# UNIVERSITY OF ZIMBABWE

# MASTER OF LAWS IN INTERNATIONAL LAW


**TITLE: APPLICATION OF THE PRINCIPLES OF EXTRADITION IN THE CASE OF TERRORISM. AN ANALYSIS**

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## DEDICATION

I dedicate this work to The Almighty through him all things are possible and to all the working mothers who are juggling work, home and school.

***"Faith it does not make things easy…It makes them Possible".*** **LUKE 1:37**

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**Abstract**

Operational extradition procedures are an essential tool of international law enforcement in the fight against terrorism, both in relation to local criminal acts and, increasingly, on international territories. In recent years, a number of terrorists attacks have been recorded whilst some terrorists have been apprehended worldwide and have been the subject of extradition requests different requesting States. This research examines the progression of laws relating to the extradition of terrorists across the globe. It puts into consideration whether or not terrorist acts can be regarded as political offenses in terms of the law and the actors not eligible for extradition. International jurisprudence considers the objective of augmenting international responses to the crime of terrorism. The recognition and application of long standing legal principles such as the 'political offence' exception has been diluted over time and the efficacy of other principles, such as the principle of specialty, has been compromised in practice. It can be argued that it is imperative that the progression of international extradition laws have to be balanced against the need to ensure equal protection of the requested persons. However, the fair protection of the fundamental rights of the suspects must not take precedence over the ultimate goal of extraditing and prosecuting the offenders.

*Key words: Terrorism, extradition, political offence exception, state sovereignty, international human rights and extradition cases.*

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# CHAPTER ONE

## 1.1. INTRODUCTION.

Terrorism has posed a global threat for decades thereby creating the need for the global village to create mechanisms and principles in an effort to combat the crime of terrorism. It has emerged through practice that combating terrorism effectively by governments within the respective confines their jurisdictions has become a requirement and most urgent task for many states and governments. Internationally, regionally and domestically obligations have been established among states through treaties, bilateral agreements and domestic laws in a bid to protect the people within their respective jurisdictions from the inevitable threats caused by terrorism. Terrorism poses a direct threat to security both at national and international level and can only be contained by well-established legal and effective principles based on respect for human rights, rule of law and democracy. Established universal norms of human rights ought not to be seen as barriers to the global efforts in combating terrorism and guaranteeing security, but rather should be considered as a mechanism, in itself, to ensure that peace and security are guaranteed in a manner which gives leeway to state co-operation to enable effective prosecutions of perpetrators of terrorism and prevention of the crime.

Extradition is one of the mechanisms used to facilitate international co-operation in the battle to end terrorism. Extradition is a bilateral official process which is regulated by treaties between countries where one State submits a suspected or convicted criminal, in this case terrorist, to another country referred to as the requesting State upon proof that the particular person has absconded from the jurisdiction of the requesting state in order to run away from the claws of justice. Thus, extradition involves a country, surrendering, an individual who has been accused of or convicted of a transgression outside of its own territory, and which is within the jurisdiction of another country, which being capable of trying and punishing that individual, demands the surrender.[1] However in considering the decisions on whether they can effect extradition or the

[1] *Terlinden v. Ames*, 184 U.S. 270, 289 (1902).

transfer of the suspects, the states should not turn a blind eye to the potential challenges which that decision may result in. A choice to extradite may result in violation of a number of fundamental rights of persons including, rights the non-derogable rights to freedom from torture, cruel, inhuman and degrading treatment and the right to a fair trial, the principle of legal certainty and freedom from discrimination inter alia. It is thus crucial that these decisions meet their obligations under international human rights law.[2]

Extradition laws are bilateral and treaty based hence there is no mandatory requirement on a State to extradite a suspect or convict unless both parties are in agreement. There is no law which can compel a State to surrender perpetrators of the crime of terrorism or those who are suspected to be involved in terrorism. The process can only be done by the States who have bilateral agreement to extradition and it is governed by the principles which are clearly laid down and universally accepted. These principles include the principle of double criminality, specialty and political exception. The principle of 'Double Criminality' Principle holds that, a crime should be committed in both jurisdictions concerned for extradition to be done and the 'Specialty' principle asserts that a person whose surrender is sought can only be tried and penalized for the offence for which extradition is sought after and not any other offence. The political exception is to the effect that crimes of a political nature are excluded and that a person must be prosecuted or persecuted for an offense which has been committed and not for his political opinion. Putting these principles together with the contemporary notion of fundamental human rights this research will interrogate extradition as a mechanism to combat terrorism. The applicability of the principles of extradition in eradicating the crime will be discussed and all the dilemmas faced in different situation within the implementation of these principles will be interrogated.

## 1.1 BACKGROUND OF STUDY.

The definition of terrorism is problematic. The degree of the challenge in defining terrorism was expounded on by Ambassador Fields in his accounts before the Judicial Committee when he stated that;

> *[I]f you can define terrorism, you ought to win the Nobel Prize, because we have been grappling with this definition for the last dozen years, to my certain knowledge. I would*

[2] MN Shaw, *International Law 4th edition*, Cambridge University Press, 2008. 204.

*think it would be extremely difficult to find a definition of terrorism that even the United States and Great Britain could agree to. The problem with terrorism is that the cliché ... about one man's heroism being another man's terrorism is operative throughout this entire subject.*[3]

It has almost become common that the definition of terrorism is generally derived from how it is done that defining what really it is because of how difficult it is to define the term terrorism. Terrorism entails attacks by a group of terrorists or splinter groups which are carefully orchestrated on government buildings or on persons involved in government matters, but they may also be directed at causing mayhem in public areas where victims are primarily civilians who are not involved in government operations. [4] Varr & Peristein argue that due to the wide range of political objectives followed by terrorists and the spectrum they follow from violent to nonviolent means in attacks is hard to follow with certainty so as to be characterized as terrorism per se or how it can be defined.[5] The only certainty however, is that terror-violence embodies a two pronged problem, that is the pursuit of political change, by targeting civilians so as to evade open conflict.[6]

Extradition is one of those non-violent measures adopted to combat terrorism in light of the above-mentioned rule. Extradition involves a process of returning persons accused who are found seeking refuge in a foreign state, back to their homelands for prosecution.[7] In the absence of extradition, terrorists can evade justice for crimes by seeking sanctuary in foreign countries that do not authorize it.[8]

In the case of *Terlinden v. Ames* it was held that extradition involves the surrender by one nation to another of an accused or convicted person so accused or convicted of an offense outside of its own territory, and falling under the territorial jurisdiction of the other, which, being capable to try

[3] Supplementary Extradition Treaty Between the United States and the United Kingdom of Great Britain and Northern Ireland: Hearings Before the Sub-committee on the Constitution of the Senate Committee on the Judiciary, 99th Congress.
[4] AC Petersen, 'Extradition and the Political Offense Exception in the Suppression of Terrorism', 1992. Vol. 67 *Indiana Law Journal* 768.
[5] H Varr & G Peristein*, Perspectives on Terrorism*, Brooks Publishing Company 1991. 42.
[6] Petersen (n 4 above) 769.
[7] M Whitemtan, *Digest of international Law* 727
[8] *Proposed Ratification of the Supplementary Treaty: Hearings Before the US Senate Committee on Foreign Relations*, 99th Congress, 1st Session 1 (1985) (statement of Abraham D. Sofaer, Legal Advisor to the State Department)

and to punish him, demands such surrender.[9] In *Factor v. Laubenheimer* it was also stated that, extradition is not a part of customary international law, a state must extradite only when bound to do so by treaty. Both Chief Justice Taney and Justice Thompson indicated that where there is no such treaty, no obligation to surrender exists.[10] This arose as a matter of mutual legal assistance. In the case of *Valentine v. United States ex rel Neidecker*[11] it was stated that the judicial and executive branches cannot of government extradite without authority expressly conferred by treaty or statute.

Resolution number 1373 of 2001 by the Security Council indicated that all States must accommodates one another and afford each other assistance.[12] The resolution requires the States to ensure that any person who engages in the financing, planning, preparation or perpetration of terrorist activities or in backing terrorist acts is brought to book[13] and the States are prohibited from granting asylum to such perpetrators by the resolution.[14] The principle of extradite or prosecute (aut dedere aut judicare) is non-derogable and it gives full effect to the provisions of the resolutions.[15] Professor Bassiouni spoke on the relationship between extradition and foreign relations as follows:

> *Because the requested and requesting participants are states it is clear that there is a nexus between the interests of those respective states and the granting or denial of extradition. In fact, the whole history of extradition has been little more than a reflection of the political relations between the states in question. This explains why whenever a state maintained in its relations with another state a certain degree of formality, extradition was bound in solemn formulas and treaties, but whenever relations between the interested states were informal other informal modes of rendition were resorted to as a sign of cordial cooperation.*[16]

[9] *Terlinden v. Ames*, 184 U.S. 270, 289 (1902).
[10] *Factor v. Laubenheimer,* 290 U.S. 276, 287 (1933).
[11] 299 U.S. 5, 8-9 (1936).
[12] Paragraph 2 (f) of Security Council Resolution 1373 (2001).
[13] Paragraph 2 (e) (n12 above).
[14] paragraph 2 (c) (n 12 above).
[15] This principle is also set forth in paragraph 3 of Security Council Resolution 1456 (2003).
[16] . M. C Bassiouni, *International Extradition and World Public Order*, Sijthoff Doezastraat, 1974. 3.

The United Nations Global Counter-Terrorism Strategy, presented a plan of action of the Member States whereby they resolved to cooperate totally in the fight to end terrorism, in accordance with their duties under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or perpetration of terrorist acts or provides safe havens. Furthermore, States have under taken to ensure that perpetrators of alleged terrorist acts are apprehended and prosecuted, in accordance with the relevant provisions of national and international law, with particular regard to human rights law, refugee law and international humanitarian law.[17]

Article 5 of the African Charter on Human and Peoples Rights provides that; every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. sAll forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited. Similarly, the International Covenant for Civil and Political Rights (ICCPR) provides that; everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.[18] No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[19] In the case of Simon Francis Mann[20] it was held that most jus cogens norms such as torture have occupied a special place in the hierarchy of law as customary international law and are legally binding on every state event though the state is not a party to treaties governing principles of torture. Thus, where there is tangible evidence that a suspect or convict of terrorism might be tortured or inhumanly treated in the requesting state the requested state should not extradite that particular person.

[17] General Assembly resolution 60/288, annex, section II, paragraphs 2 and 3 (see annex I for the text of the resolution).
[18] ICCPR Article 9.
[19] ICCPR Article 7.
[20] HH 1-08.

## 1.1 PROBLEM STATEMENT.

Extradition treaties are very crucial and they aid in combating terrorism. However their effectiveness is limited by the fact that political offenses are excluded in all extradition treaties, protects from extradition political offenders of all types, nonviolent and violent alike, including terrorists.[21] The proven effectcacy of extradition treaties in the containment of terrorism and the desire to uphold the venerable principle of the political offense exception present an irreconcilable dichotomy. The difficulty in using extradition to prosecute individuals accused of terrorism is that most extradition treaties clearly excuse persons accused of political crimes despite the fact that many terrorist attacks are committed to attain political goals. As a result many terrorists often use the political offense exceptions to extradition treaties to thwart and avoiding extradition to jurisdictions where the alleged terrorist acts have occured.[22] This is a major legal problem which needs to be resolved.

## 1.1 MAIN RESEARCH QUESTIONS.

**Research Questions**

1.4.1. How has the problem of terrorism manifested in international law?

1.4.2. How has extradition been used to address the international crimes?

1.4.3. What are the mechanisms which have been put in place as international responses to terrorism?

1.4.4. How are the principles of extradition applicable to terrorism and what interventions can be put in place to eradicate terrorism?

1.5 What are the recommendations which can be made to create effective solutions to curb terrorism?

## 1.1 METHODOLOGY.

This research is uses the doctrinal analysis methodology which is mainly focused on a desktop study. It entails reliance on secondary data sources, that is submitted works in hard and soft copy

[21] AC Petersen, 'Extradition and the Political Offense Exception in the Suppression of Terrorism', 1992. Vol. 67 *Indiana Law Journal* 767.

[22] JJ Kinneally, III, 'The Political Offense Exception: Is the United States-United Kingdom Supplementary Extradition Treaty the Beginning of the End?' 1987. Vol *2 American University International Law Review* 204.

and well as online library resources without undertaking fieldwork. It is a qualitative form of research based on a review of literature, from both primary and secondary sources including treaties, international case law, academic books and journals dealing with extradition in general, and the applicability of extradition principles to terrorism, specifically. Having done so, the research engages in a comparative approach by interrogating on various international treaties, sub-regional and municipal legal frameworks governing extradition. The historical practices and extradition agreements between states will be discussed and analyzed. This methodology will look at the letter of the law, that is an examination of the law as a written body of principles which can be discerned and analyzed using only legal sources. The evolution of the laws relating to extradition and terrorism will be traced from the past and to the contemporary practices.

