

**AN EVALUATION OF EXTRADITION BETWEEN THE REPUBLIC OF BOTSWANA AND THE  
REPUBLIC OF SOUTH AFRICA**

**BY**

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## DECLARATION

I, the undersigned, hereby declare that the work contained in this dissertation is my own original work and that I have not previously in its entirety or in part submitted it at any University for degree. Other people's works used here have been properly acknowledged.

**Signature:** .....  
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**DATE:**.....

## ABSTRACT

The extradition process between the Republic of Botswana(hereinafter referred to as Botswana) and the Republic of South Africa(hereinafter referred to as South Africa) has proven to be less effective due to procedural disparities. There is a gap in the extradition treaty that has been overlooked. For extradition to run smoothly, countries ought to build a working relationship. Botswana's border with South Africa makes it easy for criminals to move between the two countries without detection. In most cases, criminals from both countries cross over the border without going through designated areas in order to escape justice. This has led to an increase in extradition requests between the two countries.

An overview of the extradition arrangements between Botswana and South Africa has suggests that provisions in extradition agreements, whether bilateral or multilateral, should assist not only in the operation of international cooperation on criminal matters, but also in the protection of the rights of persons subject to an extradition request. The extradition treaty between Botswana and South Africa needs extensive evaluation and review in order to align it with international developments. This is a treaty that was entered into in May 1969.

Delays have been identified as the major problem in the extradition arrangements between the two countries. Delays in extradition impede rather than promote justice and international relations. Extradition hearings by nature are meant to be speedy. This is so because it is not a substantive trial and the accused person is not called to his defence.

These delays are due to a number of factors. As one of the factors, Interpretation of extradition statutes has proven to be problematic. Problems were found to result from lack of uniform interpretation of law methods used by the courts. Further Differing policies on capital punishment have been at the heart of delays in recent extradition cases between Botswana and South Africa where a fugitive is wanted for murder, which carries the death penalty. South Africa and Botswana are parties to most international human rights conventions which do not support the death penalty though Botswana still practices it and the decision whether to

execute it lies with the Executive. It has been proven that getting the Executive to give an assurance not to execute is a battle that takes a long time.

The treaty between the two countries and their Extradition Acts are ancient and overdue for amendment to rectify those acts that create technicalities used to fight extradition. Below are the proposed elements for a new Extradition Treaty between Botswana and South Africa

The Preamble of the treaty should include that Botswana is a “foreign state”

1. Article 6 should be amended to read:

Extradition shall be refused if under the laws of the requesting Party the offence for which extradition is requested is punishable by death unless there is an undertaking from the requesting state that if the accused is convicted, the death penalty will not be imposed or where it is imposed it will not be executed.

An extradited convict sentenced to death shall not be held on death row for a period exceeding one year.

2. Article 15 should be amended by adding the following:

6. The Magistrate must ensure that extradition hearing is completed within six months of commencement.

3. Article 16 should be added as follows:

4. Expenses incurred by reason of non cooperation of the requesting party shall be borne by that party.

## **DEDICATION**

This dissertation is dedicated to my beloved mother who passed away in February 2009. She encouraged me to pursue my Masters when I had opted to decline studying in order to take care of her when she was ailing. To my two sons Boniface and Gigi. And to my lovely husband Bokang for understanding and encouragement to come to South Africa to pursue my studies whilst he remained at home alone.

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## TABLE OF CONTENTS

<b>DECLARATION</b>	<b>ii</b>
<b>ABSTRACT</b>	<b>iii-iv</b>
<b>DEDICATION</b>	<b>v</b>
<b>ACKNOWLEDGEMENTS</b>	<b>vi</b>
<b>TABLE OF CONTENTS</b>	<b>vii-ix</b>
<b>ABBREVIATIONS</b>	<b>x</b>
<b>CHAPTER 1: INTRODUCTION</b>	
1.1 Context of the Research	1
1.2 Outline of the Research and Methodology	1
<b>CHAPTER 2: EXTRADITION IN CONTEXT</b>	
2.1 Definition of Extradition in General	3
2.2 The International Law of Extradition	4
2.2.1 The Nature of International Law	5
2.2.2 International Obligation to Extradite	5
2.3 Extraditable Crimes	8
2.4 Concluding remarks	10
<b>CHAPTER 3: OVERVIEW OF EXTRADITION BETWEEN BOTSWANA AND SOUTH AFRICA</b>	
3.1 Introduction	11
3.2 The History of Extradition between Botswana and South Africa	11
3.3 Extradition Treaty between Botswana and South Africa	14

3.4	Incorporation of Extradition domestically	15
3.4.1	The Role of Statutes	15
3.4.2	The Role of Treaties	16
3.5	Concluding Remarks	16
<b>CHAPTER 4: IDENTIFIED PROBLEMS AND HOW THEY AFFECT EXTRADITION BETWEEN BOTSWANA AND SOUTH AFRICA</b>		
4.1	Introduction	18
4.2	Misinterpretation of Statutes	18
4.3	Extradition Procedure	19
4.4	Improper classification of Botswana under the Extradition Act of South Africa	20
4.4.1	Is Botswana a Foreign State?	20
4.4.2	Is Botswana Associated State?	22
4.4.3	What would be the correct interpretation?	23
4.4.4	The consequences of misinterpretation	23
4.5	Capital punishment policies	24
4.6	Delays of Extradition	24
4.6.1	Causes of delays	25
4.6.2	Consequences of delays	27
4.6.3	Mutual Legal Assistance and Extradition	28
4.7	Concluding remarks	29
<b>CHAPTER 5: HUMAN RIGHTS</b>		
5.1	Definition of Human Rights	30
5.2	Human rights violations	30
5.3	Capital Punishment and limitation on the duty to extradite	31



5.4	Death penalty and Extradition	32
5.5	Death penalty and politics	34
5.6	Abduction and human rights violation	35
5.7	The effect of human rights violations	36
5.8	The solutions to overcome human rights violations	36
5.9	Concluding remarks	38
<b>CHAPTER 6:</b>	<b>COST IMPLICATIONS</b>	
6.1	Who bears the extradition costs?	39
6.2	What causes extradition to be costly?	39
6.3	Possible ways of reducing cost implications	40
6.4.	Time limit for extradition	42
6.5.	Concluding remarks	42
<b>CHAPTER 7:</b>	<b>FINAL CONCLUDING REMARKS</b>	43
7.1	Proposed elements for a new Extradition Treaty between Botswana and South Africa	45
<b>BIBLIOGRAPHY</b>		46

## ABBREVIATIONS

(of titles of books, etc., quoted in the text)

**SAYIL** South African Yearbook of International Law

**SAJCJ** South African Journal of Criminal Justice

**BLR** Botswana Law Reports

**DPP** Directorate of Public Prosecutions

**SACR** South African Criminal Law Reports

**AJIL** American Journal of International Law

## CHAPTER 1

### INTRODUCTION

#### 1.1 Context of Research

The extradition process between the Republic of Botswana (hereinafter referred to as Botswana) and the Republic of South Africa (hereinafter referred to as South Africa) has proven to be less effective due to procedural disparities. There is a gap in the extradition treaty that has been overlooked. For extradition to run smoothly, countries ought to build a working relationship. Botswana's border with South Africa makes it easy for criminals to move between the two countries without detection. In most cases, criminals from both countries cross over the border without going through designated areas in order to escape justice. This has led to an increase in extradition requests between the two countries.

#### 1.2 Outline of the Research and Methodology

There is not much literature on the extradition processes between Botswana and South Africa. This dissertation relies mostly on submissions that have been made in Courts during extradition hearings, as well as the interpretation of statutes relating to extradition. The intention is to build up a base literature (handy structure) within which extradition can be improved and developed to make it more effective.

This dissertation will discuss the Extradition treaty entered into between Botswana and South Africa in 1969. It comments on the position regarding the extradition process between two countries, analyses and evaluates the extradition process between them, and comes up with possible solutions and recommendations. The rest of this dissertation is organised as follows: Chapter 2 looks at the background of extradition. In Chapter 3 an overview of the extradition between Botswana and South Africa is provided. Chapter 4 discusses the key problems that

often occur with respect to the extradition process between the two countries. In chapter 5 extradition and human rights law are discussed together with the question of abduction and its consequences. Chapter 6 examines the question of extradition expenses and the cost implications of non-cooperation between the two countries. Finally, Chapter 7 deals with the proposed elements for an amendment of the treaty.

