An analysis of the competing factors within an extradition decision.

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AN ANALYSIS OF THE COMPETING FACTORS WITHIN AN EXTRADITION DECISION

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Declaration

I, Onamiru G. Ubiebor, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work, nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the university to reproduce for research either the whole or any portion of the contents in any manner whatsoever.

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Dedication

Dedicated to my father Gideon K. Ubiebor

Abstract

In an era where an increasing number of states are affected by various types and forms of transnational crime, including terrorism, cybercrime, financial crime, murder, illegal drugs, and human trafficking one response has been a greater emphasis upon and employment of extradition agreements. These agreements are intended to make the transfer of the alleged offender easier. However, ironically, these agreements also contain provisions that directly or indirectly may stymie the process. These include human rights, domestic and international politics as well as language, religion, race and immigration concerns. These are factors that may arise in the court of extradition, and when they are invoked by the alleged offender, they inevitably influence the decision to extradite. Thus, efforts to address the goals of protecting the national security of a state and furthering international cooperation in the interest of law enforcement on the one hand and the protection of the alleged offender, on the other hand, create a tension. These factors create tension because in the course of an extradition decision these conflicting interests are present and are conditioned by the underlying goal of overall justice and fairness in international criminal justice. It is possible to categorise these conflicting factors into two broad groups - legal and non-legal factors. It is further possible to break down these categories into human rights, diplomatic assurances, political factors, social factors and economic factors. The identification of the categories of factors enables a detailed analysis of the decision-making process. One feature arising from this analysis is the appearance of an imbalance between the competing factors – where some states place more emphasis on certain factors and other states on other factors. This occurs in spite of the international nature of extradition obligations – being found largely in bilateral extradition agreements. A facet of extradition law complicating the picture is that most states require to incorporate their international extradition obligations into their national law and procedure. International extradition law and procedure call for consistent identification and weighing-up of the

competing factors within extradition decisions. This will allow the creation of a system where the relevant applicable factors are appropriately taken into account and also where the interest of the state parties, offender and victims as well as the international criminal law itself will be appropriately served. This thesis argues that fair and just decisions are made through a thorough identification, conceptualisation and the analysis of the various conflicting factors that are related to and affecting extradition. Therefore, it is the central feature of this thesis to identify, categorise and analyse the factors affecting extradition with the view of allowing a balance to be drawn that will facilitate fairness and justice.

Keywords: Extradition, Human Rights, International law, Cultural Conflicts, Capital Punishment, International and Cross-border crime.

Table of Cases

Primary Sources

Table of Statutes, Treaties and Conventions

Primary Sources

UK Theft Act 1968
UN International Convention for the Suppression of Terrorist Bombings 1997
US Computer Fraud and Abuse Act 1986
US Cyber Security Enhancement Act 2002
US Securities Exchange Act 1934
Vienna Convention on the Law of Treaties, 1969, 1155 UNTS

List of Tables and Figures

List of Abbreviations

AU	African Union
CAT	Convention Against Torture
COE	Council of Europe
CSEW	Crime Survey for England and Wales
EAW	European Arrest Warrant
ECE	European Convention on Extradition
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
ECtHR	European Court on Human Rights
EU	European Union
FCA	Financial Conduct Authority
FOI	Freedom of Information
ICCPR	International Covenant on Civil and Political Rights
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
MOU	Memorandum of Understanding
NCA	National Crime Agency
NSA	National Strategic Assessment of Serious and Organised Crime
NDIC	Nigerian Deposit Insurance Corporation
OAU	Organisation of African Unity
OAS	Organisation of American States
SIS	Schengen Information System
TEU	Treaty of the European Union
UKHTC	UK Human Trafficking Centre
UK	United Kingdom
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
US	United States
UDHR	Universal Declaration of Human Rights
WTC	World Trade Centre

Chapter One

Thesis introduction

1.1. Introduction

Increased global economic integration, global forms of governance, globally inter-linked social and environmental developments are often referred to as globalisation.[1] From a mundane perspective, purchasing a product from abroad is possible because globalisation makes it so. The same applies to other taken-for-granted events such as travelling abroad, posting a card overseas or viewing a foreign television channel.[2] During the last few decades, human dynamics, institutional change, political relations and the global environment have become successively intertwined as a result of globalisation.[3] Among the more visible manifestations of globalisation are, the greater international movement of goods, services, people and capital from one state to another. These developments have arguably led to an improved allocative efficiency that, in turn, enhances growth and human development.

On the cultural front, there is a more international cultural exchange and greater cultural diversity. Such developments are facilitated by the free trade of more differentiated products as well as tourism and immigration. For example, the European Union (EU) created the euro as a single currency and has built a single market of goods and services that span the EU states. The EU also

[1] Axel Dreher, Noel Gatson, and Pin Mathews, *Measuring Globalisation Gauging Its Consequences* (Springer 2008) 2.
[2] Anthony Aust, *Handbook of International Law* (2nd edn, Cambridge University Press 2010) 4.
[3] *Ibid* footnote 1, pg. 2.

allows citizens to move freely without barriers within member states and can live and work wherever they want within the EU. Another example of globalisation boosting international contact thereby making the world a smaller place is the advent of the African Union (AU).[4] The AU can be described as an event of great magnitude in the institutional evolution of the continent, and one of its objectives is to achieve greater unity and solidarity between African states, encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights (UDHR).[5]

Though globalisation has boosted international contact, at the same time, it is also perceived as creating new threats to individuals and states. This has been illustrated in crimes such as terrorism, financial crime, cybercrime, kidnapping, murder, illegal drugs etc. In the UK according to the national strategic assessment of serious and organised crime 2017, there has been a rise in off-the-shelf cyber-crime products which has resulted in less technically proficient offenders being able to commit large-scale, high impact offences.[6] Likewise, the professional, organized and technological approaches of certain criminals enable major economic crime and money laundering to take place on a large scale. For various illegal commodities such as firearms and illicit drugs,

[4] African Union https://www.au.int> Accessed 18 October 2018. Hereinafter referred to as AU, is a continental union consisting of all 55 states on the African continent. It was established on the 26th of May 2001 in Addis Ababa, Ethiopia and launched on the 9th of July 2002 in South Africa with the aim of replacing the Organisation of African Unity (OAU). The most important decisions of the AU are made by the Assembly of the African Union.

[5] Hereinafter referred to as the UDHR. The Universal Declaration of Human Rights (UDHR) is a declaration adopted by the United Nations (UN) General Assembly on the 10th of December 1948 at the Palais de Chaillot in Paris, France. The UNDH promises to all the economic, social, political, cultural and civic responsibilities that underpin a life from want and fear. Human rights abuses did not end when the UDHR was adopted but since then countless people have gained freedom. Violations have prevented independence and autonomy have been attained. Many people though not all have been able to secure freedom from torture, unjustified imprisonment, summary execution, enforced disappearances, prosecution and unjust discrimination as well as access to education, economic opportunities and adequate resources and health care. http://legal.un.org/avl/ha/udhr/udhr.html> Accessed 20 September 2018.

[6] National Crime Agency (NCA) National Strategic Assessment of Serious and Organised Crime 2017, pg 5. Available at www.nationalcrimeagency.gov.uk/publications/807-national-strategic-assessment-of-serious-and-organised-crime-2017/file> Accessed 20 September 2018.

these commodities can follow diverse ways to reach consumers with different criminal groups taking control of or facilitating their passage. An increase in crime amongst states has matched the evolution and advancement of technology. For example, the Telegram messaging app is now widely used by terror groups including ISIS to relay encrypted instructions amongst themselves. The suicide bomber who blew himself up on the St Petersburg metro, in Russia, on the 3rd of April, 2017 killing at least 15 people, used the telegram app to plan the attack with his accomplices.[7] Before globalisation, such an act would not have been possible to be carried out in such a way. As a result, these developing threats are by definition international in a technologically interconnected world.

States cannot usually prosecute or punish alleged offenders for offences that have occurred beyond their borders. One of the reasons is because they flee to avoid accountability and this avoidance of accountability by alleged offenders has been made easier as a result of globalisation. The pathways into criminality are diverse, trends relating to divergence and deepening political divides in conjunction with the impact of technological change are likely to continue. As a result, conflicts in, but potentially not limited to Libya, Syria and Ukraine are likely to regenerate chances of criminal activity. Therefore, it is likely that these international criminal groups will exploit vulnerabilities such as lack of extradition treaties, inadequate law enforcement, criminal justice structures, weakness of legislation and vulnerable states, with the aim of disrupting states. Their risk of involvement in criminal activity increases when they belong to specific networks. Areas of instability will continue to serve as source states and transit routes for illegal exploitation.

[7] DailyMail, 'Russia Threatens to Block Telegram Messaging App Widely used By Terror Groups Including ISIS to Send Encrypted Instructions to Each Other' (*Reuters,* 26 June 2017) http://www.dailymail.co.uk/news/article-4639560/amp/Russia-upping-pressure-Telegram-app-says-terrorists-use-it.html > Accessed 20 September 2018.

The horrific terrorist atrocities experienced in both the UK-EU[8] and other states have underlined how vital it is for states to work closely with each other. The use of firearms in the attacks in Europe over the past two years highlights the threat they also present to the UK. This means that states must recognise the imperative of suppressing the availability of such weapons. Additionally, the Office for National Statistics in the UK said that the police data showed a 9% rise in overall crime in 2018.[9] Going by the statistics in the overall increase of crime provided in the UK, these crimes may exacerbate both within and across states outside the UK, creating new threats to human security.

[8] The European Union herein after referred to as the EU grew out of a desire for peace in a war-torn and divided continent. Five years after World War II ended, France and Germany came up with a plan to ensure their two countries would never go to war against each other again. The result was a deal signed by six nations to pool their coal and steel resources in 1950. Seven years later a treaty signed in Rome created the European Economic Community (EEC) - the foundations of today's European Union. The UK was one of three new members to join in the first wave of expansion in 1973. Today the EU has 28 member states with a total population of more than 500 million. The euro (€) is the official currency of 19 out of 28 EU member states. These states are collectively known as the Eurozone. The Schengen Area is one of the greatest achievements of the EU. It is an area without internal borders, an area within which citizens, many non-EU nationals, business people and tourists can freely circulate without being subjected to border checks. Since 1985, it has gradually grown and encompasses today almost all EU states and a few associated non-EU states. While having abolished their internal borders, Schengen states have also tightened controls at their common external border on the basis of Schengen rules to ensure the security of those living or travelling in the Schengen Area. European Union < https://europa.eu/european-union/about-eu/countries_en#28members> Accessed 18 October 2018.

[9] Office of National Statistics- Crime in England and Wales: 19th July 2018. Available at https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingmarch2018 > Accessed 20 September 2018. See Also, 2016 Crime Statistics Released, Violent Crime Increases, and Property Crime Decreases. Available at https://www.fbi.gov/news/stories/2016-crime-statistics-released> Accessed 16 October 2018. Official statistics cannot provide a measure of all crime, but the available sources can provide useful insights to long-term and emerging trends in crimes. The Crime Survey for England and Wales (CSEW) provides a good measure of long-term trends for a selected range of crimes experienced by the general public, including those not reported to the police and the latest figures show one in five adults, aged 16 and over, had fallen victim in the previous year. Including new Experimental Statistics on fraud and computer misuse offences, the CSEW estimated 10.8 million incidents of crime in the latest survey year, but first annual comparisons will not be available until January 2018. The police recorded 5.2 million offences in the latest year; this series can provide a better indication of emerging trends but can also reflect changes in recording practices and police activity rather than genuine changes in crime. The 13% increase in police recorded crime from the previous year reflects a range of factors including continuing improvements to crime recording and genuine increases in some crime categories, especially in those that are well-recorded. The new presentation of official statistics on violent crime highlights there were 711 deaths or serious injuries caused by illegal driving, a 6% rise from that recorded in the previous year. A number of sources showed a rise in bank and credit card fraud in the last year; UK Finance reported a 3% rise in the volume of fraudulent transactions reported on UK-issued cards.

In some circumstances, the crime committed has a negative impact on another state without the individual being physically present in that state. As illustrated in the case of *Calder v HM Advocate,*[10] David Calder, 35, from Aberdeen, faced extradition over claims that he imported ingredients from the UK to the US to make the drug GHB (Gamma-Butyrolactone). His legal team argued that the alleged offence was not an extraditable offence because he never left Scotland. In a written judgment three appeal judges said that the UK is duty-bound to uphold treaty obligations made by states which include the US. The judges, who heard the appeal at the Appeal Court in Edinburgh, also said that the fact that Calder was not physically present in the US at the time of the alleged offence was irrelevant, as his alleged conduct could still be seen to have occurred there in the US. The judges in their view stated that the conduct could rightly be interpreted as occurring in the place where it affects.[11]

The *Calder case*[12] is an illustration that the mobility of capital and technology plus the global communications network are viewed as obliterating spatial lines of geographical boundaries. As a result of globalisation making the world a smaller place, alleged offenders increasingly disregard state borders, which both international and domestic laws have been designed around. The perpetrators of these offences intentionally take advantage of globalisation, advanced technology, porous borders and easy transportation by fleeing to avoid accountability and being brought to justice by the state of greater interest in the offence committed.

[10] [2006] S.C.C.R 609 at 14.
[11] *Ibid*.
[12] *Ibid.*

While these developments present a range of challenges, the same events will equally provide opportunities for states with the assistance of one another to suppress crime. Suppressing crime effectively within the confines of the social order has become one of the most urgent tasks for states. In Europe, several crimes which include terrorist incidents have been part of political reality for more than two decades.[13] US citizens face the possibility that terrorism will strike them at home as well as away from home.[14] As this spectrum of threats becomes ever more complex, states have amended their approach, by responding to them under various headings internally and internationally. States now engage in bilateral relationships, international forums and law enforcement institutions such as Interpol and Europol. This international presence also supports stability and security which can influence a state's prosperity.

Thus, when an alleged offender flees from one state to another, some form of inter-state cooperation is required to ensure that the alleged offender is physically returned to face trial or prison in the state that has a greater interest in the offence committed. This form of cooperation that is usually used by states guarantees that the alleged offender is physically returned to the requesting state to face prosecution or sentence for the offence. The form of inter-state cooperation that is often used by states is 'extradition' defined simply as a procedure of 'request and consent'[15] that takes place between two sovereign states. Allowing for the formal surrender by one state is known as the 'sending' or 'requested' state at the request of another the 'receiving' or 'requesting' state of an individual who is accused or convicted of an offence that occurred within the

[13] Anjte C. Petersen, 'Extradition and the Political Offence Exception in the Suppression of Terrorism' (1992) 67 Ind. L. J. 769.
[14] *Ibid.* pg 769.
[15] Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 313.

jurisdiction of the requesting state.[16] The participants in the extradition process are therefore the alleged offender, who is the subject of the proceedings as well as the 'requesting' and 'requested' state.[17] The obligation to extradite or prosecute has gained greater importance and acceptance in the age of globalisation. As a result, most states require an extradition treaty.

The framework of international cooperation in the suppression of crime thus consists mainly on a binding international commitment, whether of a bilateral or multilateral nature and enabling legislation.[18] What happens mostly is that states enter into an agreement about the procedure and the transfer of an alleged offender and then bring those laws into its domestic laws. For example, in the UK, it takes the form of the Extradition Act 2003, an Act of the Parliament of the UK which regulates extradition request by and to the UK. In Nigeria, it takes the form of the Nigerian Extradition Act 1967.[19] The US alone has over 100 extradition treaties in force including the extradition treaty between the UK dated 2003.[20] There is also an extradition treaty between the UK and Nigeria dated 1931, but it came into force in 1935. These extradition treaties signal that the contracting state parties accept each other's sovereign right to prosecute alleged offenders accused of offences committed against the requesting state.[21] These extradition treaties and

[16] See for example Anna W. la Forest, *La Forest's Extradition to and from Canada* (3rd edn, Canada Law Book, 1991)1. See also; Ivan Anthony Shearer, *Extradition in International Law* (Manchester University Press 1971)12.
[17] M Cherif Bassiouni, *International Extradition United States Law and Practice* (6th edn, Oxford University Press 2014) 2.
[18] Ivan Anthony Shearer, *Extradition in International law* (Manchester University Press, 1971) 22.
[19] Nigerian Extradition Act 1967 – An Act to repeal the former Extradition Laws made by or applicable to Nigeria and to make more comprehensive provisions for extradition of fugitive offenders in Nigeria [1966 No. 87] [Commencement.L.N. 28 of 1967]
[20] Congressional Research Service CRS Report, Prepared for Members and Committees of Congress, Extradition to and from the United States: *Overview of the Law and Contemporary Treaties'* (October 4, 2016) 1. Available at < https://fas.org/sgp/crs/misc/98-958.pdf> Accessed 20 September 2018.
[21] *Ibid.* footnote 13. pg. 771.

legislation not only supply the broad principles and detailed rules of extradition but they also dictate the very existence of the obligation to surrender alleged offenders.[22]

At the European level,[23] the most important way of suppressing cross-border crimes are represented by international judicial cooperation in criminal matters, which should be achieved among all EU states. The first and most important step towards this aim is the European Convention on Extradition.[24] Thus, the enlargement of the EU by the accession of new states created new opportunities for crime to spread, which were enhanced by the problematic extradition procedure. In this context, the enactment of the Framework Decision on the European Arrest Warrant, and the surrender of persons between member states represent natural choice meant to help create an EU area of freedom, security and justice. However, the European Multilateral Convention on Extradition 1957, is one of the major exceptions but, by and large, these are Conventions between two state parties.

Extradition was not unknown in antiquity and is one of the oldest forms of interstate cooperation in the criminal law field.[25] Ancient history does provide examples of alleged offenders being delivered up between people not only for political offences or acts of aggression against the sovereign but also for rape, murder, theft and other serious, non-political offences.[26] Indeed,

[22] *Ibid.* footnote 13 pg. 779.
[23] The Council of Europe is the oldest governmental organisation in Europe and it brings together the largest number of the European states- 47 member states representing some 800 million Europeans. While this is totally independent from the European Union, the two entities do collaborate in certain domains. The 28 member states of the European Union are all members of the Council of Europe. The Council of Europe principally aims to defend human rights and parliamentary democracy. < Institutions under the Authority of the Council of Europe, Strasbourg L'europeenne' Available at http://en.strasbourg-europe.eu/council-of-europe,2090,en.html> Accessed 20 September 2018.
[24] European Convention on Extradition herein after referred to as ECE. Paris, 13/12/1957- Treaty open for signature by the Member states and for accession by non-member states.
[25] Christopher L. Blakesley, 'The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History' (1981) 4 B.C. Int'l & Comp. L. Rev. 45.
[26] *Ibid.* pg 45.

several ancient and medieval renditions resemble present-day extradition. One of the problems has been the fact that for an extended period in human history there were no states.[27] Therefore, acts such as theft, murder or rape, considered common crimes today, were subject to private justice or individual reprisal rather than the modern reaction of a sovereign state.[28] For example, endangering food supply incurred the sanction of banishment, and in keeping with whatever procedure was required by its law and custom which would determine what activities were deemed punishable. This is similar to what modern states reserve for extraditable offences, where the alleged offender is transferred to the requesting state.

The continued support for the use of extradition reflects a willingness among states to engage in some form of cooperation on the international plane for suppressing crime, if only for the reason that most states do not want to become places of refuge for another state's offender. The issues of safe havens were also expressed in the cases of *Celinski,*[29] *Abu Hamza* [30] and *Dewani.*[31] These cases reflect an acceptance of the view that, if states did not have the 'right and duty' to extradite alleged offenders, they could become a safe haven for alleged offenders. In the case of *Re Arton,*[32] as explained by Lord Russel of Killowen CJ, it was held that;

> 'The law of extradition is, without doubt, founded on the broad principle that it is to the interest of civilised communities that crimes acknowledged being such, should not go unpunished, and it is part of the comity of nations that one state should afford to another every assistance towards bringing persons guilty of such crimes to justice'[33]

[27] *Ibid.* footnote 25. pg 45.
[28] *Ibid.* footnote 25. pg 45.
[29] *Polish Judicial Authority v Celinski* [2015] EWHC 1274 (Admin).
[30] *Mustapha Kamel Mustpha (also known as Abu Hamza) v United States* [2008] EWHC 1357.
[31] *South Africa v Dewani* [2014] 1WLR 3220.
[32] [1986] 1 QB 108 at 11.
[33] *Ibid.*

A similar opinion was also expressed by the European Court of Human Rights in the case of *Ocalan v Turkey,*[34] that:

> 'As movement about the world becomes easier, and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the state obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation'.[35]

Thus, these cases above show that international extradition serves as an important function by providing a mechanism by which states can cooperate with one another by surrendering to the requesting state an alleged offender that is accused of an extraditable crime. These extradition treaties also reflect the common interest of states in suppressing international and cross-border crimes. This is done by ensuring that the alleged offenders are transferred and punished accordingly. It also mirrors the mutual interest of the world community in prosecuting crimes and ensuring that offenders do not find safe havens in states.

1.1.1. The Problem

There are competing common yet complimentary interests at play where states guarantee to protect the human rights of the requested person and yet seek to achieve the aims of extradition. The rapid development, indeed transformation, of international human rights law in the last four decades has lent weight and reason to this particular interest in providing it with content and specificity and by extending its reach and scope.[36] Requested persons can invoke human rights norms on a wide variety of subjects ranging from the abolition of capital punishment, private and family life. There

[34] [2005] 41 EHRR.
[35] *Ibid.* at para 87.
[36] Ved P. Nanda, 'Bases for Refusing International Extradition Requests- Capital Punishment and Torture' (1999) 23 Fordham Int'l L. J.1369.

is also an increasing adherence by states to these norms. At the same time has been the rise in crime which includes terrorism, cybercrime, financial crime, murder, illegal drugs and human trafficking which has been made easier by globalisation as discussed in section 1.1.[37] This, in turn, has resulted in the strengthening of bilateral extradition treaties. As a result of these developments the complementary goals of protecting national security and furthering international cooperation in the interest of law enforcement, on the other hand, might collide and in reality, they do collide. The problem of reconciling these competing common interest has appropriately begun to receive scholarly attention.[38] This thesis seeks to further that inquiry by focusing upon the identification and categorisation of the competing factors within extradition decisions. It does so in a way that facilitates a balance between those competing factors in order to lead to fairness and justice.

As can be seen from the case-law discussed in section 1.1 above the underlying aim of extradition is the administration of justice to requested persons. Thus the question that comes to mind is - what is justice from an extradition perspective and how can it be achieved? According to Hans Kelsen's theory on justice - it seems that it is one of those questions to which the resigned wisdom applies that man cannot find a definitive answer but can only try to improve the question.[39] From an extradition perspective, however, Kelson's theory of justice may be applicable. A starting point in coming to an understanding of justice in the context of extradition is that there is a common interest

[37] Section 1.1. pg. 1-9.
[38] See Robert Herbert Wood, 'Extradition: Evaluating the Development, Uses and Overall Effectiveness of the System' (1993) 3 Regent U. L. Rev. 43, 45. John Dugard & Christine Van Den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 92 Am. J. Int'l L.187. M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (Oxford University Press 2014); Heather Smith, 'International Extradition; A Case Study between the U.S and Mexico' (2000) The UCI Undergraduate Research Journal 73; Paul Arnell, 'The Continuing Tension Between Human Rights and Extradition' (2016) S.L.T. 4.
[39] Hans Kelsen, 'What is Justice? Justice, Law, and Politics in the Mirror of Science' Collected Essays by Hans Kelsen. University of California Press Berkeley and Los Angeles 1960) 1.

of states in the preservation of law, order and peace. This has led to international cooperation in the promotion of this goal, which is from the perspective of the states themselves justice. On the other hand, there are other perspectives, not least of requested persons. This thesis seeks to understand justice objectively and to address justice within extradition in such a way.[40]

An alternative understanding of justice can be seen in the following example. Assume that an extradition request is made for a UK national by Nigeria for an offence which the penalty is death by hanging. He suffers from a terminal illness and his aged mother as his only carer in the UK. In such a case it may be doubted that justice will be achieved if Nigeria acquires his presence. In this case, the individual could invoke certain ECHR provisions to prevent his extradition in that his human rights would likely be violated in the requesting state. Notably, that would likely not be the case if a Nigerian was sought from Nigeria by the US in similar circumstances. The death penalty is still practised in Nigeria thus that fact will not prevent extradition (but the current bilateral treaty dated 1931 with the US may hinder extradition – see below). Nigeria is also, of course, not a party to the ECHR. Were a US national sought by Nigeria in such circumstances he would not be able to invoke such provisions as a ground for extradition refusal. The US of course also not a member of the ECHR, although it is a member of the UDHR. That does not directly create legal obligations for states.[41] The point being made is that there are differing perspectives on justice in the context of extradition, primarily between those taken by states and those of requested persons. There are also different manifestations of justice in extradition practice on account of the various types of legal obligations and instruments agreed to by states. An important judicial instance where an

[40] This approach adds to that taken by certain of the authors noted above, at footnote 38.
[41] Australian Human Rights Commission< https://www.humanrights.gov.au/publications/what-universal-declaration-human-rights > Accessed 20 September 2018.

objective approach to justice in extradition was taken is found in the case referred to above, that of *Celinski.*[42] Here the right to protection of one's private and family life under article 8 of the ECHR was invoked as a ground for extradition refusal, and the court adopted a balancing approach to the decision required to be taken – see further below.

Underlying extradition cases there is a conflict of interests. This is seen in the hypothetical example given above. This is because the requesting state's interest is to address the crime allegedly committed by the requested person. Where he is in the UK courts will take into account the interests of the requested person in the form of his human rights. At the end of the extradition hearing it may be the case that either, say, Nigeria's request is accepted, or the individual's human rights prevent extradition. One interest is satisfied at the expense of the other. This happens in most cases - one interest is realised only if another is neglected. Justice is therefore required. It requires an objective approach to be taken. This weighs up the various factors, including the interest of states and requested persons as well as social order and the interests of victims, for example. As regards a just social order, this means an order that regulates the behaviour of individuals in a way that is satisfactory to all including states, that is to say, so that all individuals and states both have their interests taken into account as far as possible.[43]

Achieving justice in extradition is not simply a matter of weighing up the interests of states and requested persons, and other factors. The process can also be a dynamic one, where diplomatic assurances are sought where there are reasons to believe that there will be a breach of human rights

[42] *Ibid.* footnote 29.
[43] *Ibid* footnote 39. pg 2.

of the requested person. In such cases where assurances are not received an extradition request may be denied in its entirety.[44] Here justice may be met - or at least less injustice result - through such a process. Overall, however, this thesis asserts that there is not a complete solution to the problems of competing interests in extradition and the resulting challenges to justice in the process. However, through the use of assurances, the cause of justice can be something that is satisfied to an extent. For example in the well-known case of *Soering*[45] *wh*ere the ECtHR held that the UK could not extradite an individual where there is a real risk that the offender would be subjected to inhuman and degrading punishment in the requesting state. Another contrasting example is the case of *Hamza,*[46] who is currently serving a life sentence in a high-security prison. His complaint that the conditions in the 'supermax' prison in Florence, Colorado where he would be held would breach his human rights despite the assurances that were given before his extradition was granted to the US was rejected by the ECtHR.[47]

This thesis argues that justice in the context of extradition is objective. Whilst individual states, of course, take a subjective view because they view justice in the eyes of their given laws and interests a broader approach is needed. However, the desire for justice from an extradition perspective is not straightforward and uncomplicated. States generally agree that alleged offenders should be made to face the penalty for offences committed (however not all states have the same interests, of course). This is done by negotiating extradition treaties to make this goal achievable. But the idea of justice goes beyond the interests of states. It can become complicated when it concerns an

[44] *Soering v United Kingdom* Series A. No. 161 [1989] 11 EHRR 439.
[45] *Ibid.*
[46] *Ahmad v UK* [2012] ECHR 609.
[47] Callum Adams, 'Hate Preacher Abu Hamza: US Prison is Too Tough' (*The Telegraph,* 17 December 2017) < https://www.telegraph.co.uk/news/2017/12/17/hate-preacher-abu-hamza-us-prison-tough/> Accessed 12 October 2018.

acceptable and universal fair and balanced approach that accommodates other interests including those of developed and developing states. Ultimately, justice is served when conflicting interests are balanced in an objectively reasonable way. This is the foundation upon which this thesis is based, and where its contribution is made.

1.1.2. The Challenge

There have been relatively rapid changes in some states as regards the acceptance of human rights law. The ECHR and indeed the development of international human rights law more generally has increased the specificity of human rights and has extended their reach and scope. Individuals can invoke international and regional human rights norms on a wide variety of subjects ranging from the abolition of capital punishment and torture to right to private and family life and other fundamental freedoms. States now encounter resistance to their extradition request from surrendering states. Consequently, the situation results to several possible outcomes which include; (i) delayed/ prolonged cases (ii) refusal for the state to extradite (iii) relevant notes of assurances that death penalty would not be imposed. Conclusively, extradition treaties in the context of suppressing international and cross-border crime do not attack the identified problem which is the conflict of interest, at its roots. However, on a very practical level, extradition treaties between states help to reduce the options for alleged offenders regarding crime. The extradition treaty assures that the alleged offenders are accountable for their acts either in the state where the act occurred or in the state where the arrest was made.

It is a central tenet of this argument that in the current extradition framework, the interest of states to suppress crime and the aim of extradition-justice conflict with each other in the course of its procedure or extradition negotiation. A conflict of interest exists when one interest can be satisfied

only at the expense of the other or what amounts to the same when there is a conflict between two values and when it is not possible to realise the two at the same time; when one can be realised only if the other is neglected.[48] This conflict is illustrated in the course of extradition negotiation, where the mutual goals of protecting the national security of a state and furthering international cooperation in the interest of law enforcement on the one hand, and the protection of the alleged offender, on the contrary conflict.

As a result, this thesis has also identified the need to analyse the extent to which a fair, balanced approach between those factors for and against extradition can achieve the ultimate purpose of extradition - justice. Human rights are often seen as a conflict with extradition, and in most cases, it stands in the way of extradition. This is where the alleged offender claims that if they are transferred or sent to another state to face trial, it will breach their human rights. There are several cases regarding this issue that will be analysed in chapter two, three and four in this thesis. The test that is applied by courts is whether there are substantial grounds for believing that there is a real risk of a violation of the relevant right upon extradition.[49] Thus, the rapid development and indeed transformation of international human rights has provided these requested individuals with the platform to invoke these international and regional human rights standards. For example, if a state denies an extradition request because the rights of the alleged offender would be breached illustrates the supremacy of the requested individual at the expense of extradition to the requested state.

[48] *Ibid* footnote 39, pg 4.
[49] *Ibid.* footnote 45 [*Soering* Case].

Since the landmark decision by the ECtHR in the case of *Soering v. the United Kingdom,* (*Soering's case*)[50] there has been a growing awareness of the role of human rights concerning surrender by extradition.[51] This debate has predominantly been about the obligations and the role it imposes on requested states when deciding to extradite. An issue in *Soering* was whether the United Kingdom (UK), as a party to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[52] could extradite an accused individual wanted for a capital offence in the United States (US) without a sufficient assurance that the death penalty would not be imposed. Given the circumstances facing death row detainees in the US, the ECtHR held that the UK could not extradite where there was a real risk that the offender would be subjected to inhuman or degrading punishment in the requesting state. It further held that the ECHR obliged its contracting parties to refuse any request for extradition where there were considerable grounds for believing that the fundamental rights of the offender would not be respected, even if the relevant treaty specified no such grounds for an extradition refusal. The supposition was apparent that in the circumstances involving a rights violation of an irreparable nature, the human rights obligation would challenge that of the extradition treaty, without consideration of the usual rules of time and specificity applicable to resolving treaty conflicts.

In the light of these developments, the *Soering* decision is significant because it breaks new grounds in the fields of human rights, extradition law and the law of treaties, all of which attract

[50] *Ibid.* footnote 45 [*Soering* Case].
[51] *Ibid.* footnote 45 [Soering Case].
[52] 4 November 1950, 213 UNTS 221, ETS No. 5 (In force 3 September 1953) The European Convention on Human Rights is a treaty that was drafted in 1950. Each of the numbered 'articles' protects a basic human right. Taken together, they allow people to lead free and dignified lives. 47 states, including the UK, have signed up. That means that the UK commits to protecting the Convention rights. If a person's rights are being breached, and they can't get a remedy in the UK through the Human Rights Act, the Convention lets them take their case to the European Court of Human Rights.< https://rightsinfo.org/the-rights-in-the-european-convention/> Accessed 16 October 2018.

significant interest and controversy.[53] Also, the appropriate balance between the desire to promote international cooperation in matters of international criminal law enforcement and the obligations owed by members of the international community to ensure the protection of human rights.[54] Both of which are identified as areas where literature can be built on regarding the justice and fairness in the context of extradition while considering the conflicting factors and a contribution be made.

Soering's case also raised the considerable alarm about what was regarded as an extraterritorial dimension to the application of a human rights treaty given that the requesting state in the *Soering* scenario was not a party to the ECHR. Nevertheless, this thesis recognises that this tension exists, and the need for balance is not new. Many extradition treaties, both past and present, exhibit some concern for the position of the alleged offender. This concern is reflected in the provisions granting various exceptions to extradition enabling states to refuse an otherwise valid extradition request. These extradition requests may be influenced by certain specified forms of perceived unfairness regarding the treatment awaiting the alleged offender in requesting states. All of which will be identified through case-laws where they have been invoked in the course of extradition in subsequent chapters. It is, however, the goal of this thesis to identify, categorise and analyse on the competing factors, while considering justice and fairness in the context of extradition. This thesis will discuss the issue of which human rights guarantees can provide a basis for barring an otherwise valid extradition request. With a review of domestic and international jurisprudence suggesting that the right to life, the prohibition on torture, diplomatic assurances, culture, politics

[53] Stephan Breitenmoser and Guntere Wilms, 'Human Rights V Extradition; The Soering Case' 11 (1990) Mich. J. Int'I L. 545, 846.
[54] International community also known as states. States are subjects of the international community.

and other forms of ill-treatment, and possibly the right to fair trial, private and family life are the most supportable potential grounds.

The political offence exception has also hampered the obligation of parties to extradite under the law of extradition. One of the most frequently mentioned reasons why alleged offenders are not extradited for a political offence, is the fear that the requesting state's judicial system will be incapable of treating justly those who have shown their disregard for or distrust of their government.[55] The requested states may also fear that political offenders will be subjected to torture, inhuman treatment in the requesting state. The political offence exception is now a standard clause in almost all extradition treaties of the world, and it is also specified in the domestic laws of several states. The typical language of the political exception is found in the treaty between the UK and US in 2003. Where it stipulates that extradition shall not be granted if the offence for which extradition is requested is regarded by the party as one of a political character. The political offence exception is a rule of extradition that provides that the requested states can refuse extradition if the individual is sought for political reasons. Thus, the inherent loopholes in the laws of extradition concerning the political offence exception may conflict with the decision to extradite an alleged offender because some requested individuals hide under this exception to escape the wrath of the law as illustrated in the case of *Julian Assange*.[56] This case will also be analysed in subsequent chapters to illustrate this statement.

Culture, technology, diverse legal systems and immigration borders are also problems that conflict with the decision to extradite an alleged offender. Extradition requires cooperation and willingness

[55] *Ibid.* footnote 13, pg 776.
[56] *Julian Assange v Swedish Prosecution Authority* [2011] EWHC 2849.

between states and these categorised social factors are intertwined. All these problems taken together lead to a stormy relationship with extradition. For example, a requesting state official may visit the requested state regarding the gathering of evidence to help an extradition case. The difference in language, culture, technology, immigration borders and the diverse legal system in states affects extradition. Some states do not have the technology to store the data of its nationals, neither do they have the records of their nationals. Thus, the evidence gathering technique obstructs extradition as illustrated in the case of *Senator Buruji Kashamu's case*.[57] Also, the use of torture for gathering evidence in criminal cases is widely practised by law enforcement officials, especially in Mexico.[58] Amnesty International reported in 1997 that the most popular forms of torture used by law enforcement are:

> 'Electric shocks; semi- asphyxiation with plastic bags or by submersion in water; death threats; mock executions; beatings using sharp objects, stick or rifle butts; rape and sexual abuse; forcing carbonated water up the detainee's nose or slapping both ears at once'[59]

After being subjected to such atrocities, detainees are often forced to sign a confession of guilt. Such practices used to secure evidence are not acceptable in the UK. However, in situations where states cooperate, this method of obtaining evidence will obstruct extradition. At the same time, there may be an issue with obtaining necessary and vital evidence due to the language barrier. The disparity between culture and religion in states gets in the way of extradition.

There is also constant political pressure and tension that accompany any decision to extradite. The negotiation of extradition treaties by states exhibits an interplay between domestic and

[57] *America v Buruji Kashamu* No. 10-2782 September 1, 2011.
[58] Heather Smith, 'International Extradition: A Case Study between the US and Mexico' (2000) The UCI Undergraduate Research Journal, 72.
[59] Mexico Daring to Raise the Voices Amnesty International, 10 December 2001. http://www.refworld.org/pdfid/3cc6b8d34.pdf> Accessed 12 October 2018.

international law. This brings it to a level where some states' government officials often have conflicting enticements regarding the negotiation of extradition treaties. Such conflicting interests lead to domestic or international politics. The apparent need to retain friendly relations with the requesting state directly impacts the court's decision. In these cases, not only did the court have to weigh the evidence before it carefully, but it had to assume the role of a politician to consider the potential effect that granting or denying extradition might have on the state.

Economic interdependence plays a significant role in determining whether to negotiate an extradition treaty with other states. When states desire to maintain a good relationship with one another, it often requests to negotiate treaties. However, the burden that states must accept to take part in international treaty negotiations is central to state concerns. Furthermore, the extradition negotiation process requires financing, and not all states are economically stable enough to keep up with maintaining a large number of treaties. There are costs and expenses involved in bringing a request for extradition, not only must the requesting state hire a representative for their interest, but if extradition is granted, the requesting state is required to provide for the transportation of the requested individual.[60]

Additionally, for states with numerous extradition treaties, the maintenance of these treaties can be time-consuming and often leads to them to being neglected. It is necessary that the extradition treaty is reviewed from time to time due to globalisation. Furthermore, the foundation that is needed apart from a treaty negotiation is goodwill and friendly relations between states. This is because states that are not familiar with each other or harbour fugitive offenders among them might

[60] Ivan Anthony Shearer, *Extradition in International law* (Manchester University Press 1971) 210-211.

not want to negotiate an extradition treaty. As affirmed earlier, the practice of surrendering a requested individual to a requesting state is mostly accomplished by applicable extradition treaties. A possible twist to this alternative mode of transfer of the requested individual by an extradition treaty is the reluctance of some state parties to incorporate its international treaty obligations into its domestic law. This is a challenge to an extradition decision because it is directly parallel to those factors that the court considers when deciding whether to extradite a requested individual or not.

Finally, these factors mentioned above conflict because in the course of extradition negotiation procedure they weigh both in favour of and against extradition thereby causing an imbalance. One of the considerations of this thesis is to consider which human interests and what are the competing factors that are worthy of being satisfied and especially, what is their proper order of rank if any? The need for the balance and how this balance can be achieved by states when making an extradition decision. These are the questions which arise because conflicting interest exists and it concerns the possible conflict of interest that justice within the social order is required. This thesis will also consider when it is necessary to prefer the realisation of one interest to that of the other. Also, to decide which one is more important or of the highest value.

Placing extradition on a scale of balance, the factors that militate for extradition are; the gravity of the crime, penalty of the crime, public interest, safe haven policy and diplomatic assurances. The cases above further highlight that the aim of extradition is justified because states have an interest in ensuring that crimes should not go unpunished. In its entirety, it can be argued that the prosecution of the alleged offender is necessary because crime is becoming a global threat. As evidenced in the September 11, 2001, terrorist attack, the March 11, 2004, terrorist attack in Spain,

and the terrorist attacks on June 3, 2017,[61] May 22, 2017,[62] March 22, 2017, [63] in Britain are all unlikely to be one-off events. It has attained the ability to influence states policy, the activity of democratic institutions, safety, economic stability and most importantly world peace. For example, in London as a commercial and tourist centre, it is expected in reality that an unexpected and lengthy critical situation will affect the performance of businesses and organisations as well as tourist attractions.

As with the achievement of the alleged offender being punished for illegal conduct, what is frequently put forward as the aims of extradition amount to factors in favour of extradition. They are arguments in support of the authority of the state to take the alleged offender into custody and render them up for trial to the requesting states. This sort of argument is required on the assumption that the practice of extradition which deprives an individual of rights he would otherwise enjoy, stands in need of justification. It does not follow, however, that extradition will be warranted whenever it is likely to promote some general aim regarding which practice may be justified.

Furthermore, it is therefore not clear that a state would be harmed in all instances of having them. This is because a requested individual who is termed an alleged offender is regarded as another states' freedom fighter. As evidenced in *McKinnon* and *Assange's* case,[64] they were not necessarily seen as an offender but as individuals who had made a positive contribution to the state government. Thus, in addition to the imaginary scale of balance, the aim of extradition also

[61] An attack in London that left 7 people dead and 48 people injured. A white van hit pedestrian on London Bridge before three (3) men got out and began stabbing people in nearby Borough market.
[62] An attack in Manchester that left twenty-two (22) people dead and fifty-nine (59) people injured after a male suicide bomber targeted children and young adults at the end of the concert at the Manchester Arena by singer Ariana Grande.
[63] Where six (6) people including the attacker died and 50 people were injured in a terror attack near the house of parliament.
[64] *McKinnon v The United States* [2007] EWHC 762, *Assange v Sweden* [2012] UKSC 22.

includes the desire by states to fight international and cross-border crime, various international obligations, the cost and effect of that crime on national and international society, and also the interest of the victims of the crime. Unless it can be agreed that there is a mutual moral or societal order which the criminal law of every state aims to secure regarding its self- interests, these other factors mentioned above justify the aim of extradition and are also in favour of extradition. In the same vein, it will be ill-informed to argue that the need to see that crimes do not go unpunished is the all-embracing aim of extradition.

On the other side of the scale that militates against extradition are diplomatic assurances, economy, language, religion, race immigration borders, domestic and international politics, political offence exception and human rights in most cases are not in favour of extradition, and they limit the pursuit of its general aims. These factors do not derive from the general aim of extradition but rather from independent considerations of the extradition procedure. Indeed, these factors inevitably arise in the course of its operation, and it influences the decision to extradite either positively or negatively. The factors also create conflict that takes the form of upholding extradition treaty obligations in one hand and protecting the rights of the alleged offender on the other hand and at the same time trying to suppress crime. The conflict reflects the appearance of an imbalance between the competing factors within an extradition decision, due to some states placing more emphasis on individual factors and other states on different factors. Also, it is possible to categorise these factors against extradition into two broad groups- legal and non-legal factors. It is further possible to break down these classified factors into human rights bar, political, social and economic factors.

These distinct factors placed on either side of the scale mentioned above bear on the extradition process, and they sometimes limit the absolute pursuit of its general aims. For example, these competing factors which bear on the extradition process can lead to delays in processing the extradition request, which in turn leads to delay in the trial of the alleged offender and some cases extradition is not effected in its entirety. As illustrated in *David Calder's case,*[65] who fought his extradition to the US for three years, *Hamza,*[66] fought his extradition to the US for eight years invoking human rights issues, fifteen court cases and a £25M bill for taxpayers.[67] Thus, it is pertinent for states to be as transparent as possible about justifying and qualifying the aims of extradition, as this will aid in the categorisation of the factors and the decision to extradite. Therefore, a useful distinction can be drawn between justifying the aim of extradition and its competing factors. When this is achieved the upholding of extradition treaty obligations on one hand and protecting the rights of the alleged offender on the other hand and at the same time trying to suppress crime may be balanced if these factors for and against extraditions were articulated and acted upon.

This distinction corresponds to the difference between what justifies the practice of extradition and the conditions that limit or qualify the circumstances in which extradition may be resorted to. Such a distinction between the aims of extradition and the limiting aims has proved very helpful in identifying, categorising and analysing the factors for and against extradition, which is the aim of this thesis. It is, however, the premise of this thesis that in the course of extradition negotiation

[65] *David Calder v HM Advocate* [2006] S.C.C.R 609 at 14.
[66] *Ibid.* footnote 30 *Hamza's case.*
[67] Chris Hughes, 'Hook gets the Boot; Abu Hamza has finally left the UK after 8 years, 15 court cases and a £25 million for taxpayers' (*Mirror* 6th October 2012) http://www.mirror.co.uk/news/uk-news/abu-hamza-deported-from-uk-after-1363430> Accessed 20 September 2018.

there is a conflict between the factors for and against extradition. A closer analogy of this argument bears that it is necessary to strike a fair balance between extradition and the competing factors, to establish a just order that may afford happiness to both the requesting and requested state. This requires a balancing exercise because doing this will enable a detailed analysis of the decision-making process. It is the further premise of this thesis that the balancing approach is essential, but objective given that each case that is decided on will turn on the facts found by the judge. The approach should be the one where the court after finding the facts, sets out the factors that are for and against it. Only after this, sets out a consistent and rational conclusion as to the result of the fair balance that is reached and why extradition should be ordered.

1.2. Aims and Objectives

This section sets out the research aim, questions and objectives.

1.2.1. Research Aim

With the assumption that there is a need on how to balance the competing factors within an extradition decision, this thesis seeks to identify, categorise and analyse the competing factors. This goal raises the following *research questions*, which this thesis seeks to answer;

i. Why is there a need for balance between extradition and its competing factors?

ii. What are the competing factors that must be balanced within an extradition decision?

iii. How can a fair, balanced approach between the competing factors within an extradition decision be achieved by states when making an extradition decision?

1.2.2. Research Objectives

To adequately answer the research questions and achieve the aim of this thesis, the following objectives are identified;

i. To describe the problems encountered in the course of extradition;

ii. To identify and categorise the competing factors that arise from an extradition decision;

iii. To evaluate and analyse the impact of the legal and non-legal factors that emerge from an extradition decision in states;

iv. To evaluate the concept of justice and fairness in the context of extradition

v. To analyse the extent to which a fair balancing approach between the factors for and against extradition can achieve the ultimate purpose of extradition – justice.

1.3. Purpose of the Thesis

The purpose of this thesis is to categorise and analyse the factors that conflict within an extradition decision and in doing so bring to light an approach that will aid fairness and justice. In the existing literature, several studies address the current traps and challenges facing the law of extradition.[68] These problems in the law on extradition are many and complicated because the interests and values involved in applying it are in some respects contradictory.[69] Certain of these studies raise the issue and question of 'balance'. 'Balance' is pertinent to this study of the competing factors within an extradition decision. A balance must be sought of those competing factors or interests. First, is the interest of the requesting state to acquire the presence of the alleged offender before

[68] John Dugard and Christine Van den Wyngaert, 'Reconciling Extradition with Human Rights' (1997) AJIL Vol 92; 187, Robert Herbert Woods, Jr, Extradition: Evaluating the Development, Uses and Overall Effectiveness of the System' (1993) 3 Regent. U. L. Rev. 72, Heather Smith, 'International Extradition: A Case Study between the U.S and Mexico' (2000) UCI Undergraduate Research Journal, Paul Arnell, 'The Continuing Tension Between Human Rights and Extradition' (2016) S.L.T. 4.

[69] Dionysios Spinellis, 'Extradition- Recent Developments in European Criminal Law' (2006) 8 Eur. J.L. Reform 223, 252.

its authorities to be able to prosecute or execute a penalty. A second interest is that of the requested alleged offender to avoid being surrendered to a requesting state that may violate their fundamental rights. There are other interests at stake as well, including those of the victims of crime and international legal obligation. All these should be considered. To the extent to which they conflict with each other solutions should be sought in which the conflicting interests are balanced in the best possible way. The thoughts of these studies[70] have traditionally been influenced and conditioned by relevant treaties and jurisprudence. It is suggested, however, that these conflicting factors and interests be seen in a new light. This includes a balancing approach that takes into account fairness and justice from an extradition perspective in the course of considering the conflicting factors.

These studies[71] generally do not take into account the fairness and justice of extradition while considering the conflict of interests between extradition and the factors that shape its outcome. In other words, in many cases, researchers are more concerned with whether states meet their obligations rather than the underlying justification of the aim of extradition. Although not without problems an analysis of the competing factors within extradition decisions are part of a fruitful research agenda when the concept of justice and fairness is taken into account. However, while this thesis will address the international legal framework in which this 'balance' is considered, it is of interest to also consider the issue of justice and what it achieves. As discussed above, what justice and fairness are from an extradition perspective is not straightforward.

[70] *Ibid.* footnote 68.
[71] *Ibid.* footnote 68.

Before understanding how a fair balancing approach can be reached when the competing factors conflict there is the need to also understand the concept of fairness and justice in the context of extradition. To achieve a balanced approach to fairness and justice from an extradition perspective will be determined. As noted, it is submitted that fairness and justice in extradition is something that results from an objective analysis of all the competing interests and factors within a decision. The thesis seeks to approach the problem of 'balance' by accepting the strong pressures making extradition desirable for all states and yet realising that at a fundamental level the aim of extradition also includes justice in the form of protecting the rights of the alleged offender. This position is analysed primarily by highlighting the competing factors that weigh both in favour of and against extradition.

1.4. Significance and Contribution of the Thesis

This thesis contributes to knowledge by advancing the academic debate and suggesting whether a universal fair balance approach is possible in general and in particular in both developed and developing states. Further, this thesis entails an analysis of the competing factors within an extradition decision designed to lead to an understanding that includes the concept of justice and fairness in the context of extradition. This thesis asserts that a conflict of interest exists in the current extradition framework in both developed and developing states. In the process of considering the fairness and justice of extradition, it is necessary to strike a balance between the conflicting factors to establish an order that considers them in an objective and reasonable manner. This thesis is significant and makes a contribution by adding to the body of literature on when it is necessary to prefer the realisation of one interest over the other. It also contributes to knowledge by indicating a hierarchy of the categorised competing interests, whether one interest may be considered of a higher value and indeed whether one may be thought to be the highest.

1.5. Literature Review

There is a wealth of scholarly writing in addressing extradition in general and the notion that certain considerations should be taken into account in the extradition process. This is found in both primary and secondary sources,[72] and includes the writings and opinion of scholars on extradition from 1954 to 2016.[73] Within this writing information and discussion of the competing factors with an extradition decision is present. The present thesis builds upon the writings of these scholars and refers to relevant jurisprudence. In doing so, this thesis adds to the body of existing knowledge.

One of the relatively early writers is Honig, who published a relevant work in 1954.[74] He explained that the multilateral Convention provides the footing for the effective practice of extradition. According to him, such Conventions require the acceptance of the state that they seek to bind. Further, he suggested that certain fundamental principles and agreements should be achieved. These rotates around the following issues: (i) whether the parties to the Convention are to be under a legal duty, in prescribed circumstances, to grant a request for extradition, or whether the decision concerning such a request is to be left to their discretion, viz whether extradition is to be mandatory or permissive; (ii) whether political offences shall be defined, or whether it shall be left to the requested state to define such offences by references to municipal law, and whether the duty to

[72] As identified in the bibliography and footnotes, table of cases, Journal Articles, Government Report, Policy Documents, law reform documents and media reports in this thesis.

[73] Fredrick Honig *Extradition by Multilateral Convention* (Cambridge University Press 1954) 67, See also Robert Herbert Woods Jr, 'Extradition; Evaluating the Development, Uses and Overall Effectiveness of the System' (1993) 3 Regent. U. L. Rev. See Also, John Dugard and Christine Van den Wyngaert, 'Reconciling Extradition with Human Rights' (1998)92 AJIL 187; Umozurike. U.O, *Introduction to International Law* (Spectrum Books, Ibadan Nigeria, 2010).104, See also; Chris N. Okeke, *The Theory and Practice of International law in Nigeria* (Fourth Dimension Publishing Ltd Enugu, 2014) 103 See also, M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (6th edn, Oxford University Press 2014). Paul Arnell, 'The Continuing Tension between Human Rights and Extradition' (2016) S.L.T. 214.

[74] Fredrick Honig, *Extradition by Multilateral Convention*. (Cambridge University Press 1954) 78.

refuse the extradition of political offenders shall be absolute or whether discretionary power shall be vested in the requested state; (iii) whether the parties to the Convention shall be allowed to differentiate between their own and foreign nationals, or whether request for extradition shall be determined without regard to the nationality of the persons whose extradition is sought; (iv) whether the rule of speciality is to be strictly observed, alternatively whether its observance may be waived by the requested state and/or the person concerned, etc. Honig also discussed extraditable offences, political offences, and offences punishable by death as well as the conflicting request for extradition.

Following on from Honig[75] is Bedi who in 1968[76] asserted that extradition as a subject involves municipal law as well as international law. He examined the four basis for a claim to extradition, which are treaties, national laws, reciprocity and morality. He also covered extraditable offences, objects of extradition and practice in common law states. Under the procedure for extradition, he discussed the request for extradition, concurrent demands by various states, judicial intervention, conditional competence with request and grounds for refusal of extradition. He added that though under the existing rules of international law, no state, in the absence of a treaty, is under any legal obligation to surrender a fugitive found within its jurisdiction to the requesting state. Neither Honig's[77] nor Bedi's[78] approach engages in an in-depth look at specific problems that can occur following a request where there are competing factors to extradition at play. Further, neither author examines the principles directly aimed at the application of human rights within extradition. They do not explain why measures must be taken to respect human rights and how to balance fighting

[75] *Ibid.* footnote 74. pg 77.
[76] Satya Deva Bedi, *Extradition in International Law and Practice*. (Dennis & Co., Sukkur 1968) 34.
[77] *Ibid.* Footnote 74.
[78] *Ibid.* Footnote 76.

international cross-border crime and respecting the rights of the alleged offender- this is partly a result of the date of these publications.

This thesis identifies, analyses and categorises the competing factors within an extradition decision. These identified and categorised competing factors include human rights, accepting that human interests are worthy of protection during an extradition procedure. Moving forward to 1993 and the writing of Wood,[79] he submits that a myriad of political, social, and judicial factors play a crucial role in shaping the outcome of extradition. The Wood[80] article examines the development of extradition throughout the centuries, both with and without the use of extradition treaties. It explores the various disguised or alternative methods to extradition and also the advantages that they have over traditional extradition. Finally, it proposed that bilateral treaties be replaced with treaties based on geographical or political affinities, consisting of several states. Citing modern day examples which include the Arab League Extradition Agreement, The Beneloux Extradition Convention and the European Convention.[81]

Wood[82] further mentions the fact that the injustice arising from the traditional rule of non-inquiry would ostensibly be eliminated through a centralised system which carefully monitors international extradition and pays more significant attention to individual rights and liberty. Building on Wood's study[83] this thesis suggests an approach to the myriad of factors that play a crucial role in shaping the outcome of extradition that can lead to objectively justifiable decision

[79] Robert Herbert Wood, Extradition: Evaluating the Development, Uses and Overall Effectiveness of the System' (1993) 3 Regent U.L. Rev.43, 43.
[80] *Ibid.* pg. 69.
[81] *Ibid.* pg. 69.
[82] *Ibid.* pg. 69.
[83] *Ibid*. pg. 69.

making. These factors have been identified and categorised through analysing extradition jurisprudence where persons have been sought for terrorism, cybercrime, financial crime, murder, illegal drugs and human trafficking. A number of these cases have been decided by the ECtHR, and are important due to its scrupulous examination of the cases and the weight of its arguments.

One of the leading articles in the area of extradition is that of Dugard and Van den Wyngaert.[84] It is their assertion that there is tension between human rights in the extradition process and the demand for more effective international cooperation in the suppression of crime. Dugard and Van den Wyngaert, therefore, added human rights to the factors to be taken into account and that it is necessary to strike a balance between the two. Dugard and Van den Wyngaert [85] went further to state that the incremental and caustic response of extradition law fails to provide a proper legal framework for balancing the human rights of the fugitives and the interest of states in the suppression of transnational crime. Dugard and Van den Wyngaert [86] stress that new treaties and additional protocols to existing treaties should take into account the human rights factor and regulate it. This is in order that courts and executives can exercise powers in a coherent manner that balances the interest of the requested person's human rights with that of law enforcement. In achieving a better balance, the authors suggested that the solution might be to make more use of conditional extradition, which would allow a requested state to monitor the treatment of the individual after their return to the requesting state. The other suggested solution lies in the

[84] John Dugard and Christine Van den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 92 AJIL, 187, 188.
[85] *Ibid.* pg. 187.
[86] *Ibid.* pg. 207

development of the procedure of *aut dedere aut judicare,* which would allow states to refuse extradition on human rights grounds without letting the offender go unpunished.[87]

Although these strategies might be appropriate in some cases, they cannot be applied in all cases. Consequently, it will usually still be incumbent on the domestic courts to find the solution to individual cases by balancing the rights of the alleged offender with the state interest in the suppression of crime. Such balancing will entail refinement of the criteria on which they base their findings.[88] Building on Dugard and Van den Wyngaert's[89] assertion which has only included the acknowledgement of human rights in extradition, this thesis adds that apart from human rights, there are other factors. It suggests an explicit recognition of the role of the additional competing factors in extradition will serve the interest of both the alleged offender and international criminal law enforcement.

From an African perspective is Umozurike,[90] who makes the general point that postulates that the rationale for extradition is that serious crime should not go unpunished even if the offender escapes from the jurisdiction where the crime was committed. He goes on to discuss the procedure for extradition and notes that for an extradition request to be made, there must be an extraditable person and an extraditable crime. He concludes that a request for extradition may be turned down if it is based on political, racial or religious grounds. Okeke in 2010[91] also comes from an African perspective. He addresses aspects of extradition in international law from that viewpoint. He traces

[87] *Ibid.*footnote 84. pg. 207.
[88] *Ibid.* footnote 84. pg 206.
[89] *Ibid.* footnote 84. pg 188.
[90] Umozurike, U. O. *Introduction to International Law* (2010, Spectrum Books, Ibadan, Nigeria) 104.
[91] Chris N. Okeke, *The Theory and practice of International Law in Nigeria* (Fourth Dimension Publishing Ltd, Enugu, Nigeria. 2010) 103-135.

the history of extradition and the position of extradition in contemporary international law. The author explained extraditable offences, extraditable persons, and procedure for request for extradition, speciality principle, and offences of a political, military and religious character. The concept of extradition in light of the applicable law in Nigeria was also discussed. The author extensively discussed political offence exception. According to the author, political offences have given rise to difficulties of interpretation which different states have tried to solve in different ways. In contrast to Okeke, this thesis argues that there are myriad of other factors that affect the outcome of extradition. It takes an in-depth look at the competing factors in international extradition arrangements, building on the extradition literature in Nigeria and increasing understanding of the competing factors as well as the concept of justice and fairness of extradition in Nigeria and beyond.

A leading text on extradition law is that by Professor Bassiouni published in 2014.[92] He approached the subject in a relatively broad way, noting the factors that conflict with extradition including those based on law, policy, political factors and human rights. His assertion relies on the certainty of enumerated offences, the clarity of detailed national laws and knowledgeable judges and prosecutors who will apply the law fairly and impartially. Unfortunately, Professor's Bassiouni's assertion is plagued with practical drawbacks similar to that of Heather Smith[93] and Paul Arnell.[94] Arnell asserts that there is tension between competing interests in extradition, but has only identified one of those conflicting interest, namely human rights.[95] In addressing the question of

[92] M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (6th edn, Oxford University Press 2014) 507.
[93] Heather Smith, 'International Extradition; A Case Study between the U.S and Mexico' (2000) The UCI Undergraduate Research Journal, 73.
[94] Paul Arnell, 'The Continuing Tension Between Human Rights and Extradition' (2016) 40 S.L.T. 214.
[95] *Ibid.* footnote 95. pg 213.

the interest that will prevail, he concluded that the exercise of the UK courts to examine the practice of its partners including assurances that may be made is something that the courts are not best suited to undertake. Akin to Arnell's[96] assertion, Smith[97] identified human rights, interpretation problems and cultural conflict as problems that occur between states during an extradition negotiation. Although the issue of balance was not specifically mentioned, her discussion generally increases the understanding of extradition relationship as a whole.

Overall, it is suggested that the current literature suffers from several shortcomings and limitations. Certain analysis are specific to a particular state, some are archaic, and others are primarily descriptive. This thesis attempts to ameliorate these shortcomings and limitations by drawing upon the literature and jurisprudence to address the role of competing factors in extradition in a broad and general sense. It addresses the fact that there has not to date been a direct examination of the competing factors within an extradition decision, centring upon the issues of fairness and justice. It is believed that the delivery of an alleged offender is not extradition unless it is motivated by the participants' belief that justice obligated them.[98]

The authors and scholars identified above have described extradition law and practice and identified issues arising in the area. Woods,[99] Dugard and Van den Wyngaert,[100] Bassiouni,[101] Smith[102] and Arnell[103] and others have all identified that certain factors shape the outcome of

[96] *Ibid.* footnote 94. pg 214.
[97] *Ibid.* footnote 93. pg 75.
[98] *Ibid.* footnote 25. pg 44.
[99] *Ibid.* footnote 79.
[100] *Ibid.* footnote 84.
[101] *Ibid.* footnote 92.
[102] *Ibid.* footnote 93.
[103] *Ibid.* footnote 94.

extradition decisions. This thesis, in building on the work of these authors adds that there are other factors that influence extradition decision making that must be identified, classified and analysed. This thesis adds to the already existing body of knowledge with a more explicit acknowledgement of the role of the various competing factors in extradition will balance the interests of both the alleged offender and the international criminal law enforcement.

1.6. Research Method, Methodology and Approach

Paul Chynoweth[104] asserts that no purpose would be served by introducing a methodology section within a doctrinal research publication because the process is one of analysis rather than data collection.[105] While this may be true for published research journals, the situation about a PhD thesis is different. This is because legal academics seek to educate their interdisciplinary colleagues on the nature of method and methodology they use. To do this, there is a need to reflect on the practice of our discipline.[106] If the analysis of the data or the assumptions that inform the analysis are not known, it is difficult to evaluate this thesis and synthesise it with other studies on a similar topic. It can also impede other researchers carrying out related projects in the future.[107] For these reasons alone, clarity around process and practice of method is vital. It is hoped that this section will lead to more clarity around thematic research analysis in law.

[104] Paul Chynoweth, 'Legal Research' In Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2008) 37.
[105] *Ibid.* pg. 37.
[106] *Ibid.* footnote 104. pg. 37.
[107] Jennifer Attridge - Stirling, 'Thematic Networks: An Analytic Tool for Qualitative Research' (2001) 1(3), Qualitative Research 385-405.

A research method is simply a research tool that is used in performing research- for example, a qualitative method.[108] On the other hand, a research methodology is a justification for using a particular research method.[109] Having a clear idea of the methods and methodology of this thesis makes the literature review more straightforward because it precisely targets studies related to this topic and it critiques the whole approach to similar studies. Every research thesis, no matter the methodology that is being used, needs a literature review as a precursor to a further study- a nexus to which has been done before. The literature review is asking what has been said about extradition, what testimony is available this includes- the secondary literature- text, journals, government reports, policy documents, law reforms documents, media. One point that must be made is that doctrinal research is more than merely a literature review.[110] However, academic lawyers are now participating in broader interdisciplinary environments, where there is little knowledge of different expectations about explanations of research methods and methodology. Therefore, by continuing this discussion, it is important to explore some of the nuances implicit in the terminology that will be used in this section of the thesis.

i. Qualitative Research- A qualitative research is defined simply as non-numerical and contrasted as such with quantitative (numerical research).[111] After identifying this thesis as qualitative research in a broad sense, categories which could be considered as covering the majority of the research that is carried out has been identified as doctrinal research, which will be explained below.

[108] C. R. Kothari, *Research Methodology and Techniques* (2nd edn, New Age Publishers 2004) 26.
[109] *Ibid.* pg. 26.
[110] Arlene G. Fink, *Conducting Research Literature Review; From the Internet to Paper* (2nd edn, Sage Publication, 2005) 22.
[111] Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press Ltd 2012) 17.

ii. Doctrinal Research- Provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and perhaps predicts future developments.[112] Doctrinal research focuses on legal principles generated by the courts and the legislature. The arguments are based on legal norms and standards, and a distinction is made between these standards and the facts of any situation. The study of the legal text characterises the methods of doctrinal research, and for this reason, it is often described colloquially as 'black letter law'.[113] The doctrinal method is usually a two-part process because it involves first locating the sources of law and then interpreting and analysing the text.[114] Before analysing the law the researcher must first locate it, for example, it may require the researcher to access and analyse all the current and historical legislation on extradition.

iii. Thematic Approach – Thematic analysis approach is a widely used qualitative data analysis method. Thematic analysis is a method of identifying, analysing, and reporting patterns (themes) within data. It minimally organises and describes your data set in (wealthy) detail.

The other method that could be used for this research is content analysis. Content analysis has been compared to doctrinal research. Although like doctrinal analysis, it emphasises the role of the investigator in the construction and the meaning of the text. There is an emphasis on allowing

[112] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do; Doctrinal Legal Research' (2012) 17 Deakin L. Rev. 83, 124.
[113] *Ibid.* footnote 104. pg. 29.
[114] *Ibid.* footnote 112. pg. 110.

categories to emerge out of data and recognising the significance of understanding the meaning of the context in which an item being analysed (and the categories derived from it) appeared.[115] However, it is not suitable because content analysis includes the process of reading judgment, legislation and policy documents as text rather than reading the substance of the law and legal reasoning.[116]

In the first instance, this thesis examines the current competing factors within an extradition decision. In particular, it argues that a conflict of interest exists between the mutual goal of protecting the national security of a state, furthering international cooperation in the interest of law enforcement and the protection of the alleged offender conflicts in the process of extradition negotiation. This is because case-laws have shown that one interest is always satisfied at the expense of the other. These determine, to some extent, which human interests and the competing factors that are worthy of being satisfied. Also, especially what their proper order of rank is if any. This thesis identifies these competing factors, categorise and very briefly analyses them through cases. This thesis notes the various attempts at categorisation and the testimony of scholars over the last two decades. This thesis argues that there is a need for a more explicit process for the fair balancing approach for articulating the method that is accepted within and outside the UK-EU. Then more ambitiously, the thesis makes a start by introducing the need to consider the concept of justice and fairness of extradition within which conclusions can be reached.

In achieving this, a thematic approach to presenting these arguments is appropriate for this research. Also, having examined the research terminologies, the research aim, questions and

[115] *Ibid.* footnote 111. pg. 17.
[116] *Ibid.* footnote 107. pg. 118.

objectives illustrate that this thesis is qualitative in nature. Qualitative approaches are incredibly diverse, complex and nuanced,[117] and thematic analysis is seen as a foundational method for qualitative analysis. It is the first qualitative method of analysis, as it provides core skills that will be useful for conducting any other forms of qualitative analysis. One of the benefits of thematic analysis is its flexibility. However, the absence of clear and concise guidelines around thematic analysis means that 'anything goes' critique of qualitative research,[118] may well apply in some instances. Any theoretical framework carries with it some assumptions about the nature of the data, what they represent regarding the 'the world', 'reality', and so forth.

Some of the phases of thematic analysis are similar to the phases of other qualitative research, so these stages are not necessarily all unique to thematic analysis. The process starts when the analyst begins to notice, and look for, patterns of meaning and issues of potential interest in the data – this may be during data collection. The endpoint is the reporting of the content and meaning of patterns (themes) in the data, where 'themes are abstract (and often fuzzy) constructs the investigators identify before, during, and after analysis'.[119] The analysis involves a constant moving back and forward between the entire data set, the coded extracts of data that is being analysed, and the analysis of the data that is being produced. Writing is an integral part of the analysis, not something that takes place at the end, as it does with statistical analysis. There are different positions regarding when to engage with literature relevant to the analysis with some arguing that early reading can

[117] Immy Holloway and Les Todres, 'The Status of Method: Flexibility, Consistency and Coherence' (2003) 3(3), Qualitative Research, 345-357.
[118] Charles Antaki, Michael Billig, Derek Edwards, and Jonathan Potter, 'Discourse Analysis Means Doing Analysis: A Critique of Six Analytical Shortcomings' *DAOL Discourse Analysis Online [Electronic Version] 1(1)* 2002 < https://extra.shu.ac.uk/daol/articles/open/2002/002/antaki2002002-paper.html> Accessed 16 October 2018.
[119] Gery W. Ryan and H. Russel Bernard (eds), Data *Management and Analysis Methods. Handbook of Qualitative Research* (2nd edn. In: Handbook of Qualitative Research, 2nd edn. Norman Denzin and Yvonne Lincoln, eds. Sage Publications. 2000) 780.

narrow the analytic field of vision, leading to the focus on some aspects of the data at the expense of other potential crucial aspects.[120] Another, argue that engagement with the literature can enhance the analysis by sensitising one to more subtle features of the data.[121] Therefore, there is no right way to proceed with reading, for purposes of thematic analysis. Although a more inductive approach would be enhanced by not engaging with literature in the early stages of analysis, whereas a theoretical approach requires engagement with the literature before analysis.

Overall, this thesis relies on 'black letter law', there will be no interviews or a survey concerning the aim and goal of this thesis. Its approach is to identify, categorise and analyse the competing factors within an extradition decision. This will involve the collection of data from primary and secondary sources. These include academic evaluation, textbooks, encyclopedias, periodicals (law journals and law reviews) case digest, (which would provide case facts and decisions) legislation, statutes and treaties; as such, this is best conducted by using a library-based approach. In summary, this thesis employs a qualitative doctrinal approach.

