

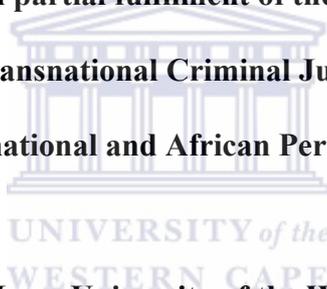
SOUTH AFRICA'S HUMAN RIGHTS CENTRED APPROACH TO EXTRADITION.

By

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**Research paper submitted in partial fulfilment of the requirements for the degree of
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International and African Perspective**



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DECLARATION

I declare that ‘South Africa’s human rights centred approach to extradition’ is my own work, that it has not been submitted before any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Student: Envar Robin Hartnick

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DEDICATION

Vir Mummie, dankie vir alles en vir altyd.



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LIST OF ABBREVIATIONS AND ACRONYMS

FBI :Federal Bureau of Investigation

ICCPR : International Covenant for Civil and Political Rights

NPA : National Prosecuting Authority

NSA : National Security Agency

UK : United Kingdom

UN : United Nations

USA : United States of America

WWII : The Second World War



CHAPTER 1: INTRODUCTION

1.1 PROBLEM STATEMENT

Due to South Africa's geographical location; often lax border control; extensive refugee protection scheme; rights centred Constitution; pervasive corruption in all sectors of society; high crime rates, a weak police force and its status as the economic powerhouse of Africa, South Africa has become an attractive destination for those seeking to hide from prying eyes reinforcing the notion that South Africa is a safe haven for criminals.

Tales such as those of Radovan Krejcir from the Czech Republic and that of Rwanda's General Faustin Kayumba Nyamwasa, contribute to the stereotype that South Africa is a safe haven for criminals. Radovan Krejcir is a Czech national who has been convicted of fraud, amongst other things, in his home country and whom the NPA have wanted to extradite but have been flouted in their attempts until his refugee status has been determined. This is despite the fact that he entered the country using a fake passport and has been illegally residing here since 2007. The case has now landed up in the Constitutional Court, with media houses challenging the blanket ban on revealing details of asylum seekers' applications.¹

Rwanda's General Faustin Kayumba Nyamwasa is a suspected war criminal with warrants for his arrest and extradition requests having been issued by the Spanish government, French government and the government of Rwanda, despite all of which he still managed to obtain refugee status in

¹'Krejcir appeal tests rights of refugees' available at <http://www.southernafricalitigationcentre.org/2013/05/21/salc-in-the-news-krejcir-appeal-tests-rights-of-refugees/> (accessed 21 May 2013).

South Africa.² Nyamwasa is alleged to have ‘ordered war crimes – committed on displaced Hutus on the border between Rwanda and the Democratic Republic Congo while he serving in the Rwandan army between 1994 and 1998.’³

With the influx of foreigners into South Africa, some as refugees, others as economic migrants or even fugitives, also the increase in transnational crime, the question of extradition is becoming increasingly relevant in combating the problem that is the perception that South Africa is a safe haven for criminals.

1.2 KEYWORDS

- South Africa
- Constitution
- Bill of Rights
- Extradition
- Human rights
- Constitutional Court
- Death sentence
- Refugee law
- Mutual legal assistance



²*Consortium for Refugees and Migrants in South Africa v the President of the Republic of South Africa and Others* briefing paper available at <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2012/11/Briefing-Paper.pdf> (accessed 20 May 2012).

³‘Krejcir appeal tests rights of refugees’ at note 1 above.

1.3 SIGNIFICANCE OF THE STUDY

After the fall of the Apartheid regime, the new Constitutional dispensation committed itself to building a society founded on the respect for human rights. One of the first and decisive steps taken in this regard was abolishing the use of the death penalty as a penal sanction, denouncing it as a form of cruel, inhumane and degrading treatment or punishment which violates the right to life as also the right to human dignity enshrined in the South African constitution. ‘The Constitution... forbids [the South African government] from knowingly... participat[ing], directly or indirectly, [or] in any way... imposing or facilitating the imposition of such punishment’⁴. This is why the Republic of South Africa has taken the position that it will not comply with a request for extradition from a requesting state which still practises the death penalty if there is a chance that the person will be subject thereto, unless, an assurance is provided that the death penalty will not be imposed.

In the light of the recent Constitutional Court ruling in the cases of *Minister of Home Affairs and Others v Emmanuel Tsebe and Others*; *Minister of Justice and Constitutional Development and Another v Emmanuel Tsebe and Others*⁵ and after the events of 11 September 2001 and the subsequent war on terror conducted by the United States of America and her allies, in addition to the increase in international crime and the influx of refugees and other persons into South Africa, the question could be asked whether or not South Africa should maintain the stance that it has taken with regard to extradition requests. South Africa has in the past refused a request for extradition where there is a possibility that the person may be subject to the death penalty or some form of cruel inhumane or degrading treatment or punishment, unless an undertaking is provided guaranteeing that

⁴*Mohamed and Another v President of the Republic of South Africa and Others* (CCT 17/01) [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).

⁵*Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others* (CCT 110/11, CCT 126/11) [2012] ZACC 16; 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC).

the death penalty will not be imposed.

Concerns have been raised about the South African approach, that is, the refusal to extradite persons to states where they may be subject to the death penalty or some other form of cruel; inhumane treatment; punishment or torture, in-addition to our lenient refugee laws, reinforcing the impression that South Africa is a safe haven for criminals and whether or not the South African approach is in conformity with international law.

The need to study South Africa's extradition practices became even more important in the light of the fact that South Africa has incorporated the Statute of the International Criminal Court into its national law. Also, South Africa has ratified the UN Torture Convention, and is in the process of introducing the crime of torture as a discrete crime in South Africa. The domestication of both international instruments means that where any person suspected of having committed an international crime or of having perpetrated torture is physically present in South Africa, such a person will have to be either prosecuted in South Africa or extradited to the requesting state. It is, therefore, important to look into how South Africa has gone about implementing its extradition policy against the background of the principles laid down in the Constitution. Given that the refusal of an extradition request may have a negative impact on South Africa's diplomatic relations with the state requesting such extradition and depending on whom the requesting state is, such a refusal may have dire consequences with respect to the economic and political ties of the Republic.

1.4 RESEARCH QUESTION

The question this research paper seeks to answer is: What is the nature of the South African extradition scheme?

In order to conclusively answer the aforementioned question the following questions crop up:

- How does South Africa approach extradition requests and is this approach in-line with international norms and practices?
- What are South Africa's obligations in-terms of international law?
- Which considerations are paramount in deciding on whether or not to extradite a person?
- What happens in instances where no extradition treaty exists with the requesting state?
- What is the relationship between refugee law and extradition law?

1.5 ARGUMENT



It will be argued that due to South Africa's tumultuous history, characterised by a gross disregard for fundamental human rights, the new Constitutional dispensation has characterised itself by guarding against any violation of fundamental human rights. Therefore, the extradition scheme which it has created is centred on protecting the fundamental human rights and freedoms enshrined in the South African Constitution, with various checks and balances in place. South Africa has, therefore, adopted the approach of refusing a request for extradition where there is the possibility that the death penalty may be imposed or that the person may be subject to any form of cruel inhumane or degrading treatment or torture. It will be argued that despite the Bill of Rights enshrining the rights of all people in South Africa, this does not imply that the Constitution only has territorial application. Furthermore, it will be shown that the South African Constitutional Court has vindicated the human rights of individuals despite the possible diplomatic and political outfall of its decisions, and that its

decisions have influenced and contributed to the vindication of human rights in other jurisdictions and the collective thought process on the issue of human rights and extradition. Furthermore, it will be shown that the approach South Africa has taken is not one unique, but one which the international community has endorsed. It will also be shown that there is a possibility for abuse of the system, but that such instances are limited and are few and far between. The paper will also demonstrate that, despite the negative perception that South Africa is a safe haven for criminals, the human rights centred approach South Africa has taken is a commendable one and is one that is not likely to be discarded.

1.6 LITERATURE SURVEY

The pool of literature on extradition is vast, but very little has been written South African on South African extradition law.

Dugard's *International Law: A South African Perspective*⁶ devotes an entire chapter to extradition. This seems to be the most comprehensive guide but as this is only a chapter it does not analyse extradition in detail.

In Robyn Tyler's LLM thesis, titled, *Impact of the Bill of Rights on Extradition*,⁷ the author delves into how the practice of extradition developed in South Africa over the relevant periods in our countries history, namely the pre-colonial era, colonial era, apartheid era and the post-apartheid period. The author discusses relevant case law, legislation and treaties. However, the author does not place near enough emphasis on the meaning of the relevant Constitutional principles, ideals or rights enunciated and impacted on by extradition proceedings and how these rights have been

⁶Dugard J, Du Plessis M & Anton Katz et al *International Law: A South African Perspective* (2011) 4th ed. Cape Town: Pronto Publishers.

⁷Tyler R *The Impact Of The Bill Of Rights On Extradition* (Published Masters Of Law Thesis, Nelson Mandela Metropolitan University 2007) available at <http://dspace.nmmu.ac.za:8080/jspui/bitstream/10948/830/1/RZTyler.pdf> (accessed 2 April 2013).

interpreted. The author also does not explain why the South African Constitutional Court is so strongly guided by international law or the status of international law with respect to domestic law. The author assumes the reader is intimately acquainted with the South African Constitution and its workings, which is not always the case.

Anton Katz⁸ and Dugard both highlight the need for domestic incorporation of international agreements, in accordance with s231(4) of the Constitution, to which extradition agreements relate. However, there is a debate around the status of such extradition agreements entered into without subsequent domestication of such legislation, a debate which I intend to weigh in on when I discuss the impact of the Constitution on extradition.

Max Du Plessis, in his article titled, “The extra-territorial application of the South African Constitution,”⁹ argues in favour of extra-territorial application of the South African Constitution. He bases his views primarily on the Constitutional Court’s finding in *Mahomed* as endorsing such a view. The South African Constitution is merely used to restrain South African officials from extraditing persons when it is apparent that their constitutional rights will be violated if extradited, even if such breaches were to occur extra-territorially, a contention which I wholly agree with and intend to support.

My research paper aims to be a comprehensive guide to how South Africa approaches extradition requests and why. It aims to bring together issues of concern, some not touched on by the formerly mentioned authors, and other relevant and connected issues such as the following:

- How extradition is effected in South Africa, that is, the procedure;
- The relationship and or status of international law with respect to municipal law in

⁸Katz A ‘The Incorporation Of Extradition Agreements.’(2003)(16) 3 *S. Afr. J. Crim. Just.* 311 - 322.

⁹Du Plessis M ‘The Extra-Territorial Application of The South African Constitution’ (2003) (120) *SALJ* 797-819.

South Africa and its impact on extradition practice;

- The impact of the principle of non-refoulement on extradition in the light of the unique situation South Africa finds itself in with regard to the influx of refugees into the country;
- The political offence exception in-light of the increase in international terrorism and how this issue is approached by South Africa; and
- Mutual legal assistance law and extradition.

1.7 CHAPTER OUTLINE

Chapter 2: Introduction.

