may attempt to uncover possible terrorist activity.

[64] Gilbert: Transnational Offenders, 12-13

States frequently resort to methods alternative to extradition to secure the person of the fugitive for purposes of prosecution.[65] These methods have on the most part existed before extradition and are carried out with or without the consent of the State of refuge of the fugitive.

4.1.1 Methodology

Alternative methods of rendition may be effected using several methodologies including deportations, expulsions, extraordinary renditions, exclusion at ports. In deportations, the relevant government department of the State seeking the fugitive may ask the requested State to deport or expel the fugitive.

Lure or ruse involves using a subterfuge to entice a criminal defendant to leave a foreign country so that he or she can be arrested in the requesting country, in international waters or airspace, or in a third country from where a subsequent extradition can be more easily obtained, expulsion, or deportation to the requesting State.[66]

An example of the use of lure was in U.S. v. Yunis[67], where the FBI captured a suspected Lebanese terrorist Fawez Yunis, by luring him from Cyprus in a boat in international waters using an enticing drug deal. He was forcefully taken to the U.S. by a naval ship and an aircraft.

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[65] Nadelmann – Cops Across Borders , where it is stated that the U.S. administrations relies on alternatives to extradition to expel and obtain criminals

[66] See, International Extradition and Related Matters, (available at <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/15mcrm.htm

[67] 681 F. SUPP. 896 CD.C.C. 1988

Arrests may also be arranged by the country seeking the fugitive during trips to foreign countries by the fugitive or when stops have made a brief stop over, for instance in 1975, DEA agents arranged for Dominique Orsini, a drug trafficker based in Argentina, to be arrested by Senegalese police and thereafter deported to the US, when the flight on which he was traveling from Buenos Aires to Nice stopped briefly in Dakar.[68]

States also sometimes make use of private agents like informants, private detectives and criminals including bail bondsmen and bounty hunters.

4.1.2 Involvement of the State

The highest level of State officials are openly and covertly involved in giving effect to these extraordinary renditions which is testimony of the favor with which extraordinary renditions are looked upon.

There was a case where the Uruguayan interior minister approved an irregular rendition plan only on condition that his consent would not be publicly revealed if anything went wrong. He said he would be among the first to publicly condemn the entire operation if any backlash resulted.[69] Rafael Caro Quintero who was involved in the Camarena murder was apprehended and deported with the approval of the Honduran President. There was also the politically dramatic rendition of Jamie Paz Zamora with the personal approval of the Bolivian President.

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[68] U.S. v. Orsini, 424 (F. Supp. 229 F.D.N.Y. 1976), in Nadelmann – Cops across 443.

[69] See Nadelmann – Cops Across Borders 443. It is also noted that in certain cases, U.S. law enforcement officials were given permission by top foreign officials to proceed with their operations and told that a formal – but otherwise meaningless – protest might thereafter be filed by their government

The foregoing discussion shows that indeed extradition has a low rate of utilization as a means for a State to acquire the arrest of a transnational fugitive, in spite of its advantages legally as discussed above.

4.1.3 Advantages of Extradition - Why Extradition?

Bassiouni has said that "The pursuit of justice and accountability, it is believed, fulfills fundamental human values, helps achieve peace and reconciliation, and contributes to the prevention and deterrence of future conflict."[70]

Extradition is important to this cause because of the central role that it plays in the handling of transnational crimes and fugitives.[71] Many treaties dealing with universal crimes, terrorism and mutual cooperation in criminal matters recognize extradition as important for the efficacy of the treaties. This is because extradition hinders the escape of a criminal from the jurisdiction of a State suitable to try him by crossing territorial borders and makes the criminal amenable to the violated laws of that State[72].

The importance of extradition in dealing with transnational crime has been recognized by the Commission on Crime Prevention and Criminal Justice. In its first session, the Commission recommended extradition as one of the measures to be

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[70] M. Cherif Bassiouni, Combating Impunity for International Crimes, 71 U. COLO. L. REV. 409,410 (2000), in Okechukwu Oko, The Challenges of International Criminal Prosecutions in Africa, Fordham International Law Journal, Vol. 31, Number 2, January 2008

[71] See Hermann F Woltring and Joanne Greig, State-Sponsored Kidnapping of Fugitives: An Alternative to Extradition, in Richard D. Atkins, The Alleged Transnational Criminal, [books.google.co.ke] (1995) (Atkins – The Alleged Transnational Criminal) 115 '...means by which the threats of organized and transnational crime can be countered, [include] ... extradition and mutual legal assistance arrangements.'

