

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

RESEARCH PAPER

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Proposed Degree **Magister Legum (LLM) (Mode III)**

Department **Department of Criminal Justice and Procedure**

Title of Research Paper **The protection of the right to freedom from
torture and extradition in South Africa**

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1. List of abbreviations

ACHPR:	African Commission on Human and Peoples' Rights.
AJIL:	American Journal of International Law.
CAT:	UN Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment
CIDT:	Cruel, inhuman and degrading treatment or punishment
CSR:	Convention on the Status of Refugees
ECHR:	European Convention on Human Rights
ICCPR:	International Covenant on Civil and Political Rights.
SACJ:	Southern African Journal of Criminal Justice.
SADC:	Southern African Development Community
SAJHR:	South African Journal on Human Rights.
SALJ:	South African Law Journal.
SCA:	Supreme Court of Appeal
UDHR:	Universal Declaration of Human Rights

2 Key words

Conventions

Domestic laws

Extradition law

Human rights

International law

Treaties

The right to freedom from torture

Procedure



DECLARATION

I, Siyasanga Njambatwa, declare that 'The protection of the right to freedom from torture and extradition in South Africa' is my own work and that it has not been submitted before for any degree or examination in any other University, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed: _____

Siyasanga Njambatwa

November 2013

Signed: _____



Prof Jamil Mujuzi (Supervisor)

November 2013

Acknowledgement

First and foremost Glory be to God for his everlasting grace and mercy unto me.

To Prof Jamil Mujuzi, my supervisor, thank you for your patience and for the extra mile you took. I am greatly indebted to you.

I would like to thank my parents Mr and Mrs Njambatwa for being my pillars of strength, for their love and support and words of encouragement.

To my siblings Chuma Njambatwa, Lukhanyo Njambatwa, Litha Balekile, Amahle Njambatwa, thank you for the moral support and just for being good listeners.

To a very special friend Lusanda Dongeni, thank you for being a shoulder to lean on, for the support and love.



Finally to my friends and cousins who have been encouraging me throughout my journey, Thulaganyo Goitseone Selokela, Timothy Kyepa, Lwando Dondashe, Thembela Njambatwa and Amanda Njambatwa. You have been more than a support system.

DEDICATION

This work is dedicated to my loving parents, Mrs Grace and Mr Sicelo Njambatwa who never gave up on me and who have supported me emotionally, financially and spiritually.

To my beautiful daughter, NgazoMivuyo Njambatwa-Your smile kept me going. This one is for you my angel.

Lastly I dedicate this paper to my supervisor Prof Mujuzi, I am eternally grateful for everything.



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CHAPTER ONE

1. INTRODUCTION

In this study different stages in South African political history are discussed to indicate how the government dealt with the issue of extradition. Reference will be made to aspects relating to the protection of the suspect's procedural rights as well as to the protection of the individual's right to freedom from torture. Such examination will refer to the position in South African law as well as the position on the international front. Attention is given to developments in case law as well as to how the courts approach the tension between extradition and human rights both locally and internationally.



It is submitted that the extradition process is the most effective procedure available to return an offender to the state seeking his prosecution. The process has however, in modern times adapted to uphold the rights of the suspect whose return is requested. This can be seen from the provisions included in recent treaties and conventions, most notably the European Convention on Extradition to which South Africa became a party in 2003. States rely on extradition conventions, general schemes such as the Common Wealth Scheme for the Rendition of Fugitive Offenders of 1990 and domestic law also plays a vital role as a legal base for extradition. In cases where a treaty is not applicable, extradition may also take place in terms of the *aut dedere aut judicare* principle or through comity. Extradition is clearly concerned with the balancing of the offender's human rights and the need for effective enforcement of domestic and international criminal law.

Prior to 1994, many states declined to interact with South Africa in general and more specifically in the investigation and prosecution of crime because during the apartheid era South Africa became politically isolated. States, which had extradition arrangements with South Africa, cancelled them during apartheid and few states were willing to enter into new extradition agreements with South Africa¹. The extradition agreements that were concluded were limited to states within the Southern African region² and to states such as Israel³ and the Republic of China⁴. In the situation where no extradition agreement existed between South Africa and the requesting state, a special arrangement had to be made for South Africa to return a suspect to this particular state.



After South Africa had gained its democracy, many States entered into new arrangements for extradition with South Africa. The apartheid era ended in 1994 and as a result, on the 20th of July 1994 South Africa was readmitted into the Commonwealth. This development accelerated in May 2003 when South Africa acceded to the European Convention on Extradition⁵, and thus became party to extradition agreements with a further fifty states. This then meant that South Africa can extradite fugitives to other countries without necessarily entering into bilateral extradition treaties. This convention has been invoked recently, in May 2012, South Africa was faced with an extradition case of Mr Louka from Cyprus who allegedly

¹Dugard, *International Law – A South African Perspective* 2nd ed. (2000) 156.

² Swaziland (Proc R292 GGE 2179 of 4 October 1968 (RegGaz 1026, Botswana (Proc R118 GG2376 of 2 May 1969 (RegGaz 1128), and Malawi (Proc 67 GG 3424 of 24 March 1972).

³Proc R14 GGE 6362 of 5 February 1960 (RegGaz 6), amended by Proc R184 GG 5283 of 10 September 1976 (RegGaz 2367). Also see Dugard J, *International law: A South African Perspective* (2011) 4ed pg 215.

⁴Proc 83 GG 11316 of 24 May 1988.

⁵European Convention on Extradition NO:024.

committed murder in South Africa.⁶ The court ruled in favour of extradition as Cyprus had joined the European Convention on Extradition (EU) in 2004, because Cyprus joined the EU in 2004 this meant that extradition was possible. Even though Cyprus and South Africa do not have an existing extradition treaty, government authority of both countries signed a co-operation agreement to fight organised crime and money laundering.⁷ Transborder-movement of human beings has increased dramatically over the past decade globally. Also, South Africa has become a desirable state for fugitives to hide in.⁸

Extradition is known to be a method of surrendering an alleged offender from one state to another for prosecution⁹. The person is then taken back to the state where the alleged offence had taken place so that he could be tried (and convicted). The purpose to be achieved by extradition is to prevent the successful escape of persons accused of crime, and to secure their return to the state where they allegedly committed the offence. The return of suspected criminals is secured by means of extradition agreements between states¹⁰. Extradition can take place in terms of reciprocal agreements entered into bilaterally, in terms of multilateral conventions or based on international comity recognised between states in general.

⁶ Fenwick S' Eye Witness News': available on ewn.co.za/2012/05/14/Louca-extradition-hearing-postponed (accessed on the 5th of September 2012).

⁷ The Government of South Africa v Louka George (unreported case).

⁸ Example of such includes Jurgen Harksen, James Kilgore, Khalfan Khamis Mohammed and General Kayumba Nyamwasa.

⁹ Dugard *International Law* 42.

¹⁰ *Harksen v President of the Republic of South Africa and others* 2000 (2) SA 825 (CC) para 4.

South Africa's ability to participate in extradition procedures is regulated by the Extradition Act¹¹. The Extradition Act fulfils a threefold purpose. First it serves as an enabling act for entering into treaties in accordance with certain guidelines¹². Secondly the Extradition Act provides for the procedure to be followed in the execution of extradition request¹³. Thirdly the Extradition Act provides for the manner in which persons extradited to the Republic should be dealt with¹⁴.

Under international law the prohibition of torture, or the right to physical integrity, has a special status. It is not only non-derogable in the International Covenant on Civil Political Rights, European Convention on Human Rights¹⁵ and African Charter on Human and Peoples' Rights, it is also ensured without any restriction whatsoever¹⁶. Specialised treaties have been adopted both on the international and the regional level in order to battle the worldwide practice of torture¹⁷. The definition of torture in article 1(1) of the 1984 Torture Convention must be regarded as authoritative. It provides:

“[T]orture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or with the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions”.¹⁸

¹¹ Act 67 of 1962.

¹² Section 2 of the Extradition Act.

¹³ Sections 3 to 17 of the Extradition Act.

¹⁴ Sections 19 to 20 of the Extradition Act.

¹⁵ European Convention on Human Rights CET NO 005.

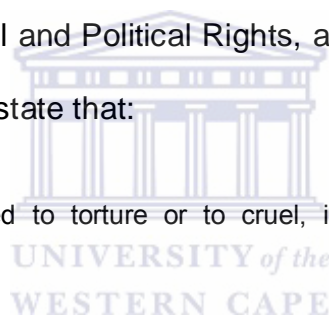
¹⁶ It has amongst others been included in Art. 5 of the UDHR, Art.3 of the four Geneva Conventions, Art.7 of the ICCPR, Art.3 of the ECHR, Art.5 of the ACHR.

¹⁷ In 1987, the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* came into force, calling on States Parties to criminalise torture. South Africa signed this Convention in 1993 and subsequently ratified it in 1998.

¹⁸ Article 1(1) of the Torture Convention, 1984.

Apart from the provisions of the Convention, torture and other forms of inhuman and cruel treatment or punishment have been prohibited in terms of codified international law since at least 1948. International rights instruments including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (Article 7), the Convention (III) relative to the Treatment of Prisoners of War Geneva (Article 13)¹⁹ and the Rome Statute of the International Criminal Court (Article 8)²⁰, in one way or the other, prohibit torture and other acts of severe ill-treatment as a peremptory norm of international law. This prohibition is absolute and non-derogable, meaning that no act amounting to torture or severe ill-treatment can be justified in any way or form, or for any reason whatsoever. The first sentence of Articles 7 of the International Covenant on Civil and Political Rights, and Article 5(2) of the American Convention on Human Rights state that:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.



This prohibition relates both to physical pain and mental suffering. None of the monitoring bodies make a clear distinction between the different concepts²¹. However, in hierarchical terms torture is considered the most serious violation, followed by, respectively, cruel and inhuman treatment, and degrading treatment or punishment²². Torture involves the intentional infliction of severe pain or suffering²³.

¹⁹ 12 August 1949.

²⁰ Rome Statute of the International Criminal Court A/CONF.183/9.

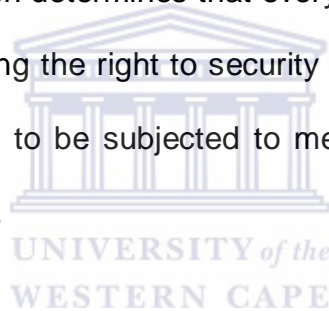
²¹ Rodley N 'The Definitions of Torture in International Law' Current Legal Problems, Vol. 55, (2002). 467-493.

²² UN Committee Against Torture (2008) General Comment – Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2, Implementation of Article 2 by States Parties, Thirty-ninth session, 5-23 November 2007, para 3.

²³ UN Committee Against Torture (2008) General Comment – Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2, Implementation of Article 2 by States Parties, Thirty-ninth session, 5-23 November 2007, para 10.

Cruel and inhuman treatment concerns the causing of intense physical and mental suffering. Degrading treatment mainly entails (severe) humiliation of the victim.

Apart from the Convention, in terms of section 1 of the Constitution²⁴, dignity is a founding value underlying our constitutional democracy. Section 10 of the Bill of Rights affirms the right to dignity as an inherent right and determines that every person has a right to have his or her dignity respected and protected. Moreover, section 12(1) of the Constitution provides that everyone has the right to freedom and security of the person, which includes the right not to be tortured in any way and the right not to be treated or punished in a cruel, inhuman or degrading way, whilst section 12(2) of the Constitution determines that everyone has the right to bodily and psychological integrity, including the right to security in, and control over, his or her body, as well as the right not to be subjected to medical or scientific experiments without their informed consent.



More than 14 years after South Africa ratified the Convention, legislation²⁵ criminalising torture and incorporating other provisions of the Convention has finally been enacted as law. This is a sign of development for the South African domestic law.

²⁴The Constitution of South Africa 1996.

²⁵The Prevention and Combating of Torture of Persons Act 13 of 2013.

2. The aim of the research

This paper will focus on the legislation governing extradition from a South African perspective. The author will specifically analyse the extent to which South Africa complies with its national and international human rights obligations in extraditing suspected offenders. To achieve this, the author will examine the relevant treaties- UN, European, African, SADC and the relevant domestic law, that is the constitution, Extradition Act and case law. Because of the fact that case law shows that there has been an overlap between the jurisprudence on deportation and extradition, the author will also examine the recent case law from the Supreme Court of Appeal on the relationship between extradition and human rights especially the right to freedom of torture.



3. Research question

The purpose of this study is to highlight the obligations imposed on South Africa by the Extradition Act, the constitution and international law, with respect to extraditing people to countries where there is a risk that their right to freedom from torture might be violated. This research argues that extradition can only be carried out when the fundamental human rights of the individual will not be violated. Put differently, is there any legal tension between human rights of fugitives and the right of states to extradite such fugitives? And what human considerations must a state take before extraditing fugitives to the requesting foreign state?

4. Literature review

Dugard²⁶ notes that international law does not recognise any general duty on the part of States to surrender criminals. In practice therefore, the return of criminals is secured by means of extradition agreements between States. The treaties always do not include crimes of a political nature among the extraditable offenses. In the context of South Africa, the concept of political offenses assumed great importance after the abolition of apartheid and the unbanning of the ANC and other liberation movements in 1990, in order to decide who should be pardoned or granted indemnity under the Indemnity Act of 1990, to allow exiles to return home and convicted political offenders to be released²⁷.

Dugard has criticised the decision of the Constitutional Court in Harksen²⁸. He is of the opinion that the Constitutional Court should have examined the interpretation of section 231²⁹ in greater detail. The writer is concerned with the lack of transparency and democracy created by the application of section 3(2)³⁰. This section creates a situation where transparency and accountability by the Executive to Parliament in matters relating to extradition will apply except in the situation where the offender is extradited in terms of s 3(2). Accordingly, the writer is of the opinion that, that situation is unacceptable in light of South Africa's new constitutional order.

²⁶ Dugard J, *International law: A South African Perspective* 4ed(2011) 214.

²⁷ Dugard J, Van Wyngaert C, "Reconciling Extradition with Human Rights"(1998).

²⁸ *Harksen v President of the Republic of South Africa and Others* 2000 (5) BCLR 478 (CC).

²⁹ The Constitution of South Africa 1996.