### 1.1 SIGNIFICANCE OF THE STUDY.

It has been established that terrorism has become the subject of public concern globally and measures have been put in place to reduce the crime of terrorism with extradition being one of the mechanisms established to curb terrorism. Underpinning the law of international extradition of fugitives is a policy of cooperation and courteousy between States.[23] No state on earth can consider itself immune'.[24] Terrorists have commonly evaded prosecution by seeking the assistance of fellow terrorist groups in different countries. In that regard, acts of terrorism will frequently neither be prosecuted nor penalized.[25] In the event that the suspects of terrorism are being sought through extradition request different interpretations have been drawn by the courts and jurists in trying to define terrorism because, by its political nature, it very subjective and have no static definition. Generally, the crime is a political crime in nature making it difficult to be prosecuted under extradition law because of the political exception principle. The procedural requirements and other principles of extradition such as specialty and double criminality principles have been abused overtime thereby rendering extradition law ineffective in combating terrorism. This study is fundamental to the subject of extradition because it will come up with the best interpretations to

[23] I. Shearer*, Extradition in International Law*, Manchester University Press, 1971. 24
[24] Council of the European Union, Brussels, 29 March 2004. (Available from: http://data.consilium.europa.eu/doc/document/ST-7906-2004-INIT/en/pdf, Accessed date: 23.05.2022).
[25] AC Petersen, 'Extradition and the political offense exception in the suppression of terrorism.' 1991 *Vol 67(3) Indiana Law Journal,* 772.

the principles of extradition and bring fourth solutions to the problems which have been so far encountered in the application of principles of extradition in fighting terrorism.

## 1.1 CHAPTER SYNOPSIS.

### Chapter 1

Introduces the study, concisely states the problem to be investigated by this research and gives the background and significance of the study. It will highlight the problem statement that gave birth to the analysis in this paper.

### Chapter 2

Discuses the historical conceptual framework on extradition law under international law in the fight against terrorism. This chapter will give a proper description of extradition as previously experienced at international level. The reason for establishment of extradition is also discussed in this chapter.

### Chapter 3

Critically analyses the international efforts at ending terrorism as a threat to international peace and security. It further sheds light on the nature and scope of the crime of terrorism.

### Chapter 4

Brings to light the practicality of extradition, in the fight against terrorism. The principles governing the application of extradition in situations of terrorism is discussed in this chapter.

### Chapter 5

The first part of this chapter provides some conclusions to this study paper and lastly provides recommendations which can be adopted.

**CHAPTER TWO.**

# EXTRADITION AND TERRORISM UNDER INTERNATIONAL LAW

## 2.0 INTRODUCTION

This is the second chapter of the study and in it the researcher discuses historical conceptual framework on extradition law under international law in the fight against terrorism. This chapter gives a proper description of extradition as previously experienced at international level. The reason for establishment of extradition will also be discussed in this chapter. The chapter is made up of different sections with each section addressing a certain aspect of the foregoing.

## 2.1 EXTRADITION UNDER INTERNATIONAL LAW.

Extradition is a key concept in the current study. Extant literature suggests that one of the major reasons why terrorism has been divorced from politics worldwide is the political offence exception to extradition. The said exception to extradition has traditionally been incorporated in all extradition treaties.[26] Extradition is a consensual legal assistance between two sovereign nations

[26]MC Bassiouni, *International Extradition: United States Law and Practice 4th edition*, Oxford Press, 2001. 512

thus, it lies at the intersection and congruency of international and national law.[27] In extradition proceedings, a request is made by one state to another to have a certain fugitive or suspect surrendered for sentence execution or prosecution. The concept of National sovereignty entails that States must enjoy jurisdiction over those individuals in its territory.[28] As such the state has no duty to exclude aliens or admit them from and to its territory and as such no duty to hand over or extradite upon being requested to do so unless where an explicit treaty exists between it and another state.[29] Thus international law does not mandate extradition.

The 1802 Treaty of Amiens is recognized as the first multilateral treaty which also dealt with extradition. The extradition article of the treaty was however never put into force owing to war. The United States of America and Britain also signed the Webster-Ashburton treaty which contained an article which covered extradition of individuals charged with assault with intent to commit murder, murder, robbery, arson and forgery.[30] Many other treaties at various levels have been signed ever since. Extradition refers to a formal process that involves the relinquishing or surrender of an individual by one sovereign nation to another for the purpose of enforcement of a sentence of criminal prosecution.[31] Extradition serves to enable states to make sure those individuals responsible for certain serious crimes or offences are held accountable which makes extradition an important mechanism in criminal justice. Serious crimes like crimes against humanity, corruption and cybercrimes often see individuals being extradited to the states in which they are expected to face prosecution or serve a sentence.[32] In the same vein, extradition is an essential tool in complementing efforts by states to deal with terrorism among other types of transnational crimes.[33] The interplay between extradition and international law provisions for

[27] Webster-Ashburton Treaty, 9 August 1842; Abbell, 2010, 3. 200 Convention for the Surrender of Criminals between the United States of America and His Majesty the King of the French, 8 State.580 (1844), 9 November 1843.
[28]MI Khavronyuk, Criminal legislation of Ukraine and other countries of continental Europe: comparative analysis, problems of harmonisation. Monograph., 2006. 321
[29] E Kendall, Sanctuary in the 21st Century: The unique asylum exception to the rule, 2014. Vol 23 *Michigan State International Law Review.* 153.
[30]Webster-Ashburton Treaty, 9 August 1842; Abbell, 2010, 3. 200 Convention for the Surrender of Criminals between the United States of America and His Majesty the King of the French, 8 State.580 (1844), 9 November 1843.
[31]The state surrendering the individuals is known as the "requested state" while the state to which the individuals is being surrendered is known as the "requesting state"
[32] The case of Julian Assange is a good example as the journalist and founder of Wikileaks faces a possibility of being extradited to the United Sates. See
[33] Jurisdictional issues are easily addressed thereby allowing states to actively and legally fight impunity.

refugees and asylum seekers rights provide an important insight into the important role that extradition plays. Refuges are protected under the 1951 Convention as well as the 967 Protocol.[34] However the two do not shield individuals that have refugee or asylum seeker status from being held accountable for their crimes. Similarly, the conventions do not preclude extradition of individuals universally.[35]

At best, the special protection needs of an asylum seeker or refugee ought to be fully considered where their extradition is sought. Traditionally, bilateral extradition treaties and national laws have primarily governed extradition relations between sovereign states.[36] However as extradition has evolved over time, the body of rule which are largely reflective of consensus amongst states have seen laws change substantially largely on account of new security concerns and crimes and threats relating to terrorism. Other developments in international law ever since the Second World War ended, have had significant impacts on the jurisprudence pertaining extradition.

Various international anti-terrorism conventions, human rights treaties and other international instruments relating to transnational crimes embody provisions that establish an obligation to extradite individuals that are suspected of having perpetrated certain crimes. These instruments serve to ensure that state parties are in a position to ascertain that undertakings in question are actually offences as define in their criminal law and that the same justify extradition even where extradition treaties are not in place.[37] However individuals that are refuges or asylum seekers enjoy

[34]See the 1951 Convention relating to the Status of Refugees and the 1967 Protocol.

[35] This is also applicable to regional refugee instruments including the 1969 OAU Convention Governing Specific Aspect of Refugee Problems in Africa (hereinafter known as the "OAU Convention") (available at http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b36018), 1984 Cartagena Declaration on Refugees (accessible at http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b36ec) and the 1950 Statute of the United Nations High Commissioner for Refugees which is an annexure to the General Assembly resolution 428 (V) of 14 December 1950 (see http://www.unhcr.org/cgibin/texis/vtx/refworld/rwmain?docid=3ae6b3628).

[36] The legal criteria for the granting of extradition requests are determined based on multilateral or bilateral extradition treaties which apply to the two states involved. This is in addition to the national law of the requested state. National legislation sets down the kinds of crimes for which extradition may be granted (extraditable offences) and well as the grounds for refusal of extradition requests. Guidelines for the requisite evidence and documentation are also provided. Also see Kapferer, The Interface between Extradition and Asylum, UNHCR, Legal Protection Research Series, PPLA/2003/05, November 2003. (http://www.unhcr.org/cgibin/texis/vtx/refworld/rwmain?docid=3fe846da4).

[37] NA Zelins'ka, International crimes and international criminality. Monographic research (Odesa, Ukraine: Yurydychna literature) 2006. 111

certain legal safeguards that are provided for by certain principles as well as provisions that are espoused in extradition law.[38] The suspect or fugitive may actually benefit from the blind application of these restrictions relating to re-extradition from the original requesting state to a third state, the principle of specialty; the political offence exception; the potential granting of extradition on the condition that on conclusion of criminal proceedings the individual concerned returns to the requested state or other longstanding ground for refusal including those that relate to capital punishment or the notion of fairness and justice.[39]

More recently, clauses known as "discrimination clauses" have come into being and these provide that extradition must or may be refused where the same was being sought for political motives or for purposes of discrimination or persecution.[40] Such safeguards that are in extradition law do somewhat overlap with non-refoulment obligations that fall on the requested state based on the international refugee and human rights law.

The concept of extradition is thus an important one in generation and in the current study in particular. The same has evolved over time and straddles both domestic and international law. However, it is one that requires careful maneuvering for the states involved and cases are likely to vary. The current study analyses extradition as applied in terrorism cases. This necessitates a careful analysis of the equally contentious concept of terrorism which is done in the next section.

## 2.2 TERRORISM AND INTERNATIONAL LAW

The term terrorism emerged first during the French Revolution and it was used to describe a system that was facilitated by the Jacobins (*'terrorisme'*).[41] In its original sense the concept described a situation where state instigated and unleashed terror upon its own citizens in a bid to control and pacify them. Though the term has retained its fundamental connection with terror, it has been

[38] Yet non-refoulemt obligations that derive from international human rights law impose bars to extradition under certain circumstances in addition to those that are based in international refugee law.
[39] https://www.unhcr.org/3fe84fad4.pdf.
[40] J Dugard and C Van den Wyngaert, 'Reconciling Extradition with Human Rights,' 1998. Vol 92 *African Journal of International Law* 187.
[41] MC Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 3rd edition, Oxford University Press, 1996. 496.

expanded over time to include violence instigated by private individuals with the intention to intimidate states, groups or citizens. Terrorism can thus be subdivided into three categories which are domestic or internal terrorism by private individuals or groups; state instigated policies of terror domestically applied and international terrorism including transnational violence sponsored by states.[42] The involvement of national governments in terrorism remains a concern to this day both in terms of internal terrorism and transnational terrorism.[43] The third type of terrorism has however received the greatest attention in international law though private individuals are also involved. Terrorism is generally held to be a way of violence which is meant to breed fear so as to serve political ends through coercion of groups of governments into submitting to certain demand normally unacceptable.[44]

From a historical perspective, the actions of partisan which often saw violent resistance in the occupied France during the second World War fall within the general categorization of terrorism despite French forces being hailed as heroes. In the same context and in the contemporary situations, the issue of perspective is evident as will be expounded more in the next section.[45]

## 2.3 DEFINING TERRORISM

As indicated earlier, terrorism is an old phenomenon which has been around for a long time.[46] However, the same has been subject to a serious debate predominantly around the definition of the term. Reaching a consensus regarding the definition of the term is highly important given that failure to reach an agreement on the matter may complicate processes that interact with and depend

[42]LR Beres, 'The meaning of terrorism-Jurisprudential and definitional clarification,' 1995. *Vanderbilt Journal of Transnational Law* 239-240.

[43] State sponsored terrorism internationally is addressed largely under general international law including the principles concerning the responsibility of states for international wrongful acts especially the United Nations General declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res 2625, UNGAOR, 25TH sess, 1883nl mtg, supp no28, art1para 8, UNDocA/8028 (1970).

[44] For example the US Department of State in 2003 identified six states as sponsoring terrorism and these included Syria, North Korea, Cuba, Sudan, Iran and Libya. United States Department of States, 85.

[45]The definitional problems associated with the concept of terrorism are mostly based on the subjective nature of the term

[46] B Ganor, 'Defining terrorism: Is one man's terrorist another man's freedom fighter?', 2002, Vol 3(4) *Police Practice and Research,* 287-304.

on the same including extradition which is of interest to the current study. The absence of a universally accepted definition takes states to an untenable situation. Thus establishing a fitting and comprehensive definition is important.[47] Before addressing extradition laws applied in terrorism cases, the current section deals with conceptual issues around the term "terrorism". Schmid and Jongman provide different definitions for terrorism in their book *Political Terrorism*.[48] The definitions provided are those that were in extant between 1936 and 1981.[49] Golder and Williams indicate that the number of definitions attributed to the terms is higher than that provided by the duo, yet still efforts to come up with a universally accepted definition have failed.[50] It is however clear in retrospect why the endeavour to come up with a single accepted definition has been a futility. One of the main factors that have contributed to this is cultural relativism.[51] This explains the differences in the definition of terrorism from one community to another.[52]

In the same vein, security experts, journalists and politicians have defined terrorism differently. Begorre-Bret notes that failure actually serves communities better as it spurs juridical and ethical relativism.[53] In this regard, it is safe to state that cultural relativism is one of the main reasons for the aforementioned failure to settle for a single definition of terrorism. As claimed by Ganor, without an authoritative and objective description that is accepted by nation states, the fight against terrorism might continues to be impeded by cultural relativism.[54] The challenges here emanates from the endeavor of both academia and practice to come up with a firm definition of terms which are seemingly untenable.