[72] Branick - Northern Ireland case 173, 'Extradition ensures that serious crimes do not go unpunished simply because the criminal has sought refuge inn another State

considered by member States in dealing with transnational crime. During its second session, the Commission supported the process of extradition and arranged for a workshop on extradition as part of the Ninth UN Congress on the Prevention of Crime and Treatment of Offenders in 1995.[73]

Extradition is also important in compelling compliance with international legal rules, law and order. [74]It is deterrent on criminals who may seek to escape the consequences of their crimes by crossing international borders. In this way it fosters the observation of law and order in the society.

Extradition acts as a point of balance of the interests of several parties involved in the process i.e. the international community, the requested State, the requesting State and the fugitive.

The interests of the international community are observed by hindering the proliferation of crime because of avoidance of punishment by criminals who escape justice by crossing international borders.[75] Ensuring the observance of human rights on the part of the requesting State is also in the interests of the international community. It also helps in preventing disharmony in international relations.[76] This sometimes occurs

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[73] Atkins – The Alleged Transnational Criminal ,p.122

[74] Professor Christopher C. Joyner, International Extradition and Global Terrorism: Bringing International Criminals to Justice, Loyola of Los Angeles International & Comparative Law Review, 25 (2003), no. 3, (Joyner) 7

[75] Branick - Northern Ireland case 173, 'Extradition ensures that serious crimes do not go unpunished simply because the criminal has sought refuge inn another State.'

[76]] "The pursuit of justice and accountability, it is believed, fulfills fundamental human values, helps achieve peace and reconciliation, and contributes to the prevention and deterrence of future conflict." [M. Cherif Bassiouni, Combating Impunity for International Crimes, 71 U. COLO. L. REV. 409,410 (2000), in Okechukwu Oko, The Challenges of International Criminal Prosecutions in Africa, Fordham International

when States procure the arrest of a transnational fugitive by means that violate the sovereignty of another State such as abduction.

Extradition helps to preserve the sovereignty of the requested State. A State seeking to exercise jurisdiction over an offender in the territory of another State must seek to do so through extradition proceedings to avoid violating the sovereignty of the requested State.

Article 2, paragraph 2, of the Parlemo Convention [77]provides that: "The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States, and that of non-intervention in the domestic affairs of other States." This can be construed to show that extradition is the proper means of combating narcotics without violating sovereignty and territorial integration of States.

Extradition is therefore a means of securing the prosecution or incarceration of transnational fugitives without violating the sovereignty of the host State. Extradition also provides a means for the requested State to fulfill the duties it owes the international community.

The requesting States interests are also satisfied through extradition. Extradition is important in satisfying the sovereign rights of the pursuing State. It has been stated that 'without an ability to prosecute all crimes that occur within its borders, a state's

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[77] UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Parlemo Convention)

sovereignty would be severely compromised.' Extradition therefore provides an avenue through which States can prosecute crimes committed by persons who are not within the territorial jurisdiction of the State for purposes of extradition.

Extradition also helps in maintaining national cohesion and law and order which would all be jeopardized by a lack of accountability on the part of criminals if extradition were not existent to secure their arrests from foreign jurisdictions.

Finally the interests of the fugitive are protected mainly through the application of the principles of extradition which hinder extradition in cases where the due rights of the fugitive are in jeopardy. [78]

4.2 Consequences of Rendition

4.2.1 Risks posed to States

Extraordinary rendition especially abduction poses several risks to both the State pursuing the fugitive and the one hosting him. Abduction involves the exercise of law enforcement by one State in another without the consent of the affected State. It also involves intrusion into the territory of a State without lawful authority. These are an affront to the sovereignty of the host State.

For the State pursuing extraordinary rendition, there are several negative consequences as well. The State impliedly opens itself up for reciprocal abductions of fugitives from within its territory by other States.

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[78] See Chapter 2

There are also cases where abductions have been met by violent protests by the public of the host State who are incensed by the breach of their country's sovereignty. The abducting State also risks being denied extradition by a third State where the presence of the fugitive in that State was obtained by lure as the third State normally perceives this as an infringement on sovereignty. In the Colunje claim [79]A Panama Canal zone detective induced the claimant under false pretensions to accompany him from the territory of Panama to the Canal Zone where a warrant for the claimant's arrest on the ground of the use of U.S. mail for fraudulent purposes had been issued. In awarding damages to Panama, the U.S. Panama General Claims Commission unanimously held the action of the detective constituted an unwarranted exercise of authority within the jurisdiction of Panama.