Chapter one serves to define what is meant by extradition generally and how this process occurs. It will furthermore paint a historical picture of why the new constitutional dispensation has developed such a strong human rights centred approach with regard to extradition, that is, squarely as a result of the treatment meted out by the Apartheid regime, focusing on the ideals of the new order as having developed in opposition to the old regime. It will furthermore evaluate the legal basis in terms of which extradition is carried out in the South African context, that is, the Extradition Act and its amendments. Moreover, this chapter will evaluate the requirements for extradition, extraditable offences and the procedural framework, that has been created to facilitate the process of extradition.

Chapter 3: The South African Constitutional and Legislative Framework

This chapter will trace the development of the South African human rights centred approach to extradition. Given that no chapter dealing with South African legislation can be complete without an

evaluation of the Constitution, this chapter will also evaluate the relevant sections of the South African Constitution. It will pay particular attention to how these provisions are to be interpreted and understood. That is sections 2,7,8,10,11,12,39,231 and 232, respectively. In addition, particular attention will be paid to the status of international law within the Constitutional framework so as to understand how and why the case law has developed in the way it has.

The emphasis will be on the following decided cases:

- *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR.
- *Harksen v President of the Republic of South Africa and Others* (CCT 41/99) [2000] ZACC 29; 2000 (2) SA 825 (CC); 2000 (1) SACR 300; 2000 (5) BCLR 478.
- *Mohamed and Another v President of the Republic of South Africa and Others* (CCT 17/01) [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).
- *Geuking v President of the Republic of South Africa and Others* (CCT35/02) [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC).
- *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others* (CCT 110/11, CCT 126/11) [2012] ZACC 16; 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC).

Furthermore, this chapter will evaluate South Africa's obligations under international law, that is, the various international instruments it has ratified and the treaties or conventions of which it is a states party.

Chapter 4: Various Legal Principles and Extradition

This chapter will be devoted to the evaluation of various legal principles and their impact on extradition: Namely the principle of *aut dedere aut judicare* and its implications, the principle

of non-refoulement and its relationship with extradition, the political offence exception and lastly this chapter will delve into the idea of mutual legal assistance law and what this entails with regard to the Republic.

Chapter 5 : Comparative International Law

This chapter will evaluate the stance taken by other jurisdictions in the following cases:

- *Soering v UK* (1989) 11 EHRR 439;
- *United States v Burns* 2001 1 SCR 283; and
- *Venezia v Ministero di Grazia e Giustizia* 79 Rivista di Diritto Internazionale 815 (1996).

The idea here is to determine if the South African approach is in line with that taken by other jurisdictions.



Chapter 6 : Concluding Observations

This chapter will tie together all of the individual chapters, highlighting areas of concern with regard to the South African approach and suggesting reforms. Furthermore, this chapter aims to assert why the South African approach is commendable and not only in line with the South African Constitution but also with international law and foreign law.

1.8 METHODOLOGY

This research paper will make use primarily of case law from the South African Constitutional Court, which is charged with interpreting the content, scope and meaning of the relevant Constitutional provisions upon which the South African human rights-centred

approach is based. Furthermore, the legislative context within which these provisions operate, with regards to extradition, will be evaluated, using the various Acts that have been passed to regulate extradition procedures. Ultimately, this research paper will be compiled using an assortment of cases, legislation, international conventions, treaties, newspaper articles, websites, journal articles, theses and books.



CHAPTER 2

2.1 INTRODUCTION

At the time of writing, Mr Edward Snowden who was formerly working for the American National Security Agency (NSA) finds himself in a veritable no man's land because of principle and politics. Having worked for an independent contractor hired by the NSA, Edward Snowden is said to have had almost unfettered access, as a system analyst, to the NSA's most highly classified intelligence information.¹⁰ Using his position as a system analyst he secured classified information about how the American government has been spying, not only on its own citizens but on other governments as well. Snowden subsequently leaked this information to the media.¹¹ He then fled the United States and has now been granted temporary asylum in Russia, after spending several weeks holed up in the transit area of Moscow's Sheremetyevo Airport.¹² The United States of America has revoked his passport, thereby declaring him *persona non grata*, and is very keen to have him extradited or returned to the US to stand trial for espionage. A telling sign of just how intent the American government is to have Snowden returned to the United States is the saga with the Bolivian Presidential plane. When it was feared that Mr Snowden had somehow stowed away aboard the Bolivian Presidential plane, the Bolivian Presidential plane was denied permission to fly over French, Spanish, Portuguese and Italian airspace,¹³ thus clearly showing how important political influence can be in matters of international affairs, extradition being chief amongst these.

¹⁰Esposito R and Cole M 'How Snowden did it' available at http://investigations.nbcnews.com/_news/2013/08/26/20197183-how-snowden-did-it?lite(accessed 1 September 2013).

¹¹ Esposito R and Cole M at note 10 above.

¹² Payne E and Shoichet C 'Morales challenges U.S. after Snowden rumor holds up plane in Europe' available at <http://edition.cnn.com/2013/07/04/world/americas/bolivia-morales-snowden> (accessed 24 July 2013).

¹³Payne E and Shoichet at note 12 above.

2.2 WHAT IS EXTRADITION?

International law regulates the relations between States.¹⁴ Due to the doctrine of State sovereignty, States have to respect the territorial integrity of other States. Furthermore the doctrine of non-interference prohibits one State from interfering in the internal affairs of another State.¹⁵ Given that the law of nations imposes no obligation on States to surrender persons within their territorial boundaries to other States seeking such persons,¹⁶ the international community of States, had to devise an alternative method of securing the attendance at trial of an individual who is not physically present within the jurisdiction of the State which seeks to put him or her on trial, in instances where such an individual is within the jurisdiction of another State – the fugitive State.

In order to secure the presence of a person in the State seeking him or her, international law has devised a mechanism called extradition, according to which States enter into an agreement of co-operation and mutual legal assistance in terms of which the State in which the person finds himself (the requested State) hands him or her over to the State in which the person is sought (requesting State).

Pyle holds that ‘the law of extradition was designed to make systems of reciprocal surrender orderly and principled and to make abduction, military incursions and fraudulent deportations unnecessary and illegal.’¹⁷ The importance of extradition law lies in the substantive and procedural safeguards it provides the person subject to the extradition request. ‘Extradition itself is an element in the international protection of human rights.’¹⁸ Unlike deportation or rendition, the extradition of an

¹⁴Von Glahn G and Taulbee J *Law Among Nations: Introduction To Public International Law* 8thed (2007) 3.

¹⁵Watney M ‘A South African perspective on mutual legal assistance and extradition in a globalised world’ *Potchefstroom Electronic Law Journal* (2012) 293.

¹⁶Gilbert G *Transnational Fugitive Offenders In International Law* (1998) 14, Von Glahn G and Taulbee J (2007) 245 at note 14 above, Katz A (2003) 312 at note 8 above.

¹⁷Pyle C *Extradition, Politics and Human Rights* (2001) 3.

¹⁸ Gilbert G *Aspects of Extradition Law* (1991) 4 .

individual may only occur under a very specific set of circumstances.

Extradition is defined as

‘a process, initiated by an adequately founded, formal request from one sovereign State to another, based on treaty, reciprocity or comity, by means of which an individual, accused or convicted of the commission of a serious criminal offence within the jurisdiction of the requesting State, is surrendered to competent courts in the territory of that State for trial or punishment.’¹⁹

In other words, it is the surrender of an accused found in the territory of one State to another State which seeks his or her extradition in order that she or he may stand trial for the commission of some or other criminal offence or the execution of an imposed sentence. The extradition of an individual is primarily facilitated by the conclusion of extradition treaties. If extradition occurs on the basis of reciprocity then the States would come to the agreement that in exchange for the extradition of an individual from one State, the requested State, to another, the requesting State, the requesting State will in the future be under an obligation to extradite an individual to the requested State should such a request ever be made in similar circumstances.²⁰ This is based on comity, which refers to those actions or interactions between States that are based purely on goodwill or courtesy.²¹

If one ascribes to the Hobbesian worldview, centred on the preservation of self and the accrual of power by a State,²² it is easy to see how extradition could be about maintaining good ties and relations with other States, seeing that it is said to have derived as a gesture of friendship and co-operation between States.²³ However, extradition can also be about the exertion of influence on one State by another State in order to obtain the desired result. If we consider Napoleon Bonaparte for example, who with all the might of the entire French military behind him is said to have issued

¹⁹ Botha N ‘Extradition’ *The Law of South Africa* vol 10 First Reissue 2nded 2008.

²⁰ *Harksen v President of the Republic of South Africa and Others* (CCT 41/99) [2000] ZACC 29; 2000 (2) SA 825 (CC); 2000 (1) SACR 300; 2000 (5) BCLR 478 (hereafter Harksen) para 3 at footnote 1.

²¹ Harksen at note 20 above.

²² Von Glahn G and Taulbee J (2007) 14 at note 5 above.

²³ Bassiouni M *International Extradition and World Public Order* (1974)1.

threats against other States in order to secure the extradition of persons,²⁴ it becomes evident that the question of extradition can never be devoid of politics.²⁵ As Bassiouni states:

‘Because the requested and the requesting participants are States it is clear that there is a nexus between the interests of these respective States and the granting or the 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.’²⁶

Therefore, in deciding the question of extradition, a State is bound to factor into the equation the maintenance of good ties with the requesting State and the potential political, economic and social consequences of a refusal of such an extradition request. Thus extradition is a matter of international affairs involving the executive and judicial branches of the State.

Given that the focus of international law, traditionally, was on interstate relations, there was huge potential for abuse of extradition proceedings, with persons being treated as pawns in a game of international chess. However, with the development of human rights jurisprudence in the wake of the atrocities committed during and leading up to World War II, there has been a growing respect for ‘the inherent dignity [of all human beings] and of the equal and inalienable rights of all members of the human family... [as being the] the foundation of freedom, justice and peace in the world...’²⁷

2.3 THE BACKGROUND TO SOUTH AFRICA’S EXTRADITION PRACTICE

The preamble to the South African Constitution²⁸ makes the resounding proclamation that to heal the divisions of the past the people of South Africa wish to establish a society built on the respect for

²⁴Van den Wijngaert C *The Political Offence Exception to Extradition: The Delicate Problem Of Balancing the Rights of the Individual and the International Public Order* (1980) 10.

²⁵Bassiouni M (1974) 3 at note 23 above, Von Glahn G and Taulbee J (2007) 254 at note 14 above.

²⁶Bassiouni M (1974) 3 at note 23 above.

²⁷UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) available at <http://www.refworld.org/docid/3ae6b3712c.html> (accessed 21 August 2013).

²⁸The Constitution of the Republic of South Africa, 1996 (hereafter The Constitution)

fundamental human rights and social justice.²⁹ Therefore the background to South Africa's extradition practices can be found to have its genesis with the Apartheid regime. Starting in 1948 and lasting for 46 years, Apartheid was a dark period in South Africa's history. It was a time of forced racial segregation. The Apartheid policy embodied a strong element of structural violence, with the apparatus of the State being used to control the population through repressive laws.³⁰ The use of torture, extrajudicial executions, forced disappearances and complete disregard for due process was a common occurrence in Apartheid South Africa, as the Report from the South African Truth and Reconciliation Commission shows.³¹ Other legally sanctioned instruments such as the use of the death penalty were also perverted to quell or stifle political opposition.³²

After the demise of Apartheid, the new democratic government committed itself to a respect for human rights. It is therefore not surprising that the new democratic government has adopted what will here be termed a human rights-centred approach to extradition. This reference to the policy change is supported by the laws that have been enacted, coupled with the human rights-centred body of case law that has come into being in the post-1994 period with respect to extradition practices.