[47] The definition should encapsulate all the important elements, lest loopholes allow certain perpetrators to escape prosecution owing to their action being deemed to fall out of those held to constitute acts of terrorism.
[48] Ganor (n46 above) 288
[49] B Golder & G Williams, 'What is 'Terrorism'? Problems of Legal Definition', 2004. Vol 27 *University of New South Wales Law Journal.* 270.
[50] S Fish, "Don't blame relativism" The Responsive Community, 12(3). 30.
[51] Ibid
[52] AS Schmid, 'The response problem as a definition problem. Terrorism and Political violence', 1992. Vol 4(4). 7.
[53] C Begorre-Bret, 'Definition of Terrorism and the Challenges of Relativism', 2005. Vol 27(5) *Cardozo Law Review* : 1987.
[54] See n53 above

There is always an inclination to expect a universally accepted or objective definition of terrorism hence it is an impossibility due to the purported variability of the term.[55]The logic in the popular cliche: 'One man's delicacy is another man's poison' applies in regard to terrorists with equal force. That is because what may be considered as terrorism by one group of persons may be regarded as freedom fighting or nationalism by another hence based on the describer, the answer regarding who can be taken to be a terrorist changes.[56] Another reason for the lack of a universally accepted and recognized definition is the contestations around the term terrorism as the term has divergent social science, legal, political and popular notions.[57] It can be thus said that terrorism is not just a legal issue as it straddles the scope of both politics and law. Consequently, law is not sufficient in designating the concept of terrorism. The problem may actually be the political side making the same responsible for the definitional variations and resultant definition problems that characterize terrorism to this day.[58] States around the globe widely vary in terms of backgrounds and regimes which may explain the failure to reach consensus regarding the definition of terrorism.

It is important to note that if states define terrorism in a broad sense while other defines the same in its narrow sense, it will be difficult to arrive at a constant and consensual policy.[59] Given the subjective nature of terrorism as a concept, it is difficult to identify and distinguish illegitimate violent from legitimate force or a barbarian from a hero. Suffice to say stakeholders have relied on various ideological and partial characterizations of violence meted by the enemy.[60] An individual or a nation's philosophy thus is where the definition of terrorism is embedded.

National interests have also contributed to the definitional problems around terrorism. In defining terrorism, states focus on their own interests and priorities in relation to national interests and as such the definition of terrorism needs to be disinterested. Failure by states to effectively change their priorities as well as disenable respective political and economic interests waging an effective

[55] Given that the term is highly varied across contexts, many may assume and accept that it is impossible to have an objective and universal definition.
[56]M Howard, *"What's in a name? How to fight terrorism*." Foreign Affairs ,8-13, 10
[57] S Schmid, 'Terrorism-the definitional problem,' 2004. *Vol 36 (2) Case Western Reserve Journal of International Law,* 395
[58] A Devrim, 'Terror Eylemerinin Siyasal Suc Acisindan Degerlendirilmesi. (Evaluation of terrorist acts with respect to political crime).' 2003. 39
[59] Ibid.
[60] Begorre-Bret (n70 above). 1992

war against terrorism won't be feasible.[61] As Begorre-Bret avers, many state nations endeavor to cause disputes and confusion concerning the definition of terrorism as a concept to expand the boundaries for their use of force against their perceived enemies.[62]

Thus the term terrorism has proven difficult to objectively define in a manner acceptable to all stakeholders and various factors have contributed to this. However, some relief and hope abounds in the legal arguments which have been put forward over time and an analysis of these is important in the attempt to conceptualize terrorism for the current study.

### 2.3.1 INTERNATIONAL LEGAL INSTRUMENTS AND TERRORISM

The year 1937 saw the first attempts to provide a definition for the concept of terrorism being made through the League of Nations' Convention for the Prevention and Punishment of Terrorism. The Convention however never got sufficient support to be operationalised and as such the same never came into force.[63] After the year 1963, various conventions and have been made and accepted in the United Nations.[64] Examination of the United Nations Treaty Collections on terrorism including the 1963 Convention on Offences and Certain Other Acts Committed on board Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, one will clearly see that none of the treaties includes a definition of terrorism despite this being important in determining the sorts of acts that would be worth responding to.

In the same vein, the Council of Europe had a convention arranged in 1977 focused on ending terrorism.[65] Ironically, little effort was made to provide a definition for the term terrorism.[66] Further in 1999, which was 20 years later the International Convention for the Suppression

[61] Ganor (n46 above). 290

[62] The war on terrorism fronted by the United States and its NATO partners has been plagued by these challenges as certain entities or individuals have been targeted ostensibly for being terrorists or supporting terrorism.

[63] MT Franck and BB Lockwood, 'Preliminary thoughts towards an international convention on terrorism', 1974. *Vol 68(1) American Journal of International Law.* 70.

[64] G Guillame, 'Terrorism and international law', 2004. *Vol 53(03) International and Comparative Law Quarterly.* 537.

[65] K Watkin, "*Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict*." (2016) 113.

[66] Part I (3) UN GA Resolution Declaration on Measures to Eliminate International Terrorism, annexed to the Measures to Eliminate International Terrorism, UN Doc. A/RES/49/60, 9 December 1994, italics added.

for the Financing of Terrorism was enacted and an effort were made to define terrorism though this was a marked failure to arrive at a universal definition.[67] However, certain regional treaties have come up with general definitions with the main distinction amongst these definitions are so stark that they militate the emergency of the universally shared international conception of terrorism.[68] Further, some of these definitions are wide and are distinguishable from other forms of political violence. On the other hand, the International Court of Justice (ICJ) cites this distinctive nature of the definitions indicating that the absence of a definition has curtailed progress in extradition relating to terrorism cases.[69]

In a case of *Colombia v Peru*[70] at the International Court of Justice held that the treaties are reflective of the great uncertainty as well as contradiction, uniform and constant utilization, accepted as law.

This arrangement may however not put an end to the definitional problem as every state will come up with a definition that is divergent and in line with its own laws. The United Nations Security Council Resolution 1566 conversely makes an attempt to proffer a definition and states that "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined n the international conventions an protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature."[71]

[67] Article 1 (b) Convention for the Suppression of the Financing of Terrorism [Terrorism Financing], UN Doc. A/54/109, 9 December 1999.
[68] B Saul, *Defining terrorism in international law*, Oxford Press. 2016. 190.
[69] Ibid
[70] *Colombia v Peru* ICJ 225 (Oct. 20) 1949.
[71] United Nations Security Council Resolution 1566

Schmid however indicates that the Resolution is not binding and thus lacks legal authority in international law.[72] In the same vein Saul claims that the United Nation Security modified the resolution to adapt it such that a general definition of terrorism is given albeit not clearly couched as a description.[73] Based on the above, certain conclusions reached that there are certain aspects on the concept of terrorism over which parties are in agreement about. Definitions have also been given in academia and these cannot be dismissed as not having practical implication including the general opinion on what would pass off as terrorism. Ganor defines terrorism as the systematic and planned use of violence or threats thereof against civilians or civilian targets so as to reach political goals such as regime change.[74] The definition hinges on three major pillars namely: the use of violence or threats thereof; aiming at achieving political change and the idea that such terrorist acts should be committed against civilians. Another definition is provided by Goodwin whose definition of terrorism is not far removed from the others in that he describes as the strategic and systematic use of violence or threats thereof by certain opposition political groups against a civilian population and in a bid to influence various audiences.[75] The definitions implies that the attack or threat of an attack ought to be able to affect those targeted psychologically forcing them to act in a certain way. The commonality amongst these definitions is the targeting of civilians and the aim of striking fear to influence the audience. Terrorism is thus fully captured in the age-old adage that terrorists want many people watching as opposed to many people dead. The current study conceptualized terrorism as the killing of innocent civilians for ideological, religious or political reasons.[76] Given that political crime is an exception to extradition and yet political motivation is the most important element of terrorism, domestic law and international law may fail to clearly discern what qualifies to be called political crime or terrorism. The latter thus ought to always be clearly defined. The focus of the current study on extradition points

[72] Schmd (n92 above). 38

[73] See Saul, 2005; Young, 2006; Schmid, 2011; Saul, 2012. "Criminal acts intended or calculated to provoke a state of terror in the general.'

[74] Ganor (n62 above). 177

[75] T Sandler and W Enders, *Economic Consequences of Terrorism in Developed and Developing Countries: An Overview,* (2008) 12.

[76] S Hallam University, Dhillon, Sital and Mama-Rudd, http://shura .shu.ac,uk/14529/

to the centrality of terrorism as an international crime. This variant of terrorism is dealt with in the next section.

## 2.4 CONCLUSION

The chapter discussed the historical conceptual framework on extradition and terrorism under international law. This chapter gave a proper description of extradition as previously experienced at international level. The reason for establishment of extradition was also discussed in this chapter. Extradition was shown to be an old and important concept. National legislation however remains an important consideration in extradition matter. Extradition same is important in ensuring that jurisdictional issues do not stand in the way of justice. It also ensures that states can cooperate on cases on mutual interest including the fight against terrorism. However definitional issues that have characterized the concept of terrorism make this cooperation difficult. This is so given that perspective matter in the definition of terrorism and disagreements regarding one's status as a terrorist may mean that cooperation through extradition is impossible. Similarly national interest and a general reluctance to come up with a definition have also arguably contributed to the definitional problems. The term terrorism has however evolved with the emergence of other crimes that fit the description of terrorism. The next chapter critically discusses the nature and scope of the crime of terrorism.

## CHAPTER THREE: INTERNATIONAL RESPONSES TO TERRORISM

### 3.0 INTRODUCTION

This third chapter of the study focuses on a critical analysis of the international responses. That is because terrorism is a threat to international peace and security hence the nature and scope of terrorism will be dealt with again in this chapter.

### 3.1 TERRORISM AND INTERNATIONAL CRIMINAL LAW.

While it seems evident to consider terrorism as an international crime, international has faced difficulties in dealing with the phenomenon as the body of international law is state-centric and has trouble with fitting international individuals or organizations in the picture.[77] Further, the

[77] J Klabbers, 'Rebel with a cause? Terrorists and humanitarian law', 2003. *Vol 14(2) European Journal of International Law*. 299.

usefulness of classifying terrorism as an international crime can be debated. Where such a classification is utilized, terrorism cannot be left to domestic judiciaries to prosecute and rather alls within the international domain offering more protection to the accused as opposed to what domestic laws do.[78] The debate regarding classification of terrorism as an international crime remains alive in international criminal law. The debate was solved in part in 1949 when terrorism crimes committed during armed conflicts were integrated into the Geneva Convention. This Convention prohibits the use of terms like "measures of terrorism" and "acts of terrorism".

Convention outlaws "collective penalties" as well as all "forms of intimidation or of terrorism" while the 1977 Additional Protocol II prohibits "acts of terrorism" against people who are no longer part to hostilities during non-international violent conflict (war). The main import is the emphasis on the prohibition of subjecting individuals or civilian population to any collective punishment which would induce fear and a state of terror. The proclamation of the war on terror in the wake of the September 11 attacks in the United States in 2001, questions were raised regarding whether terror attacks could be held to be an armed conflict that is regulated by International Humanitarian Law.[79] Seemingly, IHL may be able to accommodate these attacks though there is no consensus regarding the same anywhere. Isolated, low-level and sporadic acts of violence are excluded by the IHL.[80] In some cases however, conflict that takes place between a non organized group and a state may become intense enough to evolve into a non international armed conflict.[81]

### 3.2 INTERNATIONAL LEGAL RESPONSES TO TERRORISM.

Terrorism has proven to be a pervasive matter which has attracted a lot of attention internationally. This attention has come with different responses internationally. The current section addresses the international responses to terrorism. This is better understood by looking at the various conventions and laws that have emerged as part of the international response to terrorism.

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[78] SP Du Plessis, 'Because there isn't an international tribunal with competence to prosecute terrorist acts, only states that are in a position to enforce anti-terrorist laws and prosecute the nationally criminalized acts' (2009) 33.

[79] B Saul, 'International convention against the taking of hostages', 2014. *United Nations Audiovisual Library of International Law,* 122.

[80] SP Du Plessis (in 98 above).

[81] Article 4(2)(d) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), 8 June 1977.

### 3.2.1 INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM (1999).

The International Convention for the Suppression of the Financing of Terrorism (hereinafter referred to as the Financing Convention) is arguably the most important development with regards to the attempts to define terrorism. The convention was concluded in the year 1999 and it establishes a treaty framework for the various obligations that United Nations member states assume by operation of Security Council Resolution 1373.[82] The treaty is an important instrument in the endeavour to stamp out international terrorism by depriving perpetrators of the necessary resources. However, it can be noted that the Convention is not divorced from prior counter terrorism convention, in particular the International Convention for the Suppression of terrorist bombings of 1997 (hereinafter referred to as the Terrorist Bombings Convention). Rather it actually follows the convention and also provides a definition of terrorism albeit in a way that is indirect.[83] This is archived in art (1) where the convention lays out acts which qualify as acts of terrorism.

