THE IMPACT OF THE BILL OF RIGHTS
ON
EXTRADITION

by

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SUMMARY

The process of extradition is a vital component of International Criminal Law as a means of ensuring the suppression and prevention of international crimes. It is the internationally accepted method used by states to surrender an offender back to the state where the alleged offence was committed so that such offender can be tried and punished. Without such process, and with the ease of modern global travel, offenders would, in all likelihood be able to escape prosecution and punishment. Most organized democratic societies recognize that the suppression of crime is necessary for peace and order in society and that extradition is an effective tool to be used to bring to justice a fugitive attempting to evade the law by fleeing to another country.

What follows is a discussion, firstly on the theory of extradition and secondly on the effect that human rights has had on the law of extradition.

The theory of extradition involves an analysis of extradition from its ancient roots to its position in society today. With regard to extradition in South Africa, reference is made to the various periods of the country's history. The colonial era before South Africa acquired Republican status in 1961 is referred to in order to establish a basis for the present law of extradition in South Africa. The period during the apartheid era after achieving Republican status in 1961 is discussed in order to show how and why South Africa moved away from its common law roots
based on English Law. This era is also of importance as it led to the introduction of the present Extradition Act 67 of 1962. Finally the current position spanning from 1994 to the law as it stands in South Africa today, as influenced by the introduction of Constitutional law, is examined.

The rule on non-inquiry is also examined in order to compare the traditional approach by states, where state sovereignty was of paramount importance, with the modern trend of emphasis being placed on fundamental human rights.

The methods in terms of which extradition is accomplished, both in South Africa and internationally is also discussed.

Such reference to the theory and nature of extradition is done to provide general background on the complex issue to be discussed.

The crux of the treatise relates to the impact that the rise in status of fundamental human rights has had on the extradition process. Reference will be made to aspects relating to the protection of the offender’s procedural rights as well as to the protection of the individuals right to life, dignity and bodily integrity. 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.
Finally, in conclusion 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 offender 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. Extradition is clearly concerned with the balancing of the offender’s human rights and the need for effective enforcement of criminal law.
CHAPTER 1 INTRODUCTION

It is a well-known fact, as illustrated in the local and international press that international crime is on the increase. The intention of the present discussion is to show that the aim of International Criminal Law is to prevent and suppress the commission of these offences while still upholding the rights of the individual offender. In this respect, the Law of Extradition plays an integral role as part of International Criminal Law.

In order to obtain a general overview of the topic to be discussed it is important to refer to the nature of the extradition process. The initial purpose of the thesis is to examine the concept of extradition and how it is used as a method to acquire jurisdiction over an offender who has committed an offense outside the borders of the requesting state. It will be shown that the decision whether or not to extradite and the method used to give effect to such extradition lies in the hands of the state from which the extradition is requested.

Once the requested state has made the decision to extradite the offender, the extradition may take place in terms of varied procedures. It is thus important to consider the methods which are applied internationally to effect extradition. The generally accepted method used for extradition is that of the extradition treaty. This may take the form of a bilateral treaty or a multilateral convention. The European Convention on Extradition involves fifty party states. Reference will be
made to the provisions of this Convention which are applicable to South Africa. In the absence of a treaty, extradition may also take place in terms of the aut dedere aut judicare principle or through comity.

Traditionally, state sovereignty was of paramount importance on the International Law front. However in recent times there has been increased emphasis on the human rights of the individual. As a result there has been a move away from a strict application of the once popular rule on non-inquiry. An account of this rule is included in order to show how this general shift in emphasis has impacted on the Law of Extradition.

It will be noted that the inclusion of human rights in the extradition process and the need for effective co-operation between states in the suppression of the growing international crime rate has led to a tension in the Extradition process. Such tension is often the cause of conflict between states in respect of extradition requests and procedures. The crux of the treatise will relate to this tension and how it is dealt with both locally and on an international level. Various case law will be referred to in order to illustrate this situation.

In 1993 individual human rights began to play an integral role in South African law. This was as a result of the interim Constitution, Act 200 of 1993, followed by the final Constitution, Act 108 of 1996. The South African Constitution embodies a new approach to human rights accorded to South African citizens and residents
within the country. This increased emphasis on human rights has had an impact on the traditional South African law of extradition, governed by the Extradition Act 67 of 1962. As a result, the constitutional validity of various provisions of the Extradition Act have been attacked as being procedurally unfair and in conflict with the Bill of Rights. A discussion of case law where the above arguments have been raised will be included in this work.

The South African Constitution also introduced a protection on the individual's right to life, dignity and bodily integrity. As a result the death penalty was declared unconstitutional by the Constitutional Court. However such sentence is still valid and enforceable in certain foreign jurisdictions. Due to South Africa's approach regarding the death penalty, a question to be addressed is whether South Africa, as a requested state should allow the extradition of an offender to a state where the possible sentence which may be imposed is that of the death penalty. In order to resolve such a question, it will be shown how the Constitutional court has shown willingness in recent decisions to make use of comparative international decisions and such case law will be referred to in order to illustrate this point.

As in South Africa, the comparative international law discussed appears to attempt to strike a balance between protecting the of fundamental human rights of the offender and the need to combat crime.
CHAPTER 2 THE THEORY OF EXTRADITION

Extradition has been defined by Prof Dugard as the delivery of an accused or convicted individual to the state where he is accused of, or has been convicted of, a crime, by the state on whose territory he happens for the time to be.\(^1\)

The basic aim of extradition is for states to provide each other with assistance in criminal matters.

2.1 A HISTORICAL PERSPECTIVE

The process of extradition has been regarded as one of the best-known and oldest forms of co-operation between foreign states.\(^2\)

Rases II of Egypt and Prince Hattushili of the Hittites concluded the first known extradition treaty in 1280BC. This treaty only applied to the extradition of political offenders. Extradition treaties that were entered into up until the 18th century dealt mainly with political or religious offences.\(^3\) During this period extradition was regarded as a means to protect the political order of a state.\(^4\) From the 18\(^{th}\)

century to the mid 19th century military offenses became the focus of extradition treaties. Extradition proceedings during this period were used by Heads of State to request the return of soldiers following military conflicts. It has been estimated that approximately one hundred treaties, dealing with extradition, were concluded during this period.5

From the 19th century onwards the focus of extradition was on common serious crimes due to the fact that such crimes replaced political offences as crimes affecting the stability of a state. In fact the 20th century saw a trend to exclude political offences in extradition agreements. This has however recently changed due to the increase in international terrorism.6 From the 19th century and to date there has also been an increase by states to conclude extradition treaties. This increase may be attributed to the increased mobility of citizens as well as the increase in international trade.7

The need for extradition proceedings was discussed in the 19th century in the English case of In Re Arton8 where Lord Russel observed the following:

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8 [1896] 1 QB 108.
“The law of extradition is, without doubt, founded upon the broad principle that it is to the interests of civilized communities that crimes, acknowledged to be such, should not go unpunished, and it is part of the comity of nations that one state should afford to another every assistance towards bringing persons guilty of such crimes to justice.”

2.1.1 SOUTH AFRICA: THE COLONIAL ERA

During the 19th century, the Law of Extradition in South Africa followed the law applicable in England. Under British Law a distinction was made between extradition involving members of the Commonwealth to which the Fugitive Offenders Act of 1881 applied and extradition to countries outside of the Commonwealth, which was governed by the British Extradition Acts from 1870 to 1906.

During the early 20th century, before South Africa acquired independence in 1961, England granted the Union the authority to conclude treaties on its own behalf, independent of British law.

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9 Supra 111.
10 Joubert The Law of South Africa: Executive Authority to Fundamental Rights (1993) 244.
11 Supra.
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After becoming a Republic in 1961, South Africa gave up its membership of the Commonwealth and as a result lost membership of all extradition arrangements that had been previously concluded with Commonwealth countries, including the United Kingdom.\(^\text{12}\)

However South Africa's departure from the Commonwealth and its new Republican status did not affect the extradition treaties which had previously been concluded with non-Commonwealth countries. These remained in force.\(^\text{13}\)

In 1962 South Africa broke away from the English Common Law governing extradition and the Legislature promulgated and implemented the Extradition Act 67 of 1962.