To start with, the Republic of South Africa will not extradite persons to States where they may be subject to the death penalty. Given the history of the death penalty in South Africa,³³ the new order has developed a particular aversion for the use of the death penalty, the imposition of which was racially biased, with the majority of those who faced the hangman's noose being black and poor.³⁴

²⁹ The Constitution, the Preamble at note 28 above.

³⁰ Harrison F 'Global apartheid, foreign policy, and human rights' (2002) (4)3 *Souls: A Critical Journal of Black Politics, Culture, and Society* 53.

³¹ Pigou P 'The apartheid State and violence: What has the Truth and Reconciliation Commission found?' (2001) (28) 2 *Politikon: South African Journal of Political Studies* 222-223.

³² Devenish G *Application Of The Death Penalty In South Africa* (1990) 21, Bouckaert P 'Shutting down the death factory: The abolition of capital punishment in South Africa' (1996) 32 *Stanford Journal Of International Law* 291-294.

³³ See generally *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (hereafter referred to as *Makwanyane*).

³⁴ Devenish G (1990) 21 at note 32 above.

Consequently the right to life of all persons has been Constitutionally entrenched.³⁵ Secondly, the South African Government does not extradite persons where it is feared or believed that their fundamental rights as espoused in the South African Bill of Rights will not be guaranteed by the requesting State. Notwithstanding the fact that the Extradition Act³⁶ specifically provides that if a person is likely to be prosecuted or punished by reason of his or her race, gender, religion, nationality, or political opinion, or if the surrender of the person is not requested in good faith, an extradition request may be refused on these grounds.³⁷ The Constitutional Court cases of *Mohamed*³⁸ and *Tsebe*,³⁹ amongst others,⁴⁰ will be offered as incontrovertible proof of a general human rights exception to extradition.

2.4 THE SOUTH AFRICAN EXTRADITION SCHEME

The Bill of Rights found in Chapter 2 of the Constitution can be said to be the ultimate expression of the human rights utopia the drafters of the Constitution envisioned, and it is within this framework that extradition is to occur. The law regulating extradition in South Africa is the Extradition Act 67 of 1962 and the Amendment Act thereto⁴¹. It authorizes the President of the Republic to enter into extradition agreements with other States.⁴² The extradition of an individual may be sought by a State which has an extradition treaty with South Africa or where no such agreement exists, the extradition takes place on the basis of comity.⁴³ There are, however, certain requirements that have to be met

³⁵ S11 of The Constitution at note 28 above.

³⁶ Extradition Act 67 of 1962 (hereafter the Extradition Act).

³⁷ S11(iii) and (iv) of the Extradition Act at note 36.

³⁸ *Mohamed* at note 4 above.

³⁹ *Tsebe* at note 5 above.

⁴⁰ Du Toit *Commentary on the Criminal Procedure Act* 2013 App B20C.

⁴¹ Extradition Amendment Act 77 of 1996.

⁴² S2 of the Extradition Act at note 36 above.

⁴³ *Harksen* para 3 at note 20 above.

before an individual can be extradited to another State requesting the extradition of such an individual.

Firstly, the requirement of double criminality must be satisfied. This means that the offence with which the individual is charged has to be an offence in both the requesting State and the requested State. This is in accordance with the principle of legality, according to which there can be no crime without law.⁴⁴

The Extradition Act provides that an extraditable offence is ‘any offence which in terms of the law of the Republic and of the foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more...’⁴⁵ This is termed as the eliminative method of defining extraditable offences⁴⁶ and has the advantage of ‘eliminating problems of characterisation of offences arising from definitional differences between the laws of the requested and the requesting States.’⁴⁷ The Act is, however, unclear about whether the offence should be a crime in both States at the time of commission or if it is sufficient that the conduct in question be criminalised at the time the request for extradition is made.⁴⁸

The second requirement is that of speciality, that is, that a person may not be tried for any other offence other than the offence for which she or he was extradited for or on a charge of the offence, or unless the extraditing State consents to it.⁴⁹ Thus the person has to be tried for the offence for which she or he was extradited for unless the extraditing State consents to a change in the charges.

Generally, offences of a political character are excluded from extradition agreements. The question

⁴⁴Dugard J and Van den Wyngaert C ‘Reconciling Extradition with Human Rights’ (1998) 188.

⁴⁵S1 of the Extradition Act at note 36 above.

⁴⁶Bassiouni M (1974) 316 at note 23 above.

⁴⁷Bassiouni M (1974) 316 at note 23 above.

⁴⁸Du Toit(2013) App B20 at note 40 above.

⁴⁹S2(3)(c) of the Extradition Act at note 36 above.

of what constitutes an offence of a political character has been left open to debate and will be discussed in a succeeding chapter.

The principal of *non bis idem* also applies to extraditable offences. It is a general principle of criminal law which prevents a person from being convicted of an offence for which she or he has already been convicted or acquitted of and although not expressly included in the Act, it must be applied.⁵⁰

However, with regard to the procedure to be followed in extradition proceedings a distinction is made between an associated State, a foreign State and a designated State.

Designated States are those States whose extradition law is in conformity with that of the Republic.⁵¹

The President may designate such States for extradition.⁵² Thus, although The Republic has not formally entered into an extradition treaty with these States, extradition to these States is permitted in accordance with the municipal law of the two States.⁵³

An associated State is defined as one of South Africa's neighbouring States.⁵⁴ A foreign State refers to all other States. If however, the President consents to the extradition of an individual on the basis of reciprocity or comity where the Republic does not have an extradition treaty with the requesting State⁵⁵ the procedure to be followed domestically to secure the extradition of the individual is no different than one the employed if an extradition treaty were in effect between South Africa and a foreign State.⁵⁶

⁵⁰Dugard J, Du Plessis M & Anton Katz et al (2011) 221.

⁵¹ Botha N (2008) at para 232 see footnote 5 at note 19 above .

⁵²S(2)(1)(b)of the Extradition Amendment Act at note 41 above.

⁵³ Botha N (2008) at para 232 see footnote 5 at note 19 above.

⁵⁴Dugard J, Du Plessis M & Anton Katz et al(2011) 229 at note 6 above.

⁵⁵Harksenpara 3 at note 20 above.

⁵⁶S3(a) of the Extradition Amendment Act at note 41 above.

a. Foreign States

If a State has an extradition treaty with South Africa it must submit such a request for the extradition of an individual to the Minister of Justice through diplomatic or consular channels. The Minister will then notify a magistrate of such extradition request and the magistrate will issue a warrant for the arrest for the specified individual. The justification needed for the magistrate to issue the warrant of arrest is the same as it would have been if the said offence was committed in the territory of the Republic as opposed to a foreign State.⁵⁷ Once the person has been arrested she or he will have to appear before a magistrate who will conduct an enquiry to determine if there is sufficient evidence to warrant prosecution and if the person should be surrendered to the requesting State.⁵⁸

The magistrate shall 'accept as conclusive proof a certificate...issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.'⁵⁹ The person concerned may then either be held in police custody or released on bail whilst awaiting the Minister's decision on whether or not she or he will be extradited.⁶⁰ The individual then has 15 days within which she or he can approach the High Court to appeal the decision of the magistrate with respect to whether or not she or he should be surrendered to the requesting State.⁶¹

If the magistrate is of the opinion that there is not sufficient evidence to found such prosecution she or he may discharge the individual and inform the Minister of this decision.⁶²

Ultimately the decision on whether or not an individual will be surrendered to the requesting State lies with the Minister. The Minister may order that a person who has been detained be released

⁵⁷S5(1)(b) of the Extradition Act at note 36 above .

⁵⁸S10(1) of the Extradition Act at note 36 above.

⁵⁹S10(2) of the Extradition Act at note 36 above.

⁶⁰S9(2) of the Extradition Act at note 36 above.

⁶¹S12(1) of the Extradition Act at note 36 above.

⁶²S10(3) of the Extradition Act at note 36 above.

notwithstanding the magistrate's decision.

Furthermore, the Minister may refuse the surrender of an individual to a requesting State if the Minister believes for any reason that the person would be 'prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion'⁶³ or if the Minister is of the opinion that

'by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would, having regard for the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned'⁶⁴

If South Africa does not have an extradition treaty with the requesting State the President may consent to the extradition of the person concerned on an ad hoc basis.⁶⁵

b. Associated States

With regard to associated States the procedure has been slightly simplified in order to facilitate an expedited process.⁶⁶ The Act provides as follows:

'Whenever an extradition agreement with any foreign State in Africa provides for the endorsement for execution of warrants of arrest on a reciprocal basis, any magistrate to whom is produced a warrant issued in such State for the arrest of any person alleged to be a person liable to be surrendered to such State, may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, endorse such warrant for execution in the Republic, if he is satisfied that it was lawfully issued...'⁶⁷

This means that as regards the extradition process with regard to associated States, it is not necessary to engage diplomatic channels prior to the magistrate conducting the enquiry mentioned above. Dugard states that the warrant of arrest is first to be presented to the Director of Public

⁶³S11(b)(iv) of the Extradition Act at note 36 above.

⁶⁴S11(b)(iii) of the Extradition Act at note 36 above.

⁶⁵S3(2) of the Extradition Amendment Act at note 41 above.

⁶⁶Dugard J, Du Plessis M & Anton Katz et al (2011) 231 at note 6 above.

⁶⁷S6 of the Extradition Act at note 36 above.

Prosecutions having jurisdiction before it is submitted to the magistrate for endorsement.⁶⁸

The magistrate may order that a person be not surrendered to the requesting State if

‘by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would, having regard for the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or [if] the person concerned will be prosecuted or punished or prejudiced at his or her trial in the associated State by reason of his or her gender, race, religion, nationality or political opinion.’⁶⁹

Thus although the procedure has been simplified, its integrity is not compromised and the individual is still afforded a great deal of protection.



⁶⁸Dugard J, Du Plessis M & Anton Katz et al (2011) 231at note 6 above.

⁶⁹S12(2)(c) of the Extradition Act at note 36 above.

CHAPTER 3:

CONSTITUTIONAL ASPECTS RELATED TO EXTRADITION LAW IN SOUTH AFRICA.

3.1 INTRODUCTION

The Constitution is the supreme law of the Republic. Law or conduct that is inconsistent with its provisions is invalid.⁷⁰ This presupposes that all law and the actions of the State must be in conformity with these Constitutional guarantees, in particular, the Bill of Rights which binds all organs of the State⁷¹.

The Bill of Rights, found in chapter two of the Constitution, can be said to be the ultimate expression of the utopia⁷² the drafters of the Constitution envisioned and it is within this framework that extradition is to occur. The rights in the Bill of Rights are to be purposively interpreted which, in essence, means remembering the political and historical context of human rights abuses as a result of which these rights arose and striving to uphold ‘the decisive break with the past’⁷³ which the new Constitution seeks to be.⁷⁴

Explicitly guaranteed by the South African Constitution are the right to life;⁷⁵ the right to human dignity;⁷⁶ the right to freedom and security of person, which includes the right to be free from any form of cruel, inhumane treatment or punishment and which includes the right not to be tortured⁷⁷.

⁷⁰S2 of the Constitution at note 28 above.

⁷¹S(8)1 of the Constitution at note 28 above.