Thus the crime of terrorism is implicitly defined as an act that constitutes an offence as stipulated and set out in one of the counter terrorism conventions of the United Nations or any act that is carried out with the intention to cause death or inflict serious injuries to civilians or any other person not actively participating in the hostilities in an armed conflict with the purpose of intimidating a population or to compel a certain government or international organisation into certain undertaking or abstinence from a certain act.[84] The first part relates to the existing antiterrorism convention of the UN while the second part speaks to the general based on the intention, victims and purpose for

[82] Terrorism Financing Convention, opened for signature 9 December 1999, 2178 UNTS 229, art 14 (entered into force 10 April 2002).

[83] In art 2(1), of terrorism financing: Any person commits an offence within the meaning of this Convention if that individual by any means, indirectly or directly, willfully or unlawfully, provides or collects funds with the intention that they should be utlised or in the knowledge that they are to be used, in full or in part, in order to carry out: (a)An act which constitutes an offence within the scope of and as defined in one of the [UN's twelve counter-terrorism conventions]; or

(b)Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act.

[84] E Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism', 2003. *American Journal of International Law,* 333.

which the acts are undertaken.[85] An attack with intention to kill or injure is already a crime under the national legislations in different territories and the intention to intimidate a certain population or compel a government or international organisation to act or not act in a certain way. The then makes such terrorists' attacks. While the definition in this regard is indirect and somewhat unclear, the same is the closest that the international community has come to defining terrorism. More importantly in the context of the current discussion, the definition is part of a wider international response to international terrorism as it s born out of the desire to combat the same.

On the other hand, the Convention in which the definition is contained is an important Convention in place to date that has culminated from the rising threat of terrorism. As terrorism evolved, some of the acts thereof have become sophisticated which is indicative for the resources that may have been committed to them.[86] The international community in response deemed it necessary to address the availability of such resources in a bid to stamp out act of terrorism.
The covered offences under the Financing Convention are therefore stipulated as the provision or collection of funds by any means, directly or indirectly, with the full knowledge that they will be used to finance terrorist acts within the scope of the treaties listed in the index including the Convention for the Suppression of Terrorist Bombings, or pertinent treaties that are subsequently concluded, or any other act intended to cause harm to a civilian, or any other person not taking active part in an armed conflict with the intent of intimidating a population or compelling a government or international organization to do or to abstain from doing any act; an attempt to commit such an offense; and organizing, directing, participating as an accomplice, or otherwise contributing to the commission of such an offense.[87]

Under the Financing Convention it is a requirement that each State Party has to establish the offenses set forth in under the definitional section, Article 2, as criminal offenses under its domestic laws, to impose appropriate penalties which take into account the grave nature of those

[85] International Convention for the Suppression of the Financing of Terrorism, opened for signature 9 December 1999, 2178 UNTS 220 (which entered into force on 10 April 2002). See: I Bantekas, 'The International Law of Terrorist Financing' American Journal of International Law. 2003. 315
[86] *International Convention for the Suppression of Terrorist Bombing, opened for signature 15 December 1997, 2149 UNTS 284 (which enters into force on 23 May 2001). 462 UNSW Law Journal Volume 27(2).*
[87] See article 2 & 23 of the Financing Convention.

Offences, and to ensure that a legal entity organized under its laws may be held liable, either criminally, civilly, or administratively, when a person responsible for its management or control has committed a covered offense. Jurisdiction of the State Parties over these offences in conferred upon a State Party establishing that over these offenses were committed within its territory, or on board a vessel flying its flag or an aircraft registered under its laws, or by one of its nationals, and when an alleged offender is present in its territory and is not extradited.[88] The Financing Convention also permits a State Party to establish its jurisdiction over these offenses when an offense is directed toward or leads to the commission of a terrorist act in its territory, or against one of its nationals, or against one of its facilities abroad, or in an attempt to coerce that State to do or abstain from doing any act, or when the offense is committed, by a stateless person habitually resident in that State, or on board an aircraft operated by its government.[89]

Under the Financing Convention, each State Party is required to investigate whenever it receives information that an alleged offender is present in its territory and to take the appropriate measures to ensure that person's presence for the purpose of prosecution or extradition. Also requires States Parties to assist one another in any investigation, including, if necessary, by transferring for purposes of giving testimony a person already serving a sentence, and provides that they may not refuse a request for mutual legal assistance on the ground of bank secrecy.[90] The convention does not only permit a State Party to investigate alleged offences but also confers the power to extradite or prosecute the offender(s). Articles 9 and 10 of the Financing Convention requires each State Party either to extradite an alleged offender to another State that has jurisdiction or to prosecute, and to inform other interested States of both the findings of its investigation and of its decision whether to submit the case for prosecution or extradite.[91] Given that terrorism is an organized crime which requires financing, it can be argued that the Financing Convention is very essential in combating terrorism and enhance international co-operation in the fight against terrorism.

[88] Article 7 of the Financing Act.
[89] Article 7.
[90] See articles 9, 12 and 16 of the Financing Convention.
[91] Articles 9 & 10.

### 3.2.1.1 THE FIRST GENERATION OF COUNTER-TERRORISM CONVENTIONS

#### 3.2.1.1.1 CONVENTION ON OFFENCES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT

In the wake of increased cases of hijacking that defined the 1960s in the context of international terrorism. The International Civil Aviation Organisation (ICAO) subsequently sponsored four different treaties with the first one being the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (hereinafter referred to as the Tokyo Convention).[92] The convention applies to all acts which may impact negatively on the safety of passengers, aircraft and crew that are registered in a country or state that is party to the convention.[93] The Tokyo Convention mainly focuses on ensuring that there is clarity regarding the jurisdiction of member-states over offenders to allow for effective exercising of the same. The general import here is that the state in which the aircraft is registered has jurisdiction and should ensure that it can effectively exercise the jurisdiction.[94] A non-contracting state may, however, exercise jurisdiction in the event that its own national are responsible for the offence.[95]

The most striking feature of the Tokyo Convention is it desisting from conferring on any member state the obligation to extradite offenders.[96] Because most extradition treaties refer to crimes committed within the territory of a state, Article 16 states that an offense committed aboard a registered aircraft of a contracting state shall be considered, for purposes of extradition, as if committed not only in the place it occurred, but also in the territory of the registering state. However, Article 16 goes on to say the Convention creates no duty to grant extradition.[97] This clause has an effect of suppressing efforts in extradition and can be abused for political reasons.

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[92] (n 118 above) art 3(2).

[93] (n118) above) art 4(b).

[94] Article 16 *Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971).

[95] D Freestone, 'International Cooperation against Terrorism and the Development of International Law Principles of Jurisdiction' in Higgins and Flory

[96]Article 16 of the Convention on Offences and Certain Other Acts Committed on Board Aircraft, opened for signature 14
September 1963, 704 UNTS 219 (entered into force 4 December 1969).

[97] R.F. Klimek, 'International Law - Convention on Offenses and Certain Other Acts Committed on Board Aircraft - The Tokyo Convention,' 1971. Vol 20 DePaul Law Review 504.

Therefore, this clause is arguably anti-progressive on effective extradition and prosecution of terrorism.

### 3.2.1.1.2 CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT (HAGUE CONVENTION).

The same cannot be said of the Convention for the Suppression of Unlawful Seizure of Aircraft (hereinafter referred to as the Hague Convention).[98] The convention is broader and more extensive than the Tokyo convention. Freestone notes that the convention serves as a framework for most of the counter-terrorism conventions that exist today.[99] The *Hague Convention* criminalises the forceful and unlawful seizure of or an attempt to seizure an aircraft.[100] The Convention requires severe penalties to be given out by contracting parties to the offenders.[101] Further, under the convention contracting states have to make an effort to exercise jurisdiction over an offence committed on an aircraft registered in it or where an offender is on its soil.[102] These provisions in this regard have the effect of establishing universal jurisdiction which is underpinned by a treaty.[103] By operation of the *Hague Convention*, states in which offenders are found on its soil where extradition is not possible, a contracting state is required to expeditiously submit to authorities in its jurisdiction for prosecution without any exception.[104]

The *Hague convention* is the origin of the obligation *aut dedere aut judicare (punier)* which is the obligation to prosecute or extradite.[105] Notably, the same obligation is an outstanding feature of most subsequent counter-terrorism treaties. The obligation takes away from states the right to ignore any offences and offenders. This is important in that it ensures that one way or the other, prosecution is undertaken. It is important to note that the Convention does anticipate non-

[98] (n 118 above) art 16(2). Note however art 16(1) which aims to facilitate extradition to the registering state by providing that offences are taken to have been committed not only in the place of commission, but also in the territory of the state of registration.
[99] D. Freestone (n 124 above)
[100] ( n 123 above) art 1
[101] *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973).
[102] (n123 above) art 3(2)
[103] *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation* (supplementary to the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*), opened for signature 24 February 1988, 1652 UNTS 499 (entered into force 6 August 1989).
[104] (n123 above) article 2
[105] *Hague Convention*, opened for signature 16 December 1970, 860 UNTS 105, art 7 (entered into force 14 October 1971).

compliance by certain states and therefore makes provisions for clearer and wider basis for seeking extradition and having the same granted in art 8.

### 3.2.1.1.3 CONVENTION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION (MONTREAL CONVENTION)

Further, the *Convention of Unlawful Acts against* the *Safety of Civil Aviation* (hereinafter referred to as the *Montreal Convention*) is another treaty that applies to civil aviation.[106] More importantly, the treaty adopts the formula utilised in the *Hague Convention*. The Montreal Convention endeavours to lower the threats to aviation safety through criminalisation of acts of violence committed on board an aircraft which many endanger the safety of the same, damage or destruction of aircraft, placement of any device on board an aircraft which may endanger the safety of aircraft, destruction, damage or interference with air navigation facilities and communication of false information which may endanger the safety for aircraft in flight.[107] The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Airports Protocol) adds two more offences the first one being an intentionally and illegally performance of an act of violence against a person at an airport that services international civil aviation which may cause or which is likely to cause serious harm or damage. The second offence being unlawful and intentionally destroy of seriously damage facilities at an airport or an aircraft located there is such an act endangers or is likely to endanger safety at that airport. The aforementioned offences clearly focus on combating acts of terrorism on aircraft.

### 3.2.1.1.3 INTERNATIONALLY PROTECTED PERSONS CONVENTION.[108]

The Conventions the Internationally Protected Persons Convention (IPP Convention) was promulgated in response to sporadic attacks which were directed to diplomats and a notable event was the dramatic seizure of the US Embassy in Tehran but Iranian students during the Iranian revolution.[109] The IPP Convention in article 2 provides that; 'States must criminalise any threat or actual murder, kidnapping or actual attack on the premises of an internationally protected person or on the person him/herself.'[110] According to the IPP

[106] *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973

[107] (n35 above) article 1(1)(b)

[108] *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*, opened for signature 14 December 1973, 1035 UNTS 167 (entered into force 20 February 1977).

[109] See *US Diplomatic and Consular Staff in Tehran Case (United States v Iran) (Provisional Measures)* [1979] ICJ Rep 7; *(Merits)* [1980] ICJ Rep 3

[110] (N 137 above ) article 2

Convention the head of state, the head of government and the minister of foreign affairs all falls under the category of international protected persons.[111]

### 3.2.1.1.4 TAKING OF HOSTAGES CONVENTION[112]

Just like the Conventions the Internationally Protected Persons, the Taking of Hostages Convention (TH Convention) was also promulgated in response to sporadic attacks which were directed to diplomats and a notable event was the dramatic seizure of the US Embassy in Tehran but Iranian students during the Iranian revolution. The TH Convention clearly articulates the circumstances to be considered for an offence of hostage –taking to be proved. It is asserted that a person commits this offence when he or she seizes or detains someone and threatens to kill, injure or continue to detain the detainee in order to compel a third party either a state, individual or non-governmental organisation to refrain from doing something or perform something so that the hostages can be released.[113] More so, the TH Convention is applauded for being the first Convention to refer to its offences as the serious manifestation if international terrorism.[114]

### 3.2.1.1.5 MARITIME NAVIGATION CONVENTION[115]

This Maritime Navigation Convention (M N Convention) was a reaction to the acts of terrorism that were being committed in the waters and it was catalysed by the seizure of the Achille Lauro cruise liner in the Mediterranean in 1985 by Palestinian militants and the murder of an American passenger.[116] In terms of the MN Convention an offence of terrorism is committed when a person seizes or exercises control over a ship by force, performs an act of violence against a person on board a ship, destroys or damages a ship, places an explosive device on board a ship, destroys or damages a ship, places an explosive device on board, destroys or damages navigational facilities or communicates false information endangering the safe navigation.[117] This is a good convention because it confers power on State Parties to protect people on board on a ship flying its flag, ships within its territory or nationals boarding ships[118] against specified acts of terrorism.

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[111] (n 137 above ) article 1

[112] International Convention against the Taking of Hostages opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983).

[113] (n 138 above ) article 1(1)

[114] (n 138 above ) see the preamble

[115] *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992).