³⁰ Extradition Act 67 of 1962.

Kemp highlights that extradition has by custom been an aspect of international law.³¹ Thus emphasis has been placed on the role of the executive rather than the courts (judiciary). He provides two reasons, why the emphasis should be on the procedural process rather than the executive.

First he argues that human rights and due processes are best protected when viewed as an extension of the criminal justice system rather than as a matter of international relations. Secondly he argues that the aim of extradition should be effective criminal justice rather than international state relations.

On the other side Gilbert³² argues that the delicate balance seen in extradition law between, on the one hand, its provision of mutual assistance in criminal matters at an international level between states and, on the other, its protection of the rights of the fugitive, means that occasionally there will be a conflict and that one party will suffer. The recognition of both aspects of extradition law is essential to a full understanding of its operation and future development.

Katz³³ looks at South Africa's emergence from isolation and its consequences, the cases of *Mohamed* and *Kaunda*, and the development of the laws of extradition and mutual legal assistance. He argues that the recent responses by the legislature, executive and judiciary to South Africa's re-emergence in global affairs and the increasing and more dangerous terrorist activities in the last decade will guide and

³¹ Kemp GP, "Mutual legal assistance in criminal matters and the risk of abuse of process: a human rights perspective" (2006) 730-743.

³² Gilbert G, *Aspects of Extradition Law: International Studies in Human Rights* (Volume 17) (1991)148.

³³ Katz A, "The Transformation of South Africa's Role in International Co-Operation in Criminal Matters" conference on 7-8 February 2005. (<http://www.csvr.org.za/wits/confpaps/katz.htm>).

shape the future of South Africa's role in global and regional attempts to investigate and prosecute international crime.

This research will discuss the approaches adopted by the South African courts in protecting human rights with regard to extradition, looking at how courts strike a balance between domestic laws and international laws. Most of the literature in South Africa deals with the relationship between extradition and death penalty and where torture is discussed it is done in passing. The researcher is not aware of any work that covers the recent development from South African Courts on the issue of the approaches these courts have taken to protect the right to freedom from torture in extradition cases. This study will fill that gap.

It is critical to note that even in cases where extradition has been denied on the basis of death penalty, this has not been deemed just because the death penalty will be imposed but rather because the death penalty would be a violation of the right to human dignity. Other applicants have claimed that extradition would subject them to unfair trial practices in the requesting state³⁴.

6 Research methodology

This research used desktop methodology as part of its research on the topic of extradition law. Relevant primary and secondary sources on extradition were relied

³⁴*The Government of South Africa v Shrien Dewani* (Unreported case, City of Westminster Magistrates' Court, sitting at Belmarsh Magistrates' Court, 10 Aug 2011). Dewani's appeal against the extradition order to the High Court was dismissed on 30 March 2012. The High Court, however, temporarily halted his extradition to South Africa on the grounds that it would worsen his mental health condition and make it more difficult to get him into a position where he was fit to plead. The court found that it would be in the interests of justice to facilitate his recovery so that the trial could proceed sooner rather than later. Greenhill S "We just want the truth': Agony of murdered Anni Dewani's family after her husband's extradition to South Africa is temporarily halted on mental health grounds", 2012. Available on www.dailymail.co.uk/news/article-2122643/Shrien-Dewani-extradition-halted-mental-health-grounds.html (accessed on the 9 of June 2012).

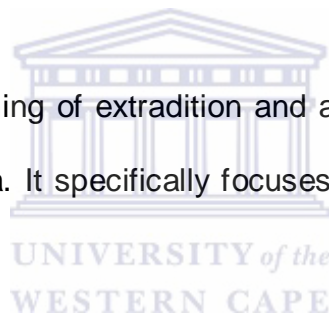
on. The primary sources included international law and domestic law. Domestic law included the Constitution, the Extradition Act, other relevant pieces of legislation, as well as case law. International law included international treaties and customary international law. Leading text-books, law journal articles, and internet websites on the topic were also referred to as secondary sources.

7 Chapter overview

This research paper consists of five chapters namely:

Chapter one is the introduction to the research paper, it outlines the problem statement and gives brief over view to the arguments of this paper

Chapter two focuses on meaning of extradition and a brief historical perspective on extradition law in South Africa. It specifically focuses on the Extradition Act and its procedures.



Chapter three looks at torture: South African obligations, international laws and domestic laws with regards to the right to freedom from torture.

Chapter four, deals with case law on extradition and the protection of human rights. This chapter looks at the development of South Africa from the apartheid era into constitutionalism.

Chapter five consists of a conclusion.

CHAPTER TWO: EXTRADITION AND HISTORICAL PERSPECTIVES ON EXTRADITION LAW IN SOUTH AFRICA

2.1. Introduction

In South Africa extradition procedures are governed and regulated by the Extradition Act, (the Act).³⁵ Extradition is an official surrender of a suspect or a convicted individual who is a fugitive from justice by one state on whose territory he is found to another state where he is accused or has been convicted of a crime or crimes.³⁶ The suspect is transferred to the requesting state in which the alleged offence took place for the purpose of criminal prosecution or the execution of a sentence³⁷. The latter case should be distinguished from the issue of the transfer of sentenced persons whose discussion falls outside the scope of this thesis.³⁸ The Act serves three purposes³⁹, first it serves as an enabling act for entering into treaties in accordance with certain guidelines⁴⁰. This should be understood against the background that generally for international treaties to become part of South African law, they have to be domesticated through enabling legislation.⁴¹ Secondly the Act provides for the procedure to be followed in the execution of extradition requests⁴². And thirdly, the Act provides for the manner in which persons extradited to South Africa should be dealt with⁴³. The main goal to be achieved by extradition is to secure the return of a suspect to the state where they allegedly committed the offence. Thus extradition is

³⁵ Extradition Act 67 of 1962.

³⁶ Dugard J, *International law: A South African Perspective* 4ed (2011) 214.

³⁷ Dugard *International Law* 214.

³⁸ For the discussion of the issue of the transfer of sentenced persons between countries see *The International Transfer of Sentenced Persons*, Criminal Justice Handbook Series (2012) 10.

³⁹ Extradition Act 67 of 1962.

⁴⁰ Section 2 of the Extradition Act 67 of 1962.

⁴¹ *Glenister v President of the Republic of South Africa* 2011 (7) BCLR 651 (CC). Also see section 231 of the Constitution of South Africa 1996.

⁴² Sections 3-17.

⁴³ Sections 19-20.

one of the ways⁴⁴ through which states cooperate in criminal matters and it is invoked to ensure that people do not escape from justice.

Every single extradition is regarded as an agreement under international law. However, international law does not recognise any general duty on the part of a state to surrender suspects or criminals.⁴⁵ There are at least two ways through which extradition can be achieved. The first is that two states may conclude bilateral extradition agreements. South Africa has, for example, concluded bilateral extradition agreements with countries such as Lesotho⁴⁶, China⁴⁷, and Algeria⁴⁸. The second way is by a state ratifying or acceding to a multilateral extradition treaty or treaties⁴⁹. Examples of multilateral treaties include the Convention for the Suppression of Hijacking,⁵⁰ which allows for the extradition of a person alleged to have committed an offense under the Convention. The second example is the European Convention on Extradition,⁵¹ and the United Nations Convention against Torture. Accordingly article 4 (f) of the Southern African Development Community Protocol on Extradition provides that, extradition will be refused if the person is in prejudice of torture. The Convention on the Prevention and Punishment of the Crime of Genocide article 7 (2) places a binding obligation on all parties to this Convention

⁴⁴ The other ways through which states cooperate in criminal matters include deportation. However, these are beyond the scope of this paper.

⁴⁵ Sanders AJGM "Extradition" in *The Law of South Africa* (vol 10) (1983). In terms of the European Convention on Extradition, Article 1 provides for an obligation to extradite: Article 1 – Obligation to extradite "The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order".

⁴⁶ Government Gazette 26375 of 28 May 2004.

⁴⁷ Entered into force on 17 November 2004.

⁴⁸ Approval to ratify 11 November 2002 but not yet in force.

⁴⁹ One example of such multilateral treaty is the Convention for the Suppression of Hijacking that allows for the extradition of a person alleged to have committed an offense under this Convention.

⁵⁰ Hague Convention 14 October 1971.

⁵¹ European Convention on Extradition CET NO 024.

to grant extradition in accordance with their domestic laws. Article 14 of the Great Lakes Protocol on Genocide sets out legal basis for extradition.

2.1.1 Brief historical background to extradition

In the early 19th century the focus of extradition was on a common serious offence due to the nature of such crimes as they replaced political offences as crimes dominating to the instability of a state⁵². In the 20th century there was a pattern to exclude political offences in extradition treaties. This, however, changed due to the increase of international terrorism⁵³.

During the early 19th century extradition law in South Africa was based on British law. During this period, a distinction was drawn between extradition involving members of the Commonwealth on the one hand and extradition which did not involve members of the Commonwealth on the other hand. The Fugitive Offender Act of 1881⁵⁴ applied to extradition to countries in the Commonwealth and the British Extradition Acts from 1870 to 1906⁵⁵ governed extradition to countries outside the Commonwealth. During the 20th century but before South Africa gained independence, England granted the Union⁵⁶ the authority to conclude treaties on its own behalf independent of Britain⁵⁷.

⁵² Joubert *The Law of South Africa: Executive Authority to Fundamental Rights* (1993) 244.

⁵³ Gilbert G, *Aspects of Extradition Law: International Studies in Human Rights* (Volume 17) (1991).

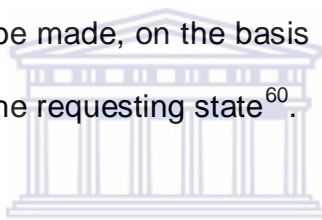
⁵⁴ In 1966 the Fugitive Offenders Act was replaced by a 'Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth'.

⁵⁵ Dugard *International Law*, 215.

⁵⁶ This allowed the British Government to extend extradition treaties entered into between the British Government and other states to British colonies. After South Africa acquired full treaty making power the South African Government was able to enter into treaties with other states on its own behalf.

⁵⁷ Dugard *International Law*, 215.

In 1961 South Africa became a republic. It introduced the apartheid system and as a result gave up its membership to the Commonwealth. The effect of this was that South Africa forfeited its membership of all extradition agreements that had been previously entered into with Commonwealth countries⁵⁸. This, however, did not affect the status of these agreements between these states as they continued being valid and enforceable. During this period South Africa had introduced the apartheid system and was politically isolated and as a result few extradition agreements were concluded with the neighbouring countries such as Lesotho, Namibia and Zimbabwe and states such as Israel and the Republic of China⁵⁹. In the circumstances in which there was not an extradition agreement between South Africa and a requesting state, a special arrangement had to be made, on the basis of the Act, so as the suspect or offender could be returned to the requesting state⁶⁰.



The apartheid regime ended in 1994 and as such South Africa became part of the international community again. As a result, on 20 July 1994 South Africa was readmitted into the Commonwealth.⁶¹ However, by 1994 there had been developments at the Commonwealth level and as extradition treaties previously concluded were now dealt with in terms of the London Scheme on Extradition within the Commonwealth⁶². In terms of this Scheme, Commonwealth states agreed to uphold national extradition legislation that was in line with the Scheme. Thus article 22 of the Scheme provides that:

Each country will take, subject to its constitution, any legislative and other steps which may be necessary or expedient in the circumstances to facilitate and effectuate - (a) the transit through its territory of a person sought who is being extradited under this Scheme; (b) the delivery of

⁵⁸ Dugard J *International Law: A South African Perspective* (2000) 156.

⁵⁹ Proust K "International Co-operation: A Commonwealth Perspective" (2003) 297.

⁶⁰ Dugard *International Law*, 215.

⁶¹ Proust "International Co-operation" 297.

⁶² The London Scheme for Extradition within the Commonwealth *incorporating the amendments agreed at Kingstown in November 2002*.

property found in the possession of a person sought at the time of arrest which may be material evidence of the extradition offence; and (c) the proof of warrants, certificates of conviction, depositions and other documents.

The Act⁶³ was amended in 1996 to give more power and authority to the President (this will be illustrated shortly). Before the amendment, the Act provided for only two situations in which extradition might take place. The first was governed by section 3(1) of the Act and applies to any person who is accused or convicted of an extraditable offence committed within the jurisdiction of a foreign state which is a party to an extradition agreement with South Africa. The requested person is liable to be surrendered to the requesting state, subject to the provisions of the Act in accordance with the terms of such agreement. The second basis for extradition was governed by section 3(2) of the Act prior to the 1996 amendment. Section 3(2) provides that:

“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 President has in writing consented to his or her being so surrendered”

The 1996 amendment created a third situation in which a person might become liable for extradition. In terms of the amendment, extradition is possible where the foreign state which requests the surrender has been “designated” by the President. Thus, the President has capacity to designate a particular foreign state as a state with which extradition proceedings may be concluded. The current position is that extradition can take place on the basis of any one of the three situations mentioned above. In terms of section 2(1) (b) read with section 3(3) of the Act, the President has designated the Republic of Ireland, Zimbabwe, Namibia and the United Kingdom. South Africa has subsequently entered into extradition agreements with

⁶³67 of 1962.

Canada⁶⁴, Australia⁶⁵, Lesotho⁶⁶, United States of America⁶⁷, Botswana⁶⁸, Malawi⁶⁹, Swaziland⁷⁰, Israel⁷¹, Egypt⁷², Algeria⁷³, Nigeria⁷⁴, China⁷⁵ and India⁷⁶. In 2003 South Africa ratified the European Convention on Extradition which resulted in extradition agreement with fifty other states⁷⁷. This clearly indicated development and growth in terms of the process of extradition from its historical background to its modern international law⁷⁸.

2.2. General principles of Extradition

Extradition, like any other form of international cooperation, is based on a set of principles. These principles are found in the Extradition Act and in the bilateral and multilateral agreements that South Africa has signed or ratified. These principles will now be dealt with.



The Extradition Act endorses the principle of reciprocity. Section 2(1) (a) provides that the President may enter into extradition treaties with foreign states which provide "... for the surrender on a reciprocal basis of persons accused or

⁶⁴ Notice in Government Gazette 7063 of 18 May 2001.