It was during this period that South Africa introduced the practice of apartheid. During the apartheid era South Africa became politically isolated. As a result of this isolation few extradition agreements were concluded. The extradition agreements that were concluded were limited to states within the Southern


\(^{13}\) *Supra.*
African region and to states such as Israel and the Republic of China. 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 an offender to this particular state. S3(2) of the Extradition Act\textsuperscript{14} empowered the State President to consent to the surrender of such offender on an \textit{ad hoc} basis.\textsuperscript{15}

2 1 3 SOUTH AFRICA: THE CURRENT POSITION

The apartheid era ended in 1994 and as a result, on the 20\textsuperscript{th} of July 1994 South Africa was readmitted into the Commonwealth. Extradition proceedings between South Africa and Commonwealth countries where no extradition treaties had previously been concluded were now dealt with in terms of the London Scheme. In terms of the London Scheme, Commonwealth states undertook to promulgate national extradition legislation that was in accordance with the requirements set out in the Scheme. The effect of this is that extradition proceedings are undertaken by the use of the respective state’s national legislation and thus there is no need for specific treaty arrangements between these states. The Extradition Act\textsuperscript{16} was amended in 1996 to allow for the designation of states by the President. In terms of this legislation, the South African President is authorized to designate a particular foreign state as a state with which extradition proceedings may be concluded. This designation is however subject to the same

\textsuperscript{14} 67 of 1962.
parliamentary approval required for the conclusion of a treaty. The Republic of Namibia, Zimbabwe and the United Kingdom have, to date been declared designated states.\textsuperscript{17}

South Africa has subsequently entered into extradition agreements with Canada, Australia, Lesotho and the United States of America. In 2003 South Africa became party to the European Convention on Extradition which resulted in extradition agreements with fifty other states.\textsuperscript{18}

It is clearly evident that there has been a substantial change in the process of extradition from its ancient roots to its structure in modern International Law. This change however has been gradual. Extradition as a form of international co-operation is generally regarded as a process resistant to change. This resistance may be attributed to deep-rooted philosophies and traditions or it may be attributed to the effect that the surrender by a state of a person to another state has on that person or state.\textsuperscript{19}

2.2 THE RULE OF NON-INQUIRY

An illustration of this resistance can be found in the rule of non-inquiry, a concept related to the process of extradition. The traditional approach of states faced with an extradition request was that their courts would not inquire into the good

\textsuperscript{16} 67 of 1962.
\textsuperscript{17} Joubert \textit{The Law of South Africa: Executive Authority to Fundamental Rights} (1993) 244.
\textsuperscript{18} Katz “The Incorporation of Extradition Agreements” 2003 \textit{SACJ} 314.
faith of or the motive for an extradition request by another state. Neither would the court inquire into the treatment that an offender may receive after the extradition. This approach was based on the doctrine of sovereignty. The rule of non-inquiry established itself as a rule of Customary International Law. States that observed this rule did not allow the offender to produce any evidence to show that the requesting state would violate fair trial rights. Instead, the court assumed that the requesting state was acting in good faith and in the interests of justice.\textsuperscript{20}

In 1901 the rule received attention in the US Supreme Court in the case of \textit{Neely v Henkell}.\textsuperscript{21} In this case the court was of the opinion that in the extradition process, the court should not review the foreign legal system of another state as this would result in the court involving itself in a matter of foreign affairs. However what must be borne in mind is that at the time this matter was presided on, international human rights played no role in the decision making process.\textsuperscript{22}

The approach of the US Supreme Court was not applied in the 1960 matter of \textit{Gallina v Fraser}\textsuperscript{23} where the US Court of Appeals held that an inquiry should be

\textsuperscript{19} Proust “International Co-operation: A Commonwealth Perspective” 2003 \textit{SACJ} 297.
\textsuperscript{21} 180 US 109 (1901).
\textsuperscript{22} Barrie “Human Rights and Extradition Proceedings: Changing the Traditional Landscape” 1998 \textit{TSAR} 127.
\textsuperscript{23} 278 F2d 77,79 (2d Cir 1960); 364 US 851.
held in circumstances where, if extradited, the offender would face a sentence in conflict with US Federal Courts sense of decency.²⁴

Judicial decisions such as the one shown above, indicate a trend in the United States towards a less strict application and in certain instances the abandonment of the rule of non inquiry in extradition proceedings. This shift in approach indicates the modern trend to place increased importance on the rights of an individual in the extradition process.²⁵

Despite the United States move away from the traditional approach of not inquiring into the quality of the justice system of the requesting state, the rule of non-inquiry was found to be still applicable in the Canadian Supreme Court in the case of Argentina v Mellino²⁶ where the court stated the following:

“The assumption that the requesting state will give the fugitive a fair trial according to its law underlies the whole theory and practice of extradition and our courts have over many years made it abundantly clear that an extradition judge should not give effect to any suggestion that the proceedings are oppressive or that the fugitive will not be given a fair trial...In truth, the assumption by an extradition judge that

²⁵ Supra.
²⁶ 1987 1 SCR 536.
delay or other defenses would not be given appropriate consideration by the foreign court is even more offensive than the assumption of control over the actions of foreign diplomatic and prosecutorial officials. It amounts to a serious adverse reflection not only of a foreign government to whom Canada has a treaty obligation but on its judicial authorities concerning matters that are exclusively within their competence.”

Although Canada applied the rule in 1987, the modern trend has been a move away by Anglo-American jurisdictions from applying a strict policy of non-inquiry. This is due to the realization that effective law enforcement is becoming more reliant on international co-operation. It has been phased out in European jurisdictions, like Germany, Switzerland and the Netherlands.

A further move away from the rule of non-inquiry can be seen from provisions contained in modern treaties. The International Covenant on Civil and Political Rights requires fair trial procedure. The Convention Against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment prohibits extradition

\footnote{27 Supra 522-523.} \footnote{28 Labuschagne & Olivier “Extradition, Human Rights and the Death Penalty: Observations on the Process of Internationalisation of Criminal Justice” 2003 SAIL 133-134.}
where there is the possibility of the offender being subjected to torture. The International Convention Against the Taking of Hostages and the Convention Relating to the Status of Refugees also prevent extradition where human rights are violated. The United Nations Model Treaty on Extradition of 1990 discourages the extradition of an offender where his fair trial rights would not be protected. Of significant importance is Art 3(2) of the European Convention on Extradition which requires that extradition be refused in the instance where the requested state has grounds to believe that the extradition request was made to prosecute or punish a person as a result of his race, religion, nationality or political opinion.29

It is clearly evident therefore, that in terms of the abovementioned Conventions there needs to be an inquiry by the requesting state into the treatment which the offender is likely to receive once extradited to the requesting state.

2 3  REQUIREMENTS FOR EXTRADITION

In addition to a move away from the rule of non-inquiry, certain norms have emerged which are designed to protect the integrity of the extradition process. There are also norms that guarantee the offender a degree of procedural fairness. These generally accepted principles include the requirement that the alleged offender has in fact committed an extraditable offence, which is linked to

29 Supra 127-128.
the principle of double criminality.\textsuperscript{30} Extradition is thus not merely the act of handing over an offender by one state to another but rather the act of handing the offender over in accordance with certain prescribed procedures.\textsuperscript{31}

The law relating to extradition includes both International Law and international politics as well as Criminal Law and the law relating to human rights.\textsuperscript{32}

Requests for extradition are usually made through diplomatic channels. However the actual extradition proceedings will normally involve input from both the executive and the judiciary. Like South Africa, most states prefer this hybrid system. Extradition is thus not an exclusively judicial procedure but also a procedure involving the executive branch of the government that impacts on international relations between states.\textsuperscript{33} However it is not uncommon for states to give exclusive control over the extradition process to either the judiciary or the executive.\textsuperscript{34}

When confronted with an extradition request, the first issue that the requested state needs to address is whether there is a duty on it to extradite the offender. The second issue to be addressed is the origin of such duty. The duty may be a

\textsuperscript{32} Katz “The Incorporation of Extradition Agreements” 2003 \textit{SACJ} 311.
\textsuperscript{33} Supra.
legally enforceable duty under International Criminal Law that results in a sanction for its breach or it may be a duty arising from a treaty/agreement/convention that the state has entered into or it may be a duty based on what a state should morally do in the relevant circumstances.35

The generally accepted legal basis of extradition is that of a treaty, reciprocity or comity.36

2 3 1 EXTRADITION BASED ON TREATY PROVISIONS

In 1990 the General Assembly approved the UN Model Treaty on Extradition. This model treaty contains general principles of Extradition Law, which are commonly used by states concluding extradition agreements. The purpose of the Model Treaty is to provide states concluding extradition treaties with a framework for the negotiation of these treaties.37

When a state concludes an extradition treaty, it voluntary takes on an enforceable international obligation to act in accordance with the provisions of this treaty. The provisions of the extradition treaty may limit the right of the state to admit whom it pleases into its territory. The treaty may also prescribe to the state the method of protecting certain individuals within its territory.38

36 Katz “The Incorporation of Extradition Agreements” 2003 SACJ 312.
Traditionally the extradition treaty was regarded as a bilateral arrangement between two states. In recent times however, there has been a decrease in the tendency among states to conclude bilateral agreements. Instead, multilateral extradition treaties involving a number of states are concluded. A further trend is to conclude multilateral treaties which are not aimed specifically at extradition but do contain provisions which allow for the extradition of offenders contravening the terms of the treaty.\(^{39}\)

Most extraditions in South Africa take place in terms of a specific extradition treaty. The extradition treaty will prescribe the offences in respect of which extradition is possible as well as the circumstances in which extradition may be refused. The Extradition Act\(^{40}\) prescribes the procedure that has to be followed in extradition proceedings (the act also prescribes the circumstances in which extradition may be refused).\(^{41}\)

In order that any of the extradition agreements which South Africa has entered into be valid, it is necessary that the agreement comply with the provisions of s2(1) of the Extradition Act.\(^{42}\) The agreement will be of no force and effect until Parliament has ratified it in terms of s2(3) of the Extradition Act.\(^{43}\) Such

\(^{39}\) Supra 118-119.

\(^{40}\) 67 of 1962.


\(^{42}\) Act 67 of 1962.