## **CHAPTER TWO**

## EXTRADITION IN CONTEXT

### 2.1 Definition of Extradition in General

There are multiple definitions of extradition that exist in the extradition literature. In all these definitions there is one central theme, which is handing over of fugitives.” According to Torsten Stein, ‘Extradition may be described as an act of international legal assistance and cooperation in criminal matters by the handing over of a suspect, an accused, or a convicted person by the requested state to the requesting state for the purpose of prosecution or execution of a sentence.’<sup>1</sup>

The United States Statute defines International extradition as ‘the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory and within the territorial jurisdiction of the other, which being competent to try and punish, demands the surrender.’<sup>2</sup>

In the South African case of *President of the Republic of South Africa and Others v Quagliani; President of the Republic of South Africa and Others v Van Rooyen and another; Director-General, Department of Justice and Constitutional Development and Others*, SACHS J defined extradition as ‘The surrender by one state, at the request of another, of a person within its jurisdiction who is accused or has been convicted of a crime committed within jurisdiction of the other state.’<sup>3</sup>

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<sup>1</sup> Stein T as cited in JMT Labuschagne and Michele Olivier: “Extradition, human rights and death penalty: observations on the process of internationalisation of criminal justice values” (2003) 28 *SAYIL* 130

<sup>2</sup> Extradition Act CAP 276 (United States of America) Order, 2007 published by Legal Notice 375 of 2007, the Minister for Justice and Home Affairs

<sup>3</sup> Case number (CCT24/08;CCT52/08) (2009) ZACC 1; 2009 (4) BCLR 345(CC) (21 January 2009) 3

Anton Katz defines extradition as follows: ‘The process of extradition is a bilateral event between two sovereign states. One sovereign state surrenders an individual situated in its territory in response to a request for extradition by another sovereign state.’<sup>4</sup>

Finally, Cowling says that ‘Extradition is a process in terms of which a fugitive from justice who is located in one jurisdiction but wanted in another on criminal charges or as a result of a conviction in the latter may be apprehended in the former and sent to the requesting state in order to be dealt with according to that criminal justice system.’<sup>5</sup>

For the purpose of this dissertation the definition by Cowling will be adopted because it is more precise and encompassing.

## 2.2 The International Law of Extradition

Countries rely on the co-operation of other states to obtain the surrender of suspected or convicted criminals who have escaped to other states whether neighbouring or abroad. Where this cooperation between states rests on the procedure of request and consent synchronized by certain general principles, the form of global judicial aid is called extradition.<sup>6</sup>

The internationalization of crime has made national law enforcement authorities increasingly dependent on international cooperation. Extradition is the oldest and paramount known form of such co-operation. There is an emerging need for international cooperation on the part of both national police forces and judicial authorities in respect of collecting evidence, tracing of fugitives, tracing of proceeds of crime, and so forth.<sup>7</sup> The creation of an International Police

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<sup>4</sup> A Katz: “The incorporation of extradition agreements” *SAJC* (2003) 16 321

<sup>5</sup> M Cowling: “Recent cases: extradition proceedings” *SAJC* (2003) 16 427

<sup>6</sup> Ibid

<sup>7</sup> J Dugard: *International Law: A South African Perspective* 3<sup>rd</sup> ed (2005 Juta) 235

organisation (Interpol) was basically for the fulfilment of international cooperation in policing. International law concerns the question of the content of obligation between individual states.

### **2.2.1 The nature of International law**

Charlotte Ku and Paul F. Diehl define International Law as follows: ‘it embodies several other questions that need to be answered in order to understand what we are examining. Questions like 1. What does International law do? 2. How does it work? 3. Is it effective in what it does? And 4. What can we expect from it? In answering the above questions, it is held that International law allows for the coexistence of multiple political units and their interaction. It provides a framework for the international system to operate effectively. International law is a factor in state behaviour; we expect it to facilitate and to support the daily business of international relations and politics.’<sup>8</sup>

Treaties are classified as part of international law.<sup>9</sup> They have a prominent place and considerable importance in international relations. In modern practice, treaties are couched in a written form and signed by duly authorised representatives of the contracting parties. Extradition treaties therefore are international agreements between states, sanctioned by international law.

### **2.2.2 International Obligation to Extradite**

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<sup>8</sup> Cogan JK: International Law as Operating and Normative System: An Overview 3 accessed at [http://ilreports.blogspot.com/2007\\_08\\_12\\_archive.html](http://ilreports.blogspot.com/2007_08_12_archive.html) on 23 February 2009

<sup>9</sup> Article 2(1) a of the Vienna Convention on the Law of Treaties of 1969 defines “treaty” as an international agreement concluded between states in written form and governed by international law.

When a State receives a request for extradition, the first question arising is whether there is a duty resting on that state to extradite the fugitive sought. The other question is whether this duty, if it exists, is legally enforceable, attracting sanction for its infringement or whether it is conceivably a moral obligation.<sup>10</sup> There is no general duty under International law for the requested state to extradite.<sup>11</sup>

On discussing the issue of whether there is a domestic duty to extradite a distinction must be drawn between extraditions on the basis of an extradition treaty and extradition requested in the absence of a treaty.<sup>12</sup> Given the non-existence of a treaty, a state has no contractual obligation to extradite an accused. However, where there is no extradition agreement, it does not automatically mean that a state cannot extradite a fugitive to a requesting state. Extradition is one form of reciprocity between countries that builds international relations. Predominantly the discretion to extradite without a treaty is provided for in the domestic laws under the Extradition Acts of States.

The Extradition Act of Botswana provides under section 3 that:

*“ 1) Where an arrangement has been made with any country, with respect to the surrender to that country of any fugitive criminal, the Minister may, having regard to reciprocal provisions under the law of that country, by order published in the Gazette, direct that this Act shall apply in the case of that country subject to such conditions, exceptions and qualifications as may be specified in the order.*

*(2) An order made under subsection (1) shall recite or embody the terms of the arrangement and shall not remain in force for any longer period than the arrangement.*

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<sup>10</sup> N Botha: “The Basis of Extradition: The South African Perspective”, (1991)17 *SAYIL* 117

<sup>11</sup> *Supra* note 8

<sup>12</sup> *Supra* note 11

*(3) Any order under subsection (1) may prescribe what crimes shall be deemed to be extradition crimes for the purposes of the order and this Act.”<sup>13</sup>*

Despite the fact that the Act is not specific about extradition where there is no treaty, the Act provides that Botswana may extradite where there is reciprocal relationship

Similarly the Extradition Act of the Republic of South Africa gives the President the power to consent to extradition where there is no treaty.<sup>14</sup> In the case of *Harksen v President of the Republic of South Africa and Others*<sup>15</sup> the Court held that the consent of the President under section 3(2) of the Extradition Act was a domestic act and it was never intended to create international legal rights and obligations.<sup>16</sup>

In the recent case of *President of the Republic of South Africa and Others Quagliani; President of the Republic of South Africa and Others v Van Rooyen and another; Director General, Department of Justice and Constitutional Development and Others*,<sup>17</sup> there was an issue of enforcement of a treaty with the United States of America. In the absence of its incorporation, The Court in the judgment at paragraph 36 stated that:

*“Gilbert states ‘While bilateral treaties were the first method to be used to conclude extradition relations, states have since developed alternative forms of arrangement. For instance, even though universal multilateral conventions open for accession by any state in the world is an impractical dream, regional conventions have proved popular. Furthermore, in an effort to ensure serious offenders do not escape justice the United Nations sponsored anti-terrorist*

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<sup>13</sup> Chapter 09:03 of the Laws of Botswana, Act no 53 of 1968

<sup>14</sup> Section 3(2) of the Extradition Act no 67 of 1962

<sup>15</sup> 2000 2 SA 825 (CC) also discussed in Dugard: *International Law, A South African Perspective* 213

<sup>16</sup> 2000 2 SA 825 (CC) at 834 paragraph 21

<sup>17</sup> (CCT24/08;CCT52/08) (2009) ZACC 1; 2009 (4) BCLR 345(CC) (21 January 2009)

*conventions have included clauses to permit them to be used as surrogate extradition treaties where no treaty exists between the requesting and asylum states. In more specific situations, states with close geographical and historical connections have reached agreements allowing for very much specified procedures. Finally states have occasionally provided for extradition without any international arrangement through domestic legislation; the object is to ensure that a state does not become a safe haven for criminals and to facilitate in a practical way the comities of nations.”<sup>18</sup>*

The South African Extradition Act clearly allows extradition without a treaty whereas the Botswana Law is vague on the issue. It leaves room for argument. The law should be clear, it should clearly state that the Minister of Justice may give consent to extradition where there is no treaty.

Basically, extradition is one of the reciprocal agreements entered into by states. The refusal of a country to extradite suspects or criminals to another may lead to international relations being strained. Countries always ensure that there is assistance where there is no treaty and therefore Botswana’s laws should be clear on this issue.