⁶⁵ Notice in Government Gazette 7132 of 1 August 2001.

⁶⁶ Government Gazette 26375 of 28 May 2004.

⁶⁷ Notice in Government Gazette 7100 of 29 June 2001.

⁶⁸ Government Gazette 26375 of 28 May 2004.

⁶⁹ Government Gazette 7100 of 29 June 2001

⁷⁰ Government Gazette 7100 of 29 June 2001.

⁷¹ Government Gazette 26497 of 2 July 2004.

⁷² Government Gazette 26497 of 2 July 2004.

⁷³ Approved to ratify on the 11 Nov 2002, but not yet in force.

⁷⁴ Approved to ratify on the 11 Nov 2002, but not yet in force.

⁷⁵ Government Gazette 27168 of 21 Jan 2005.

⁷⁶ Government Gazette 28680 of 7 April 2006.

⁷⁷ Katz "The Incorporation of Extradition Agreements" (2003) SACJ 314.

⁷⁸ This convention has been invoked recently by the South African authorities to seek the extradition to South Africa of a person from Cyprus who allegedly committed murder in South Africa. However, the Supreme Court of Cyprus held that the condition of assurance was not satisfied as the court was not satisfied that the appellant would not be killed in prison if extradited to South Africa. The Court did not grant extradition. Fenwick S 'Cyprus extradition' available at <http://cyprus-mail.com> (accessed 29 September 2012).

convicted...” of certain offences. Dugard has argued that for section 2(1)(a) to be given effect “the requesting state must have jurisdiction to subject the offender to criminal proceedings in respect of the offence for which his or her surrender is sought”⁷⁹. It should be recalled that this requirement does not, however, imply that the offender must have been present in the requesting state at the time the offence was committed, or that every essential action of the offence must have taken place in the requesting state⁸⁰. The Extradition Act provides for this principle in section 2(1) in relation to extradition treaties. With regards to extradition in the absence of a treaty section 3(2) of the Act provides a way forward.

When extradition is successful, the extradited person will be governed by the laws of the requesting state. However, those laws may not be invoked to try or punish the extradited person for an offence which was not envisaged in the extradition treaty. This is known as the principle of speciality⁸¹ which is provided for in section 2 (3) (c) is to the effect that an agreement entered into by the President will be of no force unless the domestic legislation of the other party or the treaty provides for the application of this principle. The principle of speciality is “aimed at ensuring that an offender is not tried or punished because of a non-returnable offence”⁸². Section 2(3) (c), makes this principle applicable to extradition agreements to which South Africa is a party. Section 19 of the Act⁸³ applies to the prosecution of persons extradited to South Africa. It provides that an extradited person may not be detained or tried for any offence other than the offence in respect of which extradition was requested,

⁷⁹Dugard *International Law*, 220.

⁸⁰International Cooperation in Criminal Prosecution, Law Commission (1995) 189.

⁸¹Dugard *International Law*, 219.

⁸²Dugard *International Law*, 219.

⁸³Extradition Act 67 of 1962.

unless the person was returned to the requested state or permission was obtained from the state.

International extradition treaties are in many circumstances applicable to a restricted scope of offences⁸⁴. These offences are always specified in the relevant extradition treaty or treaties⁸⁵. The Act embodies this principle in section 2(1) by providing that an agreement must provide for the surrender of “persons accused or convicted of the commission... of offences specified in such agreements...” The extradition agreements which South Africa has signed with other countries provide that extradition will not take place if the offence mentioned in the extradition request is of a political nature⁸⁶. Although the Act deals with offences of a political character, it does not contain an express prohibition against extradition for political offences. Section 11 of the Act authorises the Minister of Justice to prevent the surrender of an offender for a political offence by cancelling the warrant or ordering a discharge⁸⁷. This should be understood against the background that if a person has fled to South Africa after committing an offence of a political nature in his country of nationality or citizenship, that person qualifies for refugee status in terms of South Africa’s national and international law obligations.⁸⁸

⁸⁴Dugard *International Law*, 218.

⁸⁵ In terms of the European Convention on Extradition Art 3, extradition will not be granted if the offence for which the offender is requested, relates to a political offence or the extradition request is a result of the offender’s race, religion, nationality or political opinion. Art 3 also provides for the circumstances where the offence will not be regarded as a political offence. These include crimes against humanity provided for in the Convention on Prevention and Punishment of Crimes of Genocide. It furthermore excludes any violation of specific articles contained in the 1949 Geneva Conventions. Art 4 of the European Convention on Extradition excludes extradition for military offences. Art 6 allows for a state party to refuse to extradite its nationals. In this regard South Africa restricts such nationals to South African citizens

⁸⁶ For example, see extradition agreements between South Africa and Egypt, article 4 of No. 26497 July 2004. Also see the extradition between South Africa and Swaziland, article 3 of 5th October, 1968.

⁸⁷Section 11 of the Extradition Act 67 of 1962.

⁸⁸ On the issue of the laws governing the rights of refugees and asylum seekers in South Africa see Gilbert G, *Transnational Fugitive Offenders in International Law* (vol55) 156. The Refugees Act 130 of

2.3.1. Foreign states

Section 231(1) of the Constitution provides that the negotiating and signing of all international agreements is the responsibility of the national executive. The power to enter into an agreement vests in the President⁸⁹. Such a treaty will enter into force on its publication by proclamation in the Government Gazette⁹⁰. An extradition request received in terms of such a treaty must be handed to the Minister of Justice⁹¹. The Minister will then notify the magistrate of the fact that a request has been received⁹². South Africa requests the requesting state to provide a *prima facie*⁹³ case of guilt against the offender before granting extradition⁹⁴.

A request to the Minister of Justice through diplomatic channels must be filed by the foreign state which requests South Africa to extradite the offender in terms of the extradition agreement. When the offender is arrested, they must be brought before the magistrate. The arrest and detention's aim is to conduct an extradition enquiry. This enquiry is regarded as judicial and not administrative proceedings. Extradition proceedings are *sui generis* in character hence they cannot be described as criminal proceedings as they are modelled upon a preparatory examination⁹⁵. At the enquiry, section 10 of the Act applies. It provides that:

1998 was enacted to give effect within South Africa to the relevant international legal instruments and principles relating to refugees and to provide for the reception of asylum seekers. Also see *Minister of Home Affairs v Watchenuka* 2004 (4) SA (SCA) para 2.

⁸⁹Section 2 (1) of the Extradition Act. *Harksen v The President of the Republic of South Africa* 2000 (5) BCLR 478 (CC) para 16.

⁹⁰Section 2(3) (a).

⁹¹Section 4.

⁹²Section 5(1) (a).

⁹³ *Prima facie* would in this context mean a fact to be presumed to be true unless it is disproved.

⁹⁴ *Landsdown AV, Campbell J South African Criminal Law and Procedure* (vol v) (1982).

⁹⁵ Botha "The Basis of Extradition: The South African Perspective" (1991-1992) *SAYIL* 117. A preparatory examination is a criminal proceeding. It is not a trial because the final decision in the proceedings rests with the Director of Public Prosecutions and not with the court. It is an examination which, is held before a magistrate to determine whether the evidence presented before him justifies a trial before a superior court. See *Swanepoel* 1999 (1) SA 478 (A).

If upon consideration of the evidence adduced at the enquiry referred to in section 9 (4) (a) and (b) (i) the magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the magistrate shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender; at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court. (2) For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the magistrate shall accept as conclusive proof a certificate which appears to him or her to be 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. (3) If the magistrate finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time, he shall discharge the person brought before him. (4) The magistrate issuing the order of committal shall forthwith forward to the Minister a copy of the record of the proceedings together with such report as he may deem necessary.

The liability to surrender any person accused or convicted of an offence committed in a foreign state with which no extradition treaty exists, may be considered in terms of the Extradition Act⁹⁶. The consent of the President is the only additional requirement. Apart from the consent of the President the procedure of executing the request runs the same course as in the case of a request made in terms of an extradition treaty.

In the case of *S v Khanyisile and Another*⁹⁷, the Court had to determine whether Botswana was a foreign or an associated state. The Court noted that it was important to determine this issue as different sections and different procedures apply depending on the classification of the state requesting extradition. If a state is a foreign state, then the inquiry must be conducted in terms of section 10 of the Act by a magistrate but the final decision, whether or not to extradite the person concerned, is that of the Minister of Justice⁹⁸. The Court, in making the decision, looked at the precedent of the *Shoniwa*⁹⁹ case and the *Tsebe*¹⁰⁰ case (this case will be discussed later in this thesis) and noted that there was a discrepancy between these two

⁹⁶Section 3 (2).

⁹⁷*S v Khanyisile and Another* (CA 12/2012) [2012] ZANWHC 35.

⁹⁸Paragraph 10.

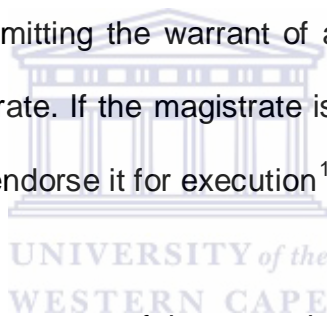
⁹⁹*Shoniwa and Others v S* 2011 (25) ZANWHC.

¹⁰⁰*Tsebe and Another v Minister of Home Affairs and Others* (2012) 1 BCLR 77.

judgements as they differed in their outcome. The Court noted that the treaty discussed in the Shoniwa case was the same which is applicable to the appellants. It therefore does not provide for the endorsement of warrants issued in either Botswana or South Africa on a reciprocal basis as provided for in section 6 of the Act, which section defines what an associated state is. The court therefore concluded that Botswana is a foreign state and not an associated state¹⁰¹.

2.3.2. Associated states

An associated state is a state with whom South Africa has an extradition agreement which provides for the reciprocal execution of warrants of arrest¹⁰². The process to be followed is initiated by submitting the warrant of arrest which was issued in the associated state to the magistrate. If the magistrate is satisfied that the warrant was lawfully issued, he or she will endorse it for execution¹⁰³.



A person who is arrested in the course of the execution of an endorsed warrant must be brought before a magistrate as soon as possible in order for an enquiry to be held¹⁰⁴. The procedure to be followed at the enquiry is similar to that of a preparatory examination¹⁰⁵. At the enquiry the provisions of section 12,¹⁰⁶ will apply if the person

¹⁰¹ Paragraph 15.

¹⁰² Section 6 of the Extradition Act.

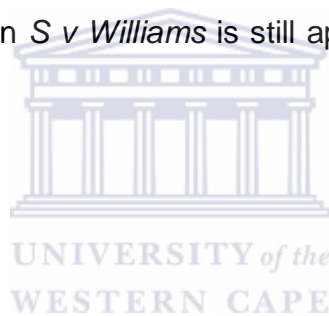
¹⁰³ Section 6 of the Extradition Act.

¹⁰⁴ Section 9(1) of the Extradition Act.

¹⁰⁵ Section 9(2).

¹⁰⁶ Section 12 provides that, (1) If upon consideration of the evidence adduced at the enquiry referred to in section 9 (4) (b) (ii) the magistrate finds that the person brought before him or her is liable to be surrendered to the associated State concerned, the magistrate shall, subject to the provisions of subsection (2), issue an order for his or her surrender to any person authorized by such associated State to receive him or her at the same time informing him or her that he or she may within 15 days appeal against such order to the Supreme Court. (2) The magistrate may order that the person brought before him or her shall not be surrendered-(a) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served; (b) where such person is serving, or is about to serve a sentence to a term of imprisonment, until such sentence has been completed; or (c) at all, or before the expiration of a period fixed by him or her, or

was arrested in the execution of a warrant of arrest endorsed in terms of section 6¹⁰⁷. It may transpire that, the person is liable to be surrendered to the associated state but that the surrender is undesirable for some reason or another. In these circumstances the Extradition Act provides that the magistrate must also decide whether the surrender would be unjust and unreasonable or too severe a punishment by reason of the nature of the offence, or the surrender was not required in good faith or in the interest of justice¹⁰⁸. In *S v Williams*¹⁰⁹ it was decided that the unreasonableness or severity of the sentence is not an obstruction but must appear upon consideration of all relevant facts¹¹⁰, and that the sentence which is likely to be imposed must be wholly inappropriate or unconscionable¹¹¹. The question of whether or not the principle laid down in *S v Williams* is still applicable will be dealt with later in this thesis.



make such order as to him or her seems just if he or she is of the opinion that- (i) 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 (ii) 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. (3) If the magistrate finds that the evidence does not warrant the issue of an order under subsection (1) or that the required evidence is not forthcoming within a reasonable time and the delay is not caused by the person brought before him or her, he or she shall discharge that person.

¹⁰⁷ Section 9(4) (b) (ii) provides that, if the associated state merely requests the extradition of the person as envisaged in section (4)(1), without relying on the endorsement of the warrant of arrest, the provision of s 10 will apply.

¹⁰⁸ Section 12(2).

¹⁰⁹ 1988 (4) SA49 (W). The appellant had been convicted in Botswana of being in possession of 984 Mandrax tablets in contravention of the Botswana Habit Forming Drugs Act. After conviction, but before sentence he got bail and returned to South Africa. He was arrested and detained in South Africa. The Magistrate hearing the extradition proceedings found that the Appellant was liable to be surrendered to Botswana and granted an order for his surrender. The Appellant appealed against this order. The mandatory sentence in terms of the Botswana Habit Forming Drugs Act included (a) imprisonment for 10 to 15 years; (b) a fine of P15 000 or in default, additional imprisonment of between 3 to 5 years; (c) corporal punishment. It was argued for the Appellant that the sentence was unduly severe and the discrepancy between possession and aggravated possession was grossly unjust and unreasonable

¹¹⁰ 52J to 53A of the judgement.

¹¹¹ 53F-G of the judgement.

The requested state on the other hand may also surrender the individual only after ensuring that there exists an extradition procedure which works both on an international and a domestic plane¹¹². Although the interplay of the two may not be severable, they are distinct. On the international plane, a request from one foreign State to another for the extradition of a particular individual and the response to the request will be governed by the rules of international law. At play are the relations between States¹¹³. However, before the requested State may surrender the requested individual, there must be compliance with its own domestic laws¹¹⁴.