\(^{43}\) Supra.
ratification is consistent with the requirements of s231(2) of the 1996 Constitution that relates to all international agreements.\footnote{Constitution of the Republic of South Africa, 1996.} Despite the decrease in the tendency of states to conclude bilateral agreements, most South African extradition treaties are bilateral. South Africa is however party to a number of multilateral treaties. 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. In addition to the extradition proceedings provided for in this Convention, the South African Extradition Act\footnote{67 of 1962.} as well as the Civil Aviation Offences Act 29 of 1974 also provide for the extradition of offenders referred to in this Convention.\footnote{Dugard \textit{International Law: A South African Perspective} (2000) 158.}

The European Convention on Extradition was concluded in 1957. Parties to this Convention agreed to extradite offenders to member states requesting such extradition. South Africa ratified this Convention and it came into force in South Africa in 2003. However South Africa’s ratification is subject to the offence carrying a penalty of at least six months imprisonment.\footnote{Stassen “New Legislation: Extradition” 2003 \textit{De Rebus} 56.}

The provisions of this Convention replace those of any previous bilateral treaty or convention or arrangement existing in respect of extradition between party
states. The Convention excludes extradition in certain specified circumstances. Firstly, in terms of 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 party state to refuse to extradite its nationals. In this regard South Africa restricts such nationals to South African citizens.49

Further restrictions can be found in Art 7 and 8. The requested state may refuse to extradite if a part of the offence was committed inside its borders. Extradition may also be refused where the offence was committed outside the borders of the requesting state, provided that the requested state is either in a position to prosecute the offender itself in respect of the offence or such offence is not regarded as an extraditable offence in the requested state. Art 11 provides for the situation where the death penalty is outlawed in the requested state but not in the requesting state. In such circumstances the requested states may refuse to

49 Supra.
extradite or may extradite the offender on certain conditions relating to the death penalty.\textsuperscript{50}

Art 22 provides for the procedure states must follow in order to effect extradition. The law of the requested state shall govern the extradition and provisional arrest.\textsuperscript{51}

232 AN INTERNATIONAL DUTY TO EXTRADITE

In addition to extradition proceedings taking place in terms of a specific extradition treaty, an extradition request may be considered as a result of the international duty on states to extradite. This duty is reflected in the principle of \textit{aut dedere aut judicare} and requires that the state where an offender who has committed a crime of international concern is located, to either extradite the offender to another state that is prepared to try him or else to take steps to have him prosecuted before its own courts.\textsuperscript{52}

This duty to prosecute or extradite as a method of extradition (\textit{aut dedere aut judicare}) applies to specific crimes falling within Customary International Law.\textsuperscript{53}

It will not necessary apply to common crimes.\textsuperscript{54}

\textsuperscript{50} \textit{Supra} 56-57.
\textsuperscript{51} \textit{Supra} 57-58.
\textsuperscript{53} \textit{Supra} 20.
\textsuperscript{54} Katz “The Incorporation of Extradition Agreements” 2003 \textit{SACJ} 312.
The principle is regarded as a customary rule of International Criminal Law. It may apply in respect of a particular offense defined in a particular treaty or more broadly as a customary rule, having application on a whole class of International Law offences. As a result of this broader view of the principle, if a treaty requires the duty to extradite or prosecute in respect of an offence recognized by International Criminal Law and defined in that treaty, this duty will also be binding on states that are not party to the treaty. Such application on the non-party state is due to the fact that the offense falls within the ambit of International Criminal Law as well as the fact that the principle of aut dedere aut judicare is a customary rule of International Law.\footnote{Bassiouni & Wise \textit{International Criminal Law: Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law} (1995) 20.}

\textit{Aut dedere aut judicare} is a tool to ensure the efficiency of International Criminal Law as well as a reflection of the principle that states have a duty to act, either through prosecution or through extradition in order to ensure that offenders who perpetrate crimes against the fundamental interest of the international community are brought to justice.\footnote{\textit{Supra} xi.}
2.3.3 EXTRADITION BASED ON COMITY

A further method of extradition can be found in *ad hoc* agreements which the President or Head of State of a particular country enters into. These *ad hoc* agreements have been implemented to provide for the situation where the alleged offender is found in a state with which the requesting state does not have any extradition treaty.

The *ad hoc* agreement is based on comity or good relations between states. In the process of extradition, comity means that the requested state will receive a request for extradition from another state. The state then has the discretion to either grant or refuse the requested extradition. This method of extradition is dependant on the goodwill of the Head of State within whose territory the offender seeks refuge. The Head of State makes the decision whether or not extradition will be granted. In making this decision the Head of State is to a large extent, free from any kind of constraint. The determining factor lies in the relationship between the states and not in the concern for the individual involved. However in making the decision, the Head of State will have to take into account that the alleged offender is entitled to the protection of his minimum human rights.

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Reciprocity is not a necessary element of the special ad hoc agreement. However there is usually an understanding between the two states that in similar circumstances their requests will be considered.  

A comity or ad hoc agreement as a basis for extradition in the international sphere is regarded as the exception. The South African courts do however make use of this method of extradition in practice. S3(2) of the South African Extradition Act allows for the extradition of an alleged offender to a foreign state where no extradition treaty exists with that state, provided that the President consents in writing to the extradition.

Under South African law, the consent of the President alone does not amount to the extradition of the offender. It merely serves to certify that the offender is the person liable to be extradited to the relevant state. The actual extradition proceedings take place in terms of the Extradition Act. This important distinction means that the individual offender retains the full protection of the extradition hearing before his extradition.

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64 Act 67 of 1962.
Recently the constitutional validity of s3(2) of the Extradition Act[^66] has been challenged in the cases of *Geuking v President of the Republic of South Africa*[^67] and *Harksen v President of the Republic of South Africa & Others*[^68].

Despite these challenges, South Africa is still prepared to allow extradition in terms of a special arrangement in addition to extradition in terms of a specific extradition treaty. Germany, Australia, Britain (since 1089), Brazil, Sweden, Italy also follow this liberal approach. However states such as the United States, Belgium and the Netherlands require a treaty to be in place before such state will proceed with the process of extradition[^69].

[^67]: 2004 (9) BCLR 895 (CC).
[^68]: 2000 (5) BCLR 478 (CC).
CHAPTER 3  EXTRADITION AND PROCEDURAL RIGHTS

3.1  THE POSITION IN SOUTH AFRICA

The South African Extradition Act\textsuperscript{70} has governed the procedure in terms of which extradition takes place since its introduction in 1962. This Act\textsuperscript{71} makes provision for a limitation on extradition if the potential exists for the violation of an offender’s basic rights. The introduction of the Interim\textsuperscript{72} and Final Constitutions\textsuperscript{73} extended this protection with the introduction and application of the Bill of Rights.

3.1.1  THE PRE-CONSTITUTIONAL POSITION

Prior to 1993, the Extradition Act\textsuperscript{74} governed all procedural challenges to extradition. S11(b)(iv) and s12(2)(c)(ii) of the Extradition Act\textsuperscript{75} prevent extradition where the offender will be prosecuted, punished or prejudiced in the trial conducted by the court of the requesting state as a result of the offender’s gender, race, religion, nationally or political opinion.

S11(b)(ii)\textsuperscript{76} also prescribes certain limitations in respect of extradition. These limits apply to requests for extradition for trivial offences, or where the extradition

\textsuperscript{70} 67 of 1962.
\textsuperscript{71} Supra.
\textsuperscript{73} Constitution of the Republic of South Africa, 1996.
\textsuperscript{74} 67 of 1962.
\textsuperscript{75} Supra.
\textsuperscript{76} Supra.
has not been made in good faith, or where the extradition is not in the interests of justice. In such circumstances the Minister of Justice may refuse the extradition request. The Minister is also permitted by the Act\textsuperscript{77} to refuse an extradition request, where, after taking into account the circumstances of the case, the requested extradition would be unjust or unreasonable or where the punishment that may be imposed, is too severe. These limitations may be referred to as humanitarian grounds. They apply when the prosecution of the offender whose extradition has been requested, outweighs any advantage of such prosecution.\textsuperscript{78}

In the case of \textit{S v Williams}\textsuperscript{79} and that of \textit{S v Schwing}\textsuperscript{80} the offender raised humanitarian grounds as a reason for the court to refuse the extradition. Both matters were adjudicated on prior to the implementation of either the Interim\textsuperscript{81} or the Final\textsuperscript{82} South African Constitution.

In \textit{S v Williams}\textsuperscript{83} 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 estreated 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

\textsuperscript{77} \textit{Supra.}
\textsuperscript{78} Joubert \textit{The Law of South Africa: Executive Authority to Fundamental Rights} (1993) 249.
\textsuperscript{79} 1988 4 SA 49 (WLD).
\textsuperscript{80} 1989 3 SA 567 (TPD).
\textsuperscript{81} Constitution of the Republic of South Africa, 1993.
\textsuperscript{82} Constitution of the Republic of South Africa, 1996.
\textsuperscript{83} 1988 4 SA 49 (WLD).
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.\(^{84}\)

Thus the issue before the court was whether or not to extradite due to the penalty imposed by the Botswana law being too severe in the sense that it was wholly inappropriate or unconscionable.\(^{85}\)

It was argued that there is a marked discrepancy between the sentence that might be imposed for possession of Mandrax tablets in South Africa and the sentence that would be imposed for aggravated possession in Botswana and that the interests of justice would be better served if the Appellant were not surrendered to the Botswana authorities.\(^{86}\)

The court found that in terms of s12(2) of the Extradition Act\(^ {87}\) the Magistrate is required to determine whether, in all the circumstances of the case, the penalty to be imposed would be unjust, unreasonable or too severe. This requires an

\(^{84}\) Supra 52-55.

\(^{85}\) Supra.

\(^{86}\) Supra.