### **2.3 Extraditable Crimes**

Extradition has been regarded as only involving criminal matters. What is classified as criminal differs from state to state. It is common practice that countries list offences to which extradition will be applicable in the relevant extradition treaty. In the Extradition Act of Botswana Section 2 (2) states that “Extradition crime” means a crime which, if committed within the jurisdiction of Botswana, would be an offence described in the Schedule. The Schedule provides a list of extradition crimes. On the other hand, Section 1 of Extradition Act of South Africa provides that “*extraditable offence*” means any offence which in terms of the law

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<sup>18</sup> Supra note 3

*of the Republic and the foreign states concerned is punishable by a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more.'*

The extradition treaties have a propensity to provide for extraditable offence in respect of crimes that are punishable in both states with a sentence above a particular imprisonment period without identifying the crime.<sup>19</sup> For instance article 2 of the Extradition treaty between Botswana and South Africa provides that:

*' Extradition shall be granted in respect of offences which are in terms of the laws of the requesting party subject to the jurisdiction of that party's highest court of appeal in criminal matters, provided that they are punishable, both under the laws of the requesting party and of the requested party , by imprisonment for a maximum period of at least twelve months or by some more severe penalty. Where a sentence has been imposed after conviction in respect of any such offence, extradition shall be granted irrespective of the nature or period of the punishment imposed.'*<sup>20</sup>

Political offences and military offences as a matter of extradition law and practice are exempted from extradition.<sup>21</sup> The treaty between Botswana and South Africa recognises the political offence exception under article 3 and the military offence exception under article 4. Botswana and South Africa have incorporated this political offence exception in their domestic laws under their respective Extradition Acts. Botswana has demonstrated its commitment to the observation of this exemption when it refused an extradition request from Namibia on the grounds that the offence, for which the fugitives were requested, was of a political nature and there was a possibility that they would not receive a fair trial.<sup>22</sup>

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<sup>19</sup> Supra note 8 at 216

<sup>20</sup> Extradition treaty of Botswana and South Africa of 2<sup>nd</sup> May 1969.

<sup>21</sup> Supra note 8 at 217

<sup>22</sup> Republic of Namibia v Alfred and Others 2004 (2) BLR 101 (CA)

## **2.4 Concluding remarks**

Generally, extradition is one aspect of International law that needs development. All countries have an interest in the prosecution of offenders. Criminal offences are one of the factors that disturb peace generally, and harboring of criminals by states is detrimental to fight against crime internationally. Botswana and South Africa need to develop in this area in order to overcome transnational criminals.

## CHAPTER 3

### OVERVIEW OF EXTRADITION BETWEEN BOTSWANA AND SOUTH AFRICA

#### 3.1 Introduction

In 1961, when South Africa left the Commonwealth, all its extradition arrangements with Commonwealth countries came to an end. However, it did not affect the extradition agreements it had with non- Commonwealth states.<sup>23</sup>

In 1962 the Extradition Act 67 of 1962 of South Africa was enacted to govern the country's extradition procedures. Following the enactment of the Extradition Act there was an establishment of a treaty between South Africa and Botswana entered into on the 2<sup>nd</sup> May 1969. Similarly, in 1968 the Extradition Act no 3 of 1968 was enacted to govern Botswana's extradition procedures.

#### 3.2 The History of Extradition between Botswana and South Africa

The history of extradition between Botswana and South Africa has come a long way. There have been major developments in this regard.

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<sup>23</sup> Supra note 8 at 211



The map above is an indication that Botswana is bordered by South Africa to the South and South East (which is most populated), Namibia to the west and north, Zimbabwe to the North East and meeting Zambia at a single point.

By not following proper procedures the South African Police Services incurred a challenge from the South African Human Rights Commission in the case of Mr David Motlatsi Mafojane<sup>24</sup>, a South African citizen. Mr Mofojane was being tried in Botswana for an offence of armed robbery following an illegal extradition. Ms Nthabeleng Sarah Mafojane a relative of Mr Mofojane allegedly reported to the South African Human Rights Commission that three members of the South African police had assisted two Botswana police officers to kidnap her brother to Botswana. The Botswana authorities, following negotiations, were requested to return Mr Mafojane to South Africa so that appropriate procedures could be followed. Unfortunately Mr Mafojane became ill and died before the case was resolved.

A similar instance emerged again in the case of *Benson Keganne*, a Botswana national, *Amos Suna Moloji and William Sedi*, both South African citizens. The three were accused of murdering a Botswana businesswoman Agnes Mohowe after she gave them a lift across the border near Gaborone in 2001. Benson Keganne and Amos Suna Moloji were subsequently arrested in North

<sup>24</sup> Report by South African Human Rights Commission dated 11 September 2002 1

West Province in South Africa and sent to Botswana under immigration laws as illegal immigrants. The Police regarded this as a quick method of bringing fugitives to Botswana because it did not involve the normal complicated and long procedure as formal extradition. It was soon realised that they were wanted for murder and that proper extradition procedures had not been followed. As in the case of Mr Mafojane, the negotiations took a long time, with Botswana refusing to surrender the fugitives to South Africa in order to follow proper extradition procedures. The fear was that South Africa would not surrender the fugitive to Botswana. In the past South Africa received numerous requests from Botswana. Unfortunately, request documents were not in order or according to the requirements of the treaty. For instance, documents were not properly drafted and were not properly authenticated. This caused cases to be dismissed before Court due to technicalities. This created a cynical relationship between Botswana and South Africa in the extradition field. As a result Botswana developed a negative impression that the South African authorities were unwilling to assist or honour their extradition obligations.

In *S v Benson Keganne*,<sup>25</sup> the extradition came before the Court as a preliminary issue when the accused were brought for trial for murder and they challenged the Court's jurisdiction. The issue was that the Court did not have jurisdiction to try them for murder because they were not properly brought to Botswana from South Africa. The Court held that they were to be returned to South Africa instantly in order for proper procedure to be followed according to the extradition arrangements Botswana has with South Africa. It also condemned the procedure that was followed and held that it violated the accuseds' rights, in that it denied the accused a right that they should be an undertaking assuring that if sentenced to death, it will not be executed. This however only happened at the start of 2006. The accused were returned to South Africa where proper extradition procedures were followed and this was the last instance that was conducted in the field of extradition between Botswana and South Africa where proper procedure was not followed.

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<sup>25</sup> *State v Benson Keganne and others* (CLCLBO6/08 unreported )

The Directorate of Public Prosecutions through Advocate Elbie Leonard, the Deputy Director of Prosecutions of South Africa, in collaboration with Ms Priscilla Kedibone Israel and Ms Thato Dibeela of the Directorate of Public Prosecution Botswana, organised a lecture in which Mrs Leonard came to Botswana and trained the Botswana authorities on how to go about drafting proper extradition documents. This act developed the extradition relationship between the two countries because subsequent to the lecture, Botswana was successful in its extradition requests.<sup>26</sup> An example of such cases is *State v Hendrick Molohe*, *State v Tebogo Mafisa*, *State v Skhumbuso Ricardo Mlotsa*, *State v Nkosinathi Moyo*, to state a few<sup>27</sup>.

### **3.3 Extradition treaty between Botswana and South Africa**

The consensus in International Law is that a state does not have any duty to surrender a fugitive to another state; this is based on the principle of sovereignty in that every state has legal authority over the people within its borders. Nonexistence of an international obligation to extradite and the desire of the right to demand criminals from other countries have resulted in a network of treaties or agreements. Botswana and South Africa entered into an extradition agreement on 2<sup>nd</sup> May 1969. This treaty established a relationship between Botswana and South Africa. The two countries entered in to this agreement at a time when very few countries were keen to sign international agreements with South Africa.<sup>28</sup> The extradition procedure of both Botswana and South Africa is a combination of judicial and executive systems. In this method, a refusal on the part of the judicial authorities to grant extradition is binding on the executive authorities.

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<sup>26</sup> DPP1/6/1 I (38) ( an Extradition File with the Directorate of Public Prosecutions- Botswana)

<sup>27</sup> Ibid

<sup>28</sup> Supra note 5 at 311

### 3.4 Incorporation of Extradition domestically

The implementation of an extradition treaty should be tailored to the particular legal system of the state concerned. Some states will not require extensive implementing legislation, as their legal systems provide for extradition treaties to be directly applied in their system. However, even in such cases, most states will need to implement legislation or regulations governing the procedure applicable to the conduct of extradition hearings when they are the requested State. The South African Constitution provided that once the Republic becomes a party to an extradition agreement, its provisions do not have domestic effect until it is incorporated into South African Law in terms of section 231 of the Constitution. The case of the *President of the Republic of South Africa and Others Quagliani; President of the Republic of South Africa and Others v Van Rooyen and another; Director- General, Department of Justice and Constitutional Development and Others*, cited above, was decided in the contrary. Judge Sachs held that an extradition treaty needs no incorporation but he declined to address whether it was self-executing.