In *Shonwa v S*¹¹⁵, the Court had to establish whether Botswana was an associated state or foreign state as an application for extradition was made by the Republic of Botswana, communicating the request through the diplomatic channels to the Minister of Justice as required by section 4 of the Extradition Act¹¹⁶. The appellants contended that the order of the court *a quo* finding that they were extraditable was wrong, because the extradition enquiry should have been held in terms of section 12 of the Extradition Act and not section 10 because Botswana is an associated state as contemplated by the Act¹¹⁷. The court held that the Act defines an associated state as “any foreign state in respect of which section 6 of the Act applies”¹¹⁸. Section 6 deals with warrants of arrest issued in certain foreign states in Africa and the crux thereof lies in the reciprocal endorsements of warrants for arrest that was issued in a foreign state¹¹⁹. The treaty on extraditions between the republics of South

¹¹² Stassen “New Legislation: Extradition” 2003 *De Rebus* 56.

¹¹³ Katz “The Incorporation of Extradition Agreements” (2003) 312.

¹¹⁴ *Harksen v President of RSA and others* 2000 (5) BCLR 478 para 14.

¹¹⁵ *Shonwa and others v S* 2011 (25) ZANWHC .

¹¹⁶ Extradition Act 67 of 1962.

¹¹⁷ Paragraph 10.

¹¹⁸ Paragraph 14.

¹¹⁹ Paragraph 14.

Africa and Botswana does not provide for the endorsement of warrants issued in either state on a reciprocal basis as provided for in section 6 of the Act. Therefore accordingly Botswana is a foreign state¹²⁰. The *Tsebe*¹²¹ case, however, was of the opinion that Botswana was an associated state. The Court held that:

Section 12 applies directly to the facts of this case. Section 12(1) is comparable in wording to section 10(1) save for the fact that section 12 deals with the extradition of a foreigner from an “associated State” as contemplated in section 9(4)(b) referred to above. Botswana is such an associated State by virtue of the Extradition Treaty concluded with South Africa as contemplated in section 6 of the Act. In terms of section 12(1) the magistrate conducting the enquiry concerning a foreigner from an associated state who has committed an offence may surrender such person to such state subject to the provisions of subsection (2). In terms of this latter subsection the magistrate is given similar powers to that held by the Minister to refuse the extradition of a foreigner under section 11(b)(i) to (iv)¹²².

The *Khanyisile*¹²³ case, however, differs from this decision as the Court found that Botswana was a foreign state. What is clear is that South African courts have handed down conflicting decisions on whether a state in question, in this case Botswana, is a foreign state or an associated state. In my opinion, the correct view is that Botswana is a foreign state. This is clearly supported by a literal interpretation of section 10 of the Extradition Act. However, for the purpose of this thesis, the question of whether or not the state in question is an associated or foreign state is not what is important. What is important is whether the extradited person’s rights will be protected in the extradition process.

2.4 Incorporating the international treaty into domestic law.

An extradition treaty between South Africa and another state can be legally and validly entered into according to section 2 (1) of the Extradition Act read together with section 231 (1) of the Constitution. Section 231(1) provides that the negotiation

¹²⁰Paragraph 15.

¹²¹*Tsebe and Another v Minister of Home Affairs and Others* (2012) 1 BCLR 77.

¹²²Paragraph 59 (6).

¹²³*S v Khanyisile and Another* (CA 12/2012) [2012] ZANWHC 35.

and signing of all international agreements is the responsibility of the national executive and section 231(2) of the Constitution states that an international agreement binds South Africa internationally after it has been approved by resolution in both the National Assembly and the National Council of Provinces. Incorporation of the treaty into domestic law is governed by section 231(4) of the Constitution. Section 231(4) states that an international treaty becomes law when it is enacted into law by national legislation but a self-executing provision of an agreement that has been approved by parliament is law in the Republic unless it is inconsistent with the Constitution or an act of parliament. If the extradition agreement is not validly incorporated into the domestic law it cannot be given effect, despite the extradition agreements being valid on international level¹²⁴.

The Constitutional Court recently dealt with the issue of the relationship between national law on the one hand and international law on the other hand and in particular the meaning of section 231 of the Constitution. In *Glenister v President of the Republic of South Africa*¹²⁵, Justice Ngcobo held that

The constitutional scheme of section 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature. It contemplates three legal steps that may be taken in relation to an international agreement, with each step producing different legal consequences. First, it assigns to the national executive the authority to negotiate and sign international agreements¹²⁶. But an international agreement signed by the executive does not automatically bind the Republic unless it is an agreement of a technical, administrative or executive nature¹²⁷. To produce that result, it requires, second, the approval by resolution of Parliament¹²⁸.

Court further noted that:

The approval of an agreement by Parliament does not, however, make it law in the Republic unless it is a self-executing agreement that has been approved by Parliament, which becomes law in the Republic upon such approval unless it is inconsistent with the Constitution

¹²⁴Katz "The Incorporation of Extradition Agreements" 2003 SACJ 314.

¹²⁵2011 (7) BCLR 651 (CC).

¹²⁶Section 231 (1) of the Constitution of South Africa 1996.

¹²⁷Section 231 (3).

¹²⁸Paragraph 89.

or an Act of Parliament. Otherwise, and third, an international agreement becomes law in the Republic when it is enacted into law by national legislation¹²⁹.

The approval of an international agreement, under section 231(2) of the Constitution, conveys South Africa's intention, in its capacity as a sovereign state, to be bound at the international level by the provisions of the agreement. As the Vienna Convention on the Law of Treaties provides, the act of approving a convention is an "international act... whereby a State establishes on the international plane its consent to be bound by a treaty¹³⁰". The approval of an international agreement under section 231(2), therefore, constitutes an undertaking at the international level, as between South Africa and other states, to take steps to comply with the substance of the agreement. This undertaking will, generally speaking, be given effect by either incorporating the agreement into South African law or taking other steps to bring our laws in line with the agreement to the extent they do not already comply¹³¹.

Justice Ngcobo concluded that

In our constitutional system, the making of international agreements falls within the province of the executive, whereas the ratification and the incorporation of the international agreement into our domestic law fall within the province of Parliament. The approval of an international agreement by the resolution of Parliament does not amount to its incorporation into our domestic law. Under our Constitution, therefore, the actions of the executive in negotiating and signing an international agreement do not result in a binding agreement. Legislative action is required before an international agreement can bind the Republic¹³².

In *Harksen v The President of the Republic of South Africa*¹³³, the German government requested the South African government to extradite the applicant, Mr Jurgen Harksen, to Germany to stand trial for allegedly committing fraud in Germany. The Cape High Court held that he could be extradited to Germany. Mr

¹²⁹Paragraph 90.

¹³⁰Vienna Convention on the Law of Treaties, 1969 8 *ILM* 679 at article II para 1(b).

¹³¹Paragraph 92.

¹³²Paragraph 95.

¹³³2000 (5) BCLR 478 (CC).

Harksen asked the Constitutional Court to set aside the High Court's judgement which had upheld the validity of section 3(2) of the Extradition Act. His argument before the Constitutional Court was based on section 7(2) of the Constitution, which obliges all organs of the state to protect, promote and fulfil the rights in the Bill of Rights.

As mentioned earlier, in the absence of an extradition treaty between South Africa and the requesting state, section 3(2) of the Extradition Act empowers the President to consent, in writing, to the extradition or surrender of person to such a state. On the basis of section 3(2) of the Act President Mandela consented to Mr Harksen's surrender to Germany. Against that background, the then Minister of Justice invoked the provisions of the Act, and a magistrate held an inquiry and found that there was sufficient evidence against Harksen to justify his extradition. Harksen brought proceedings in the Cape High Court designed to set aside the magistrate's findings. A number of challenges were raised. Although Harksen succeeded on a ground of review relating to aspects of the procedure followed, the constitutional issues argued by his counsel were dismissed.

Harksen first submitted that section 3(2) of the Extradition Act was unconstitutional as the President's consent under section 3(2) constitutes the conclusion of an international agreement which was not made subject to parliamentary approval as mandated by section 231(2) of the Constitution. Harksen argued in the alternative that the failure, in this instance, to subject the 'international agreement' to the constitutional requirements of parliamentary approval and legislative incorporation,

as provided for in section 231(2) and (4) of the Constitution, made his extradition process unlawful and invalid¹³⁴.

Justice Goldstone, with whose judgment the entire Court concurred, held that the presidential consent under section 3(2) had domestic application only, serving merely to bring the requested individual within the ambit of the Extradition Act¹³⁵. As a domestic act, the President's consent was never intended to create international legal rights and obligations and did not constitute an international agreement¹³⁶. The constitutional requirements of section 231 relating to international agreements thus do not apply.

In the *President of the Republic of South Africa v Quagliani*¹³⁷ case, the Court was also faced with the challenge of enforceability of agreements in South African domestic law. The applicants argued that the agreement between South Africa and the United States of America was accordingly not law in the Republic, with the consequence that extradition to and from the United States could not be undertaken. Their argument was based on section 231 (2) and 231 (4) of the Constitution. The applicants contended that the agreement had not become law in the Republic because it had not been enacted into national legislation, that its provisions were not self-executing¹³⁸.

With regards to the validity of the agreement, the applicants argued that the agreement was invalid as the President had delegated his own responsibilities to

¹³⁴Paragraph 20.

¹³⁵Paragraph 21.

¹³⁶Paragraph 22.

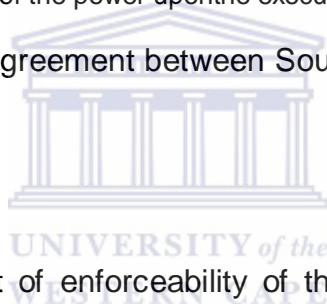
¹³⁷*President of the Republic of South Africa v Quagliani* 2009 2 SA 466 (CC).

¹³⁸Paragraph 34.

members of his cabinet. In determining the validity of the agreement, the Court looked at section 2(1) of the Act and section 231(1) of the Constitution. The Court held that:

The power conferred upon the President in section 2 of the Act must now be read with section 231 of the Constitution which provides that the national executive bears the constitutional responsibility to negotiate and sign treaties. When the President decides to enter into an extradition agreement in terms of section 2 of the Act, he does so as head of the national executive. Given the provisions of section 231 of the Constitution, it is not improper for the President, once the decision to enter into the treaty has been made by the President, to confer other formal aspects relating to the accession to the treaty on other members of the national executive. It is important that these provisions should not be applied in a formalistic manner that will impair the ability of the national executive to function. The facts that I have set out above make it plain that the President did decide that the Agreement should be entered into in terms of section 231 of the Constitution as Presidential Minute No. 428 expressly states. The fact that in the same minute the President empowered the Minister (who is a member of the national executive) to sign the Agreement and take the necessary steps to ensure that the Agreement was formally concluded is entirely consistent with the power conferred upon the national executive by section 231 of the Constitution. Similarly, the fact that the Acting Minister of Foreign Affairs signed the instruments of ratification is also consistent with the conferral of the power upon the executive¹³⁹.

The court concluded that the agreement between South Africa and the United States was therefore valid.



With regards to the argument of enforceability of the agreement in South African domestic law, the Court held that the legal question is whether the agreement becomes law in South Africa as contemplated by section 231 (4) of the Constitution. In answering this, the Court established two approaches. The first was that the agreement itself does not become binding in domestic law, but the international obligation the agreement encapsulates is given effect to by the provisions of the Act¹⁴⁰. The second approach is that once the agreement has been entered into as specified in sections 2 and 3 of the Act, it becomes law in South Africa as contemplated by section 231 (4) of the Constitution without further legislation by Parliament¹⁴¹. The Court concluded that whichever approach is used, no further

¹³⁹ Paragraph 25.

¹⁴⁰ Paragraph 46.

¹⁴¹ Paragraph 47.

enactment by Parliament is required to make extradition between South Africa and the United States permissible in South African law.¹⁴²

2.5 Extradition law and Human Rights.

It is now necessary to have a look at how the issue of human rights is addressed in South African extradition law. This should be understood against the backdrop that the South African Constitution has a comprehensive Bill of Rights¹⁴³, and South Africa has signed¹⁴⁴ and ratified¹⁴⁵ or acceded to international and regional human rights treaties. The Extradition Act and the relevant treaties show that the most significant thing is that the extradited person's right to a fair trial will not be violated in the requesting state. Sections 11 (b) (iv) and 12 (2) (ii) of the Extradition Act provides that an offender will not be surrendered to the requesting state if they will be prejudiced at the trial by reason of his or her gender, race, religion nationality or political opinion¹⁴⁶. Section 9(3) of the Constitution of South Africa further prohibits the state not to unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief,

¹⁴²Paragraph 48.

¹⁴³Chapter 2 of the 1996 Constitution of South Africa.

¹⁴⁴ "Signature applies to most multilateral treaties. This means that when a State signs the treaty, the signature is subject to ratification, acceptance or approval. The State has not expressed its consent to be bound by the treaty until it ratifies, accepts or approves it. In that case, a State that signs a treaty is obliged to refrain, in good faith, from acts that would defeat the object and purpose of the treaty. Signature alone does not impose on the State obligations under the treaty". Article 18 of the Vienna Convention on the Law of Treaties, 1969.

¹⁴⁵ "Ratification in contrary to signature refers to the act undertaken in the international plane, whereby a State establishes its consent to be bound by a treaty. Usually ratification involves two distinct procedural acts. The first is related to the constitutional (internal) laws of a contracting party. It involves the international procedure that must be fulfilled before the state can assume the international obligations enshrined in the international agreement. In many instances this involves approval by the national parliament. The second element deals with the external (international) level. It is the process through which the contracting party indicates its consent to be bound to the other contracting parties". 'Frequently asked Questions on the Hague Convention', http://www.hcch.net/index_en.php?act=faq.details&fid=38. See also definition of 'ratification' in Vienna Convention on the Law of Treaties, 1969.

¹⁴⁶67 of 1962.

culture, language and birth. The Extradition Act grounds are not exhaustive or a closed list. They should be read in line with section 9(3) of the Constitution.