[116] Christopher C Joyner, 'International Extradition and Global Terrorism: Bringing International Criminals to Justice' (2003) 25 *Loyola of Los Angles International and Comparative Law Review* 493, 520

[117] ( n. 144 above) article 3

[118] Article 6 of MN Convention.

### 3.2.1.2 THE NEW GENERATION OF COUNTER TERRORISM CONVENTIONS.

The United Nations never rested but continued to elaborate Conventions on combating nuclear terrorism through the Ad Hoc Committee and working groups of the Sixth Committee.[119] As a result two vital instruments were drafted namely the *Terrorist Bombings Convention*[120] and the *Terrorism Financing Convention*[121].

#### 3.2.1.2.1 TERRORIST BOMBINGS CONVENTION

A closer analysis on these two Conventions reveals that they are only applicable to cases with an international element. The United Nations also worked on the *Draft Comprehensive Convention*.

The *Terrorist Bombings Convention*, made it an offence for a person to unlawfully and intentionally deliver, place, discharge or detonate an explosive or other lethal device in or against a place of public use, a state or government facility, a public transport system or an infrastructure facility with the intent to cause death or serious bodily injury, or with the intent to cause to cause extensive destruction of such a place, facility or system, where such destruction results in, or is likely to result in, major economic loss.[122] More so, a person is held liable for this offence if he or she attempts to commit such an offence, participates as an accomplice in such an offence or organise or directs others to commit such an offence.[123]

The approach adopted by both the *Terrorist Bombing Convention* and the *Terrorism Financing Convention* with regards to jurisdiction over offences, extradition and prosecution of offenders is similar to that one adopted in the earlier Conventions. However, because of their efforts to tighten the extradition regime, these two agreements, along with the *Draft Comprehensive Convention*, can be considered, as a new generation of counter-terrorism treaties. Earlier anti-terrorism agreements protected the functionality of broad laws governing extradition, notably its exclusion for political offenses. However, a change from this can be seen in the next generation of counter-terrorism conventions acceptance of violence motivated by politics and a commitment that cannot refuse extradition based on the claim that the offense was political character. It is clear that none of the offences shall be regarded, for the purpose of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offense inspired by political

[119] The new Convention will supplement the *Convention on the Physical Protection of Nuclear Materials* which seeks to enhance safety in the use, storage and transport of nuclear material by suppressing unlawful acts involving nuclear materials including theft and unauthorised use: *Convention on the Physical Protection of Nuclear Material*, opened for signature 3 March 1980, 1456 UNTS 124 (entered into force 8 February 1987).

[120] *Terrorist Bombings Convention* opened for signature 15 December 1997, 2149 UNTS 284 (entered into force 23 May 2001).

[121] *Terrorism Financing Convention*, opened for signature 9 December 1999, 2178 UNTS 229, art 14 (entered into force 10 April 2002)

[122] (n 148 above) art 2(1)

[123] (n 148 above) art 2(2) and(3)

motives.[124] Therefore, a request for extradition or mutual legal assistance based on such an offense may not be denied on the basis that it relates to a political offense, an offense associated with a political offense, or an offense itself.[125] The purpose of this provision is to make the crimes covered by treaties appear to lack any political justification. Therefore, the clause can be interpreted as an effort to differentiate between legal and terrorist violence and other acts of violence committed by individuals or groups in the name of achieving self- determination or other authorized political.

However, these three Conventions also aim to maintain some defence against politically driven prosecution of accused terrorist. They state that if the arresting state has a reason to believe that the requesting state is seeking extradition in order to 'prosecute or punish a person on account of that person's race, religion, nationality, ethnic origin, or political opinion, or that compliance with the request would cause prejudice to that person's position for any of these reasons," it is not required to extradite or to provide mutual legal assistance.[126]

The combined result of eliminating the exemption for political offenses and adding this new humanitarian exception, which continues to provide an arresting state discretion to decide whether to deny an extradition request, shifts the focus from the specifics of the offense to a more comprehensive analysis of the justice of a criminal trial. The justification for this is that extradition agreements for alleged terrorists may allow politics to have an influence in the extradition of the alleged criminal terrorist. This is a significant change in emphasis from the earlier creation of anti-terrorism agreements.

## 3.3 EXTRADITION PRINCIPLES IN ZIMBABWE

Extradition within the Zimbabwean context is governed by the Extradition Act *[Chapter 9:08]* and the same contains provisions for extradition from and to Zimbabwe.[127] There is two main basis upon which such extradition is undertaken in Zimbabwe. First extradition may be based on an

[124] *Terrorist Bombings Convention*, opened for signature 15 December 1997, ATS [2002] 17, art 11 (entered into force 23 May 2001); *Terrorism Financing Convention*, opened for signature 9 December 1999, 2178 UNTS 229, art 14 (entered into force 10 April 2002)

[125] n 152 above

[126] *Terrorist Bombings Convention*, opened for signature 15 December 1997, 2149 UNTS 284, art 12 (entered into force 23 May 2001); *Terrorism Financing Convention*, opened for signature 9 December 1999, 2178 UNTS 229, art 15 (entered into force 10 April 2002); *Draft Comprehensive Convention*, art 15.*2004 International Criminal Law and the Response to International Terrorism*

[127] See Extradition Act *[Chapter9:08]*

agreement entered into between the Zimbabwean government and another foreign government.[128] Secondly, extradition may be undertaken to and from designated countries. The Act is subdivided into three parts with Part I dealing with extradition in terms of the aforementioned agreements. On the other hand, Part II deals with extradition to and from designated countries while Part II addresses issues like legal representation, evidence and bail at related hearings.[129] Part I of the Act provides that the Minister of Home Affairs may enter into extradition agreements with other nation states though the same should be in accordance with the international treaty obligations of Zimbabwe.[130] However, reciprocity is not a condition in this regard. In the same vein, double-criminality as a rule doesn't apply which means crimes need not be applicable to both the other country and Zimbabwe. Of interest is the in applicability of the political offence exception that is important in the context of extradition as applied to terrorism cases.[131]

This is particularly interesting considering that Part II of the Extradition Act address both the principles of double criminality rules and political offence exception. This means that extradition to designated countries is only permissible where the two conditions are not violated. There is however lack of clarity with regards to the actual legal arrangement under Extradition Part II. This emanates from the fact that the extradition under Part II were largely based on the Commonwealth Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth as agreed up by Commonwealth Law Ministers Meeting of 1966 in London and reviewed at the Commonwealth Law Ministers' Conference in Harare. Zimbabwe leaving the Commonwealth thus contributed to the current state of affairs with regards to clarity on the legal provisions.[132] This will be touched on latter in the paper.

In practice however, Zimbabwe has not been called upon to extradite individuals though the case of Simon Mann among others is well documented.

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[128] The Act incorporates the Vienna Convention on Diplomatic Relations, 1961 and the Vienna Convention on Consular Relations, 1963.
[129] JR Rowland, *Criminal Procedure in Zimbabwe*, 62
[130] Section 3 (N177 above)
[131] The political offence exception is an important consideration in cases of extradition for example in the European Union.
[132] Section 3(2)(a)
212 Ibid.
213 Sections 14 (2) (b) and Section 15 (b) and (c).

### 3.3.1 THE CASE OF SIMON MANN

*Mann v Republic of Equatorial Guinea* is based the arrest of Simon Mann and his accomplice on their way to Equatorial Guinea.[133] They had various weapons and they were believed to have been on their way to topple the government in the West Arica State. Mann was arrested and prosecuted in Zimbabwe for violating the national laws regulating dealings in arms and munitions. While he was serving his sentence, the respondents sought to extradite him from Zimbabwe based on the provisions of the Extradition Act [Chapter 9:08]. The respondents argued that despite Mann having illicitly dealt in arms in Zimbabwe he was on his way to the respondent where he had hatched a conspiracy to kill the head of state or illegally change the country's government. The magistrate's court granted the request resulting in Mann appealing the judgment on the basis of Section 18 of the Act. In the *Simon Mann case,* the court acknowledged that extradition of an individual to a country where there was reasonable risk of being in danger, Equatorial Guinea, would violate Zimbabwe's obligations under the international and regional legal framework and that such an extradition would thus run contrary to and would be prohibited by Section 15(a) which is read with section 17(b) of the Extradition Act. The court however held that, the appellant had failed to adduce the evidence necessary to sustain his appeal on the ground that he would be subjected to torture in the respondent State which led to the appeal being dismissed. Mann was subsequently extradited from Zimbabwe. The implications of this judgment, therefore, are that in the matters of extradition where the suspect alleges torture in the requesting State, his mere assertion will not be enough to convince the requested state to extradite. The suspect should bring tangible evidence to support his assertions. However, it is acknowledged that it is not easy for suspects to adduce such evidence and eventually they will be extradited and exposed to torture.

### 3.3.2 MHARAPARA CASE

In the case of *S v Mharapara,*[134] Mharapara a Zimbabwean diplomat was charged with theft of funds in Belgian francs equivalent to Z$30 449.62. The theft took place in Belgium where the accused was based and attached to the Zimbabwean foreign mission. However, the theft was only discovered after the accused had already returned to Zimbabwe. Upon being brought before the

[133] *Mann v Republic of Equatorial Guinea* (CA 507 of 2007) [2008] ZWHHC 1 (22 January 2008)

[134] The case of *S v Mharapara* 1985 (2) ZLR 211 (SC) 4 SC 79/06 was decided on the basis of the approach enunciated in Treacy's case supra.

High Court of Zimbabwe to face theft charges, the accused argued that the Zimbabwean courts did not have jurisdiction to try the matter as it had taken place in Belgium. The appeal was however dismissed by the Supreme Court on the ground that Zimbabwean court had jurisdiction to handle the matter. Justice Gubbay CJ reasoned that while the law of Zimbabwe provided that only common law crimes committed within the country's borders were punishable, the facts of international life where movement from one country to another was no longer difficult nor restricted, the principle had become less appropriate.[135] He further indicated that technological development had widened the reach of the consequences of crimes which had become unlimited in effect making the territoriality principle culpable of injustice where a crime's constituent elements occur in different countries or locations.

Chief Justice Gubbay also indicated that there was need for a flexible approach to the principle as opposed to the strict adoption of the Anglo-America approach. Consequently, despite the court being satisfied that the constituent elements of the crime has taken place in Belgium, the State was nonetheless entitle to proceed on the indictment and adduce evidence in order to establish the harm sustained by the Zimbabwean government in "this country" as a result of the crime. The implication of the Mharapara case are that it broadened the basis of criminal jurisdiction assumption beyond territoriality with the principle of impact assuming the role hitherto played by the principle of territoriality.

### 3.3.3 THE CASE OF KAPURIRA.

The facts of *S v Kapurira* are that two male Zimbabwean nationals crossed from Zimbabwe into Mozambique on a drinking spree.[136] While they were there, the appellant attacked and fatally wounded his fellow Zimbabwean. The victim despite being brought back to Zimbabwe bled to death from the wound sustain in the attack. The friend was charged with murder in the High Court. The accused appealed and argued that the courts in Zimbabwe had no jurisdiction as the offence was committed in Mozambique. The appeal was dismissed with the High Court arguing that it was competent to try the case given that Zimbabwean courts preferred the approach of jurisdiction being based on place of impact or intended impact. However, jurisdiction in this case was based on the fact that one of the constituent elements of the crime had taken place in Zimbabwe. The

[135] GUBBAY CJ at p 221F-222C,
[136] S v Kapurira 1992 (2) ZLR 17 (S)

court relied on the ruling in S v Mharapara which further shows the implication of the ruling in the Mharapara case.

### 3.4 OVERVIEW BASED ON MAJOR CONCLUSIONS FROM CHAPTER 3.

The UN's counter-terrorism conventions establish extensive and generally effective mechanisms for enlivening the international criminal justice system to address a variety of terrorism-related offenses. Various conventions were formed to in a bid to combat terrorism. The conventions cover acts of terrorism committed in the air, seas and on land. These conventions are built around core provisions establishing universal jurisdiction and an obligation to extradite or prosecute terrorist suspects. Nonetheless, international criminal law remains perplexed when it comes to terrorism as a distinct international crime. In contrast to recognized crimes such as genocide, crimes against humanity, and war crimes, each revolve around a central reasoning or rationale.Terrorism in international criminal law continues to include a variety of offenses relating to specific methods of violence or prohibited targets. Prosecution of terrorism has been made difficult by the failure of the state to agree on the definition of the criminal terrorism and what constitutes an offence of terrorism.

## CHAPTER FOUR: APPLICABILITY OF EXTRADITION IN FIGHTING TERRORISM.

### 4.0 INTRODUCTION.

This chapter is going to focus on the applicability of extradition in fighting terrorism. More so, it will examine the principles that govern the application of extradition in cases where they are allegations of terrorism.