In Botswana international agreements have no effect in Botswana until they have been incorporated into Botswana national law. International treaties require legislative action to become applicable in municipal law. There is no provision in either the Constitution of Botswana or any other piece of Legislation that clearly defines the status of international law in domestic law.<sup>29</sup> Botswana has adopted the dualist approach to the recognition of international law within its domestic sphere which emphasis that rules of international law and national law system exist separately and can not purport to have an effect on, or overrule the other.

#### 3.4.1 The Role of Statutes

There is no dispute that extradition treaties are international agreements. Parliament has the authority to enact the laws. Basically the Extradition Act incorporates the provisions of extradition agreements into South African law. The extradition Act lays down the procedural

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<sup>29</sup> Tshosa OB: “*The Status and Role of International Law in the National Law of Botswana: Essays on the Law of Botswana*” 232

regulations or classifies the proviso to be incorporated in extradition treaties.<sup>30</sup> In Botswana international agreements should be incorporated into domestic law to become binding. The Extradition Act of Botswana has subsidiary legislation in regard to all extradition agreements it has entered into thus incorporating them into Botswana laws.

### 3.4.2 The Role of Treaties

There are two types of extradition agreements. These are bilateral and multilateral treaties.<sup>31</sup> Bilateral treaties regulate extradition between two states, such as the treaty between Botswana and South Africa. Multilateral treaties are those signed by more than two states, such as the Southern African Development Community (SADC) Protocol on Extradition, to which both Botswana and South Africa, together with other states in the SADC region are signatories.<sup>32</sup> The signatories are obliged to extradite only to co-signatories.<sup>33</sup> Since there is no obligation to extradite when there is no treaty, the role of a treaty is to create this obligation to extradite in order to intensify extradition relations.

### 3.5 Concluding remarks

An overview of the extradition arrangements between Botswana and South Africa has suggests that provisions in extradition agreements, whether bilateral or multilateral, should assist not only in the operation of international cooperation on criminal matters, but also in the protection of the rights of persons subject to an extradition request.<sup>34</sup> It is important that extradition agreements are properly incorporated into both South African and Botswana laws in

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<sup>30</sup> Supra note 30.

<sup>31</sup> H Smith: "International Extradition: A case Study between the U.S. and Mexico" 67. accessed at [www.aic.gov.au/.../smith\\_russell.aspx](http://www.aic.gov.au/.../smith_russell.aspx) on the 23<sup>rd</sup> March 2009

<sup>32</sup> SADC Protocol on Extradition which entered in to force on the 1<sup>st</sup> August 2006 obtained from SADC website.

<sup>33</sup> *ibid*

<sup>34</sup> Supra note 4 at 321

accordance with the provisions of laws for these states. This is due to the fact that it is important not only to protect the rights of those subject to extradition, but also to deal with transnational criminal activities and the increasingly complex nature of international crime in a lawful manner.<sup>35</sup>

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<sup>35</sup> *ibid*

## CHAPTER 4

### IDENTIFIED PROBLEMS AND HOW THEY AFFECT EXTRADITION BETWEEN BOTSWANA AND SOUTH AFRICA

#### 4.1 Introduction

Botswana and South Africa have managed to improve their extradition relations. Preparation of extradition request documents is no longer a difficult task for Botswana authorities. A closer assessment or an evaluation of the extradition arrangements between the two states will reveal that their effectiveness is hindered by procedural disparities. The discussion of these disparities is intended to make a contribution to the review of the treaty between Botswana and South Africa.

#### 4.2 Misinterpretation of Statutes

Interpretation of extradition statutes has proven to be problematic. Problems result from lack of uniform interpretation methods used by the courts. This problem of misinterpretation is usually experienced in the South African courts when there is an extradition hearing emanating from Botswana. This is due to the fact that the treaty between Botswana and South Africa has never been amended in order to align it with the requirements provided for in the Extradition Acts of Botswana and South Africa. If the treaty is unambiguous, interpretation of statutes will not be problematic. The other issue that causes misinterpretations is the fact that the Laws of Botswana are not amended to align them with developments, for instance, Section 7 of the Authentication of Documents Act<sup>36</sup> defines the highest ranking magistrates in Botswana as “Magistrate grade 1”, whereas this magistrate is present designated “Regional Magistrate”. This causes a difficulty in South African courts if a magistrate above Grade 1 has prepared

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<sup>36</sup> Chapter 14:02 of the Laws of Botswana

authentication certificates<sup>37</sup>. The South Africa courts interpret the Act to mean that only Magistrates of Grade 1 shall sign the authentication certification. The Act is outdated and needs to be amended because at present a magistrate grade 1 is no longer of the highest rank.

### 4.3 Extradition Procedure

The Extradition Act<sup>38</sup> of South Africa establishes two procedures for the extradition of offenders viz: the procedure for '*foreign states*' in accordance with Section 10 of the Extradition Act and procedure for '*associated States*' in accordance with Section 12 of the Extradition Act. The definitions of a "foreign state" and "associated state" will be discussed in detail below in the chapter.

Any foreign state that wants South Africa to extradite a fugitive to it should forward an extradition request to the Minister of Justice through diplomatic channels.<sup>39</sup> The extradition hearing will be conducted in accordance with Section 10 of the Extradition Act. The Magistrate must be satisfied that there is sufficient evidence in the requesting country to warrant prosecution of the fugitive, to which end the magistrate must accept as conclusive evidence a certificate in accordance with Section 10 (2) to be issued by the relevant authority in the requesting country, deposing that there is ample evidence against the fugitive to warrant prosecution of the person concerned.<sup>40</sup>

In order to facilitate the progress of extradition between South Africa and associated states, there is a speedy process which is followed under Section 12 of the South African Extradition

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<sup>37</sup> This was an argument in the ongoing extradition case of State v Diteko Saolekwe Francis Rabana Case no: 3/342/07, DPP REF: 9/2/08(07/01)E held at Randburg Magistrate Court.

<sup>38</sup> 67 of 1962

<sup>39</sup> Supra note 8, Dugard 227.

<sup>40</sup> Ibid.

Act. The Act provides that the requesting state which is “an associated” is not required to request extradition through diplomatic channels; instead it may provide the Director of Public Prosecutions of South Africa with a warrant of arrest of the fugitive, together with a statement providing information of the offence and sufficient evidence against the fugitive.<sup>41</sup>

#### **4.4 Improper classification of Botswana under the Extradition Act of South Africa**

There has been an unresolved argument on what procedure should be followed in South African courts for extraditions emanating from Botswana to South Africa. It should be clarified whether Botswana is a ‘foreign state’ or an ‘associated state’. In the case of *S v Williams*<sup>42</sup> it was held that Botswana qualifies as an ‘associated State.’ This decision has been followed in some extradition hearings, for instance, the extradition case of *S v Tebogo Augustinus Mafisa and Ricardo Sikhumbuso Mlotsha* held at Sebokeng Magistrate Court<sup>43</sup>. And in the case of *Hendrick Vacey Molope*<sup>44</sup> held at Brits Magistrate Court the judgment was criticised and the Court ruled that it was incorrect and instead held that the correct interpretation was that Botswana is a “foreign State”. This has created a big problem when it comes to drafting extradition documents because Botswana does not know what procedure to follow.

##### **4.4.1 Is Botswana a Foreign State?**

The issue to discuss here is whether Botswana is a “foreign state.” The first question is: What is a foreign state? According to the Extradition Act of South Africa ‘a *foreign state includes any*

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<sup>41</sup> Ibid

<sup>42</sup> 1988 (4) SA 49 (W)

<sup>43</sup> Interpol case number 94/01/2007

<sup>44</sup> Interpol case number 39/06/2004

*foreign territory*.<sup>45</sup> This definition does not explain further than that. The definition is shallow as it is and it is of no assistance. The treaty does not specify whether Botswana is a foreign state or an associated state and the only thing to do is to interpret the Act together with the treaty to try and figure out where it falls according to the definition.

The Legal practitioners of South Africa hold a different view on the issue of whether Botswana is a foreign state or not. Both the Prosecutorial and defence legal practitioners interpret the Act in a different manner. Several Botswana extradition requests held in different courts classified Botswana differently. In the extradition pertaining to *Hendrick Vacey Molope* cited above, it was held that Botswana is a foreign state, agreeing with Advocate Elbie Leonard.<sup>46</sup> Advocate Elbie Leonard has always maintained that Botswana is a foreign state. Her argument is based on the interpretation of the South African Extradition Act and the treaty. An associated state according to the Act means '*any foreign state in respect of which section six applies,*' and section six provides that:

*'Whenever an extradition agreement with any foreign state in Africa provides for the endorsement for execution of warrants of arrest on a reciprocal basis .....'*<sup>47</sup>

The Extradition treaty between Botswana and South Africa does not provide for reciprocal endorsements of warrants of arrest. The other fact is that, the *prima facie* requirement in the treaty on the other hand, corresponds to Section 10 (1) of the Extradition Act of South Africa where sufficient evidence is required. This is indicative of the fact that Botswana cannot be considered an associated state but a foreign State.