In *Shonwa v S*¹⁴⁷, South Africa applied for the extradition of the appellants to the Republic of Botswana to stand trial on the three counts of theft of motor vehicle. The appellants challenged the extradition order, contending that they will not have a fair trial in Botswana should they be extradited. Their argument was that their right to legal representation will be violated. In support of their argument, they submitted that there was no government-funded organisation that can assist them in their trial in court, and that this will not be in the interest of justice.¹⁴⁸ In resolving the issues before it, the Court made a few points that should be examined in order to determine whether extradition would infringe the suspect's human rights.

The Court firstly noted that an extradition enquiry was not a criminal trial and the subjects of an enquiry are not accused persons¹⁴⁹. That an order that the appellants are extraditable is not a sentence and therefore the fair trial rights as contemplated in section 35(3)¹⁵⁰ of the Constitution are not relevant to an extradition enquiry and

¹⁴⁷ *Shonwa and others v S*2011 (25) ZANWHC .

¹⁴⁸ Paragraph 23.

¹⁴⁹ Paragraph 26.

¹⁵⁰ Section 35 (3) of the Constitution provides that: (3) Every accused person has a right to a fair trial, which includes the right- (a) to be informed of the charge with sufficient detail to answer it; (b) to have adequate time and facilities to prepare a defence; (c) to a public trial before an ordinary court; (d) to have their trial begin and conclude without unreasonable delay; (e) to be present, when being tried; u to choose, and be represented by, a legal practitioner, and to be informed of this right promptly; (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; (h) to be presumed innocent, to remain silent, and not to testify during the proceedings; (i) to adduce and challenge evidence; (j) not to be compelled to give self-incriminating evidence; (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language; (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted; (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted; (n) to the benefit of the least severe of the prescribed punishments if the prescribed

therefore procedural fairness is what should prevail¹⁵¹. Extradition agreements should be accommodated as far as possible. The Court added that the magistrate conducting an enquiry in terms of section 10 of the Act has no power to consider whether the constitutional rights of the person sought may be infringed upon extradition, because that aspect should be considered by the Minister in terms of section 11 of the Act and that the decision of the Minister is subject to judicial control.¹⁵² The court held that when the application of a national law would infringe the sovereignty of another state that would ordinarily be inconsistent with and not sanctioned by international law.¹⁵³

The Court concluded that it was speculative to argue that if no legal representation at state cost is afforded, the trial that follow will necessary be unfair. It was without merit to assume that unrepresented accused do not receive fair trials¹⁵⁴, and that there was not any evidence to indicate that the trial that will follow would necessarily be unfair. The Minister under section 11 of the Act also has the opportunity to look at the appellants' concerns regarding the fair trial issue and may refuse their surrender on that basis.¹⁵⁵

In the *Khanyisile*¹⁵⁶ case the appellants contested their extradition to Botswana, as they submitted that Botswana's sentence for the offence of armed robbery carried corporal punishment. The appellants further contented that corporal punishment is a

punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and (0) of appeal to, or review by, a higher court.

¹⁵¹ Paragraph 26.

¹⁵² Paragraph 26.

¹⁵³ Paragraph 26.

¹⁵⁴ Paragraph 27.

¹⁵⁵ Paragraph 27.

¹⁵⁶ *S v Khanyisile and Another* (CA 12/2012) [2012] ZANWHC 35.

form of torture which is outlawed in South Africa.¹⁵⁷ In this regard, the Court found that robbery was an extraditable offence in terms of section 3 (2) of the Act. Furthermore the Court held that the penalty for robbery was imprisonment exceeding twelve months as required by article 2 of the treaty, and thus capital punishment was not applicable. The court thereof dismissed the appeal¹⁵⁸.

The case of *The Government of South Africa v Shrien Dewani*¹⁵⁹ is also noteworthy in this regard. In November 2010, while the United Kingdom citizen, Dewani, and his wife, Anni, were on honeymoon in Cape Town, South Africa, Anni was shot and killed during a hi-jacking. Dewani soon thereafter left South Africa with the permission of the South African law enforcement agency. It was later alleged during the sentencing of one of the perpetrators involved in the hijacking that Dewani had arranged for the killing of his wife. The motive for the killing is unknown, although unproven allegations have been made to the effect that it was a forced marriage which did not carry Dewani's approval and withdrawal from the marriage would have resulted in his being disowned by his family. Dewani was arrested in the United Kingdom and released on bail pending an extradition application. He denied involvement in the killing of his wife and alleged that on being extradited to South Africa his human rights would be infringed as he would be in danger of gang-related sexual violence in prison. The application by the South African government for

¹⁵⁷ Paragraph 23.

¹⁵⁸ Paragraph 38.

¹⁵⁹ *The Government of South Africa v Shrien Dewani* (Unreported case, City of Westminster Magistrates' Court, sitting at Belmarsh Magistrates' Court, 10 Aug 2011). Dewani's appeal against the extradition order to the High Court was dismissed on 30 March 2012. The High Court, however, temporarily halted his extradition to South Africa on the grounds that it would worsen his mental health condition and make it more difficult to get him into a position where he was fit to plead. The court found that it would be in the interests of justice to facilitate his recovery so that the trial could proceed sooner rather than later. Greenhill S "We just want the truth': Agony of murdered Anni Dewani's family after her husband's extradition to South Africa is temporarily halted on mental health grounds' (2012). Also available at www.dailymail.co.uk/news/article-2122643/Shrien-Dewani-extradition-halted-mental-health-grounds.html (accessed on 10 July 2013).

Dewani's extradition, however, was successful. This was because, inter alia, the South African government managed to convince the United Kingdom court that his rights, including the right to a fair trial and to be detained in humane prison conditions, would be protected in South Africa.

2.6 Conclusion

Dugard argues that the extradition process is the most effective procedure available to return an offender to the state seeking his prosecution¹⁶⁰. However, the issue of human rights is now critical in the extradition process. In South Africa, a person will not be extradited to another country where there is reason to believe that his fundamental rights will be violated. Other countries will also not extradite a person to South Africa if that person's fundamental rights would be violated. This is evidenced from some of the cases discussed above and those that will be discussed below. Practice from other parts of the world also shows that human rights have to be respected in the extradition process. The European Convention on Extradition to which South Africa became a party in 2003 recognises the issue of human rights in the extradition process. Jurisprudence from the European Court of Human Rights has also shown the importance of human rights in the extradition process.¹⁶¹ Extradition is therefore concerned with the balancing of the offender's human rights and the need for effective enforcement of criminal law¹⁶².

It is important that extradition is understood not only as a governmental function, as it also involves the courts. Extradition requests may therefore result in courts in the

¹⁶⁰Dugard *International Law*, 214.

¹⁶¹Dugard J & Van Wyngaert C "Reconciling Extradition with Human Rights" (1998) AJIL 203. Also see *Soering v UK* (1989) 11 EHRR 439.

¹⁶²*Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC) para 56.

requested state scrutinising the legal system of the requesting state. This is done in order to ensure that all procedures are respected and all duties and obligations are adhered to so as to prevent any infringement of the extradited person's human rights. In the next chapter I will deal with the issue of the right to freedom from torture in South Africa.



CHAPTER THREE: THE PROTECTION OF THE RIGHT TO FREEDOM FROM TORTURE IN SOUTH AFRICA

3.1 Introduction

South African history shows that torture has been used in the country for many years.¹⁶³ However, it is beyond the scope of this thesis to deal with the history of the use of torture in South Africa. Torture was also widely used by the apartheid government.¹⁶⁴ Because of South Africa's political history, the parties which were involved in the drafting of the Constitution raised the issue of torture and the significance of including the right to freedom from torture as a clause into the Constitution. Consequently, the right to freedom from torture was included both in the interim Constitution and the final Constitution.¹⁶⁵ However, evidence from our courts¹⁶⁶ and from different credible sources show that torture is still being practiced in South Africa¹⁶⁷. However this thesis is concerned with the right to freedom from torture in the context of extradition. Before I deal with the issue of the right to freedom from torture and extradition in South Africa, I shall briefly first highlight South Africa's international, regional and national obligations to prevent torture.

3.2 International treaties on torture

Torture is a serious violation of human rights and is strictly prohibited by international law. International law prohibits torture and other forms of inhuman and degrading

¹⁶³Van Zyl Smit *South African Prison Law and Practice*, (1992) 7.

¹⁶⁴Robertson G *Crimes against Humanity*, (2006) 264. Also see Muntingh L, 'The implications of torture for South Africa' (2012) Civil Society Prison Reform Initiative, Community Law Centre (UWC) 10-11.

¹⁶⁵Curie I & De Waal AJ *The Bill of Rights handbook* (2005) 273.

¹⁶⁶*S v Mthembu* 2008 (2) SACR 407 (SCA).

¹⁶⁷Long D & Muntingh L 'The Special Rapporteur on Prisons and Conditions of Detention in Africa and the Committee for the Prevention of Torture in Africa: the potential for synergy or inertia?' (2011)

treatment, which cannot be accepted under any circumstances. Prohibition against torture is therefore absolute and non derogable¹⁶⁸, this means that no exceptional circumstance whatsoever may be invoked by a state party to justify acts of torture in any territory under its jurisdiction¹⁶⁹.

Prohibition of torture belongs to general international law since it is codified in international treaty law and in international customary law¹⁷⁰. Some of the treaties which prohibit torture include the international Covenant on Civil and Political Rights (article 7), European Convention on Human Rights ECHR¹⁷¹ (article 3), the African Charter on Human and Peoples' Rights¹⁷² (article 5), the Arab Charter on Human Rights (article 13), and the American Convention on Human Rights (article 5). These treaties have been ratified by many States. Moreover, the prohibition of torture forms part of international customary law as well. Based on these facts one could say that this non-derogable right find acceptance by the international community of States as a whole. However, in order to become a norm of *jus cogens* the rule must be accepted by the international community of States as a 'peremptory rule'. In other words, a very fundamental norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character¹⁷³. In the *Furundzija*¹⁷⁴ the International Criminal Tribunal for the

¹⁶⁸ Article 2 para 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹⁶⁹ The Committee Against Torture's General Comments no 2 (2008) paragraph 5.

¹⁷⁰ Mujuzi J.D, "An analysis of the approach to the right to freedom from torture adopted by the African Commission on Human and Peoples' Rights", 2006 (6) AHRLJ 425.

¹⁷¹ European Convention on Human Rights CET NO 005.

¹⁷² African Charter on Human and Peoples' Rights CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

¹⁷³ Article 53 of the Vienna Convention on the Law of Treaties provides that "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

Former Yugoslavia¹⁷⁵ stated that the prohibition of torture has evolved into a norm of *jus cogens*.¹⁷⁶ The recognition of the prohibition of torture as belonging to *jus cogens* does not only have the effect of making it binding upon States which have not ratified international human rights instruments, it also means that no derogation is permitted by any State, not even during the times of a public emergency¹⁷⁷.

Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture. Apart from the provisions of the Convention, torture and other forms of inhuman and cruel treatment or punishment have been prohibited in terms of codified international law since at least 1948. International rights instruments including the Universal Declaration of Human Rights,¹⁷⁸ the International Covenant on Civil and Political Rights,¹⁷⁹ the Convention relative to the Treatment of Prisoners of War Geneva¹⁸⁰ and the Rome Statute of the International Criminal Court¹⁸¹, in one way or the other, prohibit torture. This prohibition is absolute and non-derogable, meaning that no act amounting to torture or severe ill-treatment can be justified in any way or form, or for any reason whatsoever.

¹⁷⁴ *Prosecutor v. Anto Furundzija (Furundzija case)*, Judgment of 10 December 1998, ICTFY Trial Chamber para 159-160.

¹⁷⁵ The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, more commonly referred to as the International Criminal Tribunal for the former Yugoslavia or ICTY, is a body of the United Nations established to prosecute serious crimes committed during the wars in the former Yugoslavia, and to try their perpetrators. The tribunal is an ad hoc court which is located in The Hague, the Netherlands.

¹⁷⁶ Paragraph 144.

¹⁷⁷ Paragraph 5 of the Committee against Torture's General Comment No 2.

¹⁷⁸ Article 5 of the Universal Declaration of Human Rights.

¹⁷⁹ Article 7 of the International Covenant on Civil and Political Right.

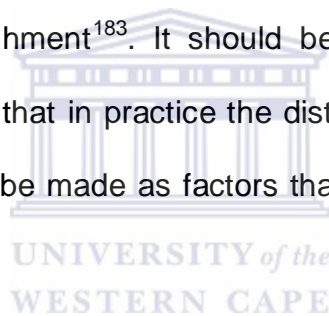
¹⁸⁰ Article 13 12 August 1949.

¹⁸¹ Article 7 & part 2 of the Rome Statute of the International Criminal Court. A/CONF.183/9.

This prohibition relates both to physical pain and mental suffering. Even though there is no definition provided for CIDT (cruel, inhuman or degrading treatment), the Committee against Torture invokes the concept of “degree of severity” to differentiate between torture from CIDT. This is clear from the Committee’s General Comment No 2 where it state that

The Committee recognizes that most States parties identify or define certain conduct as illtreatment in their criminal codes. In comparison to torture, ill-treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes. The Committee emphasizes that it would be a violation of the Convention to prosecute conduct solely as illtreatment where the elements of torture are also present¹⁸².

However, Nowak and McArthur have argued that the Committee against Torture gives discretion to the courts to decide whether an act constitute cruel, inhuman, degrading treatment or punishment¹⁸³. It should be recalled that the Committee against Torture has observed that in practice the distinction between torture and ill-treatment might be difficult to be made as factors that lead to torture also lead to ill treatment.¹⁸⁴



Articles 2 and 4 of the Convention¹⁸⁵ imposes obligation on the state parties. In terms of article 2, every state is required to take effective legislative, administrative, judicial, or other measures to prevent acts of torture in its territory. Under article 4, acts of torture must be offences under criminal law. Articles 5, 6 and 8 further require states to prosecute torture as an international offence. Article 3 stipulates that:

No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture

¹⁸²Paragraph 10.

¹⁸³Nowak M & McArthur E 'The Distinction between torture and cruel, inhuman or degrading treatment' *Torture*, Volume 16, (2006) 151.

¹⁸⁴Committee against Torture, General Comment No 2 paragraph 10.