⁷² Curry I and De Waal J *The Bill of Rights Handbook* 5thed (2006) 159.

⁷³*Shabalala and Others v Attorney-General, Transvaal, and Another* (CCT 23/94) 1996 (1) SA 725 (CC) at para 26.

⁷⁴ Curry I and De Waal J (2006)153 at note 72 above, ‘Constitutional Law: Bill of Rights’ *Law of South Africa* (2012) Vol 5(4) 2nded at para 18.

⁷⁵S11 of the Constitution at note 28 above.

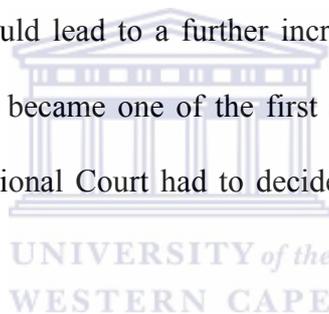
⁷⁶S9 of the Constitution at note 28 above.

⁷⁷S12 of the Constitution at note 28 above.

The Importance of and the place of these rights in the new Constitutional dispensation was detailed in the case of *S v Makwanyane and Another*.⁷⁸

a. *S v Makwanyane and Another* (1995)

In essence, the case centred on whether or not the death penalty as a penal sanction should be retained in the new Constitutional era, given the history of the death penalty in South Africa, the ideals of the new order and whether a limitation of the right to life would be permissible in terms of the thereof. To further complicate matters there was overwhelming public support in favour of retaining the death penalty⁷⁹ and with the high crime rate in South Africa, it was feared that renouncing the death penalty would lead to a further increase in crime rates.⁸⁰ Consequently, the case of the *State v Makwanyane* became one of the first and most contentious cases the newly appointed bench of the Constitutional Court had to decide after its inception. Ultimately the court was of the opinion that



‘The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.[T]his must be demonstrated by the State in everything that it does, including the way it punishes criminals.’⁸¹

Thus retaining the death penalty was held to be in direct violation of the Constitutionally protected right to life and human dignity in addition to also violating the prohibition on cruel inhumane and degrading treatment or punishment and out of spirit with the ideals of the new order⁸². Remembering that what

‘the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting “future founded on the

⁷⁸*Makwanyane* at note 33 above.

⁷⁹*Makwanyane* para 87 at note 24 above.

⁸⁰*Makwanyane* para 117-118 at note 24 above.

⁸¹*Makwanyane* para 144 at note 24 above.

⁸²*Makwanyane* para 144 at note 24 above.

recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”⁸³

In *Makwanyane* the right to life was interpreted negatively, meaning that the State is enjoined to State to refrain from taking actions which would violate the right to life of any person.⁸⁴ However, as Curry and De Waal note, there is also a positive obligation placed upon the State to protect human life.⁸⁵ This positive obligation placed on the State is reinforced by the provisions of 7(2) of the Constitution which was expounded upon and can be best illustrated by the case of *Mohamed and another v President of the Republic of South Africa and others*.⁸⁶

b. *Mahomed v the President of the Republic of South Africa (2001)*

On the 7 August 1998 the United States Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania were bombed. After investigations into the attacks were conducted it was believed that an organization called Al Qaeda was behind these terrorist Attacks. It was furthermore alleged that a certain Mr Mahomed had conspired and actively participated in the bombing of the embassy in Tanzania. On the day following the explosion Mr Mahomed departed Tanzania, making his way to the Republic of South Africa where he found employment, accommodation, obtained a temporary resident permit and was eventually arrested.

Mr Mahomed was apprehended after his asylum application was encountered by an agent of the Federal Bureau of Investigation (FBI), pursuant to an arrest warrant issued by the Federal District Court for the Southern District of New York on charges of ‘conspiracy to murder US nationals

⁸³*Makwanyane* para 144 at note 262 above.

⁸⁴ Curry I and De Waal J (2006) 285 at note 72 above.

⁸⁵ Curry I and De Waal J (2006) 285-286 at note 72 above.

⁸⁶*Mohamed* at note 4 above.

outside the United States [and] attack on a federal facility resulting in death.’⁸⁷If convicted of these charges, Mr Mahomed would have faced the death penalty.

The ink on the new extradition treaty signed between South Africa and the United States of America was barely dry when Mr Mahomed was captured. This new extradition treaty provided that a person could be extradited to the requesting State without the need for any extradition proceedings if the said person consented to the extradition. Furthermore, the political offence exception was removed from the new extradition treaty between the two States.

After his arrest Mr Mahomed was interrogated by South African immigration authorities, the South African Police Services and members of the FBI and was subsequently transferred into the custody of the FBI and deported to stand trial in the USA.

The court in *Mahomed* held that regardless of whether Mr Mahomed’s removal from the Republic was classified as a deportation or an extradition, the government of South Africa is under a Constitutional obligation to obtain an undertaking from the requesting State that the death penalty will not be imposed or if imposed the death penalty would not be carried out.⁸⁸This obligation placed upon government has its origin in Section 7 of the Constitution, which obliges the Government to respect, promote and fulfil the rights in the Bill of Rights.⁸⁹

Regardless of whether the removal of a person from the Republic is classified as a deportation or an extradition, the provisions of the Constitution would supercede any empowering legislation or the provisions of a treaty, owing to the Supremacy of the Constitution.⁹⁰Consequently, the State may not be a party in any way to the imposition of punishment that is considered cruel, inhumane or

⁸⁷*Mahomed* para 11 at note 4 above.

⁸⁸*Mahomed* para 43 at note 4 above.

⁸⁹*Mahomed* para 38 at note 4 above.

⁹⁰*Mahomed* para 43 at note 4 above.

degrading as this would be in violation of the Constitution, and by failing to ensure that the United States provided the necessary undertaking before deporting Mr Mahomed, the State is said to have violated this duty to respect, promote and protect the rights in the Bill of Rights as the death penalty is considered cruel and inhumane.⁹¹ Thus the rule established in *Mahomed* case is that the State is Constitutionally mandated to ensure that, if deported or extradited, an individual's right to life, human dignity, freedom and security of person, including the right not to be subject to any form of cruel, inhumane or degrading treatment or torture is respected.

c. *Minister of Justice v Tsebe* (2012)

Mr Tsebe and Mr Phale were both accused of murdering their respective partners in Botswana and subsequently fled to the Republic of South Africa in an attempt to evade prosecution and the hangman's noose. In view of expediency the South Gauteng High Court consolidated the cases of Mr Tsebe and Mr Phale into one matter in view of the similarity of the two cases and the issues which the court was called upon to decide.

Botswana is a retentionist State, that is, one which still imposes the death penalty as a penal sanction, and in Botswana the death penalty may be imposed if one is convicted of murder.

Therefore, when the accused were faced with the looming threat of extradition proceedings they beseeched the courts that such extradition would be unconstitutional as in South Africa the right to life is protected by law.

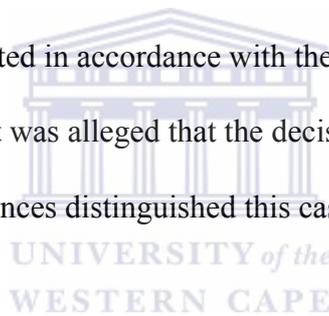
Seeing that Botswana refused to provide an assurance that the death penalty would not be imposed on the accused, or if imposed on the accused, it would not be carried out, the case ended up in the Constitutional Court, The applicants challenged the finding of the South Gauteng High Court,

⁹¹*Mahomed* para 38 and 59 at note 4 above.

contending, that the State would be in breach of its Constitutional obligations in terms of Section(2), 7 (1) and (2), 10, 11 and 12 of the Constitutional if it were to extradite the accused without an assurance from Botswana that the death penalty would not be imposed, or if it were to be imposed, it would not be carried out.⁹²

To further complicate matters, South African courts do not at present have extra-territorial jurisdiction, thus domestic courts cannot prosecute persons for the commission of crimes which occurred outside the territorial borders of the Republic.⁹³ Consequently, Mr Phale could not be tried by South African courts, neither could he be extradited, which meant that he was to be unconditionally released.⁹⁴

The Department of Home Affairs was of the opinion that, as foreigners who had illegally entered the country, the two were to be deported in accordance with the Immigration Act and that the matter would end there.⁹⁵ Furthermore, it was alleged that the decision in *Mahomed* was not an absolute bar to extradition as the circumstances distinguished this case from the former.⁹⁶



The court held that

‘[t]he human rights provided for in sections 10, 11 and 12 of our Constitution are not reserved for only the citizens of South Africa. Every foreigner who enters our country –whether legally or illegally – enjoys these rights and the State’s obligations contained in section 7(2) are not qualified in any way. Therefore, it cannot be said that they do not extend to a person who enters our country illegally.’⁹⁷

Thus the duty placed upon the State to respect, promote and protect the rights in the Bill of Rights can be invoked by anyone within the territory of the Republic. *A fortiori* Section 9(1) of the Constitution provides that ‘everyone is equal before the law and has the right to the equal

⁹²Tsebepara 20 at note 5 above.

⁹³Tsebepara 10 and 60 at note 5 above.

⁹⁴Tsebepara 12 at note 5 above.

⁹⁵Tsebepara 14 at note 5 above.

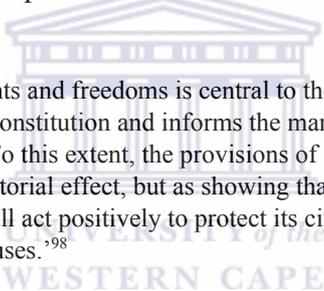
⁹⁶Tsebepara 48 at note 5 above.

⁹⁷Tsebepara 65 at note 5 above.

protection and benefit of the law’ and because Section 9(1) is also unqualified and applies to everyone within the territory of the Republic. Therefore, everyone is entitled to the full protection and benefit of the Constitution, which includes the obligation placed upon the State to respect, promote and fulfil the rights in the Bill of Rights as per Section 7.

Thus the State, in keeping with its obligations in terms of Section 7, which are reinforced by Section 9, is Constitutionally mandated to ensure that the rights of everyone within the territory of the Republic or who is subject to the control of its agents, must be respected, promoted and protected, in particular the right to dignity and the right to life, which would be liable to violation if the accused were to be deported or extradited to the Republic of Botswana.

In reaching its decision the court emphasized that:



‘The advancement of human rights and freedoms is central to the Constitution itself. It is a thread that runs throughout the Constitution and informs the manner in which government is required to exercise its powers. To this extent, the provisions of section 7(2) are relevant, not as giving our Constitution extraterritorial effect, but as showing that our Constitution contemplates that government will act positively to protect its citizens [and those subject to its control] against human rights abuses.’⁹⁸

Therefore, the court was of the opinion the State could not derogate from the principle established in *Mahomed*.⁹⁹

3.2 EXTRA-TERRITORIAL EFFECT OF THE CONSTITUTION

Considering that the Constitution’s territorial application is limited to South Africa,¹⁰⁰ individuals lose the rights or the protection they may have under the Constitution once they leave the territory of the Republic.¹⁰¹ Du Plessis argues that because the decision about whether or not to extradite a person

⁹⁸*Kaunda and Others v President of the Republic of South Africa* (CCT 23/04) [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) (hereafter referred to as *Kaunda*) at para 66 in *Tsebe* at para 46 at note 5 above.

