

# Interrogating the Diplomatic Fault Lines Regarding the Extraterritorial Arrest of Nnamdi Kanu: A Sense of Dèjà Vu of Extraordinary Rendition under International Law?

Paul Adole Ejembi,<sup>\*</sup> David Dogara Goar,<sup>\*\*</sup> and  
Grace Sewuese Orshio<sup>\*\*\*</sup>

## Abstract

*Nnamdi Okwu Kanu is an ardent advocate of self-determination and pertinacious agitator for the secession of south eastern states from the rest of Nigeria. He was arrested on the 14<sup>th</sup> of October, 2015 over allegations of terrorism and treasonable felony, among other charges. While facing trial, he was admitted to bail by the Federal High Court. In 2017, the Nigerian army launched a military operation in south eastern Nigeria dubbed, 'Operation Python Dance.' He disclosed that the army invaded his house in Afara-Ukwu, near Umuahia, Abia State purportedly to annihilate him but he managed to escape. In an interview, Nnamdi Kanu disclosed that he fled Nigeria with the assistance of his relatives. In June 2021, it was reported that he was abducted with the assistance of Kenya authorities and was repatriated and moved to Abuja, Nigerian capital city, in handcuffs. Against this backdrop, this article seeks to examine the diplomatic fault lines regarding the extraterritorial*

---

<sup>\*</sup> PhD (BSU), DSW (Jos), LLB (BSU), LLM (Jos), BL (Abuja); PGDIMATHE (Uganda): Solicitor and Advocate, Lecturer, Department of International Law and Jurisprudence, Benue State University. E-mail: paulejembi1972@gmail.com, paulejembi@yahoo.com; Phone: +2348039650978

<sup>\*\*</sup> LLB, BL, LLM, PhD (In View), Lecturer, Department of Public and Private law, Beingham University, Karu, Davidgoar664@gmail.com, Phone: 08038585310, 08039446197

<sup>\*\*\*</sup> LLB, BL, LLM, AICMC, Solicitor and Advocate, No. 3 Naraguta Avenue, Jos, Plateau State. E-Mail: graceorshio@gmail.com

*arrests of Nnamdi Kanu in Kenya and his subsequent detention in Nigeria. Adopting the doctrinal research methodology, the article finds that the extraterritorial arrest and repatriation of Nnamdi Kanu without the knowledge and consent of Kenyan government in defiance of the Kenyan Extradition (Common Wealth Countries) Act unequivocally depicts a sense of Dèjà Vu of Extraordinary Rendition under International Law. The article indicates that the question of competence of states who undertake such acts to exercise jurisdiction over such cases in court varies from state to state. The present article contends that the principle which precludes courts from exercising jurisdiction in respect of fugitives arbitrarily arrested and abducted by way of extraordinary rendition is a better position of the law. The article recommends that all states must refrain from the use of extraordinary rendition and urges the Nigerian government to recant its acts of extraordinary rendition of Nnamdi Kanu and return him to Kenya accordingly. The government ought to take steps to comply with the rules governing extradition of accused persons as stipulated under the Kenyan Extradition (Common Wealth Countries) Act so as to foster the promotion of the principle of state sovereignty and non-intervention in the territorial integrity of states which is in consonance with trite principles of international law.*

**Key words:** Extradition, Extraordinary rendition, Fugitive, International law, Jurisdiction, Nnamdi Kanu

## 1. INTRODUCTION

Nnamdi Okwu Kanu is a British Nigerian citizen and ardent advocate of self-determination and the secession of south eastern Nigeria from the Federal Republic of Nigeria. He is the leader of the indigenous people of Biafra (IPOB).<sup>1</sup> IPOB is a group that clamours for the secession of the south eastern geo-political zone of Nigeria from the rest of the country. The group was established by Nnamdi Kanu with the primary aim of creating a new country called Republic of Biafra. In September 2017, the government declared IPOB a

---

<sup>1</sup> Dbpedia, 'About Nnamdi Kanu' <<https://dpedia.org/page/Nnamdikanu>> accessed 23 November 2022.

terrorist group.<sup>2</sup>The Federal Government of Nigeria has published the order of the Federal High Court which proscribed the IPOB and designated it a terrorist group in a gazette titled, 'Terrorism (Prevention) (Proscription Order) Notice, 2017.<sup>3</sup>

Prior to the proscription of IPOB, Nnamdi Kanu was arrested on the 14<sup>th</sup> of October 2015 over allegations of terrorism, treasonable felony, defamation, managing an unlawful society, and illegal possession of firearms, among other charges. While facing trial, he was admitted to bail by the Federal High Court. In 2017, the Nigerian army launched a military operation in south eastern Nigeria dubbed, 'Operation Python Dance.' In an interview with Isreali Television Channel 1, Nnamdi Kanu disclosed that he fled Nigeria with the assistance of his relatives. He alleged that 28 persons were killed extra judicially during the military operation. He further revealed that the army came to his house in Afara-Ukwu, near Umuahia, Abia State purportedly to kill him but he managed to escape.<sup>4</sup>The Guardian Newspaper reported that since Nnamdi Kanu's departure from Nigeria in 2017, his whereabouts was not certain until June 2021 when Kingsley Kanu, his brother, disclosed that he communicated with him while he was in Kenya and all of a sudden, he was abducted with the assistance of Kenya authorities and was repatriated to Nigerian capital city, Abuja, in handcuffs.<sup>5</sup>