4.2.2 Risks to Offenders

The fugitive is normally most at risk when alternative methods are used to obtain his rendition. This is because of all the parties involved in the rendition process, he is least able to protect and enforce his interests.

Abductions nullify the safeguards of the fugitive's rights which are normally protected by extradition. [80] Who is to protect the fugitive from double jeopardy or subjection to inhuman treatment, apart from extradition? Extraordinary renditions put the

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[79] George Schwarzenberger, International Law and Order, Stevens, London (1971)

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[80] Atkins – The Alleged Transnational Criminal 123. The effect of [abduction] is to abrogate the rights of persons to have access to the courts of the country where they are situated.

fugitive at a high risk of being subjected to inhuman treatment by law enforcement. An example is in the Toscanino case [81] where, Francisco Toscanino, an Italian drug trafficker was seized by a special Uruguayan police unit operating under the direction of a U.S. drug enforcement agent. Toscanino was then driven over the border to Brazil, where he was kept for three weeks while the Brazilian police interrogated him under torture. He was then put on a commercial airline flight to the US, where he was indicted and prosecuted. This is an unjustifiable abuse of the inalienable right of the fugitive of the freedom from torture.

Extradition proceedings also serve the obvious but very crucial task of ascertaining the identity of the fugitive.[82] There are cases where abductions have resulted in the acquisition of the wrong person. In a case where the US obtained twenty Chileans whom the DEA had identified as major cocaine traffickers. One of these turned out to be a case of mistaken identity.

Abduction in itself is a violation of the human rights of the fugitive. Abduction is not provided for in the criminal process and is a violation of due process which is an inalienable right. It violates the individual's human rights. Scholars have criticized Ker case on the grounds that it 'was decided before it was clear to us that arbitrary arrest is a

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[81] U.S. v. Toscanino [500 F. 2d 267 (2d Cir. 1974), in Nadelmann – Cops Across Borders 438

[82] Dr. Muwolobi Dan, Public International Law Lectures given to 3rd Year School of Law Students, Kampala International University Topic - Extradition (2008/09 Academic Year).

fundamental wrong'. [83] It is therefore a breach of human rights to subject fugitives to this kind of treatment.

4.2.3 Breach of law

These extraordinary methods of rendition are favored because of their capacity for informal action. However most of these methods are unlawful and highly controversial. A court has described State sponsored abductions as "conduct so outrageous as to shock the conscience of the court".[84] They are prohibited by international law. The commentary to the 1988 Convention [85] states that, "a party has no right to undertake law enforcement action in the territory of another party without the prior consent of that party. The principle of non-intervention excludes all kinds of territorial encroachment, including temporary or limited operations (so-called "in-and-out operations"). It also prohibits the exertion of pressure in a manner inconsistent with international law in order to obtain from a party "the subordination of the exercise of its sovereign rights."

There is international consensus that abduction is a breach of international law. In the Machain case, Canada undertook a survey of the policies and laws of some countries on the question of extraterritorial abduction by law enforcement officers. The 1992 survey received replies from Australia, Austria, Britain, Finland, Germany, The

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[83] See Ker v Illinois, supra n13, Comment of Ruth Wedgwood, in Proceedings, American Society of International Law, 1990, 241, in Nadelmann – Cops Across Borders 460

[84] In Sneed v. State of Tennessee 872 S.W. 2d. 933

[85] Commentary to the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Parlemo Convention), paragraph 2.17)

Netherlands, Norway, New Zealand, Sweden and Switzerland. All countries indicated that they would regard such abductions as a violation of their sovereignty.[86]

4.2.4 Causing disharmony and disorder

Extraordinary rendition is a set back to international cooperation in law enforcement and wastes the efforts made in gaining that cooperation.

These methods of rendition further create unpredictability in extradition practice and this violates the sovereignty of the affected State, breaches international order, and also creates an atmosphere of insecurity and distrust between States.

In the Machain case[87], Canada filed a brief in the case as amicus curiae in support of the respondent. It was of the opinion that the case would encourage the practice of trans-border abductions of fugitives contrary to law. The proliferation of this kind of conduct would naturally disrupt world public order.

4.3 Why do States opt out? - Why not Extradition.

It is of interest to understand why States will forego all the benefits afforded by extradition to opt for other methods of rendition that pose all kinds of risks ranging from fracturing international relations, risking the lives and health of those that carry out the renditions as well as posing legal consequences to them. States also risk international embarrassment when carrying out such sorties.