1.7. Scope and Limitation of the Thesis

Extradition law is an amalgamation of international and domestic law. This thesis approaches the subject of extradition from both an international and domestic law perspective. It does not involve a comparative dimension. Despite the diverse legal systems that are used by state courts, a comparative approach is not taken because the case-law that will be analysed in subsequent chapters in this thesis reveals that the competing factors affecting extradition decision and the need for the balance are in fact universal. The case-law reveals that one interest is always satisfied only

[120] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) Qualitative Research in Psychology, 3 (2). pp. 77-101. ISSN 1478-0887 < Available from: http://eprints.uwe.ac.uk/11735> Accessed 16 October 2018.
[121] Anthony G. Tuckett, 'Applying Thematic Analysis Theory to Practice: A Researcher's Experience' (2005) 10 (1-2), Contemporary Nurse 75-87.

at the expense of another. This only occurs when there is a conflict between two or various interests and when it is not possible to realise both at the same time, or when one can be realised only if the other is neglected. Therefore, there is no need for a specific comparative approach to be taken, and the findings will be relevant to both developing and developed states.

While an extradition treaty may impose an obligation to extradite on the international legal plane, the determination of the state's response to an extradition request whether made by the executive or the judiciary must take place by that state's domestic law. This thesis will examine states including the US and UK where illustrations will be drawn from, this is due, in part, to the number of cases that have arisen in both. In addition, Nigerian case-law will be examined. Overall, states from Europe, the UK, North America, the US and Africa, Nigeria will be examined. As these states are party to international and regional agreements, the findings from this analysis will provide a relevant link to the bilateral/multilateral extradition regime examined throughout this thesis.

In recognition of the inevitable political aspect of many extradition decisions, especially the decision to refuse to surrender, two of the more powerful states were deliberately chosen to examine. They have both been chosen because of their extensive experience in handling complicated and often controversial extradition request from a close, culturally similar, but powerful, neighbouring state. The analysis will aid to identify and evaluate the impact of human rights. Also, the human interests and the competing factors that are worthy of being satisfied and especially, their proper order of rank, if any. Additionally, the need for the satisfaction and how this satisfaction can be achieved by states when making an extradition decision rather than simply politics, on a decision to extradite.

Furthermore, the UK-EU and US extensive experience in dealing with challenges to extradition on human rights grounds have arisen within a highly charged political context between two otherwise close states. In most recent ECtHR case-laws, however, a new source of exception has emerged, grounded in the provisions of the UK extradition law and practice. This exception aims to protect alleged offenders from unfair trials, unfair treatment, and to guarantee the right to private and family life. These human right interests have an impact on different legal fields stretching from family to criminal law. As has been experienced in the UK lately, there has been a change as alleged offenders now rely on these human interest to resist their extradition to other states or appeal against it. A leading case here is *Polish Judicial Authority v Celinski.*[122]

The US's experience on extradition is also useful for this study, although it is not a member of the Council of Europe (ECHR), it has engaged in several cases involving a UK national invoking specific human rights provisions to avoid or stall extradition. Although, the context of many of the US extradition cases differs significantly from the UK being part of the EU. Most of the provisions of the Convention are triggered by alleged offenders as a means of challenging their extradition on human rights grounds. However, the US courts have taken a different view as to the appropriate role of human rights in matters of extradition. This divergence between how the UK and the US approach the question of extradition also justifies their inclusion in this thesis.

This thesis is also not concerned with the jurisdiction that punishes crimes, nor the protections accorded to refugees from prosecution, and it is not concerned with acts of deportation or expulsion. It is also not a study of the law of asylum, which serves a different purpose than

[122] *Ibid.* Footnote 29.

extradition law given its association with refugee protection or punishment. Extradition law is focused precisely on those who have committed a crime that is extraditable or at least is alleged to have done so. By contrast, with deportation, which remains an act to get rid of an undesired alien. Extradition is a bilateral act of international cooperation valued by states for the very purpose of securing an alleged offender's presence in a particular state for justice. It is the cooperative element and the consequences of the refusal that makes the competing factors within a decision to extradite a compelling subject for this thesis.

This thesis, further extends its focus, to justice and fairness in the context of extradition, it identifies, categorises and analyses the competing factors that may influence the achievement of a successful extradition decision – one that is objectively just. During this research, certain limitations have been encountered. One of the limitations is the insufficient and limited extradition literature and case-law from Nigeria and other developing states. In some developing states, the law of extradition is a novel aspect hence little has been said about it. Often, extradition cases are unreported and only obtained from newspaper reports online, or blogs, some of which are not very reliable sources. Nevertheless, it is considered important to include a developing state, in order to broaden the subjects examined and therefore increase the objectivity of the analysis.

Furthermore, extradition laws are symbolic apparatus through which an entire state try to understand the transfer procedure for an alleged offender better. As can be seen the fact that states use the same word gets printed or uttered again and again does not mean that exactly the same meaning (which is half of the word) spreads from mind to mind.[123] At best what can be displaced

[123] Pierre Legrand, 'The Impossibility of Legal Transplant' (1997) 4 Maastricht J. Eur. and Comp. L.120.

from one jurisdiction to another is, literally a meaningless form of words.[124] For example, the case of *Lord Advocate (for the Government of the Federal Republic of Germany) v M,*[125] Edinburgh Sheriff Court utilised a structured approach where a judge sets out the pros and cons in a balance sheet fashion and then sets out a reasoned conclusion as to the result of the balancing exercise and why extradition has to be ordered. The same principle has been used successfully in other cases within the EU, which includes *Norris v Government of the United States of America,*[126] *HH v Deputy Prosecutor of the Italian Republic, Genoa,*[127] *Celinski case,*[128] and possibly future extradition cases. These cases reveal that the structured approach is used in the UK-EU states when there is a conflict of interest.

Another limitation is the difficulty in achieving the recommendation of this thesis suggesting that others states outside the EU-UK adopt the same or a similar structured approach that is currently used in the UK-EU when there is a conflict of interest. Presently, the US is not a member of the Council of Europe. Thus a US national cannot invoke the right to private and family life within it in US courts if there is fear that such a right would be breached. Advocating that the US or Nigeria use exactly the same balancing approach, therefore, when there is conflict is impossible in reality. This is because it may entail changing or transplating an already existing law from the UK-EU to the US, Nigeria or other states. In any meaningful sense the term legal transplant, therefore, cannot happen, this may be partly because no rule in the borrowing jurisdiction can have any significance as regards the rule in the jurisdiction from which it is borrowed.

[124] *Ibid.* pg. 120.
[125] [2016] SC EDIN 7.
[126] [2010] 2 AC 487.
[127] [2012] UKSC 25.
[128] *Ibid.* footnote 29.

Furthermore, a consideration of a range of case-laws decided by the ECtHR and the established principles that can be relied on leads anyone interested in the matter of 'balancing extradition and the competing factors' to conclude that the model could emerge from continual massive borrowing. This is because anyone who takes the view that 'the law' travels across jurisdictions must have in mind that law is somewhat autonomous entity encumbered by cultural baggage.[129] Unfortunately, laws cannot travel, recommending that other states like the US and Nigeria adopting the ECtHR becomes a legal transplant which is impossible practically. This legal transplant implies displacement, given that there is something in a given jurisdiction that is not native to it and has been brought from another. However, conclusively as previously stated, the recommendation adds to the current existing body of the extradition literature despite its limitations.

1.8. Thesis Structure

The examination of the issues in this thesis is organised into five chapters. This introductory chapter delineates the background of the research and sets out the research aim, questions and objectives. It provides a concise account of the problem, challenge, the research method, methodology and approach of the thesis. Finally, it provides the theoretical framework within which conclusions can be reached.

Chapter two describes the problems encountered in the course of extradition, thus underlining the competing factors that must be balanced within an extradition decision and why there is a need for a balance between extradition and these competing factors. Extradition law, however, is an

[129] *Ibid.* footnote 123, pg. 117.

amalgamation of international and domestic law, this leads to an analysis in using standards developed on a bilateral basis in both Europe-UK and inter-America for illustration, the European Arrest Warrant (EAW) as well as the Model Treaty on extradition developed under the auspices of the UN. The extradition framework is examined in detail to determine the problems encountered in the course of extradition. The various types of crimes analysed will show that the delivery of an alleged offender is not extradition unless it was motivated by the participants' belief that they were obligated by justice. Accordingly, it is relevant to note that if extradition in the current sense of the term occurred, it had to have occurred by authority of natural right and justice. It is common knowledge that an alleged offender is made to face justice for the crime committed or laws that have been violated. For example, a man who is charged with murder in the UK faces a prison sentence. Thus, extradition can be said to be justice brought on behalf of the requested state or the state that has more interest in acquiring the presence of the fugitive offender. This leads to another apparent feature that arises from this thesis, which is establishing what justice and fairness are in the context of extradition.

Revealing a long-held commitment on the part of some states to ensure that an alleged offender receives both a fair trial and fair treatment in the requesting state in chapter two. Leads to a full consideration of the role of human rights from within the extradition treaty itself and it is also a feature that will add to the current extradition literature that exists. In chapter three, the competing factors that arise from extradition decisions are categorised and thoroughly explored, as well as the case-laws from the developed and developing states. This analysis draws upon the collection of judgement, reports, recommendations and views on extradition that have developed under the ECtHR. The examination of these case-laws will assist in the determination of the extent and nature of the role of human rights obligations in matters of extradition, diplomatic assurances. While also

demonstrating that some human right considerations, such as the prohibition of torture and other forms of serious ill-treatment, can bar an otherwise extradition request. Also, as factors that must be balanced within an extradition decision. By examining the human right interest, this thesis identifies an interesting dynamic to the extent to which justice can be achieved.

Following on, chapter four analyses the categorised non-legal factors that may influence extradition. The non-legal factor categorisation is further broken down into three subcategories- political, social and economic factors and the criteria for the classification of these factors will be discussed. While also demonstrating that social, political and economic factors have been recognised as having the ability to influence an otherwise valid extradition request. This analysis draws upon the collection of judgements, unreported cases, reports and recommendations. This analysis is necessary to assist in the determination of whether a fair balance approach between the competing legal/non-legal factors for, and against extradition can be achieved. This chapter shows the need for the fair, balanced approach and how to reduce the tension that inevitably arises during extradition negotiation.

Finally, chapter five discusses and concludes this thesis by reflecting on the archival records examined. It sets out the thesis recommendations and considers issues for future research. The recommendation and proposals of this thesis incorporate safeguards already provided in some ECtHR cases and extradition authors. Therefore this thesis highlights the competing factors within an extradition decision and suggests whether a universal, applicable fair balance approach solutions will mitigate the tension.

Chapter 2

Extradition, Globalisation and Crime

2.1. Introduction

In support of the argument of this thesis set out in chapter one, on why there is a need for a balance between extradition and its competing factors. This chapter aims to discover the competing factors mentioned in chapter one that must be balanced within an extradition decision. However, before this can be achieved, there will be an evaluation of both the effect of international and cross-border crime on states and the impact of globalisation. This evaluation is necessary because it introduces extradition as a method through which states suppress international and cross-border crime. The evaluation further highlights the relationship between bilateral and multilateral treaties. Particularly between the US/UK, US/Nigeria, UK/Nigeria and how they contrast with the European Arrest Warrant (EAW). International and cross-border crime will also be reviewed because it reveals the problems that are encountered by states in the course of extradition. When this is achieved, the distinction between justifying the aims of extradition and it's limiting or qualifying aims will be produced, this adds to the already identified competing factors that should be taken into account in the fair balancing exercise thus contributing to knowledge and building on the current extradition literature.

2.2. Globalisation and Crime

It is sensible, to begin with, an evaluation of the relationship between globalisation and crime because they make good bedfellows, also as the world evolves, and there are new methods and ways of cheating the system and ignoring international boundaries. This evaluation is necessary

because the law of extradition grew from the need or the desire to obtain custody of individuals deemed dangerous to the social cell.[1] Thus, this evaluation leads to the identification of some of the conflicting interest in extradition. Globalisation is characterised by the elimination of time, distance barriers and the increased popular access to technology. All of which has been exploited by both legitimate and illegitimate enterprises. Globalisation and more specifically the upsurge of crime,[2] confront all justice system in states with new difficulties, which includes the nature of the crime committed, taking increasingly sophisticated forms and also acquiring the alleged offender to face trial or prosecution.[3] Terrorists especially now use specialised communication technology to increase reach and effectiveness. This includes social media platforms such as Facebook, Instagram, and Twitter. For example, it is now possible for a jihadist to recruit fighters over the internet and also preach hate and the convert may be anywhere in the world. This strategy has led to young individuals converting into jihadist fighters.[4]

Terrorist groups now have a good reason to use social media whose popularity suits them in several ways.[5] The internet has fast overtaken conventional forms of media such as books, magazines and the social media outlet as radicalisation tools as they allow the terrorist to present themselves as

[1] Christopher L. Blakesley, 'The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History' (1981) 4 BC Int'l & Comp L. Rev. 59.
[2] Crime (hereinafter referred to as offence) has been defined as any violation of law, either in divine or human; an omission of a duty command, or the omission of an act that is forbidden by law, in distinction from a misdemeanour or trespass, or other slight offences. Usman Ahmad Karofi and Jason Mwanza, `Globalisation and Crime' (2006) Bangladesh eJournal of Sociology, Vol 3. No 1. 19.
[3] United Nations Office on Drugs and Crime, Cross Cutting Issues International Cooperation. United Nations New York 2006.
[4] Muslim converts in the West are much likelier than their native born co-religionist to engage in terrorism, or travel abroad to fight for jihadist organisations like IS. In Britain, converts make up less than 4% of muslins but 12% grown jihadist. About fifth of American muslins were raised in another religion yet two-fifth of those arrested on suspicion of being IS recruits in 2015 in Syria and Iraq. <http://www.economist.com/news/britian-convert-make-up-less-4-muslims-12-grown-jihadist-converts> Accessed 18 September 2018.
[5] Maeghin Alarid, `Recruitment and Radicalization: The Role of Social Media and New Technology' Available at www.co.ndu.edu/Potals/96/Documents/books/Impunity/CHAP_13%20> Accessed 18 September 2018.

just another part of the mainstream news.[6] Most social media platforms are easy to use and cost little or nothing to become part of, with them and through them, a terrorist can tailor their messages to recruit fighters. Data from January 2017 shows that the global active Facebook users were between ages 18 – 24, with almost half of all users logging in daily.[7] Terrorist groups understand that if they want to reach out to the younger generation, this is an excellent vehicle. It had also become possible, to carry out illegal conduct or terrorist act with a device that is as small as a smartphone compared to the era when there was no improved technology. In some situations, the individual does not need to be physically present in a state to carry out illegal or unlawful conduct as previously mentioned in *Calder's case.*[8]

As a result of this development, these crimes which include terrorism, cybercrime, financial crime, murder, illegal drugs and human trafficking, now cease to be termed as a local crime but international and cross-border crime.[9] This is due to its universal applicability of the crime mentioned above. The very fact that activities such as murder, kidnapping, cybercrime, illegal drugs, human trafficking and terrorism are deemed criminal in some states, is not sufficient to make it an international crime. To become an international crime, at least the following elements must be present in addition to those of common crime.[10] If the act or series of acts takes place in more than one state; (ii) the act or series of acts takes place wherein no state has exclusive national

[6] *Ibid.* footnote 5.
[7] The Statistics Portal, 'Distribution of Facebook users in the United States as of January 2018, by age group and gender< https://www.statista.com/statistics/187041/us-user-age-distribution-on-facebook/> Accessed 18 September 2018.
[8] *Calder v Lord Advocate* [2006] SCCR 609 Fact of the case is mentioned in Chapter One, Section 1.1. *at* pg 4.
[9] 18th Session of the Commission on Crime Prevention and Criminal Justice, Vienna, 16 April 2009 https://www.unodc.org/unodc/en/commissions/CCPCJ/session/18_Session_2009/CCPCJ_18.html Accessed 18 September 2018.
[10] M. Cherif Bassiouni, 'Methodological Options for International Legal Control of Terrorism' (1973-1974) Akon. L. Rev. 388, 390.

jurisdiction;[11] (iii) the act affects the citizens of more than one state; (iv) the acts affects internationally protected persons (i.e., diplomats, personnel of international organisation); and lastly the acts affects internationally protected objects such as international civil aviation and international means of communication.[12] Thus, whenever any of these elements exist in conjunction with the common crime, it has become an international crime in addition to being a domestic crime wherever it occurred.[13]

The case of *Lord Advocate v Dean* [14] is a recent development that began with a hit and run traffic accident in Taiwan in 2010. *Dean* had been convicted of causing the death of a Taiwanese delivery man when driving under the influence of alcohol. He fled from Taiwan before serving his sentence, returning to his native Scotland in 2012. The Taiwanese Government had sought his extradition since 2013 when it discovered its whereabouts. The High Court decision was necessitated by *Dean v Lord Advocate,*[15] in which it was held that human rights law required consideration of whether the conditions in which Dean would be held in Taipei prison would be compatible with ECHR Article 3. This case illustrates the tension between the human rights of a requested person and the interest served by extradition. That tension has its origins in the case of *Soering v United Kingdom.*[16] As asserted by Arnell,[17] the scenario indicates that it continues to this very day and the *Dean's case* is a clear reminder of the conflicting interest in extradition. The prosecution of criminality nationally and transnationally, the maintenance of good international relations, the

[11] *Ibid.* footnote 10 pg. 390.
[12] *Ibid.* footnote 10 pg. 390.
[13] *Ibid.* footnote 10 pg. 390.
[14] [2016] HCJAC.
[15] *Ibid.*
[16] Series A. No. 161. [1989] 11 EHRR 439.
[17] Paul Arnell, `The Continuing Tension between Human Rights and Extradition' (2016) 40. S.L.T.211, 213.

human rights of the alleged offender, and adherence to the national and the international rule of law are all at play. The conflicting interest in extradition was demonstrated by Lady Paton giving considerable weight to human rights and placing less emphasis upon the presumption that the UK's extradition partners will abide by their obligations including extradition agreements and diplomatic assurances.[18] As noted the reasoning of Lady Paton included the point that the observance of the assurances may well give rise to resentment and hostility that could amount to substantial grounds for the belief that there was a real risk of the violation of Article 3. Lord Drummond Young, on the other hand, focused upon the presumption that Taiwan would act in good faith and abide by its obligations.[19]

The relationship between globalisation with international and cross-border crime rests on the fact that there are deteriorating boundaries between states caused by the ease of migration and further factors such as fastened transportation of persons from one state to another.[20] Compared to the eighteenth century, it has led to the upsurge in international and cross-border crime. Therefore, the *Calder and Dean's case* also supports the assertion that globalisation can be said to have facilitated the growth of international and cross-border crimes. The situation in *Calder and Dean's case*[21] results in three possible outcomes, (i) delay/ difficulty in processing extradition request, which in turn leads to delay in the trial of the accused (ii) letter from relevant authorities of the requesting state giving assurances, and ; (iii) refusal to extradite.

[18] *Ibid.* footnote 14. p.1124, para 56.
[19] *Ibid.* footnote 14. p.1126, para 64.
[20] Janet Ceglowski, 'Has Globalisation Created a Borderless World' (1998) Business Review.17, 20.
[21] *Ibid. See* footnote 8 and 14 for citation of both cases.

2.2.1. Impact of Globalisation

As the impact of globalisation become more eminent, there is increasing attention towards international capital flow.[22] Through globalisation, both developing and developed states can attract foreign investors and foreign capital.[23] At the international level, entry markets into a foreign state require access either by trade or by the establishment of an affiliate in the foreign state with national treatment to compete on equal terms with domestic producers. Consequently, the interaction between international trade, investment and policy at the domestic level is becoming even more important. This has led to both positive and adverse effects for those states. Positively, globalisation offers developing states access to international lending, which can be used to improve infrastructure.

Globalisation is increasing noticeably and is generating new opportunities for both developing and developed states.[24] In the past, developing states were not able to tap on the world economy due to trade barriers, with globalisation the World Bank and international management encourage developing states to go through market reforms and radical changes through loans.[25] Several developing states began to take steps to open their markets by removing tariffs. For example, the rapid growth in India and China has caused poverty to decrease. Developing states depend on developed states for resource flows and technology, while developed states rely heavily on the developing states for raw materials like cocoa, oil. Also, in a state like Nigeria, the first GSM

[22] Winfield Wing-Fai Lau, 'Maximising the Benefits of Globalisation' (2008) 2 Hong Kong J. L.S.129.
[23] Fairoz Mustafa Handi, 'The Impact of Globalisation in Developing Countries' (2013) Developing Countries Studies. Vol. 3 No. 11. 64.
[24] Angie Mohr, 'The Effects of Economic Globalisation on Developing Countries' www.smallbusiness.chron.com/effects-economic-globalization-developing-countries-3906.html> Accessed 18 September 2018.
[25] *Ibid.* footnote 23. pg 64.

service was launched in 2001 before this launch the existing landline networks were limited.[26] This made communication much more accessible for those who could afford a mobile phone.

From an extradition perspective, states such as Nigeria, India, Syria, UK, US, Canada etc., have all been affected by globalisation negatively. These gains that globalisation has brought to the economic sector, education and medical system, while impressive has brought several drawbacks to these states as well. Crimes such as illegal drug trafficking, cybercrime, terrorism, and murder now spread under the influence of globalisation. This negative impact of globalisation affects stability and financial markets. Inevitably, crime has become global, and this increases inequity across and within states.[27] This has been illustrated by individuals that exploit the weakness of states existing regulations. The benefits accrued from crossing borders have been capitalised by many including organised criminals, drug trafficking, terrorism, murder and human traffickers.[28]

There is also an increase in difficulty in regulating global trade. This difficulty is due in large part to exploitation by traffickers and smugglers, where some states no longer have a strict immigration policy regarding the movement of certain individuals. Its disruptive effect has caused people to embrace organised crime and operate in illicit markets as coping mechanisms.[29] The advent of

[26] Dan Isaac, 'Nigeria Goes Mad for Mobile Phones' (BBC News 01 April 2002). <http://news.bbc.co.uk/1/hi/business/1905744.stm > Accessed 18 September 2018.
[27] Nikos Passas, 'Cross-border Crime and the Interface between Legal & Illegal Actors' pg 11.< http://www.cross-border-crime.net/freecopies/CCC_freecopy_2002a_Upperworld.pdf > Accessed 18 September 2018.
[28] Carole McCartney, 'Opting in and out: Doing the Hockey Cokey with EU Policing and Judicial Cooperation' (2013) 77 Journal of Crim. L. 543.
[29] Council on Foreign Relations, 'How Globalisation Affects Transnational Crime' May 20, 2012 Interviewer; Stewart M. Patrick, Senior Fellow & Director of the International Institutions and Global Governance Program, Council on Foreign Relations. Interviewee; Phil Williams, Director of the Matthew B. Ridgway Centre for International Security Studies, University of Pittsburgh. May 30, 2012. < https://www.cfr.org/explainer-video/how-globalization-affects-transnational-crime> Accessed 18 September 2018.

globalisation has helped terrorist groups such as Al Qaeda. They have mainly benefited terrorist groups by allowing the group's members and supporters to cross states borders to acquire and move equipment. Globalisation has allowed terrorist groups to develop strategic alliances with other groups engaged in transnational criminality. Although international crime has been defined as acts prohibited by international criminal law based on the draft codes, treaties or customary practices by all states.[30] However, there is no fixed, accepted definition of international crime. Thus, a distinction can be made regarding international crimes, which is based on international customary law and therefore applied universally.[31] This distinction also extends to crimes resulting from specific treaties, which criminalise certain conduct and require the contracting states to implement legislation for the criminal prosecution of this conduct in their domestic legal system.[32] The core international crimes, that is, under international law, are genocide, war crimes, crimes against humanity and aggression. Cross-border crimes, on the other hand, are acts that violate more than one state.[33] Hence states are faced with the need to suppress crime because of the adverse effect on it.

[30] https://www.peacepalacelibrary.nl/research-guides/international-criminal-law/international-criminal-law/> Accessed 18 September 2018. International criminal law is the part of public international law that deals with the criminal responsibility of individuals for international crimes. International criminal law finds its origin in both international and criminal law. It also closely relates to other areas of international law. The important areas are human rights and humanitarian law as well as the law on state responsibility. The sources of international criminal law are the same as those of general international law mentioned in Article 38 (1) of the Statute of the International Court of Justice; Treaties, international customary law, general principles of law, judicial decisions and writings or eminent legal scholars. The Nuremburg and Tokyo trials signalled the birth of the present day international criminal law i.e. the prosecution of individuals for international crimes before international tribunals. In the early nineties of the previous century, international criminal law received a major stimulus with the establishment of the international criminal tribunal for the Yugoslavia and the international criminal tribunal for Rwanda by the United Nations Security Council. Also the creation of various internationalised or mixed criminal court in 2002, contributed to the rapid development of international criminal law during the last two decades.
[31] https://www.peacepalacelibrary.nl/tag/icty/ Accessed 18 September 2018.
[32] *Ibid*.
[33] *Ibid.* footnote 31.

2.2.2. The Effect of Crime in States

The police, courts and the prison service may be seen as responsible for authorising the official account of a particular crime.[34] Consequently, in a formal sense, the institutions accountable for identifying and processing crime have their authority located in the state.[35] In this detail, states play a fundamental role in the formalisation of crime through its control over criminal justice institutions and the process. Thus, it can be argued that without state clarity policies, there could be no crime. This is not envisioned to mean that criminal deeds would accompany the disappearance of the state. Relatively it implies that crime or an offence is reliant on official identification, determination and enforcement processes. Also, that the social context of crime, at least regarding the community appreciation of it, cannot be as it is without state intervention.

Crime stymies economic growth, it has a social impact on states, its nationals and it also interrupts the security and peace of a state. The economic challenges of crime on states can induce citizens to migrate. Economist estimate that each crime reduces a state's population by approximately one person and each homicide reduce a city's population by seventy.[36] The extent that migration diminishes a locality's tax and consumer base, crime fuelled departures can threaten states ability to adequately educate children, provide social services and maintain a local economy. Furthermore, crime has a physical and emotional impact on individuals in a state, this includes

[34] Mark Findlay, *The Globalisation of Crime Understanding Transitional Relationship in Context* (1st Publish, Cambridge University Press 1999) 68.
[35] The nation state is one where the great majority are conscious of a common identity and share the same culture. The nation-state is an area where cultural boundaries match up with political boundaries. The ideal nation-state is that the state incorporates people of single ethnic stock and cultural traditions. Available from < http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/nation-state > Accessed 18 September 2018.
[36] Julie Berry Cullen and Steven D. Levitt, 'Crime, Urban Flight and the Consequences of Cities' (1999) The Review of Economics & Statistics. Vol. LXXX1 May No. 2. 36.

those who are harmed and for their families and friends.[37] No matter the category of crime, it may diminish the individual's self-control. Thus it affects different individuals in several ways.

Following on from the discussion on the impact of globalisation and crime in states discussed in section 2.2.1 and 2.2.2 it can be seen that individuals are 'just' if their behaviour conforms to the norms of social order supposed to be 'just'. The analysis of the impact of globalisation and crime in states, supports the earlier assertion in this thesis, that states are now interested in preserving the law, order and peace. This led to the international cooperation for the promotion of justice by states seeking to acquire the presence of the alleged offender to face trial or prosecution. Extradition, as mentioned in chapter one of this thesis,[38] has become recognised as a significant element of international cooperation in suppressing these crimes. However, extradition as a panacea to international and cross-border crime is debatable. It is debatable because it may not guarantee the happiness of both the requesting and requested states when the presence of the alleged offender is acquired. Thus, the issue of whether justice is served comes to mind.

2.3. Extradition as a Tool Against Crime

As mentioned in chapter one, section 1.1[39] extradition has become recognised as a major element of international cooperation in the suppression of crime.[40] The extradition process can be seen as taking place as a matter of courtesy between states, and existed in the early non-western

[37] Commissioner for Victim's Right; The Effect of Crime < http://www.voc.sa.gov.au/effects-crime > Accessed 18 September 2018.
[38] Discussed in chapter One of this thesis Section 1.1. at pg. 8.
[39] Chapter One, Section 1.1 of this thesis.
[40] Gavin Griffith QC and Claire Harris, 'Recent Developments in the Law of Extradition' (2005) 6 Melbourne J. Int'l L. 3.

civilisations such as the Egyptian, Chinese, Chaldean and Assyro- Babylonian,[41] where each international agreement was bound up in solemn, religious formulas in the name of national gods. Thus, in the eastern world, the sanctity of international extradition pacts and the honouring of the request by the heads of state have long been respected and viewed as important in the life of domestic communities.[42] The main phases of the history of extradition include; antiquity until the end of the seventeenth century; the eighteenth century to the first half of the nineteenth century; the latter half of the nineteenth century to the mid-twentieth century and the mid-twentieth century to the present.[43] Each of these phases reflects a particular concern central to the state's concept of itself. The early days of practice most frequently subjected political and religious offenders to extradition.[44] From the eighteenth century to the first half of the nineteenth century, extradition treaties began to focus on military deserters.[45] The final phase of extradition law, running from the middle of the twentieth century to the present, has shown an increasing concern with the rights of the alleged offender as well as maintaining the central purpose of the process – the prevention and suppression of crime.

Extradition traditionally reflects the character of international law as the law of states.[46] The term extradition comes from Voltaire's joining of two separate words, 'ex' and 'traditionem'. The word

[41] M Cherif Bassiouni, *International Extradition United States Law and Practice* (6th Edn, Oxford University Press 2014) 97.
[42] M Cherif Bassiouni, 'International Extradition; Summary of the Contemporary American Practice and A Proposed Formula' 15 (1968-1969) Wayne L. Rev. 733.
[43] Valerie Epps, 'The Development of the Conceptual Framework Supporting International Extradition' (2003) 25 Loy. of L. Ang. Int'l and Comp. Rev. 369.
[44] *Ibid.* pg 369.
[45] *Ibid.* pg 369.
[46] John Quigley 'The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law' (1990) 15 N. Carolina Journal of Int'l law and Comm. Reg. 401.

'ex' means 'out', and 'traditionem' means 'a delivering, a handing up'.[47] Therefore, international extradition,[48] involves the surrender by one state to another, an individual that is accused or convicted of an offence and found outside its territory which is competent to try and punish him, and within the jurisdiction (territory) of the another and demands surrender.[49] Several definitions of extradition are evidenced in the various extradition literature.[50] For example, according to Murphy, [51] international extradition is a tool for punishing international terrorists and the necessary conditions for the prosecution of an international terrorist.[52] However, Bassiouni defines international extradition as the process whereby one state delivers to another state, at its request, a person charged with a criminal offence against the law of the requesting state, so that he may be

[47] International Law Commission (ILC) 'The Obligation to Extradition or Prosecute (*Aut dedere aut judicare*)' (2013) 1 UFRGS Model United Nations Journal. 202.

[48] In countries herein referred to as 'states' that consist of other states, for example the US, this thesis may refer to illustrations from extradition that are either interstate or international. It becomes international extradition when it is between the US and another state outside the US. For example, extradition from Nigeria to US will be termed as international extradition. The international extradition process is considerably different from interstate or intrastate extradition. However, this thesis will on focus on extradition internationally between states and the competing factors will be categorised and sub-categorised based on international extradition cases between states.

[49] Roberto Iraola, 'International Extradition and Plea, Immunity and Cooperation Agreements' (2011-2012) 37 University of Dayton L. Rev. 303; See also, *Terlin v Ames,* 184 U.S. 270, 289 (1902); Also Ivan Anthony Shearer, *Extradition in International law* (Manchester University Press 1971)27 -31. The first ever-recorded extradition agreement in the world dates from 1280. B.C. An agreement, providing for the return of prisoners, war refugees and persons who had fled from the state where required, was made within a Peace Treaty document between Rameses II of Egypt and the Hittite King Hattusili.; See Also O'Higgins, 'The History of Extradition in British Practice' (1964) 13 Indian Yearbook of International Affairs 78, Christopher Blaskey, The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History, (1981) 4. Boston College Int'l and Comp. L. Rev. 39. Blakesley actually considers the whole history of extradition, not just French and American, although his review does skip from pre-Christian extradition agreement to those of medieval times.

[50] See Also M. Cherif Bassiouni, *International Extradition United States Law and Practice* (6th Edn, Oxford University Press 2014) See also; John Francis Murphy, *Punishing International Terrorist* (Rowan & Allan held Publishers 1985) 5. Extradition is a process whereby one state surrenders to another state at its request a person accused or convicted of a criminal offence committed against the laws of the requesting state usually within the territory of the requesting state the latter being competent to try the requested person. Starke J. G, *An Introduction to International law* (4th Edn, Butterworth and Co) 260; See Also; 'Kathryn Westcott and Vanessa Barford' 10 Things About Extradition' (BBC News, 27 June 2013). <http://www.bbc.co.uk/news/magazine-23029814> Accessed 18 September 2018.

[51] John Francis Murphy, *Punishing International Terrorist* (Rowan & Allan held Publishers 1985) 5.

[52] *Ibid.* pg. 5.

tried and punished.[53] He further added three core elements which include; acts of sovereignty on the part of two states, secondly a request made by one state from another for the surrender of an accused or convicted person and lastly the surrender of the person required for trial or punishment, in response to the request.[54]

From both definitions provided on extradition, Bassiouni emphasises the actual delivery of the requested individual as the core element of extradition. Most importantly, the key points highlighted by both definitions are the request, delivery and prosecution or imprisonment. All of which are fundamental to the extradition process, but they do not formulate the definition of extradition because they stand isolated from one another. Therefore, for the purposes of this thesis, international extradition will be defined as 'a means by which states cooperate to prevent, control and suppress international and cross-border crime by the surrender of an alleged offender or convicted person by one state to another'.[55] Outlining a basic definition of extradition is necessary as some difficulties may arise on account to imprecise its definition and understanding.[56] Therefore, the request, delivery and the prosecution and sentence of accused and convicted persons are used as a reference point in discussing the original concept of the extradition between states.

In the UK, extradition is an executive function. Extradition proceedings are brought against the subject in the name of the requesting state, and in England, the Crown Prosecution Service represents the requesting state at the proceedings.[57] Hearings in England take place at Westminster

[53] M Cherif Bassiouni, 'International Extradition in American Practice and World Public Order' (1968) 36 (1) Tenn. L. Rev. 1.
[54] *Ibid.* footnote 53 pg. 2.
[55] *Ibid.* footnote 53 pg 2. Herein after referred to as extradition.
[56] Interpretation takes place of terms of a treaty itself, within and outside judicial decisions.
[57] Jennifer Nicole Copenhaver-Celi, 'The New US-UK Extradition Regime: Implications of White Collar Criminals' (2008)25 (1) Arizona Journal of Int'l & Comp. L.158.

Magistrates' Court. In Nigeria, the position is similar to the UK, but a Federal High Court Judge hears extradition proceedings. Similarly, in the US, extradition is not a judicial function but is an executive function that stems from the President's authority to manage foreign affairs. The US attorney's office represents requesting states at the extradition proceedings in the US. As regards the applicable treaties, the treaty in force between the US and UK is the 2003 Extradition Treaty. The treaty currently in force between the UK and Nigeria is the 1931 Extradition Treaty.[58] The Nigerian International Extradition Treaty with the United States 1931, (The treaty applicable to Nigeria was originally signed with the United Kingdom.) entered force June 24, 1935. Within the EU the European Arrest Warrant (EAW) applies. It is a mechanism by which individuals wanted in relation to significant crimes or to serve a sentence post-conviction are surrendered between to face prosecution or to serve a prison sentence. In the UK extradition is the responsibility of the Home Office. From a UK and EU perspective, the EAW has had considerable success in streamlining the extradition process within the EU.

[58] (The treaty applicable to Nigeria was originally signed with the United Kingdom.) EXTRADITION Treaty Series 849 1931 U.S.T. LEXIS 60; 12 Bevans 482 Date-Signed December 22, 1931, Date-In-Force June 24, 1935. Treaty and exchanges of notes signed at London December 22, 1931 Senate advice and consent to ratification February 19, 1932 Ratified by the President of the United States March 3, 1932 Ratified by the United Kingdom July 29, 1932 Ratifications exchanged at London August 4, 1932 Proclaimed by the President of the United States August 9, 1932 Entered into force June 24, 1935.

Extradition can serve as an effective tool effecting mutual legal assistance. It is not, however, a panacea for tackling the international and cross-border crime discussed in this thesis. Extradition often involves a balance of conflicting interests. A challenge for extradition is to balance those competing interests or factors within a decision to surrender in such a way that both the requesting and requested states, as well as the requested person, victims and other interests, are treated in an objectively reasonable manner. A closer look at the definition of extradition itself provided above includes several interlocking elements of the process - request, delivery and prosecution/sentence. The interests of both the requesting and requested states and other parties must be weighed and balanced because only through this can the most objectively reasonable benefits for both states and persons concerned be met. Relevant factors here include the international duty to preserve and maintain public order and minimum standards of fairness for the requested person. The latter point entails the protection of certain fundamental rights of all persons. The former relates to the collective duty of all states to suppress criminal conduct. These factors are part of the continuing conflict of interests or factors in extradition, as the jurisprudence illustrates.

2.3.1. Aims of Extradition

The common interest of states in the preservation of law, order and peace has led to international cooperation for the promotion of this goal. In principle, the underlying aim of states in employing extradition is the final surrender of a requested person in order to administer justice. According to West,[59] the principal purpose of extradition to ensure the swift and effective administration of justice. The very concept of justice is intensely theoretical but highly practical. In reality, from an extradition perspective, the concept of fairness and justice cannot generate easy answers to the

[59] Edward M. West, 'Some Problems of Extradition' (1969) 15 Wayne L. Rev.709.

problem of balance when the interests compete for priority. Thus, the scale of justice invites a superficially attractive solution for courts. However, Ashworth is of the opinion that the metaphor of balancing is a rhetorical device in which one must be extremely wary.[60] At worst it is a substitute for principle arguments, 'achieving a balance' is put forward as if it were self-evidently a worthy and respectable goal, rather like 'achieving justice'.[61] He added that who after all would argue in favour of injustice or an unbalanced system, yet talk of 'balancing' often assumes a kind of hydraulic relationship between human rights safeguards and the promotion of public safety, an assumption that should not be made in the absence of clear objective evidence.[62] That noted, as has been discussed above, this thesis makes the argument that a balance of the competing factors in an extradition decision in an objective and reasonable way can lead to justice in an overall sense.

Bassiouni's definition[63] of extradition stated that its purpose is the surrendering of an alleged offender to the requested state for trial and punishment. This sort of argument is required on the premise that any practice that deprives an individual of liberty would otherwise enjoy stands in need of justification. The effectiveness of international and domestic criminal law is impaired as the occasions for impunity increases, for this reason, in reality, it can be argued that extradition is primarily important to the requesting state. This is because it is not clear that a state would be harmed in all instances by having the alleged offender.[64] While terror directed at civilian or state

[60] Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th Edn Cambridge University Press 2010) 41-45.
[61] *Ibid*. footnote 60.
[62] *Ibid.* footnote 60.
[63] *Ibid.* footnote 53. pg 2.
[64] See the case of *Assange v Sweden* [2012] UKSC 22. see also *Ibori's case,* the town was agog with jubilation as the crowd of kinsmen and associates of the former governor sang and danced from Oghara junction, along the Warri-Benin expressway, where they had waited for him, to his country house. The crowds erupted into a loud and long session of praise songs and prayers as the convoy entered the palatial compound. <The Telegraph 'Why is Julian Assange Still inside the Embassy of Ecuador?' < https://www.telegraph.co.uk/news/worldnews/wikileaks/11681502/Why-is-Julian-Assange-still-inside-the-embassy-of-Ecuador.html> Accessed 13 October 2018. See also Omon-Julius Onabu, Dele Ogbodo, Adibe Emenyonu, and

targets is widely condemned in many states as senseless and unjustifiable, the same act is often viewed in another state as noble acts of 'freedom fighters' or is another as 'state heroes'.[65] For example, the Chair of the Home Affairs Committee was quoted as saying, 'Anyone who can hack into a computer system of the Pentagon should not be sent to trial - I believe he should be offered a job'.[66] This comment was made by the Committee who happens to be the requested state, while the requesting state saw *McKinnon* as an alleged offender.

Additionally, Baroness Browning presented in Parliament that 'the Pentagon would do well to employ *Gary McKinnon* to sort out the weakness in their computer system'.[67] Consequently, this argument may overlap with the general aims and justifications for the practice of extradition. This is because it is often said that all states have an interest in ensuring that its territory is not seen as a 'safe haven'.[68] As a result, states negotiate extradition treaties to enable the transfer to avoid the scenario where an alleged offender can flee in the belief that they will not be sent back to the requested state for trial or serve a penalty for the criminal conduct. There is also a constant and weighty interest in extradition regarding the safe haven policy that individuals accused of extraditable crimes should be sent to the requesting state to face trial or the penalty for the crime that was committed. However, when the pendulum swings, either way, it is likely that the public

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Sylvester Idowu 'Ibori Returns to Rousing Welcome by Kinsmen' (*THISDAY* 5 February 2017) < http://www.thisdaylive.com/index.php/2017/02/05/ibori-returns-to-rousing-welcome-by-kinsmen> Accessed 18 September 2018.

[65] John Dugard, 'International Terrorism and the Just War' (1977) 12 Stan. J. of Int'l L. Stud. 21.

[66] Daniel Martin, 'Ministers should give Gary McKinnon a Job, Says Senior Labour MP Keith Vaz' (*DailyMail* 19 November 2009) http://www.dailymail.co.uk/news/article-1229403/Ministers-Gary-McKinnon-job-says-senior-Labour-MP-Keith-Vaz.html> Accessed 18 September 2018.

[67] *Ibid*.

[68] *Ocalan v Turkey* [2003] 37 EHRR.

interest in extradition matters will outweigh the competing factors unless the consequences of the inference of the competing factors with the rights of the alleged offender are severe.

Extradition makes it possible for the requesting state to acquire the presence of the alleged offender.[69] For example, *Ibori's* transfer from Dubai to the UK was done based on the treaty agreement between both states.[70] In achieving the aim of extradition by preventing states from being seen as a safe haven by ensuring that the alleged offender is sent to the requesting state, the final surrender further serves the basic concepts of fair play and the protection of the alleged offender as well as international interest. Therefore, extradition also aims at recognising the importance of the rights of the alleged offender. The grant of extradition for reason of states' not being seen as a safe haven is not therefore prompted solely by the concern for the welfare of the state. In most instances the courts allow the alleged offenders to argue against their extradition if they believe that the extradition decision will affect their rights as illustrated in the cases of *McKinnon,*[71] *Celinski,*[72] *Soering,*[73] where the interest of the individual rights of the alleged offenders was a decisive factor. These case-laws further illustrate that it is also the principal purpose of extradition to ensure the swift and effective administration of justice.

[69] https://publications.parliament.uk/pa/ld201415/ldselect/ldextradition/126/126.pdf> Accessed 18 September 2018. Report from the Home Office shows that in 2009-2010 the UK surrendered 699 persons to other EU Member states under the EAW procedure and, in 2010, 24 persons were extradited to non-EU countries under part 2 of the Act.
[70] 'Nigerian ex-state Governor James Ibori Charged in the UK' (BBC News, 15 April 2011) < www.bbc.co.uk/news/world-africa-13100426> Accessed 18 September 2018.
[71] [2008] 1739.
[72] *Polish Judicial Authority v Celinski* [2015] EWHC 1274 (Admin).
[73] *Ibid.* footnote 16.

2.3.2. The Legal Basis of Extradition

Extradition treaties can be either bilateral or multilateral. Both forms of agreement are equally valid.

2.3.2.1. Extradition by Treaty

When states become aware of a crime committed by an individual that is punishable under its applicable laws, as discussed earlier in this chapter, the formal method of acquiring the presence of the alleged offender is through extradition. The process also applies to convicted persons. The transfer of alleged offenders/ convicted persons from one state to another represents pioneering efforts in the field of international cooperation in penal matters. Therefore, it is noteworthy that if states choose this route, it cannot function without an extradition treaty between parties. The fundamental objective of extradition treaties is to permit the transfer of persons convicted or accused of crimes in a foreign state.[74] The first step toward accomplishing this purpose is the requesting state to contact the requested state and indicate its desire to secure the individual under the applicable extradition treaty. In many cases, even when there is an extradition treaty between the state parties the treaty has to be domesticated into a state's national law to make it applicable.[75] This depends upon the position taken to international law by any one state. Thus, treaties are of vital importance to extradition. It is necessary to describe what they show and how states use them, including the concept of an extraditable crime. According to Article 2(1) (a) of the Vienna Convention, a treaty is:

> An *international agreement* that is concluded *between states* in written form and is *governed by international law*, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[76]

[74] M Cherif Bassiouni, 'A Practitioners Perspective on Prisoner Transfers' (1978) 4 National J of Crim. Def. 127.
[75] John Dugard, 'International law and Foreign Relations' (1997) Annual Survey of South African Law 136.
[76] Vienna Convention on the Law of Treaties 1969.

The law of treaties is the body of rules that govern treaties and determines how they are made, brought into force, amended, terminated and operate. Apart from the issues of *ius cogens,* the law of treaties is concerned with the substance of a treaty, which is known as treaty law.[77] Extradition treaties can be either bilateral or multilateral. Both types may govern extraditions as long as they meet certain standard requirements.[78] The bilateral treaty is a treaty entered into between two states, while multilateral treaties are treaties entered into between more than two states.[79] During treaty negotiations, the states outline and adopt the text of the treaty as the 'negotiating states'.[80] A state that has consented to be bound by the treaty, whether or not the treaty has entered into

[77] Anthony Aust, Vienna Convention on the Law of Treaty 1969 May 23, 1969, 1155 U.N.T.S.331 (Hereinafter VCLT) The Vienna Convention on the Law of Treaties of 1969 (VCLT) sometimes referred to, as the 'treaty on treaties' is a fundamental tool that regulates treaties. The VCLT was adopted on 22 May 1969 and entered into force in 1980, and currently, has 114 State parties that have ratified the Convention. See Also, Sean D. Murphy, *Principles of International law* (2nd edn, West Publishing Co. 2012)78. States and international tribunal regard the VCLT as mainly reflecting the customary law of States and thus accept the VCLT as relevant when considering how states should behave in their treaty relations. The VCLT sets forth a wide variety of rules relating to treaties, which include how treaties are made, amended, interpreted, how they operate and how they are terminated. Further, the VCLT does not aim to create precise fundamental rights or obligations for state parties. This is left to the particular treaty that the consenting state parties negotiate.

[78] Anthony Aust, *Handbook of International Law* (2nd edn, Cambridge University Press) 50.

[79] *Ibid.* pg. 50 See also, C. Moncrieff, Abu Hamza Extradition: The UK Must Assert its Sovereignty on Human Rights, (*dailymail*, 10 April 2012). < http://www.dailymail.co.uk/debate/article-2127682/Abu-Hamza-extradition-The-UK-assert-sovereignty-human-rights.html > Accessed on 20 September 2018. For example, following a decision in the ECHR discussed above, it was written in the UK's Daily Mail that: It is not only the Prime Minister and the Home Secretary, Theresa May, who are exasperated and frustrated….it is also, for want of a better description, the man on the Clapham omnibus who wonders how twisted minds of these judges reach such rulings. Thus, the desire to make the law more efficient and to accommodate new developments led to the introduction of the Extradition Act 2003. The Extradition Act 2003 provides a framework for extradition proceedings in the UK and applies to an extradition request made on or after January 1, 2004. The Act aims to improve the fight against international, cross-border crime and bring fugitive offenders who flee to other States to justice. The Act is also compatible with the Convention rights within the meaning of the Human Rights Act 1998 (s. 42). Hence, the Act does not only impose an obligation to extradite a fugitive offender, accused or convicted but also provides grounds for which an extradition request can be refused or denied. These barriers are primarily geared towards accommodating human rights protections for the fugitive offender. Furthermore, Part 1 of the 2003 Act governs the powers of the court in ordering the surrender of a person to another Member State of the European Union. The Act also accommodated new developments by drawing a distinction between category 1 territories, which are the EU Member States, and category 2 territories, which are all other territories with which the UK has extradition arrangements. Part 1 of the Act deals with category 1 States. Part 2 addresses category 2 territories, including the United States. Part 3 deals with the procedure for applying for a European Arrest Warrant from a Category 1 State. Finally, Part 4 sets out the powers available to the police in extradition cases.

[80] Art 2(1)(e) Vienna Convention on the law of Treaties 1969.

force, is termed a 'contracting state'.[81] While a state which has consented to be bound by the treaty and for which the treaty is in force is termed a 'party'.[82]

Once an extradition treaty has been drafted and agreed by the state's authorised representatives, several stages are required before it becomes a binding legal obligation upon the parties involved.[83] The consent of states parties to a treaty is a vital factor, as states are bound only by their consent. Hence, treaties in this sense can be seen as a contract between states and if they do not receive, the consent of states involved, their provisions will not be binding upon them.[84] A treaty may be made or concluded by the parties in virtually any method they wish, and no set form or procedure determines how a treaty is formulated and by whom it is signed. This depends on the intent and agreement of the states concerned,[85] and states may express its consent to a treaty in several ways. Such consent may be expressed by 'ratification', 'acceptance', 'approval' and 'accession' which means in each case the international act is so named, whereby states establishes on the international plane its consent to be bound by a treaty.[86]

Furthermore, a multilateral treaty is frequently opened for signature for a discrete period, such as one year from the date of adoption. At any time during the year, an authorised representative of the state may sign the treaty.[87] Ultimately, treaties become operative when and how the negotiating

[81] Art 2(1)(i) Vienna Convention on the law of Treaties 1969.
[82] Art 2(1)(g) Vienna Convention on the law of Treaties 1969.
[83] *Ibid*. footnote 82.
[84] *Ibid.* footnote 82.
[85] Article 12 Vienna Convention on the Law of Treaties 23 May 1969, 1155UNTS 331, Can TS 1980 No 37, in force 27 January 1980.
[86] Article 14-15 Vienna Convention on the law of Treaties 1969.
[87] *Ibid.* footnote 74, pg. 127. See also Sean D. Murphy, *Principles of International law* (2nd edn, West Publishing Co. 2012) 81.

consenting states decide, but in the absence of any provision or agreement regarding this, a treaty will enter into force as soon as they are content to be bound by the treaty that has been established for all the negotiating states.[88] In several cases, the treaty will specify that they will come into effect on a specified date or after a determined period following the last ratification.[89] However, it is usual that where multilateral Conventions are involved that the treaty enters into force once a fixed number of states have adopted it. For example, the UK-US extradition treaty provides for entry into force, even though the necessary number of ratifications has not been received for the treaty to come into operation, only those states that have ratified the treaty will be bound.[90] It will not bind those that have not merely signed it unless of course, the signature is in the particular circumstances regarded as sufficient to express the consent of the state to be bound.

Once a treaty has entered into force each party must perform its treaty obligations in good faith. For example, a party cannot invoke the provisions of its domestic law as grounds for not performing those obligations.[91] Thus if there is a conflict with the domestic law, the party should seek to alter its law before joining the treaty. Normally, a party's obligations under the treaty are not retroactive. They are only prospective in application.[92] In a situation when a new treaty conflicts with an earlier treaty, the new treaty will govern relations between states who are parties to both treaties. If, however, a third state has not joined the new treaty, then the state's treaty

[88] Vienna Convention on the law of Treaties 23 May 1969, 1155UNTS 331, Can TS 1980 No 37, in force 27 January 1980.
[89] Article 24 (1) Vienna Convention on the law of Treaties 23 May 1969, 1155UNTS 331, Can TS 1980 No 37, in force 27 January 1980.
[90] Article 14. Vienna Convention on the law of Treaties 23 May 1969, 1155UNTS 331, Can TS 1980 No 37, in force 27 January 1980.
[91] Article 26 – 27. Vienna Convention on the law of Treaties 23 May 1969,1155UNTS 331, Can TS 1980 No 37, in force 27 January 1980
[92] Article 28. Vienna Convention on the law of Treaties 23 May 1969,1155UNTS 331, Can TS 1980 No 37, in force 27 January 1980

relationship with all parties to the earlier treaty remains intact.[93] Additionally, an alleged offender whose extradition is sought by a foreign state may raise defences based on the treaty that served as the basis of the surrender.[94] For example, an alleged offender surrendered to the US under the applicable extradition treaty may be tried only on the offence on which the extradition is sought. The alleged offender will be able to insist successfully that the procedure is conducted just as permitted under the applicable treaty.

2.3.2.2. Treaty Obligations

From its earliest inception, the use treaties as a means of extradition has been a relatively effective means of final surrender.[95] The framework of international co-operation in the suppression of international and cross-border crime consists mainly of binding international commitments, which are based on a treaty, bilateral or a multilateral.[96] The viability of these instruments is of the utmost importance in the present state of extradition law and practice.[97] All developed and most developing states are parties to at least some bilateral treaties.[98] Some level of the agreement must be approached between two consenting states acknowledging that the alleged offender might be surrendered given that the prerequisites are met. It is a state act and can only be finally concluded by the exercise of the sovereign power. A fundamental principle of sovereignty declares that every state has the legal authority over persons within its territory. It is, therefore, desirable that

[93] Article 30. Vienna Convention on the law of Treaties 23 May 1969,1155UNTS 331, Can TS 1980 No 37, in force 27 January 1980
[94] John Quigley, 'Human Rights Defences in US Court' 20 (1998) Human Rights Quarterly pg 558.
[95] Robert Herbert Woods, 'Extradition: Evaluating the Development, Uses and Overall Effectiveness of the System' (1993) 3 Regent University L. Rev. 4.
[96] Ivan Anthony Shearer, *Extradition in International law* (Manchester University Press 1971) 27 -31.
[97] *Ibid.* pg 23.
[98] *Ibid.* footnote 96. pg 34.

extraditable crimes are punishable and this is the principal rationale for the practice of extradition.[99]

Extradition treaties between states create formal obligations and legal rights which require states to extradite upon a request made when conditions within the treaty are met. Treaties, in essence, effect the underlying goals of extradition. Accordingly, states which include the US, UK,[100] and Nigeria, have relied on enabling extradition treaties, and in turn on their national legislation.[101] In a West African context, Kofi Annan acknowledged that there is a need to take action before the grip of the criminal network tightens into a stranglehold on West African political and economic development.[102] This action could be attained through an intense, well-coordinated and integrated effort, led by the West African states and with the strong backing of the international community. Indeed, extradition in this region is now mainly used to suppress international and cross-border crime.

An example of the importance of the domestic incorporation of extradition treaties is seen in an unreported Nigerian case.[103] In this case, the domestic court refused the extradition request of the

[99] B.H. Giles, 'Extradition and International law' (1971) 1 Auck. L. Rev. 111, 118.
[100] BBC News 'US-UK Extradition: The law Explained' The European Court of Human Rights has sanctioned the extradition of five terror suspects, including radical Muslim cleric Abu Hamza al-Masri, from the UK to the US (10 April 2012)< http://www.bbc.com/news/uk-politics-16041824 > Accessed 18 September 2018.
[101] The UK is part of the European Union (EU), which created the European Arrest Warrant (EAW) in 2004, which may be issued for any offence punishable by the law of the issuing Member State. Although it is not a treaty, the EAW makes it easier to transfer alleged offenders and convicted persons from one European Union (EU) Member State to another where there are claims that a crime has been committed. According to reports in 2009, the system has been used to extradite over 4,000 people across the EU, with 700 from the UK alone. This shows the effectiveness of the EAW. < https://eur-lex.europa.eu/legal-content/GA/ALL/?uri=celex:32002F0584> Accessed 18 September 2018.
[102] Kofi Annan, 'Save West Africa from the Drug Barons: Trafficking is Endangering the Fragile Democracies of this Vulnerable Region' *Observer*, (28 Jan 2012) 41.
[103] Human Trafficking: 'Judges Refuses to Extradite Alleged Nigerian Trafficker to Netherlands' (Premium Times, 2, July 2014)< https://www.premiumtimesng.com/news/164260-human-trafficking-judge-refuses-to-extradite-alleged-nigerian-trafficker-to-netherlands.html > Accessed 18 September 2018.

alleged offender to the Netherlands because the extradition agreement between both states had not been domesticated into the Nigerian national legislation.[104] Mutual assistance and cooperation by states are required in most cases both internationally and nationally. The importance of this includes making investigations into a situation where the requesting state needs information from the requested state. Obviously, adverse relationships between states could frustrate an extradition process. For example, the US and Cuba have an extradition treaty, but strained diplomatic relations,[105] which has meant it is rarely used. It is unclear what the recent reconciliation between the two states will mean for extradition.[106] Significantly, extradition treaties do not only formally state parties they also may provide for due process and protect certain fundamental rights of the accused individual.[107] An extradition treaty, therefore, signifies the presence of formal obligations and legal rights. The latter point in some cases is important in giving rise to one of the factors taken into account in extradition decisions.

2.3.3. The Establishment of Bilateral Standards by States

This section describes the framework of the cases discussed in this thesis. It will highlight how the EAW contrasts with bilateral treaties, particularly those between the UK/US, US/Nigeria and UK/Nigeria. Even though it is widely accepted that one state should render neighbourly assistance to bring alleged offenders of crimes to justice, international law imposes no duty on the state to afford such assistance. As a result, states are not obliged to extradite an alleged offender at the

[104] *Ibid*.
[105] Council on Foreign Relations < https://www.cfr.org/backgrounder/us-cuba-relations > Accessed 18 September 2018.
[106] Andrew Anderson, 'The Best Non- Extradition Countries to become Invisible' (Nomad Capitalist, 3 November 2017) <http://nomadcapitalist.com/2013/06/03/the-best-non-extradition-countries-to-be-invisible/ > Accessed 19 September 2018.
[107] *Ibid.* footnote 41. pg. 508.

mere request of another state.[108] As the world's interdependence increases, there will doubtless be greater reliance on international law as a means to resolve a variety of issues which neither conventional nor customary international law appears ready to meet.[109] Amongst the developments is the explicit and implicit recognition of the nature and importance of a number of the factors affecting and underlying extradition decisions. The most pressing issues that will advance to the fore are human rights, environment protection, economic and social development, and international and transnational criminality. Existing needs and conflicts will necessarily require some legal basis for their satisfaction and resolution.[110] Sovereign states may, however, agree to assume such an obligation under international law by entering into a treaty (often a treaty dealing specifically with extradition) or by concluding a special non-treaty agreement with other states.[111] While international law imposes no bar on states granting an extradition request as an act of courtesy or goodwill.[112] Goodwill, however, offers no guarantee of future assistance in return, and so states have shown a preference for concluding extradition treaties to ensure that a reciprocal obligation to extradite is a binding obligation under international law.

The practice of negotiating treaties to make provisions for extradition is said to have a long history.[113] Extradition is normally based on bilateral treaties, and it is distinguishable from other means of transfer because it involves a conscious effort to return an alleged offender to where the

[108] Ian Brownlie, *Principles of Public International law,* (6th edn, Oxford University Press 2003) 313; Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law,* (9th edn, Longman 1992) 415.
[109] M. Cherif Bassiouni, 'A functional Approach to General Principles of International Law' (1989-1990) Michigan Journal of Int'l L.769.
[110] *Ibid.*
[111] Examples include the former Commonwealth scheme for the rendition of fugitives and the 'backing of warrants' arrangements between Australia and New Zealand; Singapore, Malaysia and Brunei.
[112] Ivan Anthony Shearer, 'Extradition without Treaty' (1975) 1 Australian L. J. 16, 22.
[113] *Ibid.* footnote 1. pg.78.

crime was committed.[114] Other methods or alternatives outside the traditional practice of extradition may be equally effective in accomplishing the final surrender of an alleged offender.[115] These methods are in essence a form of disguised extradition. The other alternatives to extradition are kidnapping or abduction, expulsion and deportation. As the discussion to this point indicates, the underlying goals and purpose of extradition may be carried out through other means other than the traditional practice of extradition. These may, however, ill-accord with the international rule of law. States that extradite in the absence of a treaty will often require a guarantee of reciprocity before surrendering the alleged offender. Reciprocity may be secured either by the formation of a treaty or through guarantees based on comity, courtesy and goodwill.[116]

Extradition treaties establish a legal duty and obligation to transfer in certain circumstances. In the absence of the treaty, extradition is based upon reciprocity which in turn is founded upon goodwill and comity.[117] Many states do not have extradition treaties with certain other states. This is because, in reality, it is not achievable for all states to negotiate a treaty due to certain factors.[118] This brings to the fore situations where an alleged offender flees from a state where the offence was committed to another state with which it has no applicable extradition treaty. Sometimes the delivery of the alleged offender to a state can be effected based on reciprocity and comity.[119] This task involving delivery of an alleged offender was deemed a feature of friendly relations between

[114] *Ibid.* footnote 53. pg. 3.
[115] *Ibid.* footnote 95. pg 65.
[116] *Ibid.* footnote 95. pg 65.
[117] Wade A. Buser, 'The Jaffe Case and the Use of International Kidnapping as an Alternative to Extradition' (1984) 14 Georgia Journal of Int'l and Comp. L.362.
[118] No Extradition Agreement (*Arab Spring.net)* < https://humanrightsegypt.wordpress.com/say-no-to-any-extradition-agreement > Accessed 19 September 2018.
[119] *Ibid.* footnote 43. pg 192.

states. Hence, there may be implications in the area of the conduct being classed as an extraditable offence, since there is no treaty to specify what an extraditable crime is.

States may choose to extradite an alleged offender in the absence of an extradition treaty because it may be unwarranted to enter into treaties with states where extradition is a rarity and to also prevent its territory from becoming a safe haven. For example, states with few economic ties or dependencies may avoid the binding force of an extradition treaty. This may lead to the state enacting legislation permitting extradition in the absence of a treaty as a combatant to unsuspected entry. For these reasons, it can be argued that the principal reasons for extradition in the absence of a treaty are self-interest, convenience and practicability. There are doubts as to whether the rule or reciprocity should constitute a legal requirement for extradition, but it continues to play a significant role in the practice of extradition. This is because it renders extradition in the absence of a treaty possible without excessive formalities. However, a significant disadvantage of extradition in the absence of a treaty is the uncertainty and lack of consistency in which the extradition will occur.[120] Indeed, some states do not surrender requested persons in the absence of a treaty.

In the absence of an extradition agreement, reciprocity or comity may not act to lead to a state acquiring custody of an alleged offender or convicted person. This is simply because in the absence of an applicable extradition treaty between states there are no guidelines for the law to be applied. An alleged offender may challenge his transfer domestically because it is not covered by any agreement between both states. For example, in the Far East, China does not automatically

[120] Franciszek Pretacnik, *Protection of Officials of Foreign States According to International law* (Martinus Nijhoff Publishers 1983) 139.

recognise UK extradition rights. Likewise, Japan, North and South Korea, Laos and Vietnam are under no obligation to return the alleged offender.[121] In such cases, much is dependent on the relations between the states involved.[122] States outside the common law bond are not prevented from extraditing in the absence of an extradition treaty, but generally, they do not do so.[123] The constitution of the Netherlands requires the existence of a treaty before extradition may be conceded. The laws of Congo, Ethiopia, Israel and Turkey also depend on the existence of extradition treaty arrangements. Therefore, it is a challenge for the requesting state to acquire the presence of the alleged offender - comity and/or reciprocity is relied upon.[124]

In situations where relations between states are unfriendly, the transfer of the alleged offender is almost impossible, and the absence of a treaty may constitute a factor against the decision to extradite. As for the UK, it normally relies upon the presence of a bilateral or multilateral extradition treaty. Although it has made requests on numerous occasions to other states, in the absence of a treaty these requests solely relied on comity. The UK has been careful to guard their situation by making it quite clear to states that they may not be in the position to reciprocate should the occasion ever arise.

Problems similar to those that arise in the absence of an extradition treaty can be found where there is a treaty, but the specific case is not covered by the terms of it. In other cases, the treaty may not be domesticated into a state's laws. A question which often arises in practice is where the crime

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[121] Julian Joyce, 'World Shrinks for Men on The Run' (BBC News 26 March 2008) < http://news.bbc.co.uk/1/hi/uk/7312853.stm > Accessed 19 September 2018.
[122] David Sapsted, 'Man Extradited from UAE is Jailed over Killing' (*TheNational UAE*, 27 May 2010) < https://www.thenational.ae/uae/man-extradited-from-uae-to-uk-is-jailed-over-killing-1.537944 > Accessed 19 September 2018.
[123] *Ibid.* footnote 122.
[124] *Ibid.* footnote 106.

for which the surrender is sought is not one listed in the extradition treaty. As illustrated in the UK and US extradition treaty[125] as well as other states that have an extradition treaty, the answer is quite clear, the extradition request must satisfy the exact requirements both of the applicable treaty and domestic law. However, in the legal system of other states, different considerations may arise because some states negotiate treaties without incorporating them into its domestic laws. The disparity with states failing to incorporate their international extradition obligations into domestic criminal law and procedure is one of the problems that can arise in extradition law and practice which can have material consequences on the overall effectiveness of extradition.

It is evident from the horrific images of the 9/11 attack to the serious effect of financial crime, cyber-crime and human trafficking that states must act to address to combat international and transnational crime. An integrated system of cooperation is required encompassing together the West, the Middle East, the Far East and Africa. Mutual assistance in criminal matters is needed by states to take evidence, execute searches, and provide information and evaluations that will be useful to the investigation. An aspect of this is extradition. Criminality has led to states resort to extradition as a formal means of transfer to achieve the goal of suppressing international and cross-border crime within the context of public international law. This is the form of co-operation that is utilised by the UK, US, Nigeria and other states under the extradition treaties they have concluded.[126]

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[125] UK/US Extradition Treaty 2003.

[126] UK/US Extradition Treaty 2003, Nigerian Extradition Treaty 1931, Treaty on Extradition Between the Government of Canada and the Government of the United States 1976, the list of states that the US currently have an extradition treaty with can be found in 18 U.S.C.3181. The US Department of State https://www.state.gov/s/I/treaty/faqs/70138.htm> See Also Andrew Russell, 'Canada-China Extradition Treaty: Here's What You Need to Know' (Global New, 22 September 2016) < https://globalnews.ca/news/2953881/canada-china-extradition-treaty-heres-what-you-need-to-know/> Accessed 19 October 2018. See Also, https://www.gov.uk/guidance/extradition-processes-and-review > Accessed 19 October 2018.

2.3.3.1. The 2003 UK-US Extradition Treaty

There is a long history of extradition between the US and the UK. In 1794 the UK became the first state to enter into an international extradition treaty with the US, though modern English extradition law dates back only to 1842. Early extradition statutes provided for extradition for a limited number of serious crimes.[127] In the UK extradition is an executive function and its proceedings are brought against the subject in the name of the requesting state.[128] Similarly, in the US extradition is not a judicial function, but an executive function that stems from the President's authority to manage foreign affairs. International extradition request between both states is based on the 2003 bilateral treaty between them. The treaty that is currently in force is the 2003 EA Treaty.

The UK and the US signed the 2003 Extradition Treaty on March 31, 2003. The UK quickly ratified the treaty, but the US Senate did not ratify it until September 29, 2007. Upon ratification by both states, the 2003 EA Treaty, finally replaced the 1972 EA Treaty, which thus ceased to be effective. The 2003 EA Treaty did away with the Schedule of extraditable offences from the 1972 EA Treaty and instead takes on a pure dual criminality clause. This obviates the need to negotiate or supplement the Treaty as additional offences become punishable under the laws of both states. The 2003 EA Treaty also lowered the evidentiary burden that the US must meet when it submits an extradition request to the UK. When the US seeks a subject for extradition, it must furnish such information as could provide a reasonable basis to believe that the person sought committed the offence.[129] This abolishes the requirement of the US to establish a prima facie case. In contrast,

[127] Julian B. Knowles, *Blackstone's Guide to the Extradition Act 2003* (Oxford University Press, 2004) 2.
[128] Clive Nicholls, Clare Montgomery and Julian B. Knowles, *The Law of Extradition and Mutual Assistance* (Oxford University Press, 2007) 16.
[129] Jennifer Nicole Copenhaver-Celi, 'The New U.S. – UK. Extradition Regime: Implications for White Collar Criminals' (2008) 25 Ariz. J. Int'l and Comp. L. 162.

the Treaty does not alter the evidentiary burden that the UK must meet when it submits an extradition request to the US, the UK must still show probable cause.