Against this backdrop, this article seeks to examine the diplomatic fault lines regarding the extraterritorial arrests of Nnamdi Kanu in Kenya and his subsequent detention in Nigeria with a view to ascertaining whether it was tantamount to extraordinary rendition

---

<sup>22</sup> Simon Allison, 'Mystery of the Missing Biafran Separatist' Mail and Guardian 6 October 2017 <<https://mg.co.za/article/2017-10-06-oo-mystery-of-the-missing-biafra-seperatist-1/>> accessed 23 November 2022

<sup>3</sup> The Gazette is contained in volume 104 of the Federal Republic of Nigeria Gazette cited in Ade Aesomoju, 'FG Gazettes IPOB Ban, to Write Banks, Embassies, Foreign Missions' in Punch <[https://punchng.com/fg-gazettes-ipob-ban-to-write-banks-embassies-foreign-missions](https://punchng.com/fg-gazettes-ipob-ban-to-write-banks-embassies-foreign-missions/)> accessed 12 September 2019

<sup>4</sup> Chinedu Asadu, 'Nnamdi Kanu, 'How I was Smuggled Out of Nigeria During Operation Python Dance' The Cable 29 October 2018 <<https://www.thecable.ng/nnamdi-kanu-how-i-was-smuggled-out-of-nigeria-during-operation-python-dance/>&amp;gt; accessed 24 November 2022.

<sup>5</sup> Emmanuel Akinwotu, 'Biafra Separatist leader Abducted by Nigeria From Kenya, Say Family' The Guardian.com 6 July 2021< <https://www.theguardian.com/>> accessed 24 November 2022

as construed under international law. The article is comprised of seven subheads. It begins with a general introduction which presents its background and enunciates its fundamental objective. The second subhead deals with clarification of salient concepts such as ‘fugitive,’ ‘extradition’ and the means and methods of delivering an accused person other than extradition such as ‘deportation,’ ‘expulsion,’ and ‘extra ordinary rendition’ whilst the third subhead discusses jurisdiction and general principles governing transnational prosecution of crimes. The principles are territoriality principle, nationality principle, objective territoriality principle, subjective territoriality principle, principle of protection of a state, passive personality principle, and universality principle. The sub head also analyses the prescriptive implication of exercising extraterritorial jurisdiction in criminal matters. The fourth subhead presents a conspectus of Nnamdi Kanu’s debacle in relation to the government. The fifth subhead interrogates the diplomatic fault lines regarding the extraterritorial arrest of Nnamdi Kanu through the prism of international law. The sixth and final subhead concludes the discourse.

## 2. Conceptual Clarification

### 2.1 *The Concept of Extradition/International Extradition:*

Extradition has been defined as the official surrender of an accused person by one state to another state vested with jurisdiction to try the alleged offence or offences. It involves the repatriation of fugitive by the state functionaries where the fugitive is resident.<sup>6</sup> Although the term ‘extradition’ is not explicitly defined under the Nigerian Extradition Act,<sup>7</sup> its connotation may be gleaned from the provision of section 1 of the Extradition Act which refers to extradition as ‘...the surrender, by each country to the other, of persons wanted for prosecution or punishment...’ Extradition has also been defined by the Supreme Court of the United States of America in the case of *Terlindem v Amens*<sup>8</sup> as:

---

<sup>6</sup> Bryan A. Garner (ed), *Black’s Law Dictionary* (7<sup>th</sup> edn St. Paul Minn 1999) 605

<sup>7</sup> Cap E 25 Volume 6 LFN 2004

<sup>8</sup> (1902) 184 US 270, 289 cited in Gasiokwu, MOU, *International Law and Diplomacy* (Selected Essays) (Chenglo Limited 2004) 82

*The surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory and within the territorial jurisdiction of the other, which being competent to try and punish him, demands the surrender.*

Extradition or international extradition also refers to ‘Extradition in response to a demand made by the executive of one nation on the executive of another nation. This procedure is regulated by treaties.’<sup>9</sup> Thus extradition involves official request of one state to another state to repatriate a fugitive or criminal suspect to the territory of the requesting state for purposes of criminal prosecution based on treaties duly entered into by both countries.

**2.2 Fugitive or Fugitive Criminal:** Section 21 (1) of the Extradition Act, 1967<sup>10</sup>, defines a fugitive or fugitive criminal as:

- (a) Any person accused of an extradition offence committed within the jurisdiction of another country other than Nigeria.
- (b) Any person, who, having been convicted of an extradition offence in a country other than Nigeria, is unlawfully at large before the expiration of a sentence imposed on him for that offence, being in either case a person who is, or suspected of being, in Nigeria.