⁹⁹*Tsebe* para 67 at note 5 above.

¹⁰⁰*Kaunda* para 36 at note 98 above.

¹⁰¹*Curry I and De Waal J* (2006) 287 at note 72 above.

is made on the territory of the Republic of South Africa, there is, therefore, no real question of extra-territorial application of the Constitution.¹⁰² It seems clear that acts performed by public officials within South Africa may lead to consequences abroad for the person removed, which triggers the Bill of Rights.¹⁰³ Thus, although the Constitution does not have extra-territorial application it may have extra-territorial effect in that public officials have to act in accordance with the provisions of the Constitution.¹⁰⁴ Du Plessis refers to this as an extra-territorial extension of the Bill of Rights protection.¹⁰⁵ He notes that the precedent established in *Mahomed*

‘that unconstitutional results, which occur outside of South Africa, but which have their genesis in actions of officials inside South Africa, will trigger an 'extra-territorial' extension of Bill of Rights protection... There does not appear to be any principled reason why the extra-territorial effect of the Constitution ought to be limited to violations of the right to life. Rather, it is submitted, any real risk of sufficiently serious harm which engages a fundamental value protected by the Constitution may in principle attract the liability of South African officials for their decision to extradite or expel an individual. In this regard the *Mahomed* decision has opened the door for arguments about other provisions of the Bill of Rights having an 'extra-territorial' effect’¹⁰⁶

and as such precluding the extradition of an individual. Thus the crux of the argument made here by Du Plessis is that the violation of other constitutionally protected rights other than those dealt with in *Mahomed*, may in the future be invoked to prevent the State from extraditing an individual.

Consequently, it may be argued that the duty placed upon the State to respect, promote and fulfil the rights in the Bill of Rights is that greater when there is a risk that actions taken by the State may result in the infringement of the fundamental rights of an individual once she or he leaves the territory of the Republic because it would be more difficult for the State to remedy its actions.¹⁰⁷ Thus the State is enjoined to offer whatever protection it can to individuals to ensure the protection of their rights whilst they are still subject to its reach in conformity with the provisions of the Constitution and

¹⁰²Du Plessis M (2003) 800 at note 9 above.

¹⁰³Du Plessis M (2003) 800 at note 9 above.

¹⁰⁴Du Plessis M (2003) 805 at note 9 above.

¹⁰⁵Du Plessis M (2003) 805 at note 9 above.

¹⁰⁶Du Plessis M (2003) 805 at note 9 above.

¹⁰⁷Curry I and De Waal J (2006) 285-287 at note 72 above.

its fundamental guarantees.

3.3 THE CONSTITUTIONALITY OF SELECTED SECTIONS OF THE EXTRADITION ACT.

For treaties to bind the Republic of South Africa they have to be entered into in accordance with the prescriptions laid down by the Constitution¹⁰⁸. Section 231 provides that the President as head of the national executive may enter into international agreements which will be bind the Republic on the international plane, only after they have been approved by resolution in the National Council of Provinces and the National Assembly.¹⁰⁹After being approved, such international agreements have to be enacted into law by way of domestic legislation to be of force or effect domestically, unless they are self-executing provisions¹¹⁰ of an agreement which has been approved by parliament, whose provisions come into effect automatically.¹¹¹Problematically, the Constitution does not define what an international agreement is.

It is a given that extradition treaties are international agreements and as such they have to be entered into in accordance with the provisions of Section 231.¹¹² The issue with the Extradition Act is that although it provides for the President as head of the executive to enter into extradition treaties on behalf of the Republic, no provision is made for the domestication thereof¹¹³. This State of affairs can be attributed to the fact that the Extradition Act was last amended to reflect the provisions of the

¹⁰⁸S231 Of the Constitution at note 28 above.

¹⁰⁹*President of the Republic of South Africa and Others v Quagliani; President of the Republic of South Africa and Others v Van Rooyen and Another; Goodwin v Director-General, Department of Justice and Constitutional Development* (CCT 24/08, CCT 52/08) [2009] ZACC 9; 2009 (8) BCLR 785 (CC) (hereafter referred to as *Quagliani*) at para 42, Botha N 'Rewriting the Constitution: The "Strange alchemy" of Justice Sachs, indeed!' (2009) 34 SAYIL 262.

¹¹⁰Self-executing provisions are provisions which are capable of enforcement on their own without further legislative action in *Quagliani* para 35 at note 109 above.

¹¹¹S231(4) of the Constitution at note 28 above.

¹¹²Katz A (2003) 319 at note 8 above.

¹¹³S2(3)(a) of the Extradition Amendment Act at note 32 above.

interim Constitution, which did not require domestication of international agreements.¹¹⁴

Botha submits that an extradition treaty is not self executing¹¹⁵ and that the self executing provision applies only to treaties that have been approved by parliament¹¹⁶. Thus the implication would be that the treaty provisions have to be domesticated to become law in the Republic.¹¹⁷ Conversely, Stemmet argues that after extradition agreements have been approved by parliament in terms of Section 231(2) their provisions are self executing, which then means that domestic ratification of an extradition agreement is not necessary and all that is required is for a notice to be placed in the Government Gazette.¹¹⁸

The court in the *Quagliani* case held that

‘Either the Agreement has “become law” in South Africa as a result of the prior existence of the Act which constitutes the anticipatory enactment of the Agreement for the purposes of section 231(4) of the Constitution. Or the Agreement has not “become law” in the Republic as contemplated by section 231(4) but the provisions of the Act are all that is required to give domestic effect to the international obligation that the Agreement creates.’¹¹⁹

Justice Sachs however found it unnecessary to consider whether or not the agreement was self executing.¹²⁰ Botha, who is plainly frustrated by the failure of the Constitutional Court to address the issue in the *Quagliani* case aptly describes the nature of the problem. He holds that if an extradition treaty is not self executing, then, by inference, its provisions would have to be domesticated,.. Failure to do so would have the resultant effect that the courts would be unable to give effect the provisions of the Act and ‘it would be impossible to determine whether extraditees are available for extradition [t]here [would be] no process by which they [could] come to court and there [would be] no protection for their human rights.’¹²¹

¹¹⁴Dugard J, Du Plessis M & Anton Katz et al (2011) 217 at note 41 above, Katz A (2003) 320 at note 8 above.

¹¹⁵Botha N (2008) para 220 see footnote 7 at note 19 above.

¹¹⁶Botha N ‘International law: Municipal application of treaties’ *The Law of South Africa* (2008) vol 11 2nd ed para 449.

¹¹⁷Dugard J (2011) 59 at note 41 above.

¹¹⁸Stemmet A ‘The Influence of Recent Constitutional Developments in South Africa on the Relationship Between International Law and Municipal Law.’ (1999) 33.

¹¹⁹*Quagliani* para 47 at note 109 above.

¹²⁰*Quagliani* para 37 at note 109 above

¹²¹Botha N (2009) 266 at note 109 above.

Hence the importance of domestic incorporation of extradition treaties cannot be over stressed as the failure to adhere to the prescriptions laid out by the Constitution could have the resultant effect that South Africa may not be able to secure the return of the fugitive to the requesting country and such persons would have to be let free.¹²²

The perplexing reasoning employed by court in the *Quagliani* case serves only to confuse the issue of whether or not such extradition treaties are of force and effect on the domestic plain and whether such treaties are to be considered as self-executing.¹²³

For Dugard the dictum of the court is incomprehensible,¹²⁴

‘section 231(4) makes it clear that for a treaty to become law in South Africa it must be enacted in to law by national legislation unless it is self- executing... The Constitution makes no exception for extradition agreements...The highly convoluted reasoning of the Constitutional Court fails to satisfactorily explain why extradition agreements come into existence by means not contemplated by s231(4).¹²⁵

Given the fact that I have been unable to find a coherent explanation of the reasoning employed by Justice Sachs it is my belief that the Act in this regard merits amendment.¹²⁶

The other issue with the current Extradition Act is that it allows the President to consent to the extradition of an individual to a country with whom the Republic does not have an extradition treaty.

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‘Any person accused or convicted of an extraditable offence... committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the State President has in writing consented to his or her being so surrendered.’¹²⁸

If the President consents to the extradition of a person to a State with whom the Republic does not

¹²²Botha N (2009) 266 at note 109 above, Katz A (2003) 313 at note 8 above.

¹²³Dugard J, Du Plessis M & Anton Katz et al (2011) 58-59, 216-217 at note 41 above, Botha N (2009) 264-266 at note 109 above.

¹²⁴Dugard J, Du Plessis M & Anton Katz et al (2011) 59 at note 6 above.

¹²⁵Dugard J, Du Plessis M & Anton Katz et al (2011) 59 at note 6 above.

¹²⁶Dugard J, Du Plessis M & Anton Katz et al (2011) 59 at note 6 above.

¹²⁷Dugard J, Du Plessis M & Anton Katz et al (2011) 216 at note 6 above.

¹²⁸S3(2) of the Extradition Amendment Act at note 41 above.

have an extradition treaty as per s3(2) of the Extradition Amendment Act this would, in my opinion, constitute an international agreement, as the President, by consenting to such extradition, has bound the Republic. The learned author John Dugard notes that for him

‘it is difficult to reconcile the power of the President to consent to an ad hoc extradition under s3(2) with the requirement in s231 of the Constitution that treaties be approved by parliament to bind the Republic internationally and that they be incorporated by national legislation to have domestic effect.’¹²⁹

He goes further, holding that the President’s consent to extradite under Section3(2) and the subsequent exchange of notes in the case, constituted an international agreement which, in terms of Section231 required parliamentary approval and the incorporation into domestic law by legislation.

¹³⁰ This assertion can be supported by the Department of International Relations and Cooperation’s *Practical Guide and Procedures for the Conclusion of Agreements* which provides that that the term international agreement is to be understood as encompassing international ‘convention[s], treat[ies], protocol[s], memorandum of understanding[s], accord[s] [and] exchange of notes...’¹³¹

Unless one were to adopt a strict textual interpretation of what an international agreement is, in line with the Vienna Convention on the Law of Treaties,¹³² in terms of which

‘an international agreement means a treaty concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’.¹³³

A view which the court in *Harksen* seemed to prefer¹³⁴ and which sprouted a line of reasoning

¹²⁹Dugard J, Du Plessis M & Anton Katz et al (2011) 216 at note 6 above.

¹³⁰Dugard J, Du Plessis M & Anton Katz et al (2011) 216 at note 6 above.

¹³¹Department of International Relations and Cooperation *Practical Guide and Procedures for the Conclusion of Agreements* 3rded available at <http://www.dfa.gov.za/chiefStatelawadviser/documents/conclusionofagreements3rd.pdf> (accessed 9 October 2013) at pg 6.

¹³²United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at <http://www.refworld.org/docid/3ae6b3a10.html> (accessed 3 October 2013) (hereafter referred to as the *Vienna Convention*).

¹³³Art 2(a) of the *Vienna Convention* at note132 above.