2.3.3.2. UK/Nigeria and US/Nigeria Extradition Treaty

Bilateral extradition treaties currently exist between Nigeria, UK and the US. As regards the UK the bilateral extradition treaty applicable to Nigeria was originally signed on the 22nd of December 1931, and it came into force on the 25th of June 1935. Nigeria was then a colony of the UK. Thus the same treaty applied to the US. The actual treaty was between the UK and the US automatically, Nigeria was bound by the treaty because it was a colony of the UK.[130] At Nigeria's independence in 1960, the treaty became a statute of general application as was the case with all laws inherited from the UK.[131] Since then, it has been part of Nigeria's legal system. It is applicable at present. An example where the treaty was in play concerns the US request for Jessica Rene Tata. Here Tata, a US citizen, was sought for an alleged role in a Houston daycare fire. She had fled the US and was thought to be in Nigeria.[132] The daycare was owned and operated by Tata. The fire claimed the lives of four children and left three survivors. Interestingly the original charges against Tata were not extraditable offences under the US/Nigeria extradition treaty, and on this ground, extradition could be challenged.[133] As regards the UK, there has been relatively few extraditions with Nigeria. According to an FOI made by the author,[134] no UK citizens have been extradited to

[130] Dayo Benson and Abdulwahab Abdulah, Nigeria/US Extradition treaty; What the Law Says' (*Vanguard,* 25, June 2015) < https://www.vanguardngr.com/2015/06/nigeriaus-extradition-treaty-what-the-law-says/> Accessed 19 September 2018.
[131] *Ibid*.
[132] Douglas McNabb, 'International Extradition of Houston Day Care Worker Raises Serious Legal Questions' (*International Extradition Lawyer,* 7, March 2011) < https://internationalextraditionblog.com/tag/us-extradition-treaty-with-nigeria/ > Accessed 19 September 2018.
[133] *Ibid.*
[134] Freedom of Information, FOI Home Office. < https://www.whatdotheyknow.com/request/112968/response/285949/attach/3/2012%2005%2030%20FOI%2022710%20response.pdf?cookie_passthrough=1> Accessed 19 September 2018.

Nigeria and no Nigerian citizens extradited from Nigeria to the UK since 2007. However, there has been one Nigerian citizen extradited from the UAE for offences allegedly committed in the UK jurisdiction according to the FOI.

2.3.4. Extradition by Multilateral and Regional Arrangements

Whilst bilateral treaties are most commonly employed by states in their extradition relations, there are several regional extradition arrangements which may supplement or indeed supplant those bilateral treaties. These multilateral treaties can be used as an independent basis for extradition. State parties to such agreements are usually part of a region in a geographic and political sense. A regional extradition arrangement can take a form of a convention that could either replace bilateral treaties or obligate the parties to enact national legislation by the provision.

2.3.4.1. European Regime

Prior to directly addressing the current regional extradition regime within Europe, it is important to note the background to it and the human rights rules underpinning it. The background is found in the Council of Europe's European Convention on Extradition 1957. Prior to this extradition in Europe was based on a network of bilateral treaties with no consistency in terms and several gaps in coverage.[135] The desire to develop uniform rules was recognised, and the first European attempts to establish a multilateral treaty on extradition took place in the 1950s under the aegis of the Council of Europe.[136] Pre-dating the 1957 Convention is the Council's best-known treaty, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

[135] The UK, for example had no treaty with Sweden, Austria: Paul O'Higgins, 'European Convention on Extradition' (1960) 9 ICLQ.492.
[136] The Council of Europe is based in Strasbourg, France.< https://www.coe.int/en/web/portal/home> Accessed 16 October 2018.

The Convention entered into force in 1953, with the first judgement of the court it created, the ECtHR, being handed down in 1960.

The ECHR today has a real and important role in extradition, leading to human rights considerations being an important factor in extradition decisions. As such it is important to note this point presently. The Convention is limited to its application. Article 1 provides that 'The high contracting parties shall have secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention. That noted, it is not unreasonable to conclude that an alleged offender would not be protected by the Convention in a non-party to it. That is not the case. The ECtHR has interpreted the Convention to apply to extradition, as indeed it has to other cases which are not obviously within the (territorial) jurisdiction of the state parties. It has done so by considering possible future human rights violations in the requesting states – even if outside the territory of all Council of Europe states parties. This is not to suggest, though that human rights apply to extradition only in this extraterritorial sense. There exist both 'domestic' and foreign human rights cases. Domestic cases are centred upon a possible human right violation within the extraditing territory- as illustrated in the case of *Norris v United States,*[137] an account of the separation from one's family. A different case, in contrast, contains an argument that the human rights violation may take place in the requesting states, as illustrated in *Soering case.*[138]

[137] [2010] UKSC 9.
[138] *Ibid.* footnote 16.

2.3.4.2. European Arrest Warrant

The central instrument governing extradition within the EU is the Council Framework decision on the European Arrest Warrant (EAW). As noted, there is also the Council of Europe's European Convention on Extradition 1957 and two further treaties relating to extradition.[139] The most important from the UK's perspective is the EAW system which applies to members of the EU. After several years of preparation, the EAW framework was adopted in 2004. The purpose of the EAW is to create a new system of surrender between EU judicial authorities and to replace the previous bilateral and multilateral extradition scheme.[140] The EAW system is based on the principle of mutual recognition as opposed to that of mutual cooperation, which is the basis of the Council of Europe's multilateral treaty regime. In the EU's 2003 Framework Decision, an EAW is defined as 'a judicial decision issued by a member state, to conduct a criminal prosecution or to execute a custodial sentence or detention order'.[141] The EAW scheme was conceived of as a system to replace formal extradition between EU states toward the end of speeding up the delivery of alleged offenders. The foundations of the system were considered shortly before the 9/11, the events of which rapidly catapulted it to completion.[142] Historically, members of the EU have had an interest in building on the co-operative basis which sits at the heart of the political project.[143]

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[139] The Council of Europe's European Convention on Extradition 1975, 359 UNTS 273, The European Union's Convention on Simplified Extradition Between Member States of the European Union 1995, 1995 OJ C78 /1 and The Convention Relating to Extradition between Member States of the European Union 1996, 1996 OJ C313 /11. The purpose of the European Extradition Convention is to foster uniformity among member of the Council of Europe.
[140] *Ibid.* footnote 41 pg. 25.
[141] Council of the Framework Decision on EAW at Article 1(1).
[142] Lizzie O' Shea and Jen Robinson, 'Sleepwalking into Dangerous Legal Territory – Failure of the European Arrest Warrant Framework from a Human Rights Perspective' (2011) 36 Alternative L. J. 146, 147.
[143] *Ibid.* pg. 148.

The EAW system abolished extradition between member states and replaced it with a network of surrender between judicial authorities where member states must respect and execute each other's decisions by mutual recognition. The 2003 Act applies to an extradition request made on or after 1 January 2004. It introduced a new scheme of extradition to and from the UK primarily found on two sets of agreements Part 1 and 2.[144] Part 1 relates to extradition category 1 states. These are the states that have implemented the Council Framework Decision on the EAW.[145] Extradition here is procedural, judicial and a political exercise. The procedure is one of identifying the requested person and confirming that the alleged offence is concluded in the list of agreed 'framework offences' found in Sch. 2 of the 2003 Act or that it otherwise meets the dual criminality requirements. All other states that are not designated under category 1 and with which the UK has regular extradition relations are classed as category 2 states and the relevant rules for them are found in Pt 2 of the 2003 Act.[146]

Furthermore, there are differences between the requirement of Part 1 and 2 of the 2003 Act. Firstly, Part 2 provides category 2 states usually must present *prima facie* evidence of guilt. Secondly, in all category 2 extraditions, it is the Secretary of State or Scottish Ministers who make the final extradition decision. Under s. 93 of the 2003 Act ministers are obliged to consider some factors which if satisfied, bars the extradition. Lastly in category 2 cases, regarding ss. 137 and 138 of the 2003 Act, there exists a double criminality requirement stipulating that persons may only be

[144] There are also arrangements for more special situations. These relate to international treaties containing extradition provisions with which the UK is a party (s. 193) as well as a section relating for extradition with a state with which the UK has no other extradition arrangements.
[145] They are listed on the Home Office website.
[146] There are states who are party to the European Convention on Extradition 1957, those members of the London Scheme for Extradition within the Commonwealth or party to a bilateral extradition treaty with the UK. Category 2 states have been designates as such by The Extradition Act 2003 (Designation of Part 2 Territories) Order 2003, SI 2003/3334.

extradited if the crime alleged by the requesting state is also criminal in the UK. How the EAW differs procedurally from traditional extradition is in the concept of mutual recognition of judicial decisions which provides that request is recognised and approved by the requested state with the minimal enquiry and without executive interference.

Under the EAW there are specific rules as regards human rights considerations. The implementation of the EAW had also had to consider the competing factors during extradition negotiation. In the decades following *Soering case*[147] the ECtHR upheld, developed and refined its position and the history of the application of the Convention to extradition is one of substantive expansion.[148] Substantive application denotes judicial acceptance of the applicability of further human rights to extradition. In the case of *Soering,*[149] as noted, Article 3 was held applicable. Further ECHR provisions in the Convention has been argued at the ECtHR as a basis for preventing extradition on some occasions. The general rule under the EAW, though, is that there is a presumption that EU member states will abide by their human rights obligations. A perception that human rights hinder the extradition process is largely inaccurate. What has happened under the EAW, and the ECtHR more generally, is the development of a body of case-law that define the exact terms and the tests that must be met for an extradition to be frustrated by human rights.[150]

[147] *Ibid.* footnote 16.
[148] Paul Arnell, 'The European Human Rights Influence Upon UK Extradition- Myth Debunked' (2013) 21 European Journal of Crime Criminal Justice 322.
[149] *Ibid.* footnote 16.
[150] *Ibid* footnote 117. pg 322.

2.3.4.3. The U.S-European Union Extradition Agreement

In response to the attacks of September 11, 2001, the EU and the US have undertaken to increase cooperation on penal matters through a new agreement on extradition and mutual legal assistance entered into in 2003. This is a unique type of agreement because it purports to be a multilateral agreement, whereas, in reality, it is a bilateral one.[151] Its contracting parties are the EU as an organisation and the US. The EU assumes the undertaking of having its members confirm their bilateral treaties with the US, to the contents of the EU treaty. Nevertheless, each member state has to negotiate a separate agreement with the US, which operates as an amended protocol in existing bilateral treaties the US has with several EU states.

2.3.4.4. The Inter- American Conventions

There are also South American regional extradition agreements. The Montevideo Convention of 1899, which was supported by five states, was the first extradition arrangement among American states.[152] It was followed by a Convention signed by seven states, including the original signatories to the 1899 Convention, in Mexico in 1902. In 1911, a conference in Bolivia received support from five states for a new Convention. The Bustamante Code supplemented the pre-existing Montevideo Convention, and it was adopted in Havana in 1928. The inter-American Convention on Extradition was signed in 1981, and it was entered into force on March 3, 1982.[153] The inter-American states also entered into the 2002 Convention against Terrorism,[154] and the 1996 Convention against corruption which both contains the provision of extradition.[155]

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[151] *Ibid.* footnote 41. pg 32.
[152] *Ibid.* footnote 41 pg. 40.
[153] Inter- American Convention on Extradition, Feb 25, 1981, O.A.S. Doc. B-47. 6 states have ratified the convention; Antigua and Barbuda, Costa Rica, Ecuador, Panama, St. Lucia and Venezuela. 10 states have signed the convention; Argentina, Bolivia, Chile, Dominican Republic, El Salvador, Guatemala, Haiti, Nicaragua, Paraguay and Uruguay.
[154] Inter-American Convention against Terrorism, June 3, 2003, AG/Res. 1840 (XXXII-O/02), O.A.S. No, A-66.
[155] Inter-American Convention against Corruption, March 29, 1996, O.A.S. Doc. B-58.

2.3.4.5. Extradition Arrangements within West Africa

Within the African context, the sixteen ECOWAS states concluded the Economic Community of West African States Convention on Extradition in Abuja-Nigeria on the 6th of August 1994. About two years earlier, on the 10th of December 1984, Nigeria was a party to the Extradition treaty between the Peoples' Republic of Benin, the Republic of Ghana and the Republic of Togo,[156] which was the first multilateral treaty on extradition in the African continent.[157] Before the conclusion of the treaty in 1984, Nigeria had an extradition arrangement with only the Republic of Liberia, the US, the British Commonwealth states and the British dependent territories.[158] The provisions of the 1984 Treaty between the four states who are all members of ECOWAS, and the 1994 Convention on Extradition among the sixteen ECOWAS states, including those four states are mostly the same.

Ordinarily, it will be expected that each of the parties to the 1984 Treaty will be at liberty to decide which of the two treaties to use amongst themselves if and when the need arises. However, Article 32 (1) of the ECOWAS Convention on Extradition 1994 provides that the:

> 'Convention shall supersede the provisions of any Treaties, Conventions or Agreements on extradition concluded between two or several States except as provided under paragraph 3, Articles 4 of the Convention' Paragraph 3, Article 4 of the Convention provides that 'Implementation of this Article shall not affect any prior or future obligations assumed by States under the provisions of the Geneva Convention of 12 August 1949 and its additional Protocols and other multilateral international Convention'

[156] Extradition Treaty between the Peoples' Republic of Benin, The Republic of Ghana, The Federal Republic of Nigeria and The Republic of Togo, 1984. It is interesting to note that the four states, parties to the Treaty had military governments and military leaders with absolute powers at the time.
[157] Momodu Kassim-Momodu, 'Extradition; the Treaty between Benin, Ghana, Nigeria and Togo' (1985) Nigerian Current Law Rev 155.
[158] Momodu Kassim- Momodu, 'Extradition Arrangement in the Sub-Region: The Case of Nigeria, Benin, Togo and Ghana, Nigerian Forum' (1985) Nigerian Institute of International Affairs Lagos 18.

It can be argued that the 1984 Treaty is a multilateral international convention and so ought to be saved under Article 4 paragraph 3 of the 1994 Convention. However, since the four parties in the 1984 Treaty are all parties to the 1994 Convention, and since there is the likelihood that a fugitive for extradition could escape to any of the states in the region that is not a party to the 1984 Treaty. It may be more prudent for the parties to the 1984 Treaty to rely on the arrangement that has a wider territorial application, which is the 1994 Convention, in the process of extraditing an alleged offender from within the ECOWAS region.

2.3.4.6. The Relationship between Bilateral and Multilateral Treaties

There is no one set relationship between bilateral and multilateral extradition treaties. In one sense multilateral agreements may supplement or supplant bilateral treaties. As to taking effect, bilateral treaties do not necessarily require to take effect simultaneously in both states. It is frequently the case that a bilateral treaty takes effect in one of the contracting parties before the other. This is what happened to the 2003 UK-US treaty. The UK acted upon the terms of the treaty whilst the US Senate was still considering ratification. In the US context, reliance is generally placed on bilateral treaties as the legal basis of extradition, although in law reliance on the multilateral treaty is equally valid.[159] The US is a party to two such multilateral treaties; the Montevideo Convention on Extradition and the 1981 Inter-American Convention on Extradition. The Montevideo Treaty between American states and the US could serve as a legal basis for extradition in the absence of a bilateral treaty. The US may be a party to a multilateral Convention whose other state parties have a bilateral treaty with the US, as is the case of the US and EU treaty.[160]

[159] *Ibid.* footnote 41. pg 97.
[160] The Twenty-five states are party to this treaty. Agreement on extradition between the EU and the US, July 2002, Article 3 (1).

Within the EU the EAW has supplanted previous extradition regulation. The EU has moved in the direction of enhanced judicial integration and harmonisation of its criminal laws and procedure. Although the harmonisation part is a consequence of the greater affinity of member states' legal systems, it also reflects a higher degree of cooperation existing between these states where national physical boundaries have been eliminated to ensure the free movement of goods and people. Although the EAW applies to EU member states, there is also the question of how the EU as a unit deals with non-member states. Part of the answer is found in a multilateral agreement, which primarily represents a block of the EU member states and the non-EU member states. In 2003, the EU and the US signed an agreement on extradition, mentioned above, which provides the basis for extradition between the US and EU states. The extradition agreement removes the legislative and certification of requirement and simplifies the documentation to expedite the extradition process. At the same time, the EU states can rely on grounds for refusal contained in their respective bilateral treaties with the US since the extradition agreement does not replace the bilateral treaties. This means that the EU state can stipulate that the death penalty cannot be imposed and the right to fair trial is guaranteed.

There is also another European multilateral regime by the Council of Europe, namely the European Convention on Extradition and its three protocols. It should be noted that all EU states are also Council of Europe members. Therefore, the states that are parties to the US-EU extradition treaty are also parties to the European Convention on Extradition 1957. However, because the US-EU treaty comes after the Convention, it supersedes it.[161] Logically, a single multilateral treaty employing the same language and applying to all EU states would greatly enhance the uniformity

[161] *Ibid.* footnote 41. pg. 60.

of application and provide judicial economy. This avoids the risk of having different treaty language in the EU as presently exist in the bilateral treaty, for example in the 1931 UK-Nigerian extradition treaty.

Bilateral extradition agreements are the most common form of regulation. That said, they are also the most cumbersome. The UN has 192 member states. Assuming that each state entered into a bilateral treaty with every other state, there would be more than 35,000 extradition treaties in force among these states.[162] Furthermore, at any time states might be engaged in diplomatic negotiations in order to amend their agreements as and when international and national exigencies required. What would follow often would be the national legislative process subsequent to the signature and ratification processes.[163] Also, bilateral treaties may be subject to a variety of peculiarities depending upon the legal tradition of the states in question, and a range of other factors. All these issues pose difficulties for the present general bilateral approach. Clearly, uniformity can be enhanced by the adoption of regional multilateral treaties, employing a uniform standard or standard treaty provisions, and increasing the flexibility of such treaty provisions. That written, whilst the conclusion of multilateral conventions on extradition has been increasing, extradition remains generally governed in international law by bilateral treaties.

2.4. Extraditable Crimes

Irrespective of the legal basis for extradition, the alleged offence for which extradition is requested must be enumerated among the extraditable offences in the treaty that is found according to the formula for ascertaining extraditability within it.[164] In the absence of an extradition treaty, if

[162] *Ibid.* footnote 41 pg. 42.
[163] *Ibid.* footnote 41 pg. 42.
[164] *Ibid.* footnote 41 pg. 507.

extradition is based on reciprocity, the offence must be mutually agreed upon or recognised as an extraditable offence by both state parties.[165] Where extradition is based on comity, it will depend exclusively on the applicable national law. If they were not extraditable crimes that violated the laws of a particular state, the presence of the alleged offender would not be sought by the requesting state. It, therefore, follows that the first prerequisite to extradition is the recognition by both the requesting and requested parties that the crime is, in fact, one of which extradition is available.[166] The term 'extraditable crime' applies to treaty practice whereby crimes are listed by contracting parties in the applicable treaty. Thus, it is traditionally the case that an extradition treaty either lists the offences to which the treaty applies or create a formula by which states indicate those offences that are extraditable.[167] A typical approach is found in Article 2 of the UK/US Extradition Treaty 2003.

> 1. An offence shall be an extraditable offence if the conduct on which the offence is based is punishable under the laws in both states by deprivation of liberty for a period of one year or more or by a more severe penalty.
> 2. An offence shall also be an extraditable offence if it consists of an attempt or a conspiracy to commit, participation in the commission of, aiding or abetting, counselling or procuring the commission of, or being an accessory before or after the fact to any offence described in paragraph 1 of this Article.
> 3. For the purposes of this Article, an offence shall be an extraditable offence:
> 1. (a) Whether or not the laws in the requesting and requested states place the offence within the same category of offences or describe the offence by the same terminology; or
> 2. (b) Whether or not the offence is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being jurisdictional only.
> 3. If the offence has been committed outside the territory of the requesting state, extradition shall be granted in accordance with

[165] *Ibid.* footnote 41 pg. 507.
[166] Charles A. Caruso, ' Overcoming Legal Challenges in Extradition' (ABA, Asia Law Initiative) < https://www.americanbar.org/content/dam/aba/directories/roli/raca/asia_raca_charlescaruso_overcoming.authcheckdam.pdf > Accessed 15 October 2018.
[167] *Ibid.* footnote 41. pg. 507.

> the provisions of the Treaty if the laws in the requested state provide for the punishment of such conduct committed outside its territory in similar circumstances. If the laws in the requested state do not provide for the punishment of such conduct committed outside of its territory in similar circumstances, the executive authority of the requested state, in its discretion, may grant extradition provided that all other requirements of this Treaty are met.

Some states, when negotiating an extradition treaty, usually begin by defining precisely which offences are regarded as extraditable crimes,[168] while some list the extraditable offence without elaborating on the definition of such offence.[169] Equally, it is achieved by evaluation of the request, delivery and the prosecution of the alleged offender but is useful as reference points for discussing the actual creation of the extradition treaty between states. The situation where some states do not update or review the extradition treaty to reflect the sophisticated crimes brought about by globalisation may be a competing factor in a decision to surrender. This is because as the world evolves, new and more sophisticated crimes arise, and as a result, an extradition request cannot be made for a crime that is not listed as an extraditable crime in the applicable treaty between states. Furthermore, the category of crimes analysed in this thesis falls within the definition of an extraditable crime in most states that have had their treaties reviewed. Essentially, there is no difference between an individual accused of a white-collar crime and a suspected terrorist, the extradition procedures to be followed are the same.

[168] Article 2 (1) of the US-UK Extradition Treaty 2003 < an offence is an extraditable offence if the conduct on which the offence is based is punishable under the laws in both states by deprivation of liberty for a period of one year or a more severe penalty.

[169] Nigerian Extradition Act 1967 < http://www.vertic.org/media/National%20Legislation/Nigeria/NG_Extradition_Act.pdf > Accessed 19 October 2018.

An extraditable crime is explicitly defined in the 2003 US-UK extradition treaty, the US-Nigerian extradition treaty of 1931, while possibly some states only list the extraditable offences.[170] As such, it would be appropriate to provide that a crime should be an extraditable one if it is contained in the agreed extradition treaty by contracting states. Also, if it consists of a specific range of actions, it would also be termed as an extraditable crime,[171] whether or not the laws of the requesting or requested state place the offence in the same terminology. These actions include an attempt to commit, participate in the commission of, aid or abet, counsel or procure the commission of, or be an accessory before or after the fact to any offence. If the offence has been committed outside the territory of the requesting state, the provisions of the applicable treaty shall grant extradition. This is especially true if the laws in the requested state provide for the punishment of such conduct committed outside its territory in similar circumstances. Furthermore, with some extradition treaties, if the laws of the requested state do not provide for the punishment of such crime committed outside its territory in similar circumstances, then the executive authority of the requested state, in its discretion, may grant extradition if all other requirements of the treaty are met.

Even when the conduct is an extraditable crime that is listed in the applicable extradition treaty when the court considers an extradition request some states do not make an inquiry regarding the standards of the criminal justice which the alleged offender is likely to be subjected to before such a request is granted. As illustrated in a case in Nigeria where the court ordered the extradition to the US of a man named Lawal Olaniyi Babafemi, also known as Ayatollah Mustapha accused of

[170] Article 3 (1-27) US-Nigeria Extradition Treaty December 22, 1931.
[171] Article 2 (2) of the US-UK Extradition Treaty 2003.

having links with al-Qaeda and recruiting members to train in Yemen.[172] As a general rule, capital punishment in any requesting state that Nigeria has an applicable treaty with does not bar extradition. This may not be unconnected to the fact that Nigerian statutes still contain offences punishable by death and new ones are being introduced.[173] The Nigerian government did not inquire into the standards of criminal justice which the alleged offender was likely to be subjected to in the US grounds that it is a matter best left to the executive determination. Thereby assuming that the alleged offender will be given a fair trial in the US. However, the extent to which states do not make an inquiry into the standards of criminal justice that is applied varies in different states considerably. As illustrated in this case the penalty and the gravity of the extraditable crime weighs in favour of extradition. As compared to other states where it is believed that the gravity and the penalty for the conduct of the alleged offender, attract a death penalty assurances are sought.

Additionally, Nigeria is not a party to the ECHR Convention, but it is a party to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[174] Thus if *Ayatollah Mustapha* feared that any of his rights would be breached, the provisions that protect such rights of the requested person could not be invoked to stall his surrender to the US. In this sense, a fair, balanced approach by the states involved is subjective, what Nigeria term as 'fair' was granting the transfer. The EU or UK will not regard the transfer of an alleged offender to a

[172] Nigerian court orders Al-Qaeda suspect's extradition to US' (Vanguard, 23 August, 2013). < https://www.vanguardngr.com/2013/08/nigerian-court-orders-al-qaeda-suspects-extradition-to-us/> Accessed 19 September 2018.

[173] United Nations Office on Drugs and Crime; Cases and Materials on Extradition in Nigeria. < https://www.unodc.org/documents/nigeria/publications/Anti-Corruption-Project-Nigeria/Cases_and_Materials_on_Extraditon_in_Nigeria.pdf> This publication is produced with funding from the European Union under the 10th EDF. 25.Accessed 19 October 2018.

[174] UNCAT. This is an international human rights treaty, under the review of the UN, that aims to prevent torture and other acts of cruel, inhumane or degrading treatment around the world. It was adopted by the UN on 10TH December 1984.

state that practices a death penalty as a fair approach when making extradition decisions. In this case, nothing is weighed for and against the surrender of the alleged offender. This supports the earlier assertion made in this thesis that some states pay attention to specific factors and other states on other factors. In this case, Nigeria is more interested in the gravity of the offence and also not providing a safe refuge for the alleged offender as a result justice was achieved.

This thesis will now go on to discuss crimes such as financial crime, terrorism, cyber-crime, illegal drugs and arms trading, human trafficking and murder. Most of the cases that will be discussed below are ECtHR cases. This is because these states in recent times have had controversial extradition cases. They also spawn considerable jurisprudence, commentary and criticism, primarily because of the role of human rights. The EU adopted a Convention that has a single language that applies to the twenty-seven member states. The leading case of *Soering*[175] is still being used as a precedent to date since its decision in 1989. Thus, this structured approach developed by the ECtHR can be used as a reference point to developing states. For example, the Nigerian Extradition Act 1967 was amended by the Extradition Act (Modification) Order 2014. Despite these developments, there is still a lot to develop this area of law- its grey areas need to be brought to the attention of the courts. The decisions from these case-laws will serve as reference material to anyone who seeks to know and understand more about the factors that conflict with extradition. Additionally, the first text dedicated solely to extradition law and practice in Nigeria in 2016 was funded by the EU,[176] as a result of this may be in the future, some of its decisions regarding a fair balancing approach could be used as a model in Nigeria.

[175] *Ibid.* footnote 16.
[176] *Ibid*. footnote 173.

2.4.1. Financial Crime

Financial crime is a term that is widely used, but it is a label that is bedevilled by definitional uncertainty.[177] This uncertainty impacts upon how it is perceived and acted upon by law enforcement and other regulatory actors.[178] This is perhaps not surprising and echoes several of the difficulties that have plagued the states effort to suppress crime. According to FCA,[179] financial crime is any criminal conduct relating to money or financial services or markets including any offence involving fraud; dishonesty; misconduct in or misuse of information relating to, a financial market, handling proceeds of crime; financing terrorism.[180] Financial crime presents a major threat to business, individuals and the economy because it mostly results in financial loss including financial frauds in states.[181] It also includes a range of illegal activities such as money laundering and tax evasion.[182] The US has already initiated some extradition proceedings under the new requirements of the 2003 EA. Two white-collar cases, in particular, have garnered significant

[177] George Gilligan, 'The Problem of and with Financial Crime' (2012) 63(4) Northern Ireland Leg. Quarterly 495.
[178] *Ibid*.
[179] Financial Conduct Authority Handbook < https://www.handbook.fca.org.uk/> Accessed 16 October 2018.
Also, in the UK, the primary regulatory provision and legislation that is relevant to corporate or business fraud are contained in the Fraud Act 2006 (Fraud Act), and the Theft Act 1968 (Theft Act) additional offences exist in specific statutes such as company and tax legislation. The Theft Act, on the other hand, contains offences of false accounting. The Fraud Act provides three main fraud offenses that include – fraud by false representation, fraud by failing to disclose information where there is a legal duty to disclose it, and fraud by abuse of position. The Act also contains additional offences relating to the possession, manufacture or supply of articles for use in fraud. Common to all three Fraud Act offences is the requirement that the person acts dishonestly, intending to make a gain for himself or another or to cause loss to another (or expose another to a risk of loss).
[180] In the US there are also regulatory provisions and authority that attempts to suppress financial crime including: Section 32(a) of the Securities Exchange Act of 1934 (Exchange Act); Section 24 of the Securities Act of 1933 (Securities Act); Sarbanes-Oxley Act of 2002; Mail and wire fraud statutes (18 U.S.C. §§ 1341, 1343). In Nigeria, the laws that attempt to suppress financial crimes include; Economic and Financial Crimes Commission (Establishment) Act 2004. Cap E1 LFN 2004; Independent Corrupt Practices and Other Related Offences Act 2000. Cap C31. LFN 2000. The states not included in this thesis also have laws in place that attempt to suppress terrorism. Some of which involves torture. Despite these laws that have been put in place to discourage these activities, financial crime still occurs and the effect of such occurrences is severe.
[181] Joanna Howard, Daniel Hudson and Nikunj Kiri, 'Recent Development in the Fight against Fraud and Financial Crime' (2007)1 law and Financial Market Rev 293.
[182] *Ibid.* footnote 177. pg 496.

media attention, both in the UK and the US. One is the case of David Bermingham, Giles Darby and Gary Mulgrew – the NatWest Three,[183] and the other is the case of Ian Norris.[184]

a. The NatWest Three

In July 2006, the NatWest Three – British citizens David Bermingham, Giles Darby and Gary Mulgrew- arrived in Houston Texas, having lost their battle against extradition to the US. The Enron Task Force of the US Department of Justice 'Enron Task Force' had initiated the extradition request for David Bermingham, Giles Darby and Gary Mulgrew, charging the three with seven counts of aiding and abetting wire fraud. Under the 2003 EA, warrants were issued for their arrest after the appropriate documentation to the Magistrate Court. The court concluded that there was no bar to extradition in the case and granted their transfer to the US which was appealed. In the appeal there was an allegation that four mistakes were made by the District Judge and three errors by the Secretary of State: (1) the judge failed to recognise that the offences listed were non-extraditable (2) passage of time (3) abuse of the court due to the delay in the extradition request until the 2003 EA entered into force (4) breach their human rights under the ECHR (5) the Secretary of State should have found no effective or speciality arrangements; and (6) the Secretary of State should have held that extradition will breach their human rights.[185]

All these issues were raised to stall extradition to the US, given all these circumstances the court concluded that the arguments were without merit.[186] Citing their human rights under the ECHR,

[183] *R v (In re Bermingham) v Director of the Serious Fraud Office* [2006] EWHC (Adim) 200 (Eng).
[184] *R v (In re Norris) v Secretary of State for the Home Department* [2006] EWHC (QBD (Admin Ct) 280 (Eng).
[185] *Ibid.* footnote 183 para [62].
[186] *Ibid.* footnote 183 para [104].

the court agreed that extradition would interfere with the defendant's family and private lives.[187] It was noted that under the Convention, on the issue of proportionality - is the interference with the family life proportionate to the legitimate aim of the proposed extradition.[188] The Court discussed the personal situations of the defendants; each is relatively young and has a family with young children, and defendant Darby has a daughter with a learning disability, which requires her to attend a special school.[189] The Court also discussed the UK's concerns in honouring its extradition treaty obligations.[190] It noted that while the defendants could be prosecuted in the UK, it would be unrealistic to ignore the dimension of the case.[191] The Court concluded that there was a lack of exceptional personal circumstances that would indicate disproportionate interference,[192] the appeal was dismissed and extradition upheld.

b. **Ian Norris**

The US sought the extradition of Ian Norris a British national based on charges of price-fixing and obstruction of justice in a cartel investigation.[193] The US authorities' extradition application for Norris is the first of its kind concerning antitrust infringement Norris was charged with conspiracy to fix the prices of various carbon products from early 1989 to mid- 2000. When these alleged antitrust infringements occurred, these infringements concerning an agreement between competitors to fix prices were not criminal offences in the UK, although since passing of the Enterprise Act in 2002 they are now regarded as a crime. Extradition was determined as proper, and the judge approved it. Similar to the NatWest Three case, Ian Norris appealed that being sent

[187] *Ibid.* footnote 183 para [112].
[188] *Ibid.* footnote 183 at para [118].
[189] *Ibid.* footnote 183 para [112].
[190] *Ibid.* footnote 183 para [126-127].
[191] *Ibid.* footnote 183 para [129].
[192] *Ibid.* footnote 183 para [130].
[193] *R v (In re Norris) v Sectary of State for Home Department* [2006] EWHC (Admin) 280.

to face trial and possible imprisonment in the US would cause excessive damage to his wife's physical and mental health. The issue of determination was whether the extradition of Norris to the US was compatible with his right to respect for his private and family life under Article 8 of the ECHR. The crux of the matter was whether that interference was justified under Article 8(2) as being necessary by a democratic society…for the prevention of crime.[194] The answer from the Supreme Court was a yes. Such interference was a sad, but justified, a consequence of both Mr Norris and his wife, their age, length of marriage and dependence on one another. Lord Phillips asserted that rather than focussing solely on the consequences for the extraditee, the family unit as a whole had to be considered in the extradition process.[195]

However, the fact remained that Norris was fit to travel and fit to stand trial. While there had been a considerable delay when his extradition was initially sought, this was due in no small part to the action of Norris himself. The public interest is the prevention and suppression of crime, which included the public interest in the UK's compliance with extradition arrangements, was not outweighed by the mutual dependency and ill-health of Mr and Mr Norris.[196] In the words of Lord Hope, 'his family life must, for the time being, take second place.'[197] Also, Lord Kerr urged the other members of the Supreme Court not to lose sight of the bigger picture behind the circumstances of the case. It was essential to recognise a 'wider dimension' and that the preservation and upholding of a comprehensive charter for extradition be maintained. This decision by the Supreme Court is a shot across the bows for those who contemplate making similar

[194] *Ibid.* footnote 193. para [106].
[195] *Ibid.* footnote 193. Para [64].
[196] *Ibid.* footnote 193. para [131].
[197] *Ibid*. footnote 193. para [93].

human rights challenges as a bar to extradition. As Lord Kerr emphasised in his judgement, the essential point is that such is the importance of preserving an effective system of extradition, it will in almost every circumstance outweigh any article 8 argument.[198]

2.4.2. Terrorism

Terrorism is a category of crime that has existed, in one form or the other, in many states for as long as history has been recorded. Terrorism is a strategy of violence designed to install terror in a segment of society to achieve a robust outcome, propagandise a cause, or inflict harm for vengeful political purposes.[199] The difference between its various manifestations, however, has been the methods and means.[200] In times of state crisis similar to the one that the US is experiencing in the wake of the 9/11 incident, renewed interest in the phenomenon of terrorism arose. As the means available to inflict significant damage to states improve, the harmful impact of terrorism

[198] *Ibid*. footnote 193 para [136].

[199] M. Cherif Bassiouni, 'Legal Control of International Terrorism: A Policy-Oriented Assessment' (2002) 43 Harvard Int'l L. J. 83. Also, there are laws that govern terrorism at the international and domestic level. The UN sponsors some and one method of dealing with terrorism at the international level is the UN International Convention for the Suppression of Terrorism Bombings 1997. The objective of the International Convention for the Suppression of Terrorist Bombings (the Convention) is to enhance international cooperation among states by devising and adopting efficient and practical measures for the prevention of the acts of terrorism, and for the prosecution and punishment of their perpetrators. At the national level, there are laws that attempt to suppress and punish acts of the terrorism. Since 1997, the UK has introduced five major pieces of terrorism legislation: the Terrorism Act 2000; the Anti-Terrorism, Crime and Security Act 2001; the Prevention of Terrorism Act 2015; the Terrorism Act 2006; and the Counter-Terrorism Act 2008. The government has also passed some more wide-ranging legislation, such as the Criminal Justice (Terrorism and Conspiracy) Act 1998. As well as legislation that, while not aimed explicitly or primarily at countering terrorism, nevertheless has had a significant impact on the powers available to the police and security services, such as the Regulation of Investigatory Powers Act 2000. One of the applicable and common laws is the UK Terrorism Act 2000. The Act makes provision about terrorism; and to make temporary provision for Northern Ireland about the prosecution and punishment of certain offences, the preservation of peace and the maintenance of order.
In the US 18 USC & 2339A Conspiracy to Provide Material Support to Terrorist governs terrorism. One of the provisions outlaws providing material support for the commission of certain designated offences that might be committed by a terrorist, while the other law outlaws are providing material support to certain designated terrorist organisations. In Nigeria, there is Terrorism (Prevention) (Amendment) Act, 2013. This Act amends the Terrorism Prevention Act No 10, 2011, and it makes provision for extra-territorial application of the Act. It also strengthens terrorist financing offences.

[200] M. Cherif Bassiouni, 'Legal Control of International Terrorism: A Policy-Oriented Assessment' (2002) 43 Harvard Int'l L. J. 83.

increases. Additionally, as weapons of mass destruction become more accessible, the damage to the world community increases. This category of crime has benefited from the advantages of globalisation through improved technologies. Thus the increasing volume and spectacular nature of terror violence, their transnational effects and all the implications of such acts fanned by the mass media have generated disproportionate worldwide concern. Thus terrorism has become the illness of the century.[201]

Given the advent of globalisation and the development of international terrorism, the domestic and international community established policies that have been put in place at the domestic level, all of which attempt to suppress terrorism, but it requires, in response, an elaborate and efficient system of international cooperation.[202] Terrorism does not have an internationally accepted legal definition.[203] During the last three decades, modern international terrorism literature has discussed this topic and formed several definitions of terrorism, none of which have been agreed on a wide international scale.[204] Thus, terrorism is a convenient term for circumscribing certain activities of which are widely disapproved. There are certain elements that this unlawful deed contains, both internationally and nationally. These elements are known as objective and subjective.[205] The objective element is a criminal offence of absolute gravity, mainly the use of physical violence

[201] M Cherif Bassiouni, 'Prolegomenon of Terror Violence' (1978-1979) 12 Creighton L. Rev. 45.
[202] Adel Maged, 'International legal Cooperation: An Essential Tool in the War against Terrorism' (2003) < https://www.unodc.org/tldb/bibliography/Biblio_Reg_SubRegOrg_Maged_11_06_2003.pdf > pg. 157. Accessed 18 September 2018.
[203] Daniel J. Hickman, 'Terrorism as a Violation of the 'Law of Nations' Finally Overcoming the Definitional Problem' (2011-2012) 29 Wisconsin Int'l L. Jour. 462.
[204] Habil Laszlo Kohalmi, 'Human Rights and Terrorism' (2016) Journal of Eastern Eur. Crim. L. 159.
[205] Brian M. Jenkins, 'International Terrorism: A New Kind of Warfare' Available< https://www.rand.org/content/dam/rand/pubs/papers/2008/P5261.pdf> Accessed 16 October 2018.

against persons. While the subjective element, on the other hand, requires the intention of coercing the government.[206]

An adequate definition of terrorism, the effect of terrorist acts upon states and the ways through which states have suppressed these activities, as well as some of the factors that conflict with extradition, can be captured in cases of *Ahmad v the United Kingdom.*[207] These authorities are discussed mainly because they highlight the effects of human rights upon extradition in the European context. For example, mandatory life sentences without the possibility of parole and prison conditions. Also, the case-law shares some salient features with the subjective and objective element: in each case, death was caused and respectively occurred outside the context of war.[208] Also, in each case, some political, religious, or ideological purpose was served, and the individuals who perpetrated the acts were not state actors, although some had ambitions (ambitions that were in some cases realised) to become state actors. Further, in each case, a public spectacle was created, causing outrage and fear in many quarters but the celebration in others. The randomness in terrorism heightens the perception of risk, and the inability to control the source of violence increases the risk assessment.[209] Consequently, it does not only become a question of numbers, but it also becomes a question of intangibles. This includes the psychological impact of vulnerability on one hand and the lack of predictability of the prospective of harm on the other.

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[206] Muhammad-Basheer A. Ismail, *Islamic Law and Transnational Diplomatic Law*, (first published 2016, Springer) 50.
[207] *Ahamed v UK* [2013] 56 EHRR 1.
[208] Jacqueline S. Hodgson and Victor Tadros, 'The Impossibility of Defining Terrorism' (2013) 16 Crim. L. Rev. 494.
[209] M Cherif Bassiouni, 'Terrorism: The Present Dilemma of Legitimacy' (2004) 36 Case Western Reserve Journal of Int'l L. 299.

Furthermore, it is not only the definition of terrorism that is problematic.[210] Terrorism is diverse in its causes, motives, targets, weaponry, sophistication leadership, mission agenda and the pursuit of economic power. For states faced with the challenges of organising and maintaining a social system and government, the insecurity of terrorist activity is only one of a multitude of concerns.[211] Even though the threat may be within the geographical area of a particular state, terrorist funding is hardly ever limited to that geographic location alone.[212] This is why international cooperation, mutual assistance and bilateral action offers greater chances of success with states pooling resources together to this end. This factor will be in favour of states, because of the aim that it hopes to achieve.

The increase of terrorist activities after the attacks on the World Trade Centre (WTC) and the Pentagon until present has been tremendous, both in the number of attacks and the sophistication in which the conduct is carried out. This confirms that terrorists also adapt to the general trends of development in the world meaning that in a world of globalisation, terrorism is also becoming globalised as a rule. For example, the UK is a member state of the EU, where the free movement of goods and persons are encouraged. This made it easier for the suspect of the Paris attack in 2015 to travel without strict border checks within the member states.[213] The case mirrors porous immigration as a competing factor that may influence the request of an alleged offender. Additionally, the penalty for terrorist offences in states varies, and this can sometimes conflict

[210] Elimma C. Ezeani, 'The 21st Century Terrorist: Hostis Humani Generis?' (2012) 3 Beijing L. Rev. 158, 161.
[211] *Ibid.* pg 161.
[212] As Illustrated the *Ahmad, David Calder's case* chapter 1.
[213] '2015 Paris Terror Attacks Fast Facts' (CNN 30 November 2016) < https://edition.cnn.com/2015/12/08/europe/2015-paris-terror-attacks-fast-facts/index.html > Accessed 19 September 2018.

with a decision to extradite. This is because the alleged offender will invoke the harsh punishment or prison conditions as a bar to the extradition request.

2.4.2.1. Terrorist Fund- Raising

Just as it does in the legitimate world, money is the engine that vitalities terrorist acts. Without finance, it will be impossible for a terrorist to purchase the weapons and arms that is used to carry out the attacks. Where and how terrorists raise money to fund their conduct is even more complicated than the definition of terrorism and its causes. This is because a glance at the background of some of these terrorist groups raises the question of how such activities are financed for example ISIS and Boko Haram. Therefore, how the money is raised is as important to their security and their ability to mount attacks as to how they move it and store it.[214] It is therefore not surprising that the financing of terrorism has become a matter of serious concern for state authorities. Financing involves the use of banking institutions and the movement of funds, which have historical precedent in law enforcement.[215] Throughout history, terrorists have used a variety of techniques to obtain funding and disguise their activities. Donors are growing more cautious about dealing with people they do not know.[216] At the same time, the capture, death, and exposure of many old-time fund-raisers have forced terrorist groups to deploy new faces.

There have been several cases reported where a fund-raiser has reassured prospective donors that they are not being entrapped,[217] by having a photograph taken together with a known terrorist

[214] Richard Barrett, 'Preventing the Financing of Terrorism' (2011) 44 Case Western Reserve Journal of Int'l L. 719.
[215] Jeffery M. Johnson and Carl Jenson, 'The Financing of Terrorism' (2010) 10 JIJIS 103, 105.
[216] *Ibid.* pg. 105.
[217] *Ibid.* footnote 214 pg. 719.

leader (a "selfie") on his mobile phone along with a message from the leader vouching for his *bona fides*.[218] Donors are also increasingly aware of the gap between what terrorist groups promise and what they deliver. Also, terrorist factions have become increasingly obsessed with local, inter-communal or inter-ethnic disputes that have nothing to do with fighting foreign intervention or combating government policies.[219] Therefore, terrorists have increasingly had to look for other ways to raise money, mainly by increasing their criminal activity. For example, kidnapping for ransom has become particularly popular, with the senior leadership of al-Qaeda also resorting to this method of fundraising.

Al-Qaeda in the Islamic Maghreb, active in West Africa, has made hundreds of thousands of euros from kidnapping foreigners and demanding huge ransoms for their safe return. These acts have enabled it to fund its activities, as well as the activities of Boko Haram in Nigeria.[220] In addition to this income, Boko Haram has robbed banks, hijacked cars and raised money from other forms of violent crime. In Iraq as well, kidnapping, bank robbery and the robbing of jewellery stores are

[218] One of the primary ways that terrorist groups use the internet to raise funds is through criminal activity. Younis Tsouli, a young British man better known by his internet code-name "Irhabi 007", may today be the best known virtual terrorist. Tsouli began his 'career' by posting videos depicting terrorist activity on various websites. He came to the attention of al-Qa`ida in Iraq (AQI), whose leaders were impressed by his computer knowledge and ambition. He quickly developed close ties to the organisation. AQI began feeding videos directly to Tsouli for him to post. At the outset, Tsouli uploaded these videos to free webhosting services, and at this point he had few expenses and little need for funds. These free sites, however, had limited bandwidth and soon came to slow Tsouli down as he ramped up his activities. Tsouli then turned to sites with better technical capabilities, but that forced him to raise money. Not surprisingly, given his expertise, Tsouli turned to the internet to raise the funds to pay for these sites. Tsouli and his partner, Tariq al-Daour, began acquiring stolen credit card numbers on the web, purchasing them through various online forums, such as Cardplanet. By the time Tsouli and his partner were arrested, al-Daour had accumulated 37,000 stolen credit card numbers on his computer, which they had used to make more than $3.5 million in charges. Tsouli laundered money through a number of online gambling sites, such as absolutepoker.com and paradisepoker.com, using the stolen credit card information. They conducted hundreds of transactions at 43 different websites in total. Any winnings were cashed in and transferred electronically to bank accounts specifically established for this purpose. In this way, the money would now appear legitimately won, and thus successfully laundered. In total, Tsouli used 72 of these credit cards to register 180 websites, hosted by 95 different companies. Available at https://ctc.usma.edu/posts/terrorist-financing-on-the-internet> Accessed 19 September 2018.
[219] *Ibid.* footnote 214 pg. 719.
[220] *Ibid.* footnote 214 pg. 719.

favoured ways for al-Qaeda to raise money.[221] Terrorist groups, therefore, are still able to raise money, though less efficiently and more sporadically than before. As a result, making the shutting off of terrorist finances challenging.

Though no one can predict the future, it is ostensible that globalisation will continue to make shutting off terrorist finances much more challenging as the twenty-first century unfolds. This validates the need for states to employ international and mutual cooperation due to the universal and extraterritorial nature of the activities and the impact it has on states. Since these activities interrupt the security and the welfare of the states, and also the economic stability by deterring expatriates from going to work in a state that is not confirmed as safe for foreigners to work. As a result of this, efforts have been made by states to suppress terrorist financing abroad. For example, efforts that have been made by the US include some interdependent activities, such as the designation of groups as terrorist organisations, increased cooperation between intelligence and law enforcement agencies, standard-setting, training and technical assistance.

a. Al-Moayad v Germany

In the case of *Al-Moayad v Germany,*[222] regarding the extradition from Germany to the US for prosecution on charges of supporting and financing terrorism. Article 3, 5(1), and 6(1) of the Convention was invoked because he would be subjected to interrogation methods by the US authorities that will amount to torture. It was also argued that his placement under surveillance and abduction from Yemen had breached public international law, for the same reasons he alleged that the extradition proceedings in Germany had not been fair and therefore infringed Article 6(1) of

[221] *Ibid.* footnote 214 pg. 719.
[222] Application No. 35865/03.

the Convention. The ECtHR held that *al-Moayad* failed to substantiate that he faced a real risk of being subjected to treatment contrary to Article 3 of the Convention during the interrogation in custody in an ordinary US prison. In the circumstances, the assurances obtained by the German government was such as to avert the risk of being subjected to interrogation methods contrary to Article 3 of the Convention following his extradition.[223]

Regarding the violation of article 5(1) as invoked by *Al- Moayed* the court concluded that the cooperation between German and the US authorities on German territory under the rules governing mutual legal assistance in arresting and detaining *Al-Moayed* did not in itself give rise to any problem. Also regarding Article 6(1) of the Convention that was invoked, the court also concluded that the assurances obtained by the German Government were such as to avert the risk of a flagrant denial of a fair trial.

b. Abu Hamza

Hamza's act spawned ten separate cases or hearing occurring over a decade.[224] These concerned the criminal law, extradition law and human rights law. One (1) of these took place within the UK, three (3) at the ECtHR and two (2) in the US. The five (5) UK cases are his criminal trial (7 February 2006, Central Criminal Court), an appeal against the conviction (28 November 2006, Court of Appeal),[225] two (2) are challenges to his extradition at the English High Court (20th June

[223] *Ibid.* para 66 -71.

[224] *Hamza* was accused of conduct which, had it occurred in the UK, would have amounted to acts of terrorism. *Abu Hamza,* also known as *Mustafa Kamel Mustafa*, was born in Alexandria, Egypt in 1958. He was the son of a naval officer and a primary school headmistress. He immigrated to England in 1979 at the age of 21. *Hamza* studied civil engineering gaining a degree and becoming a member of the institution of civil engineers. In 1987, Hamza moved to Afghanistan. Around this time, he lost his hand and an eye, the precise circumstances of which are unclear. In 1993, Hamza returned to the UK and became a leading figure in the British Islamic scene. He began preaching at Finsbury Park Mosque in London in 1997 where he was later to assume the role of Imam.

[225] [2006] England and Wales Court of Appeal (EWCA) 2918 Crim.

2008 and 5 October 2012)[226] and an appeal of a decision to strip Hamza of his UK nationality.[227] At the ECtHR were a challenge to his English conviction (13 July 2007),[228] an admissibility hearing (6 July 2010)[229] and a substantive case about his extradition (10 April 2012).[230] Within the US there was his criminal trial (19 May 2014, Manhattan Federal High Court) and his sentencing hearing (9 January 2015, Manhattan Federal Court). Each of Hamza's cases contributes to his story. They are relevant presently to this thesis because they address extradition and human rights. To achieve the aim of this thesis one of the ten (10) cases *Ahmad v UK,*[231] or hearing is worth discussing. The substantive case before the ECtHR in opposition to *Ahmad's* extradition, require discussion because they consider issues directly related to the aim of this thesis.

Ahmad's case is a conjoined judgment addressing the matters of six (6) applicants Babar Ahmad, Haroon Rashid Aswat, Syed Tahla Ahsan, Mustapha Kamal Mustapha (also known as Abu Hamza) Adel Abdul Bary and Khaled Al-Fawaz. All six (6) were sought by the US on various terrorism-related charges. The extradition request was accompanied by assurances that the death penalty will not be sought. While each applicant's case differed procedurally, similar general arguments against extradition are put forward by each. The account of *Abu Hamza* highlights several conflicting factors within a decision to surrender when the argument put against his extradition concerned the condition of detention at the ADX Florence prison and likely

[226] *Mustapha Kamel Mustafa (Otherwise Abu Hamza) v The Government of the United States of America, Secretary for the Home Department* (SSHD) [2008] England and Wales High Court (EWHC) 1357 (Admin) and *Hamza v Secretary of State for the Home Department*, [2012] EWHC 2736 (Admin).
[227] See *Abu Hamza v SSHD* [2010] UK Special Immigration Appeals Commission (UKSIAC), 23/2003 (05 November 2010).
[228] *Mustapha (Abu Hamza) (No 1) v UK* [2011] 52 European Human Rights Reports (EHRR) SE11.
[229] *Babar Ahmad v UK* [2010] 51 EHRR SE6.
[230] *Ahamd v UK* [2013] 56 EHRR 1.
[231] *Ibid.*

imprisonment without parole or extremely long sentences.[232] With the ECtHR asserting that human rights could bar extradition, the case-law also illustrates that only in very exceptional cases, would human rights prevent the extradition of the alleged offender.

As can be seen where the ECtHR specifically addressed whether solitary confinement falls within the ambit of Article 3,[233] and also noted that the detention of persons who are ill might raise issues under Article 3 since appropriate medical care is necessary. The ECtHR is acting upon the assumption that the maximum sentence would be imposed if convicted held that *Ahmad* did not demonstrate a real risk of treatment reaching the threshold of Article 3.[234] Further, that the sentence was not grossly disproportionate in light of the terrorism-related charges faced. Conclusively, the ECtHR held that extradition would not engender a violation of Article 3.[235]

2.4.3. Cyber- Crime

Another reason for the increase in the significance of extradition lies in the growth of the internet. The opportunities for a person in one state to commit an act that is a criminal offence in another state are many times greater than they used to be when communication was limited by the need to use the telephone or travel in person.[236] As mentioned in the introduction to this thesis, the risk

[232] *Hamza* argued that his medical condition including: type 2 diabetes and raised blood pressure (both of which he is prescribed appropriate medication), extensive psoriasis and hyperhidrosis (extensive sweating provoked by a neurological condition) this condition required a shower and change of clothes at least twice daily. Also, there was blindness of the eye, with the poor vision of the left and bilateral traumatic amputation of the distal third of both forearms for which prostheses are fitted. The stumps in both arms are subject to regular outbreaks of infection, which have been increasing in its severity. This combined effect of Hamza's disabilities was undoubtedly severe. Thereby arguing that he had the right to be free from torture, inhuman and degrading punishment.
[233] ECHR.
[234] ECHR.
[235] The further complains raised by the fifth and sixth applicant were also rejected.
[236] Colin Banford, 'Extradition and the Commercial World' (2007) Company Lawyer. 2.

which technology poses to individuals and corporations has transformed radically. Information is a necessity of modern states, and its security is a defining issue of the information age.[237] Computerised information such as medical histories and financial records allows business to operate more efficiently but also exposes the individuals to whom the information relates to risks such as identity theft, monetary losses, and loss of privacy.[238] Technology is at the core of information security, it enables crime but also prevents it.[239] There has been an enormous high-tech difference and technology has come to intrude in every area of life. The development of online markets has led to an adjustment in the motivation and the emergence of the 'dark economy' where malicious programs and personal data are bought and sold for profit. The terms cyber-attack, cyber-warfare and cyber-crime, are frequently used with little regard for what they are meant to include.[240] This lack of clarity can make it all harder to design a meaningful legal response.[241]

Conclusively cyber-attack, cyber-warfare and cyber-crime are all computer related criminality that has now become a phenomenon in most states. This is because the nature of cyber communication means it can have positive or negative outcomes. Although it eases communication across states, it also makes it possible for criminal organisations to be active across the globe and within states. The conduct is achieved by either using the internet as a financial source of criminal activities or by hacking sensitive information. Either way, this behaviour affects the state involved, and it may

[237] Danielle Keats Citron, 'Reservoir of Danger: The Evolution of Public and Private Law at Dawn of Information Age' (2007) Sothern California L. Rev. 241.
[238] Mering de Villers, 'Enabling Technologies of Cyber Crime: 'Why Lawyers Need to Understand It' (2011) 11 Pittsburgh Journal of Technology Law & Policy. 54.
[239] *Ibid.*
[240] Oona A. Hathaway and Crootof Rebecca, 'The Law of Cyber-Attack' (2012) 100 California L. Rev. 817.
[241] *Ibid.* pg. 821.

expose the state to financial or security risks.[242] The effect of cyber-crime on states is often financial distress.[243] While no comprehensive international legal framework currently governs all cyber-attacks, a patchwork of efforts provides some tools that the US and other states can employ to control the growing threat. The first piece of UK legislation designed to address computer misuse specifically was the Computer Misuse Act 1990. The Act was a response to the increasing concern that existing legislation was inadequate for dealing with hackers.[244] The Act set out computer misuse offences that include unauthorised access to computer material,[245] unauthorised access with intent to commit offences[246] and unauthorised modification of computer material.[247] Further, the EU provided a common international framework for dealing with cybercrime also adopted the European Convention on Cyber-Crime.[248] In the US there is the Cyber Security Enhancement Act 2002 and Computer Fraud and Abuse Act 1986. While in Nigeria, there is Cybercrime (Prohibition, Prevention) Act 2015. The Act provides a useful, unified and comprehensive legal, regulatory and institutional framework for the prohibition, prevention, detection, prosecution and punishment of cybercrimes in Nigeria.[249]

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[242] *The Mail* (January 29, 2017) 15 < UK Military computers are wide open to hackers, says chief Major General Shaw who is one of Britain's top cyber experts has warned that Russian hackers are able to penetrate the country's military computer. He added that nothing could be done to stop the attacks, which may lead to top-secret information being read by Vladimir Putin. He also claimed he expects 800 British troops to be targeted by Russian cyber-attacks when they deploy to Estonia this summer.

[243] *McKinnon v Government of the USA*, [2007] EWHC 762 ADMIN. The cost of repair caused by the actions of McKinnon totalled over $7000, 000.

[244] David Emm, 'Cybercrime and the Law: A Review of UK Computer Crime Legislation' (*SECURELIST* 29 May 2009) Available at https://securelist.com/cybercrime-and-the-law-a-review-of-uk-computer-crime-legislation/36253 > Accessed 20 September 2018.

[245] Section 1 of the Computer Misuse Act 1990.

[246] Section 2 of the Computer Misuse Act 1990.

[247] Section 3 of the Computer Misuse Act 1990.

[248] Council of Europe- Charter of Signature and Ratifications of Treaty 185 Available at < https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures >Accessed 20 September 2018. Budapest, 23/11/2001 - Treaty open for signature by the member states and the non-member states which have participated in its elaboration and for accession by other non-member states.

[249] Sangkyo Oh and Kyungho Lee, 'The Need for Specific Penalties for Hacking in Criminal Law' *(ScientificWorldJournal* 16 June 2014) < https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4083268 > Accessed 20 September 2018.

The penalties of cyber-crime in states vary; in the US computer hackers go to jail for ten years for the first offence and a recidivist up to twenty years in prison.[250] In the Republic of North Korea, either a penalty of up to 30 million won or a maximum prison sentence of three years is used to punish the violators. Under German law, the offender is sent to jail for less than three years, in Malaysia and the Philippines the penalty attracts a death sentence.[251] The disparities in the punishment of these offences can be a competing factor in an extradition decision. Even though laws are framed in general terms to cover as many currents, and future offences as possible cyber-crime still exist. For example, Nigeria loses over 127 billion naira (353,060,000.00 US Dollars) annually through cyber-crime.[252]

a. Findikoglu v Germany

This case of *Findikoglu v Germany*[253] is between an EU member state and the US, where it was alleged by the US. Prosecutors that a Turkish hacker masterminded a series of cyber-attacks that enabled $55 million dollars to be syphoned from automated teller machines around the world. *Ercan Findikoglu*, 34, pleaded guilty in a federal court in Brooklyn, New York, to five counts including computer intrusion conspiracy for leading a scheme that resulted in stolen debit card

[250] *Ibid*. footnote 249.
[251] Manuel Mogato, 'Philippines Edges Closer to Death Penalty Return for Serious Drug Offences' (*REUTERS,* 07 March 2017) < https://www.reuters.com/article/us-philippines-drugs-congress-idUSKBN16E1CY > Accessed 20 September 2018.
[252] 'Nigeria Loses Over N217BN Annually Through Cyber Crime' (*THISDAY,* 19 April 2016). <http://www.thisdaylive.com/index.php/2016/04/19/nigeria-loses-over-n127bn-annually-through-cybercrime > Accessed 20 September 2018. The 2014 Annual report of the Nigerian Deposit Insurance Corporation (NDIC) Shows that between year 2013 and 2014, fraud on e-payment platform of the Nigerian banking sector increased by 183 percent. Also, a report published in 2014 by the Centre for Strategic and International Studies UK, estimated the annual cost of cyber-crime in Nigeria about 0.08 percent of our GDF, representing about N127 Billion.
[253] Application No. 20672/15.

data being distributed and used to make fraudulent ATM withdrawals worldwide.[254] Prosecutors called the plot one of the most successful and coordinated bank heists in history, enabling in one particular attack in 2013 the withdrawal of $40 million dollars from ATMs in 24 states in a matter of about 10 hours.

Findikoglu, who authorities say was a leader in the scheme and was known online as 'Seagate' and 'Predator' was extradited in June 2015 from Germany, where he was arrested in December 2013.[255] Prosecutors said from 2010 to 2013, hackers including *Findikoglu* gained access to the networks of prepaid debit-card payment processors Fidelity National Information Services Inc., ElectraCard Services, now owned by MasterCard Inc., and enStage.[256] Once in, the hackers caused the prepaid cards' account balances to be dramatically increased to allow large excess withdrawals. A group managed by *Findikoglu* then disseminated the stolen debit card information to 'cashing crews' around the world who in turn conducted tens of thousands of fraudulent ATM withdrawals. In exchange, *Findikoglu* and other high-ranking members of the scheme received proceeds in various forms, including by wire transfer, electronic currency or personal deliveries of cash.[257]

The most significant theft, in which the $40 million was withdrawn, targeted cards issued by Bank Muscat in Oman and involved thieves in February 2013 executing 36,000 transactions. A separate February 2011 operation targeting cards issued by JPMorgan Chase & Co and used by the American Red Cross to provide relief to disaster victims saw $10 million withdrawn globally. In

[254] Nate Raymond, 'Turkish Hacker Behind $55 Million Cyber Spree Pleads Guilty in US' (*REUTERS,* 1 March 2016) < http://www.reuters.com/article/us-usa-cyberattack-findikoglu-idUSKCN0W35LE > Accessed 20 September 2018.
[255] Jelani James and Ercan Findikoglu, 'World's Most Wanted Hacker Extradited to US' (*HNGN,* 24 June 2015). http://www.hngn.com/articles/103907/20150624/ercan-findikoglu-worlds-wanted-hacker-extradited.htm > Accessed 20 September 2018.
[256] *Ibid.* footnote 255.
[257] *Ibid.* footnote 255.

another instance in December 2012, cards issued by National Bank of Ras Al-Khaimah in the United Arab Emirates were compromised, resulting in $5 million in losses. A New York cashing crew alone withdrew $2.8 million in the 2012 and 2013 operations, and thirteen of the crew's members have pleaded guilty.[258]

The *Findikoglu* case once again illustrates that crime is boundary-less as it was possible for the attack to be carried out in several states. This further demonstrates the negative impact of international and cross-border crime. Additionally, its extraterritorial dimension is a distinct feature, because the crime affected other states even though it was not carried out in the US. Similarly, from the facts analysis, in this case, the US sought extradition. The UAE, Oman and other states involved theoretically could have requested for his extradition. This further reveals the issue why some states are more interested in the alleged offender than other states that may have been affected by the criminal act or conduct. Another competing factor within the extradition decision was the human right of the alleged offender. In *Findikoglu's case,* the existence of a risk of a prison sentence amounting to life imprisonment was considered by the court. The effect of cybercrime in states is also illustrated in the case of *McKinnon v Government of the USA*.[259]

[258] *Ibid.* footnote 255.

[259] [2007] EWHC 762 (Admin) McKinnon, 42 was born in Maryhill, Glasgow and is an avid UFO conspiracy theorist, going by the codename 'Solo'. From London between February 2001 and March 2002, forensic analysis conformed that he gained access to 97 computers belonging to the US government over the internet. He did so through extracting the identities of certain accounts and associated passwords. He then installed software called 'Remotely Anywhere'. This installation enabled further access and the ability to alter data without detection. He also installed further hacking tools that allowed him to scam over 73,000 US government computers. Amongst them were 53 Army computers that controlled its Military District of Washington and 26 Navy Computers, including US Naval Weapons Station Earle, New Jersey.

b. McKinnon v Government of the USA

In this case that involved the UK and US, *McKinnon*[260] was charged with fraud and related activity in connection with computers and was alleged by the US to have accessed and misappropriated data from seventy-three (73) US government computers. It was also added that he deleted critical operating files from nine (9) computers, which led to the shutdown of the US Army's Military District of Washington network. The conduct of this unauthorised access [261] by *McKinnon* affected the integrity, availability and operating system of the programmes, information and data on the US computers, rendering them unreliable.[262] Thus, this illustrates the effect of cyber-crime in states and its extraterritorial feature. The conduct was carried out in the UK but had an impact on the US. *McKinnon's* hacking activities were not random experiments in computer hacking, but a deliberate effort to breach US defence systems at a critical time which caused well-documented damage. They may have been conducted from *McKinnon's* home computer – and in that sense, there is a UK link – but the target and the damage were transatlantic.[263]

Theoretically, the UK would have been able to try him after the Organised Crime Division identified nine (9) occasions where *McKinnon* had admitted to the activity which would amount to an offence under section 2 of the Computer Misuse Act 1990 (unauthorised access with intent).[264] However, it was not possible because the UK evidence does not come near to reflecting the criminality that is alleged by the US authorities. As a result, there is sufficient evidence to

[260] *Ibid*. footnote 259.
[261] Section 1. Colloquially known as the Hacking Offence.
[262] *Ibid.* at footnote 259. Para. 15.
[263] Duncan Campbell, 'UK Hacker Faces US Trial for Breaking into Defence Department System' (*theguardian,* 26 February 2009) < https://www.theguardian.com/uk/2009/feb/26/hacker-mckinnon-faces-us-trial > Accessed on 20 September 2018.
[264] *Ibid.*

prosecute *McKinnon* for these offences in the US.

Furthermore, under the applicable criminal law, *McKinnon* was charged with seven (7) counts that violated Section 1030 (a) (5) (A) (i) which carried with it a risk of a fine and a period of ten (10) years' imprisonment.[265] In the case of further charges under this section being proved the term of imprisonment may increase to twenty years.[266] Secondly, it violated (a)(5)(B)(i) and lastly it violated (a)(5)(B)(v). Hence, his presence was required in the US. The issues raised in the first decision were that his conduct did not meet the definition of an extraditable offence because of the locus of his acts. The second issue that arose was that *McKinnon* was being prosecuted due to his nationality or political opinion.[267] Lastly, highlighting *McKinnon's* medical condition, since he suffered from a form of autism called Asperger's Syndrome which was diagnosed during his trial, it was argued that he would suffer torture or inhuman or degrading treatment or punishment due to the conditions under which he would be detained if convicted in the US.[268] These issues considered by the court mirrors the prohibition of torture or inhuman or degrading treatment or punishment as a competing factor in a decision to extradite.

Similarly, in the case of *Julian Assange v Swedish Prosecution Authority* [269] Assange's operation of the WikiLeaks website breached US security laws as it made available confidential information

[265] Under this provision it is an offence to transmit a programme, information, code, or command. A protected computer is defined as one used exclusively by the US government, by as provided by sub-section (e) (2) of Section 1030.
[266] Paul Arnell and Alan Reid, 'The Cautionary Story of Gary McKinnon' (2009) 18 Information and Communications Technology Law 18.
[267] Under Sec 79(1) (b), 81(a) and 81 (b) of the Extradition Act 2003.
[268] *Ibid.* footnote 266 pg. 18.
[269] [2011] EWHC 2849 (Admin) Assange founder of WikiLeaks and a well-known Australian journalist, through his operation of WikiLeaks website was accused by the US of breaching its security laws and spreading confidential information to other states. This includes Australia, where his operations are based and Hong Kong where Dotcom's business was centred.

from the US to other states. Although *Assange* had not been officially charged with any offence in the US, it is possible that there were an arrest warrant and indictment under seal. It is widely speculated that if *Assange* were brought to the US, he would be charged with violations of the 1917 Espionage Act.[270] This case outlines international and domestic politics as competing factors within extradition decisions. Conclusively, all the case-laws analysed in this section illustrate the impact of cyber-crime on states, the difficulty in acquiring the presence of the alleged offender and the risk of torture, inhuman and degrading punishment or treatment, the risk of being sentenced to death or life imprisonment if extradited as factors that conflict with extradition.

2.4.4. Illegal Drug and Arms Trafficking

Arms can be as important as all other crimes discussed in this section both at the domestic and international level because its illegal movement across national borders constitutes a crime in its right. Illegal drug and arms trafficking make good bedfellows because most criminal groups often rely on the availability of arms to carry out their activities. In the context of international drug control, 'drug' means any substance, natural or synthetic, listed in either Schedule I or II of the 1961 Single Convention on Narcotic Drugs.[271] The UN drug control does not recognise a distinction between licit and illicit drugs.[272] Illegal drugs are used to describe drugs which are under international supervision (and which may or may not have a licit medical purpose) but which are produced, trafficked and consumed illicitly.[273] The commonly used illegal drugs include

[270] 18 U.S.C 792 (2011) This Act is a previously obscure piece of the legislation, primarily used as a way to constrain speech that might be inimical to the state's military efforts. It was passed in the midst of WW1. In the relevant part of the Act, that states that it is a crime to possess and transit unauthorised national security information. This conduct, which seemingly encompasses many of the actions that Assange, has admitted to readily on numerous occasions.
[271] UNODC The United Nations Office on Drugs and Crime < https://www.unov.org/unov/en/unodc.html> Accessed 20 September 2018.
[272] *Ibid.*
[273] *Ibid*. footnote 271.

marijuana, cocaine, amphetamines and club drugs.[274] Arms refer to a fairly wide array of weapons that includes automatic rifles, machine guns, light mortars, shoulder-fired missile, rocket missiles etc.[275]

Article 51 of the Charter of the UN acknowledges the inherent right of states to individual or collective self-defence and the right to manufacture. The life cycle of arms begins with its manufacture, it is then traded and used, most of the time responsibly and for legitimate purposes such as hunting and sports shooting.[276] At the end of its life, it may be deactivated or destroyed; criminals acquire firearms by exploiting vulnerabilities in this life cycle, by illegal control of the weapons across borders.[277] The illicit market is also useful to states like Nigeria, Iraq, North Korea and Syria, where it is used in terrorist cells, ethnic insurgents and the evidence of this is relatively well publicised.