In the context of the present discourse, a fugitive or fugitive criminal may be construed as a person accused of committing an offence and is fleeing or hiding to avoid being arrested by law enforcement agents.

**2.3 Deportation and Expulsion:** Deportation is ‘the act or an instance of removing a person to another country, especially the expulsion or transfer of an alien from a country.’<sup>11</sup> Expulsion has been defined as ‘the act of depriving a member of a...society of his right of membership therein by the vote...of such society, for some

---

<sup>9</sup> Garner (n 6) 605

<sup>10</sup> Cap E25 LFN 2004

<sup>11</sup> Garner (n 6) 450

violation of his duties as such or for some offence which renders him unworthy of longer remaining a member of the society.<sup>12</sup> Although the earlier definition of deportation depicts that the term deportation is synonymous with expulsion, Gasiokwu asserts that there is a difference between both terms. He notes that expulsion, on the one hand, refers to the deprivation of membership of society while deportation, on the other hand, denotes the removal of a non-citizen from a state.<sup>13</sup>

**2.4 *Extraordinary Rendition:*** Extraordinary rendition refers to ‘the seizure and transfer of a person suspected of involvement with a terrorist group to another country for imprisonment without legal process.’<sup>14</sup> Extraordinary rendition also means the practice of illegally transferring accused persons or prisoners from one country to another for investigation or questioning.<sup>15</sup> In the light of the foregoing definitions, it may be inferred that the following elements constitutes extraordinary rendition: (a) that there must be a crime suspect, convict, or prisoner, (b) that there must be an illegal transfer, capture or seizure of an individual or group from one country to the other; and (c) that the authorities responsible for the transfer or seizure of the accused person did not follow due process and acted arbitrarily.

### 3. **JURISDICTION AND GENERAL PRINCIPLES GOVERNING TRANSNATIONAL PROSECUTION OF CRIMES**

The Montevideo Convention of 1933 enunciates the fundamental characteristics of a sovereign state. It provides that a state should possess a permanent population, a defined territory, government, and competence to enter into international relations with other states. In general terms, the exercise of the functions of a state is limited to its jurisdiction. There are basic principles

---

<sup>12</sup> Bouvier Law Dictionary Vol 1 (West Pub Co 1914) 1164 cited in Gasiokwu (n 8) 103

<sup>13</sup> Gasiokwu (n 8) 103

<sup>14</sup> Merriam Webster, ‘Extraordinary rendition’ < <https://www.merriam-webster.com/dictionary/extraordinary%20rendition> > accessed 25 November 2022

<sup>15</sup> Macmillian Dictionary, ‘Extraordinary rendition’ <<https://www.macmillandictionary.com/dictionary/british/extraordinary-rendition>> accessed 26 November 2022

governing the exercise of jurisdiction including transnational prosecution of crimes. The principles are highlighted hereunder.

**3.1 Territoriality Principle:** The territoriality principle is to the effect that a state is at liberty to exercise its jurisdiction over crimes that take place within its territory and in respect of all individuals liable for such criminal acts or omissions irrespective of their citizenship.<sup>16</sup> Thus by the principle of territoriality, a state such as Nigeria has the latitude to prosecute crimes committed within the territory of the country by its citizens, residents, and aliens so long as the person concerned does not enjoy any form of diplomatic privilege or immunity.

**3.2 Nationality Principle:** Based on the principle of nationality, states exercise jurisdiction and prosecute their own citizens in respect of crimes alleged to be committed beyond its borders or other countries. The principle of nationality, often referred to as active nationality principle, involves the authority of a state to try its nationals who have committed serious offences in other countries, although the exercise of jurisdiction is put into effect when such offenders are extradited or come within its territory voluntarily.<sup>17</sup> Thus under nationality principle, the exercise of jurisdiction by a state is predicated on citizenship. In other words, where a person is a citizen of a state and such a person commits an offence in any other country, the state reserves the right to prosecute such an individual.

### **3.3 Objective Territoriality Principle and Subjective Territoriality Principle**

Objective territoriality principle is applicable in a situation in which the element of a crime is commenced within the jurisdiction of a foreign country and completed in the jurisdiction of a given state.<sup>18</sup> Whereas, subjective territoriality principle applies where a

---

<sup>16</sup> John Duggard, Daniel Bethlehem, Max Duplessis and Anton Katz, *International Law: A South African Perspective* (JUTA 2005) 151

<sup>17</sup> U. O. Umzurike, *International Law* (3<sup>rd</sup> edn Spectrum Books Ltd 2005) 83.

<sup>18</sup> Duggard et al (n 16) 152

crime is commenced in a territory of a given state and is completed in the territory of another state.<sup>19</sup> For instance, where a person commits a crime and an element of the offence commences in Ghana and is completed in Nigeria (exemplification of the objective territoriality principle) or where a person commits a crime and the element of the crime commences within Nigeria and is completed in Ghana (exemplification of the principle of subjective territoriality principle), both states will be vested with jurisdiction to prosecute the offender.