¹³⁴*Harksen* para 21 at note 20 above.

which ultimately led the Constitutional Court in *Harksen*, to the conclusion that the President is merely consenting to the investigation of the matter by giving the Minister the required approval to instruct a magistrate to conduct an preparatory investigation and, as such, his consent is nothing more than a domestic act.¹³⁵

In the later decision of *Geuking*¹³⁶ it was argued that the President's consent to an extradition request in terms of s3(2) of the Extradition Amendment Act is a policy decision based on comity or reciprocity.¹³⁷ Accordingly what is to be considered by the President is the relationship between South Africa and the requesting State.¹³⁸

But it is my submission that if the President takes a policy decision which ultimately amounts to the creation of an international agreement, such a policy decision should then also have to be approved of by both houses to be binding in accordance with Section 231. In the same vein even if we accept the assertion as raised in *Harksen* that the President's consent merely sets into motion a series of acts which only has domestic effect that domestic effect ceases the moment the minister ultimately consents to extradite a person to a State with whom the Republic does not have an extradition treaty thus creating an international obligation for the State to fulfil and as such Section 231 should be employed.¹³⁹

¹³⁵ *Harksen* para 17 -22 at note 20 above.

¹³⁶ *Geuking v President of the Republic of South Africa and Others* (CCT35/02) [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC) (hereafter referred to as *Geuking*) para 26.

¹³⁷ *Geuking* para 26 at note 136 above.

¹³⁸ *Geuking* para 26 at note 136 above.

¹³⁹ Olivier M 'Interpretation of the Constitutional provisions relating to international law' (2003)(6)2 *Potchefstroom Electronic Law Journal* 41.

3.4 INTERNATIONAL LAW WITHIN THE SOUTH AFRICAN CONSTITUTIONAL FRAMEWORK

In response to South Africa's policy of forced segregation and the massive human rights violations that were occurring in country, on 6 November 1962 the United Nations decried South Africa's policy of Apartheid and 'its flouting of world public opinion by refusing to abandon its racial policies' and called upon all member States to sever economic and diplomatic ties with the Republic.¹⁴⁰

Following South Africa's readmission to the world arena and in order for South Africa to again take its rightful place as a sovereign State in the family of nations,¹⁴¹ and to demonstrate the seriousness of its commitment to upholding human rights, customary international law was acknowledged as being law in the Republic and international law was given a central role in the interpretation of statutes.¹⁴² 'This was an acknowledgement of the higher status of human rights norms arising from notions of *jus cogens*...' ¹⁴³ Furthermore, the Constitution provides that in the interpretation of 'legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'¹⁴⁴ thus ensuring municipal law conforms to international law.

In addition, South Africa ratified a host of international treaties and conventions aimed at the protection of human rights including the International Covenant on Civil and Political Rights¹⁴⁵ and its Second Optional Protocol aiming at the abolition of the death penalty;¹⁴⁶ the Convention against

¹⁴⁰ UN General Assembly, The policies of apartheid of the Government of the Republic of South Africa, 6 November 1962, A/RES/1761, available at: <http://www.refworld.org/docid/3b00f1dc8.html> (accessed 12 October 2013).

¹⁴¹ The Constitution, Preamble at note 28 above.

¹⁴² Sarkin J 'Effect of Constitutional borrowings on the drafting of South Africa's Bill of Rights and interpretation of human rights provisions' (1998) (1)(2) *University of Pennsylvania Journal of Constitutional Law* 178.

¹⁴³ Dugard J and Van den Wyngaert C (1998) 195 at note 44 above.

¹⁴⁴ S233 of the Constitution at note 28 above.

¹⁴⁵ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 available at <http://www.refworld.org/docid/3ae6b3aa0.html> (accessed 12 October 2013) (hereafter referred to as the ICCPR).

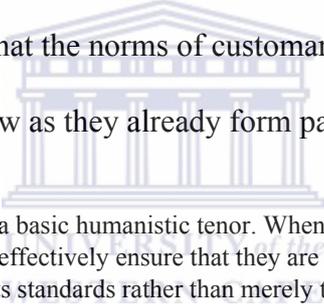
¹⁴⁶ UN General Assembly, *Second Optional Protocol to the International Covenant on Civil and Political*

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;¹⁴⁷ the UN Convention relating to the Status of Refugees;¹⁴⁸ the UN Protocol relating to the Status of Refugees;¹⁴⁹ the African Charter on Human and Peoples Rights¹⁵⁰; and the Rome Statute of the International Criminal Court¹⁵¹

The ratification of these various international instruments only serves to strengthen the protection already afforded by the Constitution to individuals subject to extradition requests. But consequently by assenting to these various human rights instruments South Africa has limited its ability to consent to the extradition of persons in accordance with the provisions of these various instruments.¹⁵²

Notwithstanding therefore mentioned instruments s232 of the Constitution provides that customary international law is law in the Republic unless it's inconsistent with a provision in the Constitution.¹⁵³

Therefore it is not necessary that that the norms of customary international law be specifically incorporated into South African law as they already form part of the law of the Republic. This



'ensure[s] that all of our law has a basic humanistic tenor. When courts interpret South African law they effectively ensure that they are giving expression to universally accepted human rights standards rather than merely the legislator's intention. This is also a type of 'never again' guarantee – that never again will South Africa be governed by positive law which conflicts with international human rights standards.¹⁵⁴

Rights, Aiming at the Abolition of the Death Penalty, 15 December 1989, A/RES/44/128 available at <http://www.refworld.org/docid/3ae6b3a70.html> (accessed 13 October 2013)(hereafter referred to as the Second Optional Protocol).

¹⁴⁷UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1948, United Nations, Treaty Series, vol. 146, p.85, available at <http://www.unhcr.org/refworld/docid/3ae6b3a94.html> (last accessed 12 October 2013) (hereafter referred to as the Torture Convention).

¹⁴⁸ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at <http://www.unhcr.org/refworld/docid/3be01b964.html> (Last accessed 3rd April 2013).

¹⁴⁹UN General Assembly, Protocol relating to the Status of Refugees, 16 December 1966, A/RES/2198, available at <http://www.refworld.org/docid/3b00f1cc50.html> (accessed 12 October 2013)

¹⁵⁰Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at <http://www.refworld.org/docid/3ae6b3630.html> (accessed 12 October 2013) (hereafter referred to as the African Charter).

¹⁵¹UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at <http://www.unhcr.org/refworld/docid/3ae6b3a84.html> (Last accessed 3rd April 2013).

¹⁵²Du Plessis M (2003) 800 see footnote 7 at note 9 above.

¹⁵³S232 of the Constitution at note 28 above.

¹⁵⁴ Hopkins K 'International law in South African courts' (2001)(21) 407 *De Rebus* 25-27.

Consequently the prominence given to international law by the Constitution and to customary international law in particular, is of particular importance with regard to the field of human rights as it brings South African law in-line with international norms without the need for domestic incorporation of treaties. This ensures that South Africa will never again return to its former status as world pariah. Thus, starting with the enactment of the Constitution and the resounding judgement in *S v Makwanyane* there came a decisive point in South Africa's history with the judiciary committing itself to upholding the principles and values of the new order premised on the respect for the human dignity, the achievement of equality¹⁵⁵ and to holding the State responsible for the advancement of human rights and freedoms in the country.



¹⁵⁵S1 of the Constitution at note 28 above.

CHAPTER 4:
VARIOUS LEGAL PRINCIPLES AND EXTRADITION.

4.1 THE PRINCIPLE OF *AUT DEDERE AUT PUNIER*

The principle of *aut dedere aut punier* or its variant *aut dedere aut judicare* is said to be a Grotian concept attributed to the father of modern international law, Hugo de Groot or Grotius as he is also known.¹⁵⁶ The obligation to extradite or prosecute has been held to be a principle of modern international law although there are doubts about its status as a rule of customary international law.¹⁵⁷

Grotius posited that a

‘general obligation to extradite or punish exists with respect to all offences by which another State is particularly injured. The injured State has a natural right to exact punishment. A State in which the offender seeks refuge should not interfere with the exercise of this right. Therefore it ordinarily must deliver the guilty individual to the requesting State for punishment. It is not rigidly bound to do so it has an alternative: to punish the offender itself. But is bound to do the one or the other either extradite or punish.’¹⁵⁸

Despite the assertions of Grotius that such an obligation to either extradite or prosecute an individual rests on States, modern legal academics seem to be in agreement on the contention that the principle of *aut dedere aut judicare* does not place any binding obligation upon a State to either extradite or prosecute an individual in the absence of a treaty creating such an obligation for the States parties concerned.¹⁵⁹

¹⁵⁶Gilbert G (1991) 157 at note 18 above.

¹⁵⁷Bassiouni M and Wise E *AutDedereAutJudicare: The Duty To Extradite Or Prosecute In International Law* (1995) 5, Gilbert G (1991) 8 at note 9 above.

¹⁵⁸Bassiouni M and Edward M (1995) 3-4 at note 141 above .

¹⁵⁹ Gilbert G (1991) 157 at note 18 above, Bassiouni M and Edward M (1995) 5 at note 157 above, Botha N (2008) para 227 at note 19 above, Plachta M ‘Contemporary problems of extradition: Human rights, grounds for refusal and the principle of *aut dedere aut judicare*’ (2001) 57 *Resource Material Series* 73-74.

4.2 THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION

In terms of classical international law only States were the subject to international law.¹⁶⁰

Historically, extradition was resorted to in order to secure the return of the political offenders, meanings someone who was guilty of a crime *lèsemajeste*, which was a crime against the State, king or sovereign.¹⁶¹

The political offence exception to extradition is said to have first arose in the Franco-Belgian treaty of 1834,¹⁶² marking one of the first times that international law concerned itself specifically with the position of an individual.¹⁶³ This was as a result of the French Revolution, which changed conceptions about the political offender¹⁶⁴. The events of the French Revolution had a ripple effect in that it inspired a wave of similar uprisings by the proletariat in other nation States.¹⁶⁵ The result of this is that the political offence exception has since been incorporated into extradition treaties the world over to protect persons who were fighting for democratic governance and the right to self determination, ideals inspired by the French Revolution.¹⁶⁶

The phrase “political offence exception” refers to a treaty reservation which a State party has made, namely the right to refuse the surrender or extradition of persons who are sought for political offences.¹⁶⁷ Thus the State will extradite individuals sought in terms of the extradition treaty except in the instance where such person is sought for political crimes or if it appears as if the prosecution is politically motivated. Thus the political offence exception to extradition is a matter of State policy or practice.¹⁶⁸ Consequently, it is not a right which the fugitive can invoke *meromotu*; it has to be

¹⁶⁰Van den Wijngaert C (1980) 37 at note 24 above.

¹⁶¹Bassiouni M (1974) 370 at note above 23 above.

¹⁶²Gilbert G (1991)115 at note 18 above.

¹⁶³Van den Wijngaert C (1980) 37 at note 24 above.

¹⁶⁴Van den Wijngaert C (1980) 9 at note 24 above, Gilbert G (1991) 115 at note 18 above.

¹⁶⁵Gilbert G (1991) 115 and 125 at note 18 above.

¹⁶⁶Gilbert G (1991) 115 and 125 at note 18 above, Bassiouni M (1974) 370-371 at note 23 above.

¹⁶⁷Van den Wijngaert C (1980) 45 note 24 above.

