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**ADHERING TO THE RULE OF LAW IN INVESTIGATIONS AND**  
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**EXTRADITION AND MUTUAL LEGAL ASSISTANCE:**  
**PRACTICE AND PROCEDURE**

**27<sup>TH</sup> AUGUST, 2019**

**12:30PM**

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## **The Various Laws and Regulations governing Extradition and Mutual Legal Assistance**

There are a number of laws that govern extradition in Nigeria and various treaties that Nigeria is party to that formally set out requirements and obligations for mutual legal assistance. Some of the most important include:

- The Constitution of the Federal Republic of Nigeria. 1999.
- The Extradition Act, CAP E25, LFN, 2004.
- The Extradition Act (Modification) Order, 2014.
- Federal High Court (Extradition Proceedings) Rules, 2015.
- Mutual Assistance in Criminal Matters Law 2019 (which has replaced Mutual Legal Assistance in Criminal Matters in the Commonwealth, (Enactment and Enforcement), Act, 2004).
- Extradition Treaty between Nigeria and the United Arab Emirates, 2016.
- Extradition Treaty among Benin, Ghana, Nigeria and Togo, 1984.
- Economic Community of West African States Convention on Extradition 1994.

While the laws and treaties above seek to extensively regulate the procedure of extradition and the concept of mutual legal assistance, there are a number of areas which require attention and improvement by the Nigerian legislature and judiciary for the purpose of their consistent application. This paper provides both an overview and critique of the concept and procedure of extradition and mutual legal assistance.

## **The Interrelationship between Extradition and Mutual Legal Assistance**

Scholars, practitioners and other specialists have never agreed about the exact definition of the terms 'extradition' and 'mutual legal assistance'. Given the political and territorial implications of both concepts, it is perhaps the reason behind the onslaught of confusion and gaps in their application by a State. However, a clear conclusion can be drawn between the two; extradition cannot be effected without the support of the other Nation, hence the formalisation of mutual legal assistance in various States but mutual legal assistance is not automatically tantamount to extradition proceedings. Before elaborating on the relationship between extradition and mutual legal assistance, it is necessary to clearly define the terms for the purpose of a critical and meaningful analysis.

## Definition of Extradition

By virtue of the various laws governing international relations, the principle of territorial sovereignty is of utmost importance, especially for the sake of peace and world order. Summarily, territorial sovereignty refers to the exclusive right of any given State to perform functions of a sovereign<sup>1</sup>. The most poignant element of territorial sovereignty lies in the external aspect which is that a State must respect the territorial integrity of other States i.e. principle of non-intervention<sup>2</sup>. Be that as it may, certain discerning factions of society see this principle and respect for state autonomy as a weakness and loophole available for exploitation and self-interested gain. As noted by Cassese, 'it leads to the effective impunity of the persons in questions by protecting them against criminal prosecution for very serious crimes which transgress universal values'<sup>3</sup>. It is for this reason that the process of extradition is fundamental to the successful prosecution of international crimes.

In essence, extradition is the process by which a country ('requesting country') formally requests the surrender of a person in another country ('requested country'), who at the time of the request is residing in that country, for a serious crime committed in the requesting state without breaching the principle of territorial sovereignty and non-intervention. The basis of such request must lie in an existing reciprocal arrangement between the countries and the crime committed must be deemed a crime in both jurisdictions, despite the possibility of the crime being termed differently.

As the nature of extradition requires the movement of a person from one jurisdiction to another, it is a procedure that can only be used at the international level and thus is a procedure to be initiated by the authorised empowered officers like the Attorney General or diplomatic representative or consular office, depending on the country.

Other important elements in this surrender order are embedded in the specialty and double criminality doctrines. The premise of the specialty doctrine is that the person whose extradition is sought can only be tried for the crime for which his extradition was requested<sup>4</sup>. As reiterated in *Udeozor v FRN*<sup>5</sup>, it is regarded as an abuse of the terms of an [extradition] treaty for a State to secure the surrender of a criminal for an extraditable offence and then

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<sup>1</sup> Page 260, Public International Law, Alina Kaczorowska, 4<sup>th</sup> Edn 2010 - Routledge

<sup>2</sup> *ibid*

<sup>3</sup> Page 352, Cassese; International Criminal Law 2<sup>nd</sup> Edn, Oxford University Press 2008 – Oxford University Press

<sup>4</sup> *States v Raucher* 119 US 407, 7 S.Ct. 234, 30.