### 3.4 Principle of Protection of a State

The principle of protection of a state is to the effect that it is incumbent on a state to exercise jurisdiction over non-citizens who have committed offences abroad which threatens or undermines the security of a state concerned.<sup>20</sup> Thus in the case of *R v Sansom*,<sup>21</sup> the court held that jurisdiction could be exercised based on acts of conspiracy, which if completed, would occasion the same consequences within the territory of the United Kingdom.<sup>22</sup> In applying the principle of protection of a state, it would be incumbent on Nigeria to exercise jurisdiction over aliens that commit crimes outside its territory which has the proclivity of threatening or undermining the national interest or security of the country.

### 3.5 Passive Personality Principle

Based on the passive personality principle a state may assert the right to prosecute an accused person for an offence committed in another state where its citizens are victims or likely to become victims of the crime.<sup>23</sup> This stand point finds support with the case of *United States of America v Yunis* (No.2),<sup>24</sup> where agents of the United States of America (USA) arrested and prosecuted a Lebanese

---

<sup>19</sup> *ibid*

<sup>20</sup> Malcolm N. Shaw, *International Law* (8<sup>th</sup> edn Cambridge University Press 2017) 499

<sup>21</sup> [1991] 2 ALLER 145

<sup>22</sup> *Ibid* cited in Martin Dixon, *Text Book on International Law* (7<sup>th</sup> edn Oxford University Press 2013) 156

<sup>23</sup> Shaw (n 20) 497

<sup>24</sup> 82 ILR 344; 681 F. Supp 896 [1988]

national in the territory of the USA based on a criminal charge of hijacking an aircraft. The court acknowledged the principle of passive personality as a ground for exercising jurisdiction in the matter. Thus applying the passive personality principle, Nigeria may assume jurisdiction over an offence committed by a Kenyan national in Nairobi if in the opinion of Nigerian authorities the alleged crime is likely to undermine the interest of Nigerian citizens or make them victims of the purported crime.

### 3.6 **Universality Principle**

Under the universality principle, it is incumbent on a state to exercise jurisdiction over aliens who have committed or is accused of committing a grave crime. Starke aptly enunciates the universality principle as follows:

*An offence subject to universal jurisdiction is one which comes under the jurisdiction of all states wherever it be committed inasmuch as by general admission, the offence is contrary to the interests of the international community, it is treated as a delicate jure gentium (law of nations) and all states are entitled to apprehend and punish the offenders. Clearly the purpose of conceding universal jurisdiction is to ensure that no such offence goes unpunished.*<sup>25</sup>

The universality principle is not exercised as a matter of course. It must be established that the crime in question is of a serious nature. Examples of crimes committed by non-citizens in which all nations may exercise universal jurisdiction include the practice of apartheid, slave trade, torture, war crime, and genocide.<sup>26</sup>

### 3.7 **Prescriptive Implication of Exercising Extraterritorial Jurisdiction and Extraterritorial Apprehension of Fugitives**

By and large, the territoriality principle, subjective and objective territoriality principle, the nationality principle, the

---

<sup>25</sup> J.G Starke, *Introduction to International Law* (10<sup>th</sup> edn Butterworths, 1989) 234

<sup>26</sup> Umozurike (n 17) 84

principle of protection of state, and the passive personality principle gives a state the jurisdiction to prosecute crimes committed in other states.<sup>27</sup> However, the illegal extraterritorial apprehension of an accused person by state functionaries is tantamount to breach of international law and undermines the principle of non-intervention<sup>28</sup> which fundamentally impinges on the territorial integrity and by extension, the sovereignty of the state in question. Furthermore, where the crime alleged is of a grave nature in which an *obligation erga omnes* exists (obligation of all states in the international community to take action based on universal jurisdiction), then all states are empowered to exercise jurisdiction under well settled rules of customary international law. In any case, extraterritorial jurisdiction ought to be exercised within the ambit of international law. Where extraterritorial jurisdiction or apprehension of criminal suspects is carried out without recourse to extradition treaties or due process of the law, it has far reaching implications and may profoundly upset international rule based order.

#### 4. A CONSPECTUS OF NNAMDI KANU'S DEBACLE

In retrospect, Nnamdi Kanu's quest for self-determination of the people of south eastern states of Nigeria has its roots in the socio-political conflict in Nigeria which culminated in Civil War from July 1967 to January 1970. The history of the crises has been traced to January 1966 when some military officers, predominantly from south eastern Nigeria, overthrew Nigeria's first democratically elected civilian administration. The rationale for the military *coup d'état* was premised on allegations of inequitable distribution of economic resources, corruption, and purported attempts by northern leaders to impose a socio-political hegemony of the north over other parts of the country.<sup>29</sup> Thus on the 15<sup>th</sup> of January 1966, there was a coup which was dominated by military officers of the Igbo ethnic group. The coup resulted in the annihilation of military officers and political