¹⁶⁸Gilbert G (1991) 117 at note 18 above.

specifically incorporated into the provisions of the extradition treaty.¹⁶⁹ Botha, however, argues that the political offence exception to extradition is a principle of customary international law.¹⁷⁰

In terms of South African law, the Extradition Act provides that the Minister may

‘at any time order the cancellation of any warrant for the arrest of any person issued or endorsed under this Act, or the discharge from custody of any person detained under this Act, if he is satisfied that the offence in respect of which the surrender of such person is or may be sought, is an offence of a political character or that the surrender of such person will not be sought.’¹⁷¹

The South African Government has thus explicitly reserved the right to refuse the extradition of persons where the offence is of a political character. The difficulty, however, arises in attempting to define what a political offence is, since under international law no convention or treaty has as of yet concretely defined what a political offence is.¹⁷² Additionally, the political offence exception, where it has been included in extradition treaties, can be invoked by anyone, including persons whom some may perceive as terrorists or war criminals,¹⁷³ as the political offence exception as incorporated into extradition treaties has a general scope which means that those who fight for and against democracy are equally entitled to claim its protection.¹⁷⁴ Furthermore, it can be argued that what constitutes a political offence is a matter of context and interpretation, for one may be a terrorist in the eyes of one person and a freedom fighter in the eyes of another. The position of the apartheid government towards the liberation movements is an example of this.¹⁷⁵ Van den Wijngaert notes that, based on the principle of neutrality, States should refuse the extradition of political offenders as a State does not want to be seen to be taking sides in an internal conflict, given that ‘today’s political offenders could be tomorrow’s political leaders’.¹⁷⁶

¹⁶⁹ Van den Wijngaert C (1980) 24 note 15 above.

¹⁷⁰ Botha N (2008) para 239 at note 19 above.

¹⁷¹ S15 of the Extradition Act at note 36 above.

¹⁷² Van den Wijngaert C (1980) 2 at note 24 above, Gilbert G (1991) 118 at note 18 above, *Rapholo v State President* 1993 1 SA 680 (T) at pg 743 (hereafter referred to as *Rapholo*).

¹⁷³ Gilbert G (1991) 113- 114 at note 18 above.

¹⁷⁴ Van den Wijngaert C (1980) 18 at note 24 above.

¹⁷⁵ Available at <http://news.bbc.co.uk/2/hi/americas/7484517.stm> (accessed 18 October 2013).

¹⁷⁶ Van den Wijngaert C (1980) 3 at note 24 above.

South Africa's Promotion of National Unity and Reconciliation Act¹⁷⁷ may serve as a guide as to when the political offence exception may be invoked.¹⁷⁸ The Act defines an act associated with a political objective with reference to the following criteria:

'The motive of the person who committed the act, omission or offence; the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto; the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence; the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals; whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organization, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued...'¹⁷⁹

In the case of *Rapholo v State President and Others* the above criteria, as then embodied in the report of the working group established in terms of the Groote Schuur Minute to make recommendations on the definition of political offences in the South African situation, served as guidance to the court in determining whether the applicant had committed a political offence.¹⁸⁰

However, in light of the threat which terrorism poses to maintaining international peace and security, the South African Government has taken the position that in respect of certain offences identified in the Protection of Constitutional Democracy against Terrorist and Related Activities Act,¹⁸¹ a request for extradition 'may not be refused on the ground that it concerns a political offence, or an offence connected with a political offence or an offence inspired by political motives, or that it is a fiscal offence.'¹⁸² Thus the effect of the political offence exception in South African extradition law has

¹⁷⁷ The Promotion of National Unity and Reconciliation Act 34 of 1995 (hereafter referred to as the TRC Act).

¹⁷⁸ Dugard J, Du Plessis M & Anton Katz et al (2011) 222 at note 41 above.

¹⁷⁹ S20(3)(a)-(f) of the TRC Act at note 177 above.

¹⁸⁰ *Rapholopara* 742-744 at note 172 above.

¹⁸¹ The Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004.

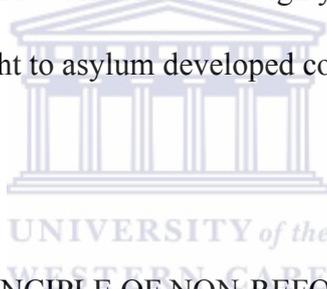
¹⁸² S22(1) of the Extradition act at note 36 above.

been somewhat watered down.

Notwithstanding the political offence exception to extradition, discrimination clauses embodied in extradition treaties may also prohibit the extradition of an individual.¹⁸³ The South African Extradition Act contains such a clause which provides that '[a] magistrate may order that the person brought before him or her shall not be [s]urrendered...[if] 'the person concerned will be prosecuted or punished or prejudiced at his or her trial... by reason of his or her gender, race, religion, nationality or political opinion.'¹⁸⁴

It should, however, also be borne in mind that a State has the power to refuse the extradition of an individual based on the exercise of its territorial sovereignty and may offer such an individual asylum.

¹⁸⁵ Thus, it can be said that the right to asylum developed co-relative to the law of extradition.



4.3 ASYLUM AND THE PRINCIPLE OF NON-REFOULEMENT

Grotius was of the opinion that 'asylum is for the benefit of those who suffer from undeserved hate, and not for those who have injured human society or other people'.¹⁸⁶ Following the atrocities committed during WWII there was a realization that individuals were deserving of protection from the State. This gave rise to the notion of fundamental human rights guaranteed to all persons.¹⁸⁷ The Universal Declaration of Human Rights provides that '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.'¹⁸⁸ Thus with the development of human rights came the

¹⁸³ Van den Wijngaert C (1980) 80 at note 24 above.

¹⁸⁴ S10(2), s11(b)(iv) and s12(2)(ii) of the Extradition Amendment Act at note 41 above.

¹⁸⁵ Colombian-Peruvian asylum case, Judgment of November 20th 1950 : I.C. J. Reports 1950, fi. 274 available at <http://www.icj-cij.org/docket/files/7/1849.pdf> (accessed 18 October 2013), Van den Wijngaert C (1980) 45 at note 140 above.

¹⁸⁶ Van den Wijngaert C (1980) 7 at note 24 above.

¹⁸⁷ Van den Wijngaert C (1980) 37 at note 24 above.

¹⁸⁸ Art 14(1) Universal Declaration of Human Rights at note 27 above.

development of the principle of non-refoulement:¹⁸⁹

‘After two World Wars, States were suddenly confronted with a major influx of people who could not return to their country of origin for fear of religious, ethnic, racial, social and political persecution. A new legal principle emerged prohibiting the involuntary return of persons in such circumstances.’¹⁹⁰

The principle of non-Refoulement developed from the provisions of the Convention Relating to the Status of Refugees¹⁹¹. It provides that States parties are not to ‘expel or return... a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’.

¹⁹² According the Refugee Convention as refugee is

‘any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’¹⁹³

South Africa, having ratified the Refugee Convention has domestically enacted the Refugee Act¹⁹⁴ in order bring South African law in line with international norms for the protection of refugees. What is more, discrimination clauses embodied in extradition treaties reinforce the principle of non-refoulement and ‘[give] a broader scope to the concept of persecution.’¹⁹⁵ That principle of non-refoulement prohibits the extradition of refugees, can be inferred from the wording of the provision which prohibits the return of refugees by ‘any manner whatsoever’.¹⁹⁶ But more than this, the principle of non-refoulement has become a norm of customary international law from which no derogation is permitted and which trumps the State’s obligations in terms of an extradition treaty.¹⁹⁷

¹⁸⁹Van den Wijngaert C (1980) 37 at note 24 above.

¹⁹⁰Van den Wijngaert C (1980) 17 at note 24 above.

¹⁹¹Refugee Convention at note 136 above.

¹⁹²Art 33 of the Refugee Convention at note 148 above.

¹⁹³Art1A of the Refugee Convention at note 148 above.

¹⁹⁴The Refugee Act 130 of 1998.

¹⁹⁵Van den Wijngaert C (1980) 81 at note 24 above.

¹⁹⁶ UN High Commissioner for Refugees (UNHCR), Guidance Note on Extradition and International Refugee Protection, April 2008 available at <http://www.refworld.org/docid/481ec7d92.html> (accessed 18 October 2013) (hereafter referred to as UNHCR Guidance Note) at para 10.

¹⁹⁷UNHCR Guidance Note para 8 at note 196 above.

Thus it is easy to understand why individuals such as general Faustin Kayumba Nyamwasa and Radovan Krejcir when faced with their impending extradition apply for asylum in an attempt to forestall the process of extradition, given that the processing of an application for asylum by the Department of Home Affairs may take up to six months¹⁹⁸ and additionally a person may not be returned to his or her country of origin whilst his or her application for asylum is being processed.¹⁹⁹ Furthermore although there are exclusions clauses, as to who qualify for asylum practice has shown that it is possible that the process of asylum may be misused.

The impact of the principle of non-refoulement on extradition proceedings can also be felt in respect of the prohibition of torture. The principle of non-refoulement as contained in the Torture Convention provides that '[n]o 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.'²⁰⁰ Consequently, the principle of non-refoulement has been extended beyond protecting an individual from being returned to face persecution to protecting an individual from being returned to be tortured. Furthermore 'the prohibition of *Refoulement* to a danger of such treatment is binding on all States, including those which have not yet become party to the relevant treaties'²⁰¹ as the prohibition of torture has reached the status of a peremptory norm (*jus cogens*).

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¹⁹⁸ Available at <http://www.dha.gov.za/index.php/refugee-status-asylum> (accessed 18 October 2013).

¹⁹⁹ UNHCR Guidance Note para 12 at note 196 above.

²⁰⁰ Art 3 of the Torture Convention at note 147 above.

²⁰¹ UNHCR Guidance Note para 18 at note 196 above.

²⁰² UNHCR Guidance Note para 18 at note 196 above.

4.4 MUTUAL LEGAL ASSISTANCE

Extradition fits into the broader sphere of law known as mutual legal assistance.²⁰³ In order to dispel ever increasing fears that South Africa is a safe haven for criminals it is important that South African authorities are able to successfully prosecute offenders. In this regard mutual legal assistance between States in criminal prosecutions may be of cardinal importance given that technological advances such as planes, trains and boats provide the means for persons to evade prosecution in one jurisdiction by fleeing to another. Watney notes that State sovereignty and the principle of non-interference prevents the officials of one State from violating the territorial integrity of another State to either secure the person of the accused or to collect any evidence.²⁰⁴ Extradition is primarily concerned with securing the attendance of the individual at trial,²⁰⁵ the fledging field of mutual legal assistance is broader in scope concerning all aspects of the co-operation and assistance offered by one State to another in conducting a criminal trial. This shall include but not be limited to the

‘ locating or identifying persons; providing original or certified copies of relevant documents and records; serving documents or processes; taking Statements or testimony from persons; executing search and seizure; providing information and evidentiary items; facilitating the personal appearance of witnesses or the assistance of persons in investigations; making available detained persons who consent to give evidence or assist in investigations; identifying or tracing, seizure, freezing or confiscating the proceeds or instrumentalities of crime...’²⁰⁶

Thus mutual legal assistance can be thought of as an umbrella term encompassing all those acts in terms of which one State gives assistance to another in order to enable it to conduct a successful criminal trial. In South Africa mutual legal assistance is governed by the International Co-operation in Criminal Matters Act and the²⁰⁷the Prevention of Organised Crime Act²⁰⁸. The International Co-operation in Criminal Matters Act provides measures for South African authorities to grant and

²⁰³Gilbert G (1991) 33 at note 18 above, Gilbert G (1998)15 at note 16 above.

²⁰⁴Watney M (2012)293 at note 15 above.

²⁰⁵D’oliveira J ‘International Co-operation In Criminal Matters: The South African Contribution.’ (2003) 16 *SACJ* 325.