### 4.1 EXTRADITION AS APPLIED IN FIGHTING TERRORISM.

Following the attacks in New York on September 11, 2001, and more recently in Madrid on March 11, 2004, and London on July 7, 2005, the necessity for increased international cooperation to combat terrorism became abundantly clear. This is more so given that advances in transport and communications together with the development of more sophisticated networks meant for clandestine activities have allowed terrorists in the modern age to undertake activities with little

impediment from international borders.[137] Terrorist group members may be trained and equipped in one country only to undertake certain activities in another country.[138] Once such missions are complete, terrorist can actually escape and settle in another country. It is these particular circumstances that make extradition an important tool for addressing the dilemma of international terrorism. Making an extradition request via the appropriate channels allows countries to obtain an offender or suspect on its soil despite them having successfully escaped to another country.[139] In the regard, extradition stands as a symbol of international cooperation in the fight against international terrorism.[140] For instance, French law regards extradition as part of interstate assistance that is meant to stamp out criminality and punish offenders.[141]

Suffice to say western states have seen cooperation amongst states in a bid to stamp out terrorism take centre stage. Efforts in this regard have revolved around general treaties, conventions and resolutions enacted through multilateral and bilateral channels alike.[142] Extradition treaties which are based on the mutuality principle have been at the centre of cooperation amongst states in fighting terrorism. Every time a state obliges to requests for extradition, the chances of the receiving state reciprocating when roles are reversed increases.[143] In addition to facilitating cooperation as noted earlier, extradition lowers international tensions as the high stakes of the requesting country in cases is recognized and acknowledged by the other state.[144] Despite not receiving the same publicity as anti terrorism measures, extradition treaties play a vital role in the

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[137]CC Joyner, Arresting Impunity: The Case for Universal Jurisdiction Bringing War Criminals to Accountability, LAW & CONTEMP.PROBS.153.1996 159-60.

[138] G Isen, *Discourse of Evil: Speaking Terrorism to Silenc*e, http://www.reconstruction.ws/033/isen.htm, citing Alex P Schmid and Albert J. Jongman, that list 22 different elements which figure in over hundred definitions; Political Terrorism: A new Guide to actors, authors, concepts, data bases, theories and literature, North Holland Publishing Co., Amsterdam 1988,p.5.

[139] For example, on December 18, 1973, Arab terrorists attacked a Pan American jet airliner at the Rome airport. Thirty-two persons were killed during the attack. In order to escape, the terrorists hijacked a Lufthansa plane and flew to Athens. They then flew to Kuwait. *See* N.Y. Times, Dec. 18, 1973, at 1, col. **8; *id*** Dec. 20, 1973, at **1,**col. **1.** For an analysis of this incident, see Lillich & Paxman, *supra*note **1,**at 277, 304.

[140] J Mintz, *15 FreightersBelieved to Be Linked to Al Qaeda,* WASH. POST, Dec. 31, 2002, at **Al. 66**

[141] Ibid

[142] JG Starke. *The ANZUS treaty alliance*. Melbourne University Press. (Cited in Giles, B. (1967). "Extradition and International Law." *Auckland University Law Review,***1**(4): 111-129.1965. 111.

[143]M Joutsen, "International Cooperation against Transnational Organized Crime:Extradition And Mutual Legal Assistance In Criminal Matters." *Annual Report for 2000 And Resource Material Series No. 59:* 364. 2002. 366-373.

[144] Ibid

fight against terrorism.[145] Their role in the grand scheme of state cooperation in the fight against terrorism is largely covert.

The front line of this cooperation may be extradition and the transfer of suspects, therefore over the past three years advancements in extradition legislation have received significant attention in Europe and beyond. To ensure that they uphold their obligations under international human rights law, states cannot ignore the potential for violations of fundamental human rights when deciding whether to extradite or transfer suspects, including, among others, the non-derogable right to freedom from torture, cruel, inhuman, and degrading treatment, and the right to a fair trial, as well as the principle of legal certainty and freedom from discrimination.[146] The application of extradition in terrorism cases can be effectively summed up as not being absolute. There are conditions that need to be met for extradition to be applied legally and ethically. However, it is important to first highlight the most important benefits of extradition in this regard besides facilitating greater cooperation.

### 4.1.1 SWIFTER EXTRADITION METHOD BASED ON MUTUAL TRUST AND AGREEMENT

Under the general international law, extradition is so complicated in cases of terrorism due to the absence of the universally agreed definition of terrorism. Thus to speed up this process so as to ensure that the alleged suspect faces justice expeditiously without violating their human rights member state concluded a number of agreements. These vary across regions globally for instance, in Europe, the Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States (EAW) was agreed upon and adopted by the European Union as a crucial component of its "Road Map on Terrorism" to provide member states with a streamlined process for turning over suspects between states.[147] This system has sped up the extradition of criminal suspects, including those accused of terrorist offenses, in part by eliminating the political

[145] SA Williams. "Double Criminality Rule and Extradition: A Comparative Analysis." *Nova Law Review,* **15**(2): 581-624. 1999.582.

[146] OSCE Charter on Preventing and Combating Terrorism, adopted by the OSCE Ministerial Council in Porto, 7 December 2002 (MC(10).JOUR/2).

[147] The EU Framework Decision on the European arrest warrant and surrender procedures between Member States (EAW), 13 June 2002, OJ L 190 of 18.07.2002,

component from earlier extradition decisions (governed, for example, in Europe by the 1957 European Convention on Extradition) and giving judicial authorities the authority to decide whether to extradite someone to a country with an active arrest warrant in another European country. Additionally, it eliminates the criterion for double criminality, or the requirement that an act constitute an offense in both the state asking and the state requesting the action, with regard to terrorist suspects in EU surrenders.

Moreover, extradition arrangements in most cases have relied on the trust established between states. The trust is mostly observable amongst member states in different blocs. For instance EU member states have demonstrated high levels of commitment to upholding the human rights, democracy, and rule of law principles enshrined in the Treaty of the European Union as well as the fact that all Member States are signatories to the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms (ECHR). The EAW expressly emphasizes in paragraphs 12[148] and 13[149] of the preamble that it does not change Member States' duties under international human rights treaties, notably the ECHR. In addition to that article 1(3) of the EAW makes it clear that it will not affect European States' obligations to respect fundamental human rights and principles as enshrined in article 6 of the Treaty on European Union.

These articles make it clear that, as part of the EAW scheme, both the seeking and requested states are required to fulfill both their duties under international treaties and those due to their shared constitutional traditions with regard to human rights. In a nation with an independent and functional court, the system's simplification by eliminating the political component of the decision should allow for an improvement in the protection of individual rights as well as an improvement in the effectiveness of cross-border prosecutions[150]. It is however important to note that where extradition is requested, the arrangement between states and trust enjoyed is not the only consideration or factors. States are bound by other obligations as members of the international

[148] (n 178 above)

[149] (n 178 above) paragraph 13 of the preamble, " No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

[150] *R v Secretary of State for the Home Department, ex parte Rachid Ramda [2002] EWHC 1278 (Admin)* (request from France to UK*)*

community. Thus in the context of regions and bloc like the African Union and the European Union, whether or not the requesting state is a member, judicial authorities can and do prevent surrender when it is likely to result in a violation of human rights.[151]

## 4.2 EXTRADITION AND THE INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

This area is best understood if an examination of some cases of extradited suspects that were dealt with by the European Court of Human Rights is done. These serve as landmark cases in extradition as applied in terrorism cases.

### 4.2.1 THE SOERING CASE.

The case of *Soering v United Kingdom* where the court pronounced that if a state extradites a suspect to a requesting state knowing that the same suspect is going to face serious inhuman or degrading treatment or torture in the hands of the requesting state, it will be found in violation of section 3 of the European Convention on Human Rights.[152] The following obiter by the learned Judge helps to stress this point.

*"Extradition in such circumstances, while not explicitly referred to in the brief and general wording of article 3, would plainly be contrary to the spirit and intendment of the Article and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving state by a real risk of exposure to inhuman and degrading treatment or punishment prescribed by that article."*[153]

Moreover, in relation to the ICCPR, the UN Human Rights Committee has also observed that if a state party extradites a person within its jurisdiction in such circumstances, and if, as a result, there is a serious risk that his or her rights under the Covenant would be infringed in any way, shape, or form the State Party may be in breach of the Covenant if it enters into another jurisdiction.[154]

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[151] *Irastorza Dorronsoro No 238/2003, Judgement of the Court of Appeal of Pau of 16 May 2003* (request from Spain to France).

[152] *Soering v the UK,* (1989) 11 EHRR 439.

[153] (n 184 above)

[154] *Chitat Ng v Canada*, Communication No. 469/1991, UN Doc: CCPR/C/49/D/469/1991, para 14.2; in the same vein, see also General Comment 20, 10 March 1992, para 9, and General Comment 31, 26 May 2004, para 12.

Further, in the European context, the ECtHR is one of the most notable authorities that confirmed the application of the *Soering* principle to an extradition case in *Chahal v. UK*.[155] The ECtHR held that there was sufficient evidence that there was a real risk of the suspect being ill-treated and underscored that returning the suspect under these circumstances was tantamount to breach of Article 3 of the ECHR. The Article had no exceptions for deviation even in times of national emergency. This was entrenched in Article 15 which provides that the prohibition that is provided for in Article 3 against ill-treatment equally applies and is absolute in extradition cases. Therefore in any case where there are substantial grounds shown to believe that an individual may face real risk of being subjected to treatment that is contrary to the provisions of Article 3 if handed over to another State, the contracting State's responsibility to safeguard him or her against this kind of treatment is engaged in cases extradition. In such cases, the individual in question's activities, however undesirable or dangerous, can't be a material consideration. Thus the protection that is afforded by Article 3 is much wider than that which is provided by Article 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.[156]

### 4.3 DIPLOMATIC ASSURANCE.

Expectedly, the recent past has seen a lot of attention and debate on diplomatic assurances and extradition of suspects in terrorism cases. Government has faced dilemma on how to handle foreign suspects in terrorism cases particularly those that they have not managed to successfully prosecute for some reason.[157] One of the main issues in this regard is the nature of evidence which is often intelligence evidence that is inadmissible in courts of law, possibility of ill-treatment and torture in the suspect's country of origin as well as lack of a willing and safe third country to accept

[155] ECtHR, Chahal v. UK, 5 November 1996. The case related to the potential deportation to Inda of a certain Sikh nationalist that had proven to the courts that he had been previously tortured by Indan authorities.

[156] *Chahal*, para.80. Accordingly, th Court reject the claim by the British government that it was possible to modfy the *Soering* obligation could be modified to incororpate national security considerations (Chahal was suspected of engaging in acts fo terrorism in the UK, though there was no conviction), nor would the obligation have been relevant as a consideration had it actually been shown that Chahal had committed the acts of terrorism. See *Chahal* Spec. paraa. 75-82.

[157] C Eagleton, International Law Association Meeting at Dubrovnik. Cited in MC Bassiouni, "Theories of Jursidiction and Their Application in Extradition Law and Practice." *California Western International Law Journal,* **5**(1): 2001.4.

suspects.[158] Countries have considered solutions like the adoption of stricter security laws as well as signing of memoranda of understanding with countries that are willing to receive suspects in terrorism cases.[159] For instance, the UK anti-terrorism, Crime and Security Act that was enacted in 2001 represent an attempt to deal with the issue as it allowed the government to detain suspects indefinitely without crime particularly for terrorism cases thereby deviating from the provisions of Article 5(1)(f) of the ECHR.[160] However, the UK's apex court (the House of Lords) held the legislation to be in violation of the country's human rights obligations as it applied only to foreign suspects held in the country.[161]

The judgment in the UK has since prompted states to explore other ways of dealing with the problem albeit in a manner that is consistent with human rights provisions at all levels. The exploration has culminated in the development of a debate relating to different complex issues which involve different international actors including the European Court of Human Rights and United Nations Special Rapporteur on Torture.[162]

Diplomatic assurances are used as a safeguard against violation of human rights by the requesting state in extradition transactions where the requesting state will assure the extraditing state that upon receiving the requested suspect it is going to uphold, respect and protect fundamental human rights and freedoms of that suspect.[163] The Kaplan case provides important insights on this.

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[158] See report to the UN Genenral Asemply Third Committee by the United Nations Special Rapporteur Professor Manfred Nowak (26 October 2005, available at http//www.un.org/News/Press/docs/2005/gashc3830.doc.htm

[159] For istance, the UK is signatory to a memorandum of understanding with Jordan singed 10 August 2005 (refer to Human Rigts Watch press release, UK/Jordan: Torture Risk Makes Deportations Illegl, London. 16/08/2005. Avaailabe at http://hrw.org/english/docs72005/08/16/jordan11628.htm)

[160] C Begorre-Bret, "Definition of Terrorism and the Challenge of Relativism."*Cardozo Law Review,* **27**(5): 1987-2004. 2005. 1993.

[161] B Ganor, "Defining terrorism: Is one man's terrorist another man's freedom fighter?" *Police Practice and Research***, 3**(4): 287-304. 2002. 290.

[162] S Fish, "Don't blame relativism." *The Responsive Community*, **12**(3): 27-31.2009. 30.