Each year according to the US Customs service, sixty million people enter the US on more than 675,000 commercial and private flights.[278] Another six (6) million come by sea and 370 million by land, 116 million vehicles cross the land borders with Canada and Mexico.[279] Additionally, more than 90,000 merchant and passenger ships dock at US ports carrying more than 9 million shipping containers and 400 million tonnes of cargo. Amid this extensive domestic travel and commercial trade, drug traffickers conceal cocaine, heroin, marijuana and methamphetamine for

[274] The National Centre on Addiction and Substance Abuse https://www.centeronaddiction.org/addiction/commonly-used-illegal-drugs > Accessed 20 September 2018.
[275] Kim Cragin and Bruce Hoffman, *Arms Trafficking and Colombia* (Published by RAND 2003) 53.
[276] European Commission https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking-in-firearms_en < Accessed 15 October 2018.
[277] Jenny Mouzos, International Traffic in Small Arms: An Australian Perspective' (1999) Australian Institute of Criminology 2.
[278] Barry R. McCaffery, *The National Drug Control Strategy* (Diane Publishing 1997) 50.
[279] *Ibid*. pg. 50.

distribution in US neighbourhoods.[280] The illegal drug market in the US is the most profitable in the world; as such, it attracts the most ruthless, sophisticated and aggressive drug traffickers.[281] Thus illegal drug and weapon trafficking are linked together because most groups use arms to facilitate other activities involved in the smuggling of marijuana, heroin and cocaine via a variety of routes. It has also been recognised that increased drug trafficking and drug addiction are also among the more serious problems in the US and Mexico.

The increasing drug trafficking problem is illustrated in several extradition case-laws. This includes *El Chapo*, the cartel kingpin who made two daring escapes from high-security prisons and lived on the run for a year before his presence was requested by the US, where he faces prosecution on narcotics and other charges.[282] Thus, drug-related law enforcement agencies face a significant challenge in protecting its state border. This case identifies porous immigration borders as a competing factor in an extradition decision. Furthermore, a closer look at the case-laws discussed below reveals that illicit drugs and arms trafficking have long been recognised as an international problem. As the quality of transportation from remote areas of the world has increased, drug smuggling now operates on a global scale. These case-laws also present factors that a right to private life and family life conflict with a decision to extradite.

[280] Drug Movement Into and Within the United States < https://www.justice.gov/archive/ndic/pubs38/38661/movement.htm > Accessed 20 September 2018.
[281] Ildefonse Ortiz, 'Nine Reason to Fear Mexican Cartels more than ISIS' (*Breitbrat,* 12 January, 2016). http://www.breitbart.com/texas/2016/01/12/9-reasons-to-fear-mexican-cartels-more-than-isis> See Also, Greg Flakus, 'Violence among Mexican Drug Gangs Seen Increasing' (*VOA*, 08 September 2016). < https://www.voanews.com/a/violence-among-mexican-drug-gangs-seen-increasing/3498456.html > Both Accessed 20 September 2018.
[282] David Agren and Rory Carroll, 'Joaquin 'El Chapo' Guzman, Mexican drug lord, has been Extradited to the US' (*Theguardian,* 20 January 2017) Available at < https://www.theguardian.com/world/2017/jan/19/el-chapo-extradited-to-the-us> Accessed 20 September 2018.

a. Polish Judicial Authority v Celinski

In the case of *Polish Judicial Authority v Celinski,*[283] *Celinski* committed a series of offences between the ages of 16-19. Celenski was subject to two accusations of EAW.[284] One conviction of EAW occurred between 2008 and 2011 when he was between 16-19 years old. Different judges heard both accusations of EAW. The first two were issued for the supply of a relatively small number of ecstasy pills. The court considered *Celinski's* age at the time of offences and the effect that his imprisonment in Poland would have on him. This was also the case in *Slovakian Judicial Authority v Cambal,*[285] *Cambal* had been convicted in absentia for offences relating to the possession of drugs and theft. He was sentenced to imprisonment. The court, in this case, found that the evidence did not prove that he had been trafficked despite findings by the UK Human Trafficking Centre Competent Authority (UKHTC) that he was a victim of trafficking. It was also taken into account that *Cambal's* rehabilitation from many years of addiction to class A drugs would likely be wasted if he were returned to Poland.

b. R v Gladue

Similarly, in the case of *R v Gladue,*[286] The accused, an aboriginal woman, pled guilty to manslaughter for the killing of her common-law husband and was sentenced to three years' imprisonment.[287] On the night of the incident, the accused was celebrating her 19th birthday and

[283] *Ibid.* footnote 72.
[284] European Arrest Warrant.
[285] [2015] EWHC 1274.
[286] [1999] 1SCR 688. In 1995, Jamie Tanis Gladue, a 19-year-old Cree woman, stabbed her common-law husband Reuben Beaver, in Nanaimo, BC. Gladue was intoxicated- her blood-alcohol-content level was between 0.155 and 0.1665, approximately double the legal limit for operating a motor vehicle in British Columbia. She suspected her husband of infidelity at a party earlier in the evening. Beaver confirmed his infidelity and insulted Gladue during an argument. Gladue stabbed Beaver in the chest after chasing him from the home with a kitchen knife.
[287] *Ibid*.

drank beer with some friends and family members, including the victim.[288] She suspected the victim was having an affair with her older sister and when her sister left the party, followed by the victim, the accused told her friend, 'He's going to get it. He's going to get it this time'.[289] She later found the victim and her sister coming down the stairs together to her sister's home.[290] When the accused and the victim returned to their townhouse, they started to quarrel.[291] During the argument, the accused confronted the victim with his infidelity, and he told her that she was fat and ugly and not as good as the others. A few minutes later, the victim fled their home. The accused ran toward him with a large knife and stabbed him in the chest. When returning to her home, she was heard saying, 'I got you'.[292] There was also evidence indicating that she had stabbed the victim in the arm before he left the townhouse. At the time of the stabbing, the accused had a blood‐alcohol content of between 155 and 165 milligrammes of alcohol in 100 millilitres of blood.[293]

At the sentencing hearing, the judge took into account several mitigating factors which were his Aboriginal background. The accused was a young mother, and apart from an impaired driving conviction, she did not have a criminal record. The court also identified several aggravating circumstances and indicated that the sentence should take into account the need for rehabilitation. This judgement advised lower courts to consider an Aboriginal offender's background and make sentencing decisions accordingly. The accused was a young mother and, apart from an impaired driving conviction, she had no criminal record. This case involves the US and Canada, which is an

[288] *Ibid.* footnote 286.
[289] *Ibid.* footnote 286.
[290] *Ibid.* footnote 286.
[291] *Ibid.* footnote 286.
[292] *Ibid.* footnote 286.
[293] *Ibid.* footnote 286.

illustration that the competing factors affect several states. The court weighed identified the facts of the case and weighed its pros and cons, the final decision that was made by the court highlights economy as a competing factor in an extradition decision.

If the offence had occurred in the US, the court might not consider the economic factor of the alleged offender- this assertion is based on the case-law so far on extradition in the US. Also, Nigeria has been identified as the third poorest state in the world, with an estimated 87 million Nigerians, or around half of the state's population, thought to be living on less than $1.90 a day.[294] The findings, based on a projection by the World Poverty Clock and compiled by Brookings Institute, show that more than 643 million people across the world live in extreme poverty, with Africans accounting for about two-thirds of the total number.[295] In Nigeria, as with other states on the continent, that figure is projected to rise. By the end of 2018 in Africa as a whole, there will probably be about 3.2 million more people living in extreme poverty than there is today.[296] Despite being the largest oil producer in Africa, Nigeria has struggled to translate its resource wealth into rising living standards. A slump in the oil prices and a sharp fall in oil production saw the country's economy slide into recession in 2016. As it stands, it is a platform for individuals to carry out illicit activities to enable them to afford the basic immediate life need, such as food and hospital bills. So far there has been no court in Nigeria that has considered the effect that years of dislocation and economic development have translated into low income, high unemployment and lack of opportunities for many Nigerians just as it was in the Canadian court in the above case-law.

[294] Bukola Adebayo, 'Nigeria Overtakes India in Extreme Poverty Ranking' (CNN, 26 June 2018) < https://edition.cnn.com/2018/06/26/africa/nigeria-overtakes-india-extreme-poverty-intl/index.html> Accessed 20 September 2018.
[295] *Ibid.* footnote 294.
[296] *Ibid.* footnote 294.

c. United States v Leonard

The *Gladue Factors* were considered in the case of *United States v Leonard.*[297] The Supreme Court of Canada, in this case, assessed the issue in light of all the facts and materials that was placed before it. The court examined the effect that years of dislocation and economic development have translated into low income, high unemployment and lack of opportunities for many Aboriginals. The court also found that the absence or irrelevance of education, substance abuse, loneliness and community fragmentation could also have an adverse effect.[298] The court concluded that these conditions, along with racism and bias, had contributed to the grossly disproportionate incidence of crime and incarceration amongst Aboriginal people.[299] In the present case, the decision to surrender *Leonard* was taken in connection with the general situation of the Aboriginals, thereby attaching weight to the consequences of extraditing him to the receiving state. The conditions considered by the court, in this case, mirrors both economic and social factors as competing factors within an extradition decision.

d. Calder v HM Advocate

Another case of illegal drug trafficking in recent times that has sparked criticism is the case of *Calder v HM Advocate.*[300] *David Calder*, who lived in Aberdeen, was extradited to California on suspicion of drug trafficking and money laundering offences. This was after losing his appeal against the Sheriff's decision to remit his case to the Scottish Ministers and the subsequent ministerial extradition order. He was alleged to have posted certain chemicals used in the

[297] 112 O.R. (3d) 496 2012 ONCA 622 Para 4-6 Leonard a Canadian citizen 18year at the time of the alleged offence, is sought by the US to face trial on a charge of drug trafficking. Leonard and his older cousin were arrested upon entry into the US. Leonard fled the US, in violation of his terms of release and returned to Canada.
[298] *Ibid.* footnote 297 at Para 4-6 Leonard a Canadian citizen 18year old at the time of the alleged offence, is sought by the US to face trial on a charge of drug trafficking. Leonard and his older cousin were arrested upon entry into the US. Leonard fled the US, in violation of his terms of release and returned to Canada.
[299] *Ibid.* footnote 296.
[300] [2006] S.C.C.R. 609 at [14].

manufacture of a date rape drug to the US from Scotland. Another argument forward was that extraditing *Calder* would be disproportionate in human rights law. The court did not find exceptional circumstances and held that the greater interest served by the extradition process, including prosecution of transnational crime, meant that the extradition should proceed. It should be noted that the consideration of Article 8 of the Convention and whether it was necessary for a democratic society in the interests of the prevention of disorder or crime to extradite Calder is relatively novel. It is only in the last several years that articles additional to Article 3 were accepted as being able to form the basis for an argument against extradition.[301] The decision also highlights the high threshold test that must be met to argue against extradition successfully. It is also worth mentioning that this test is not applicable to the US, Nigeria or other states. This is because these mentioned states are not a party to the Convention.

e. The Extradition of Brain and Kerry Howes

The extradition proceedings have their origins in a 27 September 2006 indictment files by the US, a federal grand jury in Phoenix, Arizona, issued an 82-count indictment against Howes and his then-girlfriend Kerry Ann Shanks as part of an international investigation of approximately 100 methamphetamine labs.[302] Prosecutors of the US Drug Enforcement Agency alleged that the British couple sold iodine and red phosphorus to illegal labs in the United States, New Zealand and other states that used the ingredients to produce crystal meth, which is a form of amphetamine that is crystallised so it can be smoked. Although these chemicals in both cases were legal to sell in the UK, they were regulated in the US and illegal to import.[303] The US authorities sought their

[301] Paul Arnell, 'The Long Arm of the United States Law' (2007) S.L.T.114.
[302] Robert Arend, 'Extraordinary Extradition: The Brian and Kerry Ann Howes Story' (*OpEdNews,* 28 May 2009) < https://www.opednews.com/articles/Extraordinary-Extradition-by-Robert-Arend-090524-555.html > Accessed 20 September 2018.
[303] *Ibid.*

extradition, and the argument in court was that the offences charged in the indictment were not extradition related offences because some of them were not offences in Scots law. Additionally, the human rights-related grounds of appeal were based on the protection of his right to private and family life. This was mainly founded on the fact that they were parents to some children. Consequently, the court affirmed that there was no doubt that the extradition would interfere with the exercise of their rights. Following some delay in coming to a decision, the High Court relied on the law as laid down in *Norris v Government of the United States of America.*[304] It was stated in that case that the interference must fulfil a pressing social need. It must also be proportionate to the legitimate aim' relied upon to justify the interference.[305]

The universal and global effect of illegal drugs and arms trafficking is confirmed in the development of key international airports. For example, in Hong Kong, Singapore and Bangkok the development of key international airports have inadvertently provided drug traffickers with several current departure sites. From these cities, illegal drugs can be quickly and easily delivered to other parts of the states. The negative influence of drugs has led to a significant amount of

[304]*Ibid.* footnote 184. See also *Nida v Polish Judicial* Authorities [2015] EWHC 1274 *Nida* was wanted in Poland to serve his sentence for an attempted robbery. He was handed a suspended sentence but he left Poland during the suspension period. The court concluded that Nida came nowhere near the high threshold required to satisfy the argument. In *Ciemiega v Polish Judicial Authorities* [2015] EWHC 1274 *Ciemiega* was convicted for theft and handed a suspended sentence during which he absconded to the UK. After hearing evidence, the court found that extradition would be a disproportionate interference with his rights. In *R (Piotr Inglot) v Secretary of State for the Home Department and Westminster Magistrate Court* [2015] EWHC 1274 *Pawlec* a Polish national was accused for fraud. He had been bailed for the offences in Poland but subsequently fled to the UK. The court considered the nature of the offence, the penalty; time spent in the UK and the delay in bringing proceedings and concluded that extradition would be disproportionate. The court in determining the appeal in the case *Wright v Government of Argentina* [2012] EWHC 669 (QB) *Lucy Wright* a pregnant British woman who was arrested on suspicion of smuggling cocaine. She was detained on the 14th of March 2007 at Ezeiza Ministro Pistarini Airport in Buenos Aires as she attempted to leave on a flight to the UK with the illegal substance stored in her luggage. She was remanded into preventative detention and questioned. She breached her bail conditions by fleeing to Argentinean jurisdiction and returned to the UK via Brazil. The court considered the nature of the offence, the penalty; time spent in the UK and the delay in bringing proceedings and concluded that extradition would be disproportionate.

[305] *Ibid.* footnote 184, para 9.

related crime as drug gangs kill numerous bystanders in carrying out assassinations in public places.[306] In 2009, New Orleans, Baltimore and San Francisco were ranked among the most US crime-ridden cities due to the influx of drugs.[307] Just as Mexico and its drug problems affect the US, West Africa creates a similar concern for the EU as the drug consumption rates in Europe have also increased.[308]

In West Africa, planes land on small landing strips throughout the region and ships pass through ports relatively undetected.[309] The shipments are further divided into smaller units and either swallowed by couriers who fly to Europe from international airports in West African states or travel by road.[310] Many are professional criminals who experiment with various criminal activity and profess no allegiance to anything besides money.[311] The West African criminal drug network may not be as established as other states, but illegal drugs and arms trafficking still occur, as it is a wonder how the Niger Delta Militants and the Boko Haram obtain their weapons that in used in the kidnapping and killing of individuals. To further complicate the criminal justice system most African states do not have an updated system that stores data. The lack of an updated system makes acquiring the alleged offender a challenge for both the requesting and requested states.

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[306] Hannah Parry, 'The Texas border lake where Mexican cartels 'are killing unwitting American tourists': Fisherman shot dead after 'stumbling into Zeta drug run' in same beauty spot where jet skier was slaughtered' (*MailOnline* 27 December 2016) Read more on < https://www.dailymail.co.uk/news/article-4067524/The-border-lake-cartels-killing-innocent-American-tourists-Fisherman-shot-death-stumbled-Zeta-drug-run-notorious-lake-six-years-jet-skier-slaughtered.html#ixzz5GM3BlGPY > Accessed 15 October 2018.

[307] Nathan Vardi, 'The Drug Capitals of America' 1/21/2009. < https://www.forbes.com/2009/01/20/narcotics-heroin-cocaine-biz-beltway-cz_nv_0121drugcities.html#7d2b0ebd2224> Accessed 20 September 2018.

[308] 'West Africa Drug Trade: The Cocaine Trail' (*The Economist,* 9 June 2010). < https://www.economist.com/books-and-arts/2015/06/27/on-the-cocaine-trail > Accessed 20 September 2018.

[309] Rose Skelton, 'Why West Africa Cannot Break its Drug Habit' (BBC News 21 June, 2010). <http://www.bbc.com/news/10324206 > Accessed 20 September 2018.

[310] UN News Centre Drug Crime Pose Serious Threat to West Africa, Warns UN Official (28 October 2008) <http://www.un.org/apps/news/story.asp?NewsID=28738&Crl=West#.WXIMnTPMxE4 >Accessed 20 September 2018.

[311] Stephen Ellis, 'West African's International Drug Trade' (2009) 108 African Affairs. 171, 188.

Further, there is often a small police force with limited resources that are ineffective against organised criminal networks. For example, the Judiciary of Gambia is reportedly plagued by a lack of judges and Magistrates.[312] This problem has caused continuous adjournment of several cases. Court judges are employed from Nigeria to hear cases, and this makes it difficult to conduct an investigation or obtain the relevant data of an alleged offender. This, however, makes the investigation in Africa reactive rather than proactive, resulting in a waste of resources in a region where national budgets for law enforcement agencies are far from sufficient.[313] As illustrated in these cases, drugs victimise not only the addict but also the individuals robbed, assaulted and burglarized by addicts in search of money to sustain their drug habits.[314] Furthermore, the issues discussed above outlines technology as a competing factor that may influence a decision to extradite.

2.4.5. Human Trafficking

Human trafficking is the movement of an individual from one place to another into conditions of exploitation.[315] The elements of human trafficking include:

- Movement - regarding the recruitment, transportation, harbouring or receipt of people;[316]

[312] Alhagie Jobe, 'The Gambian Judiciary Crippled by Lack of Judges and Magistrates' (27 October 2015) < http://fatunetwork.net/the-gambian-judiciary-crippled-by-lack-of-judges-and-magistrates/> Accessed 20 September 2018.
[313] Melanie Reid, 'West Africa, The EU'S Mexico: Extraditions and Drug Trafficking Prosecutions in the EU Could be the Answer' (2012-2013) 19 Columbia Journal of European Law 1.
[314] Joshua Fetcher 'Graphic photo of dead father clutching baby killed in Mexican drug gang shootout ignites Outrage' (*Express-News*, 5 February 2016) < http://www.mysanantonio.com/news/us-world/border-mexico/article/Graphic-photo-of-baby-killed-in-Mexican-drug-gang-6809524.php > Accessed 20 September 2018.
[315] National Crime Agency (NCA) 'Modern Slavery and Human Trafficking' http://www.nationalcrimeagency.gov.uk/crime-threats/human-trafficking > Accessed 20 September 2018.
[316] Abimbola Olusegun, 'Nigeria; FG should Reconsider Extradition Treaties' (*Daily Trust,* 28 December 2014) http://allafrica.com/stories/201412293077.html> Accessed 20 September 2018.

- Control - via the use of threat, force, coercion, abduction, fraud, deception, or abuse of power;[317]

- Purpose – this refers to the exploitation of a person, which includes prostitution and other sexual exploitation, forced labour, slavery or similar practices, removal of organs.[318]

It is also possible to be a victim of trafficking even if the person's consent is sought. An anecdotal example of this is illustrated in an unreported case where The Netherlands requested the presence of an individual. This individual was alleged by The Netherlands to belong to an international syndicate involved in the trafficking of girls from Nigeria for prostitution and other related acts.[319] The court refused extradition to the Netherlands to face trial because there was no extradition treaty between the Netherlands and Nigeria upon which the application was sought.[320] This, however, identifies a treaty deficiency as a competing factor within an extradition decision. The decision to extradite would have been different if the extradition treaty was domesticated into the state criminal legal system.

Most human trafficking cases in states often involve international cross-border element. Multiple actors carry out human trafficking and especially international human trafficking.[321] Children cannot give consent to being moved. Therefore, coercion or deception elements do not need to be

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[317] *Ibid.*
[318] Alex Mathews, 'Child Prostitution Gang Piled Nine Girls as Young as 12 with Alcohol and Drugs before Forcing them to have sex with as many as 50 Men' (*MAILONLINE*, 02 February 2017). <http://www.dailymail.co.uk/news/article-4183896/Child-prostitution-gang-forced-girls-sleep-50-men.html >Accessed 20 September 2018.
[319] *Attonery-General of the Federation v Kingsley Edegbe* FHC/ABJ/CS/907/2012.
[320] Ben Ezeamalu, 'Human Trafficking: Judge Refuses to Extradite Alleged Nigerian Trafficker to the Netherlands' (*Premium Times*, 2 July 2014) <https://www.premiumtimesng.com/news/164260-human-trafficking-judge-refuses-to-extradite-alleged-nigerian-trafficker-to-netherlands.html > Accessed 20 September 2018.
[321] Christal Morehouse, *Combating Human Trafficking: Policy Gaps and Hidden Political Agendas in the USA and Germany* (1st Edn Springer 2009) 58.

present. This is illustrated in another unreported case where Thailand agreed to Malaysia's request to extradite ten (10) Thai nationals, believed to be masterminds in human trafficking cases along the Malaysia-Thailand border.[322] This was granted because the offence is not viewed as only a Malaysian one by the international community but a cross-border crime that required to be tackled to ensure justice.[323] Thus, an effective criminal justice response to trafficking, as with other crime, requires that the human rights of the offenders are respected and protected.[324] This requirement extends to the extradition process. The Organised Crime Convention also confirms the importance of fair treatment and human rights.[325] These cases reveal that some states place more emphasis on certain factors and other states on different factors.

2.4.6. Murder

While murder is a crime that occurs in most states, no attempt has been made to give this offence a definition on an international level.[326] According to Curtis, murder and manslaughter cover how a person might be at fault for the killing. In the case of *Kindler v Canada (Minister of Justice)*,[327]

[322] Nation, 'Thailand Agrees to Extradite 10 Masterminds in Human Trafficking Case' (*The Star Online,* 29 August 2016) < http://www.thestar.com.my/news/nation/2016/08/29/thailand-agrees-to-extradite-10-masterminds-in-human-trafficking-case > Accessed 20 September 2018.
[323] *Ibid.*
[324] Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 406.
[325] The Organized Crime Convention, Article 16(13) provides that any person involved in an extradition request or process shall be guaranteed fair treatment at all stages of the proceedings including enjoyment of the rights of the guarantees provided by the domestic law of the state party in the territory of which that person is present"
[326] Justin Hogan-Doran 'Case Analysis: Murder as a Crime Under International Law and Statute of International Criminal Tribunal for the Former Yugoslavia: Of Law, Legal Language and a Comparative Approach to Legal Meaning' (1998) Leiden Journal of International law, 11(1) pp. 165-181,
[327] *Kindler v. Canada (Minister of Justice)* [1991] 2 S.C.R. 779, Canada: Supreme Court, 26 September 1991. Kindler was found guilty of first degree murder, conspiracy to commit murder and kidnapping in the State of Pennsylvania and the jury recommended the imposition of the death penalty. Before he was sentenced, he escaped from prison and fled to Canada where he was arrested. The extradition judge allowed the US application for his extradition.

(followed by *Chitat Ng v Canada,*[328] and *Cox v Canada)*[329] the issue of sufficient diplomatic assurances provided and torture are competing factors within an extradition decision. Extradition in these cases was ordered under s. 25 of the Extradition Act without seeking assurances from the US, under Article 6 of the extradition treaty between Canada and the US. This Article provides that the death penalty would not be imposed or, if imposed, not carried out. Both the trial division and the Court of Appeal dismissed *Kindler's* application to review the decision. This case marked the first substantive decision on the subject of a violation of human rights under the International Covenant on Civil and Political Rights (ICCPR) consequent upon extradition by a state party. These case-laws make extradition itself a violation of Covenant obligations. While some international instruments are supporting the trend that the death penalty should be abolished, all except one fall short of actually prohibiting the death penalty. Some states have resisted the trend, notably the US, Nigeria, Philippines, India and some other states.

Similarly, in the case of *Nivette v France,*[330] extradition was sought for prosecution for murder. It was argued in this case that Article 3 [331] would be breached if he were to be sentenced to life imprisonment without any possibility of early release. It was also argued that the assurances that

[328] [1991] 2 S.C.R. 858 Ng was caught shop lifting in Calgary when two security guards apprehended him. Ng resisted and shot one of the guards in the finger. He was then subdued and handcuffed. At the time he was also carrying a rucksack containing a mask, a knife, a rope, cyanide capsules, a gun and extra ammunition. The US sought to extradite NG on counts of murder, kidnapping, conspiracy to murder, accessory after murder, conspiracy to kidnap and burglary. He was charged in the state of California with several offences including twelve counts of murder. If found guilty, he could receive the death penalty. Before trial, Ng escaped from prison and fled to Canada where he was arrested. The minister of Canada ordered his extradition pursuant to s. 25 of the Extradition Act without seeking assurances from the US that the death penalty will not be imposed, or if imposed, not carried out.
[329] CCPR/C/52/D/539/1993/ Cox a citizen of the US was arrested at Laval Quebec, for theft a charge to which he pled guilty. While in custody, the judicial authorities received a request for his extradition. He was wanted in the State of Pennsylvania on two charges of first degree murder, relating to an incident that took place in in Philadelphia in 1988. If convicted he could face death penalty, although the two other accomplices were tried and sentenced to life terms
[330] [Application No. 44190/98] Nivette an American national was suspected of murdering his girlfriend. Available at < https://hudoc.echr.coe.int/eng#{"appno":["44190/98"],"itemid":["001-23082"]} > Accessed 15 October 2018.
[331] ECHR.

were provided by the Sacramento County District Attorney were not sufficiently binding on the state of California, and the best assurance would be from the state governor or the President of the US. The court concluded that the assurances provided by the French government are such as to avert the danger of being sentenced to life imprisonment without any possibility of early release. The extradition of *Nivette,* therefore, did not expose him to a serious risk of treatment or punishment prohibited by Article 3.[332] The human right issue can also be seen as a competing factor within extradition in this case.

In the case of *Einhorn v France,* [333] extradition was sought from France to the US for a sentence of life imprisonment imposed in absentia for an offence for which the death penalty could be imposed. It was argued that the extradition would breach Article 3[334] in that there were substantial grounds for believing that *Einhorn* faced a real risk of being sentenced to death. Article 6,[335] was also invoked on the basis that allowing for a new trial in Pennsylvania would not satisfy the requirements of Article 6 given the pressure of legal and media attention which the case had generated in the US and which the jury would not have been able to avoid.[336] The court concluded that the government obtained sufficient guarantees that the death penalty would not be sought, imposed or carried out. [337] The court further added that there was no evidence to show that having regard to the relevant American rules of procedure, there are substantial grounds for believing that the trial would take place in conditions that contravened Article 6.[338]

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[332] *Ibid.* footnote 330. para 6 and 7.
[333] [Application No. 71555/01]. Einhorn, an American national, left the US after being accused of murdering his former partner. He was found guilty, in his absence of murder and was sentenced to life imprisonment.
[334] ECHR.
[335] ECHR.
[336] *Ibid.*
[337] *Ibid.* footnote 333 at Para [26].
[338] *Ibid.* footnote 333 at Para [34].

In the case of *Ahorugeze v Sweden,*[339] regarding the extradition of a Rwandan national from Sweden to Rwanda for prosecution for genocide, murder, extermination and involvement with the criminal gang, allegedly committed during the genocide in Rwanda 1994. The Swedish Government decided to extradite *Ahorugeze* in respect of genocide and crimes against humanity. Article 3 and 6, [340] was invoked on the basis that he was suffering from heart problems that required bypass surgery. Therefore, there was a serious risk that he would not be able to get the surgery in Rwanda. He further argued that the prison conditions in Rwanda would violate his rights under Article 3, and the trial in Rwanda would amount to a flagrant denial of justice. In response to the arguments raised, the court concluded that the fact that his circumstances including his life expectancy, would be significantly reduced if he were to be removed from the contracting state is not sufficient enough to breach Article 3. The court added that no evidence has been submitted or found which gives reasons to conclude that there is a general situation of ill-treatment of the Hutu in Rwanda. There was no evidence in the case that he would face a risk of torture or ill-treatment.[341]

As can be seen from these cases, Article 3, 5 and 6 of the Convention was invoked as a basis for refusing the extradition. Interestingly, as can be noted from the above cases such as *Ahorugeze v Sweden,*[342] (*Ahorugeze* a Rwandan National) *Einhorn v France,*[343] (*Einhorn* a US national) *Nivette v France*[344] (Nivette a US national) that some of the requested individuals were from states that are not a member of the Convention. These articles are human right provisions that often weighs

[339] [Application No. 37075/09].
[340] ECHR.
[341] *Ibid.* footnote 339 at para 91 and 92.
[342] *Ibid.* footnote 339.
[343] *Ibid.* footnote 333.
[344] *Ibid.* footnote 330

against extradition. The salient feature of the cases discussed in this section is that it provides an example of the human rights arguments that can be made for and against extradition and criminal co-operation proceedings. As can be seen above, interestingly, however, the nature of challenges differed in two cases. The challenge made in most cases in the EU, UK was generally to the lawfulness of the interference with the rights of the requested person. There were factors both in favour of and against a state's prosecution. It is notable also that most case-laws mentioned the importance of international relations, the effectiveness of international criminal justice.

2.5. Principles for the Increase of International Cooperation

The case analysis above illustrates that crimes occur within and across state borders and the provisions of the Convention invoked highlights the universal applicability of the competing factors regarding extradition decisions. There is a value-oriented goal achieved by states, and this serves as the basis of this discussion. This goal is an attempt for states to minimise or suppress crime, with the right legal framework and a determined effort, this can be achieved. Stating that the goal will be to combat crime is farfetched as these criminal activities can only be minimised or reduced and not eradicated entirely. The suppression of these crimes will prevent its spillover effects from uninvolved participants.

In other words, the goal is to minimise the impact of crime, restrict its extension to potential victims and to prevent its exportation to the areas beyond those wherein a given conflict exists. With this in mind, the threshold questions are whether to define certain manifestations of crime and how to regulate them.[345] Put another way, the issue as for whether to define these crimes as an international

[345] *Ibid.* footnote 10. pg. 389.

crime establishing international enforcement machinery or do not define it but require the state to increase their collaboration in the fields of extradition and other forms of judicial cooperation in respect to certain activities.[346] This being said, the modalities of interstate cooperation are the very essence of enforcement, and without them, international and cross-border crime, and even domestic crime would be deprived of international enforcement methods.[347] In order to render the international system of suppression of domestic and international criminality more effective there is a need for mutual cooperation between states and fundamentally good friendly relations.

2.5.1. The Facts Established from the Impact of Globalisation and Crime

The evaluation of the facts of some of the cases involving international and cross-border crime was provided in detail, this chapter also identified that in practice, and there is an interruption on extradition for as long as the application is being examined. As can be seen from the case-laws or authorities discussed, the most typical cases are those where, if extradition takes place, the alleged offender fears the risk of torture, inhuman and degrading punishment or treatment, the risk of being sentenced to death or life imprisonment if extradited. A risk of a flagrant denial of justice, right to a fair trial and a risk to private and family life. The ECtHR has established through these case-laws the human interest that is worthy of being satisfied which further supports the assertion that conflicting interest exists within an extradition decision. Having analysed the crimes being committed, the facts established from the case analysis also produced that;

- International and cross-border crime cuts across both developed and developing states. A significant proportion of the cases are universal, and even those cases with a single

[346] *Ibid.* footnote 10. pg. 389.
[347] M. Cheriff Bassiouni, 'Policy Considerations on Interstate Cooperation in Criminal Matters' (1992) 4 Pace International L. R. 125.

jurisdiction involve offenders who originate from outside that jurisdiction. As a result, the identification of the competing factors within an extradition decision has universal applicability. Due to its universal feature, there is no need for a comparison between several states;

- The existence of various state legislation that addresses a particular type of criminal activity is not in itself sufficient enough to tackle the problem of international and cross-border crime. The offences identified show that states no longer view them as a problem that is peculiar to each state. However, states have now realised that it is a global challenge that must be confronted by the international community as a whole;
- the interest of the alleged offender and the aim of extradition conflict during extradition negotiation;
- One interest is always satisfied at the expense of the other, and these interests need to be balanced in other to minimise the tension that exists when the state initiates extradition;
- Most states that have faced these offences have engaged in several approaches, which include the use of police forces and increased cooperation between the police and judicial authorities. However, if a given set of facts may justify and lead to a criminal investigation and prosecution of offences, then it validates the fact without any uncertainty that all can have a role to play. However, one of the most important of these is the mechanism of law enforcement.[348] If states cooperate in good faith, the mechanism of law enforcement, as well as the judicial authorities, is the most appropriate means of responding to the crimes;
- The weight of the public interest regarding extradition can swing both for and against extradition. Sometimes an alleged offender by one state is seen as another state's 'freedom

[348] Walter Gary Sharp, 'The Use of Armed Force Against Terrorism: American Hegemony or Importance' (2000) 1 Chicago Journal of Int'l L. 34, 44.

fighter'. On other occasions, the weight of the public interest that alleged individuals should be brought to trial, serve their sentences and that there should be no safe havens to which they can flee can lead to calls for extradition.

2.5.2. Extradition Law

Extradition laws in states provide the footing for the conclusion of extradition treaties. According to Arnell, the law of extradition is particularly newsworthy and is topical because of the controversial extraditions that have occurred.[349] In the UK, the review of the law of extradition has seen complex, controversial cases and related litigation continues.[350] In the case-laws analysed above, the law of extradition was put into effect. They highlight the competing factors that conflict within extradition decisions into human rights issues as illustrated in cases where the alleged offender invoked Article 3, 5, 6 and 8 of the Convention as reasons for refusal in most ECtHR cases, as opposed to states like the US and Nigeria. Thus, the discussion was required because they consider issues directly related to the objectives and the research questions of this thesis.

Additionally, an extradition arrangement is governed by regulations at the international and domestic levels. The international instrument is the extradition treaty. For example, the UK/US Extradition Treaty 2003 stipulates the basis upon which alleged offenders are extradited to both states. This applies to other states that have negotiated an extradition treaty. However, not all states are willing to depend solely on the discretion of their governments as a conclusion of extradition treaties and the procedure in extradition cases. Therefore, these states have enacted special laws, which detail those offences for which extradition shall be granted and asked in return, while at the

[349] Paul Arnell, 'The law of Extradition' (2011) S.L.T 295.
[350] See McKinnon' Case for an illustration of the controversial nature of extradition in the UK. Also, see James Ibori and Senator Burunji's case for the controversial nature of extradition in Nigeria.

same time regulating the procedure in extradition cases. The first in the field with such as extradition law was Belgium in 1833.

According to Belgian law, the extradition of an offender who is pursued by a foreign state and who is within Belgian jurisdiction may only be granted in pursuance of a formal extradition treaty. Thus, it may be useful to note that in the UK, treaties are not part of it. Its law and extradition treaties require parliamentary legislation to make them efficient. In the US, treaties that are self-executing in form and become part of the law. It has been found convenient to enact laws to implement extradition treaties.[351] However, apart from the treaty, these laws do not authorise extradition. Their operation and the authority they confer are explicitly made dependent on the existence of an extradition treaty with a foreign state. Whether or not there is an interstate agreement that is to be enforced by state parties only, when considering other means of transferring the alleged individuals, the individual rights should be balanced against other relevant factors as this may provide the most favourable benefit for both the requesting and surrendering states.

2.5.3. Recognition of Extradition in International and Domestic Law

An understanding of the recognition of extradition in international and domestic legal systems will further address the questions on whether international law principles become part of the domestic law. Also, it also addresses the question of how states deal with both laws when they overlap and if the court pays attention to the reason for the supremacy. For example, in situations where a state refuses the extradition of an alleged offender because it is believed that their fundamental human

[351] Section 3181 of Title 18 of the United States Code, provides that the provisions relating to extradition "shall continue in force during the existence of any treaty of extradition. Section 3184 of the same title sets forth the procedure for obtaining the arrest and the examination of the fugitive. 'Wherever the treaty or convention for extradition between the United States and any foreign government any of the crimes provided by such treaty or Convention.

rights will be infringed by the requesting state. If the extradition is granted, or when an international court finds a state to be in breach of its obligations for transferring the alleged offender to the requesting state, primacy is in effect accorded to human rights norm over the extradition treaty. For this reason, there is a need to have an insight into the overlapping nature of the recognition of extradition in both international and domestic law.

International law provides a normative framework for the conduct of interstate relations[352] and as globalisation runs its course the world is becoming full of international law.[353] International laws are derived from the collective will of states, while domestic laws regulate the conduct of individual states. The difference in the international sphere is that the consequences are attributed to the state. It is noteworthy that the interaction between international law and domestic law is evident from the fact that a state has an obligation to extradite due to the treaty obligations that works in tandem with the states domestic law.[354] Extradition has long been recognised in international law,[355] and under international law, there is no duty for states to extradite individuals to carry out criminal proceedings in another state.[356] It is also a recognised principle of international law that states have the legal authority over individuals within their geographic borders. Also, states can have mutual treaty obligations to extradite an alleged offender.[357]

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[352] James Crawford *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2010) 20.
[353] John O. McGinnis and Ilya Somin 'Should International Law Be Part of Our Law' (2007) Stan. Journal of Int'l L. Rev. 1175.
[354] Obinna H.C. Onyeneke, 'Extradition: International law and Domestic law: Gary McKinnon v Natwest Three' (December 4, 2009). Available at SSRN: https://ssrn.com/abstract=1589502 or http://dx.doi.org/10.2139/ssrn.1589502 > Accessed 18 October 2018.
[355] D.R. Rothwell, S. Kaye, A. Akharkhavari and R. Davis, *International Law Cases and Materials with Australian Perspective* (2nd edn, Cambridge University Press 2011) 2 < International law provide a framework for understanding what rights and duties states have in relation to each other, and other international actors such as the United Nations (UN). International law can be defined as those rules and principles of general application dealing with the conduct of states and of international organizations in their international relations with one another.
[356] *Ibid.* footnote 142. pg.146.
[357] *Ibid.* footnote 142. pg. 147.

As highlighted above, these alleged offenders intentionally take advantage of porous borders and easy transportation to avoid being brought to justice. The global nature of the crime discussed above often complicates its prosecution, prevention and intelligence gathering. This international cooperation is essential in suppressing these crimes because there are limits to the effects of unilateral action in an interconnected world. The recognition of these crimes as a violation of international law will further the cooperation that is vital to suppress it and hold the alleged offenders accountable. Additionally, the crimes discussed above cannot be addressed solely by domestic law because there are gaps in enforcing due to the extraterritorial nature. Thus domestic courts acting alone often have difficulty establishing personal jurisdiction, effective process, sufficient pre-trial discovery and enforcing judgments.[358] To this end, international law can facilitate cooperation by setting up a common enemy and encouraging trust and partnership. Ultimately, international consensus and cooperation are important given the interdependence required for effective suppression of criminal activities.[359]

International and domestic laws are independent legal systems,[360] but they sometimes overlap when states are handling an extradition case. States are faced with suppressing international and cross-border crime and upholding its international obligations, and it is not always easy to find a balance. Thus, this overlap is another factor that causes tension when states decide to extradite an alleged offender. Extradition treaties are not the sole source of extradition law. As a result, states

[358] John D. Shipman, 'Taking Terrorism to Court: A Legal Examination of the New Front in the War on Terrorism' 86 (2008) North Carolina L. Rev. 526.
[359] *Ibid*. pg. 481.
[360] Fisnik Korenica and Dren Doli, 'The Relationship Between International Treaties and Domestic Law: A View from Albanian Constitutional Law and Practice' (2012) 24 Pace Int'l L. Rev. 92.

also legislate to manage the terms by which extradition may be granted. These terms also control the method of extradition from their state. The laws legislated by states regularly work in tandem with the extradition treaties of the state. However, this should not be the case since the universal obligation enacted on states to ensure that their domestic law corresponds with their international law obligations, permits a state to determine how this domestic conformity will be achieved freely.[361] This can lead to inconsistency amongst states on the domestic legal status of an extradition treaty. The states that have been examined in this thesis as with other treaties do not have domestic legal validity without the intervention of the domestic legislation.[362]

Extradition treaties take effect after these state authorities approve their legal power. The framework of the UK and US allocates the treaty-making power to the executive branch, while the legislature retains the authority to make or alter the state's domestic law. According to the Nigerian Constitution,[363] a treaty becomes binding after being signed by the President of the Republic of Nigeria and ratified by the National Assembly. To this extent, it can be understood that the Constitution assigns the Assembly and the President treaty-making powers. The engagement of the National Assembly in treaty ratification makes the treaty-making process more legitimate domestically on issues of great importance. Accordingly, an extradition treaty made by the executive can bind the state under international law, but it cannot alter the state's domestic law, nor confer rights on individuals, nor deprive individuals of the rights they enjoy under the domestic law. Overall, it can be asserted that the treaty agreement from these states' constitutional

[361] Peter Malanczuk, *Akerhurst's Modern Introduction to International law* (7th edn Routledge, 1997) 64.
[362] Peter Wogg, *Constitutional law of Canada* (4th edn Carswell, 1997) 11.
[363] Constitution of the Federal Republic of Nigeria 1999 < http://www.wipo.int/edocs/lexdocs/laws/en/ng/ng014en.pdf > Accessed 19 October 2018.

perspective is made binding due to an interaction between the state arms of government (executive and legislative).

To look more closely at the aim of this chapter, it is necessary to scrutinise precisely what states, regarding the relationship between international and domestic law prescribe. In international law, a Head of State, a head of government or foreign minister may sign a treaty in his or her right. Anyone else needs to produce 'Full Powers' from one of those three. Full Powers are the grant to another person of authority to sign a treaty on behalf of the state.[364] In UK practice, the Queen does not sign treaties, but the Prime Minister sometimes does. Full Powers are usually signed by the Foreign and Commonwealth Secretary except for certain EU treaties, which are between Heads of State and therefore require a Queen's Full Power. Foreign and Common Wealth Office ministers and certain UK Representatives hold general Full Powers giving them the authority to sign any treaty (subject to the approval of the Foreign and Commonwealth Secretary in each case). Anyone else signing a treaty on behalf of the UK requires a special Full Power enabling him or her to sign the specific treaty.[365]

Furthermore, Article 47 of the Treaty on the European Union (TEU) as amended by the Treaty of Lisbon gives the European Union (EU) legal personality. This means that the EU is subject to international law and can negotiate and conclude international agreements on its behalf.[366] Article

[364] Treaties and Memorandum of Understanding, Available at < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/293976/Treaties_and_MoU_Guidance.pdf> Accessed 19 October 2018.
[365] *Ibid*. footnote 364.
[366] Articles 216-218 TFEU are on International Agreements. The procedures by which the EU can negotiate and conclude (ratify) international agreements with third countries or organisations are set out in Articles 207 and 209 TFEU, in conjunction with Article 218(6) TFEU. Under Article 8 TEU, to develop a special relationship with neighboring countries the EU may conclude specific agreements with them.

21 TEU sets out broad general principles governing EU international action as:

> '.. democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'.

Based on the above provision, extradition arrangements are governed by regulation at two levels, international and domestic. A wealth of literature and decided extradition case-laws have been developed to answer the question of whether extradition is recognised in domestic law. For example, the international instrument between the UK and US is the Extradition Treaty of 2003.[367] The extradition treaty between these two states has only been in force since 2003. While the UK has acted on its terms since the 2003 Act entered into force, 1st January 2004,[368] the US Senate did not ratify the extradition treaty until September 2006. The non-ratification of the extradition treaty by the US Senate shows one of the main criticisms that has been levied against the UK extraditions to the US.[369]

Furthermore, states are bound by extradition treaties that they are a party to, and most of these states recognise its authority over them. These extradition treaties would be impossible without international law. In the US for example, the legislation gives the court jurisdiction to apply international law in federal courts in cases arising under the laws and treaties of the US. Simply put, states consider international law in decision-making because it constitutes a mechanism to facilitate the achievement of strategic foreign policy objectives. In matters of worldwide concern,

[367] UK/US Extradition Treaty 3003.
[368] *Ibid.* footnote 367.
[369] Ted Bromund and Andrew Robert James Southam 'The U.S.–U.K. Extradition Treaty: Fair, Balanced, and Worth Defending' https://www.heritage.org/europe/report/the-us-uk-extradition-treaty-fair-balanced-and-worth-defending > Accessed 20 September 2018.

international law determines the responsibilities and obligations of each state, organisation or individual. International law is both the product and the regulating force of international relations as states are increasingly expected to enter into relationships with one another.[370]

2.6. The United Nations (UN) Model Treaty on Extradition

The Model Treaty on Extradition is a useful guide to assist the member states in negotiating treaties.[371] Several UN Conventions contain specific provisions on extradition about a specific crime. However, there is neither a universally applicable multilateral extradition treaty nor is there likely to be one, given the political and cultural obstacles such a task would generate. Instead, the UN has opted for the endorsement of a Model Treaty on Extradition.[372] Since it is supplemented by what is described as 'complementary provisions to the Model Treaty on Extradition.[373] This serves as a frame of reference for the adoption of extradition treaties based on a set of commonly agreed standards.

These standards, however, also provide for a degree of flexibility or 'a la carte' application, with footnotes having been included in the Model Treaty to indicate where states may choose to assume a greater or less extensive extradition obligation. As initially envisioned, the Model Treaty was intended to guide the negotiation of bilateral treaties.[374] Given that its provisions can be readily adapted to a multilateral setting, the General Assembly has since urged states to use the Model Treaty as a basis for developing treaty relations at the bilateral, regional or multilateral level, as

[370] Jianming Shen, 'The Basis of International Law: Why Nations Observe' (1998-1999) 17 Dick J. of Int'l L. 287.
[371] http://www.refworld.org/docid/3b00f18618.html Accessed 15 October 2018.
[372] Adopted on 14 December 1990, UN Doc. A/RES/45/116. (1991) 30 ILM1407 [UN MODEL TREATY].
[373] Adopted on 12 December 1997, UN Doc. A/RES/52/88.
[374] UN Model Treaty.

appropriate.[375] It has also called upon states to continue to acknowledge that the protection of human rights should be considered consistent with effective international cooperation in criminal matters while recognising the need for fully effective mechanisms for extraditing fugitives.[376]

Like its counterparts in Europe and America, the Model Treaty begins by imposing on states a general obligation to extradite, if the offence underlying the extradition request is punishable by deprivation of liberty in both states and severe enough to warrant extradition. As in recent extradition treaties, seriousness is measured by the more general punishability standard rather than by any particular listing of crimes by name. However, no firm conclusion is made as to whether the measure should be one or two year's imprisonment.[377] The Model Treaty then provides for several exceptions to the obligation to extradite, seven of which are termed 'mandatory grounds for refusal',[378] and eight are considered optional.[379] The significant point to note, according to Swart, is that with exceptions: "less weight is given to traditional obstacles to cooperation like fiscal offences and the nationality of the offender, while more systematic attention has been paid to the protection of human rights.[380]

2.7. Extradition Procedure

As observed from the analysis of the practice of extradition in the UK, US and Nigeria as well as other states, an extradition request using the extradition treaty that applies to these states usually

[375] https://www.unodc.org/pdf/model_treaty_extradition.pdf Accessed 15 October 2018.
[376] *Ibid.*
[377] Article 2 UN Model Treaty
[378] Article 3(a)-(g) UN Model Treaty.
[379] Article 4(a)-(h) UN Model Treaty.
[380] Bert Swart, 'Refusal of Extradition and the United Nations Model Treaty on Extradition' (1992) 23 Netherlands Yearbook of Int'l Law 175, 178.

follows specific procedures. The sources of the procedure can be found in the treaty itself, appropriate extradition legislation or other applicable domestic laws.

2.7.1. Extradition Procedure in the UK

The following process applies in extradition cases in the UK:

- The UK receives an extradition request;[381]
- In the case of EAWs, the request must be certified as being in order by the designated authority. In England, Wales and Northern Ireland this is the National Crime Agency (NCA). In Scotland it is the Crown Office and Procurator Fiscal Service;[382]
- The Home Secretary certifies part 2 requests;[383]
- Once a request has been certified, a warrant for the requested person's arrest is issued;[384] and;
- Once arrested the requested person is brought before the court for an initial hearing. In England and Wales, extradition cases are heard at the Westminster Magistrates' Court. In Scotland, they are heard at the Sheriff Court in Edinburgh. In Northern Ireland cases are heard by designated county courts or resident magistrates;[385]

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[381] https://publications.parliament.uk/pa/ld201415/ldselect/ldextradition/126/12604.htm> Extradition: UK Law and Practice; for a detailed extradition procedure on Extradition from the UK: EAW, Extradition from the UK; Category 2 territories, Extradition from the UK; Other Territories, extradition to the UK, extradition of UK Nationals. See Also < https://www.gov.uk/guidance/extradition-processes-and-review> Accessed 15 October 2018.
[382] *Ibid.* footnote 381.
[383] *Ibid*. footnote 381. Part 2 of the Extradition Act 2003 ('the Act') applies to all territories with which the United Kingdom has extradition relations that are not designated as category 1. Territories designated under part 2 of the 2003 act are known as category 2 territories, these can be further broken down into 2 further categories. The category 2 territories are: Albania, Andorra, Armenia, Aruba, Australia, Azerbaijan, Bonaire, Bosnia & Herzegovina, Curacao, Canada, Faroe Islands, Georgia, Greenland, Iceland, Hong Kong SAR, Israel, Liechtenstein, FYR Macedonia, Moldovan Monaco, Montenegro, New Zealand, Norway, Republic of Korea, Russian Federation, Saba, San Marino, Serbia, Sint Eustatius, Sint Maarten, South Africa, Switzerland, Turkey, Ukraine, United States of America.
[384] *Ibid.* footnote 381.
[385] *Ibid.* footnote 381.

- At the initial hearing the judge must: confirm the identity of the requested person; inform the person about the procedures for consenting to be surrendered to the issuing state;[386]and
- fix a date for the extradition hearing if the requested person does not consent to extradition;[387]
- At the extradition hearing, the judge must be satisfied that the offence for which the person is requested constitutes an extraditable offence and that none of the bars to extradition applies. If these conditions are met, the court must order the extradition of the requested person. If, however, any of the bars to extradition do apply, the judge must order the person's discharge;[388]
- Appeals may be lodged with the High Court and, if appropriate, the Supreme Court.[389]

2.7.2. Extradition Procedure under the EAW

- When the location of the requested person is known, the issuing judicial authority may transmit the EAW directly to the executing judicial authority;[390]
- The issuing judicial authority may, in any event, decide to issue an alert for the requested person in the Schengen Information System (SIS);[391]
- Such an alert shall be effected by the provisions of Article 95 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of

[386] *Ibid.* footnote 381.
[387] *Ibid.* footnote 381.
[388] *Ibid.* footnote 381.
[389] *Ibid.* footnote 381.
[390] EUR-Lex; Access to the European Union law < http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32002F0584
[391] *Ibid.*

controls at common borders. An alert in the Schengen Information System shall be equivalent to an EAW accompanied by the information set out in Article 8(1);[392]

- For a transitional period, until the SIS is capable of transmitting all the information described in Article 8, the alert shall be equivalent to a European arrest warrant pending the receipt of the original in due and proper form by the executing judicial authority;[393]
- If the issuing judicial authority does not know the competent executing judicial authority, it shall make the requisite enquiries, including through the contact points of the European Judicial Network (1), to obtain that information from the executing member state;[394]
- If the issuing judicial authority so wishes, the transmission may be effected via the secure telecommunications system of the European Judicial Network;[395]
- If it is not possible to call on the services of the SIS, the issuing judicial authority may call on Interpol to transmit an EAW;
- The issuing judicial authority may forward the EAW by any secure means capable of producing written records under conditions allowing the executing member state to establish its authenticity;
- All difficulties concerning the transmission or the authenticity of any document needed for the execution of the EAW shall be dealt with by direct contacts between the judicial authorities involved, or, where appropriate, with the involvement of the central authorities of the member states;

[392] *Ibid.* footnote 390.
[393] *Ibid.* footnote 390.
[394] *Ibid.* footnote 390.
[395] *Ibid.* footnote 390.

- If the authority which receives an EAW is not competent to act upon it, it shall automatically forward the EAW to the competent authority in its member state and shall inform the issuing judicial authority accordingly.[396]

2.7.3. Extradition Procedure in the US

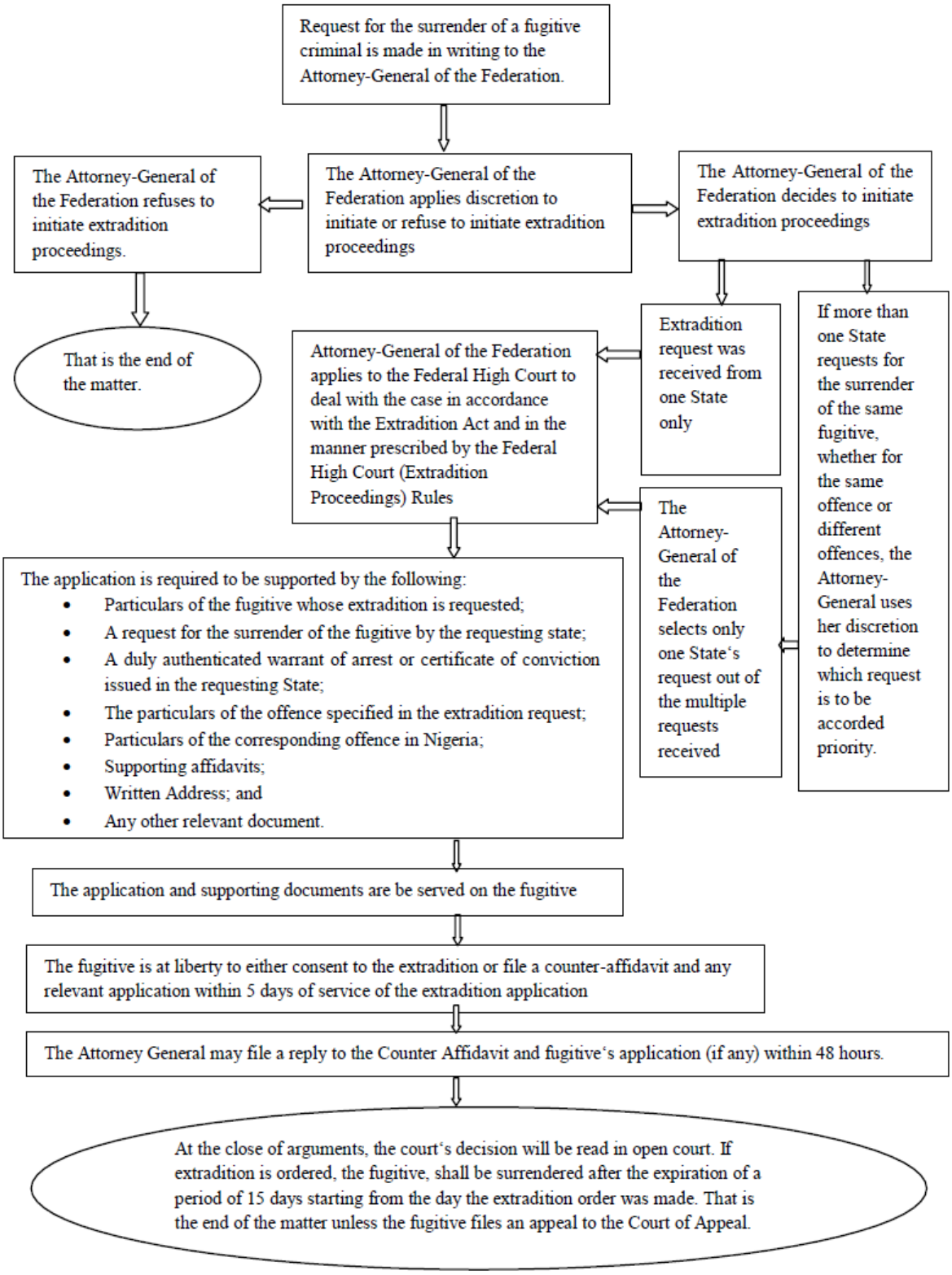
US extradition procedure is quite different from that of the UK-EU as well as Nigeria. In the US, Title U.S.C.3181-3196 regulates extradition proceedings, initiated by the Department of Justice, and it begins with a complaint, which must be sworn to or affirmed.[397] The complaint is akin to an indictment and as such must inform the alleged offender of the charges brought against him.[398] The complaint must satisfy the requirements of the applicable treaty and relevant legislation, and these require that it set forth the essential facts upon which it is founded. The documents that accompany the complaint are; a certified copy of the arrest warrant showing the offence charged, a sworn verified statement by the appropriate legal authority describing the facts and the relevant documents and accompanying affidavits, documents and evidence on the applicable foreign law and facts alleged.[399] Upon the filing of the complaint, the magistrate or judge may issue a warrant for the arrest of the alleged offender. The warrant is valid anywhere in the US, and any authorised judicial officer can hear the case even if they did not issue the warrant.[400] The process of extradition when the US is the requested state commences with a request of a foreign state, under a treaty, for a provisional arrest pending the submission of a formal request for extradition.[401] It should be noted that the

[396] *Ibid.* footnote 390.
[397] 18 U.S.C. 3184 (2000).
[398] *Ibid.* footnote 41. pg. 823.
[399] *Ibid.* footnote 41 pg. 833.
[400] *Ibid.* footnote 41 pg. 843.
[401] 18 U.S.C. 3181-3196 (2000) See also US Department of State and Foreign Affairs Manual Vol 7, 7 FAM 1630 Extradition of Fugitives from the US (CT;CON-326; 05-04-2010) (Office of the Origin; CA/OCS/PRI) Available at https://www.state.gov/documents/organization/71600.pdf > Accessed 15 October 2018.

US court will examine different issues depending on whether the extradition from or to the US for example, if extradition is from the US, in addition to the applicable treaty and legislation the court will consider the application of the conventional and customary international law. Issues concerning extradition of a person to the US are resolved in Article III.[402] The extradition procedure in Nigeria in 2.7.4. can be found in the link below.[403]

[402] *Ibid.* footnote 41. pg. 825.
[403] https://www.unodc.org/documents/nigeria/publications/Anti-Corruption-Project-Nigeria/Cases_and_Materials_on_Extraditon_in_Nigeria.pdf> Accessed 19 October 2018.

2.7.4. Extradition Procedure in Nigeria



2.8. Conclusion

This chapter has not attempted to thoroughly analyse all extradition case-law (regarding the offences that were discussed in sections 2.4.1- 2.4.6) from the UK, US and Nigeria. Only selected controversial extradition cases were analysed. The case-law analysis clearly brings to the fore the competing interests within extradition decisions. On the one hand, there is the interest of states to obtain the alleged offender to enable prosecution and on the other the interest of the requested state to protect the rights of the requested person. This chapter demonstrated that crime cuts across borders, and affects both developed and developing states. It was also found that both developed and developing states encounter problems in the course of extradition. The findings of this chapter identified human rights, economic concerns, diplomatic assurances, specific criminal penalties, public interest, culture, politics, immigration, borders and technology concerns as the competing interests that may need to be balanced within an extradition decision. This conclusion adds to the competing factors found in the extradition literature. The interplay of these interests at times gives rise to particular difficulties and obstacles which may lead to the process of extradition not functioning smoothly. The chapter also found that often certain of the interests may be irreconcileable, meaning that one interest is realised at the expense of the other. This was found in both developed and developing states. Underlying this chapter is the point that in addressing the competing interests fairness and justice are required. This leads to the next chapter categorising the different factors, and an examination of the need for that balance and the extent to which it can actually be achieved.

Chapter 3

Competing Factors within Extradition Decisions

3.1. Introduction

Chapter two of this thesis found that inevitable problems are encountered in the course of extradition, leading to states satisfying one interest only at the expense of the other thus it concerns this conflict of interest that fairness and justice are required. Additionally, a more explicit acknowledgement of the legal factors – human rights that conflict with extradition, identified in chapter two, is relevant and directly connected to the debate on how it can be balanced with an extradition decision. This poise will serve the interest of both the alleged offender and the international criminal law enforcement. Therefore this chapter aims to discuss how and whether the competing legal factors- Human rights outweighs extradition universally, making emphasis on the in the UK, US and Nigeria extradition case-laws. To understand this point, it is essential to recognise the diverse levels on which the legal factors- human right issues operate. These levels are significant implications for the nature of respect accorded to the alleged offender. Before this can be accomplished, the legal factors would be sub-categorised to enable a detailed analysis, and the basis of the sub-categorisation will be analysed. This indeed further adds to contribution to knowledge as Nigerian extradition framework is still grey as well as reducing the gap in its literature. Furthermore, another contribution to knowledge is that the scope and application of the legal factors that conflict with extradition may guide decision makers when making an extradition decision. It will also provide a useful guide simplifying the understanding of both the Convention and the court case-law in these states.

3.2. The Categorisation of the Competing Factors within Extradition Decisions

The evaluation of relevant case-law involving international and cross-border crime highlights that gravity of the crime, a penalty of crime, public interest, safe haven policy, treaty obligations, human interest of the alleged offender, domestic/ international politics, political offence, immigration border and culture are at play during extradition decision making. This fact supports the earlier assertion in this thesis that a myriad of factors plays a crucial role in shaping the outcome of extradition decisions. It is suggested that recognition of this fact may help both developed and developing states facing these challenges by allowing them to familiarise themselves with these interests and to consider a possible hierarchy in their application. Building on the already established principles from the ECtHR on the factors to be considered when these interest conflict, an approach of the identified factors that weigh in favour of extradition and militate against it are summarised in Table 1 below:

PROS	CONS
The gravity of the crime	**Legal Factors** • **Human rights obligations**
The possible punishment	**Non-Legal Factors** • **Domestic and international politics** • **Economic factors** • **Social factors**
The public interested of the requesting state	**Political offence**
Prevention of safe havens	**Diplomatic assurances**
Treaty obligations/ comity	
Diplomatic assurances	

Table. 1. Table Depicting the Pros and Cons within Extradition Decisions.[1]

[1] Table One.

3.3. Review of Case-law and its Limitations

This thesis provides a systematic exposition of the rules and factors governing extradition, analyses the relationship between rules and factors, explains areas of difficulty and indicates future developments.[2] This entails an examination of the legal principles and influencing factors generated and considered by the courts, legislatures and within extradition treaties. The arguments made in the thesis are based on legal norms and standards. These are evidenced by particular cases, where the facts in a given situation come to the fore. In analysing the competing factors within extradition decisions, the thesis considered a number of judicial decisions in various jurisdictions. These cases were reviewed and analysed, in part, in order to ascertain their value as sources. This is not to suggest cases not according to the themes and arguments under discussion were excluded but rather to highlight that consideration has taken the place of whether and why cases were discussed. An element of this process was the identification of relevant themes within the cases. This was done to allow for a thematic analysis approach to be used in order to identify and analyse cases with a view to finding similarities and patterns (themes) within the jurisprudence. This was considered suitable because it allows cases from differing jurisdictions to be considered together.

A further benefit of thematic analysis is its flexibility. This approach may be criticised, however, because it does not have clear and concise guidelines on, for example, the exact criteria defining each theme. This means that 'anything goes' critique of qualitative research,[3] may well apply in some instances. Any theoretical framework carries with it some assumptions about the nature of the data/ cases, what they represent regarding the 'the world', 'reality', and so forth. The thematic

[2] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do; Doctrinal Legal Research' (2012) 17 Deakin L. Rev. 83, 124.

[3] Charles Antaki, Michael Billig, Derek Edwards, and Jonathan Potter, 'Discourse Analysis Means Doing Analysis: A Critique of Six Analytical Shortcomings' *DAOL Discourse Analysis Online [Electronic Version] 1(1)* 2002 < https://extra.shu.ac.uk/daol/articles/open/2002/002/antaki2002002-paper.html

analysis undertaken may be similar to the phases of other qualitative research, so these stages are not necessarily all unique to thematic analysis. The decision on which cases to include involved finding patterns across cases and issues of potential interest within them. The result of the process was the inclusion of cases that support the arguments being made, although it should be noted that the 'themes are abstract (and often fuzzy) constructs the investigators identify before, during, and after analysis'.[4] Overall, the thesis identified cases that lend weight to the arguments being made, and it grouped them together, from different jurisdictions, in order to strengthen the value of every single example.

Three main jurisdictions provide the focus of the thesis and provide the majority of the case law included within it. These are the UK, US and Nigeria. This approach was taken, in part, because of the number of relevant and accessible cases that have arisen in them and, in part, in order to provide contrast in approach. As regards the UK and the US there are a large number of relevant extradition decisions. Arguments against extradition are often made in these jurisdictions and the results of which can lead to published case reports. Nigerian case law is somewhat less accessible. It was selected in order to provide a different, African, dimension to the research and, in part, due to the researcher's background there. Further relevant factors leading to the choice of the UK, the US and Nigeria as main subjects for examination include that each is from a different continent – the UK from Europe, the US from North America, and Nigeria from Africa. It is considered that such an approach will demonstrate the universality of the findings of the research. If similar competing factors are at play in all three states then, it is submitted, they are more likely to be of

[4] Gery W. Ryan and H. Russel Bernard (eds), Data *Management and Analysis Methods. Handbook of Qualitative Research* (2nd edn. In: Handbook of Qualitative Research, 2nd edn. Norman Denzin and Yvonne Lincoln, eds. Sage Publications. 2000) 780.

truly general application. If, on the other hand, there is a lack of similarity then the opposite conclusion could be drawn.

The UK, the US and Nigeria are all parties to various international and regional agreements on extradition, human rights and international criminal matters. Some of this regulation applies in all three states, some between two of them, and some in a single state alone. This adds value to the information uncovered in each jurisdiction. Also relevant is the fact that two of the most developed and powerful states are included. This leads to a wealth of case law, and academic commentary. More relevant is that they have the resources to seek to prosecute transnational crime and the extradition of alleged criminals, whereas less-developed states simply lack the resources and legal and judicial experience and expertise to do so. It is admitted that all three states have similar legal backgrounds – based on the common law. However, they also have important differences. Human rights protection in each state comes from a different source. There is constitutional protection within the US and Nigeria, with both states being party to international and regional human rights agreements. In the UK human rights are protected by the Human Rights Act 1998, which is in turn based upon the ECHR. In addition to legal differences, there are important differences in corruption and the influence of non-legal factors within extradition decisions. This is discussed below. An important feature of UK extradition law and practice is its membership of the EU and the Council of Europe. Both of these facts have a considerable influence on UK extradition law, and, have led to that law being founded upon a large body of case law decided by the UK and European courts that make the UK have one of the leading bodies of extradition law. For example, UK law in the area has considered the protection due to alleged offenders from unfair trials, unfair treatment, and to the right to private and family life. A leading case within the UK, and indeed in

support of the approach taken in this thesis is *Polish Judicial Authority v Celinski.*[5] Providing some context to the analysis within this thesis is the following information. It is limited to statistics pertaining to UK extradition.

[5] [2015] EWHC 1274 (Admin).

3.3.1. Extradition Request Statistics from 2007-2014

Table 2 – Statistics of Extradition Request from 2007-2014[6]

STATES	OUTGOING REQUEST	REQUEST DENIED	REQUEST APPROVED	TOTAL COUNT
UK-US	25 (British)	-	20	58
	8 (Americans)	-	5	
US-UK	41(British National)	-	28	132
	21(Americans)		12	
UK-non-EU[7]	48 (in the year 2015)[8]		25	48
Non-EU- UK *[9]	-	11(1st January 2014-31 March 2018)[10]		78(2014-2018)[11]
UK - NIGERIA	-	-	3[12]	-

[6] Table 2.

[7] https://www.whatdotheyknow.com/request/308967/response/756861/attach/2/FOI%20response%2037984.pdf?cookie_passthrough=1> Accessed 28 October 2018. These individuals were extradited in relation to the following offences: abduction, attempted murder, corruption, drug offences, firearms offences, fraud, murder, robbery, sexual offences (including child sex offences, rape, indecent assault etc) and wounding.

[8] *Ibid.* footnote 6. Requests were made to the following states: Australia, Canada, Hong Kong, India, Jamaica, Kenya, Mexico, New Zealand, Nigeria, Norway, Pakistan, Philippines, South Africa, St Lucia, Switzerland, Tanzania, Thailand, Turkey, Ukraine, United Arab Emirates, United States of America and Vietnam. Please note that these figures do not include Scotland. The Home Office deals with extradition requests on behalf of England, Wales and Northern Ireland only. Scotland deals with its own extradition cases.

[9] * Asterisks represents data from 2014 – 2018 provided by the Home Office (FOI) Dated 28 June 2018. According to the Home Office (FOI) extradition process provides for one country to request of another country the apprehension and return of a person who is present in the latter and is accused or convicted of a crime in the former. Not all extradition requests lead to the arrest and extradition of the subject.