\(^{87}\) 67 of 1962.
evaluation to be made upon a consideration of all the relevant facts. The court stated further 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 precise nature of the punishment which might be imposed with reference to the penalties for comparable offences in South Africa.\(^{88}\)

The court found that it was not the purpose of the Extradition Act 67\(^{89}\) that the courts should sit in judgment of the penal legislation of other signatory states. The question is not whether a penalty appears to South African courts to be unreasonable in the sense that South African courts would not impose such a penalty. The question is whether the penalty is too severe in the sense that it is wholly inappropriate or unconscionable.\(^{90}\)

The court found that there was no reason why the Appellant should not be extradited to Botswana to be sentenced for the offence committed in that country and the court dismissed the appeal.\(^{91}\)

Of importance with regard to the issue of human rights is that in this matter the court found that it would not extradite an offender to a state likely to impose a sentence that is wholly inappropriate or unconscionable.

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\(^{88}\) 1988 4 SA 49 (WLD) 52-55.  
\(^{89}\) 67 of 1962.  
\(^{90}\) 1988 4 SA 49 (WLD) 52-55.  
\(^{91}\) *Supra.*
In *S v Schwing*\(^92\) the Appellant had been convicted in Bophutswana of rape and was sentenced to four years imprisonment, half of which was suspended for five years. The Appellant did not hand himself over to the Bophuthatswana authorities to serve his sentence, but fled to South Africa. An application was brought and granted for an order for the Appellant’s surrender and extradition. The Appellant appealed against this order\(^93\).

The issues before the court were as follows:

- whether the sentence imposed on the Appellant in the Bophutswana court was too severe a punishment according to s12(2) of the Extradition Act 67 of 1962
- whether the extradition agreement complied with the provisions of s2 of the Extradition Act 67 of 1962
- whether the extradition agreement was *ultra vires* as s2(2) thereof was directly in conflict with s12(2) of the Extradition Act 67 of 1962\(^94\).

With regard to the first issue the court found that the fact that the sentence imposed was too severe was not *per se* a ground upon which the extradition could be refused but that it had to be linked, in terms of s12(2) of the Extradition Act\(^95\) to either the trivial nature of the offence or to the fact that the surrender was

\(^{92}\) 1989 3 SA 567 (TPD).
\(^{93}\) *Supra* 569-573.
\(^{94}\) *Supra*.
\(^{95}\) 67 of 1962.
not being requested in good faith or in the interests of justice or for any other reason\textsuperscript{96}. 

The court found further that there was a mutual agreement between South Africa and Bophutswana for the mutual extradition of certain persons and that the Magistrate hearing the application merely had to look at the South African legislation with regard to the agreement in question and to apply that\textsuperscript{97}. 

Finally the court found the s2 of the extradition agreement was subject to s2(2) of the Extradition Act\textsuperscript{98}. The Magistrate derived his powers and discretion to refuse an order of surrender from the Extradition Act\textsuperscript{99} and not from the agreement and that all cases that were extraditable according to the agreement were governed by this discretion. The extradition agreement was thus not \textit{ultra vires} the Extradition Act\textsuperscript{100}. The appeal was accordingly dismissed and the order of surrender was confirmed\textsuperscript{101}.

\section*{3 1 2 THE POST- CONSTITUTIONAL POSITION}

In 1993 the Interim South African Constitution\textsuperscript{102} was promulgated and had a profound effect on the promotion and protection of Human Rights. The Final

\textsuperscript{96} 1989 3 SA 567 (TPD) 569-573.
\textsuperscript{97} Supra.
\textsuperscript{98} 67 of 1962.
\textsuperscript{99} Supra.
\textsuperscript{100} Supra.
\textsuperscript{101} 1989 3 SA 567 (TPD) 569-573.
Constitution followed this Constitution in 1996 and upheld this protection. The Final Constitution places a duty on the South African state to protect the fundamental rights contained in the Bill of Rights and does not allow the South African government to participate in the imposing of, or the facilitating of, any abuse of the rights contained in the Bill of Rights.

The constitutionality of a number of legislative provisions in the Extradition Act have been challenged. There has been controversy over whether the provision that allows the South African President to consent to an ad hoc extradition under s3(2) of the Extradition Act is compatible with the requirement of s231 of the 1996 Constitution. S231 of the Constitution requires international agreements to be approved by Parliament before they have a binding effect on South Africa internationally. This section also requires that they be incorporated by national legislation to have domestic effect. Under s3(2) there is an exchange of correspondence between South Africa and the state requesting extradition before the President’s consent to extradite under s3(2) is obtained. It has been argued that this correspondence and the ensuing consent may appear to constitute an international agreement, which according to s231 is

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104 Supra.
105 S7(2) of Act 108 of 1996.
106 Supra.
107 67 of 1962.
108 Supra.
110 Supra.
111 Act 67 of 1962.
112 Supra.
required to be approved by Parliament and incorporated into domestic law by national legislation.\textsuperscript{114}

A further concern resulting from the implementation of the Constitution\textsuperscript{115} is the procedure prescribed by the Extradition Act\textsuperscript{116} to incorporate extradition agreements and designation arrangements, entered into after 1996, into the South African domestic law. The procedure prescribed by s231(4)\textsuperscript{117} requires that the agreement or designation must be incorporated into domestic law by national legislation. However, the Extradition Act\textsuperscript{118} only requires that the agreements and designations be approved by Parliament and that the Minister of Justice gives notice of Parliament’s approval of the agreement or designation in the Government Gazette. This procedure clearly does not qualify as national legislation.\textsuperscript{119}

Subsequent to the promulgation of the Interim\textsuperscript{120} and Final\textsuperscript{121} Constitutions, cases have emerged in the Constitutional Court where the extradition request was challenged on procedural and constitutional grounds.

\begin{footnotes}
\footnotetext[115]{Constitution of the Republic of South Africa, 1996.}
\footnotetext[116]{Act 67 of 1962.}
\footnotetext[117]{Act 67 of 1962.}
\footnotetext[118]{Constitution of the Republic of South Africa, 1996.}
\footnotetext[119]{Constitution of the Republic of South Africa, 1996.}
\footnotetext[120]{Constitution of the Republic of South Africa, 1996.}
\footnotetext[121]{Constitution of the Republic of South Africa, 1996.}
\end{footnotes}
In *Harksen v President of the Republic Of South Africa & Others*\(^\text{122}\) the Constitutional Court had to determine the constitutionality of s3(2) of the Extradition Act\(^\text{123}\) in relation to s231 of the Constitution.\(^\text{124}\) The court was furthermore required to determine whether the President’s consent to the extradition constituted an international agreement whereby the procedure prescribed by the Constitution\(^\text{125}\) had to be complied with before such consent could be valid.\(^\text{126}\)

In 1993 Germany issued a warrant for the arrest of Jurgen Harksen on charges of continuous fraud. Harksen was resident in South Africa and therefore Germany made the extradition request to the South African authorities who thereafter proceeded in terms of s3(2) of the Extradition Act\(^\text{127}\). The process however was interrupted when the German Federal Court declared the warrant defective as there was no crime of continuous fraud in Germany. A new warrant was issued which resulted in a series of actions by Harksen to set aside this warrant both in Germany and South Africa. In August 1995 Germany made a third request for Harksen’s extradition. Attached to this request was the Hamburg court’s order quashing the original warrant and a copy of the new German warrant. In February 1996 South African President, President Mandela

\(^{122}\) 2000 (5) BCLR 478 (CC).
\(^{123}\) 67 of 1962.
\(^{127}\) 67 of 1962.
issued an affidavit consenting to the extradition of Mr. Jurgen Harksen to the Federal Republic of Germany to stand trial for fraud.\footnote{Southwood \textit{"Constitutionality of the Extradition Process"} (2000) \textit{SAYIL} 260.}

The matter was initially heard in the Cape High Court. In this court, Harksen’s argument hinged on whether the exchange of notes between South Africa and Germany could be found to amount to a bilateral international agreement between the two countries. It was argued that the Constitution’s\footnote{Constitution of the Republic of South Africa, 1996.} use of the term international agreement is wider than the term treaty and includes \textit{ad hoc} agreements of an informal nature that South Africa may enter into. If the exchange of notes were found to be an international agreement, then s3(2)\footnote{Act 67 of 1962.} would allow the President to conclude international agreements in conflict with the provisions required by s231 of the Constitution\footnote{Constitution of the Republic of South Africa, 1996.} and such consent would then be invalid. It was further argued that the extradition proceedings in terms of s3(2)\footnote{Act 67 of 1962.} had not complied with the provisions required by s231 of the Constitution\footnote{Constitution of the Republic of South Africa, 1996.} and therefore the extradition proceedings were invalid.\footnote{Schneeberger \textit{"A Labyrinth of Tautology: The Meaning of the Term ‘International Agreement’ and its Significance for South African Law and Treaty Making Practice"}(2001) \textit{SAYIL} 23.}

The Cape High Court held that s231 of the Constitution\footnote{Constitution of the Republic of South Africa, 1996.} would only be of application if the court found that the consent to extradite or the extradition proceedings themselves were found to constitute an international agreement. In
determining this issue the court held that the documentation must indicate the
intention to conclude an international agreement with reciprocal rights and duties.
The court found that the diplomatic notes did not indicate any intention by the
parties to conclude a contractual arrangement. Furthermore the court held that
s3(2)\textsuperscript{136} was specifically enacted to provide for the situation where extradition
takes place in absence of an extradition agreement between South Africa and
the requesting state. The court rejected Harksens’s arguments.\textsuperscript{137}