---

<sup>27</sup> Duggard et al (n 16) 56

<sup>28</sup> Shaw (n 20) 509

<sup>29</sup> Ousman Murzik Kobo, 'No Victor and No Vanquished-Fifty Years after the Biafran War' *Origins* <<https://origins.osu.edu/milestone/nigeria-civil-war-biafran-anniversary/?language-content-entity=en>> accessed 1 December 2022

leaders, majority of whom were from the north. Sequel to the coup, power was handed to some members of the Nigerian Armed Forces led by General Aguiysi Ironsi, an Igbo man from south eastern Nigeria. The elimination of leading politicians and army officers from the north and the predominance of military officers from Igbo ethnic group raised suspicion among many northerners who felt that the motive of the coup was unjustly aimed at destroying their elites.<sup>30</sup> Thus in July 1966, there was a counter coup in which many military officers especially from the south eastern Nigeria were killed along with General Aguiysi Ironsi. Thereafter, another military government was formed headed by Lieutenant Colonel Yakubu Gowon (as he then was). Many Igbo elites and military leaders were upset about the elimination of their kinsmen. This gave rise to the spirited quest for secession and the declaration of the Republic of Biafra—a move meant to create a new state out of the south eastern geo-political zone of Nigeria. The ensuing political quagmire led to a full blown Civil War in Nigeria between 1967 to 15<sup>th</sup> January, 1966.<sup>31</sup>

Sequel to the end of the Civil War, there were various separatist agitations mainly from south easterners. The Indigenous People of Biafra (IPOB) was established in 2014 with the primary aim of seeking secession of the southern eastern geo-political zone from Nigeria and the creation of the Republic of Biafra. IPOB was led by Nnamdi Kanu.<sup>32</sup> He was arrested on 14<sup>th</sup> of October, 2015 in respect of criminal allegations bordering on treasonable felony, terrorism, managing an unlawful society, illegal possession of firearms, and defamation, among other charges.<sup>33</sup> He was also accused of inciting violence through the radio, television, and social media. He was arraigned at the Federal High Court Abuja and subsequently released on bail. Nnamdi Kanu disclosed that he

---

<sup>30</sup> ibid

<sup>31</sup> ibid

<sup>32</sup> DBpedia, 'Nnamdi Kanu' < <https://dbpedia.org/page/nnamdi-kanu> > accessed 1 December 2022

<sup>33</sup> Stephanie Bussari and Nimi Prince will, 'Nigerian Separatist Leader Brought Back to Nigeria to Face Trial' CNN 29 June 2021 < <https://edition.cnn.com/2021/06/29/africa/nnamdi-kanu-arrested-nigeria-int/index.htm> > accessed 1 December 2022

eventually fled the country when the Nigerian Army on a special military operation called 'Operation Python Dance II' invaded his residence situated at Afaraukwu in Abia State. He indicated that he escaped from the country to Republic of Benin. Thereafter, he proceeded to Togo, Ghana, Ivory Coast, and Senegal. From Senegal he flew to Israel.<sup>34</sup> Four years after Namdi Kanu left Nigeria, he was reportedly residing in the United Kingdom (UK), where he operated a radio station called Biafra.<sup>35</sup> However, the Guardian Newspaper reported that since Nnamdi Kanu's departure from Nigeria in 2017, his whereabouts was not certain until June 2021 when Kingsley Kanu, his brother, disclosed that he communicated with Nnamdi Kanu while he was in Kenya and all of a sudden, he was abducted with the assistance of Kenya authorities and was repatriated to Nigerian capital city, Abuja, in handcuffs.<sup>36</sup> The extraterritorial arrest of Nnamdi Kanu raised fundamental questions regarding its legality. Was he deported? Was he extradited? Or is it a case of state orchestrated abduction otherwise referred to as extraordinary rendition as construed under international law?

## 5. INTERROGATING THE DIPLOMATIC FAULT LINES REGARDING THE EXTRATERRITORIAL ARREST OF NNAMDI KANU THROUGH THE PRISM OF INTERNATIONAL LAW

The legality or otherwise of Nnamdi Kanu's arrest has been a matter of serious concern in the international community. It has been reported that Nnamdi Kanu was arrested in Kenya and subsequently repatriated and incarcerated in Nigeria.<sup>37</sup> Emmanuel Kanu, Nnamdi

---

<sup>34</sup> Magnus Eze, 'Python Dance: How I Escaped Arrest-Nnamdi Kanu' The Sun <<https://www.sunnewsonline.com/python-dance-how-i-escaped-arrest-nnamdi-kanu/>> accessed 1 December 2022

<sup>35</sup> The Cable, 'UK Asks Nigeria to Explain How Nnamdi Kanu Was Arrested' <<https://www.thecable.ng/uk-asks-nigeria-to-explain-how-nnamdi-kanu-was-arrested/>&gt; accessed 1 December 2022

<sup>36</sup> Emmanuel Akinwotu, 'Biafra Separatist leader Abducted by Nigeria From Kenya, Say Family' The Guardian.com 6 July 2021 < <https://www.theguardian.com>> accessed 24 November 2022