[10] *Ibid.* footnote 6. There have been 11 requests refused, following the person's arrest, as a result of requests made via Home Office to jurisdictions outside of the EU from 1 January 2014 to 31 March 201Requests have been refused by the following countries: Canada, Brazil and the UAE. Of those requests, 9 have been refused by the UAE. Full information on the reasons for refusal are not always provided. Where known, requests have been refused for the following reasons: Health, passage of time, not an extradition offence, dual criminality grounds and documentary reasons.

[11] *Ibid.* footnote 6. There have been a total of 78 individuals extradited to the UK as a result of extradition requests made via the Home Office to jurisdictions outside of the EU from 1 January 2014 to 31 March 2018. Extraditions have taken place from the following countries: Australia, Brazil, Canada, Ghana, Hong Kong, Israel, Jamaica, Kosovo, Malaysia, Mexico, Morocco, New Zealand, Nigeria, Norway, Pakistan, Philippines, St Lucia, South Africa, Switzerland, Tanzania, Thailand, Trinidad & Tobago, Ukraine, UAE, USA, and Venezuela. According to the Home Office (FOI) Extraditions have taken place for individuals who are wanted for the following offences: abduction, attempted murder, bribery, burglary, conspiracy to cheat the public revenue, corruption, drug offences, firearms offences, fraud, GBH, kidnapping, manslaughter, murder, people trafficking, perverting the course of justice, robbery, sex offences and theft.

[12] *Ibid.* footnote 6. There have been 3 individuals extradited from Nigeria for the offences of murder and people trafficking, as a result of requests made via the Home Office. These figures are from local management information, and have not been quality assured to the level of published National Statistics. As such they should be treated as

NIGERIA - UK	-	-	-	-
US - NIGERIA	Unknown	Unknown	Unknown	Unknown
NIGERIA-US	Unknown	Unknown	Unknown	Unknown

3.3.2. Statistics of Persons Wanted by the UK from the EU

The statistics of individuals wanted by the UK from the EU (EAW) is shown in **Table 3** below;[13]

	2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**Total**
Requests	252	226	271	219	228	228	349	1,773
Arrests	141	151	148	170	156	156	185	1, 101
Surrenders	133	136	136	127	145	145	156	956

3.3.3. Statistics of Persons Wanted from the UK by the EU

The statistics of individuals wanted from the UK by the EU (EAW) are shown in **table 4** below;[14]

	2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**Total**
Request	4,369	6,512	6,290	5,522	13,460	12,613	13,797	62,563
Arrest	1,307	1,332	1,331	1,775	1,519	2,041	1,843	11,148
Surrenders	1,038	1,079	1,025	1,126	1,097	1,149	1,431	7,945

These tables have been produced with data from the Home Office and NSA website. Statistics in table two,[15] three[16] and four[17] indicate that extradition to the US from the UK does not take place under the EAW system. Table two[18] evidences the fact that the UK receives a considerably larger number of extradition requests from EU states under the EAW compared to the US and Nigeria.

provisional and therefore subject to change. The Home Office neither confirms nor denies whether any additional information is held and relies on the exemptions at sections 23(5), 27(4) and 31(3) of the Act.

[13] Table 3. National Crime Agency, 'European Arrest Warrant Statistics' < http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics < Accessed 19 October 2018.

[14] Table 4. National Crime Agency, 'European Arrest Warrant Statistics' < http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics < Accessed 19 October 2018.

[15] *Ibid.* footnote 6.

[16] *Ibid.* footnote 13.

[17] *Ibid.* footnote 14.

[18] *Ibid.* footnote 6.

As Table two[19] relates to UK extradition practice statistics of extradition cases between Nigeria/US, US/Nigeria, Nigeria-EU, EU-Nigeria, Nigeria-Non EU, Non-EU-Nigeria is not found within it. This is not, of course, because there is no extradition practice between these states rather, it is that the UK is the source of information.

Generally as regards Nigerian information, it is clear that the majority of Nigerian case-law on extradition is unreported.[20] There is a lack of germane Nigerian, statistics pertaining to extradition to and from Nigeria,[21] which is a limitation to the research. It can lead to an assertion that the position of Nigeria is based on anecdotal evidence. While it can be agreed partly that the lack of extradition statistics from Nigeria is not ideal, this fact does not mean that there are no competing factors when it considers an extradition decision. It can be argued that the lack of information from Nigeria adds to the value of this thesis, by it bringing together the information that is available and helping to develop the knowledge of this area of law. This lack of information is evidenced by the few reports on extradition found in case-law and extracts of principle.[22] As will be discussed this case law supports the assertion that politics, culture, borders, technology, public interest, and the penalty for an alleged offence are all at play when an extradition decision is under consideration. Examples of lessons that can be learnt from Nigerian law and practice include the simple fact that

[19] *Ibid.* footnote 6.
[20] Cases and Materials on Extradition in Nigeria (*United Nations Office on Drugs and Crime Country Office Nigeria,* 2016*)* 413.< https://www.unodc.org/documents/nigeria/publications/Anti-Corruption-Project-Nigeria/Cases_and_Materials_on_Extraditon_in_Nigeria.pdf > Accessed 19 October 2008.
[21] Susan Carroll, 'Expert: One Charge Could Derail Nigeria Extradition' (*Houston Chronicle,* 01 March 2011) < https://www.chron.com/news/houston-texas/article/Expert-One-charge-could-derail-Nigeria-1540794.php > Accessed 15 October 2018.
[22] *R v. Ibori (Onanafe James)* Unreported April 17, 2012 (Southwark Crown Court); *James Onanefe Ibori v Federal Republic of Nigeria* Suit No; CA/K/81C/2008; *Attorney-General of the Federation v Kingsley Edegbe* Suit No. FHC/ABJ/CS/907/2012; *Attorney-General of the Federation v Jeffery Okafor* FHC/ABJ/CR/180/2014; *Attorney General of the Federation v Emmanuel Ehidiamhen Okoyomon* Suit No. FHC/ABJ/CS/670/2014 (Decision delivered on 4th May 2015); *America v Buruji Kashamu* No. 10-2782 September 1, 2011.

extradition is a topic which causes tension in both developed and developing states. The *Ibori case*[23] and that of *Kingsley*[24] are examples. Both of those cases involved extradition, one to the UK and the other to the Netherlands. They are among the several unreported cases that spawn the most publicity, not least because of insights into fairness and justice that can be found in the requested state. The issues in these cases are political as well as personal and prompt the question of how a fair, balanced approach can be achieved.

A further insight from the statistics regarding extradition between the UK and the US. Take the US numbers first, since the current extradition arrangements were put in place in 2003, and up until the end of 2014, a total of twenty UK citizens have been extradited to the US whereas only twelve have made the journey in reverse. Allowing for population differentials, the numbers, while noteworthy, are perhaps less than shocking.

Evidencing the non-EU element of UK extradition practice is that fact that a total of seventy-eight (78) individuals extradited to the UK as a result of extradition requests made via the Home Office to jurisdictions outside of the EU from 1 January 2014 to 31 March 2018.[25] Extraditions have taken place from the following states: Australia, Brazil, Canada, Ghana, Hong Kong, Israel, Jamaica, Kosovo, Malaysia, Mexico, Morocco, New Zealand, Nigeria, Norway, Pakistan, Philippines, St Lucia, South Africa, Switzerland, Tanzania, Thailand, Trinidad & Tobago, Ukraine, UAE, USA, and Venezuela.[26] Extraditions have taken place for individuals who are wanted for the following

[23] *R v. Ibori (Onanafe James)* Unreported April 17, 2012 (Southwark Crown Court).
[24] *Attorney-General of the Federation v Kingsley Edegbe* Suit No. FHC/ABJ/CS/907/2012.
[25] *Ibid.* footnote 7.
[26] *Ibid.* footnote 7.

offences: abduction, attempted murder, bribery, burglary, conspiracy to cheat the public revenue, corruption, drug offences, firearms offences, fraud, GBH, kidnapping, manslaughter, murder, people trafficking, perverting the course of justice, robbery, sex offences and theft.[27] There have been eleven (11) requests refused, following the person's arrest, as a result of requests made via Home Office to jurisdictions outside of the EU from 1 January 2014 to 31 March 2018.[28] Requests have been refused by the following states: Canada, Brazil and the UAE. Of those requests, nine (9) have been refused by the UAE. According to the Home Office (FOI), information on the reasons for refusal is not always provided. Where known, requests have been refused for the following reasons: health, the passage of time, not an extradition offence, dual criminality grounds and documentary reasons. There have been three (3) individuals extradited from Nigeria for the offences of murder and people trafficking, as a result of requests made via the Home Office.[29]

The statistics highlight the particular relevance of the EAW in UK extradition practice. The EAW, governed by an EU Framework Decision, entered into force in 2004. The system is valid throughout all twenty-seven member states of the EU. It allows any EU state to request the arrest and surrender of an alleged offender without proving they have a case to answer. Once the EAW is issued, it requires another member state to arrest and transfer the alleged offender to the issuing state so that the person can be put on trial.[30] A warrant can be issued to conduct a criminal prosecution (not merely an investigation) and can be issued for offences carrying a maximum penalty of twelve months or more or those within the list of specified offences in the Framework

[27] *Ibid.* footnote 7.
[28] *Ibid.* footnote 7.
[29] *Ibid.* footnote 7.
[30] Francis Kean, 'Are they Out to Get You? Some Sobering Statistics on Extradition' (Wills *Towers Watson Wire,* 17 July 2013) < https://blog.willis.com/2013/07/are-they-out-to-get-you-some-sobering-statistics-on-extradition/> Accessed 15 October 2018.

Decision.

The statistics acquired by the researcher are relevant but only provide a limited picture. What some of these figures, of course, don't reveal are the offences that the individuals were suspected or convicted of or the reason for the extradition refusal where that happened. The case-law of the ECtHR[31], however, illustrates the various articles that are invoked during extradition litigation. Based on the statistics provided above in tables two,[32] three[33] and four,[34] the UK deals with a relatively high proportion of extradition, most of these coming from the EU. In spite of this information, a number of questions remain. Is the UK particularly active in seeking to suppress crime? Or does the US seek to punish more alleged offenders? Further, what is the effect of the UK's membership of the Council of Europe? The answers to these questions are not clear. It does appear, however, that difference in practice in part depends upon understandings of justice and fairness. The UK, for example, has taken steps to ensure an alleged offender is not sent to a state where it is believed that a death penalty will be imposed.[35] The Dutch have taken steps to ensure that Dutch citizens cannot be extradited for actions that are not also crimes in Holland (double criminality), and the French rarely appear to extradite a French citizen for trial in a foreign state.[36]

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[31] Barbara Geoth-Flemmich, Miroslav Kubicek, Stephen Dupraz and Erik Verbert, 'Case Law by the European Court of Human Rights of Relevance for the Application of the European Conventions on International Co- Operation in Criminal Matters' (*European Committee on Crime Problems (CDPC) Committee of Experts on the Operation of European Conventions on Co-Operation in Criminal Matters(PC-OC)*, 14 October 2013). <https://rm.coe.int/16806ee1c9> updated version and addition of more cases can be found in; Barbara Geoth-Flemmich, Miroslav Kubicek, Stephen Dupraz and Erik Verbert, ' Case Law by the European Court of Human Rights OF Relevance for the Application of the European Conventions on International Co- Operation in Criminal Matters' (*European Committee on Crime Problems (CDPC) Committee of Experts on the Operation of European Conventions on Co-Operation in Criminal Matters(PC-OC)* , 10 October 2017) https://rm.coe.int/pc-oc-2012-21rev-11-case-law-by-the-european-court-of-human-rights-for/168075bf8e > Accessed 19 October 2018.
[32] *Ibid.* footnote. 6.
[33] *Ibid.* footnote. 13.
[34] *Ibid.* footnote. 14.
[35] *Soering v UK* Series A. No. 161 [1989] 11 EHRR.
[36] *Ibid* footnote 21.

Germany too seems to have introduced the concept of proportionality into its treatment of requests under the EAW system, agreeing only to process those applications which it deems to be for 'serious offences.[37] Nigeria and the US still practice the death penalty, with little data on extradition case law from these jurisdictions cases where the human rights of the alleged offender have obstructed extradition to another state have not been unearthed.

One thing seems clear, in an increasingly globalised economy an individual's risk of prosecution is not limited to his place of residence. A request may come from a third state to a territory where the person happens to find himself at a particular time, and where there is an applicable extradition treaty as illustrated in *Ibori's case*.[38] Overall, the categorisation of the competing factors within an extradition decision in this thesis is supported by the statistics provided by the Home Office and NSA.[39] They correlate to the crimes discussed in chapter two in this thesis. As evident from the above tables, the UK and some EU states have extensive experience in extradition matters. The ECtHR and UK courts have produced an impressive jurisprudence regarding a 'balance' when those factors conflict.

In the UK's fight against international and cross-border crime, the role of the ECtHR is important, in interpreting and applying the ECHR. It may be seen that human rights provide that states must not destroy democracy on the grounds of defending it. Under its case-law, the ECtHR has established a vital jurisprudence on how to balance human rights and the fight against international and cross-border crime. The ECtHR has developed a body of case law that makes extradition

[37] *Ibid* footnote 21.
[38] *R v. Ibori (Onanafe James)* Unreported April 17, 2012 (Southwark Crown Court).
[39] *Ibid.* footnote 7.

practice somewhat more predictable as the legal principle that will be applied, and the effect of international crime in the application of the Convention, are often well defined in the existing case-law of the Court on the subject. The ECtHR has strong developed an established body of jurisprudence on extradition. It is also evident that a review of that case-law, and that from UK courts, (and indeed the US) may prove useful to states like Nigeria when dealing with the conflict of interests. As noted, case-law on extradition in Nigeria is limited. From the available materials, it appears that the prohibition of torture, inhuman and degrading punishment, the right to a fair trial, and the right to protection for one's private to life and family life has never been successfully argued before an extradition court in Nigeria. The first compendium of cases and materials confirms this proposition.[40] This simple fact helps explain why states like Nigeria may benefit from the suggested balancing approach.

3.4. Legal Factors

It appears clear, based on the case-law and related statistics, that the factors that weigh against extradition fall essentially into legal and non-legal factors. The human rights as legal factors stems from the legal basis of extradition from the objections generated by those alleged of an extraditable offence. The extradition of an alleged offender from a state has in recent times proved to be controversial.[41] The cause of the controversy is as a result of the competing factors. It is the further argument of this thesis that these competing factors and extradition work inefficiently together. This is because extradition usually involves the infringement of individual rights, albeit prescribed by law and proportionate to its legitimate aim.[42] Thus, there has been an increase in the number

[40] *Ibid.* footnote 20.
[41] Paul Arnell, 'The Law of Extradition (2011) 40 S.L.T 295.
[42] Rosemary Davidson, 'A Sledgehammer to Crack a Nut? Should there be a Bar of Triviality in European Arrest Warrant Cases?' 1 (2009) Criminal L. Rev. 31-36.

and type of extradition requests to the UK as well as other states. Furthermore, greater public and media awareness of extradition cases have provoked considerable alarm relating to the extradition of the alleged offender. As illustrated in the previous case-law the extradition of UK, Polish and other nationals including Nigerians have occurred in controversial circumstances in the recent past. This has given rise to criticism of both a general and particular nature - a significant amount of which emanates from the competing factors.

There is an equally complementary and competing interest with extradition regarding the protection of the rights of the alleged offender. Thus, it is logical to expect that these complementary goals of extradition on one side of the scale and the protection of the alleged offender on the other side of the scale are not balanced. The problem of reconciling these competing interests has appropriately begun to receive scholarly attention.[43] Consequently, this thesis is an attempt in furtherance of that inquiry. Balancing of these competing interests in the process of decision making is not achieved only by perception and inarticulated forces but also by an explicit recognition of the pros and cons after finding the facts of the case. Only after this can a reasoned conclusion be set out as to the result of the balancing exercise and why extradition should or should not be ordered. Through this method, a fair balancing approach may be reached.

As demonstrated in this thesis, when a state initiates extradition proceedings or requests, there are inevitable competing factors that come into play in the course of its operation. In particular, the

[43] See John Dugard and Christine Van Den Wyngaert, Reconciling Extradition with Human Rights, (1998) 92 Am. J. Int'l L.187. M. Cherif Bassiouni, *International Extradition: United States Law and Practice'* (Oxford University Press 2014); Heather Smith, 'International Extradition; A Case Study between the U.S and Mexico' (2000) The UCI Undergraduate Research Journal. 73; Paul Arnell, 'The Continuing Tension between Human Rights and Extradition' (2016) S.L.T. 4.

extradition of named individuals (*Dean,*[44] *Hamza,*[45] *Kapri,*[46] *McKinnon,*[47] *Celiski*[48]) has been subject to criticism. Through the negotiation of extradition treaties, states underline that the legitimate aim or pressing social need is the honouring of an extradition treaty (as an essential aspect of the suppression of international and cross-border crime- justice). The above objective weighs heavily on decisions, and the circumstances in which interference with the competing factors will not be proportionate to it will be exceptional. Thus, the criticisms directed at extradition law and practice evidence two underlying and competing factors that weigh against extradition. Under the legal factors, the human rights issue has been identified as a legal factor that conflicts with the decision to extradite, and this categorisation surfaces out of the legal basis for extradition.[49] In considering the decision on extradition, states cannot turn a blind eye to the potential breaches of human rights while trying to suppress crimes. Thus alleged offenders are allowed to argue their case on any of such grounds if they believe that their right has been breached.

3.5. Human Rights Influence on Extradition

The conflict between human rights and extradition arises in a criminal proceeding where a warrant of arrest is issued. Human rights issues are not always successful neither can it be used as an argument against extradition in a Nigerian court. However, it remains the fact that human rights

[44] *Lord Advocate (Representing the Taiwanese Judicial Authority and other v Dean* UKSC 2016/0212 [2016] HCJAC 83
[45] *Mustapha Kamel Mustapha v United States* [2008] EWHC 1357.
[46] *Kapri v The Lord Advocate* [2014] HCJAC 33; 2104 S.L.T. 557 (HCJ).
[47] *McKinnon V Government of the United States* [2007] EWHC 762.
[48] *Ibid.* footnote 5.
[49] Human rights are the basic rights and freedoms that belong to every person in the world. http://www.equalityhumanrights.com/yourrights.com/your-rights/what-are-human-rights> Accessed 28 September 2018. Having now established the principles and underlying philosophy behind human rights law in general, the main features of the HRA falls easily into place. The fundamental proposition behind the concept of human right is captured in a legal form in the 1998 Act. By October 2000, Human Rights Acts 1998 came into force, enabling the European convention on human rights (ECHR) to be relied on directly in the municipal courts < Legislating for human rights, the Parliamentary debates on the Human rights bill (2000).

are arguable ground that is occasionally used as a ground for refusal of the extradition request from the UK-EU, irrespective of the national of the alleged offender. The statistics in table 3 shows that 90% of the cases raised a human right provision from the Convention. Under the UK implementing jurisdiction, human rights are listed as an additional ground to be considered by the executing judge.[50] The EU member states who are party to the ECHR, are bound not to extradite an alleged offender to a state, where it is believed that the human rights of the alleged offender will be breached. If human rights ground is to succeed the risk needs to meet a high threshold, and it must be a real and not a speculative one.[51] An argument on this ground mostly leads to the delay of the prosecution or trial of the accused person or no trial at all.[52] One of the most controversial topics in the human rights arena is the use of capital punishment as a method of punishment for a crime committed.[53] While the use of the death penalty is historical, the global push to get rid of its use began recently.[54]

The interference of human rights influence on extradition is therefore widely experienced as a domain of tension between the protective and cooperative functions of this form of international legal assistance.[55] It is increasingly fashionable to discuss the problems that arise from the application of general human rights in the context of extradition. There would not be a problem in the relations between member states of the EU and COE who are bound by the provisions, to the

[50] *Ibid.* footnote 13. Table 3.
[51] Theodora A. Christou and Karen Weis, 'The European Arrest Warrant and Fundamental Rights: An Opportunity for Clarity' (2010) 1 New J. Eur. Crim. L. 31, 40.
[52] *Abu Hamza's case* was argued for eight years before he was finally extradited to the US. Also Gary McKinnon who challenged his extradition to the US that lasted for ten years. See also Norris case. *Norris v Government of the United States of America* [2010] UKSC 9.
[53] Christy A. Short, 'The Abolition of the Death Penalty: Does 'Abolition' Really mean what you Think in Means?' (1999) 10 (6) Indiana Journal of Global Legal Studies, 722.
[54] *Ibid.*
[55] Michael Plachta, 'Contemporary Problems of Extradition: Human Rights Grounds for Refusal on the Principle Aut Dedere Aut Punire", 114th International Training Course Visitor's Expert Papers.

extent that capital punishment has been abolished in these states. Problems may arise in the relations between a member state of the EU and a third state in which capital punishment is enforced and practised. In such cases, the EU which would extradite an alleged offender to such state would be in breach of the Protocol.

The case-laws examined in chapter two of this thesis advance the issue as to whether human rights can be an influence on extradition or whether the extradition process itself has to comply with the requirements of the current international human rights instruments.[56] Another issue regarding human rights from the case-law analysis is whether human rights law applies extraterritorially. In response to this issue, it is correct to say from the analysis drawn on states' extradition treaties and processes that there is an apparent concern for the protection of the alleged offender in extradition proceedings. This can be seen from the exceptions allowing states to refuse extradition if it is believed that the extradition breaches the rights of the alleged offender. This is peculiar to some states, for example, the US and Nigeria as seen in some the court decisions of the case-laws analysis. Furthermore, as indicated in this thesis, extradition primarily involves the relation between states, but the rights of the sought individual have to be given consideration. The commanding presence of human rights ideology since World War II has brought a visible impact on extradition.[57]

Most states have ratified or acceded to many of the primary international and regional human

[56] See Chapter Two, at 2.4.1 – 2.4.6. Of this Thesis.
[57] Vesna Stefanovska, 'Human Rights Exceptions to Extradition Regarding the Risk of Torture' Cambridge Int'l L. J. January 18, 2017 < www.cilj.co.uk/2017/01/18/human-rights-exceptions-to-extradition-regarding-the-risk-of-torture > Accessed 28 September 2018.

rights instruments that represent the major source of support. The movement took root with the passage of the Universal Declaration of Human Rights (Declaration) by the United Nations (UN) in 1948.[58] The Declaration is not a treaty, but a document meant to provide a shared understanding of human rights and fundamental freedoms. The Declaration proclaims that a 'right to life' exists, and is the primary source upon which abolitionists of death penalty rely. Several regional treaties exist that also support the aim to protect the right to life. The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) is probably the best known and most successful human rights treaty.[59] According to the preamble, 'the purpose of the European Convention is to take the first steps for the collective enforcement of certain rights detailed in the Universal Declaration'.[60]

That being said, the new dynamics of extradition with a human right orientation has thrown a particular emphasis on the alleged offender. The issue of the human rights of an alleged offender is raised in situations where there are reasons to believe that their human rights will be violated by the requesting state.[61] The requested state may also be presented with evidence that the alleged offender would be tried under procedures that lack fundamental fairness.[62] In considering whether the extradition of the alleged offender will be granted or not, the court in the UK-EU usually

[58] The Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3rd Session, at 7, U.N. Doc. A/810 (hereinafter Declaration) in December 1966, the UN passed the International Covenant on Civil and Political Rights (ICCPR) an example of an international human rights treaty concerned with the right to life, it did not enter into force until March 1976. Article 6 of the ICCPR actually regulates the imposition of the death penalty in States that still impose the execution as punishment. Section 6 of the ICCPR implicitly approves a state's choice to abolish the death penalty but it does not require a State to eliminate the use of capital punishment to become a party to the Covenant.
[59] It entered into force on 3 September, 1953.
[60] Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No.11 and No. 14. European Treaty Series- No. 5.
[61] John Quigley, 'The Rule of Non-Inquiry and the Impact of Human Rights on Extradition Law' [1990] 15 North Carolina Journal of Int'l law and Comm. Reg. 401.
[62] *Ibid.* pg. 401.

decides whether the individual's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998. Should the judge decide that the extradition would result in a breach of human rights as defined in the Human Rights Act 1998, the extradition request will be refused.

In doing so, priority is accorded to human rights norm over the extradition and courts have paid little attention to the reason for this priority. Additionally, in situations when an international court finds a state to be in breach of its obligations under the human right provisions for extraditing an alleged offender, this decision weighs against it. However, this is not the case in some states which includes the US and Nigeria. Using Nigeria as an illustration where the death penalty is still practised. If the crime requested for attracts a death penalty, it does not bar extradition, neither does any other human rights provisions in the Convention. Thus, the competing factors may be universal with exception to the human rights bar to extradition. To enable a detailed analysis of the human right issues that is invoked in an extradition proceeding, it is possible to sub-categorise the legal factors that weigh for and against extradition.

3.6. Sub- Categorisation of the Legal Factors

There is a wealth of scholarly writing in support of *Soering*[63] and the notion that human right considerations should be taken into account in the extradition process.[64] More critically, Dugard, Wood, Arnell and Bassiouni, have asserted that there is tension between human rights in the extradition process and the suppression of crime.[65] The ECtHR lays the principle that extradition

[63] [1989] 11 EHRR 439 See also *Ibid* footnote 43. (all authors).
[64] *Ibid.*
[65] *Ibid.* footnote 43.

should be refused if it breaches the human right of the alleged offender. The most far-reaching recommendation is that of the ECtHR when the factors conflict with human right, is in its resolution on the balancing approach. In most extradition cases, human rights take priority over domestic extradition statutes and international agreements. The question that then arises is which human rights fall into this category, what are the human rights that are worthy of being satisfied and especially, what is their proper order of rank.

These questions arise because the human rights of the alleged offender or the interest of the requested state to acquire the presence of the alleged offender are satisfied at the expense of the other. It concerns this conflict of interest that justice within a social order is required. Most case-laws illustrate that it is not possible to realise both at the same time one can be achieved only when is neglected. The *Soering* case is undoubtedly the trailblazer, stating in no uncertain terms that where a requested state sends an alleged offender to a state where their rights would be breached. That said, the jurisprudence of the ECtHR apply to the EAW. The standards and principles set in cases where the ECtHR has dealt with extradition cases are of particular application to EAW cases. According to Article 3 of the Declaration,[66] everyone has a right to life, this settles the fact that human rights are worthy of being satisfied irrespective of the gravity of the offence committed. While the Declaration protects human rights to life, there is no prohibition of the death penalty.

There is also no order of rank or specific human rights that are worthy of being satisfied when there is conflict within an extradition decision. From the case-law analysis, it is the state that

[66] The Declaration is not a treaty but rather a document meant to provide a common understanding of the human rights and fundamental freedoms referred to in the UN Charter. It serves as a common standard of achievement for all people and all states.

decides to realise when it is necessary to prefer the realisation of the one to that of the other. They choose whether the human rights of the alleged offender are more important, or in other terms, to determine which is of higher value. It is, therefore, necessary to examine the principle rights that have been invoked to obstruct extradition to determine the rules and guidelines that have emerged from the court or ECtHR decisions. By the case-laws[67] and the statistics provided in table 3,[68] it is, possible to further categorise the principle rights that have been invoked to obstruct extradition into;

Article 3-Prohibition of torture, or inhuman or degrading treatment[69]

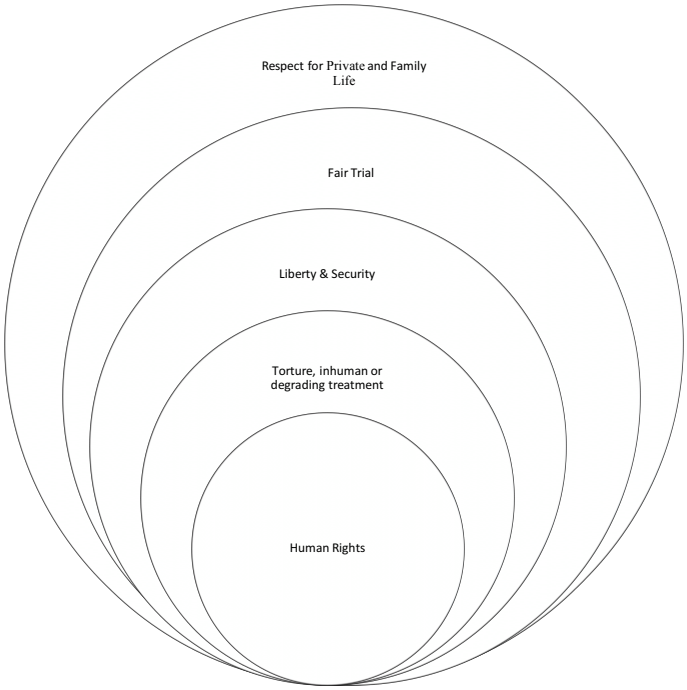
Article 5-Right to liberty and security[70]

Article 6-Right to a fair trial[71]

Article 8-Right to respect for private and family life[72]

[67] *Ibid.* footnote 56.
[68] *Ibid.* footnote 13.
[69] ECHR.
[70] ECHR.
[71] ECHR.
[72] ECHR.

Figure. 1. Sub-Categorisation of the legal factors [73]



There is no uniformity among human rights Conventions on the weight to be attached to different human rights, and there is no hierarchy of human rights.[74] Few criteria for distinguishing between ordinary rights have been agreed upon. No standard system currently exists by which higher rights can be identified and their content determined. Nor are the consequences of the distinction between higher and ordinary rights clear. Nevertheless, it is useful to distinguish between the different categories of human rights to assist courts in concrete cases at this moment adding to the current existing rights identified by authors on extradition.[75] The diagram illustrates the provisions that conflict between the rights of the alleged offender and the duty of the state to uphold its treaty obligations. The first (inner) circle represents the legal factors that are required to be considered by courts in an extradition hearing. The other four circles represent the other forms of treatment

[73] Figure One; Sub- categorisation of the legal factors.
[74] John Dugard and Christine Van Den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 92 Am. J. Int'l L. 210.
[75] *Ibid.* footnote 43. (All authors mentioned).

and punishment, and the overlap between the circles represents the link as it is often invoked together. The extent to which there is a potential conflict between these factors and extradition depends on the weight to be attached to each form when it is invoked in that context. The ECtHR sees these human interest as worthy of being satisfied, and according to its cases there is no order of rank, neither is any of the human right provisions is of highest value to the other.

There is certain uneasiness about categorising these influencing factors into legal and non-legal factors because intersections bear out that these factors are interlinked. However, the legal factors have been categorised into human rights factors. Previous extradition authors had only identified human rights as a conflicting factor with extradition, there was no categorisation into any broad group.[76] This sub-categorisation is based on the legal basis for extradition, which requires constitutional and domestic laws that warrant, limit or qualify the conduct of state authorities acting under the law in transferring the alleged offender. It also requires the evidence necessary for delivering an alleged offender to another state and the manner in which this evidence is gathered. Furthermore, this categorisation does not include all the human rights provisions of the Convention, but only a selection of the articles that are frequently invoked in an extradition process. This is because the majority of cases in extradition proceedings highlights the provisions in figure 1, that alleged offenders now seek to rely on to resist their extradition to other states.[77]

[76] *Ibid.* footnote 43. (All authors mentioned).
[77] *Ibid.* footnote 73.

The 1950 European Convention on Human Rights (ECHR) is in force in all the member states of the Union and binds them even in situations where they are implementing Union law.[78] It contains a range of civil and political rights, including the right to life, the prohibition of torture, inhuman or degrading treatment or punishment, the prohibition of slavery and forced labour, and the right to liberty and security. It also includes the right to a fair trial, the principle of no punishment without law (*nullum crimen, nulla poena sine lege*), the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, and the right to marry. Each of the numbered 'articles' protects a fundamental human right. Taken together, they allow individuals to have free and dignified lives and forty-seven states, including the UK, have committed themselves to it. That means that the UK, for example, pledges to protect the Convention rights. If a person's rights are being breached, and they cannot get a remedy in the UK through the Human Rights Act, the Convention lets them take their case to the European Court of Human Rights.

Article 3[79] of the Convention is an absolute, non-derogable right. Article 5 [80] and 6 [81] of the Convention are rights that are qualified only in times of war or public emergency when they may be subject to limited derogation. Article 8[82] is a qualified right, which allows interference where it is by the law and proportionate to a legitimate aim. These rights guarantees are further

[78] Prof. O. De Schutter, 'The Prohibition of Discrimination under European Human Rights Law, Relevance for EU Racial and Employment Equality Directives'. 2 Available at < http://www.equalrightstrust.org/ertdocumentbank/The%20prohibition%20of%20Discrimination%20under%20Human%20Rights%20Law.pdf> Accessed 16 October 2018.
[79] ECHR.
[80] ECHR.
[81] ECHR.
[82] ECHR.

supplemented by several substantive protocols to the ECHR,[83] which amend the right to guarantee to abolish the death penalty.[84] The rights and the freedoms guaranteed by these treaties suggest some degree of positive and negative influence on states. This is because human rights concerns have become widespread as various instances and occurrences for the refusal or approval of extradition requests. These issues are common especially with the growing levels of international and cross-border crime. This raises another question as to the degree of the interference of these articles when invoked by the alleged offender in extradition cases.

The apprehension over the observance of human rights has distinctly become such a high primacy that some states are being critiqued for the violation of human rights in extradition cases. Through ratification of human right treaties, states undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties.[85] The domestic legal system, therefore, requires the principal legal protection of human rights guaranteed under international law.[86] In situations where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for an individual group, complaints are available at the regional and

[83] Outlined in Article 2, 3, 5 and 8 of the Covenant are key articles relating to rights and freedom. Right to life, Prohibition of torture, Fair trial, Respect for private life and family life. These articles in the covenant mentioned above, which are also incorporated into the human rights act, are often pointed out in extradition matters. The European court of human rights (ECHR) is an international court that was set up in 1959 and it implements the convention. This is the place where rules on individual or state applications, alleging violations of civil and political rights set out in the convention, are made. It is also the physical place where the rulings are made. The court is responsible for monitoring respect for the human rights within the council of Europe member states that have ratified the Convention. http://www.theguardian.com/law/2014/oct/03/what-is-european-convention-on-human-rights-echr> Accessed 28 September 2018.

[84] Protocol No. 6 To the Convention for the protection of human rights and fundamental freedoms concerning the abolition of death penalty, 28 April 1983, ETS No. 114 (in force 1 March 1985: 45 state parties) protocol No 13. To the convention for the protection of human rights and fundamental freedoms, concerning the Abolition of death penalty in all circumstances, 3 May 2002, ETS No. 187 (in force 1 July 2003: 36 state parties).

[85]United Nations, The Foundation of Human Rights law < http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html > Accessed 28 September 2018.

[86]*Ibid.*

international level to help ensure that international human rights standards are indeed respected, implemented and enforced at the local level.[87]

According to Dugard and Van Den Wyngaert,[88] extradition law fails to provide a proper framework for balancing the human rights of the alleged offender and the interest of states in the suppression of transnational crime.[89] Based on his provision, it can be said first that as long as individuals are 'human', they will always have fundamental human rights. This is true despite their individual circumstances, for example, free or in prison. However, human rights cannot just be based on the right-holder's personal needs and interests. Rights are typically considered to be above practical considerations of that sort. Instead, they exist at the level of the moral duties individuals owe each other as reasoning beings.[90] It is commonly expected that human rights weigh as much as their justification and thus conflicts between rights should be resolved by reference to that weight. Thus, the current extradition law provides the framework for balancing the human rights of the alleged offender and the interest of the state. However, these laws cannot work on its own accord. It is now left for the state to set out the pros and cons when considering an extradition decision.

3.7. Human Right Case-laws

From the inception of the present extradition system in the UK, treaties have included human rights clauses that safeguard individual human rights.[91] When these human rights issues are invoked in

[87] *Ibid.* footnote 85.
[88] *Ibid.* footnote 74. pg. 187.
[89] *Ibid.* footnote 74. pg. 187.
[90] Embracing Commonwealth Values in Youth Development, 'What are Human Rights?' http://www.colelearning.net/cyp/unit2/page3.html > Accessed 28 September 2018.
[91] *Ibid.* footnote 35.

extradition, it turns extradition into a rubber stamp, i.e. surrender will no longer be possible until the rights of the alleged offender are considered. Thereby rendering it somewhat ineffective. Both extradition and human rights are not compatible and cannot work together; One interest is always satisfied at the expense of the other. Although clauses provided in figure 1, serve to secure the rights of an alleged offender, it would be incorrect to write that, these human rights issues act as a bar in all states. In some states, for example, Nigeria, no such restrains apply, this is because practices in domestic law, which favour the requesting state and deny the individual the opportunity to invoke the treatment that he/she is likely to be subjected to in the state as a bar to extradition.

Through past ECtHR case-laws and court decisions, this thesis asserts that there are legal and non-legal competing factors that conflict with an extradition decision. Secondly, these categorised factors are universal in the sense that it applies to UK-EU, US and Nigeria. However, it is crucial to note these identified factors are in many respects contradictory because not all of these competing factors act as a bar to extradition in some of these states discussed. However, this does not affect the categorisation of the competing factors because as would be highlighted in the decided cases either the categorised factors or the aim of extradition is realised only if the other is neglected. As asserted earlier, it is in this respect that justice is required. It is also important to note that while the issue of balance when these factors conflict is universal with states discussed in this thesis, the choice of means for ensuring a fair, balanced approach is primarily a domestic matter for the states concerned.

This section will review a selection of the case-law that involves some EU states, UK, US and Nigeria where these human rights provisions have been invoked in the field of international extradition. The majority of the human right cases to be discussed relate to extradition from the UK and US. These states have been singled out but not exclusively because some of them have sparked criticism due to the competing factors invoked. The aim is to present an accessible, consistent and broad panorama of the developing case-law resulting from these competing factors. The case-laws and materials from these states show differences in approach and reasoning but ultimately also present a remarkable degree of inconsistency regarding the content and interpretation of extradition laws and its treaty. This section is written from an intersecting perspective of international human rights, international law and extradition, with the purpose of contributing to the understanding that a more apparent acknowledgement of the competing factors will serve the interest of both the alleged offender and international law criminal enforcement. Secondly, it highlights how these human rights provisions are dealt with both within and outside the ECHR. Thirdly, it will establish how other states can utilise the already established fair, balanced approach by the ECtHR. Lastly, it is not intended to provide an exhaustive analysis of international human rights case-law or explain all topics in depth.

3.7.1. Prohibition of Torture, Inhuman or Degrading Punishment/ Treatment, Article 3

Torture is routinely committed to forcing an accused person into confessing or providing information. Recently the US President ignited a row over the use of torture (use of waterboarding) after claiming intelligence professionals told him that it works.[92] Additionally, a report from

[92] James Master, 'Donald Trump Says Torture Absolutely Works – But Does It? (CNN Politics 26 January, 2017) < http://edition.cnn.com/2017/01/26/politics/donald-trump-torture-waterboarding/ > Accessed 16 October 2018.

Nigeria provided that the death penalty should not be abolished because it would give a particular group of people the impetus to commit certain crimes.[93] Consequently, the use of such information, obtained through illegal forms of coercion, is one of the causes of torture. States' officials continue to torture and otherwise ill-treat detainees into giving them information and Amnesty International has reported on torture in 141 States: three-quarters of the world.[94]

Additionally, Amnesty International detailed how the Filipino police have killed and paid others to kill thousands of alleged drug offenders in a wave of extrajudicial executions that may amount to crimes against humanity.[95] The detainees in Tondo police station have made deeply worrying allegations of torture – Amnesty International's research has shown torture by police to be rife in the Philippines.[96] Torture is also a widespread practice in Mexico and individuals are routinely tortured in an attempt to force them to sign false 'confessions'.[97] Experience shows that under torture, or even under threat, a person can say or do anything solely to avoid pain.[98] As a result, it is hard to know whether or not the resulting statement is true. Even if the evidence that is obtained under torture is real, it must still be excluded from the proceedings.[99] However, the use of evidence obtained in this manner in any proceeding is contrary to international law. Consequently, the US,

[93] Ugo Aliogo, 'When Will Nigeria Abolish the Death Penalty' (THISDAY 6 July 2016) < https://www.thisdaylive.com/index.php/2016/07/07/when-will-nigeria-abolish-the-death-penalty/ > Accessed 28 September 2018.
[94] Amnesty International Torture: A Global Crisis < https://www.amnesty.org/en/get-involved/stop-torture/ > Accessed 28 September 2018.
[95] Amnesty International Philippines 'War on Drugs': Credible and Impartial Investigators needed After 'Secret Jail Cell Revealed' 28 April 2017 < https://www.amnesty.org/en/latest/news/2017/04/philippines-credible-and-impartial-investigations-needed-after-secret-jail-cell-revealed/ > Accessed 28 September 2018.
[96] *Ibid.*
[97] Amnesty International, Mexico: 'New Torture Law, Glimmer of Hope the Must Translate Into Justice' 26 April 2017, < https://www.amnesty.org/en/latest/news/2017/04/mexico-la-nueva-ley-contra-la-tortura-un-atisbo-de-esperanza-que-debe-traducirse-en-justicia/ > Accessed 15 October 2018.
[98] Exclusion of Evidence obtained Through Torture' Available at <http://www.apt.ch/en/evidence-obtained-through-torture/ > Accessed 28 September 2018.
[99] Article 15 of the UN Convention against Torture.

Nigeria, Mexico or the Philippines will increasingly confront difficulties in securing an alleged offender from the EU-UK states.

The influence of the risk of torture, cruel, inhuman or degrading treatment or punishment on extradition decisions have been confirmed in the jurisprudence of international and regional human rights institutions as well as domestic courts. The prohibition of torture and inhuman or degrading punishment or treatment is at the heart of human rights protection. It is both a fundamental principle of domestic law[100] and a key provision of the essential human rights (ECHR)[101] and the ICCPR.[102] The Convention against torture builds on these guarantees of freedom from torture and ill-treatment, reiterating the prohibition on states' involvement in torture or inhuman or degrading treatment, but also specifies series of positive obligations on states.[103] Therefore, if a person's extradition is sought for by a state where it is considered that torture will be employed to obtain evidence, there is a possibility that the extradition will be argued on this ground. Thus, this is where the conflict lies, because states might be willing to extradite an alleged offender to face trial and at the same time try to protect the individual rights.

i. Legal Boundaries

International sources of law about torture and cruel, inhuman, or degrading treatment have been accepted by most states. For example, the Mexican Congress passed a law which reflects the tireless efforts of countless human rights organisations and survivors of torture to ensure that this

[100] *A v Secretary of State for the Home Department* [2005] 3 WLR 1249.
[101] Article 3, ECHR.
[102] Article 7, ICCPR restating Article 5 of the UDHR.
[103] House of Lords, House of Commons Joint Committee on Human Rights, The UN Convention Against Torture (UNCAT) Nineteenth Report of Session 2005-2006. Vol. 1. Report and formal Meetings. 18 May 2006. Available at < https://publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185-i.pdf > Accessed 28 September 2018.

horrendous crime under international law and human rights violation is eliminated.[104] While torture survivors such as Verónica Razo remain in prison, this law cannot be judged as effective.[105] However, most of these global agreements reflect the guarantees of these rights. This includes the Universal Declaration of Human Rights (UDHR),[106] The European Convention for the Protection of Human Rights and Fundamental Freedoms,[107] The Geneva Convention,[108] and the International Covenant on Civil and Political Rights (ICCPR).[109] In addition to these world agreements, there are regional agreements adopted by states, for example, the US,[110] Europe and Africa.[111] This regional agreement adopted by these states also prohibits torture and other forms of ill-treatment.[112] For example, there are some obligations in the UK in respect of the prohibition against torture. It is both negative (prohibiting public authorities from doing things) and positive

[104] *Ibid.* footnote 97.
[105] *Ibid*. footnote 97.
[106] Universal Declaration of Human Rights G.A. Res 217 a (III) U.N. Doc A/810 at 71 (Dec. 10 1948) The UDHR is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly Resolution 217 A) as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected and it has been translated into over 500 languages.
[107] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No.11 and No. 14 Rome. European Treaty Series – No 5.
[108] The 'Geneva Conventions' include four conventions. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Aug 12, 1949, 6 U.S.T 3217, 75 U.N.T.S. 85 (entered into force Oct 21. 1950) Geneva Convention Relative to the Treatment of Prisoners of War, Aug 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Entered into force Oct. 21, 1950) Geneva Convention Relative to the Protection of Civilian Person in Time of War, Aug 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287 (entered into force Oct 21, 1950).
[109] International Covenant on Civil and Political Rights, Dec 16, 1966, 999 U.N.T.S. 171 (Entered into force Mar. 23, 1976)
[110] American Declaration and Conventions of the Organisation of American States. The OAS is a regional inter-governmental body that aims to strengthen democracy and cooperation in the Americas. Its member states work together to promote human rights, defend common interest and discuss the major issues facing the region. The OAS has 35 Member States from North, Central and South America and the Caribbean. Cuba was excluded from participating in the OAS between 21 January and 3 June 2009, as a result of the tensions of the Castro regime with the US. Available at < https://www.crin.org/en/guides/un-international-system/regional-mechanisms/organization-american-states > Accessed 28 September 2018.
[111] African Charter on Human and Peoples' Rights also known as Banjul Charter (Entry into Force 21 Oct. 1986), It is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African Continent. Also available at < http://www.refworld.org/docid/3ae6b3630.html > Accessed 28 September 2018.
[112] See American Convention on Human Rights, O.A.S Treaty Series No. 36, 1144 U.N.T.S 123 (Entered into force July 18, 1978).

(requiring the state to take certain action). Further, the US Constitution and its federal statutory laws prohibit torture and ill-treatment. This, therefore, provides a direct link between the US. domestic laws and international sources of a law prohibiting torture and other forms of ill-treatment.[113]

Furthermore, it is crucial to note that not all treatment of a harsh nature falls within the scope of Article 3 of the Convention.[114] The ECtHR has made it clear that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention.[115] It is also recognised that the borderline between harsh treatment on the one hand and a violation of the other, may sometimes be difficult to establish.[116] In the seminal case on Article 3 of the Convention, *Ireland v UK*[117] the court made it clear that the assessment of the minimum level of severity is relative. It depends on all the circumstances of the case, which includes the duration of the treatment, its physical and mental effects and in some cases the sex, age and state of health of the victim. In the *Soering case,*[118] the ECtHR added that severity depended on the circumstances of the case, such as the nature and context of the treatment, the manner and the methods of execution as well as the factors above.

Article 3 of the Convention further stipulates that: 'No one shall be subjected to torture or inhuman

[113] David Weissbrodt and Cheryl Heilman, 'Defining Torture and Cruel, Inhuman and Degrading Treatment' (2011) 29 Law & Inequality. 346.
[114] ECHR.
[115] ECHR.
[116] *McCallum v UK* [1990] 13 EHRR 596 See also, Report of May 1989 Series A, No 183, p.29.
[117] [1978] Series A. No. 25. ECHR 1.
[118] *Ibid.* footnote 35.

or degrading treatment or punishment'.[119] The ECHR rights are either absolute or qualified. At fifteen words, Article 3 of the Convention is one of the shortest provisions. However, the brevity of the article does not contradict its depth.[120] There is a vast panoply of international norms adopted to combat the torment of torture; Article 5 of the UDHR provides that: 'No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment', While the 1998 Rome Statute of International Criminal Court, declares that torture, committed as part of a widespread attack against civilians, is to be a crime against humanity. In addition to the Convention, most COE states are also party to treaties that prohibit torture. This is mirrored in the African Charter, which provides that: 'Every individual shall have a right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degrading of man particularly slavery, the slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'[121]

Article 3 of the UNCAT provides that:

> **1.** No State Party shall expel, return (*refouler*) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.
> **2.** For determining whether there are such grounds, the competent authorities shall take into account all the relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violation of human rights.[122]

[119] European Convention on Human Rights As Amended by Protocols Nos 11 and 14 Supplemented by Protocols No 1, 4,6,7,12 and 13. Available at < http://www.echr.coe.int/Documents/Convention_ENG.pdf > Accessed 19 October 2018.

[120] Aisling Reidy, 'The Prohibition of Torture; A Guide to the Implementation of Article 3 of the European Convention on Human Rights' Human Rights Handbooks, No. 6. Available at < https://rm.coe.int/168007ff4c> Accessed 04 November 2015.

[121] Article 5 African Charter on Human and People's Rights 1986.

[122] The other UN- sponsored human rights treaty of direct application to extradition is the Convention against torture and other cruel, inhuman or degrading treatment or punishment (UNCAT). The UNCAT was adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 on 10 December 1984 and came into force on 26 June 1987, in accordance with article 27 (1) < http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx > Accessed 28 September 2018.

This prohibition, unlike that found in the other international human rights instruments, explicitly refers to extradition. However, its scope of application is narrower than the ECHR and the ICCPR. Even though the terms were said to be inspired by the case law of the European Convention on Human Rights, which requires a state to refrain from transferring an alleged offender to a state where there is a probable risk of torture or inhuman and degrading punishment. Article 3 UNCAT only applies to the probable risk of torture, defined by Article 1 to mean:

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[123]

The prohibition of torture is also found in almost all domestic legal systems. This means that extraditing an alleged offender and exposure to a risk of extra-judicial execution would be contrary to the requested states' obligation under international human rights law. Since extradition concerns the surrender of an accused person to face prosecution or execution of a sentence already imposed, the question of possible violation of the right to life in this context is often raised in the context of capital punishment.[124] Thus, Article 1[125] and Article 6[126] abolish the death penalty. Article 11,[127]

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[123] General Assembly, Convention against Torture and other Cruel Inhuman and Degrading Treatment or Punishment' < http://www.un.org/documents/ga/res/39/a39r046.htm > Accessed 28 September 2018.
[124] Sibylle Kapferer, 'The Interface between Extradition and Asylum' (UN High Commissioner for Refugees (UNHCR) (November 2003). < http://www.refworld.org/docid/3fe846da4.html > Accessed 28 September 2018.
[125] ECHR.
[126] UN Treaty Collection: International Covenant on Civil and Political Rights, United Nations. 6 March 2012, The ICCPR is part of the International Bill of Human Rights, along with the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights (UDHR).
[127] UN Treaty Collection: International Covenant on Civil and Political Rights, United Nations. 6 March 2012, The ICCPR is part of the International Bill of Human Rights, along with the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights (UDHR).

confirms the inclusion of a clause that explicitly prohibits extradition to a state that has not abolished death sentences from its legal system or fails to provide assurance that the death penalty would not be enforced in case the extradition request is successful. Most of the extradition treaties that are negotiated by states now include the clauses that provides that if the penalty for the offence or crime committed in the requesting state attracts a death sentence, the requested state will only allow the extradition on the grounds that the requesting state offers an assurance that death penalty shall not be applied.[128]

ii. Legal Spectrum and the Challenge

Self-evidently, every individual has a natural right not to be subjected to inhuman treatment. Far from being too broad a structure, Article 3 is artificially and immorally constrained. Dugard and Wyngaert argue that due to the extensive nature of Article 3, the status of the right to be free from the prohibition on torture and inhuman or degrading treatment or punishment is not clear under the international customary law.[129] Nevertheless, specific forms of treatment will be readily discernible as constituting cruel, inhuman or degrading punishment. Therefore, an alleged offender can be said to undergo cruel inhuman and degrading punishment or treatment if kept in harsh conditions for a prolonged duration, with the spectre of death hanging over the accused person. Furthermore, the treatment of the alleged offender could be coupled with ever- mounting anguish at the impending execution.

By the end of 2015, 104 states had legally abolished the death penalty for all crimes: more than

[128] *Al-Saadoon v United Kingdom*, (2010) 51 EHRR. 9. – An example, where the ECHR states that the risk of execution of two Iraqis if transferred to Iraq is a reach of Article. 3 ECHR.
[129] *Ibid.* footnote 74. pg. 198.

half of the world's states, no matter how broadly defined.[130] Sixty-one of these states abolished in the 1990s and 2000s, in 2015 alone, four states promulgated laws that entirely abolished the death penalty (Surinam, Fiji, Madagascar, Republic of Congo and Mongolia) to fulfil an international treaty commitment to abolish.[131] Even some of the states that retain the death penalty and the use of capital punishment are rare. Forty-nine death penalty states have not carried out any execution in the last ten years. The use of capital punishment is increasingly confined to a small number of states that make a significant number of executions. Of the twenty-five states where Amnesty International recorded executions in 2015, most were carried out in Iran, Saudi Arabia and Pakistan.[132] This has given birth to what is now considered to be a global movement toward the abolition of capital punishment.

Due to the growing trend toward the abolition of capital punishment, the retentionist states encounter conflict in their extradition request from surrendering abolitionist states. Therefore, the situation results in the refusal of a state to extradite. For example, the UK as an abolitionist state, will not grant an extradition request to Nigeria a retentionist state, where the penalty for offences that attracts a death penalty. Rejecting the extradition request may mean that an alleged offender never stand trial for his crime. The situation also results in the requesting states giving sufficient diplomatic assurances that the death penalty will not be imposed. Within the EU-UK states, this provision acts as a bar to extradition. The ECtHR is aware of the difficulties faced by states when suppressing crime and it prohibits torture. Thus the challenge here is states that are not a member

[130] Death Penalty worldwide International Human Rights Clinic, Pathways to Abolition on the Death Penalty' (Cornell Law School, DPW Publications June 2016) < https://www.deathpenaltyworldwide.org/pdf/Pathways%20to%20Abolition%20Death%20Penalty%20Worldwide%202016-06%20FINAL.pdf > Accessed 15 October 2018.
[131] *Ibid*.
[132] *Ibid.*

of the Convention as a general rule the Article 3, is not a bar to extradition. Based on the extradition cases in Nigeria for example, the prohibition of torture has never been invoked as a bar to extradition. As a result, the application of the minimum severity threshold criteria is not considered in extradition cases. Consequently, the spirit of maintaining torture as the gold standard of human abuse, what should be categorised appropriately and chastised as tortious conduct has been downgraded by these states, leading to the unwarranted weight being accorded, detracting from the substance of the prohibition against torture.[133]

In states like the UK and EU, discussed in this thesis, the prohibitions on torture and inhuman or degrading treatment is an absolute right, and in no circumstances will it ever be justifiable for a state to torture a person in the process of extradition. These rights refer to those situations that do not allow any possible derogation, not even in times of war or other public emergencies. Unlike other provisions, there is no room for exceptions regarding Article 3 of the ECHR. To understand what type of conduct is prohibited during an extradition process, and how that conduct is to be classified, it is necessary to understand the legal implications of each term to ascertain the weight to be attached to each form when invoked in that context.

3.7.1.1. Torture

The assertion that the practice of the death penalty constitutes torture is gaining ground.[134] Also, based on reports, torture is still widely practised if not by a majority of states then in a significant

[133] John Cooper, 'Article 3 and the Road to Ultra- Violence' (2007) 13 University College London Jurisprudence Review, 61-84.
[134] Eric Prokosch, 'The Death Penalty versus Human Rights' In Council of Europe. Strasbourg: Council of Europe, 2004.

manner.[135] The universally binding status of the norm may not exclude differences in interpretation over what constitutes torture.[136] Nigeria is a party to the UN Convention against Torture and Other Cruel, Inhuman and degrading punishment. The Convention expressly prohibits state parties from expelling, returning 'refouler', or extraditing a person to a state where there are substantial grounds for believing that there would be a danger of being subjected to torture. An alleged offender may not be surrendered by Nigeria if it is established that there may be torture in the requesting state. The torture envisaged by the Convention does not extend to those arising from lawful sanction by the penal laws of the requesting states. If Nigeria extradites an alleged offender to a requesting state where he would be tortured, Nigeria shall have state responsibility for the violation of an international obligation. Based on this provision, it can act as a bar to extradition in Nigeria, but up till date, there have been no reported extradition case-laws between Nigeria and UK, or Nigeria and US, where the prohibition of torture has been invoked.

In the US case in *Filaritiga v Pena-Irala*[137] A suit against Pena-Irala (Defendant) on the premise that he had tortured to death the decedent of Filartiga (Plaintiff) was filed by Filartiga (Plaintiff). Torture has been officially renounced in the vast majority of states, and this is the reason the US court concluded that torture violates the law of nations. Judge Kaufman held that:

> '..in light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the notions of the world (in principle if not in practice) we find that an act of torture

[135] Case Briefs; *Filaritiga v Pena-Irala* < https://www.casebriefs.com/blog/law/international-law/international-law-keyed-to-damrosche/chapter-4/filartiga-v-pena-irala/2/ >Accessed 28 September 2018.
[136] *Ibid*. footnote 135.
[137] 630 F.2D 876 (2D Cir. 1980).

> committed by state official against one held in detention violates established norms of international law of human rights…'[138]

In the UK as illustrated by the court in the case of *Dikme v Turkey,*[139] the accused person was detained under the suspicion of being a member of the terrorist organisation Devrimci Sol. He alleged that he was subjected to blows causing both physical and mental pain and suffering, all aggravated by the fact that he was in total isolation and blindfolded. The court emphasised that the requirements of an investigation and the particular difficulties inherent in the fight against terrorist crime could not justify placing limits on the protection to be afforded in respect of the physical integrity of individuals.[140] Subsequently, the court reaffirmed that the victim or detainees' conduct, and the nature of the offence, is irrespective of the absolute prohibition of Article 3 of the ECHR. The court took the critical step of referring to the *Selmouni* [141] case and recalled that the Convention is a living instrument, which must be interpreted in the light of present-day conditions. It further added that certain acts that had previously been classified as 'inhuman and degrading treatment' as opposed to 'torture' might be classified differently in future. Therefore, the court continued its determination and concluded that the treatment inflicted amounted to torture in violation of Article 3. The court also found that there was a lack of a thorough and efficient investigation into the allegations of ill-treatment, which also resulted in a violation of Article 3.

[138] *Ibid.*
[139] *Dikme v Turkey* [Application no. 20869/92].
[140] *Ibid.* para 90.
[141] *Selmouni v France* [2000] 29 ERHH 403.

3.7.1.2. Death Penalty

The death penalty influences an extradition request if the requesting state still enforces it. Although in situations where the penalty for the conduct of the alleged offender attracts a death sentence, extradition is usually denied. However, in states like Nigeria, as a general rule, capital punishment in the requesting state is not a bar to extradition from Nigeria. This may be unconnected to the fact that Nigerian statutes still contain offences punishable by death and new ones are still being introduced. In 2013 the UN reported that Nigeria had adopted an amendment to its terrorism prevention law with several offences carrying the death penalty. Nigeria also rejected recommendation on the abolition of the death penalty during the 2014 Universal Periodic Review conducted on the platform of the UN Human Rights Council.[142] Notwithstanding the absence of a rule prohibiting extradition for capital offences, the Nigerian Extradition Act prohibits the surrender of an alleged offender where the offence is trivial in nature, or there is an unduly long intervening period.[143] So extradition in Nigeria may not be refused on the sole ground that the offence attracts capital punishment. However, the alleged offender shall not be surrendered if having regard to all the circumstances in which the offence was committed, the Attorney-General or the Court dealing with the case is satisfied that, by reason of the trivial nature of the offence, it would be unjust or would be too severe to surrender the alleged offender.[144]

In *Soering* [145] the ECtHR held that because of the very long time that *Soering* was likely to spend on death row in Virginia, in harsh conditions, his extradition to the US would expose him to a real

[142] https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23602&LangID=E> Accessed 19 October 2018.
[143] Section 3 (3) (a) Nigerian Extradition Act (Modification Order 2014).
[144] *Ibid*. footnote 20. pg. 25.
[145] *Ibid.* footnote 35.

risk of treatment going beyond the threshold set by Article 3. This finding on the death row phenomenon is supported by several Indian decisions[146] and has been endorsed by the Supreme court of Zimbabwe.[147] Many states in the world, in addition to foregoing capital punishment themselves, have begun trying to discourage its use by other states.[148] The absolute nature of Article 3 is demonstrated in the case of *Einhorn v France,*[149] regarding the extradition from France to the US for a sentence of life imprisonment imposed in absentia for an offence for which death penalty could be imposed. *Einhorn* invoked Article 3 and 6 of the Convention to avoid his return to the US believing that there was a real risk of being sentenced to death, which is considered a source of inhuman or degrading treatment or punishment. This was also exhibited in the case of *Judge v. Canada* [150] where the human rights committee proclaimed that the Canadian authorities violated Article 6(1) of the ICCPR. In this case, *Judge* had been sentenced to death in Pennsylvania, but escaped from prison and fled to Canada before the penalty had been enforced. However, he committed two robberies in Canada and was arrested; the court sentenced him to ten years in prison. This was because the Canadian authorities rushed to extradite Roger Judge to the US where he was to face capital punishment. It was argued that Canada should have waited for an official request from the US to ensure that assurances that capital punishment will not be applied to the requested individual. This decision by the court was viewed as a breach of the obligations of Canada under the ICCPR.

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[146] *Triveniben v State of Gujurat* [1989] 1 S.C.J. 383, *Madhu Mehtu v Union of India* [1989] 3S.C.R. 775,
[147] *Catholic Commission for Justice & Peace*, *Zimbabwe v Attorney-General Zimbabwe* [1993] (4) SALR 239 (Sup. Ct).
[148] John Quigley, 'International Attention to the Death Penalty: Texas as A Lightning Rod' (2003) 8 Texas Forum on Civil Liberties & Civil Rights 175,176.
[149] [Application No. 71555/01] Extradition from France to the U.S for the purposes of a sentence of life imprisonment imposed absentia for an offence for which death penalty could be imposed. Initially extradition was denied but was later granted on the basis of fresh extradition request following a change in law in Pennsylvania and under the condition that *Einhorn* would be granted a retrial and death penalty will be sought, imposed and carried out.
[150] *Roger Judge v. Canada,* Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003).

Furthermore, in the case of *Harkins and Edward v UK,*[151] the requested persons raised the issue of the death penalty. The ECtHR considered the validity of assurances that were provided sufficient and concluded that there is no risk of any death penalty sentence. Consequently, the court found that the assurances provided by the Florida authorities, when taken with the assurance contained in the diplomatic note, were sufficient to remove any risk that *Harkins* would be sentenced to death if extradited and convicted as charged. The post-*Soering* approach is not followed by courts in states like the US and Nigeria. The UN Human Rights Committee, in 1993 ruling, *Kindler v Canada,*[152] the Committee held that 'prolonged periods of detention under severe custodial regime on death row cannot be considered to constitute cruel, inhuman and degrading treatment if the convicted person is merely availing himself of appellate remedies. Likewise, courts in the US [153] and Canada[154] have rejected the *Soering* approach in some cases. Although this might be the case, it is of paramount importance to emphasise that there lies no obligation upon the requested state to insist on the existence of such assurances, which is why, in the *Kindler* case, the Canadian government refused to request assurances of its nature from the US. In turn, the UN human rights committee held that the obligations arising under Article 6(1) of the ICCPR did not require Canada to refuse extradition. Moreover, the US has excluded the interpretation clause 'cruel, inhuman or degrading punishment' in its reservations to both ICCPR and the Convention against Torture.

[151] Application No. 9146/07 [2012] ECHR 45.
[152] [1991] 2 S.C.R. 779, 785.
[153] *Richmond v Lewis,* 848 F.2d 1473 (1991).
[154] *Kindler v Canada* [1991] 2 S.C.R. 779, 785.

Additionally, in the case of *Capriani v Italy,*[155] there was a complaint that his extradition to the US exposed him to the risk of being sentenced to death. The assurances given by the US government did not exclude the possibility that the offence of which he was accused could be altered to a capital felony as the Extradition Treaty between the US and Italy allowed for such alteration. The treaty does not prohibit the requesting states from prosecuting the extradited person when some facts constitute a differently denominated offence, which is extraditable. The absence of certainty is not compatible with the absolute nature of the prohibition laid down by Protocol No. 6. The court noted that the Italian authorities had avoided any risk of the death sentence because the applicant was accused of crimes for which such penalty is not incurred and that the principle of speciality included in the treaty prohibited the alteration of the denomination of the offence into a capital felony. Thus, the treaty as implemented by the US law must, therefore, be observed by the US court. The court took into account the assurances and concluded that there was no violation of Article 3, 1 (Protocol. 6).

There is a difference of opinion between the US and Nigeria over whether *Soering* is authority for the proposition that the death row phenomenon per se will bar extradition. Even though Nigeria is not a member of the ECHR where the S*oering* approach would be considered by the national courts, its statutes still contain offences punishable by death. Given that these states have the death sentence in its statutes, it is difficult to argue with the persuasion that the universal applicability of the death row phenomenon as a bar to extradition in the absence of the kind considered in *Soering,* will take matter beyond the threshold of permissibility. On the other hand, a requesting state that

[155] [Application. No. 22142/07]. The case regarding the extradition of an Italian national to the US for the purpose of prosecution. At the request of the Italian court, the US Department of Justice provided an assurance that the applicant was not accused of a capital felony and therefore the death penalty was not even potentially applicable in the case.

retains the death penalty would be wise to realise that, despite judicial pronouncements to the contrary, the refusal of extradition on account of the death row phenomenon will be a deception to avoid the death penalty itself. This means that the death row phenomenon will continue to be raised as an obstacle to extradition as long as international law tolerates the death penalty.[156] In these circumstances, a requesting state would be well advised to provide firm assurances that it will not impose the death penalty when it initiates an extradition request for offences that carry the death sentence under its law.[157]

3.7.1.3. Ill-Treatment

An unacceptable circumstance of detention in prison is also an underlying influence in the cases where the requested individual invokes Article 3 of the ECHR during extradition: ill-treatment that attains a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of these, where treatment humiliates or debases an individual, such as showing a lack of respect for or diminishing the individual's dignity. Also, the arousal of feelings of fear, anguish or inferiority capable of breaking a person's mental and physical resistance, may be characterised as degrading and also falls within the prohibition of Article 3 of the ECHR.

Other circumstances could weigh heavily for a violation of Article 3 of the ECHR. This includes a situation where there is neither the availability nor the conditions and duration of outdoor exercise prisoners could use. This also included restrictions on access to natural light and air owing

[156] Michael J. Kelly, 'Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists-Passage of *aut dedere aut judicare* into Customary Law and refusal to Extradite Based on the Death Penalty' (2003) 20 Arizona Journal of Int'l and Comp. L. 501.
[157] *Ibid.* footnote 74. pg. 199.

to the fitting of metal shutters which severely aggravated the situation of an accused person in an already overcrowded cell.[158] In the case of *Lord Advocate* (Representing the Taiwanese Judicial Authority and another) *v Dean*,[159] The issue was whether Dean's extradition would be incompatible with Article 3 of the ECHR. The court found in this case that there was no establishment of any risk of being subjected to inhuman treatment, which would infringe the provision in Article 3.[160] The court assumed that the Taiwanese authorities would honour the assurances that they had given to the UK. This is because diplomatic assurances are designed to ensure compliance with the Convention and thus engage with European standards of prison conditions.

Furthermore, in the case of *Ananyev and Others v Russia,*[161] The applicants complained under Article 3 of the ECHR that they had been detained in circumstances that had been so severe that they constituted inhuman and degrading treatment in breach of the human rights provision. The court considered that the Russian legal system did not dispose of an effective remedy that could be used to prevent the alleged violation or its continuation and provide the applicant with adequate and sufficient redress in connection with a complaint about inadequate conditions of detention.[162] The court further considered that the extreme lack of space in a prison cell weighs heavily as an aspect to be taken into account for establishing whether the impugned detention conditions were 'degrading' from Article 3 of the Convention. The court added that the provision of four metres square in the Russian prison remains the desirable standard of multi-occupancy accommodation,

[158] *Ananyev v Russia* [*Application* no. 42525/07 and 60800/08] para 140 – 154.
[159] UKSC 2016/0212.
[160] *Ibid.* footnote 158 at Para 107.
[161] [Application No. 42525/07 and 60800/08] See Also *Aswat v United Kingdom* [Application no. 17299/12], ECHR.
[162] *Ananyev and Others v Russia* [Application No. 42525/07 and 60800/08] at Para 119.

and found that *Ananyev & Others* had less than three metres square of floor surface at their disposal. Consequently, the overcrowding was considered so severe that it justified itself in finding a violation of Article 3 of the Convention.