[163]Human Rights Watch, *"Diplomatic Assurances" against Torture - Questions and Answers*, at http://hrw.org/backgrounder/eca/ecaqna1106/; HRW, *Still at Risk - Diplomatic Assurances No Safeguard Against Torture*, at http://hrw.org/reports/2005/eca0405. More publications on the topic of diplomatic assurances may be found in the websites of other NGOs, such as Amnesty International ('Diplomatic assurances'–No protection against torture or ill-treatment at http://www.amnesty.org.ru/library/pdf/ACT400212005ENGLISH/$File/ACT4002105.pdf)andInternational Helsinki Federation for Human Rights (Counter-terrorism measures and the prohibition on torture and ill-treatment - A briefing paper on developments in Europe, Central Asia and North America, November 2006 http://www.ihfhr.org/documents/doc_summary.php?sec_id=58&d_id=4343).

### 4.3.1 CASE OF KAPLAN.

In the case of *Metin Kaplan* the German court refused to hand over *Kaplan* to Turkey even if the latter had assured the former that it is not going to violate his human rights and fundamentals as provided in all international human rights Conventions and treaties or Agreements.[164] In this case it was held that Turkey was likely to torture Kaplan or treat him in an inhuman manner considering the seriousness of the crime he was facing as well as what previously happened when he was in prison.[165] Therefore, it can be deduced that even if the requesting state assured the extraditing state that it is not going to violate the rights of the suspect just to be given the wanted suspect, the extraditing state can refuse to extradite that suspect if there are likely chances that the requesting state may violate the rights of the suspect despite the assurance.

### 4.3.1 CHAHAL CASE.

In the *Chahal*[166] case, the European Court of Human Rights ruled that the assurances given by the Indian government regarding the likely treatment of Chahal were he to be extradited were insufficient in reducing the risk of ill-treatment that the suspect faced. the European Court of Human Rights in the *Chahal* case passed the following remarks with regards to diplomatic assurance, "*Although it did not doubt the Indian government's good faith in providing the assurances... it appears that, despite efforts by the government, the NHRC, and the Indian courts to bring about reform, Human rights violations by members of Punjab's security forces and elsewhere is a stubborn and persistent issue. In opposition to this In light of this, the Court is skeptical that the above assurances will be fulfilled to provide Mr. Chahal with a sufficient level of security*."[167]

This judgment is worth emphasizing as Article 3 did not just protect against State torture but rather extended to cases where the State's control of its security apparatus' the everyday practices was curtailed or in doubt. The Chahal principle has since been extended so that it covers situation where the individuals that is to be extradited has reasonable fear that they will be ill-treated by non state actors.[168] It is important to note that the capacity of States to guarantee the security of suspects

[164] Kaplan 4 Aus (a) 308/02-147.203-204.03111, 27 May 2003
[165] n 188 above
[166] *European Court of Human Rights, Chahal v. UK*, 15 Novemeber 1996.
[167] *ECtHR, Chahal v. UK*, 15 Novemeber 1996
[168] A Schmid, "Terrorism-the definitional problem." *Case Western Reserve Journal of International Law,* **36**(2-3): 375-420. 2004. 359.

extradited to them will not be easily dismissed by the courts at all levels. Courts will endeavor to assess circumstances and determine whether a suspect deserves protection against extradition. While an important principle in the current context, the Chahal principle has ignited debate recently and it has been challenged with the case of *Ramzy v. Netherlands* being a good example interventions on which have challenged the principle.[169] Ramzy and acquitted suspect in a case where a cell encouraged young Muslims to take part in suicide mission brought the case against the Netherlands. Mohammed Ramzy was unsuccessful in claiming asylum and challenged a decision to deport him arguing that he would be politically persecuted in Algeria.

Diplomatic assurances have however been effectively applied through the insertion of important provisions in the interest of safeguarding the rights of suspects.

### 4.3.2 CASE OF AGIZA AND ALZERY.

This is a case in which Egypt sought to extradition of the suspected terrorists.[170] Based on a memorandum of understanding between Sweden and Egypt, the suspects were extradited to Egypt after Egypt provided assurances that he would not face the death penalty nor would he be mistreated or tortured.[171] There were also guarantees of a fair trial. More interestingly, the agreement provided for regular visits by Swedish diplomats to the suspect.[172] This is interesting in that it addressed concerns raised by the Council of Europe Commissioner of Human Rights regarding the inadequacy of assurances that had little in terms of mechanisms for enforcing the same.[173] However, the Special Raportuer on torture dismissed the mechanisms in the Agiza case

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[169] *Agiza v. Sweden,*CAT/C/34/D/233/2003,24 May 2005, para 13.8. This jurisprudence may be deemed consolidated, for example see *Tapia v. Sweden*, CA/C/18/D/39/1996, 28 April 1997,para. 145. Similarly, in *Alzery v. Sweden,* Communication No 1416/2005,CPR/C/88/D/1416/2005, 10 Nov 2006, paara 118. HRC ruled that article 2 of the Covenant read together with article 7 does require an effective remedy for any violation to the latter provision. By nature of refoulement, effective review of certain decision in favour of expulsion to arguable risk of tortureshould have an opportunity to be held before expuslsion so as to avoid irreparable damage to the individuals and rendering the review meaningless and otiose. The lack of oppotuntity for effective reviewof the expulsion decision thereforewas tatamount to a breach of artice 7 as read with article .

[170] PL Griset and S Mahan, *Terrorism in perspective,* California: Sage Publications, Inc.2003. 13.

[171] B Saul, "*Defining terrorism in international law*." New York: Oxford University Press Inc. 2006. 190.

[172] G Guillaume, "Terrorism and international law." *International and Comparative Law Quarterly*, **53**(03): 537-548. 2004. 537.

[173] Similalr conclusios were reached by the Human Rights Committee in Alzery, "The existence of diplomatic assurances, their cotent and the existence and implementation of enforcement mechanisms are all factual elemtnes relevant to the overall determination of whether, in fact a real risk of proscribed ill-treatementexists [⋯]. Nor were any arrangements made outside the text of the ssurances themselves which wuld have provided for effective implementation[⋯] the State party has not shwn that the diplomatic assurances procurd were in fact sufficient in

as being insufficient particularly against manifest risk of ill-treatment and torture. Furthermore, in as much as states would like to rely on diplomatic assurances in a bid to necessitate extradition of suspected terrorist in a manner that do not violate their human rights, the system has its limitations. This can be noted from the Council of Europe (CoE) Commissioner of Human Rights' statement which reads as follows, *"diplomatic assurances, in which receiving states promise not to torture particular individuals if returned, are categorically not the solution to the conundrum of extradition or deportation to a country where torture has been practiced. Such promises lack credibility, and they have proven to be ineffectual in cases that have been well-documented. Since the concerned governments have already broken legally binding international standards, it is simply unacceptable to put anyone at danger of torture on the pretext of breaking an even less solemn promise to make an exception in a specific circumstance."*[174]

From this discussion it can be concluded that whenever extradition is performed the extradition state must be conscious of the non-derogable fundamental human rights and freedoms the alleged terrorist such as a right to freedom from torture, inhuman treatment and a right to human dignity. Thus, it is the obligation of the extraditing state to ensure that the requested suspect will not suffer any violation of the said rights in the hands of the requesting state.

## 4.4 EXTRADITION OF TERRORISM SUSPECTS AND THE POLITICAL OFFENSE EXCEPTION.

The advent of the Political Offence Exception to extradition has its roots in the practice of granting asylum to criminal offenders. Though the asylum privilege was afforded to different criminals, it wasn't extended to political offenders as political crimes were viewed as being intolerable from the perspective of the community and the gods worshipped by the community.[175] As legal principles evolved, besides fostering extradition as a new concept, efforts were also made to advance the position that those that were victims of religious and political persecution needed to be somehow protected.[176] Thus political offences replaced common crimes as requiring special

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the present case to eliminate the risk of illtreatment too a level consistent with the requiments of article 7 of the Covenant. The author's expulsion thus amounted to violation of the covenant,".

[174] T Hammarberg, CoE Commisioner for Human Rights, Torture can never, ever be acceptd, available at http://www.coe.int/t/t/commissioner/Viewpoint/060626_em.asp

[175] E Rosand, "Security council resolution 1373, the counter-terrorism committee, and the fight against terrorism." *The American Journal of International Law*, **97**(2): 333- 341. 2003. 333

[176] BM Jenkins, "The new age of terrorism." *Terrorism and Political Islam*. 2006. 26

protection for the individuals concerned. The development of revolutionary political ideology in the 18th century further buttressed the political offence exception.[177] Let's not dwell much on the historical evolution of the exception. In the context of the current discussion, doctrinal hesitations have emerged in relation to tits applicability to terrorism cases of extradition. The main tests have emerged in the regard particularly from the jurisprudence of courts in handing the problem of definition of a political.[178] This is important in the determination of whether an act of terrorism qualifies as a political offence for extradition purposes.[179] The first is the Anglo-America test where crimes committed with the aim of furthering political disturbance are held to be political crimes. On the contrary, the Swiss test holds a crime to be a political crime if the political elements outweigh the common ones. The two thus are in contrast to each other.

The third test is however the most flexible and this emanates from the judgement by French courts which indicated that political crimes are those that directly injure rights of the state i.e. Purely political crimes. This is also known as the objective test and it is the most restrictive in this regard.

### 4.4.1 CASTION COURT RULING.

The Castioni court made a landmark judgement culminating in the Anglo-American test as the divisional court rejected an extradition request by the Swiss government in respect of a suspect accused of launching an attack on government building with one official being shot.[180] The court argued that the offences qualified as political offences as they were incidental to and formed part of political disturbances or furtherance of the same.[181] In contrast, the divisional court granted extradition in a case of an anarchist that bombed army barracks and a café despite arguments that

[177] DS Polat, "Uluslararası Terörizmle Mücadele Yaklaşımları." *Ankara Üniversitesi Sosyal Bilimler Dergisi,* **6**(1). 2017. 121.
[178] AP Schmid, "The Revised Academic Consensus Definition of Terrorism." *Perspectives on Terrorism***, 6**(2): 158-159. 2012. 158.
[179] D Garcia-Mora, The Nature of Political Offenes: A Knotty Problem of Extradition Law, 48VA.L.Rev. 1226, 1240-56(1962).[Vol,3).
[180] B Rumelili & B Boşnak, "8 Taking stock of the Europeanization of civil society in Turkey. *The Europeanization of Turkey: Polity and Politics*, 127." 2015. 136.
[181] H Chiappetta, "Rome, 11/15/1998: Extradition or Political Asylum for the Kurdistan Workers Party's Leader Abdullah Ocalan." *Pace International Law Review,* **13**(1): 117-150.2001. 125.

the attacks targeted government property.[182] The absence of two different parties seeking to impose their own government that made the anarchist an enemy of all governments was cited as the reason. In the same vein, the Ezeta case saw the United States reject a request by the Salvadorian Government in respect of murder and robbery suspect. The reasoning was that the crimes had been committed in efforts to thwart an uprising and as such were political offences.

### 4.5 RENDITIONS AND EXTRADITION.

Persons suspected of terrorist or criminal activity may be transferred from one State (i.e., country) to another to answer charges against them.[183] The surrender of persons to a requesting State to answer criminal charges was originally guided by principles of comity and reciprocity. Beginning in the late eighteenth century, the surrender of persons to a requesting State to answer charges increasingly became governed by formal extradition treaties between States (though the practice of extradition can be traced back to antiquity).[184] The surrender of a fugitive from one State to another is generally referred to as rendition.[185] Extradition is in fact a distinct form of rendition under which one State surrenders a person who is facing criminal charges within its territorial jurisdiction to another State, requesting State, via a formal legal process which is typically established in terms of the treaties between the two countries. However, the serious danger with renditions is that they may be effectuated even in the absence of extradition treaties between the countries.[186] The terms "irregular rendition" and "extraordinary rendition" have been used to refer to the extrajudicial transfer of a person from one State to another, generally for the purpose of arrest, detention, and/or interrogation by the receiving State (for purposes of this report, the term "rendition" will be used to describe irregular renditions, and not extraditions, unless otherwise

[182] T Köprülü, "Yeni Türk Ceza Kanunu Bakımından Suçluların ve Sanıkların Geri Verilmesi" *Hukuki Perspektifler Dergisi*, sayı:4, s.221-229. ('Evaluating Extradition in the Light of New Turkish Criminal Code', *Legal Perspectives Journal, 2005. 128.*

[183] MJ Garcia, 'Renditions: Constraints Imposed by Laws on Torture', (2009) CRS Report for Congress, 1.

[184] CRS Report 98-958, Extradition To and From the United States: Overview of the Law and Recent Treaties, by Charles Doyle.

[185] BLACK'S LAW DICTIONARY 1298-99 (7th ed. 1999).