<sup>37</sup> Sahara Reporters, 'Breaking: How IPOB Leader, Nnamdi Kanu Was Arrested' in Kenya, Unlawfully Extradited to Nigeria-Family' <[saharareporters.com/2021`/06/30/breaking-how-ipob-leader-nnamdi-kanu-was-arrested-kenya-unlawfully-extradited-nigeria](https://saharareporters.com/2021/06/30/breaking-how-ipob-leader-nnamdi-kanu-was-arrested-kenya-unlawfully-extradited-nigeria)> accessed 3 December 2022

Kanu's brother disclosed that he was arrested during a trip to Kenya and was handed over by Kenyan authorities to Nigerian state functionaries who moved him to Nigeria. He asserted that Nnamdi Kanu had been subjected to extraordinary rendition by Kenya and Nigeria.<sup>38</sup> He disclosed that Nnamdi Kanu holds both British and Nigerian citizenship even though he had renounced Nigerian citizenship owing to his quest for self-determination and creation of Biafran State.<sup>39</sup> However, Kenya's complicity in the extraterritorial territorial arrest of Nnamdi Kanu by Nigeria is doubtful. The Vanguard reported that the Kenyan government categorically refuted its involvement in the arrest of Nnamdi Kanu in its territory. He also revealed that Nnamdi Kanu did not undergo extradition proceedings in Kenya.<sup>40</sup> The report also indicated that there was no record of the arrest and detention of Nnamdi Kanu in any Kenyan Police Station for purposes of commencing extradition proceedings.<sup>41</sup> The Sahara Reporters have also buttressed the foregoing state of affairs. The media reported that Kenya's Director of immigration services, Alexander Muteshi, categorically denied claims of Kenya's complicity in the arrest of Nnamdi Kanu.<sup>42</sup>

A fugitive cannot be arrested as a matter of course. Due process of the law must be followed. The procedure for the surrender and repatriation of a fugitive is enunciated under section 5 of the Kenyan Extradition (Contiguous and Foreign Countries) Act<sup>43</sup> as follows:

- (1) A requisition for the surrender of a fugitive criminal of any country who is or suspected of being in Kenya shall be made to the Minister by diplomatic representative or Consular officer

---

<sup>38</sup> *ibid*

<sup>39</sup> *ibid*

<sup>40</sup> Steve Oko, 'We Have No Hand in Nnamdi Kanu's Arrest, Extradition, Kenya Government Tells Court' Vanguard 4 November 2021 <<https://www.vanguardngr.com/2021/11/we-have-no-hand-in-nnamdi-kanus-arrest-extradition-knya-govt-tells-court/>> accessed 3 December 2022.

<sup>41</sup> *ibid*

<sup>42</sup> Sahara Reporters, 'Kenya Authorities React to Nnamdi Kanu's Arrest, Extradition to Nigeria' <<https://saharareporters.com/2021/07/02kenyan-authorities-react-nnamdi-kanu%E2%80%99s-arrest-extradition-nigeria>> accessed 4 December 2022

<sup>43</sup> No. 65 Cap 76 1968

of that country and, upon receipt of such requisition, the Minister may, by order under his hand, signify to a magistrate that a requisition has been made and require the magistrate to issue his warrant for the arrest and detention of the fugitive criminal.

- (2) If the Minister is of the opinion that the offence is one of a political character he may refuse to make an order and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody.

The Kenyan Extradition (Contiguous and Foreign Countries) Act is the law applicable to cases of extradition of offenders where Kenya has an agreement with a non- commonwealth country.<sup>44</sup>The Kenyan Extradition (Common Wealth Countries) Act<sup>45</sup>requires Kenya to surrender persons accused or convicted of offences in Commonwealth countries such as Nigeria to other commonwealth countries on a reciprocal basis.<sup>46</sup>Article 5 of the Kenyan Extradition (Common Wealth Countries) Act stipulates the general conditions in which a fugitive in Kenya will not be surrendered to a requesting state. It states that:

- (1) A fugitive shall not be surrendered, or committed to or kept in custody for the purposes of surrender, if it appears to the court of committal, or to the High Court on application for habeas corpus, or to the Attorney General, that:
  - (a) The offence of which the fugitive is accused or was convicted is an offence of a political character; or
  - (b) The request of his surrender (though purporting to be made on account of an extradition offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions; or
  - (c) That he might, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by

---

<sup>44</sup> Apollo Mboya, 'Extradition Laws Out of Tune with Constitution' *The Sunday Standard*, <https://www.standardmedia.co.ke/commentary/article/2000098247/extradition-laws-out-of-tune-with-constitution>> accessed 4 December 2022

<sup>45</sup> 1968 Cap 77

<sup>46</sup> *ibid*

reason of his race, religion, nationality or political opinions.