In deciding whether there has been a breach of Article 3 of the ECHR because of the lack of personal space, the court considered more factors. The factors also considered were that each person must have an individual sleeping place in the cell. Secondly, each must have at disposal at least three square metres of floor space and lastly, that the overall surface of the cell must be such as to allow the alleged offender to move freely between the furniture items. The absence of any of the above elements created a strong presumption that the conditions of detention amounted to degrading treatment and was in breach of Article 3 of the Convention. The court found a violation of Article 3 of the Convention since the space factor was coupled with the established lack of ventilation and lighting.[163]

In *Othman (Abu Qatada) v UK,*[164]Articles 2, 3, 5 and 6[165] were invoked during his extradition. *Othman* was affiliated with Al-Qaida and cited on the UN's Al-Qaida Sanctions Committee list. He had been convicted twice in absentia in Jordan for conspiracy to carry out bomb attacks on the American school and the Jerusalem hotel in Amman. The Jordanian authorities consequently

[163] *Ibid.* Footnote 162 at Para. 149 -154.
[164] *Othman (Abu Qatada) v. The United Kingdom*, [Application No. 8139/09] Council of Europe: European Court of Human Rights, 17 January 2012. Othman was born in Jordan and claimed that it would be a breach of his rights under the ECHR if the UK deported him to Jordan. Othman resisted deportation under Articles **2, 3, 5 and 6** of the ECHR. Othman had been successful in gaining UK asylum, a year after arriving in the UK in 1993. The charges against Othman were received in absentia in Jordan and related to conspiracy to cause explosions. Othman stated that the evidence connected with these convictions were extracted from his co-defendants through torture, there was compelling evidence in support of this claim. It was the UK Government's understanding that the ECHR [6] excluded deporting terrorist suspects to Jordan and a memorandum of understanding was negotiated with Jordan. Jordan assured the UK that the treatment of deportees would be consistent with the Convention. The UK ordered the deportation of Othman. Available at: < http://www.refworld.org/cases,ECHR,4f169dc62.html > Accessed 28 September 2018.
[165] ECHR.

requested his extradition from the UK. In early 2000, Jordan withdrew the request. In the autumn of 2000, the applicant was again tried in absentia in Jordan, this time for conspiracy to cause explosions at Western and Israeli targets in Jordan. Othman relied on evidence which demonstrated that Jordanian prisons were beyond the rule of law. Similarly, in the case of *King v UK,*[166] regarding the extradition of a British national to Australia for prosecution. The relevant complaint was that if *King* was extradited and convicted, there was a real risk that he would be sentenced to life imprisonment without parole. The court in its conclusion held that a sentence of life imprisonment without parole was unlikely to be imposed in this case and thus there was no real risk of the applicant serving such a sentence if convicted in Australia. Little significance can be attached to the absence of any sufficient diplomatic assurances from the Australian government that life imprisonment with no parole period will not be sought, and no fault can be attached to the UK government for failing to seek an assurance. Both state governments are entitled to take the view that since such a sentence was highly unlikely, no such guarantees were necessary.[167]

In the case of *Saadi v Italy,*[168] the relevant complaint submitted by application, in this case, was that it was a matter of common knowledge that persons suspected of terrorist activities, in particular, those connected with Islamist fundamentalism, were frequently tortured in Tunisia. *Saadi's* family had received some visits from the police and were continually subject to threats and provocations, and it was considered that a reminder of the treaties signed by Tunisia could not

[166] [Application. No. 972/07].
[167] *Ibid.* footnote 166 at Para 19.
[168] [Application. No. 37201/06] case regarding *Saadi's* expulsion from Italy following serving a sentence in Italy imposed for criminal conspiracy of terrorist character and following failed asylum application to Tunisia where he was sentenced in absentia by a military court to 20 years of imprisonment for the membership in a terrorist organisation and incitement of terrorism. At the request of Italy, Tunisia provided assurances that the applicant, if expelled to Tunisia would enjoy safeguard of the relevant Tunisia laws. Also that the Tunisia laws in force guarantee the protection of the rights of prisoners and secure them the right to a fair trial.

be regarded as sufficient. The court concluded that a visit by the International Committee of the Red Cross could not exclude the risk of subjection to ill-treatment. The existence of domestic laws in accession to international treaties guaranteeing respect for fundamental rights in principle are not themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities, which are contrary to the provisions of the Convention.[169]

Furthermore, in the case of *Shakurov v Russia,*[170] Articles 3, 5 and 8 of the Convention were invoked as a ground for refusal. Extradition was requested from Russia to Uzbekistan for prosecution for a military offence. *Shakurov* referred to the risk of being subjected to ill-treatment. He argued that human rights violations, including torture, were common in Uzbekistan and that he risked workplace discrimination and political persecution in Uzbekistan because he had not mastered the Uzbek language and disapproved of the politics of Uzbekistan. However, neither he nor his family had been politically or religiously active or persecuted. There was no reliance on any personal experience of ill-treatment at the hands of the Uzbek law-enforcement authorities or relevant reports by international organisations' and UN agencies. The domestic authorities, including the courts at two levels of jurisdiction, considered the arguments and dismissed them as unsubstantiated. No evidence had been adduced before the court to confirm that Russian-speaking criminal suspects of non-Uzbek ethnic origin are treated differently from ethnic Uzbek criminal suspects. The applicant's allegations that any criminal suspect in Uzbekistan runs a risk of ill-treatment were unconvincing. Furthermore, the materials at the court's disposal did not indicate it. Consequently, the court held that there was no violation of Article 3 of the Convention.

[169] *Ibid*. Para. 129 -147.
[170] [Application No. 55822/10].

The case of *Klein v Russia*[171] concerned the extradition of an Israeli national from Russia to Colombia for enforcement of a sentence of imprisonment combined with a fine imposed in absentia based on reciprocity. *Klein* alleged that a statement by Colombian Vice-President Santos that, 'Hopefully they'll hand Klein over to us so [that] he can rot in jail for all the damage he's caused [to] Colombia' suggested a serious risk of ill-treatment that the applicant would face once extradited, given that the Vice-President was the second most influential official of the executive branch. According to the court, the information from various reliable sources, including those referred to by *Klein*, undoubtedly illustrates that the overall human rights situation in Colombia is far from perfect. For instance, state agents are presumed liable for some extrajudicial killings of civilians, forced disappearances and arbitrary detentions. The Committee against Torture expressed its concerns that measures adopted or being adopted by Colombia against terrorism and illegal armed groups could encourage the practice of torture. The court further noted that the evidence before it demonstrated that problems persist in Colombia in connection with the ill-treatment of detainees.[172]

The court further added that the statement in expressing the wish of a high-ranking executive official to have a convicted prisoner 'rot in jail' may be regarded as an indication that the person in question runs a grave risk of being subjected to ill-treatment while in detention. The Supreme Court of Russia limited its assessment of the alleged individualised risk of ill-treatment deriving from Vice-President Santos's statement to a mere observation that the Colombian judiciary was independent of the executive branch of power and thus could not be affected by the statement in

[171] [Application. No. 24268/08].
[172] *Ibid.* footnote 171. Para 51 and 53.

question. The court was, therefore, unable to conclude that the Russian authorities duly addressed the applicant's concerns about Article 3 of the ECHR in the domestic extradition proceedings.[173]

These case-laws discussed above confirms the earlier assertion in this thesis that Article 3, 5, 6, 8 of the ECHR act as a bar to extradition. The limitations of the case-laws analysis highlight the fact that some of these human rights provisions may nor bar extradition in states like Nigeria, where the death sentence is practised. Whatever the internal accommodations may be, state governments in most cases decide whether domestic sentiments will influence extradition request from other states and to what extent. These case-laws also reveal that the ECHR has identified certain elements that characterise ill-treatment or punishment as torture, although it has never tried to define exactly what each term means. However, the definition provided in the United Nations Against Torture[174] was endorsed in part as 'torture means any act which **severe pain or suffering**, whether physical or mental is **intentionally inflicted** on a person for such purposes as **obtaining from him or a third person information** or a confession, punishing him for an act or a third person'.[175] Thus, the essential element that constitutes torture from the provision of the UNAT is highlighted in bold.

Furthermore, the distinction between torture and other forms of ill-treatment has made a difference in the intensity of the suffering inflicted.[176] Therefore, acts that objectively inflict sufficient

[173] *Ibid.* footnote 171. Para 54 and 56.
[174] http://www.unhcr.org/uk/protection/migration/49e479d10/convention-against-torture-other-cruel-inhuman-degrading-treatment-punishment.html > Accessed 16 October 2018.
[175] *Akkoc v Turkey* [*Application* No. 2297 & 8/93] ECHR [2000] para. 115.
[176] *Selmouni v France*, [2000] 29 EHRR 403 Salmouni was a citizen of the Netherlands and Morocco and was arrested in France for drug trafficking. While in police custody he was ill-treated and was raped, punched, kicked and urinated in and threatened with a blowlamp and syringe. This was confirmed except the rape and the police were convicted. The treatment was severe enough to constitute torture within the meaning of Article 3 ECHR. The court found

severity of pain irrespective of their condition will be considered as torture. In a case where there is no sufficient intensity or purpose, it will be classed as inhuman or degrading punishment.[177] Cruel treatment covers at least such treatment that deliberately causes severe mental or physical suffering that is unjustifiable. Degrading treatment is that which is said to arouse in its victims' feelings of fear, anguish and inferiority, capable of humiliating and debasing them. This has also been described as involving treatment that would lead to breaking down the physical or moral resistance of the victim.[178] Most of the conduct and acts that fall foul of this provision could be classified as ill-treatment. However, it may also be a form of punishment imposed on a person. It is crucial for states to establish whether that penalty for the crime committed is inhuman or degrading.[179]

This case-laws analysis further reveals that Articles 3, 5, 6, 8,[180] are the legal competing factors that require balancing within a decision to extradite, especially given that the provisions, notably Article 3 of the ECHR, may be compromised when diplomatic assurances are used. An essential feature of this case-laws analysis is that the alleged offender often invokes Articles 3, 5, 6 and 8 of the ECHR during extradition. However, this chapter finds that the successful use of these articles depends on several factors. These factors include (i) whether the articles are applicable in all states including developed and developing states, thereby making it the binding on all states? (ii)If so,

violation of Article 3 and 6 of the ECHR Also available at http://www.hrcr.org/safrica/dignity/Selmouni.html > Accessed 28 September 2018.

[177] *Tekin v Turkey* [1998] ECHR.

[178] *Ibid.* footnote 117.

[179] *Ibid*. footnote 117.

[180] ECHR *Chalal v UK* Articles 3, (violation) 5(4) was invoked. 5(1) No-violation; *Einhor v France* - Article 3 and 6- No violation; *Mamatkulov and Askarov v Turkey* - Article 3, 6(1) No violation; *Ocalan v Turkey* - Article 3, 5(3)(4) 6(1)(3)(b)(c) – Court held it was violated no violation of 5(1); *Shakurov v Russia,* Article 3, 5 and 8 was invoked – No Violation of 3,5(1) & 8 but there was violation of Article 5 (4).

does it cover all extraditable offences? (iii) if not are extraditable crimes becoming amenable to this provision? (iv) If so, can the structured approach be used by other states other than the UK-EU? These questions also reveal the link between the legal competing factors as they are often, if not always invoked together by the alleged offender. A second feature that is apparent from this case-laws analysis is that the cases represent examples of the application of the *Seoring test,* in situations related to Article 3 of the ECHR. It is also clear as some of the appeals illustrate that the legal and non-legal factors have not always been appropriately taken into account.

A third feature that the case-laws analysis highlights are that Article 3 of the ECHR may have both a positive and negative influence on extradition and states. A positive perspective is the fact that an alleged offender is not returned to a state where there is likely to be any form of treatment that is contrary to the provisions of the Convention. In other words, human rights are applied appropriately because the accused person is always given a chance to appeal the extradition decision. However, it can be argued that this repeated decision by the court has an adverse impact on extradition and states regarding its national security. Courts, by placing restrictions on the ability of states to extradite a person that is accused of an extraditable offence, oblige the contracting states to harbour criminals at the expense of their national security.[181] The court's approach is indeed rigorous to an extent, but it does not disregard the legitimate national security concerns of states that have increased. In the attempts by states to suppress these crimes discussed in Chapter Two, and safeguard its national security, several states sought to convince the courts that national security considerations should be taken into account in deciding whether to remove an alleged offender. However, notwithstanding these affirmations of national security concerns

[181] *Ibid*. footnote. 117.

that have been presented by some states, the court has kept its faith in the independent nature of the prohibition to be found in Article 3 of the Convention.[182]

The court in reiterating its position – that Article 3 of the Convention preserves a fundamental value of a democratic society - has repeatedly stated that the Convention, even in these conditions, prohibits in absolute terms torture and other ill-treatment.[183] However, the court, possibly in response to its strict approach, has acknowledged that states can oblige extradition without being liable under the Convention when they obtain sufficient assurances from the authorities of the requesting state concerning the treatment of the requested or accused the person in question. Consequently, states can see the court's acceptance of satisfactory diplomatic assurances as a reasonable response to these criticisms.

3.7.2. Right to Liberty and Security, Article 5

In ECtHR case-laws, emphasis is placed on the importance of Article 5 'for securing the right of alleged offender in a democracy to be free from arbitrary detention in the hands of the authorities. The right to liberty and security focuses on protecting individuals from unreasonable detention, as opposed to protecting personal safety.[184] From an extradition perspective, this provision means that a state cannot imprison or detain anyone without good reason. However, when an alleged offender is arrested, the Human Rights Act 1998,[185] provides that the individual has the right to:

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[182] Jens Vedsted-Hasen, 'The European Convention on Human Rights, Counter Terrorism and Refugee Protection' (2011) 29 Refugee Survey Quarterly 45, 56. See Also Robin C.A White and Clare Ovey, *The European Convention on Human Rights (*5th edn, Oxford University Press 2010) 194.

[183]Equality and Human Rights Commission, Available at < https://www.equalityhumanrights.com/en/human-rights-act/article-5-right-liberty-and-security > Accessed 15 October 2018.

[184] *Ibid*.

[185] The Human Rights Act is a UK law passed in 1998. It lets you defend your rights in UK courts and compels public organisations – including the Government, police and local councils – to treat everyone equally, with fairness, dignity

i. Be told in a language that he/she understands and the charges[186]

ii. Be taken to court promptly[187]

iii. Have a trial within a reasonable time[188]

iv. Go to court to challenge the detention if convinced that it's unlawful.[189]

There are certain circumstances in which public authorities can detain an individual as long as they act within the law.[190] This applies if the individual has been found guilty of an offence. Furthermore, what constitutes a denial of liberty depends on the circumstances. The prominent cases refer to absolute denials such as imprisonment or forced detention. However, this provision does not concern restriction on freedom of movement. The difference between restrictions on liberty and denial of liberty is one of degree or intensity, and it depends on the type of measure imposed.

i. Legal Boundaries

Article 3, of the UDHR,[191] provides that everyone has the right to life, liberty and security of person.[192] Through case-law, the ECHR has developed jurisprudence on the right to liberty and

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and respect. The Human Rights Act may be used by every person resident in the United Kingdom regardless of whether or not they are a British citizen or a foreign national, a child or an adult, a prisoner or a member of the public. It can even be used by companies or organisations (like Liberty).The human rights contained within this law are based on the articles of the European Convention on Human Rights. The Act 'gives further effect' to rights and freedoms guaranteed under the European Convention. It means: Judges must read and give effect to other laws in a way which is compatible with Convention rights. It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

[186] Article 5(2) Human Right Acts 1998.

[187] Article 5(3) Human Right Acts 1998.

[188] Article 5(1) (a) Human Right Acts 1998.

[189] Article 5(4) Human Rights Act 1998.

[190] *Del Rio Prada v Spain* [Application No. 42750/09].

[191] The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected and it has been translated into over 500 languages.

[192] UDHR.

security, thereby highlighting the importance of Article 5.[193] To secure the right of individuals in a democracy, they must be free from arbitrary detention at the hands of the authorities. It is specifically for that reason that the court has repeatedly stressed in its case-law that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of its domestic law but must equally be in keeping with the very purpose of Article 5, namely to protect the person from arbitrariness. Article 5 (1)[194] stipulates that everyone has a right to liberty and security of person. No one shall be deprived of liberty save in the following cases and by a procedure prescribed by law. The article goes on to list circumstances under which it may be breached including:

> The lawful detention of a person after conviction by a competent court;[195]
> The lawful arrest or imprisonment of a person for non-compliance with the lawful order of a court, or to secure the fulfilment of any obligation prescribed by law;[196]
> The lawful arrest or detention of a person effected to bring him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;[197]
> The detention of a minor by lawful order for educational supervision or his lawful detention to bring him before the competent legal authority;[198]
> The legitimate detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind,

[193] ECHR European Convention on Human Rights as Amended by Protocols Nos 11 and 14 Supplemented by Protocols No 1,4,6,7,12 and 13.
[194] ECHR European Convention on Human Rights As Amended by Protocols Nos 11 and 14 Supplemented by Protocols No 1,4,6,7,12 and 13.
[195] ECHR European Convention on Human Rights As Amended by Protocols Nos 11 and 14 Supplemented by Protocols No 1,4,6,7,12 and 13.
[196] ECHR European Convention on Human Rights As Amended by Protocols Nos 11 and 14 Supplemented by Protocols No 1,4,6,7,12 and 13.
[197] ECHR European Convention on Human Rights As Amended by Protocols Nos 11 and 14 Supplemented by Protocols No 1,4,6,7,12 and 13.
[198] ECHR European Convention on Human Rights As Amended by Protocols Nos 11 and 14 Supplemented by Protocols No 1,4,6,7,12 and 13.

> alcoholics or drug addicts or vagrants;[199]
> The lawful arrest or detention of a person to prevent his affecting an unauthorised entry into the country or of a person against whom the action is being taken to deportation or extradition[200]

It also stipulates that:

> 2. Everyone who is arrested shall be promptly informed of the reasons for the arrest and any charges against in clear and unambiguous language.
> 3. Everyone arrested or detained by the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released pending trial. Release may be conditioned by guarantees to appear for trial.
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the arrest is not lawful.
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation'.

Article 5 of the ECHR also protects the right to be informed promptly of the reasons for arrest and charge, to be brought immediately before the judge or another authorised judicial officer, and have a trial within a reasonable time or to be released pending trial. The corresponding to the EU Charter is much shorter 'everyone has a right to liberty and security of the person.'[201] The purpose of the provision is to secure an individual who is arrested and detained the right to judicial supervision of the lawfulness of the measure to which they are thereby subjected.[202] A remedy must be available during a person's detention to allow that person to obtain a quick judicial review of the

[199] ECHR European Convention on Human Rights As Amended by Protocols Nos 11 and 14 Supplemented by Protocols No 1,4,6,7,12 and 13.
[200] ECHR European Convention on Human Rights As Amended by Protocols Nos 11 and 14 Supplemented by Protocols No 1,4,6,7,12 and 13.
[201] ECHR.
[202] *Mutatis Mutandis, De Wilde, Ooms and Versyp v Belgium* [1971] EHRR 371.

lawfulness of the arrest. The existence of the solution required must be sufficiently precise, in both theory and practice.

ii. Legal Spectrum and the Challenge

The question of applicability of Article 5 has arisen in a variety of circumstances that will be discussed below. To determine whether an individual has been deprived of his liberty, within the meaning of Article 5, the starting point must be taken of a whole range of criteria such as type, duration effects and manner of implementation of the measure in question as illustrated in the case of *Creanga v Romania.*[203] The court does not consider itself bound by legal conclusions of the domestic authorities as to whether or not there has been a deprivation of liberty, and undertakes an independent assessment of the situation. As illustrated in the case of *H.L v the UK,*[204] The ECtHR found that HL was deprived of his liberty within the meaning of Article 5(1). Giving the following reasons;

> ' It is not disputed that in order to determine whether there has been a deprivation of liberty, the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question. The distinction between deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance….[205]
> 91. Turning, therefore, the concrete situation as required by the *Ashingdane* judgment,[206] the Court considers the key factor in the present case to be that the health care professionals treating and managing the applicant exercised complete and effective control over his care and movements from the moment he presented acute behavioural problems …to the date he was compulsorily detained. The Correspondence … reflects both the carer's wish to have the applicant immediately released to their care and, equally, the clear intention of Dr M and the other relevant health care professionals to exercise strict control over his assessment, treatment, contacts, and, notably, movement and residence … the applicant's contact with his carers was directed and controlled by the hospital … the concrete …'[207]
> 92. The Court would, therefore, agree with the applicant that it is not determinative whether the ward was 'locked' or 'lockable.' [208]

[203] [Application. No 29226/03], IHRL 3797 [ECHR 2012].
[204][2002] ECHR 850, 45508/99, [2004] 40 EHRR 761.
[205] *Ibid.* para 89.
[206]*Ashingdane v United Kingdom* [1985] 7 EHRR 528.
[207] *Ibid.* para 91.
[208] *Ibid.* para 92.

93. … each case has to be decided on its own particular 'range of factors' and, while there may be similarities between the present and the HM case, there are also distinguishing features. In particular … a regime entirely different to that applied to the present applicant (the foster home was an open institution which allowed freedom of movement and encouraged contacts with the outside world) allows a conclusion that the facts of the HM case were not of a 'degree' or 'intensity' sufficiently severe to justify the conclusion that she was detained.[209]

The ECtHR found that the deprivation of liberty HL suffered was not 'lawful' within the meaning of Article 5(1), adopting the following analysis:

118. It is true that, at the particular time of the applicant's detention, the doctrine of necessity and, in particular, the 'best interests' test was still developing … It is, therefore, true that each element of the doctrine might not have been fully defined in 1997 [the time of HL's detention] …[210]
119. Whether or not the above allows the conclusion that the applicant could, with appropriate advice, have reasonably foreseen his detention on the basis of the doctrine of necessity (*Sunday Times v UK* (1979) 2 EHRR 245 at paras 49 and 52), the court considers that the further element of lawfulness, the aim of avoiding arbitrariness, has not been satisfied.[211]
120. In this latter respect, the court finds striking the lack of any fixed procedural rules by which the admission and detention of compliant incapacitated persons are conducted …[212] In particular and most obviously, the court notes the lack of any formalised admission procedures which indicate who can propose admission, for what reasons and on the basis of what kind of medical and other assessments and conclusions. There is no requirement to fix the exact purpose of admission (for example, for assessment or for treatment) and, consistently, no limits in terms of time, treatment or care attach to that admission. Nor is there any specific provision requiring a continuing clinical assessment of the persistence of a disorder warranting detention. The nomination of a representative of a patient who could make certain objections and applications on his or her behalf is procedural protection accorded to those committed involuntarily under the 1983 Act and which would be of equal importance for patients who are legally incapacitated and have, as in the present case, extremely limited communication abilities.[213]
123. The government's submission that detention could not be arbitrary within the meaning of art 5(1) because of the possibility of a later review of its lawfulness disregards the distinctive and cumulative protections offered by paras 1 and 4 of art 5 of the Convention: the former strictly regulates the circumstances in which one's liberty can be taken away whereas the latter requires a review of its legality thereafter'.[214]

It is a challenge for states to be able to show what pre-trial detention should or should not be in another state. Therefore, demonstrating that the law of the issuing state will not hold a requested

[209] *Ibid.* footnote 206. para. 93.
[210] *Ibid.* footnote 204. para. 118.
[211] *Ibid.* footnote 204. para. 119.
[212] *Ibid.* footnote 204. para. 120.
[213] *Ibid.* footnote 204. para. 120-122.
[214] *Ibid.* footnote 204. para. 123.

person can be challenging to prove. However, this provision has been argued in some extradition cases with varying degrees of success. For example in the cases of *Chalal v the UK*[215] and *Soldatenko v Ukraine*[216] In *Soldatenka's* case, the court was of the view that the Ukrainian legislation did not provide for a procedure that was sufficiently accessible, precise and foreseeable in its application to avoid the risk of arbitrary detention pending extradition.

Furthermore, the fact that an alleged offender is handed over as a result of cooperation between the states concerned, without proper extradition, the procedure does not violate the provision. All that is required is a legal basis for an order for the arrest of the accused person and an arrest warrant issued by authorities of the accused person's state of origin. Therefore, if the court carefully considers the pros and cons concerning the nature of the crime, a fair balance is likely to be achieved. In the case of *Ocalan v Turkey,*[217] he alleged amongst another right, violations of Article

[215] [Application No. 22414/93].

[216] [Application. No 2440/ 07] Case regarding extradition from Ukraine to Turkmenistan for the purposes of prosecution. < http://www.refworld.org/docid/4906f2272.html > Accessed 16 October 2018.

217 [Application No. 46221/99] On 9 October 1998 Ocalan was expelled from Syria, where he had been living for many years. He arrived the same day in Greece, where the Greek authorities requested him to leave Greek territory within two hours and refused his application for political asylum. On 10 October 1998 the applicant travelled to Moscow in an aircraft that had been chartered by the Greek secret services. His application for political asylum in Russia was accepted by the Duma, but the Russian Prime Minister did not implement that decision. On 12 November 1998 the applicant went to Rome where he made an application for political asylum. The Italian authorities initially detained him but subsequently placed him under house arrest. Although they refused to extradite him to Turkey, they also rejected his application for refugee status and the applicant had to bow to pressure for him to leave Italy. After spending either one or two days in Russia he returned to Greece, probably on 1 February 1999. The following day (2 February 1999) the applicant was taken to Kenya. He was met at Nairobi Airport by officials from the Greek Embassy and put up at the Greek Ambassador's residence. He lodged an application with the Greek Ambassador for political asylum in Greece, but never received a reply. On 15 February 1999 the Kenyan Ministry of Foreign Affairs announced that Ocalan had been on board an aircraft that had landed at Nairobi on 2 February 1999 and had entered Kenyan territory accompanied by Greek officials without declaring his identity or going through passport control. The announcement added that the Minister of Foreign Affairs had convened the Greek Ambassador in Nairobi in order to elicit information about the applicant's identity. After initially stating that the new arrival was not Ocalan, on being pressed by the Kenyan authorities the Ambassador had gone on to acknowledge that he was. The Greek Ambassador had informed the Minister of Foreign Affairs that the authorities in Athens agreed to arrange for Ocalan's departure from Kenya. The Kenyan Minister of Foreign Affairs also said that overseas Kenyan diplomatic missions had been the targets of terrorist attacks and that the applicant's presence in Kenya constituted a major security risk. In those circumstances, the Kenyan Government were surprised that Greece, a State with which it enjoyed friendly relations, could knowingly have put Kenya in such a difficult position, exposing it to suspicion and the risk of attacks. Referring

5 (right to liberty and security). *Ocalan* complained that he had been unlawfully deprived of his liberty, without an applicable extradition procedure being followed. Although an arrest by one state on the territory of another state made of this nature affects individual rights, the Conventions that also makes this provision for the prohibition against liberty does not prevent cooperation between states, within the framework of extradition treaties from bringing an alleged offender to justice. This is the ultimate aim of extradition. The court held that even atypical extradition could not be regarded as being contrary to the Convention.[218]

In *Othman's* case,[219] the court concluded that there would be a real risk of a flagrant denial of his right to liberty as guaranteed by Article 5 of the Convention. This was due to the Jordanian law of

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to the Greek Ambassador's role in the events, the Kenyan Government said that they had serious reservations about his credibility and had requested his immediate recall. The Kenyan Minister of Foreign Affairs added that the Kenyan authorities had played no part in the applicant's arrest and had had no say in his final destination. The Minister had not been informed of any operations by Turkish security forces at the time of the applicant's departure and there had been no consultations between the Kenyan and Turkish Governments on the subject. On the final day of his stay in Nairobi, the applicant was informed by the Greek Ambassador after the latter had returned from a meeting with the Kenyan Minister of Foreign Affairs that he was free to leave for the destination of his choice and that the Netherlands was prepared to accept him. On 15 February 1999 Kenyan officials went to the Greek Embassy to take the applicant to the airport. The Greek Ambassador said that he wished to accompany the applicant to the airport in person and a discussion between the Ambassador and the Kenyan officials ensued. In the end, a Kenyan official into a car drove the applicant. On the way to the airport the car in which the applicant was travelling left the convoy and, taking a route reserved for security personnel in the international transit area of Nairobi Airport, took him to an aircraft in which Turkish officials were waiting for him. The applicant was then arrested after boarding the aircraft at approximately 8 p.m. The Turkish courts had issued seven warrants for Ocalan's arrest and a wanted notice (red notice) had been circulated by Interpol. In each of those documents the applicant was accused of founding an armed gang in order to destroy the territorial integrity of the State and of instigating various terrorist acts that had resulted in loss of life. From the moment of his arrest an army doctor throughout the flight from Kenya to Turkey accompanied the applicant. A video recording and photographs taken of Ocalan in the aircraft for use by the police were leaked to the press and published. In the meantime, the inmates of İmralı Prison were transferred to other prisons. Ocalan was kept blindfolded throughout the flight except when the Turkish officials wore masks. The blindfold was removed directly the officials put their masks on. According to the Government, the blindfold was removed as soon as the aircraft entered Turkish airspace. Ocalan was taken into custody at İmralı Prison on 16 February 1999. While being transferred from the airport in Turkey to İmralı Prison he wore a hood. On photographs that were taken on the island of İmralı in Turkey, the applicant appears without a hood or blindfold. He later said that he had been given tranquillisers, probably at the Greek Embassy in Nairobi. Para 1-13 Available at http://www.refworld.org/docid/429c284f4.html > Accessed 16 October 2018.

[218] *Ibid.* at Paras 87 and 89.

[219] *Ibid.* footnote 164.

incommunicado detention for up to 50 days. The court also considered the possibility of legal assistance during any such detention. Thus if convicted at his retrial, any sentence of imprisonment would be a flagrant breach of Article 5 of the Convention as it would have been imposed as a result of a breach of Article 6 of the Convention. To sum up, the case-law on Article 5 of the ECHR presents that the court will take into account the important nature of the crime when interpreting and applying Article 5 of the ECHR. However, it will consider the nature of the crime to the extent of impairing the protection guaranteed by it. Thus, when a state derogates from Article 5 of the ECHR, there are limits to the measures that can be adopted. Therefore, the protection against arbitrary and excessive arrest and detention remain strictly supervised in the context of extradition.

As shown from the ECtHR cases discussed, Article 5 of the ECHR provides that no one shall be deprived of their liberty save in the cases that it prescribes and by the law. The ECtHR has consistently emphasised that the concept of 'deprivation of liberty' is an autonomous concept. Precisely what the concept entails is a question that the ECtHR has had regular cause to consider. Unfortunately, and as analysed further below, this provision as a bar to extradition have not been entirely consistent with states that include the US and Nigeria. The current situation of the guidance and the ECtHR case law is most uncertain as applying as a bar to the US and Nigeria for the following reasons.

Firstly, there is a significant divergence of view as to how the deprivation of liberty should be distinguished from the restriction of liberty. Secondly, this divergence of view by these states is at least to some extent based upon current extradition cases in these states where no alleged offender has invoked this prohibition to liberty as a bar to their extradition highlights different

interpretations. In the circumstances, ECtHR's judgments lack complete consistency with the US and Nigerian extradition cases. In considering how the emerging differences of the definition of 'deprivation of liberty' in the UK, US and Nigeria might be reconciled, if the definition of liberty were to be adopted by most states, this includes the US and Nigeria. These states should modify its guidance to the question of whether something is a deprivation of liberty being a matter for the court so that the criteria to be adopted more closely follow the development of the domestic law.

3.7.3. Fair Trial, Article 6

While great strides have been made towards the universal abolition of capital punishment, it should not be forgotten that thousands of individuals each year are executed, several after proceedings which do not meet fair trial standards.[220] Human rights also require that for any case regarding extradition, the fairness of the highest level and standards should always be exercised. Individuals whose extradition is being sought predominately seek the right to a fair trial.[221] The right to fair trial is among the human rights provisions that are invoked in extradition cases. In fact, the ECHR has held that these rights play a major role in a democratic society, from which no derogation may be drawn, not even in cases of terrorism or organised crime. Thus in *Soering* the ECtHR acknowledged that extradition might be refused 'in circumstances where the fugitive has suffered or risk suffering a flagrant denial of a fair trial in the requesting country'.[222]

[220] Death Penalty Worldwide International Human Rights Clinic Pathways to the Abolition of Death Penalty Cornell Law School June 2016 < https://www.deathpenaltyworldwide.org/pdf/Pathways%20to%20Abolition%20Death%20Penalty%20Worldwide%201016%20Final.pdf> Accessed 16 October 2018.
[221] Article 6, ECHR.
[222] *Ibid.* footnote 35. para. 113.

Furthermore, regarding a decision to extradite, the issue of a fair trial may arise either where it would be impossible to give the alleged offender a fair trial, or where it would amount to a misuse/manipulation of the process.[223] This is because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.[224] This shows that the doctrine of the abuse of power can be employed by the court to stay the proceedings, if not it could amount to an abuse of the court process. The principle of the fair trial also influences the decision to extradite if the court in the requested state holds that the extradition process might expose or lead the individuals under consideration to treatment in the state that may or is considered of a criminal nature.

i. Legal Boundaries

Article 10 of the UDHR provides that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and any criminal charge against him. Articles 6, 7 and 8 of the ECHR protect the right to a fair trial within a reasonable time. In principle, the risk that a trial in the issuing state will be unfair is capable of being a bar to extradition, as the ECHR held in *Soering.*[225] Where the court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting state.

[223] The Crown Prosecutor Service, Abuse of Process' (*The National Archives*, 12 June 2008) < http://webarchive.nationalarchives.gov.uk/20080612095828/http://www.cps.gov.uk/legal/section15/chapter_e.html> Accessed 15 October 2018.
[224] *Ibid*.
[225] *Ibid.* footnote 35.

ii. Legal Spectrum and the Challenge

In Nigeria, even when the extradition application is unopposed, the court will satisfy itself that the request is not frivolous.[226] The court in considering an extradition application will satisfy itself that the alleged offender will be accorded a fair trial if extradited.[227] Article 6 [228] has been argued in some prominent cases with varying degrees of success. Sometimes, it is invoked alone, but on other occasions, it is cited alongside other human rights provisions discussed above. In the case of *Brown et al. v Rwanda* [229] under s.93 (4) of the Extradition Act 2003, the Secretary of State signed orders to the effect that four appellants were to be extradited to Rwanda to face trial for crimes of genocide. The decision marked the conclusion of a nine-year battle on behalf of the Government of Rwanda to secure the extradition of the men, who were alleged to have participated in the genocide. In 2006, the Government of Rwanda and the UK signed a Memorandum of Understanding, which gave rise to the first set of extradition proceedings in 2007. The Secretary of State ordered that extradition should take place, and all the defendants appealed to the High Court.[230] In a landmark decision of the High Court in 2009, Lord Justice Laws ruled that extradition would breach Article 6 of the ECHR because of the risks of witness intimidation and absence of judicial independence in Rwanda. The following year, the law was amended to allow a requested individual to be prosecuted in the UK.

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[226] *Attorney-General of the Federation v Jeffery Okafor* FHC/ABJ/CR/180/2014 (Decision delivered on 27 October, 2014)
[227] *Ibid*.
[228] ECHR European Convention on Human Rights as Amended by Protocols Nos 11 and 14 Supplemented by Protocols No 1,4,6,7,12 and 13
[229] [2009] EWHC 770 (Admin).
[230] Edward Fitzgerald, Kate O'Raghallaigh and Tim Moloney, 'Rwandan genocide - Extradition found to breach Article 6' (*Doughty Street Chambers,* 23 December 2015). < https://www.doughtystreet.co.uk/news/article/rwandan-genocide-extradition-found-to-breach-article-6> Accessed 15 October 2018.

Following a shift in the approach of the International Criminal Tribunal for Rwanda (ICTR) in 2009, when the court started to transfer genocide cases to the Rwandan High Court for trial, and some European jurisdictions followed suit.[231] The Government of Rwanda signed a second Memorandum of Understanding with the UK and launched the second round of extradition requests in 2013. The second extradition hearing started in April 2014. Since then, the case has centred on the political regime in Rwanda, the provisions of Rwanda's Transfer Law, and the ability of the Rwandan criminal justice system to provide fair trial rights in genocide cases.[232]

The UK Supreme Court considered the case in 2014 during an interlocutory judicial review relating to anonymous witness evidence. The case involved detailed consideration of the recent jurisprudence of the ICTR and the ongoing genocide trials in the High Court in Rwanda. In refusing to send the defendants' case to the Secretary of State, Judge Arbuthnot found that the overall picture of Rwanda is an authoritarian, repressive state that is not less so than it was and is probably more so than in 2008-9. A state that is stifling opposition and that there is evidence of the state being suspected of threatening and killing those it considers to be its opponents or they simply disappear at home and abroad'. The court also found evidence that suspects can be tortured in secret camps where basic human rights are ignored. On 22 December 2015, following a case which has lasted for more than two years in the City of Westminster Magistrates' Court, Deputy Senior District Judge Arbuthnot discharged five men from a Rwandan extradition request relating to the 1994 genocide.[233]

[231] *Ibid.* footnote 230.
[232] *Ibid*. footnote 230.
[233] *Ibid.* footnote 229.

Additionally, the principle of fair trial conflicts with extradition, when states do not allow trials in absentia. States that would enable trials in absentia might not refuse extradition if the alleged offender in question were sentenced in their absence.[234] As illustrated in the case of *Bozano v France,*[235] the Italian police arrested *Bonzano,* an Italian national, on the charge of abducting and murdering a 13-year-old Swiss girl. It was alleged that he hid the body and tried to extort a ransom of 50 million Italian lire from the victim's father, an industrialist. He was also tried for committing indecent assault with violence on four women and was convicted by the Court of Appeal in Italy to life imprisonment in absentia. He took refuge in France and assumed a false identity. However, he was arrested in the course of a routine check. Italy then sought for his extradition from France, but the latter refused to surrender him because the prosecution took place against *Bonzano* in the Italian Court of Appeal in his absence and was against the French public order.[236]

In the court's case law, the term 'flagrant denial of justice' has been synonymous with a trial that is manifestly contrary to the provisions of Article 6 of the ECHR. Although it has not yet been required to define the term more precisely, the court has nonetheless indicated that certain forms of unfairness could amount to a flagrant denial of justice. A flagrant miscarriage of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 of the ECHR if occurring within the state itself. Instead, it represented a violation of the principles of fair trial guaranteed by Article 6 of the ECHR, which is so fundamental that it amounts to nullification, or destruction of the very essence, of the right secured

[234] United Nations Office on Drugs and Crime -Vienna, 'International Cooperation in Criminal Matters: Counter – Terrorism', Module 3 of the Counter Terrorism Legal Training Curriculum.
[235] [Application No. 9990/82], Council of Europe: European Court of Human Rights, 2 December 1987.
[236] *Ibid.* footnote 235.

by that Article.

Therefore, in assessing whether this test has been met, the court considered that the same standard and burden of proof should apply as in Article 3 cases. Thus, if the requested or accused person shows evidence capable of proving that there are substantial grounds for believing that if he is removed from a state, then he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the government to dispel any doubts about it, as was illustrated in *Othman's* [237] case, where there was a submission that there would be a real risk of a flagrant denial of justice if retried in Jordan for either of the offences for which he has been convicted in absentia. The Confessions of Al-Hamasher and Abu Hawsher were the predominant basis for his convictions at the original trials and these men and some of the other defendants at each trial had been held incommunicado, without legal assistance and tortured. The use of torture evidence was a flagrant denial of justice. The court found that this flagrant denial of justice would arise when evidence obtained by torture is admitted in criminal proceedings. The applicant demonstrated that there is a real risk that Abu Hawsher and Al-Hamasher were tortured into providing evidence against him. The court then found that no higher burden of proof could reasonably be imposed upon him. Having regard to these conclusions, the court concluded that there is a real risk that *Othman's* retrial would amount to a flagrant denial of justice.[238]

Similarly, in *King's case,*[239] Article 6 of the Convention was also invoked during his extradition. *King* submitted that he would suffer a flagrant denial of justice since he would be unable to obtain

[237] *Ibid.* footnote 164.
[238] *Ibid.* footnote 164. at Para 259, 260.
[239] *Ibid.* footnote 166.

legal aid. He went further to add that the Australian authorities were only prepared to allow video link evidence for non-contentious testimony. Thus, he would be unable to secure the attendance of witnesses for his defence who would have to travel from Europe to Australia to attend the trial, as the Australian legal aid budget would not meet the cost of the trip. This would infringe the right to equality of arms, the right to legal assistance and the right to obtain the attendance and examination of witnesses. The court in its conclusions held that *King* failed to demonstrate that his trial in Australia would give rise to a breach of Article 6 of the Convention, or less convincingly that, it would amount to a flagrant denial of justice of the kind considered by the court in the case of *Soering and Mamatkulov*. There was also insufficient evidence to demonstrate that the Australian authorities would not give due consideration to any application for legal aid he might choose to make. Article 6(3) (d) of the Convention does not guarantee the accused an unlimited right to secure the appearance of witnesses in court. It is for the domestic court to decide whether it is appropriate to call the witness.[240]

In the case of *Kapri v The Lord Advocate,*[241] the question in these proceedings was whether in seeking *Kapri's* extradition to Albania, the Lord Advocate and the Scottish Ministers were acting

[240] *Ibid.* footnote 166. Para 23 and 24.

[241] [2014] HCJAC 33; 2104 S.L.T. 557 (HCJ) Mr Kapri is an Albanian national. In 2001 he was present in the UK as an illegal immigrant. He is alleged to have been responsible for the murder of another Albanian national in London on 7 April 2001. The Metropolitan Police were unable to locate Mr Kapri, who had left the day after the murder for Glasgow and assumed a false Macedonian identity. They invited the Albanian authorities to prosecute him, since Albania has jurisdiction to prosecute in cases of homicide committed abroad where the victim and the alleged perpetrator are both Albanian. Mr Kapri was tried in his absence in Albania, convicted, and sentenced to 22 years' imprisonment. On 3 January 2003 the decision against Mr Kapri became final. His whereabouts remained unknown to the Albanian authorities. In May 2010, the UK police became aware that he was living in Glasgow. On 22 June 2010, the Albanian authorities formally requested his extradition to Albania. Mr Kapri was arrested in Glasgow on 24 June 2010 and has been in custody ever since. On 20 January 2011, the Sheriff decided that there were no bars to extradition and ordered that the case be sent to the Scottish Ministers. The Scottish Ministers decided that they were not prohibited from ordering his extradition and on 15 March 2011 an extradition order was served on him. https://www.supremecourt.uk/cases/docs/uksc-2012-0192-judgment.pdf > Accessed 24 February 2017.

in a way that was contrary to the appellant's fundamental rights regarding the European Convention. In particular, it was questioned whether the extradition to Albania would interfere with *Kapri's* right to liberty and the right to fair trial as provided for in Articles 5 and 6 of the Convention.[242] In considering whether *Kapri* would suffer a flagrant denial of justice if he were to be extradited to Albania, the court observed that the threshold test was stringent. The ECtHR found that until now it has been or would be met only in certain very exceptional circumstances. It would also require a breach of the relevant right in the state to which the person is to be extradited, which is so fundamental that it nullifies or destroys the very essence of, the right. None of the cases in which the test has been described was concerned with a complaint of systemic judicial corruption as in the species. It is not apparent that the only way it can be met, as it was in those cases, is by pointing to particular facts or circumstances affecting the case of the particular individual.[243] The Commission observed that even if a press campaign can affect the fairness of a trial, the press and the authorities 'cannot be expected to refrain from all statements, not about the guilt of the accused persons but about their dangerous character where uncontested information is available to them' for example in the case of previous convictions or the use of firearms on arrest. They also complained about not being represented by all the lawyers of their choice. On this matter, the Commission mentioned that the lawyers excluded were strongly suspected of supporting the criminal association and that this did not affect the effective defence since the applicants were still represented on average by ten defence counsel, some even chosen by them. In the end, no violation of Article 6 ECHR was found.[244]

Furthermore, while the provision of fair trial may influence a decision to extradite when invoked

[242] *Ibid.* footnote 241. Para 33, 34.
[243] *Ibid*. footnote 241. para 29, 32.
[244] *G.Ensslin*, *A.Baader & J.Raspe v. FRG*, Comm. Dec. 8 Jun. 1978, DR 14, pp.112-113, §15

by the alleged offender, there have to be sufficient reasons to show any possible irregularities in the trial of the alleged offender. These possible defects are usually considered even though there are obvious grounds for doubting whether the alleged offender will receive a fair trial for offences accused of in the requesting state. This can be accomplished if the extradition judge carefully establishes the pros and cons, firstly by establishing what constitutes a flagrant denial of justice. In the case of *Mamatkulov and Askarov v Turkey,*[245] the relevant part of the provision that provides that 'in determination of….any criminal charge against him, everyone is entitled to fair…hearing…by an independent and impartial tribunal that is established by law.' This was invoked on the grounds of the unfairness of extradition proceedings in Turkey and the criminal procedure in Uzbekistan. The court held that the test was not satisfied. There was no violation of Article 6(1) after considering whether the risk of a flagrant denial of justice in the country of destination was primarily assessed by reference to the facts that the contracting state knew or should have known when it extradited persons concerned.[246] Similarly, in the case of *Othman v*

[245] [2005] 41 EHRR. 494 The case concerns applications brought by two Uzbek nationals, Rustam Mamatkulov and Abdurasulovic Askarov, who were born in 1959 and 1971 respectively. The applicants are members of the ERK 'Freedom' Party (an opposition party in Uzbekistan). They were extradited from Turkey to Uzbekistan on 27 March 1999 and are understood to be currently in custody there. Mr Mamatkulov arrived in Istanbul from Kazakhstan on 3 March 1999 on a tourist visa. The Turkish police arrested him at Atatürk Airport (Istanbul) and took him into police custody. Mr Askarov came into Turkey on 13 December 1998 on a false passport. The security forces arrested him and took him into police custody on 5 March 1999. Both men were suspected of murder, causing injuries by the explosion of a bomb in Uzbekistan, and an attempted terrorist attack on the President of the Republic. They were brought before a judge who ordered them to be remanded in custody. Uzbekistan requested their extradition under a bilateral treaty with Turkey. A judge at Bakırköy Criminal Court questioned Mr Mamatkulov and Mr Askarov was brought before Fatih Criminal Court (Istanbul). The judge and court noted that the offences with which the applicants were charged were neither political nor military in nature, but ordinary criminal offences. They ordered them to be detained pending their extradition. The applicants lodged applications with the European Court of Human Rights, which on 18 March 1999 indicated to the Turkish Government, under Rule 39 (interim measures) of the Rules of Court, that 'it was desirable in the interests of the parties and the proper conduct of the proceedings before the Court not to extradite the applicants to Uzbekistan until the Court had had an opportunity to examine the application further at its forthcoming session on 23 March'. On that date the Chamber extended the interim measure until further notice. In the meantime, on 19 March 1999, the Turkish Cabinet had issued a decree for the applicants' extradition. They were handed over to the Uzbek authorities on 27 March 1999. In a judgment of 28 June 1999 the High Court of the Republic of Uzbekistan found the applicants guilty of the offences as charged and sentenced them to 20 and 11 years' imprisonment respectively.

[246] *Ibid.* footnote 245. para 27.

United Kingdom,[247] the Court adopted the meaning to be given to flagrant denial of justice in the partly dissenting opinion in *Mamatkulov's* case,[248] where it said that it was a stringent test of unfairness. Also in *Ocalan's* case, the court found that there was a violation of Article 6(1), (3) (b) and (c).

3.7.4. Respect for Private and Family Life, Article 8

It is important to note that the right to private and family life exist in the jurisdictions discussed in this thesis, which includes the UK, US and Nigeria. However, from an extradition context, the law of private and family life does not apply in the US and Nigeria. Most people will readily agree that criminal investigations and trials are highly disagreeable experiences for alleged offenders and their families.[249] The right to private and life remains broad in scope, in the sense that human rights law traditionally has been concerned with public acts. For example, those of states and government, not those of private actors. The law has come to recognise that private and family life involves private and public acts, and it does not apply out the UK-EU. This could be partly because a state ought to be a party the ECHR to enable a requested individual to invoke its provisions. The case law shows that development in human rights law increasingly allows for interventions into

[247] *Ibid.* footnote 164. [2012] 55 EHRR 1. Mr. Othman, had arrived in the United Kingdom in 1993, having fled Jordan. He requested asylum, alleging that he had been detained and tortured by the Jordanian authorities. He was recognised as a refugee in 1994 and granted leave to remain in the UK for an initial period of four years. In 1998 he applied for indefinite leave to remain in the UK. In 2002, while his application was still under consideration, he was arrested and taken into detention under the Anti-terrorism, Crime and Security Act of 2001. In August 2005 he was served with a notice of intention to deport. He challenged his possible deportation, thereby eventually reaching the European Court of Human Rights, He claimed that there was a real risk that evidence obtained by torture – either of him, his co-defendants or other prisoners – would be admitted against him during the retrial, in violation of article 6 ECHR. Also available at https://strasbourgobservers.com/2012/02/08/othman-abu-qatada-v-the-united-kingdom-questioning-gafgen/ > Accessed 17 October 2018.

[248] *Ibid.* footnote 245.

[249] Antje du-Bois Pedain, 'The Right to Family Life in Extradition Cases: More Defendant-Friendly than Strasbourg Requires' (2010) 69 Cambridge L.J. 223.

what has been construed as the sphere of private relationships.[250] The respect for family life includes the importance of personal dignity and autonomy and the interaction a person has with others, either in private or in public.[251] This provision also guarantees the right to respect one's established family life, and this includes close family ties, although there is no pre-determined model of a family or family life. It includes any stable relationship, for example, married, engaged, or de facto; relationships between parents and children; siblings; grandparents and grandchildren. This right is often employed, for instance, when measures are taken by the state to separate family members by removing children from care or deporting one member of a family group.[252]

Nigeria is of course not a party to the ECHR, and there are currently no reported cases where Nigerian extradition law has considered arguments based on the right to private and family life as a ground for extradition refusal from Nigeria. Where a Nigerian national is sought by the US for example in such circumstances, the individual would not be able to invoke such provisions as a ground for extradition refusal. The US is also, of course, not a member of the ECHR, although it is a member of the UDHR, The UDHR, however, does not directly create legal obligations for states. More generally, US extradition law does not admit the possibility of arguments being made on the basis of private and family life. The point being made here is that the right to a private and family life as a ground to refuse extradition is not considered outside the UK-EU. To attract the protection of Article 8 the complaint[253] must fall within one of the four dimensions guaranteed by

[250] Roger J.R. Levesque, 'Piercing the Family's Private Veil; Family Violence, International Human Rights and the Cross-Cultural Record' (1999) 21 Law and Pol'y.168.
[251] Article 8 Right to Family and Private Life < https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/article-8-right-private-and-family-life> Accessed 15 October 2018.
[252] *Ibid.*
[253] Ivana Roagna 'Protecting the right to respect for private and family life under the European Convention on Human Rights' Council of Europe human rights handbooks Council of Europe Strasbourg, 2012. 12. <https://www.echr.coe.int/LibraryDocs/Roagna2012_EN.pdf > Accessed 17 October 2018.

the provision, namely private life, family life, home or correspondence. The meaning of the four concepts is not self-explanatory and is very much fact-sensitive. Also, these areas are not mutually exclusive, and a measure can simultaneously interfere with multiple spheres at once. The Court has avoided laying down specific rules as to the interpretation of the various facets of the dimensions and will most usually proceed on a case-by-case basis, giving the concepts an autonomous meaning. The analysis of the case-law, and of the particular circumstances of the cases, however, provides sufficient guidance in interpreting situations from the angle of Article 8, also keeping in mind its evolutive and dynamic character.[254]

Forms of cohabitation or personal relationships which are not recognised as falling within the ambit of 'family life' in the jurisdiction of a contracting state can still enjoy protection by Article 8; essentially family life is not confined to legally acknowledged relationships. The Court is led by social, emotional and biological factors rather than by legal considerations when assessing whether a relationship is to be considered as 'family life'. However, a legal tie may be sufficient to constitute 'family life'.[255] For example, the mere fact that children have been adopted creates a relationship falling within the provision of the right to private and family life, even if the parents and children have never lived together and could not establish any emotional ties.[256] This right is subject to proportionate and lawful restrictions.[257] This provision, like all others discussed, is often closely connected with other rights such as torture, fair-trial, discrimination and liberty.[258]

[254] *Ibid.* footnote 253. pg. 12.
[255] *Pini and others v Romania [*Application No: 78028/01 and 78030/01]. Case can be read in < http://www.refworld.org/pdfid/58a730ab4.pdf > Accessed 17 October 2018.
[256] *Ibid.*
[257] https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/article-8-right-private-and-family-life> Accessed 15 October 2018.
[258] http://echr-online.info/right-to-family-life/> Accessed 15 October 2018.

Therefore, while the right to privacy is engaged in a vast number of situations, the right may be lawfully limited. Thus, any limitation must have regard to the fair balance that has to be struck between the competing interests of a person and of the state. In particular, any restriction must be by law, necessary and proportionate.[259]

i. Legal Boundaries

Family rights in the sense of the rights of a private and family unit to be free from interference and the right of the family unit to protection by the state are an unlikely basis for challenging extradition by a requested person. In the UK-EU, the US and Nigeria there is some protection of the right to private and family life – however, as noted, it is only applicable in extradition in the UK-EU. In the UK-EU such a claim would rely on Article 8 of the ECHR, in the US it could theoretically be made under Articles V and VI of the American Declaration, and in Nigeria Articles 11(2) and 17 of the ACHR. Applying generally are Articles 17 and 23 of the ICCPR. The courts in the EU-UK have recognised that the family unit needs to be considered as a whole, while each family member can be regarded as an innocent victim.[260] Also that the relative, individual and collective rights under article 8 of the Convention need to be considered.[261] The right to private and family life is guaranteed under Article 8.[262] It provides that:

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[259] *Ibid.* footnote 258.
[260] *R (On Application of Ullah) v Special Adjudicator* [2004] UKHL 26 at para 47.
[261] *Ibid.*
[262] European Convention on Human Rights As Amended by Protocols Nos 11 and 14 Supplemented by Protocols No 1,4,6,7,12 and 13 < http://www.echr.coe.int/Documents/Convention_ENG.pdf > The Charter of fundamental Rights of the EU brings together in a single document the fundamental rights protected in the EU. The Charter contains rights and freedoms under sic titles: Dignity, Freedoms, equality, solidarity, citizens' rights and justice. Proclaimed in 2000, the Charter has become legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009. The Charter is consistent with the ECHR adopted in the framework the Council of Europe <. http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm> Accessed 15 October 2018.

> '(1) Everyone has the right to respect for his private and family life, his home and his correspondence[263]
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'[264]

The rights guaranteed in Article 7 of the EU Charter[265] are parallel to those guaranteed by Article 8 of the ECHR.[266] Furthermore, this article is one of the most open-ended of the Convention rights. This is because its scope is very broad and it extends to many areas of life. The EA 2003 provides at sections 21 and 87 the judge must decide if surrender or extradition is consistent with the requested person's Convention rights. The court is therefore bound, if asked, to consider the compatibility to surrender/extradition with the alleged offender's Article 8 right to family life and the proportionality of the decision to order surrender with the alleged offender's family life as established in the UK. Article 8 on home and family life are dealt with differently outside the Convention. For purposes of illustration, it is necessary to refer to provisions guaranteeing the right to family life in the US and Nigeria. Article 17 of the American Convention on Human Rights, provides that;

> '1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state'[267]

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[263] Article 8(1) European Convention on Human Rights As Amended by Protocols Nos 11 and 14 Supplemented by Protocols No 1,4,6,7,12 and 13 < http://www.echr.coe.int/Documents/Convention_ENG.pdf> Accessed 15 October 2018.
[264] Article 8 (2) European Convention on Human Rights As Amended by Protocols Nos 11 and 14 Supplemented by Protocols No 1,4,6,7,12 and 13 < http://www.echr.coe.int/Documents/Convention_ENG.pdf> Accessed 15 October 2018.
[265] Charter of Fundamental Rights of the European Union 2000/C 364/01 - http://www.europarl.europa.eu/charter/pdf/text_en.pdf > Accessed 15 October 2018.
[266] European Convention on Human Rights As Amended by Protocols Nos 11 and 14 Supplemented by Protocols No 1,4,6,7,12 and 13 < http://www.echr.coe.int/Documents/Convention_ENG.pdf> Accessed 15 October 2018.
[267] AMERICAN CONVENTION ON HUMAN RIGHTS 'PACT OF SAN JOSE, COSTA RICA'(Adopted at San José, Costa Rica, November 22, 1969 at the Inter-American Specialised Conference on Human Rights) Entry into force; July 18, 1978, in accordance with Article 74.2 of the Convention. Depository; OAS General Secretariat

It is clear that the right to family life is a right that ought to be expressly provided for and not subsumed under or implied in another right. Article 18 (1) and (2) of the African Charter on Human and People's Rights succinctly captures the protection of the family and private life. The preceding is part and parcel of Nigerian law, having been ratified and domesticated in Nigeria.[268] In Nigeria, a family is regarded as the basic unit of society. By section 14(2) (b) of the Constitution, the welfare of the people is the primary purpose of government. If the family is the basic unit of society, then, the protection of the family unit should be the primary purpose of government. Arguably, most of the societal vices that bedevil the state are direct consequences of the failure to emphasise and protect the family unit and the right to family life and values. The Nigerian Constitution is the grundnorm and takes precedence in the hierarchy of laws. It is inexcusable for the family unit and the right to family life not to be expressly protected in the grundnorm. It appears that the right to family life has been annihilated in the course of striking a balance between the right of the alleged offender and the state so that the Constitution only emphasises rights within the alleged offender and states perspective. Outside the Convention, the mere fact that one member of the alleged offender is entitled to remain in the state while another member of the family is required to leave does not constitute interference with family life. With the latter leading to a balancing exercise that weighs the significance of the states' reasons for the removal against the adverse consequences,

(Original Instrument and Ratifications). Text; OAS, Treaty Series, N° 36. UN Registration: August 27, 1979, N° 17955. 17(2). The right of men and women of marriageable age to marry and to raise a family shall be recognised, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.17(3).No marriage shall be entered into without the free and full consent of the intending spouses.17(4) The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during the marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely by their own best interests.17(5). The law shall recognise equal rights for children born out of wedlock and those born in wedlock

[268] See the African Charter on Human and People's Rights (Ratification and Enforcement) Act CAP A9 LFN 2010 and *Abacha v Fawehinmi* [2000] 6 NWLR [Pt. 660] 228 at 228-229).

such surrender would impose on private life. Given the test, it is unlikely that the impact of private and family life would prevent a spouse or parent from extradition in light of the significance attached to criminal law enforcement as a reason for surrender in states like the US and Nigeria.

ii. Legal Spectrum and the Challenge

The right to respect for private and family life has an impact on different legal fields stretching from family law to criminal law. The consideration of the provision on home and family is dealt with differently both within and outside the Convention. Before the decision of the court in the case of *HH V Deputy Prosecutor of the Italian Republic, Genoa,*[269] it was only on rare occasions that reliance was placed on Article 8.[270] However, there has been a change as alleged offenders now presume to rely on Article 8[271] to either resist their extradition to other states or appeal against it. This shift is noticed in the cases of *Polish Judicial Authority v Celinski,*[272] *Slovakian Judicial Authority v Cambal,*[273] *Polish Judicial Authority v Nida,*[274] *R (Piotr Inglot) v Secretary of State for the Home Department and Westminster Magistrate Court,*[275] *Polish Judicial Authority v Pawlec.*[276] The court in all the hearings at first instance considered different factors and the decisions were made centred on proportionality. The court allowed two appeals by prosecuting authorities but dismissed the four defence appeals. The issue on appeal was whether the district judge had correctly applied discretion in each case.

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[269] [2012] 3 WLR 90.
[270] *Ibid*. See Para 168-169 of the judgement of Lord Wilson in *HH.*
[271] European Convention on Human Rights As Amended by Protocols Nos 11 and 14 Supplemented by Protocols No 1,4,6,7,12 and 13 < http://www.echr.coe.int/Documents/Convention_ENG.pdf > Accessed 15 October 2018.
[272] *Ibid.* footnote 5.
[273] [2015] EWHC 1274 (Admin).
[274] [2015] EWHC 1274 (Admin).
[275] [2015] EWHC 1274 (Admin).
[276] [2015] EWHC 1274 (Admin).

The right to private and family life plays little role in Nigerian and US extradition law. However, of course, article 8 may be invoked if nationals from states which include the US and Nigeria reside or happen to be in the UK or EU territory. According to a newspaper report,[277] a feature relied upon by foreign criminals to remain in the UK is Article 8. In a case that involved a Nigerian, who was accused of raping a 13-year- old girl the ECtHR held that there would be a breach of his 'right to a private and family life if removed from the UK'. This is despite him not having a wife, long-term partner or children in the UK. The ECtHR said that removing him from the UK- where he works for a council and attends church to his home country- would be disproportionate as he has committed no further offences and is no longer a danger to the public.[278] Although the case is not an extradition case (it is a deportation case), but it illustrates that the right to private and family life applies to foreign nationals living in the UK.

Article 8 of the ECHR may be engaged in cases of substantial grounds for believing there is a real risk of a violation of the right if the individual is extradited. The Strasbourg Court has never offered a clear and precise definition of what is meant by private life. In its view, it is a broad concept, incapable of exhaustive definition. What is clear is that the notion of private life is much wider than that of privacy, encompassing a sphere within which every individual can freely develop and fulfil his personality, both in relation to others and with the outside world.[279] Instead of providing

[277] Jack Doyle and Lydia Warren, 'Nigerian Rapist Who Can't Be Deported because European Judges Say It Would Violate His Right to Family Life' (MailOnline 17.30, 20th September 2011) < https://www.dailymail.co.uk/news/article-2039702/UK-deport-Nigerian-rapist-violate-right-family-life.html> Acessed 15 October 2018. Akindoyin Akinshipe who spent 13 years living in Nigeria. He arrived in Britain in 2000 with his two sisters to join his mother, who came four years earlier to work as a nurse. Just two years later, at the age of 15, he was convicted of raping a 13-year -old. But only ten months into the four-year sentence in a young offenders institution, he was released for good behaviour.

[278] *Ibid.* footnote 277.

[279] Ivana Roagna, 'Protecting the Right to Respect for Private and Family Life under the EU Convention on Human Rights, (Council of Europe Human Rights Handbook, January 2012) 9. < https://rm.coe.int/16806f1554 > Accessed 17 October 2018.

a clear-cut definition of private life, the Court has identified, on a case-by-case basis, the situations falling within this dimension. The result is a rather vague concept, which the Court tends to construe and interpret broadly. Over the years the notion of private life has been applied to a variety of situations, including bearing a name, the protection of one's image or reputation, awareness of family origins, physical and moral integrity, sexual and social identity. It also involves sexual life and orientation, a healthy environment, self-determination and personal autonomy, protection from search and seizure and privacy of telephone conversations.[280]

The Supreme Court has also recognised that Article 8 rights are likely to be engaged when extradition is to be ordered.[281] The alleged offender must establish that extradition engages his Article 8 right to family life and it will be disproportionate to the legitimate aim sought to be achieved by his removal. However, as recognised by the court there requires a significant aspect to the interference with the right before the court will find extradition disproportionate as the public interest in ensuring those accused of an offence face trial. The Supreme Court observed 'only the gravest effects of interference with family life will be capable of rendering extradition disproportionate to the public interest that it serves.[282] The court observed that:

> 'In answering that all-important question, it will weigh the nature and gravity of the interference against the importance of the aims pursued. In other words, the balancing exercise is the same in each context: what may differ are the nature and weight of the interests to be put into each side of the scale.'[283]

It is likely that the public interest in extradition will outweigh the Article 8 rights of the family unless the consequences of the interference with the family life will be exceptionally severe. As a

[280] *Ibid.* footnote 279.
[281] *Norris v Government of the United States of America* [2010] UKSC 9 at para 91 per Lord Hope of Graighead.
[282] *Ibid*. footnote 281. at para 82.
[283] *Ibid.* footnote 269.

result of the *HH* case and Lady Hale's formulation,[284] the court now considers some factors when weighing up whether the public interest in extradition is proportionate to the interference with family life that extradition involves. This can be seen in *Polish Judicial Authority v Celinski,*[285] where extradition to Poland was resisted on Article 8 grounds. The court, in this case, referred to the approach laid down in *Norris*[286] and *HH's*[287] *case.* It took into account *Celinski's*[288] time in prison, the age when the offence was committed and the effect of imprisonment. Although the offences were serious, this was not the only factor to be taken into account. The court also considered the fact that *Celinsk*[289] had been successfully rehabilitated. The judgment in *Celinski's*[290] case reinforces the detail that the judicial authority of states should be rendered a proper degree of respect and mutual confidence. This judgment also highlights the weight that should be given to public interest in complying with extradition requests.[291] While the public interest will always carry great weight, this would vary according to the nature of the crime involved. However, the judgment does not put forward any new principles to be considered but suggests that the core principles set out by the Supreme Court were not always adequately taken into account.[292] This is essential because each case turns on facts as found by the court and the

[284] *Ibid.* footnote 269. at para 8: in subparagraphs (3)(4) and (5).
[285] *Ibid.* footnote 5.
[286] *Ibid.* footnote 281.
[287] *Ibid.* footnote 269.
[288] *Ibid.* footnote 5.
[289] *Ibid.* footnote 5.
[290] *Ibid.* footnote 5.
[291] Gemma Davies, 'Balancing the Interference with Private and Family Life of the Person whose Extradition is sought with the Public Interest in Extradition: Has the Pendulum Swung Too Far?' (2015) Journal of Criminal Law. Vol. 79(5).
[292] *Ibid.* footnote 281. at para 14.

balancing considerations set out in *Norris*.[293] Thus, an approach would have fulfilled this requirement, regarding the balancing of the factors concerned under Article 8.[294]

The factors that should be taken into account within the Convention are those set out in *Norris*[295] *and HH*.[296] The correct approach is to identify the pros and cons with reasons and conclusions as to why extradition should be ordered or the defendant discharged. A challenge to extradition decisions will only succeed if it is demonstrated in a review that the judge misapplied the established legal principles, made a relevant finding of fact that no reasonable judge could have reached on in evidence, failed to take into account a relevant factor, or brought into account an irrelevant factor. While the Article 8 argument covers a wide range of considerations that must be carefully weighed in a check and balance approach, this judgment also demonstrates that as in *Celinski's case,*[297] the scope of Article 8 extradition appeals has been significantly restricted, and is not impervious to challenge.

It can also be said that even when these provisions are invoked during extradition, the court considers that it will only be in exceptional circumstances that an accused or requested person will outweigh the legitimate aim pursued by his or her extradition.[298] For example, in *King's case,*[299] he relied on the fact that he has a wife, two young children and a mother in the UK, whose ill health would not allow her to travel to Australia. This in the court's view is not an exceptional

[293] *Ibid.* footnote 281.
[294] European Convention on Human Rights As Amended by Protocols Nos 11 and 14 Supplemented by Protocols No 1,4,6,7,12 and 13 < http://www.echr.coe.int/Documents/Convention_ENG.pdf > Accessed 15 October 2018.
[295] *Ibid.* footnote 281.
[296] *Ibid.* footnote 269.
[297] *Ibid*. footnote 5.
[298] *Ibid.* footnote 269.
[299] *Ibid.* footnote 166.

circumstance that would mitigate in favour of the non-extradition. Although the long distance between the UK and Australia would mean that the family would enjoy limited contact if *King* were extradited, convicted and sentenced to a term of imprisonment there, the court cannot overlook the far-reaching charges he faces. Given these charges and the interest the UK has in honouring its obligations to Australia, the court was satisfied that *King's* extradition could not be said to be disproportionate to the legitimate aim served.[300]

3.8. Harmonising Extradition and the legal Competing Factors - Human Rights

As discussed above, various academic writers support the view that the human rights of the alleged offender must be taken into account before extradition is effected.[301] The above case-law reveals that in some states, this includes the UK, certain human rights of the alleged offender are considered so critical that even when they are accused of a heinous crime, they are treated in a manner that takes into account their rights. The analysis also found that it is up to the alleged offender to spell out the right allegedly violated and to convinced the Court that it falls within the relevant article, including Article 3, 5, 6 and 8 of the ECHR. According to Plachta, the development of human rights discourse has inevitably impacted the area of international cooperation in criminal justice, whose prominent feature - extradition has for several centuries been dominated by concerns deeply engraved in states interest.[302] Accordingly, under the classical international law, human rights were protected to the extent that their protection would be consistent with the interest of the state.[303] With human rights gaining prominence in the UK-EU, this peculiar state perspective has still not changed in the US and Nigeria regarding extradition.

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[300] *Ibid.* footnote 166. at Para 29.
[301] *Ibid.* footnote 43. (All the authors).
[302] Michael Plachta, 'Contemporary Problems of Extradition: Human Rights, Grounds for Refusal and the Principle Aut Dedere Aut Judicare' (2001) (From UNAFEI Annual Report for 1999 and Resource Material Series No. 57) 64.
[303] *Ibid.* pg. 64.

The UK-EU remain keen on protecting the rights of the alleged offender. However, this is inconsistent with states which include the US and Nigeria from an extradition perspective. It must also be noted that the levels of international and cross-border crime discussed in chapter two of this thesis have grown significantly in the wake of globalisation. Despite the bilateral and multilateral treaties made by these states involved extradition still, present an unavoidable tension between the need to suppress crime and the aim of achieving justice. Thus the importance of establishing a criminal system where crime is suppressed in a manner that is sensitive to human rights was made by the ECtHR in the *Soering case.*[304]

Despite the desirability of UK-EU reconciling extradition and the legal competing factors when they conflict, the achievement of such reconciliation that will apply to both developed and developing states may prove well-nigh impossible. Reaching a compromise that may apply to all states is a difficult task because it requires taking into account due consideration, accessing and weighing the legal and non-legal competing factors. The most challenging task between these states is establishing what justice is from an extradition perspective and establishing what a fair, balanced approach is and how it can be achieved. Thus, the process of hamorminsing all the interest is entirely up to the state involved. Precisely, since the international law has not yet put in place articulated standards or guidelines and rules that must guide the decision-making process of the state having custody of an alleged offender on whether or not to surrender to the requesting state.[305] Dugard and Wyngaert, argues that a balancing exercise between the two competing interests cannot be achieved by intuition or unarticulated forces but by first identifying interest(s) involved

[304] *Ibid.* footnote 35. para. 89.
[305] Obonye Jonas, 'Human Rights, Extradition and the Death Penalty: Reflections on the Stand-off between Botswana and South Africa' (2013) 18 SUR-Int'l J. on Hum Rts. 188.

and then establishing mechanisms and procedures that should guide decision-makers in the process.[306] Akin to Dugard and Wyngaert,'s assertion, even after these interests are recognised by the respective states, the mechanisms and procedures that may be adopted by the state is entirely a decision made by the state. Thus, the primary issue is whether the extradition court can adequately require individual resisting extradition on any of the human right provisions to demonstrate exceptional circumstances. In such cases, courts should strike a fair balance between the relevant interest, namely the requested individual's human right on the one hand and the prevention of international and cross-border crime on the contrary. This concerns an acceptable and universal fair and balanced approach that accommodate interests including those of developed and developing states. This way justice is served when these conflicting interests are balanced in an objectively reasonable way which of course may reduce the tension that currently exists.