²⁰⁶D’oliveira J (2003) 336 at note 205 above.

²⁰⁷International Co-operation in Criminal Matters Act 75 of 1996.

²⁰⁸The Prevention of Organised Crime Act 121 of 1998.

request assistance with the examination of witnesses, the obtaining of evidence, the satisfaction of fines and compensation, in enforcing compensation orders and for assistance in enforcing a restraint orders.



CHAPTER 5:

COMPARATIVE INTERNATIONAL LAW

5.1 INTRODUCTION

The practice of extradition as employed by the Republic can be compared with the practice as employed by other States in order to determine if South Africa's extradition practices are in line with norms of international law.

The most important aspect of extradition practice to be evaluated is the refusal of extradition requests where the person may be subject to the death penalty upon conviction, as arose from the court's decision in Makwanyane which has formed the basis for not the protection of the right to life but has also informed our understanding on how the rights in the Constitution are to be understood.

As a point of reference it should be noted that the death penalty as a penal sanction has to date been abolished by 97 countries worldwide,²⁰⁹ thus confirming the primacy of the right to life in accordance with the Universal Declaration of Human Rights²¹⁰. Additionally, the right to life has furthermore been enshrined in the European Convention on Human Rights,²¹¹ the American Convention on Human Rights²¹², the African Charter on Human and Peoples Rights,²¹³ the ICCPR²¹⁴ with States Parties to the Second Optional Protocol²¹⁵ by their assent thereto, expressly renouncing the use of the death penalty. With the growth of the abolitionist movement and the entrenchment of the right to life, the refusal of an extradition request where the right to life will not be

²⁰⁹ Available at <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> (accessed 20 October 2012).

²¹⁰ Art 3 of the Universal Declaration of Human Rights at note 27 above.

²¹¹ Art 2 of the Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at <http://www.refworld.org/docid/3ae6b3b04.html> (accessed 20 October 2013).

²¹² Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at <http://www.refworld.org/docid/3ae6b36510.html> (accessed 22 October 2013).

²¹³ African Charter at note 150 above.

²¹⁴ Art (6)(1) of the ICCPR at note 145 above.

²¹⁵ Second Optional Protocol at note 146 above.

respected is no longer a contentious issue.

5.2 *SOERING V THE UK*

Although the case of *Soering v the UK*²¹⁶ did not deal primarily with the right to life, the case has since emerged as authority for the refusal of an extradition request where there is a threat that the death penalty may be imposed.²¹⁷ Judge DE Meyer, in writing his separate concurring judgement held:

‘When a person’s right to life is involved, no requested State can be entitled to allow a requesting State to do what the requested State is not itself allowed to do. If, as in the present case, the domestic law of a State does not provide the death penalty for the crime concerned, that State is not permitted to put the person concerned in a position where he may be deprived of his life for that crime at the hands of another State. That consideration may already suffice to preclude the United Kingdom from surrendering the applicant to the United States.’²¹⁸

Recognising the international trend towards abolition of the death penalty, he went further and held that capital punishment was overridden by the development of legal conscience and practice and that such punishment was inconsistent with the present state of the European civilization.²¹⁹ The decision in the *Soering* case can be seen as a clear illustration of the effect which the maintenance of human rights have on the system of extradition.²²⁰

5.3 *UNITED STATES V BURNS*

The Supreme Court of Canada in the case of the *United States v Burns*²²¹ held that the right to life contained in Article 7 of the Canadian Charter of Rights and Freedoms forbids the extradition of the individuals to the United States of America in the absence of an assurance that the death penalty

²¹⁶*Soering v UK* (1989) 11 EHRR 439.

²¹⁷Schabas W ‘Indirect abolition: capital punishment's role in extradition law and practice’ (2003) 25 *Loyola of Los Angeles International and Comparative Law Review* 597.

²¹⁸*Soering v UK* at note 216 above.

²¹⁹*Soering v UK* at note 216 above

²²⁰Tyler R (2007) 61 at note 7 above.

²²¹*United States v Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 (hereafter referred to as *United States v Burns*).

would not be carried out and that the Minister's consent to the extradition of the individuals without seeking such assurance was in violation of Section 1 of the Canadian Charter of Rights, which guarantees all the rights set out in the Charter.²²²

5.4 VENEZIA V MINISTERO DI GRAZIA

The Italian judiciary, in the case of *Venezia v Ministero di Grazia*²²³ held that the right to life is absolutely guaranteed by the Italian Constitution and as such assurances that the death penalty would not be imposed, although given, would not suffice.²²⁴ The Italian Constitutional Court held that in terms of

‘the Constitution, the formula of “sufficient assurances”-for the purpose of granting extradition for crimes for which the death penalty is provided in the legislation of the requesting State-is not admissible from the standpoint of the Constitution. The prohibition set out in paragraph 4 of Article 27 of the Constitution and the values that it expresses-foremost among them being life itself-impose an absolute guarantee.’²²⁵

Thus the Italians have gone a step further than South African authorities for whom an assurance that the death penalty would not be imposed or if imposed it would not be carried out, suffices. But as the aforementioned case law proves, South Africa's practices as far as the preservation of the right to life in extradition proceedings is concerned, mirror those endorsed and practiced by the majority of the community of States.

The prohibition of torture or punishment that is cruel, inhumane or degrading has also emerged as an obstacle to extradition. At the time when the decision in *Makwanyane* was handed down the European Court of Human Rights had already confirmed the death row phenomena as a violation of the right not to be subject to cruel, inhumane, degrading treatment or, punishment or torture; This was the in the case of *Soering v the UK*, a decision which was subsequently endorsed by the

²²²*United States v Burns* at note 221 above.

²²³*Venezia v Ministero di Grazia e Giustizia* 79 *Rivista di Diritto Internazionale* 815 (1996).

²²⁴*Schabas W* (2003)597 at note 217 above.

²²⁵*Schabas W* (2003)597 at note 217 above.

Constitutional Court in *Makwanyane*.²²⁶ Subsequent thereto in order for south Africa to fulfil its obligations in terms of the Torture Convention it has enacted the Prevention and Combating of Torture of persons Act²²⁷ which in Section 8, which focuses on the extradition, return or expulsion of persons provides that ‘[n]o person shall be expelled, returned or extradited to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.’²²⁸



²²⁶*Soering v UK* at note 216 above.

²²⁷Prevention and Combating of Torture of Persons Act 13 of 2013 (hereafter referred to as the Torture Act).

²²⁸S8 of the Torture Act at note 227 above.

CHAPTER 6:

6.1 SOUTH AFRICA'S HUMAN RIGHTS EXCEPTION TO EXTRADITION

In terms of the provisions of the South African Constitution, in addition to the enumerated human rights instruments and the State's obligations in terms of customary international law, the States extradition practices have to centre upon the protection of human rights. What can be discerned from the case law is that South African authorities will consent to the extradition of an individual, except in circumstances where there is a risk that that the individual's human rights, as espoused in the Bill of Rights, will not be respected upon extradition, because the State cannot be a party to conduct which violates the Constitution. Although the rights most prominently implicated have been the right to life, the right to be free from cruel, inhumane or degrading treatment, punishment or torture, in combination with the right to dignity as Du Plessis notes, there is no reason that extradition may not be refused in instances where other Constitutional rights are implicated.²²⁹

Dugard and Van den Wyngaert argue that there cannot be a general human rights exception to extradition because

‘ it would result in refusal of extradition in a wide range of situations and seriously weaken international cooperative efforts in the suppression of crime, which arguably is in violation of another obligation binding upon States the obligation to suppress crime and to protect victims of crime. [I]t disregards the need to strike a fair balance between human rights protection and crime suppression, which lies at the very heart of the criminal law and hence also of modern extradition law.’²³⁰

Although the two authors raise valid concerns about the implications of a general human rights exception to extradition, the answer to their concerns does seem to be rather obvious.

As long as States provide an assurance that the implicated rights will not be violated, then an extradition request will not be refused. Thus the onus is on the State concerned to ensure that it respects human rights, for once this assurance is given, all the concerns raised by Dugard and Van den Wyngaert disappear. This approach has the additional benefit of encouraging States to amend

²²⁹Du Plessis M (2003) 805 at note 9 above.

²³⁰Dugard and Van den Wyngaert (1998)205 at note 44 above.

their practices so that in future the same problem does not occur, thus promoting the protection of human rights. Furthermore, this human rights exception to extradition will only be invoked in cases where the State's obligation to respect, promote and protect the rights in the Bill of Rights outweighs its obligations in terms of the extradition treaty, as the cases of *Mahomed* and *Tsebe* have shown. Thus an exception to extradition in cases where there are concerns about the protection of the human rights has emerged in South African law.

6.2 CONCLUDING OBSERVATIONS AND REMARKS

Although the spirit of the legislation in force to facilitate the extradition of individuals underscores the concern for the protection of fundamental human rights in particular the right to life; the right to freedom from cruel; inhumane or degrading treatment or punishment and torture the problem with the legislation is that it does not follow the prescripts laid out by the Constitution in s231 for the domestication of extradition treaties into South African law. This may in the future have the resultant effect that the extradition of individuals not only from the Republic but to the Republic as well, may be challenged on this basis.

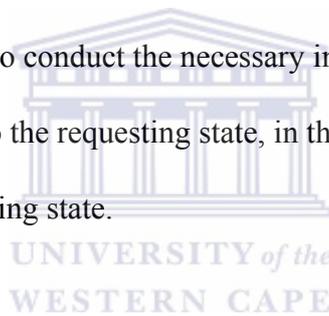
Extradition treaties between the Republic and another State cannot at present be considered self executing provisions in terms of section 231(4) of the Constitution because they are not the provisions of a treaty but an entirely new treaty which has been concluded therefore they should be entered into in accordance with the provisions of Section 231(2) of the Constitution. In the alternative the legislature may due to the volume of effected treaties and in view of the time and expenses invalidating all extradition treaties, concluded since the adoption of the Constitution, would occasion hold that all extradition treaties entered into are to be considered as self executing.

The speculation about whether extradition agreements are self executing or not has in no respect been settled by the judgement of the court in *Quagliani* which has provided no further clarity on the

issue or coherent reasoning to follow. Consequently with the judiciary providing to clear guidance on the issue it is pertinent that the legislature settle the issue.

Whilst they are at it, it would be prudent for the legislature to give clarity on what an international agreement is as this is pertinent in determining whether the procedure in Section 231(2) of the Constitution should be followed.

Furthermore the provisions of the Act which relate to the power of the President to consent to an ad hoc extradition of an individual with whom the Republic does not have an extradition treaty should also be amended for the sake of legal certainty and clarity. Considering that it has been held that the President's consent is a domestic act the act should be amended to reflect this understanding of the effect of such consent. Perhaps something along the lines that the President may consent to the Minister instructing a magistrate to conduct the necessary investigation with the view of determining if the individual can be extradited to the requesting state, in the event that the State does not have an extradition treaty with the requesting state.



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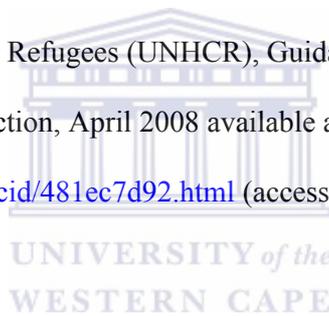
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