The same argument was raised by advocate Richard Solomon, for the defence, in the extradition request case *Diteko Saolekwe Francis Rabana*<sup>48</sup>, currently before court in South

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<sup>45</sup> Section 1 of the Extradition Act of South Africa

<sup>46</sup> Deputy Director of Public Prosecutions of the Republic of South Africa.

<sup>47</sup> Extradition Act of South Africa

Africa at Randburg presided over by Magistrate Fatima Khan. It was held that Botswana was a foreign state on the basis that the treaty does not provide for reciprocal endorsement of warrants of arrest. Advocate Elbie Leonard advanced the same interpretation before the Sebokeng Court in the Extradition request case of *Tebogo Augustinus Mafisa and Ricardo Sikhumbuso Mlotsha*,<sup>49</sup> but the court ruled against her and held that Botswana was an associated state, basing the decision on the *Williams case* which held that Botswana was an associated state.

#### 4.4.2 Is Botswana an Associated State?

According to the Extradition Act an associated state is any foreign state in Africa in respect of which section six applies.<sup>50</sup> The state prosecutor, Advocate Deon Barnard and Senior Advocate Faghre Mohamed argued on behalf of the state in the extradition case of *Diteko Saolekwe Francis Rabana*,<sup>51</sup> that Botswana was an associated state. They based their arguments on Section 9 (4) of the Extradition Act and Section 12 of the Extradition Act which they interpreted to indicate that Botswana is an associated State and further relied on the *Williams case*.

The case of *Williams* came to the conclusion that Botswana was an associated state without dwelling on to reasons in support thereof. The case proceeded from the premise that Botswana was an associated state. The definition of and criteria for an associated state were never argued or considered. The court incorrectly and clearly so, proceeded from the premise that Botswana was an associated state. The legal representatives in the case proceeded from the premise that it was common course that Botswana was an associated State, presumably overlooking the reference to '*any foreign states in Africa.*'

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<sup>48</sup> Case no: 3/342/07, DPP REF: 9/2/08(07/01)E

<sup>49</sup> Supra note 45

<sup>50</sup> Section 1 of the Extradition Act of South Africa

<sup>51</sup> Supra note 51

In an application by an associated State, prima facie proof of commission of a crime is not required and a mere request appears to be sufficient. This is in conflict with the provisions of article 10 2 (a) of the extradition treaty of Botswana and South Africa where prima facie evidence of the commission of the offence is required.

#### **4.4.3 What would be the correct interpretation?**

An assessment of these two interpretations of the law shows that Botswana is a foreign state. This is contrary to practice. Botswana and South Africa have a relationship that can be described as that of associated states looking at the way procedures are simplified due to acquaintances of officials in the relevant department that deal with extradition. The treaty should be amended to clearly classify Botswana as a foreign state. In principle Botswana and South Africa act as one country when it comes to combating crime. The old treaty between South Africa and Rhodesia made specific provision on whether Rhodesia is a foreign state or an associated state which makes it easy to deal with it, the same should be provided for in the treaty between Botswana and South Africa.

#### **4.4.4 The consequences of misinterpretation**

Misinterpretation of treaties and statutes has resulted in lack of uniform interpretation. In view of *S v Viljoen*<sup>52</sup> and the *stare decisis* rule, the *Williams* judgment complicates extradition enquiries tremendously. The magistrate tends to follow the judgment of *Williams*, resulting in a situation where case law conflicts with treaty requirements as well as the Extradition Act. The treaty requirements will conflict with certain provisions of the Extradition Act specifically if

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<sup>52</sup> 1989 (3) SA 965 TPA

Section 12 of the Extradition Act is followed because the treaty does not require the endorsement of a warrant of arrest.

#### **4.5 Capital punishment policies**

Differing policies on capital punishment have been at the heart of delays in recent extradition cases between Botswana and South Africa where a fugitive is wanted for murder, which carries the death penalty. The issue whether to execute the death penalty is an issue of the Executive. And getting the Executive to give an assurance not to execute is a battle that takes a long time. Botswana has so far signed two undertakings. One case extradition was completed and the other is in process. The accused is not yet arrested. So far there are two cases on which Botswana refused to provide undertakings and the extradition request was refused.

It should be noted that the Section 10 (2) Certificate<sup>53</sup> of the South Africa Extradition Act cannot be used when proceeding in terms of Section 12 of the Extradition Act, and this at times leads to prolonged extradition enquiries. In this situation there is confusion as to the format of the request to be submitted and therefore officials in Botswana draft documents in a manner that it suits both procedures a process that is cumbersome.

#### **4.6 Delays in Extradition**

Extradition cases between Botswana and South Africa have been taking a long time to be concluded especially those requests emanating from Botswana to South Africa. Enquiries concerning extradition cases between the two states show that extraditions emanating from

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<sup>53</sup> A certificate indicating that there is sufficient evidence to warrant a prosecution in the foreign state and the Magistrate accept it as conclusive proof of sufficient evidence if issued by an appropriate authority in charge of the prosecution in the foreign state concern.

South Africa to Botswana are a ratio of 1 case in 5 years.<sup>54</sup> Basically Botswana receives extradition requests once in a while and therefore extradition cases in Botswana never take a long time to be completed. Private legal practitioners in Botswana are not experts in defending extraditions on technicality and there are usually no prolonged trials. In most cases fugitives opt for voluntarily surrender, thus removing the necessity for an extradition hearing.

South Africa receives a number of requests at all times from different quarters of the globe including Botswana. The minimum time frame for completion of extradition cases that have been heard to date is three years, which is a long time. There are many extradition hearings before South African courts and therefore lawyers in that country are acquainted to extradition matters.

According to Advocate Elbie Leonard, 'extradition requests must be dealt with swiftly and expeditiously because the international relations are at stake.'<sup>55</sup> Extradition cases that take long to be completed affect the main trial.

#### **4.6.1 Causes of delays**

Delays in extradition impede rather than promote justice and international relations. Extradition hearings by nature are meant to be speedy. This is so because it is not a substantive trial and the accused person is not called to his defence. That is the reason why they are heard by way of a process similar to a preparatory examination. Section 10 (2) of the Extradition Act of Botswana<sup>56</sup> and Section 9(2) of the Extradition Act of South Africa<sup>57</sup> both state that the magistrate holding the enquiry shall proceed in the manner in which a preparatory examination is to be held in the case of a person charged with having committed an offence in that country.

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<sup>54</sup> Extradition from outside Botswana file n DPP1/7/1 I

<sup>55</sup> Supra note 51

<sup>56</sup> Chapter 09:03 of the Laws of Botswana

<sup>57</sup> Act 67 of 1962

Despite this, there are factors that cause extradition to be a longer procedure than initially expected. Senior advocate Faghre Mohamed<sup>58</sup> stated when he was addressing the court on the Rabana case, that one of the factors that delays extradition cases is the availability of the parties involved, which are the applicant's (state) and respondent's (fugitive) legal representatives, including the presiding officers. These parties have an influence on the progress of extradition matters. In that case, the matter was brought before court in January 2007 and was scheduled for extradition enquiry on the 23 July 2007. It did not proceed on that day due to the ill health of the applicant's representative and was then postponed to 21 November 2007. On that day some *points in limine* were raised by the Respondents (accused). The matter was then postponed to 10 December 2007 to afford the Applicant (State) an opportunity to respond to the *points in limine* raised. The matter was again postponed to 21 April 2008 and thereafter to 23 August 2008, 24 May 2009 and 10 October 2009. The extradition enquiry was eventually heard on 10 October 2009 and was postponed to 12 February 2010 for the ruling on whether the accused was extraditable or not.<sup>59</sup> This case followed a trend where it was heard at least twice a year and the postponement intervals were unreasonable. There is a clear indication that there was a delaying tactic played by the accused.

The other reason for delays is non compliance by Botswana in providing required information or further documents. In the case of *Emmanuel Tsebe*<sup>60</sup> held at Limpopo, Botswana sought his extradition to face a charge of murder. As it is the policy and requirement, South Africa needed an assurance that the death penalty would not be imposed since murder carries a death penalty in Botswana. Negotiations to get Botswana to submit an undertaking took a long time and were not fruitful in the end. Botswana caused delays by not cooperating and complying despite the fact that it was the one that instigated the extradition requests.

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<sup>58</sup> Senior advocate in the Directorate of Public Prosecution South Africa

<sup>59</sup> Information extracted from Botswana Daily News no 195, dated October 19 2009 by Thamani Shabani.

<sup>60</sup> Interpol case number 87/08/2008

The report of the Informal Experts Working Group on Effective Extradition Case Practice <sup>61</sup> identified obstacles to quick and orderly extradition. The following listed are indistinguishable to the causes of delays in extradition between Botswana and South Africa:

‘Weak/outdated extradition laws and treaties.’ The treaty between the two countries and their Extradition Acts are ancient and overdue for amendment to rectify those acts that create technicalities used to fight extradition.