¹⁸⁵The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

This article creates an unconditional obligation on state parties to ensure that a person is not expelled, returned or deported to another country where torture is likely to exist. Return is prohibited under all circumstances on an unconditional basis, provided there are substantial grounds of believing there would be a danger of torture. Article 17 of the Convention established the Committee against Torture. This Committee is empowered to, inter alia, to request the requested state to refuse extradition until the Committee has considered the request¹⁸⁶.

Torture is prohibited under article 7 of the International Covenant on Civil and Political Rights which states "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." This provision cannot be suspended or limited even in times of emergency. The Convention on the Rights of the Child further the rights of acknowledges children and protects them from torture. Article 37 of the UN Convention on the Rights of the Child provides that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment".

Torture can be considered as a crime against humanity¹⁸⁷, or a war crime,¹⁸⁸ or a grave breach of the Geneva Conventions.¹⁸⁹ The right to freedom from torture is absolute including during times of war. There is a duty to protect the life, health and safety of civilians and other non-combatants, including soldiers who are captured or who have laid down their arms. Torture of such protected persons is absolutely

¹⁸⁶Bantekas I & Nash S *International Criminal Law* (2003) 212.

¹⁸⁷Article 7 of the Rome Statute of the International Criminal Court A/CONF.183/9

¹⁸⁸Article 8 of the Rome Statute of the International Criminal Court A/CONF.183/9.

¹⁸⁹Section 5 of the Implementation of the Geneva Convention Act 8 of 2012.

forbidden. Common article 3 to the Geneva Conventions, for example, bans "violence of life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" as well as "outrages upon personal dignity, in particular humiliating and degrading treatment."

The African Charter on Human and Peoples' Rights is the main African human rights instrument, and it stipulates in article 5 that "every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." It further notes the respect for dignity as an inherent in a human being. It was argued in *S v Makwanyane*¹⁹⁰ that the rights to human dignity and life are entwined. The right to life is more than existence; it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity¹⁹¹.

According to the *Mohamed* case,¹⁹² the court made it clear that a person ought not be deported or extradited to another state where there was a real risk that his basic human rights would be violated in that state. Because South Africa is a party to the Convention against Torture¹⁹³ which prohibits extradition where there are substantial grounds for believing that the extradited person will be subjected to torture or to cruel, inhuman or degrading treatment or punishment in the requesting state it has a duty not to violate its international obligations. The Convention against Torture and

¹⁹⁰*S v Makwanyane and Another* 1995 (3) SA 391 (CC).

¹⁹¹Paragraph 327.

¹⁹²*Mohamed v President of the Republic of South Africa* 2001 3 SA 893 (CC).

¹⁹³Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits the extradition as well as the deportation of a person to a state "where there are substantial grounds for believing that he would be in danger of being subjected to torture" and allows no derogation. The Committee against Torture has developed jurisprudence on Article 3 of the Convention against Torture. For example, it has recommended that countries such as Burundi¹⁹⁴, Cameroon¹⁹⁵ and Mauritius¹⁹⁶, to ensure that domestic legislation does not permit the extradition of persons to countries where there are substantial grounds to believe that they would be subjected to torture. The Committee against Torture has concluded and made recommendations on the initial report of South Africa 2006.

Under no circumstances should the State party expel, return or extradite a person to a State where there are substantial grounds for believing that this person would be in danger of being subjected to torture. When determining the applicability of its non-refoulement obligations under article 3 of the Convention, the State party should examine thoroughly the merits of each individual case, ensure that adequate judicial mechanisms for the review of the decision are in place and ensure effective post-return monitoring arrangements.¹⁹⁷

Apart from international law, South Africa is also under a legal duty to protect and uphold the freedom from torture domestically. The prohibition on torture is to be enforced by both the municipal criminal law sanctions and international supervision.

In the case of *Soering v UK*,¹⁹⁸ Soering was a student in the United States of America. He was charged together with his girl friend of murder of the girl friends' parents. They both fled to Europe. Soering was arrested in England. He made a confession with the hope of being extradited to Germany as Germany had declared

¹⁹⁴Conclusions and recommendations of the Committee against Torture on the initial report of Burundi, CAT/C/BDI/CO/1, 15 February 2007, para 14.

¹⁹⁵Concluding observations of the Committee against Torture on the fourth periodic report of Cameroon, CAT/C/CMR/CO/4, 19 May 2010, para 28.

¹⁹⁶ Concluding observations of the Committee against Torture on the third periodic report of Mauritius (CAT/C/MUS/3), 15 June 2011, para 12.

¹⁹⁷Conclusions and recommendations of the Committee against Torture on the initial report of South Africa CAT/C/ZAF/CO/1 7 December 2006, para 15.

¹⁹⁸ (1989) 11 EHRR 439.

death penalty unconstitutional. Britain granted conditional extradition of Soering to the USA. A complaint was filed under the European Convention on Human Rights. The European Court of Human Rights explained what amounted to inhuman or degrading treatment as

“It depends on all the circumstances of the case...Furthermore, inherent in the whole of the Convention is a search for a balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundation of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases”.¹⁹⁹

The Court upheld Soering’s claim that his extradition to face the death penalty constituted inhuman or degrading treatment prohibited by Art 3. The Court also stated that the state from which extradition is requested must take into account any potential violation of the rights guaranteed by the European Convention on Human Rights by authorities in the requesting state, regardless of whether or not the latter is party to the European Convention on Human Rights.²⁰⁰

In the *NG v Canada*²⁰¹ matter, the Human Rights Committee held that Canada had violated its obligations under Art 7 of the International Covenant on Civil and Political Rights. Canada extradited NG to the United States where, if sentenced to death in California, he would be executed by gas asphyxiation and thus resulted in suffering which constituted cruel and inhuman treatment. The Human Rights Committee held that Canada should have foreseen that NG would be executed in this manner. Canada thus failed to comply with its obligations under the Covenant in the

¹⁹⁹ (1989) 11 EHRR 439 89.

²⁰⁰ Gilbert *Aspects of Extradition Law: International Studies in Human Rights* (1991) 88.

²⁰¹ 98 ILR 479.

extradition of NG to the United States. The Committee based its decision on the fact that execution by gas asphyxiation as a form of implementing the death penalty does not meet the requirement that capital punishment is required to be carried out in the manner which causes the least possible physical and mental suffering. The Committee concluded that even death penalty is a form of torture which can be used to obstruct extradition request.

3.3 Domestic obligations

It is important to note that in *S v Makwanyane*,²⁰² court held that even death penalty is a form of torture. Furthermore in *Mohammed v President of the Republic of South Africa*,²⁰³ the court made it clear that a person ought not be deported or extradited to another state where there is a risk that his basic human rights would be violated in that state. Using article 15 of the Convention against Torture, looking at cases on death penalty and some on deportation and referring to the jurisprudence from the ECHR, I will argue that South Africa has an obligation not to extradite if there is reasonable grounds to believe that the extradited individual will be subjected to torture.

Acts of torture and other acts of inhuman, cruel or degrading treatment or punishment violate the right to dignity, the right to freedom and security of the person, as well as the right to bodily and psychological integrity, in the most heinous manner. The act of one person inflicting severe physical or mental pain on another in order to achieve any objective can only be described as a gross human rights violation. Such violations are of a particular concern when the perpetrator is acting

²⁰² *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

²⁰³ 2001 (3) SA 893 (CC).

on behalf of a government which, in principle, has a duty to protect the rights of its citizens and other people within its jurisdiction.

As the highest law, the Constitution governs the right to freedom from torture in section 12(1) (e) of the Constitution. In terms of section 1 of the Constitution, dignity is a founding value underlying our constitutional democracy. As O'Regan held in *S v*

Makwanyane

The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern²⁰⁴.

In *S v Makwanyane*²⁰⁵ the principal argument was that the imposition of the death penalty for murder was a "cruel, inhuman or degrading punishment". It was further argued that the death sentence is an affront to human dignity, is inconsistent with the unqualified right to life entrenched in the Constitution, cannot be corrected in case of error or enforced in a manner that is not arbitrary, and that it negates the essential content of the right to life and the other rights that flow from it. The death penalty was accordingly declared unconstitutional.

In *Mohamed and Another v President of Republic of South Africa and Others*²⁰⁶, Mohamed was alleged to have been involved in the bombing of the United States embassy in Dar es Salaam, Tanzania. He faced charges in the United States of murder, murder with conspiracy as well as a charge of an attack on a United States facility.²⁰⁷ Mohamed was a Tanzanian national, who had fled to South Africa on a visitor's visa with a false passport under a false name. He applied for asylum in

²⁰⁴ Paragraph 238.

²⁰⁵ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

²⁰⁶ 2001 (3) SA 893 (CC).

²⁰⁷ Paragraph 11.

South Africa under an assumed name.²⁰⁸ He was afforded temporary residential status, which was to be reviewed periodically pending the decision on his application for asylum.²⁰⁹ He was brought before court, where inconsistent statements by officials of the Department of Home Affairs resulted in a conflict of evidence on the question of whether Mohamed was entitled to the protection against self-incrimination, the right to remain silent and the right to legal representation.²¹⁰ Mohamed was handed over to the FBI and interrogated, after which he confessed to the embassy bombing in Dar es Salaam.²¹¹ Mohamed left South Africa for the United States in the custody of the FBI²¹².

The Constitutional Court held that the surrender of Mohamed violated both the Aliens Control Act²¹³ and the Constitution.²¹⁴ The former statute permits deportation only to a country of which the person is a national. The constitution had been violated in that the South African immigration authorities had failed to obtain a prior undertaking from the US government that, if convicted, the death penalty would not be imposed on Mohamed.²¹⁵ This failure infringed his rights to dignity, to life and not to be punished in a cruel, inhuman or degrading manner. The court made it clear that a person ought not to be deported or extradited to another state where there was a real risk that his basic human rights would be violated in that state.²¹⁶

²⁰⁸Paragraph 10.

²⁰⁹Paragraphs 9 & 12.

²¹⁰Paragraph 22.

²¹¹Paragraph 20.

²¹²Paragraph 26.

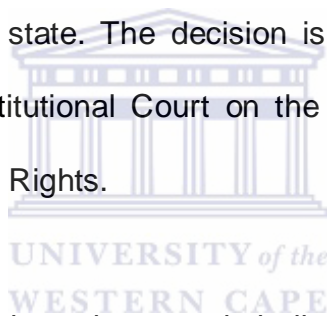
²¹³Aliens Control Act 96 of 1991.

²¹⁴South African Constitution 1996.

²¹⁵Paragraph 38.

²¹⁶Paragraph 61.

Extradition has not escaped the impact of human rights law. Extradition agreements can exclude extradition where the crime in respect of which extradition is sought is punishable by death in the state requesting extradition, but not the requested state, unless the requesting state provides a satisfactory assurance that the death penalty will not be imposed, or if imposed, will not be executed²¹⁷. In *Mohamed v President of the RSA* the Constitutional Court held that it was unconstitutional to extradite any person including undocumented foreigners to a country where he or she may face the death penalty. The Convention against Torture²¹⁸, as mentioned above, prohibit extradition where there are substantial grounds for believing that the extradited person will be subjected to torture or to cruel, inhuman or degrading treatment or punishment in the requesting state. The decision is a clear indication of the high premium placed by the Constitutional Court on the protection of the fundamental rights²¹⁹ contained in the Bill of Rights.



The use of evidence obtained through torture is indirectly governed by section 35(5) of the Constitution which provides that:

Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

In cases where the right to freedom from torture has been violated, that evidence must be excluded because its admission will always render the trial unfair and be detrimental to the administration of justice.

²¹⁷Article 11 of the European Convention on Extradition of 1957.

²¹⁸Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

²¹⁹Du Plessis (2003)805, argues for extending the *Mohamed* principle to include not only violations of the right to life but any real risk of sufficiently serious harm relating to a fundamental value protected in the Constitution.

The case of *S v Mthembu*²²⁰, dealt with torture of a state witness. The appellant's argument was that a false implication had existed as police used torture in obtaining the evidence. The legal question the court had to determine was whether the evidence relating to the discovery of the objects was obtained within the scope of section 35(5) of the Constitution, and if it should be excluded. The issue in this case was the admissibility of statements obtained under torture to secure a conviction of a suspect.

The Court acknowledged that this was the first time since the advent of the constitutional order in which torture involved a third party thereof no precedence. In this regard the Court used the plain reading of section 35(5) and held that it required that the exclusion of evidence improperly obtained from any person not only from an accused. The Court further looked at section 12 of the Constitution. The Court held that there was no doubt that the police had indeed violated all these rights in the manner that they treated Ramseroop²²¹. The Court further looked at international law as South Africa is a party to a number of treaties. It looked at the definition of torture under article 1 of the Convention against Torture (CAT), which requires that, the act to be performed for the purpose of obtaining 'information or a confession'. This is the mischief at which the CAT is aimed held the Court.²²² The Court also looked at article 15 of CAT with regards to the admissibility of evidence obtained as a result of torture:

Each State shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

²²⁰ *S v Mthembu* 2008 (2) SACR 407 (SCA).

²²¹ Paragraph 29.

²²² Paragraph 30.

The Court held that it cannot be clearer that the absolute prohibition of the use of torture demands that 'any evidence' which is obtained as a result of torture must be excluded 'in any proceedings'.²²³

In conclusion the Court held that to admit Ramseroop's testimony regarding the Hilux and metal box would require the court to turn a blind eye to the manner in which the police obtained the information from him. This then would compromise the integrity of the judicial process and dishonour the administration of justice.²²⁴ In the long term, the admission of torture induced evidence can only have a corrosive effect on the criminal justice system. The public interest, demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial. For all these reasons Ramseroop's evidence relating to the Hilux and metal box were held to inadmissible.



On the 29th July 2013 the Prevention of Combating and Torture of Persons Act²²⁵ come into operation and officially criminalized torture in South Africa. The Act is further supposed to provide for some of the obligations created by the Convention in which it falls short to. The Act defined torture as:

"Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person-(a)For such purpose as to-(i) obtain information or a confession from him or her or any other person;(ii) punish him or her for an act he or she or any other person has committed, is suspected of having committed or is planning to commit; or(iii) intimidate or coerce him or her or any other person to do, or to refrain from doing, anything, or (b) for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions"

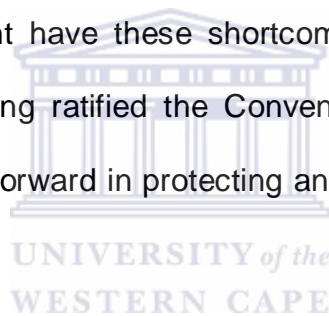
²²³ Paragraph 32.