Harksen then lodged an appeal in the Constitutional Court. His arguments were
essentially the same as those raised in the High Court. He challenged the
constitutionality of s3(2) of the Extradition Act\textsuperscript{138} in relation to s231 of the
Constitution.\textsuperscript{139} He again alleged that the presidential consent was invalid as it
constituted an international agreement and the requirements for such agreement
had not been met. His third argument was based on the doctrine of estoppel.\textsuperscript{140}

The court however held that extradition under s3(2)\textsuperscript{141} is a domestic action, and
not an international enforceable agreement creating reciprocal rights and duties
that would be subject to s231 of the Constitution.\textsuperscript{142} As a result of this finding
Harken’s first and second arguments failed. With regard to the argument based

\textsuperscript{136} Act 62 of 1962.
\textsuperscript{137} Schneeberger “A Labyrinth of Tautology: The Meaning of the Term ‘International Agreement’ and its
\textsuperscript{138} Act 67 of 1962.
\textsuperscript{139} Constitution of the Republic of South Africa, 1996.
\textsuperscript{140} Schneeberger “A Labyrinth of tautology: The Meaning of the Term ‘International Agreement’ and its
\textsuperscript{141} Act 67 of 1962.
\textsuperscript{142} Constitution of the Republic of South Africa, 1996.
on estoppel, the court held that due to the fact that the President’s consent is a domestic act and that it does not give rise to an international agreement, Germany could not rely on the President’s consent to establish an enforceable obligation against South Africa. The court thus dismissed the constitutional challenge.\footnote{Schneeberger “A Labyrinth of Tautology: The Meaning of the Term ‘International Agreement’ and its Significance for South African Law and Treaty Making Practice” (2001) \textit{SAYIL} 30-31.}

Criticism has been levied against the decision of the Constitutional Court by the learned author Prof Dugard. He is of the opinion that the Constitutional Court should have examined the interpretation of s231\footnote{Constitution of the Republic of South Africa, 1996.} in greater detail. The writer is concerned with the lack of transparency and democracy created by the present application of s3(2)\footnote{Act 67 of 1962.}. 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 s3(2).\footnote{Supra.} Accordingly, the writer is of the opinion that such situation is unacceptable in light of South Africa’s new constitutional order.\footnote{Dugard “Public International Law: 2000 Case Law” (2000) \textit{Annual survey of South African Law} 114-116.}

The constitutional validity of s3(2)\footnote{Act 67 of 1962.} was once again raised in the Constitutional Court in the case of \textit{Geuking v President of the Republic of South Africa}.\footnote{2004 (9) BCLR 895 (CC).}
Geuking was a former German citizen who received South African citizenship in 1995. He had however been convicted of and sentenced on charges of fraud and arson in Germany. In 1996 Germany requested his extradition from South Africa to Germany to serve his sentence on these charges. There was also a further German warrant of arrest for him on fifteen other fraud charges.\footnote{Supra 899.}

Germany and South Africa do not have an extradition agreement between them. Thus the s3(2)\footnote{Act 67 of 1962.} presidential consent route had to be followed. The President consented to Geuking's extradition without being notified that Geuking was a South African citizen.\footnote{Pillay “Constitutional Application” (2003) SACJ 264.}

Geuking brought the matter before the Constitutional Court where he challenged the constitutional validity of the President's consent and contended that s10(2) and s3(2) of the Extradition Act\footnote{67 of 1962.} should be declared unconstitutional and invalid\footnote{2004 (9) BCLR 895 (CC) 900.}.

The court held that s3(2)\footnote{Act 67 of 1962.} has always been interpreted to mean that the President can consent to extradition. In respect of the argument that the consent was based on incorrect information and that the President should have taken into account Geuking's South African citizenship, the court held that the President's
consent was a policy based decision and not an administrative one. The court could only interfere with this decision if the President abused his power or acted in conflict with the Constitution\textsuperscript{156}. Due to the fact that the Presidents decision was found to be policy based and not administrative, the court held that s21(3)\textsuperscript{157} which protects the rights of South African citizens was inapplicable at the presidential consent stage of the proceedings.\textsuperscript{158}

The further issue raised by Geuking was the constitutional validity of s10(2) of the Extradition Act.\textsuperscript{159} This section provides that in order for the Magistrate to satisfy himself or herself that there is sufficient evidence to put the extraditee on trial 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.\textsuperscript{160}

Geuking contended that s10(2) of the Extradition Act\textsuperscript{161} was an infringement of his right to a fair trial under s35(3) of the Constitution;\textsuperscript{162} his right to a fair public hearing under s34 of the Constitution\textsuperscript{163} and his

\textsuperscript{156} Constitution of the Republic of South Africa, 1996.
\textsuperscript{157} Supra.
\textsuperscript{158} Pillay "Constitutional Application" (2003) SACJ 264.
\textsuperscript{159} 67 of 1962.
\textsuperscript{160} S10(2) of Act 67 of 1962.
\textsuperscript{161} 67 of 1962.
\textsuperscript{162} Constitution of the Republic of South Africa, 1996.
\textsuperscript{163} Supra.
right not to be deprived of his freedom arbitrarily or without just cause under s12(1)(a) of the Constitution.\textsuperscript{164} He further contended that s10(2)\textsuperscript{165} was in conflict with the doctrine of separation of powers.\textsuperscript{166}

The court, after taking into account the nature of the extradition proceedings, held:

"[t]hat extradition proceedings do not determine the guilt or innocence of the person concerned. They are aimed at determining whether or not there is reason to remove a person to a foreign state in order to be put on trial there. The hearing before the Magistrate is .. a step in those proceedings and is focused on determining whether the person concerned is or is not extraditable. Thereafter it is for the Minister to decide whether there is indeed to be extradition. What is fair in the hearing before the Magistrate must be determined by these considerations".\textsuperscript{167}

The court furthermore found that the certificate from the foreign state indicating that there are grounds for prosecution is sufficient for

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{164} Supra.
\item \textsuperscript{165} Act 67 of 1962.
\item \textsuperscript{166} Pillay "Constitutional Application" (2003) SACJ 265.
\item \textsuperscript{167} 2004 (9) BCLR 895 (CC) 909-910.
\end{itemize}
\end{footnotesize}
extradition. The court therefore held that s10(2)\textsuperscript{168} does not deprive the person concerned of a fair public hearing.\textsuperscript{169}

The court also held that a person facing extradition was not an accused person for the purposes of the protection afforded by s35(3)\textsuperscript{170} and thus the provisions of this section were not relevant. The court however did qualify this finding by stating that the person involved in the extradition proceedings was entitled to procedural fairness at all stages of the extradition proceedings.\textsuperscript{171}

S12 of the Constitution\textsuperscript{172} entrenches the fundamental right to freedom and not to be deprived of this freedom without just cause. The court held that the role of the s10(2)\textsuperscript{173} certificate was a narrow one relating only to the question of whether the alleged conduct was sufficient to give rise to an offence in the foreign jurisdiction. The Magistrate’s enquiry and conclusion is sufficient to meet the constitutional requirement of just cause.\textsuperscript{174}

\textsuperscript{168} Act 67 of 1962.
\textsuperscript{169} 2004 (9) BCLR 895 (CC) 912.
\textsuperscript{170} Constitution of the Republic of South Africa, 1996.
\textsuperscript{171} 2004 (9) BCLR 895 (CC) 910.
\textsuperscript{172} Constitution of the Republic of South Africa, 1996.
\textsuperscript{173} Act 67 of 1962.
\textsuperscript{174} 2004 (9) BCLR 895 (CC) 911.
Finally the court held that the provisions of s10(2)\textsuperscript{175} were \textit{sui generis} and did not interfere with the independence of the judiciary. Neither did they violate the doctrine of separation of powers.\textsuperscript{176}

In the case of \textit{Director of Public Prosecutions, Cape of Good Hope v Robinson}\textsuperscript{177} the Constitutional Court was faced with interpreting the provisions of s10 of the Extradition Act.\textsuperscript{178} Robinson was a South African citizen who had been convicted by a Canadian court for sexual assault. After the conviction he fled to South Africa. He was sentenced, in his absence, by the Canadian court to three years imprisonment. Canada requested South Africa to extradite him back to Canada in order that he serve his sentence. He was brought before court where the Magistrate acting in terms of s10 of the Extradition Act\textsuperscript{179} held that he was a person liable to be surrendered. Robinson appealed and the matter was placed before the High Court. The decision of the Magistrate was overturned on the basis that if Robinson was extradited to Canada he would have to serve a sentence imposed in his absence, which amounted to a violation of his right to a fair trial. The High Court furthermore held that it is for the court and not the Minister of Justice to determine whether a person should be extradited when there will be an infringement of this person’s rights. The Director of Public Prosecutions brought an appeal before the Constitutional Court.\textsuperscript{180}

\begin{itemize}
  \item \textsuperscript{175} Act 67 of 1962.
  \item \textsuperscript{176} 2004 (9) BCLR 895 (CC) 912.
  \item \textsuperscript{177} 2005 (1) SACR 1 (CC).
  \item \textsuperscript{178} 67 of 1962.
  \item \textsuperscript{179} \textit{Supra}.
  \item \textsuperscript{180} 2005 (1) SACR 1 (CC) 7.
\end{itemize}
The Constitutional Court reversed the decision of the High Court. This Court disagreed with the High Court’s interpretation of the words ‘liable to be surrendered’ found in s10 of the Extradition Act.\textsuperscript{181} It was held that the decision of the Magistrate as to whether a person is liable to be surrendered does not automatically mean that the person will in fact be surrendered. The decision with regard to the actual extradition lies with the Minister of Justice who, when making such decision will have to take into account whether the extradition will be just and reasonable.\textsuperscript{182}