- (2) A fugitive accused of an offence shall not be surrendered, or committed to or kept in custody for the purposes of surrender, if it appears to the court of committal, or to the High Court on an application for habeas corpus, or to the Attorney-General, that he would, if charged with that offence in Kenya, be entitled to be discharged under any rule of law relating to previous acquittal or conviction.
- (3) A fugitive shall not be surrendered, or committed to or kept in custody for purposes of surrender, unless provision is made by law of the requesting country, or by an arrangement made with that country, for securing that he will not, unless he has first been restored or had an opportunity of returning to Kenya, be dealt with in that country for or in respect of any offence committed before his surrender, other than-
  - (a) The offence in respect of which his surrender is requested; or
  - (b) Any lesser offence proved by the facts proved before the court of committal; or
  - (c) Any other extradition offence in respect of which the Attorney-General may consent to his being so dealt with.
- (4) An arrangement of the kind mentioned in subsection (3) of this section may be an arrangement made for the particular case or an arrangement of a more general nature; and for the purposes of that subsection a certificate issued by or under the authority of the Attorney-General confirming the existence of an arrangement with any country and stating its terms shall be conclusive evidence of the matters contained in the certificate.

In general terms, a fugitive can only be extradited from a host country to a requesting state if a treaty exists between both countries to that effect. This stand point finds support with the case *George Udeozor v Federal Republic of Nigeria*,<sup>47</sup> where the Court of Appeal declared that the right of one state to request another of the

---

<sup>47</sup> CA/L/376/05

extradition of a fugitive accused of a crime, and the duty of the country which the fugitive finds asylum to surrender the said fugitive, exist only when created by treaty.<sup>48</sup>

In the light of the circumstances surrounding the Nnamdi Kanu saga, apparently there is no extradition treaty between Nigeria and Kenya. As indicated earlier by a couple of reports, the Kenyan government categorically refuted its involvement in the arrest of Nnamdi Kanu in its territory and there was no record of the arrest and detention of Nnamdi Kanu in any Kenyan Police Station for purposes of commencing extradition proceedings. The denial of Kenyan government's involvement in the arrest and subsequent repatriation of Nnamdi Kanu and the patent absence of evidence of compliance with the provision of the Kenyan Extradition (Common Wealth Countries) Act, which requires a formal requisition by the Nigerian government for his surrender to Kenyan government by Nigerian diplomatic representative or Consular officer and the absence of warrant for the arrest and detention leads to the irresistible conclusion that Nnamdi Kanu was arrested and abducted by agents of the Nigerian government. This is tantamount to extraordinary rendition under international law. Such arbitrary arrest constitutes a breach of international law and a flagrant violation of the principle of non-intervention in the territory of a sovereign state.<sup>49</sup>

Although it is well settled that kidnapping, abduction, or extraordinary rendition of accused persons is illegal under international law, the question of competence of states who undertake such acts to exercise jurisdiction over such cases in court varies from state to state and it is also nuanced by the facts of each case. In the case of *USA v Toscanino*,<sup>50</sup> the United States Court of Appeal held that the illegal arrest of a fugitive does not preclude the jurisdiction to prosecute the matter. Similarly, in the case of

---

<sup>48</sup> Ibid cited in Ayodele Akenroye, 'The Kanu and Igboho Saga: International Law and Extradition to Nigeria' This Day <<https://www.thisdaylive.com/index.php/2021/07/27/the-kanu-and-igboho-saga-international-law-and-extradition-to-Nigeria>> accessed 4 December 2022

<sup>49</sup> Shaw (n 20) 509; see art 2 (4) of the United Nations Charter and *Nicaragua v US*, ICJ Reports, 1986, 110 cited in Shaw (n 20) 509.

<sup>50</sup> 61 ILR 190

*Attorney-General of the Government of Israel v Eichmann*,<sup>51</sup> Adolf Eichmann, the accused person, a German citizen, presided over a state directed policy which led to the execution of millions of Jews in Europe. The accused person was abducted from Argentina to Israel in 1960 by Israeli state functionaries without the consent or knowledge of the government of Argentina. He was tried, convicted and sentenced to death. The District Court of Jerusalem noted that the government of Argentina lodged a complaint with the Security Council of the United Nations (UN) regarding the arrest and transfer of the accused person to Israel, upon which the Security Council declared that his transfer from Argentina to Israel constituted a violation of Argentina's sovereignty and that such acts may endanger international peace and security. Pursuant to the resolution of the Security Council, the governments of Israel and Argentina reached an agreement to resolve the matter amicably and Israel admitted that it had breached Argentina's fundamental rights. The district Court of Jerusalem, however, held, inter alia, that 'it is an established rule of law that a person being tried of an offence against the laws of a state may not oppose his trial by reason of illegality of his arrest or the means whereby he was brought within the jurisdiction of that state.'<sup>52</sup>Based on the foregoing decision, the court exercised jurisdiction to prosecute the accused person despite the unlawfulness of his arrest and repatriation.