[186] See *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999) (upholding surrender of Rwandan citizen to international tribunal, when surrender was authorized via executive agreement and implementing statute rather than treaty).

specified).[187] Unlike in extradition cases, persons subject to this type of rendition typically have no access to the judicial system of the sending State by which they may challenge their transfer.[188] As highlighted in the previous chapters, extradition is a legal process whereby one state can request the delivery into its custody of a person accused of committing a crime against its laws whilst within its territory.[189] Extradition is usually governed by bilateral agreements or multilateral agreements which set out the requirements of the extradition process and also the procedures to be followed. The requested state always bears duty t either prosecuted or extradite. In Extradition there are guarantees and obligations. However, rendition is a process which can consist of wilful taking of suspected terrorists into custody through illegal means such as abduction, followed by forceable detention and transportation under the induced influence of drugs, to facilities that are well-nigh untraceable at undisclosed destinations.[190] Public scrutiny and the oversight of the law cannot reach them, with no assurances required from receiving state.[191] After transfer the suspects are detained indefinitely without trial, and the governments involved often deny their involvement and any knowledge of the state of well-being of the detainees.[192] There will be absolutely no humanitarian aid groups or legal representation allowed throughout and after such detention.[193] Clearly, rendition process violates the rights of the suspects especially rights to fair trial, protection of the law and torture. The provisions of Convention Against Torture[194] (CAT) which are universally applicable in times of peace or war clearly states that;

> *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.*[195]

[187] Garcia (CRS Report for the Congress above), 1.
[188] Doyle (CRS Report 98-958 above).
[189] J Dugard, *International Law: A South African Perspective*, 4th Edition, 214.
[190] J Retief, Extraordinary rendition in international law: criminalising the indefinable? LLD Thesis(2015) 40.
[191] D Marty, 'Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report' (2007) *Report Committee on Legal Affairs and Human Rights Parliamentary Assembly Council of Europe* Doc 11302 at 22-23, 47.
[192] J Ross, 'Black letter abuse: the US legal response to torture since 9/11' (2007) *Vol 89 International Review of the Red Cross* 562.
[193] E Sepper, ' The ties that bind: How the constitution limits the CIA's actions in the war on terror' (2006) *Vol 81 New York University Law Review* 1807.
[194] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984).
[195] Article 3 CAT.

CAT requires signatory parties to take measures to end torture within territories under their jurisdiction, and it prohibits the transfer of persons to countries where there is a substantial likelihood that they will be tortured.[196] Torture is a distinct form of persecution, and is defined for purposes of CAT as "severe pain or suffering ... intentionally inflicted on a person" under the color of law.[197] Accordingly, many forms of persecution—including certain harsh interrogation techniques that would be considered cruel and unusual during renditions do not necessarily constitute torture, which is an extreme and particular form of mistreatment.[198] HOWEVER, CAT obligates parties to take measures to prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture," but this obligation only extends to acts occurring in territory under a State Party's jurisdiction.[199] In the case of *Agiza v Sweden*[200], Sweden was found guilty by the Committee against Torture for transferring the plaintiff to Egypt because the plaintiff was placed on a CIA operated flight where he was subjected to torture. Sweden breached its obligations under article 3 and 22 of CAT. Extradition, therefore, is a better legal channel which can be adopted in the fight against terrorism because of its legal and formal nature than the informal rendition process. Although there is room for human rights violations under both processes it can be argued that human rights of the suspects of terrorism are better preserved under extradition because suspects are afforded their right to be heard and also guarantees are given by the states involved.

## 4.6 ZIMBABWEAN LEGAL FRAMEWORK

Zimbabwe and Africa Union have been at odds with ICC on the principle of universal jurisdiction. The former argue that the principle of universal jurisdiction sound not supersede national jurisdiction and should not be abused for political ends. Zimbabwe has for a long time been of the view that universal jurisdiction has utility as a way of combating impunity and holding perpetrators of serious crimes to account. Hence Zimbabwe being a party to the Geneva Convention. Article 4(h) of the Constitutive Act informs Zimbabwe's position at continental level. The Article relates to the African Union's right to intervene in a member state to stop war crimes, genocide and crime against humanity. As such Zimbabwe enacted Extradition Act [Chapter 9:08 so as to comply with

[196] Art 2.
[197] Ibid Art 1.
[198] CRS Report RL32438, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques,* by Michael John Garcia.
[199] Art 37 CAT.
[200] *Agiza v Sweden* (2005) Committee against Torture CAT/C/34/D233/2003.

the aforementioned international obligations in the fight against terrorism. According to the Act extradition in Zimbabwe is agreement based. There should be an existing extradition treaty between Zimbabwe and the requesting treaty.[201] The Act empowers Zimbabwe to enter into an extradition agreement which may relate to—

*(a) any offences whatsoever, whether or not they are offences in both Zimbabwe and the foreign country concerned and whether they were committed before, on or after the date of commencement of the extradition agreement; and*

*(b) Any persons whomsoever, whether or not they are nationals of both Zimbabwe and the foreign country concerned.[202]*

The other imperative feature of the legal framework of Zimbabwe is that I afford the perpetrators right of audience in court to challenge their extradition and also the rights to appeal in the event that they are not satisfied with the findings of the courts. The Zimbabwean legal framework, although no exhaustive, presents a good standard is as far as the extradition of offenders in concerned.

## 4.7 CONCLUSION.

Terrorism is like many other crimes a menace to the society. International terrorism in particular however poses challenges in the efforts to stamp out such crimes and prosecute those involved. Extradition of apprehended suspects is an important means through which states can collectively respond to the situation. There are however various issues that need careful consideration when seeking to extradite suspects. These including the human rights obligation of the states involved which may actually preclude extradition. Other exceptions like the political offence exception are also important in this regard. However, some of these may actually be abused to prevent individuals from facing justice or to settle political score and act outside the bound of the law. Thus while extradition may be applicable in the fight against terrorism, the same is condition on various aspects.

[201] Section 3 of the Extradition Act.
[202] Section 3 (2).

## CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

### 5.1 INTRODUCTION.

This chapter concludes the study and pursuant to this, the study's main argument is restated and summarized together with the findings of the study. Further, recommendations are provided based on the findings of the study.

### 5.2 SUMMARY OF MAIN FINDINGS.

The study argued that extradition treaties have an important role to play in facilitating international cooperation in the fight against terrorism. However, the study was cognizant of the various challenges in the application of extradition in this regard. Chief amongst these is the human rights obligations that states have as members of the international community as well as the political offence exception to extradition. The study argued that exception of this nature should be applied

carefully as they may constrain the use of extradition in fight terrorism. The study found that terrorism by nature is a complex concept that is marred by different definitional issues and these may present challenge sin the application of extradition in the fight against terrorism. Particularly, the lack of a universally accepted definition and the particularities applicable all contribute to difficulties in securing extradition of suspects in terrorism crimes. However hope lies in the noted ole of trust amongst states in different regions which may actually encourage cooperation. Such cooperation is notable in the international community has various states are contracting states to different conventions and treaties that are at the core of the international community's response to terrorism.

These are varied in terms of time horizons and forms of crimes that they seek to address. However, they make an important contribution by ensuring that state parties do not abdicate their duty to prosecute. As such they require states to either prosecute or extradite through the principle of *aut dedere, aut judicare.* This was operationalised through the Hague invention and has become a centerpiece of the subsequent treaties and conventions meant to foster international cooperation in the fight against terrorism. The role of extradition is in this regard very clear as it is the main tools that the Treaties and Conventions put forward.

However, findings show that while extradition is a long established concept that has proven important in overcoming jurisdictional issues that may stand in the way of effective delivery of justice and prosecution in general, its application is not absolute. There are conditions to the application of extradition in the fight against terrorism. The study found that human rights obligations that states do have in international law and other applicable conventions are an important consideration in the application of extradition in the fight against terrorism. Various landmark cases like the *Chahal case* bring to the fore the role of human rights considerations which manifest through different principle including the principle of non refoulment. That one is a suspect doesn't take away their human rights and as such these will be considered and even when evidence is overwhelming that they need to be extradited in order to face trial, one may actually be served from such extradition by evidence that they may be endangered by any such extradition. The rights of individuals that are guaranteed at international law are thus an important consideration. States however have remedy in the form of diplomatic assurances to the state

holding a suspect. These assurances can help allay any fears that a suspect may face any danger if extradited.

However, these have themselves proven to be far from a panacea especially given the subjective nature of determination on whether these are sufficient or not. The *Chahal case* for instance shows this to be true as assurances by the Indian government were deemed in inadequate based on the view that the government may not be able to micromanager their security apparatus on a day-to-day basis. Interestingly, even where mechanisms are in place to enforce the assurances given, they may still be deemed inadequate and as indicated in the extradition has proven difficult to secure where the human rights laws are invoked. For instance, the *Agiza case* is a typical example of how even enforcement mechanism may be deemed insufficient to ensure respect for a suspect's rights.

The same challenges abound in the application of the political offence exception to extradition. While this exception may be grounded in noble foundations in relation to preservation of human rights and prevention of abuse of the justice system, it is open to abuse and my actual constrain the application of extradition in the fight against terrorism. Underpinning this is the subjective nature of the tests for determining whether offences are political. The fact that there is the French, the Swiss and the Anglo-American test is evidence of the subjectivity. This creates disagreements that may actually see extradition requests being turned down just because a certain offence has passed the French test of what a political offence is. Admittedly, the tests vary in flexibility and restrictiveness. As such some purely terrorist offences may slip through the net and extradition may never be permissible thereby rendering prosecution impossible. The political offence exception is thus open to abuse and variations in interpretation and criteria as to what a political offence is. While there are various challenges in the application of extradition, the same remains an effective tool for facilitating prosecution of terrorist offences globally.

## 5.3 RECOMMENDATIONS.

### 5.3.1 CODIFICATION OF TERRORISM LEGAL FRAMEWORK.

It is recommended that there is need for codification of the universally acceptable legal definition of terrorism albeit underpinned by greater consensus. It has been noted that several legal instruments were established to address different terrorism situations within specific territories or

problems. This has brought several perspectives on terrorism and has created definitional problems. Creating a codified legal definition will be of greater importance in ensuring that the definitional issues do not stand in the way of the much-needed prosecution of terrorism perpetrators. Having a codified definition universally accepted under international law would ensure that all acts which constitute terrorism are prosecuted without challenge of relating to whether they are acts of terrorism or not. In the same view, international cooperation will be fostered and improved thereby allowing for a greater progress in stamping out acts of terrorism. Therefore, there is need to effectively codify a definition of terrorism around which consensus can be built.

### 5.3.2 CONSOLIDATION OF ANTI-TERRORISM TREATIES.

It is also important to consolidate treaties and conventions of terrorism as the current treaties are highly fragmented with some running the risk of stagnating while terrorism itself evolve. This is important in ensuring that definitional issues do not stand in the way of the much-needed prosecution of terrorism perpetrators. Given that the current anti-terrorism legal framework is highly fragmented as indicated by the different number of parties to each treaty. This same is also clear in the areas that the treaties focus on. This silo approach to anti-terrorism treaties presents challenges as gaps may remain, making it difficult to cover a full spectrum of areas in which terrorism may manifest. It if fundamental that the international community drives towards consolidation of anti-terrorism treaties. This would reduce grey areas or gaps within the law, and if any gap might arise, it will be easily detected.

### 5.3.3 STANDARDISATION OF POLITICAL OFFENCE TEST.

Given the challenges posed by subjective and varied tests for political offences, there is need for a standardized and uniform test of what constitutes a political offence in order to ensure that all acts of terrorism are easily delineated from political offences for perpetrators to be prosecuted. The political offence exception to extradition has, in certain cases, stood as a stumbling block to effective extradition and prosecution of perpetrators. The is exacerbated by the existence of different tests applicable on political offence exception. The existence of different tests as opposed to a singular standardized test presents challenges with certain acts of terrorism being adjudged to political offences based on one test. A standard measure to what constitutes a political offence will improve the effective extradition and prosecution of offenders.

### 5.3.4 NEED FOR A FRAMEWORK FOR DIPLOMATIC ASSURANCES.

There is need for a framework to govern diplomatic assurances including standardization of the scope and magnitude of enforcement mechanism required for such assurances to be deemed sufficient. This is important given that diplomatic assurances, despite being given, sometimes they been deemed insufficient to warrant extradition in certain cases. The *Chahal case*[203] is one example of a case under which diplomatic assurances were dismissed for being insufficient. Development and implementation of a framework which governs these assurances would ensure that there is sufficient guidance on such assurances. All States seeking to extradite offenders would ensure that they have adhered to the well-established principles on assurances thereby ensuring that when necessary, extradition is undertaken with little impediments.

### 5.3.5 NEED FOR ANTI-TERRORISM ORIENTED EXTRADITION TREATIES.

Given the noted challenges in the application of extradition in terrorism cases, it is important that extradition treaties are entered into that focus on cases of terrorism and one that are designed to circumvent all the noted obstacle in the use of extradition to fight terrorism. This is important as the current treaties are all-encompassing meaning that extradition cases involving terrorism may not have any importance and special consideration.

### 5.3.6. CONFERRING POWER TO PROSECUTE IN THE INTERNATIONAL CRIMINAL COURT (ICC).

It's high time that the ICC be conferred jurisdiction to prosecute terrorism as an international crime. It emerged that sometimes acts of terrorism may no surpass the requirements of the four core crimes prosecutable under the Rome Statute. This will make it impossible to prosecute perpetrators especially where extradition is also impossible. Therefore, if terrorism is qualified as a prosecutable offence in the ICC, that will be an effective alternative to the problems so far faced in extraditing offenders.

[203] *ECtHR, Chahal v. UK*, 15 Novemeber 1996.

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