The Magistrate does not have the power to consider whether a person’s constitutional rights will be infringed if extradition takes place. S11\textsuperscript{183} gives the Minister the discretion to order the extradition subject to certain limitations. A factor that the Minister is obliged to consider in making this decision is whether the person to be surrendered will suffer an infringement of his fair trial rights. The decision of the Minister is subject to judicial control in terms of s14.\textsuperscript{184} This section provides that any Provincial or Local Division of the Supreme Court can, upon application, after reasonable notice has been given to the Minister, order the discharge from custody of the person sought to be extradited on the ground that there was not sufficient cause for further detention.\textsuperscript{185}

\textsuperscript{181} 67 of 1962.
\textsuperscript{182} Pillay “Constitutional Application (2005) SACJ 234.
\textsuperscript{183} Act 67 of 1962.
\textsuperscript{184} Supra.
\textsuperscript{185} 2005 (1) SACR 1 (CC) 30.
The Constitutional Court held that the order of committal of the Magistrate was correct. It was for the Minister to decide whether or not Robinson should be extradited, taking into consideration that he would have to serve a term of imprisonment in Canada that was imposed in his absence.\textsuperscript{186}

3.2 AN INTERNATIONAL PERSPECTIVE ON PROCEDURAL RIGHTS

Procedural rights and their effect on the process of extradition have also received attention in the International Law sphere. Due to the provision contained in s39(1)(b) of the Constitution\textsuperscript{187} South African courts are directed to consider International Law in the application of the Bill of Rights and thus the approach of foreign jurisdictions and the International Courts will impact on the approach followed by the South African courts.

In the past, the courts of the United Kingdom, Canada and the United States were of the opinion that it was not the duty of the court of the state from which extradition was requested, to investigate whether there were adequate procedural rights afforded to the offender in the state requesting the extradition. This viewpoint was based on the rule of non-inquiry. However, in recent times there has been a trend by courts to now consider the issue of whether the offender will receive a fair trial in the requesting state. This approach is partly due to the fact that the European Convention on Human Rights has

\textsuperscript{186} Supra.

acknowledged that the right to a fair trial is an important part of a democratic society. Therefore this right may be raised to oppose extradition proceedings where the offender faces the risk of suffering a denial of his right to a fair trial in the requesting state. However, the infringement of the offender’s procedural rights must be sufficiently serious before it can be raised as a ground to oppose extradition. In most cases an infringement of these rights will amount to conditional extradition.  

The European Court of Human Rights, with regard to procedural rights, stated the following in the case of Soering:

“The right to a fair trial in criminal proceedings..., holds a prominent place in a democratic society... The Court does not exclude that an issue might exceptionally be raised under Art 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting state.”

Despite what was stated in the Soering case, the European Court of Human Rights appears to be reluctant to accept the argument, namely that the offender’s

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190 Supra 113.
right to a fair trial has been violated. This is especially so when the court is dealing with cases involving international co-operation in criminal matters.\footnote{Dugard & van Wyngaert “Reconciling Extradition with Human Rights” (1998) \textit{AJIL} 203.}

The courts viewpoint in this regard is evident from the case of \textit{Drozd and Janousek v France and Spain}.\footnote{240 Eur. Ct. H.R (ser. A) (1992).} Drozd and Janousek were convicted and sentenced to imprisonment for armed burglary by a court in Andorra (at the time when it was not yet a sovereign state). The sentence was handed down by the \textit{Tribunal des corts}, a court composed of three judges, one appointed by the French President, one by the episcopal co-prince and one by the Bishop of Urgel. As Andorra had no prison facilities, the sentences were to be carried out in either France or Spain. Both offenders chose to serve their sentences in France. However, once in France the offenders argued to the European Court of Human Rights that their sentences could not be put into operation as the sentence had been given by a court that did not qualify as a proper court of law under Art 6 of the European Convention on Human Rights. The Court, when presented with this argument, stated the following:

“As the Convention does not require the Contracting Parties to impose its standards on third states or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Art 6 of the
Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Art 6 would also thwart the current trend towards strengthening international co-operation in the administration of justice, a trend which is in principle in the interests of the persons concerned. The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice.\textsuperscript{194}.

The European Court of Human Rights, by a majority of one vote, held that there had been no violation of the offenders’ procedural rights.\textsuperscript{195}

The French domestic court in the case of Galdeano, Ramirez and Beiztegui\textsuperscript{196} did, however not follow the above approach of the European Court of Human Rights. In this particular case the French court’s approach was more liberal than that advocated by the European Court of Human Rights. The court held that extradition would not be granted if the requesting state’s judicial system did not respect fundamental rights and freedoms. This liberal approach is also present in Austria and Switzerland where the procedural guarantees of the

\textsuperscript{194} Supra 110.
\textsuperscript{195} Dugard & van Wyngaert “Reconciling Extradition with Human Rights” (1998) \textit{AJIL} 203.
\textsuperscript{196} 26 SEPT ’84 Rec.307, [1985] PUB LAW 328.
European Convention on Human Rights are included in their domestic extradition legislation.\textsuperscript{197}

The issue of a fair trial rights in the requesting state was raised in the United Kingdom in the case of \textit{R v Secretary of State for Home Department ex parte Rachid Ramda}.\textsuperscript{198} The case involved an application for judicial review of the Secretary of State’s decision to order the extradition of an Algerian national from the United Kingdom to face trial in France on charges relating to a series of terrorist bombings. The evidence in the French governments’ case against the offender was based on the confession of a third party that had allegedly been obtained as a result of force. The court held that the Secretary of State should refuse extradition if there was evidence supporting the fact that the request for extradition was based on this evidence being obtained by force.\textsuperscript{199}

The importance allocated to procedural rights in the trial of the offender is also evident in the UN Model Treaty on Extradition. S3(f) of this Model Treaty prohibits extradition if the extradited person would not receive the minimum guarantees for a fair trial contained in Art 14 of the International Covenant of Civil and Political Rights.\textsuperscript{200}

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{197} Gilbert \textit{Aspects of Extradition Law: International Studies in Human Rights} (1991) 89.
\item \textsuperscript{198} [2002] EWHC 1278.
\item \textsuperscript{199} Bantkas & Nash \textit{International Criminal Law} (2003) 213.
\item \textsuperscript{200} Dugard & van Wyngaert “Reconciling Extradition with Human Rights” (1998) \textit{AJIL} 203.
\end{itemize}
\end{footnotes}
It must however be born in mind that the conduct of criminal proceedings falls within the domestic jurisdiction of a particular state. Criminal proceedings are essentially the product of a state’s history, traditions and legal culture and as such, differ from state to state. Consequently the trend in International Law is that the state from which extradition is requested will normally accord a wide margin of appreciation to the requesting state when accusations are raised regarding that state’s standard of criminal justice. The courts of the requested state will usually only refuse extradition where there is clear evidence of a flagrant and systematic denial of fair trial rights in the requesting state.\textsuperscript{201}

\textsuperscript{201} Supra 204.
CHAPTER 4 EXTRADITION INVOLVING THE RIGHT TO LIFE, HUMAN DIGNITY AND BODILY INTEGRITY

Extradition may also be challenged on the ground that the offender’s right to life, to his physical integrity and freedom from torture or inhuman and degrading treatment would be violated if he were returned.

4.1 THE APPROACH OF THE SOUTH AFRICAN CONSTITUTIONAL COURT

The 1993 Interim Constitution did not express itself on the matter of capital punishment. It was decided during the negotiation process neither to exclude nor to sanction the death penalty, but to leave it to the Constitutional Court to decide whether the death penalty is consistent with Chapter 3 of the Interim Constitution. The matter was brought to the Constitutional Court for decision in *S v Makwanyane and Another*. The court concluded that the imposition of the death penalty for murder was a cruel, inhuman and degrading punishment and declared such punishment unconstitutional.

In 2001 the Constitutional Court was faced with the question of whether a person located in South Africa could be extradited where the possibility of the death penalty existed as a punishment in the requesting state. The relevant case was

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203 *Supra.*
204 1995 (3) SA 391 (CC).
205 *Supra.*
Mohamed was alleged to have been involved in the bombing of the United States embassy in Dar es Salaam. 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. Mohamed was a Tanzanian national, who had fled to South Africa on a visitor’s visa with a false passport and on a false name. He applied for asylum in South Africa under an assumed name. He was afforded temporary residential status, which was to be reviewed periodically pending the decision on his application for asylum. The FBI detected Mohamed’s presence in South Africa. The Department of Home Affairs (DHA) notified the Directorate: Alien Control and requested that Mohamed be declared a prohibited person. This was done to ensure that he would not be allowed to leave South Africa. On the day that Mohamed went to the refugee receiving office in Cape Town to obtain an extension of his temporary residence permit he was arrested. He was brought before court, where inconsistent statements by officials of the DHA 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. Mohamed was handed over to the FBI and interrogated, 2001 (3) SA 893 (CC).
after which he confessed to the embassy bombing in Dar es Salaam. Mohamed left South Africa for the United States in the custody of the FBI.\textsuperscript{207}

Amongst other issues, the Constitutional Court had to decide whether Mohamed could be deported or extradited where the possibility of the death penalty existed.