‘Delaying tactics, such as frivolous or irrelevant defence requests for further information- and postponements.’ This is illustrated by the scenario in the case of *Rabana* discussed above.

‘Partial, repetitive or uncoordinated appeals throughout the extradition process.’ This is illustrated in the extradition case of *State v Ricardo Sikhumbuso Mlotsha referred above* where he was found extraditable in May 2008. He did not file an appeal and just before his extradition following the consent of the Minister he filed an appeal for which he failed to appear. The matter was struck off the roll and he reinstated the matter. He was eventually extradited to Botswana in December 2009. This is an unreasonable delay to defeat the ends of justice.

#### **4.6.2 Consequences of delays**

Delays in extradition have major repercussions for the cases. Firstly, for a case to be successful it relies on evidence that is well preserved and presented. Evidence of a particular nature has to be presented before court by witnesses. Cases that take time to be concluded suffer a lot of mishaps in that by the time a case is brought to court the witnesses may have died or have forgotten some vital points. This was the result in the case of *Tokololo Tshabalala* whose extradition request took more than 6 years from South Africa to Botswana and by the time the accused was brought to court a lot of evidence was missing or was destroyed. Delays in extradition affect the investigation of cases and recovery of some exhibits. In the case of *Rabana*, witnesses were called from as far as the United Kingdom. And if a mishap occurs that

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<sup>61</sup> Organized by United Nations Office on Drugs and Crime in Vienna on the 12-16 July 2004

causes the case for retrial it will be difficult to try the accused because there is no guarantee that witnesses are still alive. The *Rabana case* was part heard which means that it would be heard by the same magistrate and this magistrate is no longer a magistrate, therefore this would mean that the state would incur expenses of reinstating the magistrate to complete the matter. This is a great inconvenience to the state and the Magistrate who would have to go over a bulky file to familiarise himself with the matter.

In both Botswana and South Africa an extradition matter may go through appeals to allow defendants a remedy in law, with multiple appeals. These appeals may significantly slow down the procedures and lead to unnecessary international difficulties, as the public, politicians and journalists from requesting states would ask their executive to put pressure on the executive of the requested state, despite the fact that the executive may not in fact have the authority to deport the suspect or criminal on their own.<sup>62</sup>

#### 4.6.3 Mutual Legal Assistance and Extradition

Extradition and mutual legal assistance work hand in hand and tend to be regulated either by treaties or through Mutual legal assistance Acts of States. Mutual legal assistance is the provision of assistance on a formal legal basis, usually in the investigation and repatriation of evidence, by one country to another. Generally the relationship between extradition and mutual legal assistance causes delays and problems in extradition cases. Basically the rule is that mutual legal assistance comes before extradition because one has to get evidence in order to establish a case and then extradite. Botswana and South Africa both provide for mutual legal assistance through their domestic Acts as follows: Mutual Assistance in Criminal Matters Act<sup>63</sup> permits the provision of assistance to countries to which the Act applies, being countries with which Botswana has an arrangement for mutual assistance in criminal matters.

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<sup>62</sup> Absolute Astronomy.com on Extradition 2

<sup>63</sup> 1990 (No. 20 of 1990) of the Laws Botswana

International Cooperation in Criminal Matters Act,<sup>64</sup> facilitates the provision of evidence and the execution of sentences in criminal cases and the confiscation and transfer of the proceeds of crime between South Africa and foreign States.

In some cases it occurs that the offence is committed in Botswana and continued in South Africa thereby meaning that most of the evidence against the required fugitives is in South Africa. In other words the offence would start in Botswana and completed in South Africa. In this situation Botswana has to go through the request of mutual legal assistance to obtain evidence in order to make a request of extradition. This is illustrated by the ongoing Central medical stores 21 million pula fraud case<sup>65</sup> where Botswana was allegedly defrauded by 4 companies based in the Republic of South Africa. Some of the perpetrators absconded to South Africa and the directors of the companies are in South Africa. This is an offence that was committed in 2008 and before extradition would be initiated mutual legal assistance should come first in order to obtain evidence regarding the companies and the monies in South Africa. The request was made in May 2008 and evidence was only received in October 2009. In the meantime since the offence was committed the accused were roaming freely and are capable of destroying evidence. Requests of mutual legal assistance with a view to extradite cause delays in extradition cases.

#### **4.7 Concluding remarks**

The obstacles that affect the smooth running of extradition between Botswana and South Africa need to be addressed in order to get it aligned with the fast growth in transnational crime. The problems identified and discussed above are varied and complex. This research will propose ways in which these problems may be overcome in chapter 7 of this dissertation

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<sup>64</sup> 1996 (Act No. 75 of 1996) of South Africa

<sup>65</sup> Pending case no CTHLB-000089/08, Village Court, Gaborone , Botswana

## CHAPTER 5

### HUMAN RIGHTS

#### 5.1 Definition of Human Rights

Human rights are usually regarded as fundamental and inalienable rights. They attach to all persons equally, by virtue of their humanity, irrespective of race, nationality, or membership of any particular social group.<sup>66</sup>

Naturally, every person is born with elementary rights. Extradition has not been exempt from the impact of human rights law.<sup>67</sup> There is a close relationship between human rights and extradition.

Extradition procedures are also designed to protect the rights of those who are requested for extradition. Extradition agreement provisions ought to assist not only the function of international cooperation in criminal matters, but also in protecting the rights of persons subject to an extradition request.<sup>68</sup>

#### 5.2 Human rights violations

Human rights violation is defined in many ways. There is a standard of treatment that has to be breached for an act to amount to violation of rights, and it differs from country to country. Internationally, there is an international standard of human rights that gauges what would amount to human rights violation.

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<sup>66</sup> John Dugard and Christine van den Wyngaert: "Reconciling Extradition with Human Rights" (1996) 92 *AJIL* 195

<sup>67</sup> *ibid*

<sup>68</sup> *Supra* note 4 at 321.

There is a universal agreement that basic rights should be unrestricted in all circumstances. Protection of human rights is to ensure that people receive some degree of civilized standard of treatment. To violate the most fundamental human rights on the other hand, is to deny individuals their fundamental moral entitlements.

In the Law of Extradition there are a lot of human rights violations. One example in this regard is the *Emmanuel Tsebe*<sup>69</sup> case. Tsebe was wanted in Botswana for murder. The Botswana authorities refused to provide an assurance that if upon conviction he were to be sentenced to death, the death penalty would not be carried out. He was released from jail in South Africa and the extradition request was dismissed. Due to the fact that he was in South Africa illegally he was handed over to the immigration authorities, and in this situation the immigration authorities cannot deport him to Botswana because that would amount to extradition in disguise, which is a violation of rights.

### **5.3 Capital Punishment and limitation on the duty to extradite**

The fundamental rights to physical and mental integrity, and particularly the right to life, not to be executed, are at the forefront of conflict among states in respect of extradition requests and procedures.<sup>70</sup> Article 6 of the treaty between Botswana and South Africa clearly states that extradition may be refused if under the laws of the requesting party the offence for which extradition is requested is punishable by death and if the death penalty is not provided for such offence by the laws of the requested party. The European Convention on Human Rights<sup>71</sup> protects against inhuman or degrading treatment or punishment. The development in this regard is that a person can only be extradited to a state where he is likely to face capital

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<sup>69</sup> Interpol case number 87/08/2008

<sup>70</sup> Supra note 2 at 138

<sup>71</sup> at article 3 of The European convention on Human Rights

punishment when there is an undertaking of assurance that the death penalty will not be imposed, or if imposed will not be carried out.<sup>72</sup>

Botswana still executes the death penalty and corporal punishment whereas South Africa has declared such punishments unconstitutional and has abolished them. There is a need that Botswana should provide a presidential undertaking giving an assurance to South Africa that in the event that the accused is sentenced to death the president will evoke powers vested in him by Section 53 of the Constitution<sup>73</sup> concerning the prerogative of mercy and such death penalty will not be executed. It must be noted that the sentencing powers are vested in the Judiciary and therefore the presidential undertaking will only play a role after the Judiciary has completed its function. In Botswana the highest court of the land is the Court of Appeal. The accused is placed on death row pending appearance at the Court of Appeal. There is no time limit for the matter to be heard by the Court of Appeal. There is no certainty as to when the accused will be relieved of the burden of having to suffer the death penalty.