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[86] Atkins – The Alleged Transnational Criminal p.119

[87] ibid

Why then do States resort to other means of gaining jurisdiction over transnational fugitives?

4.3.1 Denial of an Extradition request

There are reasons why extradition may fail in the rendition of a fugitive to a State interested in prosecuting.

Firstly, there might be no extradition treaty or if there is one, it might be inadequate.

A State may fail to even make an extradition request and proceed to carry out an extraordinary rendition. An extradition request may fail on the merits and hence be denied by the courts[88]. Political or other reasons may cause the requested State's government to deny the request whether the court has granted it or not. For example the requested State may be afraid of retaliation by terrorists and other organized criminal groups such as drug trafficking organizations. Corruption and the influence of fugitives may also frustrate the process of extradition.

4.3.2 Inadequacy of extradition

There are also practical problems involved in the extradition procedures. Nadelmann says that international rendition may be hampered by several reasons including "skepticism of foreign systems and requests; cumbersome requirements of

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[88] See, International Extradition and Related Matters (available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/15mcrm.htm), a fugitive may be non-extraditable because of the nationality principle, or the crime is non-extraditable, or the statute or limitations has run in the requested country or for any other reason

transmitting requests for assistance through slow and often neglectful diplomatic bureaucracies; domination by foreign relations officials who often have insufficient knowledge of criminal procedure and criminal justice systems; a general reluctance on the part of prosecutors, courts, and legislators to accommodate the peculiar requirements of international (as distinct from municipal) law enforcement, notably those involving foreign civil law systems; and the absence of any specialized office in the government with expertise in international law enforcement matters".[89]

Sometimes law enforcement officials will avoid extradition as it will require the involvement of diplomatic officials who may undermine renditions that might have negative political consequences.

Extradition law and practice is fraught with many barriers. It is not the preferred method of surrendering persons to the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. Rule 58 of the Rwandan and Yugoslav Criminal Tribunals Constitutive Statutes state that the statutes take precedence over any legal impediment in domestic extradition law or extradition treaties.[90]

There are reasons given for not preferring the use extradition in these tribunals i.e. the fact that extradition is an interstate mechanism and not one between a State and an international body. It is also arguable that because the international tribunals are subject to international scrutiny and were created by the resolution of a UN organ, then the safeguards that extradition seeks to impose are assumed.

[89] Nadelmann – Cops Across Borders 458 – 459

[90] See Gilbert - Transnational Offenders 49, The Statutes provide that an accused person shall be 'surrendered or transferred' to the Tribunal – there is no reference to 'extradition' as the means of bringing the person to trial.

However, it is also possible that the drafters of the constitutive Statutes of the bodies were concerned to avoid the controversies of the extradition process in securing the surrender of a fugitive to the tribunals.

4.3.3 Needs of States in dealing with crime; sovereignty etc.

Every State has a right and duty to prosecute. This is a right that is important for satisfying the sovereign rights of the pursuing State. It has been stated that 'without an ability to prosecute all crimes that occur within its borders, a State's sovereignty would be severely compromised.'[91] Extradition therefore provides an avenue through which States can prosecute crimes committed by persons who are not within the territorial jurisdiction of the State and thus avoiding prejudice to the sovereignty of the requesting State.

The State also owes a duty to its citizens to protect them from harm and criminal sanctions are one means of ensuring such protection. States are therefore unwilling to see their jurisdiction over crime denied. States and governments do not easily accept that a persons who threatens the public order, whether justifiably or otherwise, will escape accountability for his actions. Mobutu Sseseko considered it an act of hostility for Belgium to grant asylum to his political adversaries and considered Belgium to be supporting those that would overturn him.

States and peoples experience frustration at being unable to mete out proper punishment to those who have offended their laws. An official of the Rwandan Patriotic

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[91] Claire de Than and Edwin Shorts, International Criminal Law and Human Rights, First Edition 203 London Sweet and Maxwell; Thomson, 38

Front has been quoted saying that, 'it does not fit our definition of justice to think of the authors of the Rwandan genocide sitting in full-service Swedish prisons with a television.'[92]

It is also said in municipal law that failure on the part of the State to provide a means for the punishment of wrongdoers leads to the adoption of self help mechanisms by the victim and his loved ones hence leading to the undermining of law and order in society. "...punishing wrongdoers prevents recourse to self-help or vigilantism by victims of crime."[93]

One can therefore safely extrapolate from this concept explaining the need for punishing wrongdoers in a municipal jurisdiction, to apply it to States, in the sense that States may also resort to self-help in trying to bring retribution upon those that have committed offences that affect it. This is because extradition does at times become too burdensome for States and sometimes entirely frustrates the efforts of offended States in dealing with transnational fugitives. Hence the high rate of extradition avoidance by States.