3.9. Chapter Conclusion

This chapter explored the impact of the legal competing factors (human rights) and agreed with authors referred to in this thesis that they sometimes conflict with the extradition decision. This analysis contributes to knowledge by sub-categorising the legal competing factors-human rights (prohibition of torture, right to liberty, fair trial, private and family life) that increasingly conflict within a decision to extradite. The analysis also revealed the different levels on which human rights are considered outside and within the Convention. Knowledge is further built on the proposition that there is a conflict of interest between extradition and human right issues thus justice is required. However, this chapter takes a dynamic approach by arguing that justice requires an objective approach to be taken. This weighs up the various factors including the interest of states

[306] *Ibid.* footnote 74. pg 1.

and the requested person. This chapter also found through case-law analysis between the UK, US and Nigeria that these legal competing factors - human rights allow for the domestic or cultural difference in the manner in which individuals are treated. It also found that the categorised legal factors – human rights may not always act as a bar to extradition of a US national from the, US, or a Nigerian from Nigeria. Regardless of the boundaries erected among these states, human rights must play a more significant role in efforts to suppress crime. The irony of the matter is that irrespective of the crime of the alleged offender, their fundamental human rights must be respected because human rights were conceived to protect everyone. Indeed, rapid changes make pressing the application of human right principles. This reason underscores that a significant window of opportunity exists in the US and Nigeria. Therefore, it can only be hoped that human rights protections will be, taken more seriously in these states. Thus, an evaluation of the case-laws relevant to the questions relating to the aim of this thesis led to this chapter concluding that the balancing approach is essential, but objective given that each case that is decided on will turn on the facts found by the judge. Also, a more explicit acknowledgement of the legal factors- human rights relating to and affecting extradition is crucial to extradition decisions. It will also serve the interest of both the alleged offender and international law enforcement.

Chapter 4

Non- Legal Competing Factors within Extradition Decisions

4.1. Introduction

Following on from chapter three of this thesis that found that legal-human rights factors have an impact on extradition in some states during its initiation and further sub-categorised the legal competing factors. Chapter three also found through the case-law analysis between the UK, US and Nigeria that these legal competing factors – (human rights) allow for the domestic or cultural difference in the manner in which individuals are treated. In saying this, apart from the legal factors such as human rights, there are also non-legal factors that conflict within a decision to extradite. This chapter aims to discuss the impact of the non-legal factors, on extradition and how they conflict with the decision to extradite. It is also the aim of this chapter to explore how the questions identified in case-laws in chapter three that the court has to answer relating to both legal and non-legal factors within and outside the UK- EU. To achieve this point, it is essential to recognise the diverse levels on which the non-legal factors operate within and outside the UK-EU. Before this can be accomplished, the non-legal factors would be sub-categorised to enable a detailed analysis, and the basis of the categorisation will be analysed. A more explicit acknowledgement of the non-legal factors that conflict with extradition, identified in chapter two, will serve the interest of both the alleged offender and the international criminal law enforcement. Furthermore, the scope and application of the non-legal factors that conflict with extradition may guide decision makers when making an extradition decision. This chapter adds to the extradition literature by sub-categorising the non-legal competing factors and contributes to knowledge by providing a useful guide simplifying the understanding of the court case-law in states regarding the non-legal competing factors.

4.2. Non- Legal Factors

Extradition problems tend to multiply, one sort of provision is often compounded by another type of problem. For example, the legal factors provide the platform to invoke human rights provision to challenge extradition; there are also other factors that may stall extradition. These legal problems also tend to lead to other non-legal factors. According to Wood,[1] a myriad of political, social and judicial factors play a crucial role in shaping the outcome of extradition. Akin to Wood's argument is Heather Smith in 2000 who asserted that human rights violations, interpretation problems, cultural conflicts between states, delays, evidence gathering techniques, are the problems in extradition, but in this case, only restricted to the US and Mexico.[2] Building on the already categorised factors provided by Wood in 1993, this thesis adds economic factors as a factor that may stall extradition in both developed and developing states. Thus, the non-legal factors include political, social and economic. It is therefore argued in this thesis that there are several platforms for an alleged offender to challenge the current system of extradition effectively. While this thesis agrees with the argument provided by Heather Smith,[3] that human rights violations, interpretation problems, cultural conflicts between states, delays, evidence gathering techniques, are the problems in extradition in Mexico and the US. This thesis adds that these problems are not restricted to the US and Mexico alone but to both developed and developing states. However, at this level of research, this thesis focused on UK-EU, US and Nigeria.

The UK-EU and the US encounter controversial extradition cases, while Nigeria as a developing state has not much-reported case-law on extradition. Therefore, using these states model is best to

[1] Robert Herbert Woods, 'Extradition: Evaluating the Development, Uses and Overall Effectiveness of the System' (1993) 3 Regent U.L. Rev. 43.
[2] Heath Smith, 'International Extradition: A case study between the US and Mexico' (2000) The UCI Undergraduate Research Journal. 65.
[3] *Ibid.*

answer the questions raised in chapter one of this thesis. Also, illustrations drawn from other states further confirms that these competing factors are universal to developed and developing states. Both developed and developing states always satisfy one interest at the expense of the other thus justice-is required in both. This being said the case-laws analysed in the previous chapter found that the human rights challenges have in most cases worked against extradition. This may not be the situation in states like Nigeria, and the US where the human rights issues may not act as a bar to extradition, thereby confirming the assertion in this thesis that some states pay attention to other factors.

A case of this interest was the extradition of David Einhorn from France back to the US.[4] Einhorn was an American who was convicted in federal district court in absentia in 1993. He had fled the country before the conclusion of the criminal investigation. The French authorities arrested Einhorn in 1997 but declined to extradite him to the US because he faced the death penalty under the Pennsylvania laws. Capital punishment is not only illegal under French law, but the law prevents delivering a person within the state's borders to another state where he is likely to be executed. Following the charges in the criminal procedures in Pennsylvania, the US in 1998 promised France that it would grant Einhorn a new trial if he were extradited. Also, the US pledged to France that Einhorn would not be subjected to the death penalty, regardless of the trial's outcome.[5] France was more interested in the human rights protection and did not agree to surrender the American until assurances were provided. The stringent questions discussed in chapter three that the court has to answer does not relate to the non-legal factors both within and outside the UK-EU. This is because the facts of the cases are different, just as human-rights issues may not

[4] *Einhorn v France* [Application No. 7155/01].
[5] *Ibid*.

stall extradition from Nigeria and some other states, the non-legal factors may not stall extradition from the UK-EU. However, the findings remain the same that there are competing factors that cause tension when extradition is initiated. The categorisation of the competing factors does not affirm that both legal and non-legal factors stall extradition in developed and developing states at every extradition request made.

At the core of these human rights challenges to the extradition system is the inadequacy of full recognition by some authors of the non-legal factors affecting extradition.[6] Thus, this chapter contributes to knowledge by building on the pronouncements by these authors and adding that the non-legal competing factors sub-categorised into political, economic and social -sometimes weigh against the decision to extradite. These non-legal factors are currently not acknowledged or adequately explained by the authors. Instead, more emphasis is placed on legal factors-human rights. By focussing attention on the human right issues, authors overlook the other ways in which non-legal factors shapes and influence state extradition decision. It may not be unconnected to the fact that the extension of this principle to the international criminal law is far more difficult because there is no quantifiable proof to establish this fact. For example, I may argue that corruption in a particular state may stall extradition. There are incidents on TV, blogs, social media platforms and newspapers, that sends the message that a particular state is corrupt, but there need to be proof to corroborate such a claim. Using the ECtHR as an example that has provided case-law precedents to be followed by other states. Thus, if there have been cases or even unreported cases regarding corruption allegation, it would be difficult to establish this fact in court as a reason to deny extradition. Also, UK-EU citizens remain protected by the ECHR provisions, the solution of the

[6] M. Cherif Bassionui, *International Extradition United States Law and Practice* (6th Edn, Oxford University Press 2014) Paul Arnell, 'The Continuing Tension between Human Rights and Extradition' (2016) S.L.T 214.

test to be applied and the court has developed the standard balance approach. Unfortunately, there are no case-laws that set the procedure to be followed when politics (with an exception to political offence), culture, or racial boundaries may conflict with extradition. For example, it may be difficult for a Nigerian whose extradition has been requested, to establish that corruption will be disproportionate to the legitimate aim sought to be achieved by his removal.

Furthermore, as highlighted earlier in this thesis, the goal of extradition is a surrender of an alleged offender to administer justice. Thus, in the process of achieving justice, certain competing factors that were also identified take effect. This thesis asserts that there is no uniformity among the non-legal factors on the weight to be attached, and there is no standard system by which higher non-legal factors can be identified nor their content determined. Nevertheless, it is believed that it is useful to distinguish between different categories of non-legal factors to add to the growing literature regarding extradition. The non-legal factors identified in this thesis are also one of the categorised competing factors that influence an extradition process. These non-legal factors include:

- Political Factors
- Social Factors
- Economic Factors

The above have been categorised into non-legal factors because they do not particularly have a direct relationship to the practice of extradition or its basics. However, in most cases, they reflect the concern for individual rights. Therefore, creating an inter-link between the legal and non-legal competing factors that influence an extradition decision.

4.3. Sub- Categorisation of the Non- Legal Factors that Influence Extradition

This thesis adds that the non-legal factors cover a range of factors which includes financial constraints, geographic factors such as large porous borders, cultural and linguistic complexities, international politics, domestic politics, political offences and the lack of internationally accepted professional police standards. The sub-categorisation aims at a detailed analysis of the non- legal factors within a decision to extradite. Table 5 (below) depicts the further sub-categorisation of the non-legal factors of which consideration should be taken into account in extradition. Among states that have suffered the delay or possible denial of an extradition request, an overview of these factors shows why there is a niche in the process.

Table 5: Non-legal factors that influence extradition

Political Factors	i. Domestic and international politics ii. Political Offence[7]
Social Factors	i. Religion, language, delay and culture ii. International and internal conflict iii. Immigration and state boundaries
Economic Factors	i. Treaty Deficiencies

4.4. Political Factors

States decision regarding extradition involves the intersection of domestic criminal law and often overtly political considerations.[8] Extradition unveils the knotty interaction between domestic and international law, this is because an extradition treaty agreement between two contracting states is requisite to be enacted into the states' laws after negotiation. This brings it to a level where some states' government officials often have conflicting incentives regarding extradition decisions,

[7] Political offence is an already established competing factors as a bar to extradition as it is always initiated in the extradition treaty agreement. However, a little explanation will be provided on political offence for the sake of reading and any individual who is new to learning about extradition. Such knowledge on the political offence is essential, thus the reason for the addition to the categorisation.

[8] William Magnuson, 'The Domestic Politics of International Extradition' (2012) 52 Va. J. Int'L. 839.

which causes tensions internationally or within the state itself (domestic). It is possible to categorise further the political factors affecting extradition into two sub-categories, which include the domestic and international politics. Both factors are linked together because international obligations need the states domestic laws to be honoured. In the process of doing this, tension erupts, and this leads to political factors internationally or domestically. These tensions, as stated in Table 5 above, helps explain the trade-offs states have made between commitment and flexibility in an extradition process. Therefore, an analysis of the incentives of both domestic and international actors in extradition decisions will reveal a broader issue in the current extradition treaty within developed and developing states.

4.4.1. Domestic and International Politics

The complicated interplay between domestic and international politics has been illustrated in high-profile cases such as that of *Gary McKinnon*,[9] *Julian Assange*,[10] *James Ibori*,[11] and *Diepreye Alamieyeseigha*,[12] to name a few. These case-laws have been fueled in part by the political and domestic uproar over the heinous nature of the accusations. Some of these case-laws, which will be analysed below, have ensured that extradition cases have remained on the political agenda. The efforts to confirm or disapprove a direct linkage between international and domestic politics is impressionistic. It can be argued that a causal link exists between these two occurrences - that states will use external distractions and foreign enemies as censures to offset their inability to deal

[9] *McKinnon v United States* [2008] UKHL 59; [2008] 1 W.L.R. 1739.
[10] *Julian Assange v The Swedish Prosecution Authority* [2012] UKSC 22.
[11] Human Right Watch, 'Nigeria: UK Conviction a Blow against Corruption' (*Reuters,* 12 April 2012) https://www.hrw.org/news/2012/04/17/nigeria-uk-conviction-blow-against-corruption> Accessed 15 October 2018.
[12] Paulinus Aidoghie, 'Britain writes FG, request ex- convict Alamieyeseigha's extradition to London' (*Premium Times,* 28 March, 2013) < http://www.premiumtimesng.com/news/127349-britain-writes-fg-requests-ex-convict-alamieyeseighas-extradition-to-london.html> Accessed 15 October 2018.

effectively with their international problems or that the outbreak of domestic politics disorders is likely to lead to widespread intervention from outside.[13]

In any event, the domestic and international politics approach to extradition law highlights another obstacle that current theories ignore. Domestic courts' decisions often make headlines around the world.[14] For example, the decision to deny the extradition request of *McKinnon*[15] has attracted international attention. However, the role of domestic courts extends far beyond headlines. States routinely make decisions with cross-border implications, for example negotiating extradition treaties. Behind this complexity of negotiating extradition treaties lies two basic functions that states perform when they make the decisions to negotiate extradition treaties. These functions correspond to two fundamental questions: why ratify the treaty and what are the implications of a ratified treaty? The result is a simple, functional map of an obstacle to extradition.

Scenario 1: Relevant legal Instruments

The main legal instruments generally relevant to extradition In Nigeria are; the Constitution of the Federal Republic of Nigeria (1999 Constitution);[16] Extradition Act; Extradition Act (Modification) Order, 2014 and the Federal High Court (Extradition Proceedings) Rule 2015.

i. The UK-Nigerian Extradition Treaty 1931

When the original treaty was made between the UK and US, the treaty automatically bound Nigeria

[13] Robert O. Mathews, 'Domestic and Inter State Conflict' 25 (1969-1970) Int'l J. 459.
[14] Christopher A. Whytock, 'Domestic Courts and Global Governance' (2009-2010)84 Tulane Law Review. 132.
[15] *Ibid.* footnote 9.
[16] The 1999 Constitution is the tool by which the validity or legality of all existing laws, within the state are determined. In this sense the 1999 Constitution stipulates that if any other law is inconsistent with its provision, that other law shall, to the extent of inconsistency, be void. Section 1(2) Constitution of the Federal Republic of Nigeria. The Constitution provides the general foundational legal framework for extradition law and practice in Nigeria.

because it was a colony of the UK.[17] This is because all treaties concluded by the UK were liable to automatic application to all her Colonies.[18] The treaty thus became a Statute of general application, and it has been part of the state's legal system. After the military incursion into politics in 1966, there was an Extradition Decree of 1967. This later became an Extradition Act, which validates the existence of the treaty. The purpose of extradition in Nigeria is to request and surrender a person who is accused of an offence that attracts a penalty to the necessary state. This has been achieved by providing a process that is regulated by the Nigerian Extradition Act, 1966.

The Colonial Acts (especially the Fugitives' Offenders Act 1881) were passed at the time when independent sovereign states were very few in the Commonwealth.[19] The Fugitives' Offenders' Act (FOA) 1881[20] thus did not refer to crimes of political nature.[21] Rather, it made provision for a warrant issued in another jurisdiction to be endorsed and the fugitive returned, subject to proof of a *prima facie* case and a report to the governor.[22] However, the inadequacy of the F.O.A was apparent amongst other cases, such as in the case of Chief Anthony Enahoro in 1962,[23] where the limitations of the 1881 Act were divulged. Thus, a meeting of the Commonwealth law ministers

[17] The current UK-Nigeria Extradition treaty can be found in this link. < www.mcnabbassoiates.com/Nigeria%20International%Extradition%20Treaty%20with%20the%20United%20States.pdf> Accessed 18 October 2018.
[18] Okon Udokang, 'Succession to Treaties in New States' (1970) 8 Canada Yearbook of Int'L Law 12.
[19] Momodu Kassim-Momodu, 'Extradition of Fugitives by Nigeria' (1986) International and Comparative Law Quarterly 18.
[20] Hereinafter referred to as FOA.
[21] S. Picciotto, 'Extradition and Independence' (1966) 2 East African Law Journal 198.
[22] *Ibid*. footnote 19. Pg 18.
[23] Chief Anthony Enahoro, '*Fugitive Offender'* (1965) Chief Anthony Enahoro was a deputy leader of Nigeria's official opposition, the Action Group, was a leader in the western region and in 1959 was elected to the federal parliament and became a shadow minister of foreign affairs. He was put under restriction and then detention when the government cracked down on the action group. The Nigerian government requested for his extradition for treason under the Fugitives Offenders Act 1881, after he fled to London and sought for political asylum. This was specifically referred to in S.9 of the F.O.A as one to which the procedure applies. This request however triggered days of debate in the House of Commons in 1963, as he battled against his extradition. He was eventually returned to Nigeria in 1963 to face treason trial.

was held in 1965 to discuss the modification of each Commonwealth state's extradition and fugitive offender's legislation, primarily to secure uniformity.[24] The meeting proposed that each Commonwealth state should legislate accordingly and on the 31 December 1966, the Nigerian government promulgated the Extradition Act 1966, which was based on the principles agreed at the Commonwealth law ministers meeting and international law.[25] The Nigerian Extradition Act regulates extradition request by and to Nigeria.[26]

Consequently, the Extradition Act was disseminated in 1966 to replace all colonial legislation as well as the earlier Nigerian Act on Extradition and Fugitives' Offenders.[27] Nigeria's extradition policies include:

- The offence for which the fugitive is requested must not be of a political, racial or religious nature;[28]
- The request must be processed with reasonable evidence;[29]
- There must be an assurance that the subject will only be tried and punished if convicted of the offence stated in the application of the requesting state;[30]
- Where the issue is already serving a jail term, he will not be extradited until the completion of his sentence;[31]
- The fugitive will only be extradited to the requesting country which does not have the right to extradite him to a third country further;[32] and
- There must be reciprocity. Otherwise, Nigeria will not extradite its citizens to a country, which given the same facts would not extradite its citizens to a country, which given the same facts would not have their national sent to Nigeria.[33]

[24] Fugitive Offenders Bill – HC Deb 06 February 1967 Vol 740 cc1131-214.
[25] *Ibid.*
[26] Nigerian Extradition Act 1966. Can be found in < https://www.imolin.org/doc/amlid/Nigeria_Extradition_Act.pdf > Accessed 18 October 2018.
[27] *Ibid.*
[28] *Ibid*. footnote 26.
[29] *Ibid*. footnote 26.
[30] *Ibid*. footnote 26.
[31] *Ibid*. footnote 26.
[32] *Ibid*. footnote 26.
[33] *Ibid*. footnote 26.

Furthermore, by negotiating an extradition treaty with another state, Nigeria assumed an obligation to extradite when an extradition request met the terms specified by the applicable extradition treaty. This requirement is enshrined in the Nigerian Extradition Act 1966 and made applicable to Nigeria in 1935. This operates on the assumption that an application that meets the terms of the Act will result in the desired extradition.[34] Nonetheless, the Nigerian Extradition Act 1966, like the European Convention, also provides for several exceptions to the extradition obligation, which is in turn further enhanced by the rights guarantees of the constitution. While the Nigerian Constitution provides the foundational legal framework for extradition law and practice, the Extradition Act 1966 is the primary legislation for specific matters. As the primary statute regulating extradition in Nigeria, it recognises two separate categories of states. States in the first category are those that have an extradition treaty with Nigeria and in respect of which an agreement has been made and published.[35] The second category consists of the Commonwealth states.[36] This categorisation is significant because while it is necessary to enter into separate and individual bilateral (or infrequently multilateral) extradition treaties with states in the first category,[37] there is no such requirement for the second category of Commonwealth states.[38] The Extradition Treaty initially conferred magistrates with the jurisdiction to determine extradition proceedings. This position changed with the coming of the 1999 Constitution.[39] This change in jurisdiction creates a conflict because the Extradition Act 1966 was not immediately amended to align with the new constitutional provision.

[34] *Ibid*. footnote 26.
[35] Section 1 Extradition Act 1966.
[36] Section 2 Extradition Act 1966.
[37] Section 1, Extradition Act 1966.
[38] Section 2 Extradition Act 1966.
[39] Section 251(1) (i) of the 1999 Constitution grants the Federal High Court exclusive jurisdiction to entertain and determine all extradition related matters.

Based on the above scenario, the current Nigerian extradition treaty with the UK has not been modified since 1931. Most states do not allow extradition in the absence of a treaty. This philosophy is consistent with the established international legal principle that states have no legal obligation to extradite in the absence of a treaty. An international treaty entered into by the Government of Nigeria does not become binding until it is enacted into law by the National Assembly.[40] As observed in the case of *Attorney-General of the Federation v Kingsley Edegbe,*[41] the extradition request was denied for being incompetent. The court held that signing and ratification of a treaty without domestication by an Act of the National Assembly in line with Section 12 of the 1999 Constitution would not make the treaty applicable to Nigerian courts because the laws had not been domesticated.[42] This method has often been ineffective because early extradition treaties did not anticipate the development of crimes such as computer fraud, credit card fraud, terrorism, etc.[43] Since extradition is permitted only for crimes specified in the treaty, it has been a challenge for some states to keep up the new crimes and new extradition procedures.

Thus, the primary defect with the current extradition treaty in Nigeria, for example, is the inadequate range of offences covered by the treaty. This is because states adhering to treaties listing specific crime may seek extradition only for those crimes. Therefore, an alleged offender who has committed an unlisted crime cannot be transferred. A modification of the current bilateral treaty dated in 1935 on extradition treaties will aid Nigerian state governments in fighting new and as of

[40] *Abacha v Fawehinmi* (2000) 6 NWLR pt. 660. P.228 at 228.
[41] Suit No. FHC/ABJ/CS/907/2012 (Decision Delivered on 1st July, 2014) see also the cases of *Attorney General of the Federation v Rasheed Abayomi Mustapha* Charge No. FHC/L/218C/2011.
[42] Suit No. FHC/ABJ/CS/907/2012 (Decision Delivered on 1st July, 2014).
[43] See Chapter 2 of this thesis.

yet unknown criminal offences. The existing Nigerian extradition treaty provides evidence of its inability to meet the current challenges. As already pointed out by Heather Smith,[44] if a treaty update or modification is not done, it may be a loophole through which an alleged offender could exploit the system not only in Mexico and the US[45] but also in Nigeria and other states with the same predicament. States must also be flexible enough to deal with these sudden and often violent changes.

This thesis agrees with Heath Smith's[46] provision that the states that already have an existing treaty would not repeal its Act to reflect any underlying challenge due to the cost of negotiating one.[47] Yarnold,[48] argues the burden that modern states must accept to take part in international extradition agreements.[49] This burden can be central to a state's extradition concerns. Extradition treaties are complicated, and they also require much input from the states themselves.[50] For example, enumerating the crimes for which extradition will be granted between the two states is no small task. For a state with several extradition treaties, the maintenance of these treaties can be time-consuming and problematic.[51] If a state goes through an effort of negotiating and ratifying a formal treaty, it is communicating with other states that are likely to comply with the treaty. Domestic institutions are not just tools for state government decision makers. However, the preferences of government decision makers are themselves influenced critically by the domestic and transnational

[44] *Ibid.* footnote 2.
[45] *Ibid.* footnote 2. pg. 69.
[46] *Ibid.* footnote 2. pg 64.
[47] *ibid.* footnote 2. pg 64.
[48] Barbara Yarnold, *International Fugitives; A New Role For the International Court of Justice* (New York; Praeger Publishing, 1991) 15.
[49] *Ibid.*
[50] *Ibid.* footnote 48. pg 69.
[51] *Ibid.* footnote 2 pg 67.

government in which they operate. Domestic politics and institutions thus can play an important role in creating a demand for treaty-based agreements.[52] Kal Raustiala,[53] for example, argues that individual groups and private groups use the state as a means of pursuing interests, both domestically and internationally.[54] The interplay of the interest, aggregated at the level of the state, ultimately determines state behaviour. Domestic preference and domestic interactions interact to affect the structure of international agreements. According to Raustiala,[55] domestic pressure for international cooperation where it exists will inevitably be skewed in favour of binding treaties rather than non-binding pledges.[56]

An even casual perusal of extradition agreements today demonstrates that treaties are the dominant form of cooperation, an observation that would appear to show that domestic groups are strongly in favour of cooperating to find, arrest and deliver an alleged offender internationally.[57] This may be explained by the powerful pull of law and order a political tactic. It may also be explained by the perceived interest of government officials within foreign ministries and the ministries of justice. Regardless of whether extradition treaties do lead to more cooperation in extradition affairs or not, many groups appear to believe that they do. The critical point here is that domestic preference for or against extradition treaties may not be entirely coherent, either within a state or through time. Some groups within a state may favour cooperation with foreign states in criminal affairs, while other groups within the state may decline any of such cooperation. For example,

[52] *Ibid.* footnote 8. pg. 863.
[53] Kal Raustiala, Form and Substance in International Agreements, (2005) 99 Am.J.Int'L. L. 581, 595.
[54] *Ibid.*
[55] *Ibid.* footnote 53. pg. 596
[56] *Ibid.* footnote 53. pg 596.
[57] *Ibid.* footnote 8. pg 865.

when *Ibori's* extradition was requested for money laundering charges in the UK, domestic groups in Nigeria were firmly in favour that he should not be sent to the requesting state.[58]

States may result to pondering the decision of whether or not negotiating an extradition treaty with a neighbouring state may be affected by more parochial incentives, such as expanding agency competencies, earning campaign contributors, or gaining re-election, may generally not align correctly with the general interest of the state, but do align for themselves and their immediate needs. The structure of domestic politics affects the demand for extradition treaties. Under contemporary treaty practice a state signature of a treaty especially a multilateral treaty typically does not make the state a party to the treaty. Rather states become a party to treaties by the act of ratification.[59] The signing of treaties under this practice is at most an indication that the terms of the treaty are satisfactory. Some states have signed numerous treaties that are not subsequently ratified. This phenomenon has been especially evident in the last decade, during which time Nigeria has signed a treaty with The Netherlands, but has not yet ratified it. There are some reasons why the state may sign but not ratify a treaty. More likely a state might withhold ratifying an extradition treaty for symbolic political benefits. Secondly, domestic politics creates incentives, in some instances for negotiations to build in greater flexibility, and lastly, it affects decisions regarding whether to comply with extradition obligations particularly in situations when states are unsure what actions count as compliance. These hidden features of state behaviour can help explain why some states have failed to review its extradition treaties.

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[58] Nick Tattersall, 'Mob prevents Nigeria police arresting ex-governor' (*Reuters,* 22 APRIL 2012) < https://af.reuters.com/article/topNews/idAFJOE63L02W20100422> Accessed 18 October 2018. See also Former Nigerian Governor James Ibori jailed for 13 Years' (*BBC News*, 17 April 2012) < https://www.bbc.co.uk/news/world-africa-17739388> Accessed 18 October 2018. See also *R v Ibori (Onanefe James)* Unreported April 17, 2012 (Southwark Crown Court).

[59] Curtis A. Bradley, 'Unratified Treaties, Domestic Politics, U.S. Constitution' (2007) 48 Harvard Int'l L. J. 307.

Extraditions are primarily effectuated through bilateral treaties, and to a certain extent, extradition treaties are binding. Indeed, that is the very definition of the treaty, as the Vienna Convention stipulates that every treaty in force is binding upon the parties involved and they must perform them in good faith.[60] However, in another vein, agreements do vary in the strictness of their obligations because some of these negotiated treaties contain specific and clear obligations for state parties, while others have more ambiguous requirements, and grant some flexibility to states deciding how to implement them.[61] In the context of extradition, an important consideration is the amount of discretion that states reserve for themselves in determining whether to extradite the alleged offender or not. An extradition request is formally issued by the state where the conduct was carried out rather than an informal exchange. Thus if the state's judiciary deems the request to be within the applicable treaty that exists between them, and the evidence for the return of the alleged offender is sufficient, then the request is granted. Although the judiciary gives the extradition request, the executive of the state ultimately authorises the extradition of the requested individual. Thus, the various arms of government in a particular state, such as the judiciary, legislative and executive arms, can frustrate an extradition process for reasons that will be illustrated in the cases below.

Furthermore, domestic politics creates the demand for extradition treaties but also distorts the formation and interpretation of these treaties in predictable ways.[62] Conceivably, and most notably, the structure of the interest group politics at a local level heavily influences a state's decision

[60] Vienna Convention on the Law of Treaties, art 26, May 23, 1969, 1155. U.N.T.S.331.
[61] Daniel E. Ho, 'Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?' 5(2002) 5 Journal of Int'l Economic Law. 647.
[62] *Ibid.* footnote 8. pg. 839.

whether to comply with its obligations under the treaties. A broadly inclusive and rigorous treaty may be desirable for the states interested in deterring crime. Nonetheless, if an influential interest group is in preference of certain exceptions in the treaty, or if the decision makers envisage a certain kind of extradition that may be harmful politically, incentives arise for negotiators to reduce the scope of the treaty or include escape hatches for otherwise obligatory treaty provision. This can happen either in situations where a decision maker predicts that certain kinds of extradition arrangement may be politically harmful to their office.

According to Ziegler,[63] geopolitics undoubtedly played a significant role in *McKinnon's* fight against extradition.[64] His perceived vulnerability was compounded by the imputed unfairness of a treaty, which according to critics poses a substantial risk to the civil liberties of everyone in the UK.[65] Furthermore, it is evident from this case-law, that domestic and international politics create the demand for extradition treaties, but also distorts the formation and interpretation of these agreements in predictable ways. Perhaps most importantly, the structure of interest groups in politics at a local level may profoundly influence a state's decision about whether to comply with its international obligations under extradition treaties as observed in *McKinnon's case.* This case also exemplifies how domestic groups and individuals can mobilise public opinion and therefore pressure politicians to promote particular agendas on an international plane.

ii. Edmond Charles Edward Genet

[63] Katja. S. Ziegler, Elizabeth Wicks and Loveday Lodson, *The UK and European Human Rights: A Strained Relationship* (Bloomsbury Publishing 2015) 70.
[64] *Ibid.* pg 70.
[65] *Ibid*. footnote 63 pg 71.

The issue of domestic and international politics can also be observed in the case of Edmond Charles Edward Genet, a French diplomat who served as French representative in Berlin, Vienna and St. Petersburg before the French Revolution. He continued to serve in Russia until 1792 when he was expelled because of his revolutionary ardour.[66] Genet was also sent, as a minister, to the US where numerous supporters of France met him with wild acclaim. President George Washington was anxious to preserve the neutrality of the US, and despite everything Genet had done to outrage the Washington administration, denied his extradition request for reasons of law and magnanimity. France went further to ask if the US would attempt to seize and send Genet to France, and this too was rejected, and Genet remained in the US. The Washington administration's hostility toward the extradition of Genet was an expression of diplomatic neutrality towards international conflict in European power.[67]

iii. Assange v Sweden[68]

In 2010, the anti-secrecy website WikiLeaks released a trove of nearly 400,000 confidential documents related to the Iraq war, exposing, among other things, which the US had systematically ignored reports of torture by Iraqi authorities. The publication of the documents proved a boom to Julian Assange, a well-known Australian journalist and founder of the WikiLeaks website who found himself hailed as a prophet of the new age of government accountability. Soon after the first batch of documents, *Assange* learned that authorities in Sweden sought him for questioning regarding charges of sexual assault by two WikiLeaks volunteers. He fled to London, where he was arrested by the British police under a Swedish warrant. Sweden submitted a request for his

[66] Hadrien Laroche, *The Last Genet, A Writer in Revolt* (Arsenal Pulp Press 2010) 86.
[67] Christopher H. Pyle, *Extradition, Politics and Human Rights*, (Temple University Press 2001) 19.
[68] *Ibid.* footnote 10.

extradition to the UK, and the court granted the request. Assange protested that the request was politically motivated and could potentially lead to his imprisonment in Guantanamo.[69] To avoid extradition to Sweden, Assange sought sanctuary in the Ecuadorian embassy in London, where he and was granted political asylum and has been in hiding.[70] *Assange* has not been charged with any offence in the US, so there cannot be a trial. Although it is possible that there can be an arrest warrant and indictment under seal, US officials are not sure of the law that he has violated.[71] Therefore, if *Assange* were brought to the US, it is widely speculated that he would be charged with violations of the 1917 Espionage Act.[72] This Act, passed in the midst of World War 1, is a previously obscure piece of legislation primarily used as a way to constrain speech that might be inimical to the nation's military efforts. In the relevant part of the Act, it provides that it is a crime to possess and transmit unauthorised national security information. This conduct is what seemingly encompasses many of the actions that Assange has admitted to, readily and unapologetically on numerous occasions.[73]

Referring to *Hamza*,[74] *McKinnon*[75] and *Assange*'s[76] case, these cases have similar facts and yet different results. In these cases, an individual committed a crime that had an impact on another state. On the surface the facts are similar, but the results diverge. One response is that, on closer inspection of these cases, the legally relevant facts are not as similar as they appear. While *Hamza*

[69] Isaac Davison, 'Julian Assange compares his situations to Kim Dotcom's Extradition Case' (*nzherald*, 08 October 2015) < https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11525876> Accessed 15 October 2018.
[70] 'Ecuador grants WikiLeaks founder Julian Assange political asylum' (*the guardian*, 16 August 2012) < https://www.theguardian.com/media/2012/aug/16/julian-assange-political-asylum-ecuador> Accessed 15 October 2018.
[71] *Ibid.*
[72] 18. U.S.C. 792(2011).
[73] *Ibid.*
[74] *Hamza v UK* [2008] ECHR 970.
[75] *Ibid.* footnote 9.
[76] *Ibid.* footnote 10.

and *McKinnon* argued that their human rights would be breached, there was no question that *Assange* has been sentenced or confined. Another response recognises that the legal aspects of these cases are similar but stresses the different political dimensions of the *Hamza*, *McKinnon* and *Assange* extradition. *Hamza* and *Assange* had earned the enmity of the governments around the world for their conduct. While *McKinnon* was hailed by acclaimed world man, who should be offered a job in the US. According to this response, the different results in these cases are best explained by politics. To dismiss these cases as merely nonanalogous, either legally or politically, is to ignore the real connection between domestic and international politics. In these cases, domestic institutions purported to ground their decisions in the interpretation of the international treaties.

4.4.2. Political Offence Exception

Most extradition laws and treaties expressly provide for an exemption from extradition for individuals who commit a political offence.[77] Another controversial issue relating to extradition is the exception for most political offences.[78] A domestic approach to extradition law brings to light several important mechanisms and failures in international legal regimes. This can also be observed in a case from 1973, where an extradition request was made by the US to France. In that year, a group of five US citizens hijacked a domestic flight. Two of the hijackers had escaped from prison, where they were serving prison sentences for armed robbery and murder.[79] The terrorists requested $1 million as a ransom for freeing the passengers on board the plane, a sum they

[77] Cindy Verne Schlaefer, 'American Courts and Modern Terrorism: The Politics of Extradition' 13 (1980-1981) New York University Journal of Int'l Law and Politics, 617.
[78] George J. Andreopoulos, 'Extradition Law' Encyclopaedia Britiannica< https://www.britannica.com/topic/extradition> Accessed 15 October 2018.
[79]BBC News, 'George Wright wins Extradition case in Portugal' (17 November 2011). < https://www.bbc.co.uk/news/world-us-canada-15778384> Accessed 15 October 2018.

received. The hijackers then forced the plane to fly them to Algeria. The individuals were eventually identified, and apprehended in Paris. The US sought extradition of the group on charges of aircraft piracy, an offence that was included in the extradition treaty between the US and France. The French Court, however, denied the extradition request. According to the court, the extradition request fell under the political offence exception, because a genuine motive of the hijackers was to escape racial segregation in the US, and the charges against them amounted to political prosecution.[80]

This case indicates just how broadly some states have read the political offence exception. Far from shielding political revolutionaries, it appears at times to cover normal individuals, who have committed terrible crimes, which are absent of any real political motivation. The approach of the French court in the above case is probably best understood as an inquiry into the fairness of the American justice system, not an investigation of the political nature of the crime. Many states have filleted the unique denotation of political offence, and in its place have approved themselves a broad leeway to establish which crime is extraditable, even in the face of the unambiguous provisions in extradition treaties.[81] However, controversy erupts when one state's interpretations of a political offence, is perceived by the requesting state as purely an ordinary crime. The political offence exception, thus often serves as a kind of escape route because it allows a state to refuse extradition and yet remain within the treaty framework. Furthermore, it also provides a straightforward and defensible legal explanation for noncompliance with the treaty. This occurs when a criminal suspect who has ongoing domestic support and is a member of powerful or popular groups or represents a particularly sympathetic symbol. The hijacking case in France is an

[80] The Individual in International law: Extradition, 1976 International Law Reports Digest 5, at 124-125.
[81] *Ibid*.

excellent example because the government officials faced severe pressure from their constituents to deny extradition, and they had strong incentives to comply under this pressure.

However, another apparent feature is the inconsistency regarding extradition in the case of *McKinnon and Abu Hamza. McKinnon's* extradition was denied on similar grounds that were invoked in several extradition cases including the case of *Abu Hamza*. The issue of whether terrorist offences are taken more seriously than cybercrime is debatable as a result of this decision. In essence, the use of executive discretion means that full observance with the letter of the treaty is no longer a guarantee to final surrender. The use of discretion is more sceptical in the aspect of the language stating that extradition 'shall' be required in cases where the requesting state has fully complied with the treaty. Anything less than full compliance in such situations would thus be considered a blatant violation of specific treaty obligations.

4.5. Social Factors

Based on certain case-laws that would be analysed in this section, this thesis finds that immigration and state border control, technology, language, culture, race, and religion are the social competing factors that influence an extradition decision. This finding builds on Woods[82] categorisation of social factors which did not include race, language and religion. Akin to Woods assertion is Heather Smith,[83] who identified cultural conflict and evidence gathering techniques as some of the problems in international extradition arrangements. Building on the contribution made by both authors, this thesis contributes by adding to the already categorised social factors by Wood.[84] It

[82] *Ibid*. footnote 1. pg. 43.
[83] *Ibid*. footnote 2. pg. 72.
[84] *Ibid*. footnote 1. pg. 43.

also builds on Heather Smith's[85] assertion who identified evidence gathering technique as an issue with international extradition, but in this case, is sub-categorises it into technology. This sub-categorisation into technology encompasses the evidence gathering technique already identified by Heather Smith[86] and other issues that were not discussed by her. Like other factors presented in this thesis, these identified social competing factors cause either the delay of the extradition procedure or denial of the extradition request in a state. These social factors are unobtrusive issues that are sometimes difficult to prove as a ground for extradition refusal. However, the fact rests that at some point in an extradition negotiation they sometimes weigh in favour of and against extradition.

4.5.1. Culture, Race and Religion

Culture, race and religion are broad terms that include differences in the language and legal system between states.[87] As one of the sub-categories of the social factors in Table 5, the disparities between the culture and religion in states could influence international extradition, and cultural conflicts may arise from insensitivity to different legal systems.[88] The UK, US and Nigeria maintain different policies on capital punishment. The US and Nigeria have remained a strong proponent of the death penalty while the UK outlawed its practice. This seems to create tension and delays in the extradition process between these states. The different values of the judicial system of these states can lead to delay or possibly termination of extradition. This, in turn, leads to a lack of obligation and can thus be seen as one of the obstacles to international extradition.

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[85] *Ibid*. footnote 2. pg. 72.
[86] *Ibid*. footnote 2. pg. 72.
[87] Council of Europe, 'Religion and Belief' < https://www.coe.int/en/web/compass/religion-and-belief > Accessed 15 October 2018.
[88] McHam Monica, 'All's Well That Ends Well: A Pragmatic Look at International Criminal Extradition' (1998) 20 Houston Journal of Int'l law 419.

Primarily, with ongoing extradition cases, most states seem to be unwilling to surrender if an extradition treaty has not been established. Even when there is an established and applicable treaty in some cases the alleged crime may not constitute an extradition offence. For example, in the case of *David Calder,*[89] the ingredients involved were not unlawful in the UK, but it was illegal in the US. Furthermore, the penalty for the same crime committed in the state varies, as a result, this disparity can cause tension and mainly triggers the contest of extradition.[90] As illustrated in the case of *McKinnon,* where the penalty for the offence in the US was longer if it were the same in the UK. Additionally, states may not be willing to surrender an alleged offender, after extensive negotiations that drag on for years and probably the chances of obtaining a diplomatic assurance. However, the heart of this issue is grounded in a fundamental cultural difference in the value of human life.

The US, for example, has demonstrated its reluctance to surrender its citizens to judgement abroad by concluding bilateral agreements with some states. Thus, ensuring that US citizens are not subjected to the jurisdiction of the International Criminal Court (ICC),[91] even though it is indicated

[89] *Calder v HM Advocate* [2010] UKSC 43.
[90] *Ibid. McKinnon v UK* See also the case of *Calder v HM Advocate* [2010] UKSC 43, 2011 S.C. UKSC 13.
[91] On 17 July 1998, 120 States adopted a statute in Rome - known as the Rome Statute of the International Criminal Court ('the Rome Statute') - establishing the International Criminal Court. For the first time in the history of humankind, States decided to accept the jurisdiction of a permanent international criminal court for the prosecution of the perpetrators of the most serious crimes committed in their territories or by their nationals after the entry into force of the Rome Statute on 1 July 2002. The International Criminal Court is not a substitute for national courts. According to the Rome Statute, it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. The International Criminal Court can only intervene where a State is unable or unwilling genuinely to carry out the investigation and prosecute the perpetrators. The primary mission of the International Criminal Court is to help put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, and thus to contribute to the prevention of such crimes.

that they would return a requested person that is accused of a crime in numerous reports.[92] The US also threatened to discontinue foreign aid to any state that did not conclude a bilateral agreement preventing the US from prosecution in the ICC.[93] At the most basic level, extraditions often implicate broader relations among states. Thus the denial of an extradition request, with these impenetrable walls in place, lead to international tensions between states and can have serious foreign policy implications. This ultimately will not suppress international or cross-border crime but will frustrate the extradition process.

There may be cases in which states are unwilling to extradite an alleged offender to states that openly discriminate on the grounds of culture, race and religion. For example, during the apartheid era, South Africa's extradition arrangements were primarily terminated, except in crimes utterly unrelated to apartheid, and then only states that had entered into bilateral extradition relations before apartheid was introduced.[94] In most cases, this sort of obstacle is done in very subtle ways, and it is well structured making it difficult to prove. This ambiguity will place the court of the requested state in an invidious position as they will be required to decide whether discrimination in the requesting state has attained the limit. In practice, courts are reluctant to make such findings as shown by decision in the US dealing with discrimination against blacks[95] and members of the Irish Republican Army in the UK.[96] To further complicate this factor which could weigh in favour of extradition is that it may be difficult for the alleged offender to prove that they are unlikely to

[92]Alisha D. Telchi, 'The International Criminal Court, Is The United States Overlooking an Easier Way To Hold Saddam Hussein and Osama Bin Laden Accountable For Their Actions?' (2004) 38 New England Law Review 451-454.
[93] *Ibid.*
[94] John Dugard & Christine Van Den Wyngaert, Reconciling Extradition with Human Rights, 92. (1998) American Journal of International Law 202.
[95] In *re Extradition of Howard*, 996 F.Sd 1320 (1st Cir. 1993).
[96] In *re Request Extradition of Smyth*, 61 F. 3d 711 (9th Cir. 1995).

be prosecuted for reasons not related to the offence for which they are sought but for other purposes.

Belief is a state of the mind when we consider something true even though we are not 100% sure or able to prove it.[97] Every individual has beliefs about life and the world they experience. Mutually supportive beliefs may form belief systems, which may be religious, philosophical or ideological. Religions are belief systems that relate humanity to spirituality. Various religions have narratives, symbols, traditions and sacred histories that are intended to give meaning to life or to explain the origin of life or the universe. They tend to develop morality, ethics, religious laws or a preferred lifestyle from their ideas about the universe and human nature.[98] Several religions have organised behaviours, clergy, a definition of what constitutes adherence or membership, congregations of laity, regular meetings or services for the worship of a deity or prayer, holy places (either natural or architectural), and scriptures. The practice of a religion may also include sermons, the commemoration of the activities of a god or gods, sacrifices, festivals, feasts, trance, initiations, funerary services, matrimonial services, meditation, music, art, dance, public service, or other aspects of human culture. However, there are examples of religions for which some or many of these aspects of structure, belief, or practices are absent.[99]

Beliefs in the spiritual dimension of life have existed since time immemorial. Several human societies have left historical evidence of their systems of belief, whether it was worship of the sun, of gods and goddesses, knowledge of good and evil or the sacred. Stonehenge, the Bamiyan

[97] *Ibid.* footnote 87.
[98] *Ibid.* footnote 87.
[99] *Ibid.* footnote 87.

Buddhas, the Almudena Cathedral in Madrid, Uluru at Alice Springs, the Bahá'í Gardens of Haifa, Fujiyama, the sacred mountain of Japan, Kaaba in Saudi Arabia or the Golden Temple in Amritsar all bear testament to the human experience of spirituality, which may be an objective reality or a result of the human yearning for an explanation of the meaning of life and our role in the world.[100] In the most straightforward sense, religion describes the relationship of human beings to what they regard as holy, sacred, spiritual or divine. It is usually accompanied by a set of related practices, which foster a community of people who share that faith. As discussed above, belief is a broader term, and it includes commitments, which deny a dimension of existence beyond this world.[101]

Religions and other belief systems in states influence their extradition laws regardless of whether they consider themselves religious, spiritual or not. At the same time, other parts of the state's approach to other religions and groups considered 'different' would influence how they interpret justice from an extradition perspective.[102] Based on the above discussion religions and related social and cultural structures play an important part in extradition decisions. As mental structures, they influence the way states perceive the extradition and the fair balance approach that is fit when there is conflict. As social structures, they provide a supporting network and a sense of belonging. In many cases, religions have become the basis of power structures and have become intertwined with it. History, remote and recent, is full of examples of 'theocratic' states, be they Christian, Hindu, Muslim, Jewish or other.[103] The separation between state and religion is still recent and only partly applied: there are official state religions in Europe and de facto state religions. The

[100] *Ibid.* footnote 87.
[101] *Ibid.* footnote 87.
[102] *Ibid.* footnote 87.
[103] *Ibid.* footnote 87.

statistics below are, therefore, intended to exemplify the diversity of the global picture. The figures indicate the estimated number of adherents of the largest religions[104]

African Traditional and Diasporic:	100 million
Baha'i:	7 million
Buddhism:	376 million
Cao Dai:	4 million
Chinese traditional religion:	394 million
Christianity:	2.1 billion
Hinduism:	900 million
Islam:	1.5 billion
Jainism:	4.2 million
Judaism:	14 million
Neo-Paganism:	1 million
Primal-indigenous (tribal religionists, ethnic religionists, or animists):	300 million
Rastafarianism:	600 thousand
Shinto:	4 million
Sikhism:	23 million
Spiritism:	15 million
Tenrikyo:	2 million
Unitarian-Universalism:	800 thousand
Zoroastrianism:	2.6 million

Leading text, reviews on international extradition,[105] do not address the impact of culture and religion on extradition decisions. International human rights law undeniably protects alleged offenders, the inquiry does not stop there. Left to be determined are the diverse ways that culture, race and religion impacts on extradition. This thesis finds that individual and states act are largely culturally determined. Reason being that, culture and religion are central to normal human development, and human makes up the state as well as the applicable domestic laws. They

[104] Major Religions of the World Ranked by Number of Adherents. The number of secular, non-religious, agnostics and atheists is estimated at 1.1 billion.
< http://www.adherents.com/Religions_By_Adherents.html> Accessed 15 October 2018.
[105] M. Cherif Bassoiuni, International Extradition United States Law and Practice' (6th edn, Oxford University Press, 2004) Also John Dugard & Christine Van Den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) American Journal of International Law 202. Robert Herbert Woods, 'Extradition: Evaluating the Development, Uses and Overall Effectiveness of the System' (1993) 3 Regent U.L. Rev. 43. Paul Arnell, 'The Continuing Tension between Human Rights and Extradition' 40 (2016) S.L.T. 214.

determine what is just and unjust practice, thus, there is a finding that different states treat individually and extradition cases differently. As a result of this, the happiness of one state will, at some point, be directly in conflict with that of another. Human rights law allows for cultural differences in the manner in which individuals are treated. It is noteworthy that individuals simply serve as the weapons cultures use. For example, the answer concerning the rank of different values such as the death penalty, torture, fair trial, family and private right is different according to the belief and who answers the question. It will be just as different according to whether the decision is made by one who believes in an eye-for-an-eye. In thinking about cultural imperialism, and the different ways international human rights functions, it is important for states to understand that human rights operate paradoxically.[106]

4.5.2. Immigration and States Border Control

For an alleged offender to avoid the penalty for an offence committed in a particular state, they seek to escape their wrongdoing by evading detection or protestation of innocence. This usually takes place at the nearest convenient point beyond the immediate jurisdiction of the pursuing state authority, i.e. a foreign state. An example of this is seen in the case of a Nigerian former state governor who evaded British control with a fake travel document, dressed as a woman, and was arrested at Heathrow airport and had his passport confiscated.[107] Although he rebuffed the claim that he dressed as a woman, even after the evidence of CCTV footage, and claimed that he just woke up and found himself in Nigeria.[108] He faced three money-laundering charges after police found £1m in cash at his London address and property in his name worth £10m.

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[106] Roger J.R. Levesque, Piercing The Family's Private Veil; Family Violence, International Human Rights and the Cross-Cultural Record' (1999) 21 Law and Pol'y 164.
[107] BBC News, 'Nigeria Governor to be impeached' (23 November 2005). < http://news.bbc.co.uk/1/hi/world/africa/4462444.stm > Accessed 15 October 2018.
[108] *Ibid.* footnote 107.

Hence, from the above, it is evident that the extent of flight is not influenced solely by distance, but also by immigration control and state borders. Immigration control plays a significant role because it monitors the point of entry and departure. Therefore, if warned by a foreign states authority of the arrival or departure of a wanted individual, an arrest for the offender can be made, rather than allowing entry or departure for a lengthier process of extradition. Additionally, the flight of an alleged offender will commonly take place in a state where the entry formalities are non-existent or minimal. A considerable number of regions in the world have suspects, especially terrorist groups, which take advantage of a state's border control. Consequently, the absence of an unwavering central government in a state often serves as an open invitation for the relocation of international terrorist or offenders. This sends out signals much the way that open windows do.

For example, the Paris attack suspect, whose brother blew himself up in the Paris attacks which killed at least 130 people in gun and suicide bomb attacks in November 2015 escaped as a result of the porous border.[109] As a French citizen, the suspect could travel freely in the European Union's Schengen area, where there are no border controls. The suspect was reported to have escaped from Paris via Belgium and is now in an African country.[110] Even though the Moroccan authorities issued an arrest warrant, it is not entirely clear whether the suspect had fled to Morocco in North Africa. Thus, with the absence of a meaningful central authority, there is little to prevent terrorist organisations, or any criminal gang, from taking their lead from the openings presented to them and in the end, this offers attractive bases for terrorist groups especially.

[109] Agence France-Presse 'Abdeslam 'chose' Not to blow himself up in Paris, says Brother' (*The Telegraph* 2 April 2016) < https://www.theguardian.com/world/2016/apr/02/paris-attacks-salah-abdeslam-chose-not-to-blow-himself-up-says-brother > Accessed 15 October 2018.
[110] Reuters, 'Morocco Issues Arrest Warrant for Paris Attack Suspect' (11 December 2015) < https://uk.reuters.com/article/us-paris-attacks-morocco-idUKKBN0TU1F520151211> Accessed 15 October 2018.

i. Diepreye Alamieyeseigha's Case

Diepreye Alamieyeseigha was arrested in the UK on charges of money laundering in September 2005.[111] At the time of the arrest, the Metropolitan police found about £1 million in cash in his London home.[112] Later, they found £1.8 million in cash and bank accounts. He was granted bail on the conditions that he would remain in the UK. He broke his bail conditions, jumped bail and evaded capture by dressing up as a woman to flee from justice in London in December 2005 and returned to Nigeria.[113] Nevertheless, it is not to be assumed that the extent of the flight is influenced solely by distance. From this case, it is apparent that immigration control also had a significant role to play, to avoid extradition processes or extradition entirely. This is because public or convicted persons find it difficult to secure passports, and where visa and health documents are required in advance of arrival, all but the most elaborately prepared fugitives are defeated. How he was able to escape from the UK in a dress and a forged passport in September 2005 remains a mystery. Some critics view Nigeria as a safe haven for alleged offenders to be protected.[114] The ex-governor was never extradited to the UK to face the charges before he died of natural causes in Nigeria.[115] Despite the obligation for Nigeria to return the ex-governor to the UK as requested, it was not willing to extradite him because it was claimed that the British government did not go through 'appropriate channels'.

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[111] Nigeria pardons Goodluck Jonathan ally, Alamieyeseigha' (*BBC News*, 13 March 2013) < https://www.bbc.co.uk/news/world-africa-21769047 > Accessed 15 October 2018.
[112] *Ibid.*
[113] 'Nigerian governor to be Impeached (*BBC News* 23 November 2005) < http://news.bbc.co.uk/1/hi/world/africa/4462444.stm> Accessed 15 October 2018
[114] *Ibid.* footnote 113.
[115] 'We won't extradite Alamieyesigh-FG' (*NigerianeEye*) < http://www.nigerianeye.com/2013/03/we-wont-extradite-alamieyeseigha-fg.html> Accessed 15 October 2018.

However, it was not made particularly clear in this case what constituted proper channels. This case is not about Britain snooping in Nigeria's internal affairs, as was claimed.[116] Rather, the UK requested that Nigeria extradites him for money laundering as that comes under extraditable offences provided in the bilateral treaty. The bilateral treaty and the constitution of Nigeria also supported this request. The other ground for rebuffing the UK extradition application in this case, as specified by Goodluck Jonathan (former president of Nigeria 2007 to 2010), was that 'the application was made in 2005/2006, which is before my administration.[117] This indeed is a tactic to protect the ex-governor from being returned to the UK to face charges, as then-president Jonathan had declared Alamieyeseigha, his benefactor, so he had to protect him. This further supports why critics say that Nigeria is regarded as a safe haven, as it is considered that Nigeria did not respect the mutual assistance treaty that it signed with the UK.

ii. James Ibori's Case

The disparity in state legal systems as a conflicting factor to extradition is clearly illustrated in Ibori's case. In 2007 the Metropolitan police raided the London offices of his lawyer and found hard drives containing details of a myriad of offshore companies run for Ibori.[118] Due to these corruption allegations, the UK courts froze his assets that were valued at £17 million. In an interview with CNN, Ibori denied the allegations against him claiming that they were politically motivated.[119] He accused Nuhu Ribadu (pioneer chairman of Nigeria's Economic and Financial Crimes Commission from 2003-2007) and the UK courts of engaging in politics.[120] The UK made an extradition request to Nigeria, but he evaded arrest as a mob of his supporters attacked the police

[116] *Ibid.* footnote 115.
[117] *Ibid.* footnote 115.
[118] *R v. Ibori (Onanafe James)* Unreported April 17, 2012 (Southwark Crown Court).
[119] *Ibid.* footnote 118.
[120] *Ibid*. footnote 118.

and prevented them from arresting him in his hometown.[121]

In 2009, a Nigerian court cleared him of 170 charges of corruption, according to the court there was no clear evidence to convict him.[122] This indeed made him a free man in Nigeria, after which he fled to Dubai to avoid his extradition to the UK. Interpol, following an alert by the Metropolitan police, arrested him in April 2010.[123] He fought his extradition, but the Dubai authorities, however, seized his travel documents, which made it impossible to flee from Dubai.[124] Dubai's highest court ruled that Ibori could be extradited to the UK to face corruption charges,[125] where he later admitted to 10 counts of conspiracy to defraud and money launder. He was sentenced to 13 years in prison by Southwark Crown court for his crime.[126]

Nevertheless, Dubai implemented its side of the bargain by assisting the UK in returning the alleged offender to face charges in the UK. Another concern that may arise here is if the alleged offender was from Dubai, would there have been mutual assistance to surrender. Dubai implementing Sharia law is strictly committed to the application of Sharia rules to every aspect of the country's life. Thus, it forms the basis for all kinds of legislation, be it administrative or judicial through the sharia council. Islamic principles also govern criminal legislation and the penal code

[121] 'Nigeria ex-governor James Ibori faces extradition to the UK' (BBC News 13 December 2010) < https://www.bbc.co.uk/news/world-africa-11986056> Accessed 15 October 2018.
[122] *James Onanefe Ibori v Federal Republic of Nigeria* Suit No; CA/K/81C/2008 See Also Clifford Ndujihe, Emman Ovuakporie, 'UAE Courts Extradites Ibori to UK' (*Vanguard,* 17 October 2010) < https://www.vanguardngr.com/2010/10/uae-court-extradites-ibori-to-uk/> Accessed 15 October 2018.
[123] Musikilu Mojeed 'How Ibori, the thief in Government house, admitted stealing $250million' (*Premium Times* 27 February 2012) < https://www.premiumtimesng.com/news/3972-how-ibori-the-thief-in-government-house-admitted-stealing-250million.html > Accessed 15 October 2018.
[124] *Ibid*.
[125] *Ibid*.
[126] Angus Crawford, 'Former Nigeria governor James Ibori jailed for 13 years' (BBC News 17 April 2012). < https://www.bbc.co.uk/news/world-africa-17739388 > Accessed 15 October 2018.

in Dubai.[127] This is the reason why Dubai has not issued internal regulations to organise the extradition of an alleged offender, as is the case in other parts of the world. These have to be decided in the light of the provisions of Sharia. However, this has not obstructed its authorities from signing bilateral and multilateral agreements on the extradition of an individual that is accused of committing an extraditable offence. A significant point to be emphasised is that in spite of such arrangements, the UAE's primary rule is that these agreements may not conflict with Islamic Sharia principles.[128]

4.5.3. International and Internal Conflicts

International or internal conflict is the absolute game changer that leads to rifts in the relations between state parties. This includes a disruption of their contractual relationships as established in treaties (and may affect those with third states).[129] Various conflicts have intensely manipulated the core basis of treaties to the extent that their original rationale can no longer be sustained, resulting in their modification or even termination.[130] In light of recent world developments, specifically in Syria, Gambia, and Libya, where revolt and cessation are a part of everyday life, the change or influence that conflict may have could terminate all existing obligations between them. Given any international or internal conflict, states may be unwilling to make specific commitments to extradite an alleged offender to a requested state.

[127] Sadiq Reza, 'Due Process in Islamic Criminal Law' (2013) The George Washington International Law Review 3.
[128] *Ibid.*
[129] Arnold Pronto, 'The Effect of War on Law- What Happens to Their Treaties When States go to War?' (2013) 2 Cambridge Journal of Int'l and Comparative Law 227.
[130] D.P. O'Connell, *International Law* (2nd edn, Stevens and Sons ltd 1970) 270.

Furthermore, some treaties are meant to apply in times of conflict, as in the case of establishing rules on the conduct of hostilities. For example, some human right treaties anticipate the non-derogation of certain rights even in times of national emergency.[131] However, in reality, the US or any other state request for an offender from Syria at the moment might be challenging due to the conflict internally and internationally. The possibilities of internal conflict between groups in a particular state may also influence an extradition decision. Therefore, the universal interest in promoting cooperative relations on criminal matters with a neighbouring state could be put aside because of the international conflict. Inversely, states in modern times tend to depend on the objective compatibility of the treaty with an aggressive situation when determining whether the treaty should be terminated entirely or whether it should be kept in place despite the rate of hostilities.[132]

4.5.4. Technology

There is a fundamental divide between the haves and the have-not's states when it comes to access to modern technology. This is so because some states, especially developing states, do not have improved technology, for example, computer programmes. Neither, do they have databases that could contain the detailed record of individuals who are accused of an offence in a requesting state. These records could be crucial for the investigation of the alleged offender, and when this cannot be found or traced, it hinders the extradition procedure. This influencing factor has been illustrated in states which are plagued with historical problems with record keeping. Most records/statistics are entered and retrieved manually, thus, where they are kept, can rarely be relied upon. Too often, considerations play a role in the compilation of records gained from this unreliable source.

[131] Art 4(1). International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.
[132] *Ibid.* footnote 130. pg 270.

Therefore, an increase in the pace and volume of criminal activity that occurs are seeing more complaints or changes in the resulting amount of work rather than patient recording and analysis of statistical data.

On another note, the developed states that have up to date technology sometimes do not pay much attention to the sharing of information. It should be a high priority that these states enter into agreements, allowing for the sharing of access, to the best modern counter-terrorism technology. For example, the Turkish authorities, according to reports, twice flagged up the 29-year-old as a possible terror suspect in 2014, but their alerts were unanswered until after the Paris attacks.[133] These disparities in technology in developed and developing states can act as a shield for terrorists who are likely to take refuge in some of these states with weak or next to no technology.

i. Buruji Kashamu's Case

In May 1998 the defendant Kashamu in the case of *United States of America v Buruji Kashamu*,[134] was one of fourteen persons charged in an indictment returned by a federal grand jury in Chicago with the conspiracy to import and distribute heroin in violation of 21 U.S.C. 963. He was indicted both in his name and under what the government presumed to be aliases that he used: 'Alaji' and 'Kasmal'. He could not be located, had not been arrested, neither did he jump bail, but his whereabouts simply were unknown. The government did not ask that he be tried in absentia. The case continued against the other defendants except for Kashamu, and all were convicted.[135]

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[133] Ceylan Yeginsu, 'Paris Attacks: The Violence, Its Victims and How the Investigation Unfolded' (*The NewYork Times* 16 November 2015) < https://www.nytimes.com/live/paris-attacks-live-updates/turkey-warned-french-twice-about-attacker-official-says/> Accessed 15 October, 2018.

[134] *United States of America V Buruji Kashamu* No.10-2782 September 1, 2011. See link < https://www.gpo.gov/fdsys/pkg/USCOURTS-ca7-10-02782/pdf/USCOURTS-ca7-10-02782-0.pdf> Accessed 18 October 2018.

[135] *Ibid.*

In December 1998, Kashamu was located in England and was arrested at the request of the US government and his extradition sought. The extradition request of the Nigerian, who either did not have or had no right to reside in England, was not granted. The UK dismissed it as a case of mistaken identity, stressing that the Chicago prosecutors had also tainted their eyewitness identification evidence by failing to disclose that one Nicolas Fillmore, one of the co-defendant was unable to pick him (Buruji) out of a photo line-up.[136] Kashamu who is currently in Nigeria, filed a motion in February 2009 at the district court in Chicago to dismiss the indictment against him on the ground that the English magistrate had found that he was not 'Alaji' and the finding should be given collateral estoppel effect in the criminal proceeding and that if this was done he could not be convicted and therefore should not have to stand trial.[137] Collateral estoppel establishes the rule that once a case has reached a final judgment, relitigation is barred. The district judge denied the motion, precipitating this appeal.[138]

The English doctrine (issue estoppel) is similar to the US, but there are differences. Firstly, it cannot be used against a non-party to the case in which the determination sought to be used as an estoppel was rendered.[139] Another critical one is that the UK does not apply the doctrine to criminal cases.[140] However, in the UK, if the court at the end of the committal proceedings discharges the accused, this is not an equivalent of an acquittal at trial. The requested person could be charged

[136] *Ibid.* footnote 134.
[137] Michael J. Petro, 'Extradition; Order Denying Extradition From Foreign Tribunal is Not a Basis for Motion To Dismiss Indictment In the US' (Criminal Defense Attorney in U.S. Federal & Illinois Courts, 12 September, 2011) < https://www.mjpetro.com/press-releases/extradition-order-denying-extradition-from-foreign-tribunal-is-not-a-basis-for-motion-to-dismiss-ind/> Accessed 15 October 2018.
[138] *Ibid.* footnote 134.
[139] *Regina v Hartington* Middle Quarter, 4 E & B 780, 794-95,119 Eng. Rep. 288, 293-94.
[140] *Regina v Humphreys* [1977] A.C. 1. 21.

again with the same offence and be required to undergo committal proceedings again. Nonetheless, jurisdictions differ on whether to give collateral estoppel on a criminal conviction. As long as the indictment against Kashamu remains pending, the US government can seek to extradite him from any state that has an extradition treaty with it. Nigeria, which has an extradition treaty with the US and UK, extended the treaty (which applies to drug offences)[141] after becoming independent continued the treaty in force.[142] If the US succeeds in extraditing Kashamu, it will put him on trial, and even if he were acquitted, he would have lost a right that he claims the collateral estoppel doctrine gives him. Additionally, if his defence of collateral estoppel is sound, it not only is a defence to file criminal charges against him but it would also protect him from extradition.

The immediate sequel to which would be a criminal trial. The burden now is on the domestic courts in Nigeria. In this circumstance, the actions of the court need to be ascertained. In this case, it is believed that Kashamu was one of the people who received the federal high court order that banned the former president's autobiography.[143] Kashamu has accused chief Obasanjo,[144] to dedicating some portions of the book on his alleged involvement in a drug deal and an allegation that he was wanted in the US. Kashamu said the former president plans to extradite him to the US as revenge against him for the comprehensive political defeat that he (Obasanjo) suffered because of Kashamu

[141] Art 3 (24) Nigeria International Extradition Treaty with the United States (The treaty applicable to Nigeria was originally signed with the United Kingdom.) Date signed December 22, 1931, Date-In-Force; 24, 1935, Status: Treaty and exchanges of notes were signed at London on December 22, 1931. Senate advice and consent to ratification was given on February 19, 1932. It was ratified by the President of the United States on March 3, 1932. It was ratified by the United Kingdom on July 29, 1932. Ratifications were exchanged at London on August 4, 1932. It was proclaimed by the President of the United States on August 9, 1932. It Entered into force on June 24, 1935

[142] *Ibid.* See Also, Congressional Research Service, 'Extradition To and From the United States: Overview of the Law and Recent Treaties' (2010) 39. < https://fas.org/sgp/crs/misc/98-958.pdf> Accessed 15 October 2018.

[143] Abiodun Oluwarotimi and Olugbenga Soyele, 'Nigeria: U.S. Prepares for Buruji Kashamu's Extradition, discloses fresh evidence' (*allAfrica* 26 May 2015) < https://allafrica.com/stories/201505260062.html> Accessed 15 October 2018.

[144] Former Nigerian Army General who was a president in Nigeria from 1999-2007.

being in one of the political parties.[145]

On relatively few occasions, the courts have had to consider problems of extradition law in Nigeria. The judges have applied themselves to the topic with an unusual degree of ingenuity.[146] Further investigations revealed the international passport that he used for his trip to the US with the names and expiration dates. The National Drug Law Enforcement Agency (NDLEA) raided Kashamu's residence in response to the US extradition request that was made to Nigeria, and he was placed under house arrest.[147] Due to this, the court barred his extradition to the US for unlawfully detaining Kashamu, as due process for his extradition was not followed. It is easy in such circumstances for a balanced perspective of the subject that is endangered. At the outset, it should be recognised that the alleged offender has always been a rarity when compared with the volume of crime committed. Many practical considerations and human inclinations combine to induce the vast majority of alleged offenders who seek to escape the consequences of their wrongdoing by evasion of detection or protestations of their wrongdoing without leaving their place of domicile. Indeed, the very fact of flight almost invariably causes suspicion to be focused on the accused person.[148]

Another factor that influences extradition is further intensified in Nigerian extradition practice by the effect of constitutionally uncertain status. It is evident from compliance that the Nigerian

[145] *Ibid.* footnote 143.
[146] Ivan Anthony Shearer, 'Recent Developments in the Law of Extradition' (1967) 6 Melbourne University Law Review 187.
[147] *Ibid.* footnote 143.
[148] *Ibid.* footnote 146 pg. 187.

Constitution can also protect some rights found in the ECHR. The Nigerian Constitution of 1999[149] does contain provisions on the protection of individual rights, however, the majority of which are found in Article 33,34,37 and 45 under the heading 'Fundamental Rights'.[150] Kashamu had instituted the fundamental rights enforcement action and invoked section 35, 40 and 41 of the Constitution.[151] These articles in the Nigerian Constitution recognise a variety of rights including those to life, to the dignity of human persons, to personal liberty, and the right to fair hearing. It also includes the right to private and family life, the right to freedom of thought, conscience and religion, the right to private and family life and restriction on and derogation from fundamental human rights.[152] The court, in upholding Kashamu's claims, said that he had shown enough cause to be apprehensive that the respondents had plans to abduct him.[153]

The court further added that the entire claim of the applicant was within the ambit of Chapter 4 of the 1999 Constitution.[154] The Constitution provides that if the alleged offender is abducted, kidnapped and taken to the US by force, without the respondents complying with the Extradition Act, it means that he is taken away without his consent. This would constitute a breach of his fundamental human right to personal liberty and freedom of movement as enshrined in the Constitution.[155] This is an ironic twist as illustrated in *Ibori's case,* where he was taken from Dubai. This also illustrates that some states pay attention to certain competing factors and others do not.