#### **5.4 Death penalty and Extradition**

Human rights law is a most important element of modern international law. Where a real possibility exists that the extraditee' fundamental rights may be violated in the requesting state conditional extradition is opted for. International law does not prohibit the death penalty, as well as Human Rights Conventions although Protocols to the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights outlaw it. States that extradite a fugitive to a country that imposes the death penalty like Botswana, for offences that attract capital punishment always resort to conditional extradition. Therefore, one can argue that the death penalty does not obstruct extradition per se. States that have abolished the death penalty often, either in their extradition legislation or

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<sup>72</sup> Ibid

<sup>73</sup> Constitution of the Republic of Botswana CAP 01:01 of the Laws of Botswana

by treaty; reserve the right to refuse extradition to a country where the offence for which extradition is sought would attract the death penalty. As an alternative to total refusal, they may demand an undertaking from the requesting state that if the accused is convicted, the death penalty will not be imposed or where it is imposed it will not be carried out. The death penalty is regarded as an act that violates a basic human right. It is said to amount to inhuman, and degrading. Despite the request for an undertaking to prevent the death penalty from being imposed, one may argue that this is not enough in that it does not protect the accused from violations other than the death penalty itself, for instance, it does not ensure that the accused is tried within a reasonable time.

The death row phenomenon has never been considered in matters of extradition between Botswana and South Africa. In the case of *Soering v United Kingdom*,<sup>74</sup> the issue of the death row phenomenon was discussed. In this case, Soering murdered his girlfriend's parents in Virginia and fled to the United Kingdom, from where his extradition was sought by the United States. The United Kingdom ordered the extradition and Soering referred the matter to the European Commission of Human Rights, who referred the matter to the European Court of Human Rights. The Court held that the United Kingdom was required by article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment, not to extradite Soering to the United States where there was a real risk that he would undergo inhuman or degrading treatment by being on death row for a lengthy period in the state of Virginia.<sup>75</sup>

There is a question whether being held on death row for an extended period amounts to torture. To answer the question first one may ask what torture is. Torture may be defined as "inflicting excruciating pain, tormenting."<sup>76</sup> If placing a person on death row is tormenting,

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<sup>74</sup> 161 European Court of Human Rights, (Series A) (1989). Discussed by Dugard J and Wyngaert V.D: Reconciling Extradition with Human Rights @191

<sup>75</sup> Supra note 69 at 191.

<sup>76</sup> Ibid

then it amounts to torture and it should be prevented in cases of extradition. An example of an extradition case where one was subjected to death row phenomenon is the case of *S v Benson Keganne and others*.<sup>77</sup> The accused persons were extradited from South Africa to Botswana for murder and armed robbery. In Botswana, chances of escaping execution in case of robbery and murder are slim. During the extradition, the President provided an undertaking that if the accused persons were sentenced to death, the death penalty would not be executed. Judge Newman sentenced Benson Keganne to death and the others to imprisonment. Benson was sentenced on the 17<sup>th</sup> August 2008 and since then he has been on death row awaiting appearance before the Court of Appeal which is scheduled for January 2011 before the President would honour his agreement made during the extradition.<sup>78</sup> Basically, Benson Keganne has been on death row for almost two years. This is an unreasonable time for a man to be on death row. This is a case that would have received special dispensation just like every case that is considered urgent. Due to the fact that this was a case that attracted international interest, it should have been treated in a special manner. There should have been a special sitting of the Court of Appeal.

## 5.5 Death penalty and politics

Basically, in practice, the issue of prosecution and sentencing is an issue for the Judiciary and the responsibility to execute the sentence is the responsibility of the Executive. The Executive must not interfere with the Judiciary's duties. The courts should finish its duties and the Executive would have to wait for its time to fulfill its agreements no matter how long the trial takes. The end result of the death penalty is the decision of the Executive. If the Executive is reluctant to exercise its duties, this affects international relations. This was experienced in the case of *Emmanuel Tsebe* where the executive refused or were reluctant to issue an assurance

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<sup>77</sup> Court of Appeal case no: CLCCB06/08

<sup>78</sup> Information by Ms Thato Dibeela of Directorate of Public Prosecution-, the Republic of Botswana.

that if Tsebe were extradited and sentenced to death, the death penalty would not be executed. This caused South Africa to refuse extradition in an attempt to protect the rights of the accused. Basically, this act might open a flood gate to attract murderous criminals to flee to South Africa with the knowledge that Botswana would not be able to effect their extradition.

## 5.6 Abduction and human rights violation

Generally, because the aim of extradition is to secure the presence of a fugitive for trial, the question arises whether there are no other legal methods by which the same objective could be achieved. Is extradition the only lawful method of effecting the surrender of a fugitive?<sup>79</sup> Extradition is the only recognized and lawful way of surrendering fugitives to face trials in foreign states. States used to take matters into their own hands, essentially to avoid going through the unwieldy process of extradition, by resorting to abduction or kidnapping of the fugitive.<sup>80</sup> This action amounts to the violation of human rights of the accused person and the sovereignty of the State from which the person was abducted. Shearer on extradition defines abduction as ‘the confiscation of a person from the jurisdiction of one state to another by force, threat or fraud.’<sup>81</sup> Abduction is an extra-legal process which violates both municipal and international law and is not an acceptable alternative to extradition.<sup>82</sup> In the case of *S v Beahan*<sup>83</sup> the court held that “there is an intrinsic objection to such a way both on international principles and because it imperils and corrodes the peaceful coexistence and mutual respect of sovereign nations.”<sup>84</sup>

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<sup>79</sup> Law of South Africa volume 10 part 1: Extradition (2<sup>nd</sup> ed 2008) (Lexis Nexis) 186

<sup>80</sup> *ibid*

<sup>81</sup> *ibid*

<sup>82</sup> *Ibid*

<sup>83</sup> 1992 1 SACR 307 (ZS)

<sup>84</sup> Case cited in Law of South Africa volume 10 part 2: Extradition (first Reissue 1998) ( Butterworth) 188

## 5.7 The effect of human rights violations

Human rights violations may sometimes threaten international peace and security. Respect for human rights has always been a point of conflict globally. Violation of Rights affects the state as a whole. To protect human rights is to ensure that people receive some degree of decent, humane treatment. Because political systems that protect human rights are thought to reduce the threat of world conflict, all nations have an interest in promoting respect for human rights worldwide. International human rights law protects the right to life and physical integrity and attempts to limit the unrestrained power of the state to extradite a fugitive without observing his/her rights. Violation of human rights causes unnecessary expenses on the extraditee in that it will have to incur further expenses taking the case to international tribunals in order to protect its rights like what happened in the *Soering* case. In *Keganne* the culprits had to be returned to South Africa thus incurring further expenses.

## 5.8 The solutions to overcome human rights violations

Violation of human rights as has been stated affects the sovereignty of another state and, therefore causes international hostility. If repeated, it may endanger peace and security.<sup>85</sup> Clearly the United Nations Charter includes international protection of human rights.<sup>86</sup> This analysis leads to the following conclusion:

‘States must abide by specific human rights norms and in spirit fulfill the principle of the Charter and the instruments that interpret it.’<sup>87</sup>

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<sup>85</sup> Bassiouni MC: International Extradition: United States Law and Practice (1996) 288

<sup>86</sup> *ibid*

<sup>87</sup> *ibid*

'The unlawful seizure in violation of international law and improper methods executed without benefit of a legal process insuring minimal standards of due process or in violation of specific human rights provisions are to be held violative of international law. And the sanction should be that the person who was subjected to these practices is to be returned to the state from which he was seized and is entitled to damages and the state wherein the act occurred is entitled to reparation'.<sup>88</sup>

The system whereby states act without consideration of the damages caused by abduction of the fugitive should be considered. In the case of *Benson Keganne and others* the accused persons were subjected to human rights violation. They were arrested in South Africa and wanted in Botswana for murder. They were then returned to Botswana as illegal immigrants though the authorities were aware of the criminal case. Negotiations took a long time between the two countries to return the fugitives to the Republic of South Africa in order to follow proper extradition procedures. Though they were eventually returned, the issue of damages was never considered.

In other jurisdictions, the issue of damages is considered. In the case of *Jacob-Salomon*,<sup>89</sup> where a former German citizen was taken to Germany from Switzerland by force and deceit, because of a 1921 treaty between Germany and Switzerland concerning unresolved disputes, the matter was submitted to an international court of arbitration. Soon after the case was initiated, Germany acknowledged the error and returned Jacob to the Swiss authorities.<sup>90</sup>

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<sup>88</sup> *ibid*

<sup>89</sup> Lawrence Press: Kidnapping of fugitives from justice on Foreign Territory, 29 AJILL 502 (1935) accessed on the 10<sup>th</sup> May 2009

<sup>90</sup> *Supra* note 92 at 287

## 5.9 Concluding remarks

Botswana and South Africa need to enter into intensive consultation in order to resolve the issue of human rights. The case of *Tsebe* is an indication that the two states have little to proffer concerning violation of human rights where criminal justice is exercised across their common borders.