By contrast with the cases of *USA v Toscanino* (supra) and *Attorney-General of the Government of Israel v Eichmann* (supra), in *R v Horseferry Magistrates' Court, ex parte Bennett*,<sup>53</sup> Bennett contended in court that he had been arbitrarily arrested and moved from South Africa to the United Kingdom (UK) by South African policemen in collaboration with police officers in the UK. The House of Lords held that where an accused person had been apprehended by abuse of due process in breach of international law, the court in the UK will not be obligated to exercise jurisdiction.

---

<sup>51</sup> (1961) 36 ILR 5 cited in David Harris, *Cases and Materials on International Law* (7<sup>th</sup> edn Sweet and Maxwell, 2010) 241

<sup>52</sup> Ibid 244

<sup>53</sup> [1993] 3 ALL ER 138

The present article contends that the principle enunciated in the case of *R v Horseferry Magistrates' Court, ex parte Bennett* (supra), which precludes courts from exercising jurisdiction in respect of fugitives arbitrarily arrested and abducted by way of extraordinary rendition is a better position of the law in the sense that it has the proclivity of fostering the promotion and sustenance of the principle of state sovereignty and the doctrine of non-intervention in the territorial integrity of states which is in consonance with the provision of paragraph 4 of article 2 of the United Nations Charter, 1945.

## **6. RECOMMENDATIONS FOR REFORM AND POLICY CONSIDERATION**

This article reiterates and espouses the view that extraordinary rendition or state abduction of a fugitive is pungently unlawful under international law. It is vehemently contended that having established that extraordinary rendition is illegal, the exercise of jurisdiction in respect of accused persons repatriated through such unlawful means is at cross purposes with natural justice, equity, and good conscience. Hence the following recommendations are made for reform and policy consideration:

- (i) All states should explicitly and consistently prohibit the jurisprudence and praxis of extraordinary rendition to the extent that it would constitute a norm of customary international law. Extradition treaties should also contain provisions which expressly prohibit extraordinary rendition.
- (ii) All states must refrain from the use of extraordinary rendition and endeavour to comply with the provision of paragraph 4 of article 2 of the United Nations Charter, which obligates all Member States of the UN to desist from the threat or use of force against the territorial integrity or political independence of a state.
- (iii) All sovereign states should adopt and espouse the view that the exercise of jurisdiction in respect of accused persons repatriated through the unlawful process of extraordinary rendition should be declined by municipal courts of all nations.

- (iv) That all states must comply with rules of international law or relevant extradition treaties regarding extradition of criminal suspects or convicts.
- (v) That paragraph 1 of article 34 of the Statute of the International Court of Justice of 1945, which permits only states to be parties before the International Court of Justice (ICJ) should be amended to give individuals the latitude to file cases before the court where their countries of nationality breaches their rights by committing acts of extraordinary rendition especially in cases where domestic remedies are exhausted or impossible to attain.
- (vi) That the Nigerian government should recant its acts of extraordinary rendition of Nnamdi Kanu and return him to Kenya. The government must take steps to comply with the rules governing extradition of accused persons as stipulated under the Kenyan Extradition (Common Wealth Countries) Act.
- (vii) That the Nigerian government must acknowledge its diplomatic fault line and accordingly apologise to both Nnamdi Kanu and the government of Kenya.

## **7. CONCLUSION**

Over the years, some states have carried out extraterritorial abduction and repatriation of accused persons residing in other countries for purposes of conducting criminal prosecution within their domestic milieu. This article reiterates and espouses the view that extraordinary rendition is unlawful under international law. It pointedly asserts that the extraterritorial arrest and repatriation of Nnamdi Kanu from Kenya without the knowledge and consent of Kenyan government in defiance of the Kenyan Extradition (Common Wealth Countries) Act unequivocally depicts a sense of *Dèjà Vu* of Extraordinary Rendition under International Law. The article indicates that the question of competence of states who undertake such acts to exercise jurisdiction over such cases in court varies from state to state. Whilst in cases such as *USA v Toscanino* (supra) and *Attorney-General of the Government of Israel v Eichmann* (supra), the courts held that the illegal arrest of a fugitive does not preclude

the jurisdiction to prosecute the matter, in the case of *R v Horseferry Magistrates' Court, ex parte Bennett* (supra), the House of Lords held that where an accused person had been apprehended by abuse of due process in breach of international law, the court in the UK will not be obligated to exercise jurisdiction. The present article contends that the principle which precludes courts from exercising jurisdiction in respect of fugitives arbitrarily arrested and abducted by way of extraordinary rendition is a better position of the law in the sense that it has the proclivity of fostering the promotion and sustenance of the principle of state sovereignty and of non-intervention in the territorial integrity of states which is in consonance with the provision of paragraph 4 of article 2 of the United Nations Charter, 1945. The article recommends that all states must refrain from the use of extraordinary rendition and urges the Nigerian government to recant its acts of extraordinary rendition of Nnamdi Kanu and return him to Kenya. The government must take steps to comply with the rules governing extradition of accused persons as stipulated under the Kenyan Extradition (Common Wealth Countries) Act so as to foster the promotion of the principle of state sovereignty and the doctrine of non-intervention in the territorial integrity of states which is in consonance with trite principles of international law.