We therefore see that the punishment of crime is of paramount importance to States. Hence it is tempting for States to use all means possible to be able to prosecute an offender in spite of any barriers – legal or otherwise – that may stand in their way. For

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[92] Phillip Gourevitch, We Wish to Inform You that Tomorrow, We will be Killed with Our Families: Stories from Rwanda at 255 (1998), in Okechukwu Oko, The Challenges of International Criminal Prosecutions in Africa, Fordham International Law Journal, Vol. 31, Number 2, January 2008 at 385.

[93] Martha Minnow, Between Vengeance and Forgiveness: Facing History After Genocide And Mass Violence (1998), 122, in Okechukwu Oko, The Challenges of International Criminal Prosecutions in Africa, Fordham International Law Journal, Vol. 31, Number 2, January 2008, 388

this reason, when the person of the fugitive cannot be secured by extradition, a State will sometimes brazenly opt for these methods especially where the case is one of particular importance to a State whether legally, socially or politically.[94]

An example of the zeal of States to exercise their criminal jurisdiction in particularly sensitive matters is the case of the abduction, torture and murder of the U.S. Drug Enforcement Agency agent known as Enrique Camarena and a Mexican pilot working for the DEA. This is a crime that involved several Mexican criminal elements including drug traffickers, corrupt police officials and Dr. Machain Alvarez in 1985.[95] Enrique Camarena was a DEA agent stationed in Guadalajara. DEA and Justice Department officials were furious when U.S. efforts to investigate the incident faced resistance from Mexican authorities. There was also substantial evidence that top Mexican officials had been involved in both the abduction and the subsequent cover-up of the crime. Determined to send a powerful message that no one could get away with killing a DEA agent, the DEA combined with federal prosecutors and Justice Department officials in an all-out effort to track down those involved in Camarena's murder and to ensure that they were brought to trial. Most of the Mexican drug traffickers were eventually arrested by Mexican police and tried and convicted in Mexican courts in the wake of powerful pressures from the U.S. government.

However the U.S. used several methods of extraordinary rendition to secure the arrest of several of those involved in the crime. One of the most notorious, Rafael Caro

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[94] See Nadelmann – Cops across borders, it is noted that because of the costs of extraordinary rendition, States normally reserve it for the more notorious criminals.

[95] See supra n 26 Alvarez – Machain

Quintero, was arrested in Costa Rica in a joint operation mounted by resident DEA agents and local police and then expeditiously deported, with the approval of the Costa Rican president, to Mexico (since he had not yet been indicted in the US).

The most important of the traffickers involved in the crime to be recovered by US officials was Juan Ramon Matta Ballestros – a Honduran citizen who had worked closely with the Colombian and Mexican drug traffickers and who was one of Honduras' leading philanthropists. Efforts to extradite Ballestros from Honduras had been precluded both by his influence with powerful Honduran officials and by Honduras' prohibition on extraditing its citizens. So DEA agents and the US Marshals service worked quickly and discreetly with selected Honduran officials to devise a plan whereby Ballestros would be quickly arrested and flown out of the country and thus deprived of any opportunity either to appeal to the courts or to contact his powerful protectors within the government. In April 1988, Ballestros was arrested at his home in Tegucigalpa by Honduran military officials, forced into a van driven by a US marshal, taken to the airport, and flown to the US.

There was also the controversial abduction of Alvarez Machain.[96] This case indicates the zest with which a State may approach the securing of a fugitive offender. One therefore wonders, can extradition really suffice to prevent the occurrence of such incidences? Is extradition developed enough to handle such passionate pursuits without loosing its characteristic of balancing various interests and not those of only one party

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[96] See supra n26 Alvarez – Machain

(here the requesting State?) There is need for reform in the law of extradition to make it competent in handling such passionate matters.