²²⁴ Paragraph 36.

²²⁵ Act 13 of 2013.

The Act provides that “no 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”.²²⁶ The Act further does not consider “cruel, inhuman or degrading treatment” as envisaged in article 16 of the Convention. The Convention does not only recognise torture but also CIDT as a form of torture. There is an obligation on States Parties to prevent both torture and CIDT. Experience has also demonstrated that the conditions that give rise to CIDT frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent CIDT.²²⁷

In as much as the Act might have these shortcomings, South Africa has finally criminalized torture after having ratified the Convention more than 14 years ago (1998). This is indeed a step forward in protecting and developing the freedom from torture.



3.4 Conclusion

As pointed out above, no records of cases on extradition and torture do exist but rather of extradition and death penalty and the right to life. Our courts have refused to in cases where the requesting state fails to provide an assurance that the death penalty will not be imposed or if imposed, will not be executed. The first case to deal with the matter of death penalty's consistency with the Constitution was *S v Makwanyane and Another*²²⁸. The Court held that the imposition of the death penalty for murder was a cruel, inhuman and degrading punishment and declared it

²²⁶Section 8.

²²⁷ UN Committee Against Torture (2008) General Comment – Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2, Implementation of Article 2 by States Parties, Thirty-ninth session, para 3.

²²⁸ 1995 (3) SA 391 (CC).

unconstitutional. Later the court was challenged with a legal question of whether a person in South Africa could be extradited where the possibility of death penalty existed in the requesting state²²⁹. With such a precedent a reasonable presumption can be drawn that if our courts refuse extradition based on death penalty surely extradition based on the violation of the freedom from torture can be included as unconstitutional. Even though there might be no case law to justify this but the Convention against Torture²³⁰ further prohibits extradition where there are substantial grounds for believing that the extradited person will be subjected to torture or to cruel, inhuman or degrading treatment or punishment in the requesting state. This is also prohibited by section 8 of the Prevention and Combating of Torture Act.



²²⁹*Mohammed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC).

²³⁰Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

CHAPTER FOUR: CASE LAW ON EXTRADITION AND HUMAN RIGHTS INCLUDING THE RIGHT TO FREEDOM FROM TORTURE

4.1 Extradition and human rights in South Africa under constitutional order

In ancient times there were no legal rules that were followed in terms of extradition but it was rather merely considered as a highly political act which was left to the unfettered discretion of the sovereign²³¹. Sovereigns could choose to grant asylums or oblige each other by surrendering those persons who were most likely to affect the political order within the requesting state²³². Hence extradition primarily involved political refugees rather than common criminals. Until the middle of the 18th century, extradition primarily involved political refugees rather than common criminals²³³.

Prior to constitutionalism, the Extradition Act governed all procedural challenges to extradition²³⁴. Section 11 (b) (ii) provides for certain limitations in respect of extradition, it states that:

The Minister may (b) Order that a person shall not be surrendered - (ii) Where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;

These limits apply to request for extradition not made in good faith or where the extradition is not in the best interests of justice²³⁵. The Minister may also refuse an extradition request where the requested extradition would be unjust or unreasonable or where the punishment that may be imposed is too severe²³⁶. These limitations

²³¹ Labuschagne J & Olivier M "Extradition, Human Rights and the Death Penalty: Observations on the Process of Internationalisation of Criminal Justice" 2003 *SAYIL* 135-136.

²³² Proust "International Co-operation: A Commonwealth Perspective" 2003 *SACJ* 297.

²³³ Labuschagne J & Olivier M (2003) 135-136.

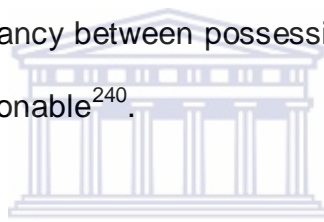
²³⁴ Dugard J *International Law: A South African Perspective* (2000) 157.

²³⁵ The Act does not define what good faith is nor what is meant by interest of justice.

²³⁶ Extradition Act 67 of 1962.

may be referred to as humanitarian grounds²³⁷. They apply when the prosecution of the offender whose extradition has been requested outweighs any advantage of such prosecution²³⁸.

In the *S v Williams*²³⁹ case, the appellant was convicted on charges of possession of mandrax drugs in Botswana which was in contravention of the Botswana Habit Forming Drugs Act. Whilst on bail he fled to South Africa, he was later arrested and detained in South Africa. The court hearing the extradition proceedings held that the appellant was liable to be returned to Botswana and an order was granted for his surrender. The appellant appealed against the order arguing that the sentence was unduly severe and the discrepancy between possession and aggravated possession was grossly unjust and unreasonable²⁴⁰.



The legal question facing the court was whether or not to extradite in terms of the penalty imposed by the Botswana law being too severe. It was argued on behalf of the appellant that there was a discrepancy in regards to the sentencing between South Africa and the sentence that would be imposed in Botswana and that the interests of justice would be better served if appellant were not surrendered to the Botswana officials²⁴¹. The mandatory sentence in terms of the Botswana Habit Forming Drugs Act included (a) imprisonment for 10 to 15 years; (b) a fine of P15 000 or in default, additional imprisonment of between 3 to 5 years; (c) corporal punishment.

²³⁷ Joubert W *The Law of South Africa: Executive Authority to Fundamental Rights* (1993) 249.

²³⁸ Joubert W (1993) 249.

²³⁹ 1988 4 SA 49 (WLD) 52-55.

²⁴⁰ Paragraphs 52-55.

²⁴¹ Paragraph 52.

The Court looked at the provisions of section 12(2) of the Extradition Act, which, as mentioned earlier, gave mandate to Magistrates to determine whether, in all the circumstances of the case, the penalty to be imposed would be unjust, unreasonable or too severe. The court held that that:

The purpose of extradition would be frustrated if each time an application for extradition came before the courts they were to engage in a comparative analysis to determine the exact nature of the punishment which might be imposed with reference to the penalties for comparative offenses in South Africa²⁴².

From a human rights' perspective, it is significant to note that in this case the court found that it would not extradite an offender to a state that probabilities are it would impose a sentence that is wholly inappropriate or unconscionable. Even though one of the legal issues raised by the appellant was the issue of corporal punishment, the court still granted extradition. The court focused too much on the discrepancy of the sentencing and ignored or did not pay much of its attention to the fact that the appellant could be subjected to corporal punishment violating his right to human dignity. One should recall that this case was decided in 1988 before corporal punishment as a form of punishment in public institutions was outlawed in South Africa. However, in the light of the fact that the South African Constitution prohibits cruel, inhuman and degrading treatment or punishment²⁴³ and the Constitution Court held that corporal punishment amounts to cruel, inhuman and degrading treatment and is an affront to human dignity²⁴⁴, the precedent set in this case is of little value today. Following this precedent would be a loophole in the light of the fact that the case was decided when the country was still under apartheid system which did not protect and uphold human rights. It is also to be borne in mind that extradition cases during the apartheid era were mostly practiced between states under the principle of

²⁴² Paragraph 52-55.

²⁴³ Section 12(1)(e) of the Constitution of South Africa.

²⁴⁴ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

reciprocity with no formal procedure followed thus there are not many recorded case law on extradition during this period.

4.2 Extradition during constitutionalism

In 1993 the Interim Constitution was promulgated and had a profound effect on the promotion and protection of human rights²⁴⁵. The Final Constitution of 1996 upheld this protection. The Constitution places a duty on the state to protect the fundamental rights contained in the Bill of Rights²⁴⁶.

4.2.1 The right to life and extradition

Closely related to the issue of torture in the context of extradition is the issue of the right to life. It is therefore necessary that I deal with the issue of the right to life and extradition. This is because in the case of *S v Makwanyane*²⁴⁷, the issue of torture and cruel, inhuman or degrading punishment or treatment featured highly when the Constitutional Court had to decide whether the death penalty was unconstitutional. Extradition has not escaped the impact of human rights law. Extradition agreements can exclude extradition where the crime in respect of which extradition is sought is punishable by death in the state requesting extradition, but not the requested state, unless the requesting state provides a satisfactory assurance that the death penalty²⁴⁸ will not be imposed, or if imposed, will not be executed²⁴⁹. In *Mohamed v President of the RSA and Others*²⁵⁰ the Constitutional Court held that it was

²⁴⁵Pillay A, "Constitutional Application"(2005) 233.

²⁴⁶Section 7 (2) of the Constitution of South Africa 1996.

²⁴⁷*S v Makwanyane and Another* 1995 (3) SA 391 (CC).

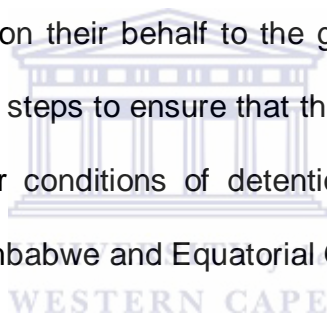
²⁴⁸*S v Makwanyane and Another* 1995 (3) SA 391 (CC).paragraph 62.

²⁴⁹Article 11 of the European Convention on Extradition of 1957.

²⁵⁰2001 (3) SA 893 (CC).

unconstitutional to extradite any person, including undocumented foreigners, to a country where he or she may face the death penalty²⁵¹.

In *Kaunda and Others v President of the Republic of South Africa*²⁵², the applicants in this case were South African citizens who were held in Zimbabwe on various charges. The applicants were accused of being mercenaries and plotting a *coup* against the President of Equatorial Guinea. The applicants were fearful of extradition from Zimbabwe to Equatorial Guinea where they contended that they would not receive a fair trial and, if convicted they stood the risk of being sentenced to death. The applicants applied for an order compelling the South African government to make certain representations on their behalf to the governments of Zimbabwe and Equatorial Guinea, and to take steps to ensure that their right to dignity, freedom and security and their right to fair conditions of detention and trial were at all times respected and protected in Zimbabwe and Equatorial Guinea.



The Judges in the case of *Kaunda and Others v President of the Republic of South Africa* concurred that a South African who faces the death penalty abroad has a right to request the government for protection against it²⁵³. The policy of the South African government with regard to a request for extradition to South Africa of a South African citizen where the citizen has been charged with a capital offence in a foreign state is that representations will be made on behalf of the citizen if and when capital punishment is imposed²⁵⁴.

²⁵¹2001 (3) SA 893 (CC) 913.

²⁵²2005 (4) SA 235 (CC).

²⁵³Paragraph 134.

²⁵⁴Paragraph 206.

A more recent judgment by the Constitutional Court is the *Minister of Home Affairs v Tsebe and others*,²⁵⁵ the Constitutional Court handed down a judgment in two similar cases dealing with the issue of whether the South African Government is entitled to deport or extradite a person, charged with a capital offence in a country seeking his extradition, after having sought and been refused a written assurance from the extraditing state that the death penalty will not be imposed, or, if imposed, will not be executed.

They applied to the South Gauteng High Court (High Court) for an order preventing the Government from extraditing or deporting them to Botswana to stand trial for the charges of murder of their respective romantic partners, unless Botswana provided South Africa with a written assurance that the death penalty would not be imposed or if imposed must not be executed²⁵⁶. The Government had, in fact, sought and been refused that undertaking²⁵⁷. The High Court nevertheless granted the order, relying on an earlier judgment of the High Court in, *Mohamed v President of the Republic of South Africa* (Mohamed), which, as discussed earlier, held that a person may not be surrendered to a country where he or she faces the death penalty without first seeking an assurance that the death penalty would not be imposed.

The Minister of Home Affairs and the Minister of Justice both appealed directly to the Constitutional Court against the decision of the High Court. The Minister of Home Affairs argued that the High Court incorrectly treated the Mohamed case as laying

²⁵⁵ *Tsebe and Another v Minister of Home Affairs and Others* (2012) 1 BCLR 77.

²⁵⁶ Paragraph 51.

²⁵⁷ Paragraphs 52-54.

down an absolute principle that operated regardless of the facts of the case and as a result, it was unsure how to exercise her obligations under the Immigration Act²⁵⁸.

The Constitutional Court dismissed both appeals²⁵⁹. The court found that because none of the parties argue that Mohamed was wrongly decided, and because there were no good reasons to distinguish this case, the principle in that case had to be applied. In this judgment the Court went further than Mohamed to require not only that the South African Government seek assurance, but also obtain that assurance, failing which extradition could not be granted²⁶⁰. By adopting the Constitution, they reasoned, South Africa affirmed its commitment to upholding the human rights of every person in everything that it did, and could not deport or extradite any person, where doing so would expose him or her to the real risk of the imposition and execution of the death penalty²⁶¹. This was further justified by the extradition treaty between Botswana and South Africa and the SADC Protocol on Extradition (SADC Extradition Protocol)²⁶². Acting Judge Ray Zondo noted that:

We as a nation have chosen to walk the path of the advancement of human rights ... no matter who the person is and no matter what the crime is that he is alleged to have committed, we shall not in any way be party to his killings as a punishment and we will not hand such person over to another country [and] ... expose him to the real risk of the imposition and the death penalty upon him²⁶³.

In his judgment, Zondo, noting that South Africa had passed legislation allowing for people to be tried in South Africa for specific crimes committed outside its borders, like Prevention and Combating of Corrupt Activities Act and the Implementation of

²⁵⁸13 of 2002.

²⁵⁹Paragraph 75.

²⁶⁰ Paragraph 184.

²⁶¹ Paragraphs 41-43.

²⁶² Paragraph 64.

²⁶³ Paragraph 67.

the Rome Statute of the International Criminal Court Act for crimes against humanity wrote:

There is no reason why similar legislation cannot or should not be put in place to ensure that persons ... can be tried by the South African courts when countries in which they allegedly committed the crimes are not prepared to give the requisite assurance that suspects will not face the death penalty when tried²⁶⁴.

He concluded thereof that South Africa will not extradite foreign nationals suspected of crimes that may lead to them facing the death penalty in those countries that seek to try them²⁶⁵.