Mohamed based his application on s7(2) of the Constitution,\textsuperscript{208} which obliges the Legislature, the Executive and the Judiciary and all other Organs of State to protect, promote and fulfill the rights in Chapter 2 of the Constitution.\textsuperscript{209}

The Chapter 2 rights relate to a person’s right to human dignity in terms of s(10),\textsuperscript{210} the right to life in terms of s(11),\textsuperscript{211} and the right not to be subjected to cruel, inhuman or degrading treatment or punishment in terms of s12(e).\textsuperscript{212} In respect of s12\textsuperscript{213} the state may not directly or indirectly, knowingly assist in the imposition of a treatment or punishment falling within this section. Mohammed contended that the imposition of the death penalty would be a punishment falling within the ambit of s12.\textsuperscript{214} The state was obliged to obtain an undertaking that

\textsuperscript{208} Constitution of the Republic of South Africa, 1996.
\textsuperscript{209} Supra.
\textsuperscript{210} Supra.
\textsuperscript{211} Supra.
\textsuperscript{212} Supra.
\textsuperscript{213} Supra.
\textsuperscript{214} Supra.
Mohamed would not be subject to the imposition (or the execution) of the death penalty.\textsuperscript{215}

The Court held the following:

“ In handing Mohamed over to the United States without securing an assurance that he would not be sentenced to death, the immigration authorities failed to give any value to Mohamed’s right to life, his right to have his human dignity respected and protected and his right not to be subjected to cruel, inhuman or degrading punishment”.\textsuperscript{216}

The Constitutional Court, in reaching its decision, relied on the approach of the Canadian Supreme Court in the case of \textit{United States v Burns}\textsuperscript{217} where the Canadian Supreme Court held that, based on the protection of life by the Canadian Charter, there was an obligation on the Canadian government in the absence of exceptional circumstances, to seek an assurance that the death penalty would not be imposed.\textsuperscript{218}

\textsuperscript{215} Botha “Deportation, Extradition and the Role of the State” 2001 \textit{SAYIL} 231.
\textsuperscript{216} 2001 (3) SA 893 (CC) 913.
\textsuperscript{217} 2001 1 SCR 283.
\textsuperscript{218} 2001 (3) SA 893 (CC) 913.
It appears from the Constitutional Court’s decision in Mohammed that there is very little difference between the Canadian approach to the right to life in extradition cases and the position presently held in South Africa.\(^{219}\)

The decision in *Mohamed and Another v President of RSA and Others*\(^{220}\) has also raised the question of whether the South African Bill of Rights has an extra-territorial effect.\(^{221}\)

The approach of the court indicates that an unconstitutional infringement of a person’s rights, which occurs outside South Africa, but which was initially as a result of actions of officials inside South Africa, will result in an extra-territorial extension of the Bill of Rights protection\(^{222}\). There must however be a causal link between the act of the South African official and the result of this act in the foreign state.\(^{223}\)

A more recent case that also dealt with the application of the Constitution\(^{224}\) outside the borders of South Africa is that of *Kaunda and Others v President of the Republic of South Africa*\(^{225}\). In this matter the Constitutional Court had to decide whether there is a constitutional obligation on the state to protect South African citizens abroad. The court


\(^{220}\) 2001 (3) SA 893 (CC).


\(^{222}\) *Supra* 799.

\(^{223}\) *Supra* 811.


\(^{225}\) 2005 (1) SACR 111 (CC).
examined the concept of diplomatic protection and the effect that this concept has on extradition of South African citizens abroad. 226

The applicants in this case were 69 South African citizens who were held in Zimbabwe on various charges. The applicants were accused on 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. 227

According to s3(2)(a) of the South African Constitution 228 all citizens are equally entitled to the rights, privileges and benefits of citizenship. A privilege and benefit of South African citizenship is an entitlement to request the South African government for protection against wrongful acts of a foreign state. This request is not an enforceable right. The

226 Supra.
227 Supra.
government has however an obligation to consider the request and deal with it consistently.\textsuperscript{229}

The Judges in the case of \textit{Kaunda and Others v President of the Republic of South Africa}\textsuperscript{230} concurred that a South African who faces the death penalty abroad has a right to request the government for protection against it. 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 imposed.\textsuperscript{231}

It is evident from the South African Constitutional Court decisions that this court will not hesitate to review the international law perspective on the right to life and extradition.

4.2 AN INTERNATIONAL PERSPECTIVE

On the international front the modern trend in extradition agreements is to exclude extradition where the crime in respect of which extradition is sought, is punishable by death in the state requesting extradition, but not in the requested state. An exception to this general refusal to extradite will usually occur when the

\begin{footnotes}
\textsuperscript{229} 2005 (1) SACR 111 (CC) 134.
\textsuperscript{230} 2005 (1) SACR 111 (CC).
\end{footnotes}
requesting state provides an assurance that the death penalty will not be imposed, or, if imposed, will not be executed. 232

Parties to modern extradition treaties attempt to strike a balance between protecting the human rights of the requested offender and the need to ensure that extradition proceedings operate efficiently and effectively. As a result many extradition treaties impose procedural protections that result in restricting extradition if surrender of the person would lead to a violation of this person’s human rights. 233

The fundamental right to physical and psychological integrity and especially the right to life appear to be the major cause of conflict between states in extradition requests and procedures. It is apparent that Customary International Law does not expressly outlaw the death penalty. Despite the lack of this Customary International Law prohibition there are a number of human right conventions that prohibit the death penalty specifically. These include the protocol to the International Covenant on Civil and Political Rights and the European and American Conventions of Human Rights. 234

231 Supra 206.
233 Supra.
The European Convention on Human Rights was signed in Rome on 4 November 1950 and came into force on 3 September 1953. This Convention takes the form of a treaty. It sets out the minimum international standards for the protection of human rights and it also provides for effective enforcement procedures.  

Art 3 of the European Convention on Human Rights guarantees that a person should not be subjected to torture or inhuman and degrading treatment and thus provides a safeguard against extradition where the offender might suffer such treatment in the requesting state. States which are party to the European Convention on Human Rights are obligated to all persons within their territory to protect them from any violations of Art 3, even if that violation will be carried out by the state requesting the extradition of the offender.

The European Court of Human Rights has recognized that states that are party to the European Convention on Human Rights do have a right, subject to the various treaty obligations, to control entry, residence and expulsion of persons who are non-nationals of the state.

When faced with a conflict between obligations under an extradition agreement and obligations under the Convention, the European Court of Human Rights

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appears to decide in favor of protecting fundamental human rights. The protection provided by Art 3 of the European Convention on Human Rights is very wide. When seeking a balance between protecting the fundamental rights of the individual and the public interest, if the European Court of Human Rights is satisfied that the applicant is at risk of being subjected to any of the forms of treatment proscribed by Art 3, the balance must be in favor of non-extradition. Thus Art 3 of the European Convention on Human Rights can result in a limitation of the extradition process.\textsuperscript{238}

4.3 INTERNATIONAL CASE LAW

Due to the influence exerted by International Law on the South African Constitutional Court it is imperative that an overview of the development of international case law regarding extradition and the right to life be examined.

In 1984, the European Court of Human Rights, in the case of\textit{R v Secretary of State for the Home Department, ex parte Kirkwood}\textsuperscript{239} had to consider Art 3 of the European Convention on Human Rights in relation to an extradition request where the death penalty in the requesting state was applicable. The offender based his argument against extradition on the concept known as the death row phenomenon, a term used to describe the years spent on death row, which he argued, constituted inhuman or degrading treatment. The Court held that the risk

\begin{footnotesize}
\begin{itemize}
  \item\textsuperscript{238} \textit{Supra} 213.
  \item\textsuperscript{239} \textit{[1984]} 1 WLR 913.
\end{itemize}
\end{footnotesize}
of suffering the death row phenomenon was not serious enough to constitute a violation of Art 3.\(^{240}\)

The European Court of Human Rights once again considered the application of Art 2 and 3 on the extradition process in the 1989 case of \textit{Soering v UK}.\(^{241}\) Soering was the son of a German Diplomat and a student in Virginia, USA. He and his girlfriend, were charged with the murder of his girlfriend’s parents in 1985. Both Soering and his girlfriend fled to Europe. Soering was arrested in England, and he confessed to committing the crime. He hoped to be extradited to Germany where the death penalty had been declared unconstitutional and he could expect a maximum sentence of ten years imprisonment. Britain granted conditional extradition of Soering to Virginia in the United States. It was required that a representation be made to the Judge at the time of sentencing that the United Kingdom did not wish that the death penalty should be imposed or carried out. Soering brought a complaint under the European Convention on Human Rights.\(^{242}\)

The arguments that Soering raised were the same as those raised in the \textit{Kirkwood}\(^{243}\) case. However an important distinction between the two cases was that Soering was a German national and the government of the Federal Republic

\begin{footnotes}{
\footnotetext{241}{(1989) 11 EHRR 439.}
\footnotetext{242}{Labuschagne & Olivier \textit{“Extradition, Human Rights and the Death Penalty: Observations on the Process of Internationalisation of Criminal Justice”} 2003 \textit{SAYIL} 139.}
\footnotetext{243}{[1984] 1 WLP 91.}
}\end{footnotes}
of Germany had declared itself willing to prosecute him for the crime. It was further argued that Soering was suffering from delusions at the time of the crime. 244

The European Court of Human Rights proceeded to explain:

“What amounts to ‘inhuman or degrading treatment or punishment’ 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 harbor 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.\textsuperscript{245}

The European Court of Human Rights did emphasize 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 court's 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

\textsuperscript{245} (1989) 11 EHRR 439 89.
State’s decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3.\footnote{246}

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.\footnote{247}

The decision taken in the \textit{Soering}\footnote{248} 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 nations.\footnote{249}

Presently, the position of the European Court of Human Rights in respect of Art 2 and 3 of the European Convention on Human Rights appears to be as follows:

- If the requesting state is a party to the European Convention on Human Rights then *prima facie*, extradition should not be prohibited.