4.3.4 Special Problems posed by Transnational Crime.

Transnational crime is posing several challenges to law enforcement considering that the suspect, victim, evidence, witnesses and proceeds of the crime may be beyond the jurisdiction of the offended laws. Because of this, law enforcement cannot afford to remain passive. Therefore States are becoming more aggressive in dealing with transnational crime like drug trafficking.[97] If extradition cannot respond fast and flexibly enough to help States battle such crimes, then they will resort to extraordinary rendition to handle such crimes.

From this discussion, we see that extradition has at times not been sufficient to meet the needs of States in fighting crime. There is therefore need that changes should occur to the law and practice of extradition to make it the preferred method of rendition by States.

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[97] See Nadelmann – Cops across Borders, generally on how the US has widely used extraordinary rendition to deal with drug trafficking from South America.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

5.1Recommendations : The Need for Reform in the Law and Practice of Extradition

Though extradition has a number of advantageous, it is also subject to various flaws which exhibit its failure as a convenient method in attaining justice for crimes committed internationally. In order to render extradition as being reliable a few modifications need to be applied.

First, States that are parties to extradition treaties need to enact laws that outline clearly extraditable offences so as to prevent a state from choosing other means of attaining justice, which may be deemed as illegal.

Secondly, States should reform the principles of extradition that pose a challenge to the process of extradition. For instance, they should renegotiate the treaties so as to eliminate the political offence exception or to depoliticize certain terrorist acts that that endanger civilians or inflict harm out of proportion to the political objectives of the alleged terrorists. This so as to ensure that terrorism suspect does not avoid extradition and hence is subjected to justice.

Thirdly, the treaties and legislation providing for extradition should be revised so as to mitigate the complexities involved in transmitting requests for assistance through slow and often neglectful diplomatic bureaucracies. There should be established a mechanism that ensures that officials appointed to carry out the extradition processes, possess sufficient knowledge of criminal procedure and criminal justice systems. The

process should also be flexible and should be conducted within reasonable time and without delay so as to assist the States involved to battle such crimes with prudence and impartiality.

Fourthly, States also need to decide whether an international treaty is needed in order for the controversy regarding extradition to be resolved. With a treaty such as this, nations would be brought together, resulting in mutual cultural and political interests, as well as continual interaction between the countries. However, an international treaty seems implausible because it would be difficult to incorporate the policies and needs of every nation. Countries need to strengthen international cooperation regarding criminal justice as well as look to the Model Treaty on Extradition as an example. In conjunction with the issue of an international treaty, it is necessary to address capital punishment. Whether or not your country practices the death penalty will define the terms of an extradition agreement.

Lastly, the failure of extradition is exhibited in the fact that it does not provide effective penal mechanisms. This explains why States choose other irregular methods such as extraordinary renditions. Extradition should be modified in order to effectively address the grievances of the offended State, so as to prevent that State from using all other means possible to mete out punishment to the offenders.

5.2Conclusion

Generally extradition has been exercised in Kenya although recent cases show that, like many States, Kenya opted to use extraordinary rendition thereby circumventing its own extradition laws. The general rule is that extraditable crimes must be those commonly recognized by civilized nations as *malum in se* (acts criminal by their very nature) and not merely *malum prohibitum* (acts made crimes by statute), and must be included in the extradition treaty. It is for this reason that though extraordinary rendition is usually deemed a violation of human rights due to actual physical abuse, a violation of freedom of movement, and a deprivation of liberty by subjecting the detainees to arbitrary detention, this method deemed as convenient especially where terrorism is involved.

Despite this reason, extradition continues to be the first avenue to be consulted, as most countries, for instance Kenya have enacted laws solely for extradition purposes. The key statutes governing extradition processes are Extradition (Contiguous and Foreign Countries) Act (Cap. 76) and the Extradition (Commonwealth) Act (Cap. 77). They embody provisions on extraditable offences, situations where extradition may be refused and also with which Kenya has an extradition treaty. Basically, extradition cannot proceed where there is failure to fulfill dual criminality, that is the offence must be an offence in the country of refuge and the requesting State, political nature of the offence, where the suspect may be subjected to ill treatment, for example torture, where the requesting State lacks jurisdictions to punish the suspect and citizenship of alleged offender.

Generally extradition has been controversial throughout history, as trust between different nations has not been complete. Equally, a crime in one jurisdiction may not be considered such in another. However, the basic effort on the part of the majority of countries in the world to prevent wrongdoers from fleeing the consequences of what they know to be illegal actions represents an effort to bring about a unified world society, breaking down barriers that divide us. Without accountability for wrongdoing a world of peace and harmony cannot be achieved.

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