The Tsebe judgment reinforced an earlier precedent setting judgment handed down by the Constitutional Court that related to Mohamed who was wanted by the United States in connection with the bombing of its embassy in Tanzania in 1998. The Constitutional Court ruled previously that even if there was an extradition agreement between South Africa and the US, he could not be handed over without an assurance that he would not face the death penalty. The Court again emphasised that the imposition of the death penalty is unconstitutional, in line with the judgment of Mohamed²⁶⁶.

4.2.2 The right to a fair trial and extradition

It is important that the extradited person will have a fair trial. The Extradition Act provides that a person will not be extradited if the person will be subjected to

²⁶⁴ Paragraph 61.

²⁶⁵ Paragraph 74.

²⁶⁶ Paragraph 71.

prejudice at his or her trial in the requesting state by reason of his or her gender, race, religion nationality or political opinion²⁶⁷.

Most states, including South Africa, are party to international human rights treaties such as the African Charter on Human and People's Rights²⁶⁸ and the International Covenant on Civil and Political Rights which guarantees the right to a fair trial. Some extradition agreements provide for the application of human rights norms, but even those extradition agreements that do not provide for such application may refuse extradition on the grounds of human rights. The two principle human rights norms in many extradition treaties provide for the non-imposition of the death penalty and non-discrimination²⁶⁹. It is important that the extradited person will have a fair trial. As seen in chapter 2 the extradition to South Africa of Shrien Dewani was temporarily suspended on grounds of his mental health. The Court held that it would be unjust and oppressive for him to be sent to South Africa until he recovered. But this the court held it was plainly in the interest of justice that he was extradited as soon as he was deemed fit enough to stand trial. The court, however, rejected his appeal on human rights grounds as it noted that the prison conditions in South Africa were not a basis not to extradite. The Court focused more on his mental health and held that his right to fair would not be violated if he was extradited when he was not fit to stand trial. The application by the South African government for Dewani's extradition was successful.

²⁶⁷ Section 11 (b) (iv) & section 12 (2) (ii).

²⁶⁸ African Charter on Human and Peoples' Rights CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

²⁶⁹ Dugard *International Law* (2011)226. In *Tsebe v Minister of Home Affairs; Pitsoe v Minister of Home Affairs* (2012) 1 BCLR 77, the court held that failure by the South African authorities to attain assurance that the sentence of death would not be imposed constituted an absolute bar to extradition to a country where the death penalty could be imposed.

The South African domestic extradition law provides that a person will not be extradited if the extradited person will be prejudiced at his or her trial in the requesting state by reason of his or her gender, race, religion nationality or political opinion²⁷⁰. It is therefore important that the extradited person will have a fair trial.

4.2.3 The protection of the right to freedom from torture and extradition

According to the *Mohamed* case, the court made it clear that a person ought not be deported or extradited to another state where there was a real risk that his basic human rights would be violated in that state. Because South Africa is a party to the Convention against Torture²⁷¹ which, under article 3, prohibits, amongst other things, extradition where there are substantial grounds for believing that the extradited person will be subjected to torture or to cruel, inhuman or degrading treatment or punishment in the requesting state, it has a duty to respect its international law obligation. The rationale is that the 1984 U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits the extradition as well as the deportation of a person to a state "where there are substantial grounds for believing that he would be in danger of being subjected to torture" and allows no derogation. In order to determine whether or not there are substantial grounds to believe that a person will be subjected to torture, South Africa has to refer to article 3 (2) of the Convention against Torture.

The same obligation in terms of article 3 of the Convention against Torture is also imposed by the African Commission on Human and People's Rights Resolution on Guidelines and Measure for the Prohibition and Prevention of Torture, Cruel,

²⁷⁰ Sections 11(b)(iv) and 12(2)(ii) of the Extradition Act 67 of 1962.

²⁷¹ Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

Inhuman or Degrading Treatment or Punishment in Africa²⁷², the Robben Island Guidelines, which provides that 'states should ensure no one is expelled or extradited to a country where he or she is at risk of being subjected to torture'.²⁷³ The Committee against Torture, the enforcement body of the Convention against Torture, has called upon different countries such as Rwanda not to extradite persons to countries where there are substantial grounds to believe that they could be subjected to torture²⁷⁴.

The European Court of Human Rights has also handed down different judgements prohibiting states parties to the European Convention on Human Rights and Fundamental Principles from extraditing persons to countries where there is a risk that they could be tortured.²⁷⁵ Although I am not aware of any case in which South African courts have declined to order the extradition of a person to a country where he or she could be subjected to torture, the above jurisprudence from South African courts and from international human rights bodies compel me to conclude that in the light of South Africa's national and international human rights obligations, it has a duty not to extradite a person to a country where there are substantial grounds to believe that he or she would be subjected to torture.

²⁷² Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, 32nd Session, 17 - 23 October 2002: Banjul, The Gambia.

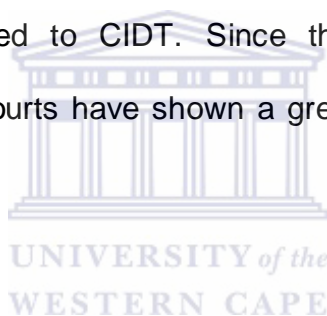
²⁷³ Paragraph 15. For a detailed discussion of the Robben Island Guidelines, see Long D & Murray R 'Ten years of the Robben Island Guidelines and Prevention of torture in Africa: For what purpose?' (2012) 12 African Human Rights Law Journal 311-347.

²⁷⁴ Concluding observations of the Committee against Torture on the initial report of Rwanda (CAT/C/RWA/1) 26 June 2012 para 18.

²⁷⁵ In *Chahal v. United Kingdom*, in which the European Court of Human Rights held that since there was a real risk of Chahal being subjected to treatment contrary to Article 3 of the European Convention on Human Rights if he were returned to India, the U.K. order for his deportation to India would, if executed, give rise to a violation of Article 3.

4.3 Conclusion

Because of the isolation South Africa found itself in, there were no real extradition treaties and South Africa relied only on the Extradition Act²⁷⁶. During the 18th century countries would exchange offenders through reciprocal mechanism, and because the alleged offenders were mostly of political rather than common offenders there was no law protecting the offenders' rights. Courts did not pay much attention to the rights violated by the practise of extradition instead more focus was placed on the sentencing and punishment²⁷⁷. This mentality changed when the Constitution came into force. The Constitutional Court held that the death penalty²⁷⁸ and corporal punishment²⁷⁹ were unconstitutional as they violated, inter alia, the right to human dignity if not to be subjected to CIDT. Since the establishment of the new constitutional order in 1994 courts have shown a great willingness to be guided by international human rights law.



In most cases in the past acts of torture occurred in the custody of police authority²⁸⁰. This was also promoted by the government as it was part of the security

²⁷⁶ 67 of 1962.

²⁷⁷ *S v Williams* 1988 (4) SA 49 (WLD)

²⁷⁸ *S v Mkwanyane* 1995 (3) SA 391 (CC)

²⁷⁹ *S v Williams* 1995 (3) SA 632 (CC);

²⁸⁰ *S v Madikane & Others* 1990 (1) SACR 377 (N). Decided at 386B-C that the application of electric shocks amounted to grievous bodily harm. Policemen were found guilty of murder and assault with intent to commit grievous bodily harm after two suspects had electric shocks administered to them. Sentences ranged from 1 - 6 years imprisonment;

S v A en 'n Ander 1991 (2) SACR 257 (N). The complainant alleged that two police officers ordered him to masturbate. He was also required to lick a few drops of urine from the floor and had electric shocks administered to his genitals. The police officers were found guilty of indecent assault and sentenced to 2.5 years imprisonment. The court commented at 270G that the application of electric shocks to the complainant's genitals clearly constituted assault, although as the shocks had not been inflicted with an indecent intention, this aspect of the case did not amount to indecent assault;

S v Krieling & Another 1993 (2) SACR 495 (A). Policemen were convicted of assault with intent to commit grievous bodily harm and sentenced to three years imprisonment, half of which was suspended. The complainant was tied up, his head covered with a sack, a pole pushed between his legs and arms and was then swung around whilst electric shocks were administered to him. He was hit with hands and fists.

S v Moolman 1993 (2) SACR 519 (EC). A policeman was found guilty of assault with intent to commit grievous bodily harm after the complainant was assaulted over a number of days by being hit with a

system during the apartheid era. It was only after the Constitution did South Africa protect persons that are deprived of their liberty from the practises of torture. However, there is evidence and allegations that torture is still practiced by law enforcement officers such as police²⁸¹ and Department of Correctional Services official.²⁸² Because of the fact that the most vulnerable victims of torture are those that are deprived of their liberty, section 35(3) of the Constitution protects the individual's rights to a fair trial²⁸³. There might be no direct cases dealing with torture and extradition in South Africa but a presumption can be drawn with regards to human rights, that our courts are under an international and national duty to protect individual's human rights. That entails refusal to extradite persons that are in danger of torture.



belt and kicked, his head covered whilst electric shocks were administered to him until he became unconscious. The accused was sentenced to three years imprisonment, of which one was suspended.

S v Maritz 1996 (1) SACR 405 (A). A policeman forced a murder suspect to run in front of a vehicle while tied to it by rope. A wheel of the vehicle caught the rope and pulled him under the vehicle, causing his death. The policeman was found guilty of culpable homicide and sentenced to four years imprisonment, of which two years were suspended.

²⁸¹Dissel A, *A Review of civilian oversight over Correctional Services in the last decade*, (2003) Research Paper No. 4, pg 36

²⁸²Viljoen F 'Special Rapporteur on Prisons and Conditions of Detention in Africa – Achievements and Possibilities' (2005) pg 27.

²⁸³*Ferreira v Levin N.O*1996 (1) SA 984 (CC).

Chapter 5

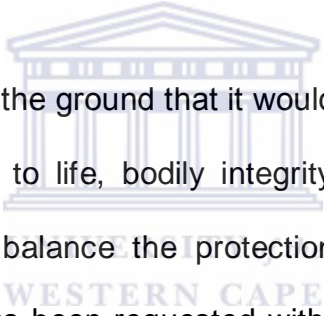
CONCLUSION

Extradition proceedings have evolved over a period of time, characterised by a shift in emphasis on the various types of crimes to which this process is applicable. Historically, the practice of extradition was dependent upon the good relations between the sovereigns of the requested state and the requesting state. Presently extradition has taken on a more formal nature with prescribed procedures necessary to affect it. In South Africa the development of extradition law has followed the path of the various periods in the country's history. The most notable period was being that of the Apartheid era, where many states refused to interact with South Africa due to political reasons. Such period also saw the implementation of the Extradition Act which has governed extradition since its enactment in 1962. The position in South Africa changed in 1993 with the introduction of a constitutional dispensation resulting in an end to South Africa's political isolation and its re-admittance into the Commonwealth. As a result the past decade has seen South Africa bring a party to two treaties and conventions for extradition.

Currently most states conclude bilateral treaties and or multilateral conventions in regard to extradition. These treaties and conventions contain specific provisions in regard to extradition and clearly set out the standard for executing an extradition request. In most cases the ground for refusal according to the treaty or convention will be when the offender will not receive a fair trial in the requesting state or where, if convicted the offender faces the death penalty.

The South African Constitution clearly states that it is a vital objective to ensure that all fundamental rights are upheld and protected. With regard to fair trial procedures,

a recent development has been the constitutional challenges to various provisions in the Extradition Act. It has been contended that s10 of the Extradition Act as well as the *ad hoc* consent²⁸⁴ to extradition of the President as a method to effect extradition is unconstitutional. It is also evident from recent decisions in the Constitutional Court that the abuse of an individual's right to life is an important factor to be considered where the decision of whether or not to extradite is considered in South Africa. It is clear that the Constitutional Court is guided by precedents set by courts from other jurisdictions and by international law relating to extradition when determining which rights will outweigh the need for international co-operation in the suppression of crime.



Extraditions are challenged on the ground that it would infringe the offender's right to fair trial procedures, the right to life, bodily integrity and dignity. As a result the requested state is forced to balance the protection of the human rights of the individual whose extradition has been requested with the necessity of ensuring that criminal laws of sovereign states are enforced. It is safe to conclude that based on the precedent laid down by our Courts that if an individual's right to freedom from torture is at jeopardy then the state has a duty to protect that individual by refusing extradition. Put differently, even though there might not be case law on extradition based on torture in South Africa, the Convention against Torture prohibits extradition where there are grounds for believing that the extradited person will be subjected to torture or to cruel, inhuman or degrading treatment or punishment in the requesting state. This is also provided for by section 8 of the Prevention and Combating of Torture Act. This therefore means that South Africa is obliged not only by

²⁸⁴Section 3(2) of Act 67 of 1962.

international law but by its domestic law. There is a duty for South Africa to protect and respect these provisions by upholding them and making sure that no individual is subjected to torture.

In the Soering case the European Court of Human Rights did emphasise that there are specific circumstances concerning the death penalty in the requesting state that may constitute cruel, inhuman or degrading treatment or punishment. With regard to the death row phenomenon, the court stated the following:

“However in the courts view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant’s extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means that would not involve suffering of such exceptional intensity or duration... Accordingly, the Secretary of State’s decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3”²⁸⁵.

The Court upheld Soering’s claim that his extradition to face the death penalty constituted inhuman or degrading treatment prohibited by Art 3. The Court also stated that the state from which extradition is requested must take into account any potential violation of the rights guaranteed by the European Convention on Human Rights by authorities in the requesting state, regardless of whether or not the latter is party to the European Convention on Human Rights. The decision taken in the Soering case is an example of the impact that human rights have had on extradition proceedings. In the past the state from which extradition was requested did not investigate the criminal justice system of that state requesting the extradition due to the doctrine of state sovereignty and principles based on the comity of nations²⁸⁶. This then shows the considerations taken by states before extraditing a fugitive to

²⁸⁵ (1989) 11 EHRR 439 89.

²⁸⁶ Barrie “Human Rights and Extradition Proceedings: Changing the Traditional Landscape” 1998 TSAR 126.

the requesting state. It is visible that human rights must be protected at all costs, that any legal tension between human rights fugitive and the right of states to extradite must be scrutinized, and if there exist any possibility of infringement of the fugitives' human rights, a guarantee must be made by the requesting state that the fugitive will not be subjected to any inhuman conduct.



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