- If the requesting state is not a member of the Council of Europe but is another Western Democracy then refusal of extradition should be rare.

- With regard to any other state, the decision to extradite would depend on whether there was an obligation to extradite under an extradition treaty. If an extradition treaty does exist, then the provisions contained in this treaty should protect the offender. If no extradition treaty exists, the requesting state has the discretion of whether or not to guarantee the rights contained in the European Convention on Human Rights in respect of the offender.²⁵⁰

On the 16th of December 1966 the International Covenant on Civil and Political Rights was signed in New York.²⁵¹ This Covenant does not specifically contain provisions that provide for the right of an offender not to be extradited. However certain effects of extradition proceedings will impact on rights protected under the provisions of this Covenant. The Human Rights Committee will consider any allegation of a violation of the International Covenant on Civil and Political Rights.²⁵²

An example of an alleged violation under this Covenant that was heard by the Human Rights Committee was the case of *Kindler v Canada (Minister of Justice.)* Kindler was extradited from Canada to the United States by the Canadian Supreme Court. The Supreme Court was divided on the question of whether extradition to face the death penalty in the United States violated the Canadian Charter of Rights and Freedoms. Canada was a party to the International Covenant on Civil and Political Rights and thus the Human Rights Committee reviewed the decision of the Supreme Court. Although the Committee was divided, it was held that Kindler`s extradition to the United States to face the possible imposition of the death penalty was not a violation of Art 7 of the Covenant on Civil and Political Rights. In making this decision, the Committee took into account that the United States had assured Canada that Kindler would receive full due process.

The Human Rights Committee reached a different conclusion in the case of *Ng v Canada.* In this matter the 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. This method of execution was known to take over ten minutes to cause death and thus resulted in suffering which constituted cruel and inhuman treatment. The Human Rights Committee

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253 (1992) 6 CRR (2d) 193.
255 98 ILR 479.
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 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.256

A further case in Canada that dealt with extradition and human rights was that of United States v Burns.257 In this matter Burns and R were interrogated in the United States in respect of murders committed in the United States. They were then returned home to Canada. The Minister of Justice issued a surrender order for their extradition back to the United States. This order was found to be unconstitutional by the Columbia Court of Appeal. The Supreme Court of Canada, for the first time since the introduction of the Canadian Charter of Human Rights and Freedoms overruled a government surrender order and upheld the decision of the Columbia Court of Appeal. The Court referred to a number of international developments relating to the death penalty and concluded as follows:

“The existence of an international trend against the death penalty is useful in testing our values against

257 2001 1 SCR 283.
those of comparable jurisdictions. This trend against the death penalty supports some relevant conclusions. First, criminal justice, according to international standards, is moving in the direction of abolition of the death penalty. Second, the trend is more pronounced among democratic states with systems of criminal justice comparable to our own. The United States (or those parts of it that have retained the death penalty) is the exception, although of course it is an important exception. Third, the trend towards abolition in the democracies, particularly the Western Democracies, mirrors and perhaps corroborates the principles of fundamental justice that led to the rejection of the death penalty in Canada.”

The Supreme Court held that the order for the extradition of Burns and R to the United States, without obtaining an assurance that the death penalty would not be imposed on them, would violate the principles of fundamental justice.\footnote{258}{Supra 92.}


In 1984 the UN held a Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which was drafted by the UN Commission
of Human Rights and adopted by the UN General Assembly. Parties to this Convention are obligated to prevent any act of torture within their territory and jurisdiction. Art 3 of the Convention requires that states do not extradite offenders if there are substantial grounds for believing that the offender would be subjected to torture. The requested state, when determining whether the offender could be subjected to such punishment, may take account of consistent patterns of human rights violations by the requesting state. Art 17 of the Convention established the Committee Against Torture. This Committee has the right to investigate patterns of human right violations by the state requesting extradition. This Committee also has the right to request the requested state to refuse extradition until the Committee has considered the request.260

In Nunez Chipana v Venezuela261, the Committee had to determine whether a violation of Art 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment had occurred in the extradition of an offender by Venezuela to Peru. Nunez Chipana claimed that her extradition to Peru placed her in a position where she could be subjected to torture by the Peruvian authorities and was thus a violation of Art 3 of the Convention. Nunez Chipana was wanted in Peru in connection with terrorist offences. She argued that proceedings in Peru for offences in connection with terrorism did not comply with fundamental fair trial principles. The Committee took into account that it was aware of allegations from reliable sources claiming the use of torture by Peruvian

authorities in relation to the investigation of terrorism. The Committee found that in view of the nature of the accusation set out in the extradition request, Núñez Chipana was in a situation where extradition to Peru would place her in danger of being subjected to torture. The Committee found that Venezuela, by extraditing her to Peru had failed to fulfill its obligation under Art 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²⁶²

CHAPTER 5 CONCLUSION

It is submitted that extradition proceedings have evolved over a period of time, characterized by a shift in emphasis on the various types of crimes to which this process is applicable. Historically, the practice of extradition was dependant 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 effect 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 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\footnote{67 of 1962.} 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 enter into a number of treaties and conventions for extradition.

On the international front there has been a general tendency of states, when requested to effect extradition, to move away from applying a strict policy of non-inquiry. Previously, under this rule the requested state would not inquire into the impact which the extradition would have on the rights of the offender. The move
away from this rule has mainly been due to human right guarantees taking on a
growing importance in International Law which has resulted in a shift of emphasis
from the offence to the offender. Most 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. In effecting such a balance it must be borne in mind that there is a
wide divergence in the legal values and principles of different states. As a result
there is no uniform standard between states as to what treatment is to be
regarded as an abuse of human rights.

Currently most states conclude bilateral treaties and/or multilateral conventions in
regard to extradition. It is submitted that this is the correct route to be followed.
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\textsuperscript{264} 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\textsuperscript{265}. It has been contended that s10 of the Extradition Act\textsuperscript{266} as well as the \textit{ad hoc} consent\textsuperscript{267} to extradition of the President as a method to effect extradition is unconstitutional. The Constitutional Court has however upheld these provisions to be valid and enforceable and thus they are applicable to any future application for extradition. 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 in International Criminal Law relating to extradition when determining which rights will outweigh the need for international cooperation in the suppression of crime.

Generally, in the circumstance where a conflict arises as to whether or not to extradite, it is submitted that the requested state will have the choice either to deny extradition or to extradite the offender on a conditional basis. As the aim of International Law is the prevention and suppression of crime, it is suggested that the practice of conditional extradition should be the preferred choice. It will

\textsuperscript{264} Constitution of the Republic of South Africa, 1996.  
\textsuperscript{265} 67 of 1962.  
\textsuperscript{266} Supra.  
\textsuperscript{267} S3(2) of Act 67 of 1962.
however remain the goodwill of the requesting state once extradition has been
effected, to comply with the agreed upon condition.
TABLE OF STATUTES

Botswana Habit Forming Drugs Act

British Extradition Acts from 1870 to 1906

Civil Aviation Offences Act 29 of 1974

Constitution of South Africa Act 108 of 1996

Extradition Act 67 of 1962

Fugitive Offenders Act of 1881

Interim Constitution of South Africa Act 200 of 1993

TABLE OF CASES

FOREIGN JURISDICTIONS

Argentina v Mellino 1987 1 SCR 536 554-55

*Galdeano, Ramirez and Beiztegui* 26 Sept ‘84 Rec. 307, [1985] PUB. LAW 328

*Gallina v Fraser* 278 F2d 77. 79 (2d Cir 1960); 364 US 85

*Kindler v Canada (Minister of Justice)* (1992) 6 CRR (2d) 193

*Neely v Henkell* 180 US 109 (1901)

*NG v Canada* 98 ILR 479


*R v Secretary of State for Home Department, Ex Parte Kirkwood*  
[1984] 1 WLR 913

*R v Secretary of State for Home Department, Ex Parte Rachid Ramda*  
[2002] EWHC 1278

*Re Arton* [1896] 1 QB 108

*Soering v UK* (1989) 11 EHRR 439
United States v Burns 2001 1 SCR 283

SOUTH AFRICA

Director of Public Prosecutions, Cape of Good Hope v Robinson 2005 (1) SACR 1 (CC)

Geuking v The President of South Africa and Others 2004 (9) BCLR 895 (CC)

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

Kaunda and Others v President of the Republic of South Africa 2005 (1) SACR 111 (CC)

Mohamed and Another v President of the Republic of South Africa and Others 2001 (3) SA 893 (CC)

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

S v Schwing 1989 (3) SA 567(TPD)
CONVENTIONS

American Convention on Human rights

Convention Against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment

Convention For the Suppression of Hijacking

Convention on Prevention and Punishment of Crimes of Genocide

Convention Relating to the Status of Refugees

European Convention on Extradition

European Convention on Human Rights

International Covenant Against Taking of Hostages

International Convention on Civil and Political Rights
Geneva Conventions of 1949

BIBLIOGRAPHY

BOOKS


**ARTICLES**


**COMMITTEE REPORTS**

Committee on Extradition and Human Rights: International Law

Association: Helsinki Conference (1996)