<sup>5</sup> (2007) 15 NWLR (PT. 1058)

punish him for an offence not included in the treaty. The double criminality doctrine states that the crime committed must be a crime in both jurisdictions<sup>6</sup>

Based on the foregoing, it can be concluded that extradition is not an automatic process as there are stringent requirements which can be summarised as the following:

1. Extradition can only be used for International Crimes (as opposed to civil wrongs).
2. There must be an existing agreement between the requesting and requested States which give a legal basis to the request.
3. The request must not offend the doctrines of speciality and double criminality.
4. There must be no concern regarding the infringement of the fugitive's fundamental human rights in the requesting state.

### **Procedure of Extradition in Nigeria**

Section 6 of the Extradition Act, CAP E25, LFN 2004 sets out in full the procedure for submitting an extradition request to Nigeria but can be briefly summarised as followed:

- 1) A request for the criminal fugitive's surrender must have been made in writing to the AG of the Federal Government of Nigeria by a diplomatic representative or consular officer of that country and such request must be accompanied by a duly authenticated warrant for arrest or certificate of conviction issued in that country.
- 2) The fugitive himself must fall into the class of persons whom the Act applies.
- 3) His return must be compatible with stipulated restrictions relating to his treatment after his surrender.

### **Definition of Mutual Legal Assistance**

The United Nations Office on Drugs and Crime defines mutual legal assistance as the process whereby States seek for and provide assistance in servicing judicial documents and gathering evidence in criminal trials from a concerned country<sup>7</sup>. As such, it is argued that Mutual Legal Assistance is in fact separate from extradition and another mechanism of bringing a fugitive to justice.<sup>8</sup> To that end and in addition to the aforementioned, mutual

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<sup>6</sup> Collins v. Loisel 259 US 309, 42 S. CT. 49, 66L. Ed. 956(1922)

<sup>7</sup> <https://www.unodc.org/e4j/en/organized-crime/module-11/key-issues/mutual-legal-assistance.html>

<sup>8</sup> Page 49, Cases and Materials on Extradition in Nigeria: United Nations Office on Drugs and Crime Country Office Nigeria. United Nations, 2016.

legal assistance is said to cover tracing the proceeds of criminal activities, search of places, persons and objects, seizure of proceeds and tools of crime and confirmation and enforcement of orders for forfeiture of the proceeds of criminal activity.

As of June 2019, it is reported that President Buhari has signed into law the Mutual Legal Assistance Bill (Mutual Assistance in Criminal Matters Law 2019) which will put Nigeria in a better position to combat transnational crime. In particular, its focus is on the ways in which embezzled funds can be recovered and also assures the countries that cooperate in the manner requested will receive same assistance when such is requested of Nigeria.

The preceding Act, Mutual Legal Assistance in Criminal Matters in the Commonwealth, (Enactment and Enforcement), Act, 2004 was limited to Commonwealth Countries which did not serve Nigeria's need for global cooperation, a welcome change in the new bill. Despite this change, an exception to the law remains for offences that are 'political in nature and which relate to military offences'<sup>9</sup> which in reality contracts the supposed wide scope of the of the new Law.

### **The Relationship between Extradition and Mutual Legal Assistance**

The premise of extradition and mutual legal assistance is to ensure cooperation on a global scale in the fight against international crime and corruption. While extradition and mutual legal assistance are separate concepts, extradition in itself cannot be conducted without the assistance of the other country as the onus lies with the country hosting the fugitive to decide whether to oblige to the order. Furthermore, extradition is a process which is heavily based on pre-existing agreements or treaties of cooperation between Nations given that the Requested Country ultimately chooses to surrender their jurisdiction to try a criminal. However, there are some instances whereby countries may agree to extradite fugitives, even in the absence of mutual assistance treaties, based on the principles of neighbourliness and reciprocity and further, to avoid becoming safe havens for fleeing criminals. It is clear that in the Nigerian case, extradition and mutual assistance are envisioned as separate mechanisms of prosecuting international crimes committed in Nigeria where the fugitive has sought to escape the Nigerian justice system and vice versa.

### **Effectiveness of Extradition and Mutual Legal Assistance in Nigeria**

Though the legal frameworks in place appear to be instrumental in combating international crimes, it is clear that much more needs to be done in order to strengthen the efficacy of these measures.

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<sup>9</sup> <https://punchng.com/anti-graft-war-buhari-signs-mutual-assistance-bill-to-prosecute-offenders-within-outside-nigeria/>

## **The Political Exception**

The most obvious area of improvement is the political exception. Section 3(1) of the Extradition Act provides that a fugitive shall not be surrendered where the reason is an offence of a 'political character'. Nowhere within the Act is this defined leaving this ambiguity open to abuse by fugitive criminals and various interpretations of 'political character'. This is incongruous particularly for the fact that it is ordinarily the persons holding political office that commit crimes warranting extradition and mutual legal assistance. The absence of a clear definition of this political exception is not unique to Nigeria as countries such as Columbia, the United Kingdom and Ghana have similar provisions thus displaying an inherent problem with such laws.