[149] Constitution of the Federal Republic of Nigeria 1999.
[150] *Ibid.*
[151] *Ibid.*
[152] *Ibid*.
[153] Micheal Abimboye 'Court Bars Nigerian Government From 'Unlawfully' Arresting, Extraditing Kashamu' (*Premium Times* Nigeria, 27 May 2015) < https://www.premiumtimesng.com/news/headlines/183728-court-bars-nigerian-govt-from-unlawfully-arresting-extraditing-kashamu.html> Accessed 15 October 2018.
[154] *Ibid.* footnote 149.
[155] *Ibid.* footnote 149 Section 38.

Another potential hitch for prosecutors is a portion of the extradition treaty which indicates that the alleged offender can only face charges for crimes for which they are extradited only if the evidence is found sufficient.[156] There is a process to amend the charges, but it can get very complicated. If the alleged offender challenges the extradition request, they would be entitled to a hearing in Nigeria that would require the requested state to show probable cause for the charges underlying the extradition. The Nigerian judge could find that there is insufficient evidence for the extradition, or if they face multiple charges, extradite the alleged offender only on that probable cause. A possible balance is to minimise the number of agencies and officials that handle an extradition request, e.g. through a central authority. Parties should work closely together and consistently share information and concerns that will be useful to the case that they are dealing with.

4.6. Economic Factors

According to Wood,[157] another factor that hinders extradition is the investment of money required to secure the final surrender of the alleged offender.[158] An ironic twist is in the case of *Demjanjuk.*[159] The case illustrates the economic factor as a potential obstacle. If Israel had accepted the US initial efforts to deport *Demjanjuk* for prior falsifications in his original application for citizenship, four years of enormous legal fees and other related costs might have been avoided. Further, when states decide to negotiate a treaty, the question that occasionally arises in most states is the finance that is available to negotiate the treaty. The cost of negotiating treaties is high, and some states may not want to negotiate an extradition treaty due to its cost. Assuming that the

[156] Article 9 of the UK-Nigerian Bilateral Extradition Treaty 1935.
[157] *Ibid.* footnote 1. pg. 66.
[158] *Ibid.* footnote 1. pg. 66.
[159] *US. v. Demjanjuk*, 680 F.2d 32 (6th Cir.(Ohio) Jun. 8, 1982) (No. 81-3415).

extradition request satisfied the requirements of the applicable treaty, the subject is then returned to the requesting state. The cost and expenses involved in bringing a request for extradition are considerable. Not only must a requesting state hire an attorney to represent its interests, but if extradition is granted, the requesting state is typically required to provide for transportation expenses for the alleged offender. Such cost may create a barrier to a valid extradition request.

A broadly inclusive and rigorous treaty may be desirable for a state interested in deterring crime. However, if powerful interest groups lobby for certain exceptions to the treaty, or if decision makers predict that certain kinds of extradition arrangements may be economically harmful, incentives arise for negotiators not pursue the treaty. Extradition treaties and legislation usually specify that an extradition request and all the supporting evidence must be provided in a particular language; documents, therefore, should be translated. Translation is not only time consuming and costly, at the same time requesting states often may not have qualified translators at their disposal. These difficulties may stem from structural problems, such as lack of expertise by domestic institutions, but they may also arise from sociological issues, such as the reluctance of witnesses to testify against influential figures without an active witness protection programme. All of which involves finance from the state.

Akin to Woods assertion, the effect of economic instability may vary in different states, but it is likely to be more devastating in developing states. This has been reflected in instances where alleged offenders of a proven criminal background have found their way back to the state's

legislature and been granted pardon by the Head of State.[160] In such vulnerable environments, as is depicted by fragile infant democracies, crime can secure the co-operation of influential state officials in its legislature, executive and judiciary, to propagate its ends.[161] It must be realised however that there is no state immune to challenges, or a justice system that can guarantee control when these competing factors are at play within a decision to extradite.

Similarly, the US ambassador to Thailand warned the newly endorsed Thai Prime Minister Abhisit Vejjajiva of a potentially 'major setback' in their relations with the US if corruption had undue influence and impacted on the case.[162] Some states have in effect created a nearly impenetrable wall that shields their nationals from the liability that arises out of a vast array of previously illegal or unethical activities. These legal protections will enable those areas to become a safe-haven for hackers and disseminators of classified and sensitive information. Currently, Nigeria has not reviewed its bilateral treaty since 1935, one could say that the constant drafting of treaty provisions was more the result of efforts by it, to overcome difficulties arising from deficiencies or ambiguities that the other state was willing to use.[163] This makes the currently applicable treaty with the UK and the US unable to align its extradition system with the emerging norms and trends

[160] Senator Buruji Kashamu whose extradition was sought in the US over an alleged drug case. The Nigerian court dismissed the suit seeking for his extradition back to the US because it was an abuse to court process. He was further allowed to run his election as senator which he also won. < 'Senator Buruji Kashamu's extradition terminated by Nigerian court> (*Sahara reporters*, New York. 01 July, 2015) < http://saharareporters.com/2015/07/01/senator-buruji-kashamu's-extradition-terminated-nigerian-court > Accessed 15 October 2018.
Similarly, the Nigerian government pardoned a key ally of President Goodluck Jonathan who was convicted of stealing millions of dollars. Opposition activist said that the decision is a major blow to the efforts of curbing corruption in Nigeria. He was released in 2007, two days after receiving a two- year sentence in prison since his arrest. He was free to run for political office again. (*BBC News* 13 March 2013). < https://www.bbc.co.uk/news/world-africa-21769047> Accessed 15 October 2018.
[161] *Ibid.*
[162] Justin Eliot, 'How the U.S. Can Now Extradite Assange' (*Salon* 7 December, 2010) < https://www.salon.com/2010/12/07/julian_assange_extradition > Accessed 15 November 2018.
[163] Rodrigo Labardini, 'Life Imprisonment and Extradition: Historical Development, International Context and Current Situation in Mexico and the US' (2005) 11 Southwestern Journal of Law and Trade in the Americas 19.

in the extradition domain and has been unable to meet up with the new challenges. At the same time, the lengthy procedures involved in dealing with an extradition request allow many loopholes to the alleged offender. Thus, this may result in otherwise valid extraditions falling through the net due to these competing factors.

i. United States v Leonard

The influence of economic factors is illustrated in the case of *US v Leonard,*[164] before the Ontario Court of Appeal regarding the case of an Ontario Aboriginal facing extradition and criminal charges in Minnesota. It was argued in this case that the Canadian government's unique obligation towards the Aboriginal community, under s. 718.2(e),[165] should prevent extradition where the alleged offender faces a severe criminal sentence which he would unlikely face in Canada, due to his Aboriginal status. This unique argument illustrates the impact of economic factors on extradition procedures. This case is significant for its application of the *R v Gladue*,[166] principles to situations involving Aboriginal defendants outside sentencing. In this case, the Supreme Court of Canada observed that

> '[y]ears of dislocation and economic development have translated, for many aboriginals, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness and community fragmentation'.[167]

Furthermore, the court recognised that these conditions, along with racism and bias, had contributed to the grossly disproportionate incidence of crime and incarceration amongst

[164] 112 O.R.(3d) 496 2012 ONCA 622 (CanLII) http://canlii.ca/t/fss8m> Accessed 15 October 2018.
[165] Canada's Criminal Code, RSC 1985, c C-46.
[166] [1999] 1 SCR 688.
[167] *Ibid*. Para 49

Aboriginal people, which it described as a 'crisis' in the criminal justice system. Consequently, the Court added that judges should use a different framework of analysis for sentencing Aboriginal offenders, taking into consideration 'the distinct situation of aboriginal peoples in Canada'.[168] This includes the unique systemic or background factors, which may have played a part in bringing a particular Aboriginal offender before the courts, and the types of sentencing procedures and sanctions, which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.[169]

Therefore, in Leonard's case, the issue was whether the *Gladue* factors were relevant in the context of extradition. In particular, whether the Minister of Justice was required to consider the *Gladue* factors in determining whether to surrender an accused Aboriginal person to be prosecuted in the United States.[170] The accused was Zachary Leonard, a Canadian citizen and a member of the Rainy River First Nations. The US sought his extradition to face trial on a charge of drug trafficking. The Minister of Justice gave his authority to proceed with the extradition. If extradited, Leonard would face a likely sentence of between 15 and 19 years' imprisonment. He could be prosecuted for the offence in Canada, where he would face a much lower sentence (given his peripheral involvement in the offence, lack of criminal record, Aboriginal status, and the significant rehabilitative steps taken since his arrest).[171]

[168] Court Decision can be found in this link < https://www.canlii.org/en/on/onca/doc/2012/2012onca622/2012onca622.html
[169] *Ibid.* footnote 166 para. 8.
[170] *Ibid.* footnote 166 para. 35.
[171] *Ibid.* footnote 166 para. 11.

The Court of Appeal held that the Minister of Justice is required to consider the *Gladue* factors when deciding whether to grant the extradition of an Aboriginal person.[172] The Minister had failed to do so in connection with Leonard, who the Court found had 'suffered from the litany of disadvantages that the Supreme Court of Canada has attributed to Canada's sorry history of discrimination and neglect about Aboriginal peoples.' The Ontario Court of Appeal has held that the '*Gladue* factors' apply in the extradition context.[173] Accordingly, the court quashed the Minister of Justice's surrender order. A majority of the Court further concluded that:

> 'It would be contrary to the principles of fundamental justice under s. 7 of the *Canadian Charter of Rights and Freedoms,* to surrender "this young, Aboriginal first offender to face a lengthy, crushing sentence in the United States that would almost certainly sever his ties to his family and Aboriginal culture and community with which he so closely identifies'[174]

Consequently, the majority of the court declined to send the matter back to the Minister for reconsideration.[175]

4.7. Diplomatic Assurances

Based on the case-law analysis in this thesis, diplomatic assurances works both in favour of and against extradition mostly in states that do not practise the death penalty. The interface of the rights discussed in chapter three of this thesis and extradition is widely experienced as a domain of 'tension' between the protective and cooperative functions of legal assistance. Protective functions as shown in case-laws analysed are most important when the risk of life or torture is a stake. By

[172] *Ibid.* footnote 166 para. 18.
[173] *Ibid.* footnote 166 para. 19.
[174] *Ibid.* footnote 166 para. 86.
[175] *Ibid.* footnote 166 para. 106.

some critical case-laws of the ECtHR and other publications regarding this matter,[176] the extent and conditions that diplomatic assurances serve to harmonise protective and cooperative functions of extradition weigh for and against it, thus cannot be categorised into legal or non-legal competing factors. The Legitimate aim of protecting a state as a whole from serious threats it faces by crimes that include, terrorism, cybercrime, financial crime, murder, illegal drugs, and human trafficking cannot justify measures which extinguish the very essence of prohibition of torture, liberty, fair trial and respect for private and family life that the Convention provides.

Thus the term assurance refers to a situation in which a requesting state makes a formal representation to a requested state through a competent state organ concerning a particular issue that is of concern to the requested state.[177] As illustrated in some of the case-laws discussed which include *Soering*. The assurances allow the requesting state to mitigate a trepidation for the requested state in connection with the surrender of the alleged offender. In this context, the state seeking the assurances must be satisfied that the state organ issuing the assurances is competent in the issuing state. Additionally, that the person signing the letter on behalf of the issuing state has the authority to do so. Resorting to assurances has become a technique by which some states enhance their prospects of cooperation and thereby increasing their potential for suppressing crime and advancing the process of criminal justice.

[176] For an extensive list of cases see Overview of the Case-law of the European Court of Human Rights 2015 < https://www.echr.coe.int/Documents/Short_Survey_2015_ENG.pdf > Accessed 18 October 2018. See Also Case Law by the European Court of Human Rights of Relevance for the Application of the European Conventions on International Co-Operation in Criminal Matter' Prepared by Barbara Goeth-Flemmich, Miroslav Kubicek, Stephane Dupraz, Erik Verbert and Malgorzata Skoczelas Strasbourg, 15 October 2014 available at < https://rm.coe.int/16806ee1c9 > Accessed 18 October 2018.

[177] *Ibid*. footnote 6. pg 611.

The assumption that states will give the alleged offender a fair trial and justice according to its laws underlies the whole theory and practice of extradition. Based on the case-laws analysed this thesis finds that diplomatic assurance is a competing factor that weighs in favour of and against extradition because the practice of giving assurances enhances the cooperation between states and thereby contributes to achieving the goals of extradition. Without guarantees, there would be incidents in which extradition and mutual legal assistance would be denied merely because the concerns of the requested state towards the alleged offender have not been addressed. As a result, the clauses providing for diplomatic assurances have become a commonplace as part of Model Extradition Treaties adopted by the United Nations and other international organisations.[178]

Examples of assurances sought and obtained by states include the non-applicability of ill-treatment, life sentence, fair trial, right to a counsel or legal representation, the conditions of the prison. As illustrated in the case of *Oleacha Cahuas v Spain,*[179] regarding the extradition of *Oleacha* a Peruvian national from Spain to Peru following terrorism charges (a suspected member of the shining path) the Peruvian government provided a diplomatic guarantee that *Oleacha* would not be sentenced to the maximum sentence of life imprisonment. In the same vain diplomatic assurances can also be seen as a competing factor against a decision to extradite because the same court also reiterates that diplomatic assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment as illustrated in the case of *Klein v Russia*.[180] See also the case of *Baysakov & Others v Ukraine,*[181] where the Court considered that the assurances given

[178] European Convention on Extradition, Dec 13, 1957, art 11, 359.
[179] [Application No 24668/03].
[180] [Application. No. 24268/08]. at para. 55.
[181] [Application No. 54131/08].

were unreliable and that it would be difficult to ensure that they were honoured given the lack of an effective system of torture prevention.[182]

Some states around the world employ torture, and the death penalty, despite international efforts to eradicate torture and ill-treatment. Such treatment remains prevalent in states regardless of their religious or cultural character. Thus, sufficient diplomatic assurances are an increasingly popular way for states to get around the international ban on torture.[183] Diplomatic assurances smooth the way for the alleged offender to be transferred to another state where they will be at risk of abuse of their human right.[184] The reason for this is because it is illegal to send an individual to a state where there is a risk of torture.[185] However, the sending state, which in most circumstances is an abolitionist state, first gets a promise from the retentionist state that there will be no use torture.[186] Diplomatic assurances can be in different forms, and they include:

- Note Verbale[187]
- Memorandum of Understanding;[188]
- Aide-Memoire; a simple summary of a consular interview or conversation that serves merely as an aid to memory;[189]
- Pro Memoria;[190]

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[182] *Ibid.* footnote 181. para. 73.
[183] Human Rights Watch 'Diplomatic Assurances against Torture' November 2006 Pg. 1< https://www.hrw.org/sites/default/files/related_material/ecaqna1106web.pdf> Accessed 15 October 2018.
[184] *Ibid*.
[185] *Ibid.* footnote 183.
[186] Ved. P. Nanda, 'Bases for Refusing International Extradition Request- Capital Punishment and Torture' (1999) 23 Fordham Int'l L. J. 1371.
[187] See the *Saadi v Italy* [Application No. 37201/06] It was only in a second note verbale, (the day before the Grand Chamber hearing)
[188] Johannes Silvis, 'Judge at the European Court of Human Rights 'Extradition and Human Rights Diplomatic Assurances and Human Rights in the Extradition Context' Lecture Presented on 20th May 2014, PC-OC Meeting in Strasbourg/F. 16.
[189] *Ibid.* pg 16.
[190] *Ibid.* footnote 188. pg 16.

- Note Diplomatique;[191]
- Note Collective;[192]
- Circular Diplomatic Note[193]

Reliance on diplomatic assurances is now standard practice in extradition relations between some states.[194] This is because they serve the purpose of enabling the requested state to extradite alleged offenders without acting in breach of the obligations under applicable human rights treaties.[195] Diplomatic assurances are usually sought on a case-by-case basis with concern to the individual that the states expect to extradite.[196] They do not typically constitute legally binding undertakings.[197] Hence there is no legal remedy for the sending state or person concerned in case of non-compliance. However, if the court considers that the diplomatic assurances are insufficient, the extradition request may be denied by the state.[198]

i. Legal Boundaries

This thesis finds that the use of diplomatic assurances is both fair and unfair. It is fair because of the approach by states requesting that torture or the death penalty will not be effected. On the other hand, it is unfair because there is no medium or policy in place by states to know if the guarantee will be honoured. Therefore, the idea should be that diplomatic assurances are permitted as long

[191] *Ibid.* footnote 188. pg 16.
[192] *Ibid.* footnote 188. pg 16.
[193] *Ibid.* footnote 188. pg 16.
[194] Diplomatic assurances are states promises not to mistreat the transferred individual upon his or her return. Evelyn Schmid, 'The End of the Road on Diplomatic Assurances: The Removal of Suspected Terrorist under International Law' Available at https://edoc.unibas.ch/41128/1/20141221144101_5496cded3d975.pdf Accessed 15 October 2018.
[195] *Ibid*.
[196] UNHCR 'Note on Diplomatic Assurances and the International Refuge Protection' pg. 2. < http://www.refworld.org/docid/44dc81164.html > Assessed 18 October 2018.
[197] Constanze Alexia Schimmel, 'Returning Terrorist Suspects against Diplomatic Assurances: Effective Safeguard or Undermining the Absolute Ban on Torture and Other Cruel, Inhuman and Degrading Treatment?' < https://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2007/returningterroristsuspects.pdf> Accessed 18 October 2018.
[198] *Ibid.* pg 7.

as their use does not conflict with the limits that are established by treaties or Conventions. At the core of these legal boundaries is the principle of non-refoulement. This policy was set up in *Soering's case,* and it places specific restrictions on the surrender of an alleged offender. Although *Soering* is currently serving a prison term, which implies that the death sentence was not carried out. Furthermore, there are pieces of legislation that restrict the use of diplomatic assurances that is related to this thesis in achieving its aim. They include:

- The Convention Against Torture (CAT)[199]
- The International Covenant on Civil and Political Rights (ICCPR)[200]
- The European Convention on Human Rights (ECHR)[201]
- The European Arrest Warrant (EAW)[202]

[199] The Committee against Torture (CAT) is composed of 10 independent experts who are elected for a term of four years. It monitors the implementation of the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Members serve in their personal capacity and may be re-elected if nominated. The Committee against Torture normally convenes twice year for sessions of three weeks' duration, normally in May and November in Geneva. The Convention was adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984**.** It entered into force on 26 June 1987**,** in accordance with Article 27, paragraph 1.

[200] The International Covenant on Civil and Political Rights (ICCPR) is an international human rights treaty adopted by the United Nations (UN) in 1966. It is one of the two treaties that give legal force to the Universal Declaration of Human Rights (the other being the International Covenant on Economic, Social and Cultural Rights, ICESCR). Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, Entry into force 23 March 1976, in accordance with Article 49.

[201] The European Convention on Human Rights is a treaty that was drafted in 1950. Each of the numbered "articles" protects a basic human right. Taken together, they allow people to lead free and dignified lives. 47 states, including the UK, have signed up. That means that the UK commits to protecting the Convention rights. If a person's rights are being breached, and they can't get a remedy in the UK through the Human Rights Act, the Convention lets them take their case to the European Court of Human Rights. The text of the Convention is presented as amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 2010. The text of the Convention had previously been amended according to the provisions of Protocol No. 3 (ETS no. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS no. 55), which entered into force on 20 December 1971, and of Protocol No. 8 (ETS no. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS no. 44) which, in accordance with Article 5 § 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols were replaced by Protocol No. 11 (ETS no. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS no. 140), which entered into force on 1 October 1994, was repealed and Protocol No. 10 (ETS no. 146) lost its purpose. The current state of signatures and ratifications of the Convention and its Protocols as well as the complete list of declarations and reservations are available at https://www.coe.int/en/web/conventions/ > Accessed 18 October 2018.

[202]The European arrest warrant (EAW) is a simplified cross-border judicial surrender procedure – for the purpose of prosecuting or executing a custodial sentence or detention order. A warrant issued by one EU country's judicial authority is valid in the entire territory of the EU. The European arrest warrant has been operational since 1 January 2004. It has replaced the lengthy extradition procedures that used to exist between EU states.

Article 3 of the CAT provides that:

> 'No party shall 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. For determining whether there are such grounds, the competent authorities shall take into account all the relevant considerations including where applicable the existence of the state concerned or a consistent pattern of gross, flagrant or mass violation of human rights'

This provision by CAT contains the non-refoulement principle, which is reinforced in Article 7 of the ICCPR that provides that:

> 'No one shall be subject to torture or cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.'

Although the provision of the ICPR may not deal directly with the non-refoulement principle, it includes the human rights and transfers limitations that may be relevant for the use of diplomatic assurances. In its official general comment no. 20 on Article 7 The UN Human Rights Committee, which is the supervising organ of the ICCPR, made a link to the principle of non-refoulement when it itemised: 'In the view of the Committee, States' parties must not expose persons to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country.[203] In Article 3 of the ECHR, it was stated: 'no one shall be subjected to torture or inhuman or degrading punishment'. While in paragraph 13 of the preamble of the EAW, it is phrased that "no one should be extradited to a state where there is a grave risk that he or she would be subjected to the death penalty, torture.[204]

[203] The United Nations Human Rights Committee, General Comment No. 20 on Article 7, 1992, Para. 9.
[204] EU Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant.

ii. Legal Spectrum and the Challenge

The challenge with the use of diplomatic assurances is whether sufficient guarantee in the eyes of the Court is adequate. In considering the decisions on extradition, it is impossible for some states to disregard the potential breaches of some rights discussed in this thesis. Hence, in some cases, the courts have halted extraditions based on insufficient diplomatic assurances. As seen in *Baysakov's* case,[205] regarding the extradition of four people, who had been granted refugee status by the Ukrainian authorities, from Ukraine to Kazakhstan for the prosecution that could result in the imposition of death penalty. According to the information concerning human rights situation in that state obtained from the UN Committee against Torture, Human Rights Watch Amnesty International, there were numerous credible reports of torture, ill-treatment of detainees, routine beatings and the use of force against criminal suspects by the Kazakh law enforcement authorities to obtain a confession. All the reports equally noted deplorable prison conditions, including overcrowding, poor nutrition and untreated diseases. The assurances that were provided by the Kazakh prosecutors that there would be no ill-treated given could not be relied on. In particular, it was not established that the First Deputy Prosecutor General of Kazakhstan or the institution which he represented was empowered to provide assurances on behalf of the state and given the lack of

[205] *Baysakov and Others v. Ukraine* [Application no. 54131/08] Council of Europe: European Court of Human Rights, 18 February 2010. The applicants were born in 1962, 1960, 1971 and 1963 respectively and currently live in Kyiv. At the end of 2002, the applicants left Kazakhstan, allegedly because of political persecution by the authorities. They arrived in Ukraine in 2005 and have remained there. By four separate decisions of 28 March 2006, the Ukrainian State Committee on Nationalities and Migration granted the applicants' requests for refugee status, finding that there were legitimate grounds to fear that the applicants would risk political persecution in Kazakhstan for their activities in 2001-02. In particular, the Committee noted that in November 2001 several top political and business figures in Kazakhstan had formed the opposition group Democratic Choice of Kazakhstan. The applicants took part in the activities of that group, mainly by providing it with financial and technical support, particularly through a television company owned by the first and second applicants. The fourth applicant held posts in the governing body (political council) of that group. Shortly afterwards, the Kazakh authorities arrested the leaders of the group. The authorities also instituted criminal proceedings against the applicants on various charges, including conspiracy to murder, abuse of power and fraud, annulled the broadcasting license of their television company, and blocked the activities of their other companies. As pressure from the authorities mounted, the applicants fled the country.

an effective system of torture prevention, it would be difficult to see whether such assurances would have been respected.[206]

In the case of *Klein v Russia,*[207] regarding the extradition of an Israeli national from Russia to Colombia for enforcement of a sentence of imprisonment. It was argued that the alleged statement made by the Colombian Vice-President Santos that 'hopefully they'll hand over to us [that] he can rot in jail for all the damage that he has caused [to] Colombia' the statement illustrated the severe risk of ill-treatment that *Klein* would face once extradited. The court concluded that the assurances from the Colombian Ministry of Foreign Affairs to the effect that *Klein* would be subjected to ill-treatment there were somewhat vague and lacked precision.[208] Furthermore, there may be the existence of weakness in diplomatic assurances from an extradition perspective. This perceived weakness, which is inherent in the practice of diplomatic assurances, is integral to the fact that where there is an apparent need for such assurances, there is an acknowledged risk of torture and ill-treatment.

In the case of *Chalal v United Kingdom,*[209] the court did not doubt the sincerity of the Indian government in providing the assurances.[210] However, it appeared that, despite the efforts of that government and the Indian courts to bring about reform, the violation of human rights by individual members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem.[211] Against this background, the court was not persuaded that the assurances from India

[206] *Ibid.* footnote 205 para. 49, 50 and 51.
[207] *Ibid.* footnote 180.
[208] *Ibid.* footnote 180 para. 55.
[209] [1996] ECHR 54. 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996.
[210] *Ibid.* at para 92.
[211] *Ibid*. footnote 209 at para 92.

would provide *Chahal* with an adequate guarantee of safety. This ruling has become known as the *Chahal Principle.* This principle was essential in reinforcing the importance of the non-refoulement in Europe. The judgment is worth emphasising because Article 3 of the Convention did not only protect against state ordered torture, it also protected where the state had limited control over the day-to-day practice of its security forces. The principle in *Chalal* has been extended to cover situations where the alleged offender to be removed feared ill-treatment at the hands of non-state actors.

This is also apparent in *Saadi's case,*[212] where he argued that enforcement of a decision to return him to Tunisia would expose him to the risk of being subjected to treatment contrary to Article 3 of the Convention and a flagrant denial of justice (Article 6 of the Convention). The measure concerned would also infringe his right to respect for his family life (Article 8 of the Convention). The Italian embassy requested the Tunisian government to provide diplomatic assurances that if he were transferred to Tunisia, he would not be subjected to treatment contrary to Article 3 of the Convention and that his case would be re-opened for a fair trial.[213] At first, they merely indicated that they were prepared to accept the transfer to Tunisia of Tunisians detained abroad.[214] It was only in a second note verbale, (the day before the Grand Chamber hearing) which the Tunisian

[212] *Saadi v Italy* [Application. No. 37201/06] Council of Europe: European Court of Human Rights, 28 February 2008, Nassim Saadi, a Tunisian national, born in 1974 and lives in Milan. He entered Italy at some unspecified time between 1996 and 1999, held a residence permit issued for "family reasons" by the Bologna police authority (questura) on 29 December 2001. This permit was due to expire on 11 October 2002. He faced four charges. The first of these was conspiracy to commit acts of violence (including attacks with explosive devices) in states other than Italy with the aim of spreading terror. It was alleged that between December 2001 and September 2002 the Saadi had been one of the organizers and leaders of the conspiracy, had laid down its ideological doctrine and given the necessary orders for its objectives to be met. The second charge concerned falsification "of a large number of documents such as passports, driving licenses and residence permits". Saadi was also accused of receiving stolen goods and of attempting to aid and abet the entry into Italian territory of an unknown number of aliens in breach of the immigration legislation.
[213] *Ibid.* para 51 – 55 [judgment].
[214] *Ibid.* footnote 212 para. 54.

Ministry of Foreign Affairs observed that Tunisian laws guaranteed prisoners' rights and that Tunisia had acceded to 'the relevant international treaties and Conventions'.[215] The court concluded that the weight to be given to assurances from the receiving state depends on, each case and on the circumstances prevailing at the physical time. Consequently, the decision to deport the applicant to Tunisia would breach Article 3 of the Convention if it were enforced.[216]

In the case of *Othman (Abu Qatada), v UK,*[217] reliance was placed on the nature of the monitoring provided for by the terms of reference agreed under the MOU. There was a claim that the surveillance system was also limited. The UK and Jordan negotiated a Memorandum of Understanding (MOU), setting out a series of assurances of compliance with international human rights standards, which would be adhered to when someone was returned to one state from the other. As a result of the agreement, there would be no violation of Article 3 ECHR since the UK obtained assurances from the Jordanian authorities.[218] The cases of *Chalal and Othman* illustrates that the UK has been at the forefront of pushing the establishment of a systematic practice of diplomatic assurances.

[215] *Ibid.* footnote 212 para. 55.
[216] *Ibid.* footnote 212 para. 149.
[217] *Othman (Abu Qatada) v. The United Kingdom*, [Application no. 8139/09] (ECtHR, 17 January 2012) Council of Europe: European Court of Human Rights, 17 January 2012. Othman, was born in Jordan and claimed that it would be a breach of his rights under the ECHR if the UK deported him to Jordan. Othman resisted deportation under Articles 2, 3, 5 and 6 of the ECHR. O had been successful in gaining UK asylum, a year after arriving in the UK in 1993. The charges against Othman was received in absentia in Jordan and related to conspiracy to cause explosions. Othman stated that the evidence connected with these convictions were extracted from his co-defendants through torture, there was compelling evidence in support of this claim. It was the UK Government's understanding that the ECHR [6] excluded deporting terrorist suspects to Jordan and a memorandum of understanding was negotiated with Jordan. Jordan assured the UK that the treatment of deportees would be consistent with the Convention. The UK ordered the deportation of Othman.
[218] *Ibid*. footnote 217. para 7, 25, 194-205.

Furthermore, in *Shakurov v Russia* [219] Articles 3, 5(1) (4), and 8 of the Convention were invoked as a ground for refusal. It was argued that there was a risk of being subjected to ill-treatment and that the diplomatic assurances of the requesting state were insufficient to discard the risk of ill-treatment. He added that the human rights violations, including torture, were common in Uzbekistan and that there was also the risk of workplace discrimination and political persecution in Uzbekistan because of the difficulty in communicating in the language. Even though the provisions of the Convention were invoked, *Shakurov* did not rely on any personal experience of ill-treatment at the hands of the Uzbek law enforcement authorities neither did produce a relevant report by international organisations and UN agencies. There was also no evidence to confirm that Russian speaking criminal suspect of non-Uzbek ethnic origin are treated differently from the ethnic Uzbek criminal suspect. The court, in this case, found that the allegations that any criminal suspect in Uzbekistan runs the risk of ill-treatment unconvincing.[220]

Furthermore, some extradition case-laws also show to an extent worrying accounts of the weakness of diplomatic assurances.[221] Opponents of diplomatic assurances regularly use the case of *Maher Arar*[222] as an example to prove its weaknesses. The US authorities claimed they received

[219] [Application No: 55822/10].
[220] *Ibid*. para. 30 -138.
[221] See Bibi van Ginkel and Federico Rojas, 'Use of Diplomatic Assurances in Terrorism-related Cases. In Search of a Balance between Security Concerns and Human Rights Obligations' Expert Paper International Centre for Counter-Terrorism, The Hague, 2011. < https://www.icct.nl/download/file/ICCT-van-Ginkel-EM-Paper-Diplomatic-Assurances.pdf> Accessed 15 October 2018. For more information, See Also the Arar's lawsuit against the United States in: *United States District Court for the Eastern District of New York, Maher Arar v. Ashcroft,* 414 F.Supp.2d 250 (E.D. N.Y. 2006). The case of *Agiza v. Sweden* (Communication no. 233/2003, decision of 20 May 2005, UNCAT), was explicitly addressed by the ECtHR in the Abu Qatada case. So was *Mohammed Alzery v. Sweden*, CPR/C/88/D/1416/2005, 10 November 2006.
[222] *Arar v. Ashcroft,* 585 F.3d 559 (2d. Cir. 2009), Maher Arar a Syrian-born Canadian citizen who moved to Canada with his parents when he was 17 years old. In 2002, Maher was living in Canada, where he had been a citizen since 1991, and worked as a consultant with The Math Works, Inc. He was a suspected member of Al Qaeda, apprehended by US authorities in September 2002 at JFK airport while on his way home to Canada Arar had dual Syrian/Canadian citizenship and allegedly told American authorities that he would be tortured in Syria if returned and should therefore

assurances from the Syrian government that *Arar* would not be subjected to torture upon return. The Department of State refused to disclose information based on 'state's secrets', and refuses to cooperate with Canadian authorities as well. Upon release, *Arar* discussed why he did not reveal he was being tortured during visits from Canadian officials: 'I could not say anything about the torture. I thought if I did, I would not get any more visits, or I might be beaten again ... The consular visits were my lifeline, but I also found them very frustrating. There were seven consular visits, and one visit from members of Parliament. After the visits, I would bang my head and my fist on the wall in frustration. I needed the visits, but I could not say anything there.'[223]

The case of *Aleksynans*[224] gives an insight into the difficulties that the requesting states have in practice in ensuring that assurances can be honoured. In that case, the Divisional Court heard that there was a lack of clarity as to the categories of the alleged offender to whom guarantees applied. Confusion exists as to whether the guarantees could apply retrospectively, and local prosecutors (and presumably police and prison staff) did not know about the exercise of assurances because they were set out in restricted documents. Although these problems resulted in breaches of assurances that were put before the court, the Divisional Court nonetheless concluded that the violations arose because of teething problems and that there was no real risk that assurance would not be honoured in the case. The approach of the court is that the question of enforcement of the assurances is only relevant once it has been established that there is a real risk that the assurances

be sent to Canada. Despite his warnings, Arar was sent to Syria after 2 weeks in detention. He was released from custody after 10 months of being detained without charge, during which he was allegedly tortured repeatedly, despite the fact that Canadian authorities were allowed to conduct several visits to his Syrian prison.

[223] *Ibid*. footnote 222.

[224] *Aleksynas v Lithuania* [2014] EWHC 437(Admin).

will be breached.[225] When the requesting states have an excellent record of compliance with diplomatic assurances, the domestic courts have been slow to conclude that there is a real risk of breach.[226] The flaw in this approach is that in the absence of effective monitoring arrangement, it is possible for a court to access whether or not, in practice a particular state's record of compliance with assurances is good.

On the assumption that a universal, transparent international system of diplomatic assurances is created in international law where a reliable enforcement mechanism is in place and legal accountability to the parties present. The bulk of criticism surrounding the use of diplomatic assurances will still not disappear. In all but the very high profile cases, there is simply no information as to whether assurances given prior extradition will be honoured on surrender. The monitoring arrangements about assurances will then be flawed. This is because there can be no effective way to assess whether an assurance had been breached and therefore no effective remedy for the requested person in circumstances in which the violation occurred.

From the above case-laws, it can be argued that there is a need for practical monitoring arrangements. This is to ensure that assurances are given in human rights cases that will avoid the required penalty that breaches the provisions of the Convention. This could be achieved through the state taking a greater role in the monitoring of assurances, which can be attained by ensuring that the court that received the assurances has a more significant role in compliance. For this to work, such an approach would require requesting states to report on whether the assurances had

[225] *Ahmad v United Kingdom* (admissibility) (2010) 51 E.H.R.R. SE6 at [108].
[226] *Hilali v Spain* [2006] EWHC 1239 (Admin); *Mustapha v United States* [2008] EWHC 1357 (Admin); [2008]1 WLR 2760 at [62].

been complied with or not. This will help identify and therefore reduce deliberate breaches of assurances that arise from practical administrative problems in complying with assurances. In reality, there is unlikely to be a one size fits all solution. This is because of the disparity between the range of matters concerning which assurances are given in extradition cases, and the human rights records between both states. Monitoring assurances may be a good starting point, but the chances of states, in reality, engaging in such may be slim or no chances at all.

Furthermore, without entering into an analysis of different forms of diplomatic assurances, it may be said in general terms that the exchange of aides-mémoires or a written MOU must be seen as a binding instrument of international law, falling within the ambit of the Vienna Convention on the Law of Treaties.[227] States intend to create binding obligations when giving and receiving such diplomatic assurances. This is a relevant matter in assessing risks concerning extradition. However, it is essential that assurances are not part of a trade-off in balancing national security interests, human rights protection and international cooperation.[228] Whether such guarantees can be accepted as relevant facts for the assessment of risk is a delicate exercise. As it was stated in *Abu Qatada v the UK*,[229] it is not for the court to rule upon the propriety of seeking assurances, or to assess the long-term consequences of doing so; its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment.[230]

[227] Noll, Gregor, 'Diplomatic Assurances and the Silence of Human Rights Law' (2006) Melbourne Journal of International Law 104.
[228] Oliver De Schutter, International Human Rights, LouvainX online course[Louv2x] UCL https://prod-edxapp.edx-cdn.org/assets/courseware/v1/f1111e0f6e134c7604d4a560315d18c9/asset-v1:LouvainX+Louv2x+1T2017+type@asset+block/_Materials__Diplomatic_Assurances_-_AbuQatada_Othman___Final_.pdf> Accessed 18 October 2018.
[229] *Ibid*. footnote 217.
[230] *Ibid*. footnote 217.

4.7.1. Harmonising Extradition with the Competing Factors

Based on the case-laws analysed in this thesis extradition always involves the infringement of individual rights, albeit prescribed by law and proportionate to its legitimate aim.[231] The case-laws analysis also reveals that not all offences are extraditable, and the definition of extradition itself prevents extradition for genuinely trivial offences. This does not mean that the gravity of the offence is never relevant when considering whether to extradite an alleged offender. When considering whether an alleged offender's extradition would be unfair, it would be pertinent to consider the nature of the offence in the request. There may very well be cases in which an alleged offender's extradition for murder would be unfair on the facts of the case, whereas extradition for shoplifting would be. Much would depend on the facts of the particular case.[232] It is also essential to distinguish extradition within the UK-EU and extradition to other states. Membership of the EU fundamentally alters traditional limits of sovereignty between member states, underpinning this is both acceptance of certain core principles and a standard approach. The point is that the level of mutual trust and co-operation upon which extradition within the EU is based, distinguished it from traditional extradition procedures and extradition to states outside the EU.[233]

This chapter also found that the extradition of case-laws on EAW proceedings points out its success, and the system introduces essential and significant changes compared to extradition outside the UK-EU. For example direct communication between judicial authorities without the intervention of the government as well as the termination of traditional principles.[234] Technical

[231] Rosemary Davidson, 'A Sledgehammer to Crack a Nut? Should there be a Bar of Triviality in European Arrest Warrant Cases?' Crim. L. R. 31.
[232] *Ibid.* pg. 32.
[233] *Ibid.* footnote 231. pg. 32.
[234] Mar Jimeno-Bulnes, 'The Enforcement of the European Arrest Warrant; A Comparison between Spain and the UK' (2007) European Journal of Crime, Criminal law and Criminal Justice 272.

improvements may also be mentioned, such as the considerable reduction in the average time for a surrender decision. Also, the effective surrender of the alleged offender in comparison with conventional extradition proceedings, which move closer to fulfilling trial within a reasonable time.[235] Traditional extradition protects the sovereignty of the state of refuge, the rights of the subject of extradition and the interest of international crime control. The extradition case-laws outside the UK-EU reveals that conventional extradition is a cumbersome and often slow process.[236] Despite the procedure within and outside the UK-EU the law of extradition is bound to remain topical, controversial and in a state of flux.[237] It is also crucial to keep in mind the underlying purpose of the system of extradition-justice, to ensure as far as possible that criminal justice is trans-nationally effective.[238] Justice should not be frustrated by the fact that an alleged offender coming to the UK, US or Nigeria, nor should these states become a safe haven for such persons. On the other hand, these states cannot and must not knowingly complicit in violations of human rights or injustice through the surrender of alleged offenders abroad. The challenge facing extradition as applied presently is, in fact, an almost impossible one.

The findings in this chapter also reveal that the UK, US and Nigeria are exemplary in extending rights to their citizens, but when it comes to extradition, cases have shown that the US and Nigeria are willing to dispose of individual rights. The presence of individual rights in domestic statutes or laws does not necessarily translate into actual protection of such rights. Alleged offenders, facing extradition from the US and Nigeria do not enjoy the full panoply of individual rights and

[235] *Ibid.* pg. 272.
[236] Samantha K. Drake, 'Dangerous Precedents; Circumventing Extradition to Implement the Death Penalty' (2013) 36 Suffolk Transnat'l L. Rev. 337.
[237] Paul Arnell, 'The Law of Extradition' (2012) 13 S.L.T. 215.
[238] Paul Arnell, 'Extradition from Scotland' (2010) 187 S.L.T. 191.

protections provided by the US and Nigerian Constitution in standard criminal proceedings. In the US extradition is regarded as a prerogative of the executive and courts have traditionally declined to challenge the executive by granting fugitives important procedural protections that would delay, complicate or even the extradition process. The UK, on the other hand, refers to the ECtHR opinions for aid in the decision-making process, It consults decisions for weighing in the competing interest of individual and state. The ECtHR in its place is based on the belief that the current treaty system accomplishes what it is designed to do. It functions because states have found ways to work around treaties when abiding by the terms of the treaty. The advantage of this option is that it allows the state to engage in a balance. The problem with this approach, however, is that it almost certainly guarantees continued imbalance between states who have a different approach. The US cases confirm the tendency of the US critically re-examining existing jurisprudence, to focus virtually on domestic institutions for guidance, they consult the constitution. Despite the need to protect individual rights, courts remain state run-institutions essentially. Therefore, asking states to apply the EU-UK extradition balancing approach when the factors conflict is considered an unrealistic proposition.

Given all the controversy and uncertainty that accompany a request for extradition and the competing (legal and non-legal) factors introduced in the preceding chapters of this thesis, it should come as no surprise that extradition is not a panacea for tackling international and cross-border crime discussed in this thesis.[239] An applicable extradition treaty makes it possible to identify the alleged offender and the locus of criminal acts given the ease with which offenders can move from

[239] Crime includes Terrorism, financial crime, cybercrime, murder, illegal arms and drugs trafficking, Discussed in detail in chapter 2.

one state to another, but does not offer a solution to the international dilemma that arises during an extradition negotiation. The dilemma before states regarding extradition is one of balancing the competing interest, a situation where the interest of states and the international criminal justice must be weighed against the rights and fairness afforded to the alleged offender.

Through the analysis of the non-legal competing factors, this chapter findings reveal that in Nigeria, extradition decisions have not significantly been inhibited in their decision making by the law. A significant reason for this is that the law (for example in previous cases, statutes) tends to be vague. Majority of Nigerian court cases on extradition are unreported in the periodic law reports. Most extradition proceedings end at the trial courts, even though there is a right to appeal to the Court of Appeal and the Supreme Court.[240] The current existing and applicable extradition treaty between the Nigeria and UK, Nigeria and the US was in force in 1935.[241] This treaty has not been revised since its original version was enacted. The early extradition treaty did not anticipate the development of crime such as computer fraud, drug trafficking, terrorism. Since extradition is permitted only for offences specified in the treaty, it may be difficult to prosecute certain crime in Nigeria. Thus the primary defect is the inadequate range of offences covered by the current applicable extradition treaty. The Extradition Act 1967 initially conferred magistrate with the jurisdiction to determine extradition proceedings.

[240] Cases and Materials on Extradition in Nigeria (*United Nations Office on Drugs and Crime Country Office Nigeria,* 2016*)* 413.< https://www.unodc.org/documents/nigeria/publications/Anti-Corruption-Project-Nigeria/Cases_and_Materials_on_Extraditon_in_Nigeria.pdf> Accessed 18 October 2018.

[241] Bilateral Treaty can be found < http://www.mcnabbassociates.com/Nigeria%20International%20Extradition%20Treaty%20with%20the%20United%20States.pdf > Accessed 18 October 2018.

However, this position was changed with the coming into force of the 1999 Consitution,[242] which grants the Federal High Court exclusive jurisdiction to entertain and determine all related extradition matters. This change in jurisdiction created conflict because the Extradition Act was not immediately amended to align with the constitutional provision until 2014 when an executive order was issued. The EA 2014 modification Order expressly modified the Act by not only replacing the magistrate with the judge but transferring the supervisory powers from the High Courts of the states to the Federal High Court. This amended the hearing of extradition cases from the magistrate court to the Federal High Court. The UK-EU has applicable standards, and even some procedures by courts deal with extradition matters when there is a conflict of the interest, between the alleged offender and the aim of extradition.

In Nigeria, the applicable standards and procedures by which Nigeria courts deal with extradition matters are barely spelt out by the Act, and extradition treaties entered with other states or case-laws. Extradition case-laws in Nigeria is currently developing, however much of it is based on obsolete decisions. Authors may criticise certain foreign treaty provisions, but a pragmatic or realistic approach to the tension is a fair balance approach, this leads to the next section to analyse the extent to which a fair balanced approach between the factors for and against extradition can be achieved by both developed and developing states.

4.8. Fair Balance Approach

[242] Section 251(1)(i) of the 1999 Constitution.

The competing factors within an extradition decision have been identified, categorised and analysed with a view to allowing a balance to be drawn that will facilitate fairness and justice. This may be pertinent to any dispute or to the preparation of advice where international extradition is a central focus. This is because there are no hard and fast rules for predicting which factors will apply in any one case. Therefore, it is important to have a clear impression of the range of competing factors that may need to be considered. Within the fair balance approach, it may be thought that legal and non-legal factors make odd bedfellows. They at times pull in different directions – while extradition seeks an efficient and effective international criminal justice system, the legal and non-legal factors can at times seek to protect the alleged offender from extreme state action. According to Arnell,[243] the resultant difficulties are seemingly intensified by the involvement of third states, international and EU law and perhaps a degree of national chauvinism.[244] A solution that thoroughly addresses the tensions and pressures arising through within extradition is not entirely possible, but it is going to in some way by adopting a fair balance approach. A complete solution is not possible merely because the factors compete and are irreconcilable. States must as far as possible accommodate the factors and balance the conflicting aims of an efficient international criminal justice and the entitlements of those subject to it. The apparent issues and problems arising in extradition law, in fact, do not concern the factors themselves but how or whether a fair balance is reached when deciding extradition cases.

It is suggested that the aim of extradition must be fairness and justice. Thus a question that comes to mind is what does fairness, and justice mean from an extradition perspective? Based on the case-

[243] Paul Arnell, 'The European Human Rights Influence Upon Extradition – Myth Debunked' (2013) European Journal of Crime, Criminal law and Criminal Justice, 21 (3-4) pp. 317 -337.
[244] *Ibid.*

law analysis this thesis affirms that fairness and justice result from an objective weighing of the competing factors within the decision. Also, based on the analysis, it is not controversial to say that there is no universal equilibrium to a fair balance approach from an extradition perspective. According to Dugard and Wyngaert,[245] it is necessary to pay more attention to strategies and means that could contribute to a better balance between human rights and the suppression of crime. He suggests one solution might be to make greater use of conditional extradition, which would allow a requested state to monitor the treatment of extraditees.[246] Another answer might lie in the development of *aut dedere aut judicare,* which would allow states to refuse an extradition request on human rights grounds without letting the alleged offenders go unpunished.[247]

In the UK-EU to find a better balance between the competing factors and extradition, the ECtHR and UK courts have developed an approach where a judge after finding the facts, sets out a list of factors for and against extradition in a 'balance sheet' fashion and then set out a reasonable conclusion as to the result of the balancing exercise. In doing this justice is said to be achieved as the interest of the alleged offender as well as that of the state was considered in an objective fashion. There is a considerable authority for this position.[248] It must be noted that the fair balance approach is not available to every requested person. This is because not everyone has nor would have equal access to justice. This is not to suggest, though, that it should not be adopted in states where it is not applied. Through the primary and secondary sources data used for this research, this thesis found that US and Nigerian extradition cases generally are of the view that not everyone

[245] *Ibid.* footnote 94. pg. 206.
[246] *Ibid.* footnote 94. pg. 206.
[247] *Ibid.* footnote 94. pg. 206.
[248] *Lord Advocate v M* [2016] SC EDIN 7, *Polish Judicial Authority v Adam Celenski* [2015] EWHC 1274(Admin), *Norris v Government of the United States of America* (No.2) [2010] 2 AC 487, *HH v Deputy Prosecutor to the Italian Republic, Genoa* [2012] UKSC 25.

has equal access to justice. Certain cases[249] document several of the current problems and challenges, the critical point of discussion here is that this fair, balanced approach as suggested by the ECtHR is only implemented in the UK and within the EU. Often requested persons and other states will be faced with a situation that demands a fair balance approach for example where one's human rights will likely be infringed if extradited. It is for this reason that the fair balance approach should be understood.

In many cases, extradition decisions are ultimately a balance of interests between individuals and states. On the one hand is the view that human life, the life of every human being, is of the highest value. On the other hand, is the opinion that the highest value is the interest to honour the state. Therefore the decision on how states come to a decision when the factors conflict depends on the answer to the question of which is higher value. Is it the protection of the rights of the alleged offender when his rights are a risk of being breached in the requesting state or the interest of states to suppress crime and the aim of extradition. If the protection of the rights of the alleged offender is the higher value, then extradition is not justifiable. If the interest of states to suppress crime is the higher value, extradition is justified. The solution to this dilemma is the question of balance, and a fair balance depends on an objective approach to answering. Not that of the requested person, nor the state – but instead the decision should be taken from the perspective of fairness and justice.

The approach the ECtHR takes to qualified human rights is of value here. It helps shed light on the fair balance approach. The questions suggest what the court has to answer in considering qualified rights whether there would be interference with the rights of the individual. Secondly, it

[249] *Lord Advocate v M* [2016] SC EDIN 7, *Norris v Government of the United States of America* (No. 2) [2010] 2. AC. 487, *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, *Polish Judicial Authority v Adam Celensik & oths* [2015] EWHC 1274 (Admin).

asks whether the interference is according to the law and pursues one or more legitimate aim. Lastly, it asks whether the interference is necessary for a democratic society, in the sense of being a proportionate response to a legitimate aim. This test adds to the fair balance approach. The ECtHR has developed a test to be applied by courts in the extradition context, and this procedure or mechanism is important in balancing two interest at play, namely the protection of the rights of the alleged offender and prosecution of those who have fallen foul of the law. The UK-EU thus sees this approach as fair in achieving a fair balance approach when there is a conflict of interest. In applying these questions regards, explicit or implicit is often had to other legal and non-legal factors. This thesis accepts that the fair balance approach will not satisfy all parties – that is simply not possible. Whilst at present there is no plan in the US and Nigeria to adopt a fair balance approach in extradition decisions it is hoped that they will consider the position and one day embrace it.

4.9. Conclusion

This chapter explored how the non-legal competing factors may conflict with a decision to extradite and found that a fair balance approach from an extradition perspective is objective - whilst individual states take a subjective view because they view justice in the eyes of their given laws and interests. This chapter also found that fair and just decisions from an extradition perspective are made through the identification, conceptualisation and objective analysis of the legal and non-legal competing factors that are related to and affecting extradition. It is suggested that there can be no universal balancing approach that would guarantee the happiness of both the requesting and requested state when the factors conflict. This is because some of the factors are irreconcilable. The findings from the case-law analysis above also affirm that there is a link between the legal and non-legal competing factors - human rights allow for the domestic or cultural

difference in the manner in which individuals are treated. It also found that the non-legal factors may not always act as a bar to extradition. They may also weigh in favour of it. Thus, this chapter concludes that arriving at a fair balance when deciding extradition cases is necessarily an objective exercise. This is because the goal of protecting the national security of a state and furthering international cooperation in the interest of law enforcement on the one hand and the protection of the alleged offender, on the contrary, will be as far as possible balanced. A solution that thoroughly addresses the tensions and pressures arising in extradition and the competing factors is not entirely possible, but those tensions could be mitigated through a fair balance approach.

Chapter 5

Thesis Conclusions and Recommendations

5.1. Introduction

As indicated in the opening of this thesis, in an era where an increasing number of states are affected by various types and forms of transnational crime including terrorism, cybercrime, financial crime, murder, illegal drugs, and human trafficking one response has been a greater emphasis upon and employment of extradition agreements. These agreements are intended to make the transfer of the alleged offender easier. However, ironically, these agreements also contain provisions that directly or indirectly may stymie the process. (as discussed in chapter two in this thesis) These include human rights (discussed in chapter three of this thesis), domestic and international politics as well as language, religion, race and immigration concerns(discussed in chapter four of this thesis). These are factors that may arise in the court of extradition, and when they are invoked by the alleged offender, they inevitably influence the decision to extradite. Thus, efforts to address the goals of protecting the national security of a state and furthering international cooperation in the interest of law enforcement on the one hand and the protection of the alleged offender, on the other hand, create a tension. These factors create tension because in the course of an extradition decision these conflicting interests are present and are conditioned by the underlying goal of overall justice and fairness in international criminal justice. To enable a detailed analysis of the decision-making process and easy identification, the competing factors were categorised into two broad groups - legal and non-legal factors (discussed in chapters three and four in this thesis) these categorised factors were further sub-categorised into human rights, diplomatic assurances, political factors, social factors and economic factors. One feature arising from this

analysis as can be seen in this thesis is the appearance of an imbalance between the competing factors – where some states place more emphasis on certain factors and other states on other factors. This occurs in spite of the international nature of extradition obligations – being found largely in bilateral extradition agreements. A facet of extradition law complicating the picture is that most states require to incorporate their international extradition obligations into their national law and procedure. International extradition law and procedure call for consistent identification and weighing-up of the competing factors within extradition decisions. As shown in this thesis, a through identification, conceptualisation and the analysis of the various conflicting factors that are related to and affecting extradition. Doing this would allow the creation of a system where the relevant applicable factors are appropriately taken into account and also where the interest of the state parties, offender and victims as well as the international criminal law itself will be appropriately served. To this end, states must analyse the factors affecting extradition with the view of allowing a balance to be drawn that will facilitate fairness and justice.

5.2. Conclusion

This thesis identified, categorised and analysed the factors affecting extradition with the view of allowing a balance to be drawn that will facilitate fairness and justice. This balance may guide decision makers in both developed and developing states, after establishing that one interest was always satisfied at the expense of another. Identifying the factors relating to and affecting extradition also allow the creation of a system where the relevant applicable factors are appropriately taken into account and also where the interest of the state parties, offender and victims as well as the international criminal law itself will be appropriately and as far as possible be served. An understanding of the legal and non-legal competing factors are important aspects of justice from an extradition perspective. The scope and application of the legal and non-legal

competing factors provide individuals/state with a useful tool facilitating the understanding of both the extradition and human rights within the law. Indeed, within the UK-EU human rights law may be seen to hinder extradition. For example, capital punishment, severe prison conditions and family life have acted as a bar to extradition from the UK-EU.[1] Human rights can be seen as one factor that acts in the balance and helps lead to fairness and justice in extradition.

The case-law discussed in chapter three and four highlights the limited practical effect of human rights upon extradition from the US and Nigeria. Through a critical explanation, it was recognised the concept of human rights do not materially impact upon the operation of extradition from the US and Nigeria. It is the precise manner in which human rights apply in the UK-EU that leads to the particular relevance to the Convention, and indeed the EU's Charter of Fundamental Rights as well. Furthermore, the UK court is required to take into account, the judgment of the ECtHR in coming to their decision. The UK's obligation under international law to abide by the terms of the Convention, and to adhere to the decisions of the ECtHR. The law developed by the ECtHR, and indeed the Convention itself, is not of direct and general applicability outside the UK-EU – this simple fact revealed why there are differences in the balancing approaches as regards the UK-EU and the US and Nigeria.

The ECtHR's approach to extradition has been one of substantive expansion and practical limitation – this is important for the present aim of this thesis. Substantive development denotes judicial acceptance of the applicability of further human rights to extradition within and outside the UK-EU. In *Soering*[2] as noted Article 3 was held applicable where the requested person

[1] As illustrated in case-law discussed in chapter three of this thesis.
[2] Series A. No. 161, (1989) 11 EHRR 439.

demonstrates the existence of substantial grounds for believing that if returned he faces the risk of being subjected to torture inhuman and degrading punishment. *Othman's*[3] case was the first case where the court considered flagrant denial or a fair trial in the requesting state. The ECtHR found that removal would violate Article 6 in *Othman v UK*.[4] Article 5, protecting the right to liberty of persons, has also been explicitly and definitively accepted as applying.

Both Article 5 and 6 of the Convention, are conditioned by the same 'flagrant denial' test. The ECtHR has considerably extended the protective scope of Article 8, safeguarding private and family life. It has been argued as a basis for refusing extradition on some occasions regarding extradition cases from the UK-EU.[5] Article 8 is the first of the Convention's qualified rights, whose application can be seen to require a balance between the protection of human rights and the contracting state's margin of appreciation. The tests applying under Articles 3, 5 and 6 differ from that under Article 8, but they are all similar to the extent that they may act as a bar to extradition. Based on the extradition case-law data collected, there has been no reported situation where these rights have been invoked by the alleged offender from the US or Nigeria. However, there have been cases where a Nigerian and a US national invoked such human rights provisions to challenge their extradition from the UK.[6] That human rights only apply in the UK-EU may be seen to lead to their having no relevance to other states. Of course, it is not a requirement that US or Nigerian courts take into account a judgment of the ECtHR in considering an extradition decision when there is a conflict between the interest of the alleged offender and that of the state. That noted, the other factors identified do apply to all states. Cultural considerations, domestic/international

[3] *Othman (Abu Qatada) v UK* [Application No. 8139/09].
[4] *Ibid.*
[5] Argued by alleged offenders in case-laws analysed in chapter 3 of this thesis.
[6] As illustrated in the case of analysed in chapter four of this thesis.

politics, immigration borders, internal/external conflicts and societal changes have had an impact on extradition.

The thesis is divided into five chapters. Each contains an extensive reference to substantive case-law that cuts across the UK-EU, UK-US, UK-Nigeria, US-Nigeria and other states. Chapter One started with a general introduction to the thesis and highlighted the subject matter. It provided the background of the research and set out the research aim, questions and objectives. The research method, methodology and approach were also identified while highlighting the need for a fair balance within extradition of the competing factors. Finally, it provided the theoretical framework within which conclusions were reached in support of the argument of this thesis set out in Chapter One on why there is a need for a balance within extradition of the competing factors. In Chapter 2 the impact of globalisation on international and cross-border crime was explored to provide background to extradition generally. It then examined in detail various case-law coming from the UK-EU, US and Nigeria. This thesis found that in trying to suppress the challenges that come with globalisation, states have agreed to a series of extradition treaties.[7] The much-increased crime rate had led to the need for states to try alleged offenders for offences that have an impact on their states. The thesis noted that international and cross-border crime has an impact on both developed and developing states. The evaluation further highlighted the differences between bilateral and multilateral treaties and agreements. Particularly between the US/UK, US/Nigeria, UK/Nigeria and how they contrast with the European Arrest Warrant. In doing this, the thesis explained the factors in support of extradition and those against it. The various factors that should be taken into

[7] Chapter 2 of this thesis.

account in the fair balancing exercise were identified and highlighted. Thus, the *first and second objectives* of the thesis were fulfilled and the *first and second research question was answered*.

Chapters, Three and Four, are devoted to the factors at play in extradition decisions and the problems that arise when attempting to balance them as noted by courts and a number of authors.[8] These chapters also considered the concept of justice and fairness from an extradition perspective. Chapter Three evaluated the legal factors – namely the human rights that can conflict with extradition as identified in chapter two. The chapter discussed the impact of legal factors - human rights on extradition and how they conflict with the decision to extradite. To enable a detailed analysis the legal factors were sub-categorised, and the basis of the sub-categorisation was also analysed. This chapter explored the impact of the legal competing factors (human rights) and found that they sometimes conflict with the surrender of a requested person. This analysis revealed how the legal factors – human rights (prohibition of torture, the right to liberty, fair trial, private and family life) could be seen to increasingly conflict within a transfer of a requested person. It also revealed the different levels on which human rights operate. These findings affirm the proposition that there can be a conflict of interest between extradition and human rights.

Justice in the extradition context has been demonstrated to be considered subjectively. Basically individual states perceived it on their own terms and based on their own law. The findings from the case-law analysis between the UK, US and Nigeria affirmed this and that - human rights led to

[8] See Robert Herbert Wood, 'Extradition: Evaluating the Development, Uses and Overall Effectiveness of the System' (1993) 3 Regent U. L. Rev. 43, 45. John Dugard & Christine Van Den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 92 Am. J. Int'l L.187. M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (Oxford University Press 2014); Heather Smith, 'International Extradition; A Case Study between the U.S and Mexico' (2000) The UCI Undergraduate Research Journal 73; Paul Arnell, 'The Continuing Tension Between Human Rights and Extradition' (2016) S.L.T. 4.

domestic and cultural differences in the manner in which individuals are treated. It also found that human rights do not generally act as a bar to extradition of a US national from the US, or a Nigerian from Nigeria. It is argued that regardless of the boundaries erected among these states human rights must play a more significant role in extradition and the efforts to suppress crime. The evaluation of the case law in this chapter concluded that a more explicit acknowledgement of the legal factors, the human rights relating to and affecting extradition, is crucial to extradition decisions. It will also serve the interest of both the alleged offender and international law enforcement. Thus, the *second and third objective* of the thesis was fulfilled and the *second research question* was answered.

As indicated in Chapters Two and Three in addition to legal factors there are non-legal factors that influence extradition decisions. Thus Chapter Four discussed the impact of non- legal factors, on extradition, how they impact a decision to extradite and how they are accommodated in the balance. The non-legal factors were also sub-categorised to enable a more detailed analysis, and the basis of the categorisation was also analysed. It found that a more explicit acknowledgement of the non- legal factors that conflict with extradition would serve the interest of both the requested person and international criminal law enforcement. This chapter explored the impact of the non-legal factors and found that they could weigh against an extradition decision. This analysis revealed how the non-legal factors - social, political, and economic factors - may increasingly conflict with a decision to extradite. These findings affirm the proposition that there can be a conflict of interest between the non-legal factors and a decision to extradite and that this should be managed in a way that leads to overall fairness and justice. The conclusions of the case-law analysis also affirm that there is a link between the legal and non-legal competing factors - human rights can be seen to reflect domestic or cultural differences in the manner in which individuals

are treated. This chapter also found that the non-legal factors may at times weigh in favour of extradition. The evaluation of the case-law relevant to the questions relating to the aim of this thesis led to this chapter concluded that a more explicit acknowledgement of the non-legal factors relating to and affecting extradition is crucial to extradition decisions. It will also serve the interest of both the alleged offender and international law enforcement.

Chapter four also found that the apparent issues and problems arising in extradition law should not concern these identified factors per se, but rather how or whether a fair and just balance is reached when deciding extradition cases. Arriving at a fair balance when determining extradition cases is necessary because the goal of protecting the national security of a state and furthering international cooperation in the interest of law enforcement on the one hand and the protection of the alleged offender, on the contrary, will be balanced as far as possible and therefore free from tension. Thus the *fourth and fifth objective* of the thesis was fulfilled, and the *third research question* was answered.

5.3. Thesis Contribution

The solution this thesis proposes is that states should adopt the UK-EU balancing approach taken by judges when deciding whether to surrender an individual under the EAW. It contributes to the current extradition literature in that way. However, it is envisaged that such a process may require an amendment of the US or Nigerian Constitutions and so this suggestion poses significant difficulties. This thesis made a significant contribution by considering the concept of justice and fairness from an extradition perspective. It suggested that justice and fairness in extradition are reached through an objective balancing of the competing factors within a decision. Furthermore, this thesis makes contributions which are synthesised as per the target audience. This thesis is

aimed at major groups not only within the states used for illustration but also to the larger target of individuals that are involved in international legal assistance. These include students, policymakers, the judiciary, human rights advocates and lawyers. It is envisaged that some of the readers of this thesis will be experienced practitioners of criminal law who have been largely involved in international cooperation cases, in either management or an operational position, while others may be novices in this area. Therefore, the thesis offers a guide to understanding the diverse impact of the competing factors on extradition. The present thesis should be viewed as a tool that can be used in conjunction with other mechanisms in accomplishing the goal of effective international cooperation in general. Moreso, with the speed at which technology evolves there are likely to be more human rights provisions or issues that could be used by fleeing individuals that are not currently categorised in this thesis.

5.4. Thesis Recommendation and Proposal

It is crucial to emphasise that this thesis does not intend to affect judicial decision making directly. Instead, it provides an analysis of the pros and cons already established in some UK and ECtHR cases. To aid decision makers in an extradition hearing both in developed and developing states;

- Courts should adopt a fair balance approach. This approach should contain the list of pros and cons in a balance sheet fashion. This recommendation builds on Dugard and Van Den Wyngaert's,[9] assertion that there is tension between the claim for the inclusion of human rights in the extradition process. Thus in striking a balance between the two, new extradition treaties and supplementary protocols to existing treaties should take account of the human rights factor and regulate it so that courts and executives can exercise their

[9] John Dugard and Christine Van Den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 92 Am. J. Int'l L.

powers in a coherent manner that balances the interest of the fugitive's human rights with that of law enforcement.

- Courts should establish facts from the evidence that is produced from the case. This will enable the court to see how those facts support one or other legal or non-legal factor.
- Courts should also see if the facts from the evidence produced give rise to an exceptionally compelling feature which would justify the court holding that the rights of the alleged offender are capable of outweighing the factors in favour if the request is granted.
- These facts should be ascertained turning to both sides of the case, scrutinising the facts more closely to determine if extradition which would typically follow as a matter, of course, will constitute an unjustified and disproportionate interference with the right of the alleged offender.
- With the identification of the facts of the case, the pros and cons can lead to the conclusion as a result of balancing those factors with reasoning to support that conclusion.
- States should review their extradition treaties to enable them to meet current challenges. With the present problems with extradition treaty in Nigeria at the time of writing this thesis, it is imperative that the issue of reviewing extradition laws is addressed through the right lens. In Nigeria, there is a gap in the legal academic literature on the need for the reform of its extradition treaties which is beset with complexities. This difference is presented in the body of the thesis. Thus this thesis may aid practitioners, researchers as well as governments to understand the situation.
- States that negotiate treaties should pass pieces of legislation or make amendments to their extradition provisions in order to provide their courts with jurisdiction to offences even though they occurred outside its borders. Examples of such legislation include that which

was passed in South African courts, as illustrated in the case of *Tsede*.[10] Here the High Court observed that South Africa could pass laws empowering its courts to try crimes that have been committed outside its borders.

The recommendation above is necessary because it will aid states in weighing the factors for and against extradition thus achieving a fair balancing approach between the competing factors within an extradition decision when making an extradition decision. Furthermore, in the context of the competing factors within a decision to extradite, a fair balance would demand that states explore areas that will create a win-win situation.

5.5. Difficulties in Achieving the Above Recommendations

It is acknowledged that the points in 5.4 of this thesis may be difficult to achieve. One of the difficulties arises from the lack of uniformity in criminal sentencing between states. This includes that some states retain capital punishment. The balancing process must take into account these factors.

Anyone or state who takes the recommendation that the EAW surrender procedure should be adopted, and the balanced structure approach be considered when there is a conflict of interest, must have in mind the law's possible cultural baggage.[11] Indeed to transplant a law, it would have to be segregated from society. Adopting the EAW pattern of the surrender of requested persons and the structured, balanced approach that the UK-EU courts consider when there is a conflict of interest leads to borrowing and transplant. Transplant implies the displacement of existing

[10] *Tsebe & Another v Minister of Home Affairs and Others* [2012] 1 All SA.
[11] Pierre Legrand, 'The Impossibility of 'Legal Transplant' (1997) 4 Maastricht. J. Eur. & Comp. 114.

regulation. There is something in a given jurisdiction that is not native to it, and that has been brought from another.[12] The state's approach to the transfer of alleged offenders and considering the factors when it conflicts is being displaced. Taking this observation to its logical conclusion, it will be a relatively difficult task to transplant the ECtHR and EAW framework to states outside the UK-EU. Accordingly, the EAW framework and the balanced approach adopted by the UK-EU courts may not survive the journey from one legal system to another. In the final analysis, however, what matters is achieving fairness and justice. Extradition turns on individual facts and applicable law. Fairness and justice can be achieved with an objective balancing of the competing factors – all the factors – in an extradition decision.

5.6. Future Research

This thesis identified certain areas for future research. It is envisaged that it will be beneficial to carry out future research on individual states or especially developing states to fully evaluate their extradition practices and recommend a sustainable framework or perhaps an alternative. Further research on whether individual states apply their criminal law appropriately regarding the issues of concurrent criminal jurisdiction – is also needed. The question as to whether it is only the strongest state that is interested in suppressing crime when it also involves other states is worth further research.

5.7. Final Thoughts

This thesis aimed to find a balance between the competing factors and extradition when they conflict and argued that fair and just decisions are made through a thorough identification,

[12] *Ibid.*footnote 11 pg 112.

conceptualisation and objective analysis of the various conflicting factors that are related to and affecting extradition. Whilst fairness and justice from an extradition perspective can be not only objective but also subjective to individual states the solution suggested to both developed and developing may not be immediately attainable. It would have been presumptuous to suggest otherwise. The conflicting interests will continue to be applied on a subjective basis by states. What this thesis – and I – hope for is that states may move to adopt an approach to extradition that seeks fairness and justice by objectively weighing the competing factors in the decision to extradite.

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