## CHAPTER SIX: COST IMPLICATIONS

### 6.1 Who bears the extradition costs?

Extradition is a process that incurs costs, like any court proceeding in a country. The treaty should be clear on the issue of bearing the costs. The extradition treaty between Botswana and South Africa provides for expenses under article 22. Which reads as follows:

1. *'Expenses incurred in the territory of the requested party by reason of the arrest, detention and maintenance of the person claimed and any court proceedings arising from request for extradition shall be borne by that party.'*
2. *'The requested party shall bear the expenses occasioned by the conveyance of the person claimed to its frontier or port of embarkation while expenses occasioned by the transportation of such person from that frontier or port to the territory of the requesting party shall be borne by the latter party.'*
3. *'Expenses incurred by reason of transit through the territory of a party requested to grant transit shall be borne by the requesting party.'*

South Africa incurs a lot of expenses in processing extraditions for Botswana because it receives many requests from Botswana, which takes long to be completed.

### 6.2 What causes extradition to be costly?

Extradition on its own is a costly procedure. This is so basically due to the fact that it is interstate or international. Where an accused person is resident in a country other than the one in which criminal proceedings are undertaken, it is possible for that person to be extradited to

stand trial. However, the procedures involved in extradition are composite and complicated, making applications costly and slow.<sup>91</sup> Delays in cases are the major causes of extradition costs. The longer it takes, the higher the expenses incurred.

### 6.3 Possible ways of reducing cost implications

The issue of cost is a major issue that needs to be addressed expansively in that, if not, may result in non performance of extradition assistance between States. South Africa is one of the big and rapidly developing countries in Africa and therefore criminals always scuttle into it in order to flee prosecution from their countries. This causes South Africa to receive many extradition requests from all over the world. It spends money assisting countries in extradition requests.

The following propositions were taken from the report by the Informal Expert Working Group on Effective Extradition Casework Practice organised by the United Nations Office on Drugs and Crime:<sup>92</sup>

- ***'To establish an obligation to either extradite or submit the case to prosecution (aut dedere aut judicare)'***<sup>93</sup>
- This would assist in cases where all the evidence is in the Republic of the requested state and request for mutual legal assistance is vital before initiating an extradition process. The process of mutual legal assistance together with extradition will take longer than if prosecution were done in that Republic to reduce costs. An example is the *Central Medical Stores 21 million fraud case*<sup>94</sup> wherein Botswana was defrauded money

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<sup>91</sup> Smithl GR: Trends & Issues in Crime and Criminal Justice Australian Institute of Criminology 2004 accessed at [www.aic.gov.au/.../smith\\_russell.aspx](http://www.aic.gov.au/.../smith_russell.aspx) on the 23<sup>rd</sup> March 2009

<sup>92</sup> The Expert Working Group met in Vienna on the 12-16 July 2004.

<sup>93</sup> Ibid

<sup>94</sup> Case number CMMV-000089-08

by Companies situated in South Africa. Most of the evidence is in South Africa and instead of the mutual legal assistance followed by extradition it would have been cheaper if this matter had been prosecuted in the Republic of South Africa. Fundamentally the directors are likely to resist extradition and this may cause the extradition request to drag for a long time just like the case of *Diteko Rabana*. After the trial then the issue of compensation will follow in order to recover the money that was allegedly stolen and it may follow the same trend of mutual legal assistance. Basically, if the requesting state is unable to provide the evidence necessary to assure the requirements of the requested state and such evidence is obtainable in the requested state, then that state may introduce such evidence at the extradition hearing under domestic rules of law of evidence

- ***'Deployment of criminal justice liaison personnel between the two countries would be beneficial and cost effective'***.

Liaison officials help transform the way requests are both made and executed. Having someone available on the spot who knows exactly what is required to process the request immediately has proved invaluable in South Africa. Liaison personnel placed in requested states help ensure that materials are provided to the requested state the first time and that waste and delays are minimised. They have proved efficient, particularly in dealing with urgent and intricate cases.<sup>95</sup> This has also proved to reduce costs.

A state initiating an extradition request must promptly cooperate by all means to reduce delays that run up costs for the requested state. They should agree in advance to follow relevant policies before the accused is arrested.

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<sup>95</sup> *ibid*

#### **6.4 Time limit for extradition**

The treaty between Botswana and South Africa does not have a time limit in the extradition process. The only time the treaty provides for a time limit is under article 15 dealing with provisional arrest where it provides that provisional arrest may be terminated if within a period of 18 days after arrest the requested state has not received extradition documents as provided for in Article 10, paragraph 2 and it shall not, in any event, exceed 40 days from the date of such arrest. This relate to the submission of extradition documents after arrest. Basically the treaty ought to proceed and regulate the whole procedure, looking at the fact that extradition is meant to be a short process. There is no time limit to the extradition procedure at court. People can drag cases as long as they wish without being monitored.

#### **6.5 Concluding remarks**

Extradition is part of international relations that states deal with time and again. Unavailability of uniform laws regarding extradition causes predicaments that may cause international relations problems. There should be a way of regulating the costs of extradition. In cases where countries are financially constrained to assist fully with extradition or mutual assistance, the requesting country must be willing and able to assist in order to advance the course of justice.

## CHAPTER SEVEN: FINAL CONCLUDING REMARKS

The extradition treaty between Botswana and South Africa needs extensive evaluation and review in order to align it with international developments. This is a treaty that was entered into in May 1969. Delays have been identified as the major problem in the extradition arrangements between the two countries. The following should be considered to overcome these predicaments. The report by the Informal Expert Working Group on effective Extradition Casework Practice organised by the United Nations Office on Drugs and Crime,<sup>96</sup> contains some propositions that would assist in developing ways to enhance the extradition treaty. Some of these proportions are highlighted as follows:

- ***'To expedite, limit and facilitate extradition hearings- extradition hearings are an expedited process designed to proceed on documentation, keep expenses to a minimum and ensure prompt compliance with international obligations.'*<sup>97</sup>**

The treaty should stipulate the time process in which extradition requests should be heard. It should not only regulate the time limit for submission of documents. It should provide a time limit when the case should be heard and completed, and further it should give a time limit for the appeal process. This will limit the parties from delaying cases by proposing dates far apart to delay cases. The states should assess whether its existing extradition instruments meet current and foreseeable needs.<sup>98</sup>

The treaty does not specify that in cases where there is a likelihood that the fugitive sought might face a death penalty there should be an assurance that it will not be executed. It should

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<sup>96</sup> The Expert Working Group met in Vienna on the 12-16 July 2004.

<sup>97</sup> Ibid

<sup>98</sup> Ibid

be included in the Extradition Act in order to align it with the obligatory arrangement of the treaty. Currently the requirement of an assurance is provided for in the domestic Extradition Acts. Botswana has provided for it under Section 7 (c) of its Extradition Act which states that

***‘a fugitive criminal shall not be surrendered to any country if the offence in respect of which his surrender is demanded is punishable by death in that country and if under the laws of Botswana such an offence is not punishable by death if committed in Botswana unless provision is made by arrangement with that country for securing that he will not be punished by death in respect of that offence.’***

On the other hand the Republic of South Africa has a provision under Section 11(b) (iii) of the Extradition Act that reads:

***‘The Minister may order any person committed to prison under section 10 to be surrendered to any person authorised by the foreign State to receive him or her; or at all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would, having regard to the distance, the facilities for communication and to all circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned:’***

South Africa and Botswana are parties to most international human rights conventions. The issue of assurance to protect human rights should go beyond the issue of death penalty. It should include consequences following in the wake of being sentenced to death. Time limits to extradition cases and trial cases of extradited cases which carry a death penalty will assist in preserving observation of human rights.

South Africa has two procedures under its Extradition Act that should be followed depending on whether a state is an associated state or a foreign state. Botswana has been classified as an

associated state in some cases and as a foreign state in others. There is a need that Botswana know where it stands in order to know what documents to submit and in what manner. The issue of where Botswana fall, also delays extradition cases due to the fact that before the enquiry is heard there are always arguments on *points in limine* that are raised regarding the procedure that has to be followed and these also affect the style of the documents that should be drafted.

### **7.1 Proposed elements for a new Extradition Treaty between Botswana and South Africa**

4. The Preamble of the treaty should include that Botswana is a “foreign state”

5. Article 6 should be amended to read:

Extradition shall be refused if under the laws of the requesting Party the offence for which extradition is requested is punishable by death unless there is an undertaking from the requesting state that if the accused is convicted, the death penalty will not be imposed or where it is imposed it will not be executed.

An extradited convict sentenced to death shall not be held on death row for a period exceeding one year.

6. Article 15 should be amended by adding the following:

6. The Magistrate must ensure that extradition hearing is completed within six months of commencement.

7. Article 16 should be added as follows:

4. Expenses incurred by reason of non cooperation of the requesting party shall be borne by that party.

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