The original purpose of the political offence exception to extradition was to protect revolutionaries from being returned to their home countries to face prosecution for crimes committed against their governments<sup>10</sup> but given the inherent ambiguity, extradition is wrought with complexities as seen in the case of Augusto Pinochet and Edward Snowden.

## **An Extraditable Offence**

The Extradition Act does not state what constitutes an 'extraditable offence' instead, a definition for a 'returnable offence' has been given in section 20 of the Act. Section 20 reads as follows:

- (1) A fugitive criminal may only be returned for a returnable offence.
- (2) For the purposes of this Act, a returnable offence is an offence, however described, which is punishable by imprisonment for two years or a greater penalty both in Nigeria as well as the Commonwealth Country seeking his surrender.
- (3) Offences described in subsection (2) of this section are returnable offences notwithstanding that any such offences are of a purely fiscal nature under the laws of the country seeking the return of the fugitive and punishable as prescribed in subsection (2) of this section.

Subsection 2 states that such offence must at least be punishable by 2 or more years. This leaves the ambit wide open for any crime to be interpreted as a returnable/extraditable offence, moreover, for arbitrary application. However, as an order for extradition and a request for mutual legal assistance requires cross country commitment, an extraditable offence can be interpreted as a grave crime that the international community disapproves.

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<sup>10</sup> Buckland, A.J. (2006) Offending Officials: Former Government Actors and the Political Offence Exception to Extradition. Vol. 94 California Law Review, page 423.

The gravity of an extraditable order cannot be overstated and given the ramifications of such an order, it is advisable that an enumerative approach be taken by Nigerian Legislators in defining, at the very least, the constituent elements of an extraditable offence.

### **The Necessity of Mutual Cooperation**

As emphasised earlier, much of the effectiveness of these measures depends on mutual cooperation with other countries. It also depends on the global view and perception of the Requested State. It is this bias, coupled with certain evidentiary requirements that have led to the difficulty faced by the Nigerian Government in extraditing and prosecuting the former Minister of Petroleum, Diezani Alison-Madueke. When it appears that the Requesting Country does not itself respect the rule of law in its own jurisdiction, it becomes a mammoth task to persuade countries to follow their international obligations. The recent seizure order of \$9 Billion of the Federal Government of Nigeria's assets, awarded by a UK court to Process & Industrial Developments Ltd, restates this fact. The flagrant disregard of Nigerian Law evidenced by, for example the arbitrary arrest of citizens, suspects and their lawyers can only be a damning indictment of the inability of this country to guarantee fundamental human rights, such as the right to a fair trial. In light of this, it is highly unlikely that any country would wish to assist, talk less of being affiliated with, a country who could abuse the purpose of an extradition or mutual legal assistance order. This poses an area of improvement that would enhance and vastly improve the effectiveness of international cooperation and perception of Nigeria as the Requesting Country of an extradition order.

Similarly, the principle of reciprocity also governs whether an extradition order will be granted. As such, it is concerning that the suit filed by Senator Buruji Kashamu against the extradition request by the United States for drug related charges has remained in the Nigerian Courts for almost two years. Arguably, this delay gives no incentive to any country to cooperate with Nigeria when it comes to their extradition requests as the Requesting Country.

The world order and peace between countries has been maintained, to an extent, thus far. In order to keep positive relationships between states, the establishment of an independent international judicial body should be established to ensure that countries do not pick and choose when to follow their international obligations. The creation of such institution is needed as it is clear that the overreliance on mutual assistance and principles of neighbourliness and reciprocity undermine the strength of international relations. Moreover, an independent international judicial body can be responsible for the conduct of extradition

proceedings so as to overcome the jurisdiction dispute of which country should hear said proceedings.

## **Conclusion**

In summary, there are laws and regulations in place that enable countries to make an extradition request to Nigeria, likewise, treaties have been entered into by Nigeria in order to cement mutual legal assistance. Due to the desire of fulfilling principles of neighbourliness and reciprocity and perhaps the fear of international castigation and scrutiny depending on the perception of the involved countries, many States oblige to such requests. However, it is apparent that further improvements must be made to these existing legal frameworks and our judicial system in order to improve our international reputation and ability to apply for and assist where extradition and mutual legal assistance requests have been made.

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for election into public office, as a violation of the African Charter on Human and People's Rights. In 2016, he was appointed by the Government of the Federal Republic of Nigeria to lead the unprecedented corruption trials of senior judicial officers, including a Justice of the Supreme Court of Nigeria, Sylvester Ngwuta JSC.