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INFORMATION AND HUMAN RIGHTS

PRESENTATION

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SUR 18 was produced in collaboration with the organizations **Article 19** (Brazil and United Kingdom) and **Fundar** (Mexico). In this issue's thematic dossier, we have published articles that analyze the many relationships between information and human rights, with the ultimate goal of answering the questions: What is the relationship between human rights and information and how can information be used to guarantee human rights? This issue also carries articles on other topics related to today's human rights agenda.

Thematic dossier: Information and Human Rights

Until recently, many human rights organizations from the Global South concentrated their activities on the defense of freedoms threatened by dictatorial regimes. In this context, their main strategy was whistleblowing, closely linked to the constant search for access to information on violations and the production of a counter narrative capable of including human rights concerns in political debates. Since they found no resonance in their own governments, the organizations very often directed their whistleblowing reports to foreign governments and international organizations, in an attempt to persuade them to exert external pressure on their own countries.*

Following the democratization of many societies in the Global South, human rights organizations began to reinvent their relationship with the State and with the system's other actors, as well as how they engaged with the population of the countries where they were operating. But the persistence of violations even after the fall of the dictatorships and the lack of transparency of many governments from the South meant that the production of counter narratives continued to be the main working tool of these organizations. Information, therefore, was still their primary raw material, since combating human rights violations necessarily requires knowledge of them (locations where they occur, the main agents involved, the nature of the victims and the frequency of occurrences etc.). Their reports, however, previously submitted to foreign governments and international organizations, were now directed at local actors, with the expectation that, armed with information about the violations and endowed with voting power and other channels of participation, they themselves would exert pressure on their governments. Furthermore, after democratization, in addition to combating abuses, many human rights organizations from the Global South aspired to become legitimate actors in the formulation of public policies to guarantee human rights, particularly the rights of minorities that are very often not represented by the majority voting system.

In this context, the information produced by the public authorities, in the form of internal reports, became fundamental for the work of civil society. These days, organizations want data not only on rights violations committed by the State, such as statistics on torture and police violence, but also activities related to public management and administration. Sometimes, they want to know about decision-making processes (how and when decisions are made to build new infrastructure in the country, for example, or the process for determining how the country will vote in the UN Human Rights Council), while at other times they are more interested in the results (how many prisoners there are in given city or region, or the size of the budget to be allocated to public health). Therefore, access to information was transformed into one of the main claims of social organizations working in a wide range of fields, and the issue of publicity and transparency of the State became a key one. This movement has scored some significant victories in recent years, and a growing number of governments have committed to the principles of Open Government** or approved different versions of freedom of information laws.***

This legislation has played an important role in the field of transitional justice, by permitting that human rights violations committed by dictatorial governments finally come to light and, in some cases, that those responsible for the violations are brought to justice. In their article **Access to Information, Access to Justice: The Challenges to Accountability in Peru**, Jo-Marie Burt and Casey Cagley examine, with a focus on Peru, the obstacles faced by citizens pursuing justice for atrocities committed in the past.

As the case of Peru examined by Burt and Cagley demonstrates, the approval of new freedom of information laws no doubt represents important progress, but the implementation of this legislation has also shown that it is not enough to make governments truly transparent. Very often, the laws only require governments to release data in response to a freedom of information request. They do not, therefore, require the State to produce reports that

*K. Sikkink coined the term "boomerang effect" to describe this type of work by civil society organizations from countries living under non-democratic regimes.

**The Open Government Partnership is an initiative created by eight countries (South Africa, Brazil, South Korea, United States, Philippines, Indonesia, Mexico, Norway and United Kingdom) to promote government transparency. The Declaration of Open Government was signed by the initial eight members in 2011, and by the end of 2012 the network had been joined by 57 nations (Available at: http://www.state.gov/r/pa/prs/ps/2012/09/198255.htm). The initiative takes into account the different stages of public transparency in each of the member countries, which is why each country has its own plan of action for implementing the principles of open government. More information on the initiative is available at: http://www.opengovpartnership.org.

***In 1990, only 13 countries had some form of Freedom of Information legislation (Cf. Toby Mendel. 2007. Access to information: the existing State of affaire around the world. In. VILLANUEVA, Ernesto. **Derecho de la información, culturas y sistemas jurídicos comparados**. México: Universidad Nacional Autónoma de México). By 2010, however, approximately 70 countries had adopted such a law. (Cf. Roberts, Alasdair S. 2010. A Great and Revolutionary Law? The First Four Years of India's Right to Information Act. **Public Administration Review**, vol.70, n. 6, p. 25–933.). Among them, South Africa (2000), Brazil (2012), Colombia (2012), South Korea (1998), India (2005), Indonesia (2010), Mexico (2002) and Peru (2003).

make the existing data intelligible, nor to release the information on their own accord. The problem is exacerbated when the State does not even produce the data that is essential for the social control of its activities. Another area in which transparency is deficient is information on private actors that are subsidized by public funding, such as mining companies, or that operate public concessions, such as telecommunications providers.

Many organizations from the South have spent time producing reports that translate government data into comprehensible information that can inform the working strategies of organized civil society or the political decisions of citizens. Human rights organizations have also pressured their governments to measure their performance against indicators that can help identify and combat inequalities in access to rights. This is the topic of the article by Laura Pautassi, entitled **Monitoring Access to Information from the Perspective of Human Rights Indicators**, in which the author discusses the mechanism adopted recently by the Inter-American System of Human Rights concerning the obligation of States-Parties to provide information under article 19 of the Protocol of San Salvador.

The relationship between information and human rights, however, is not limited to the field of government transparency. The lack of free access to information produced in the private sphere can also intensify power imbalances or even restrict access to rights for particularly vulnerable groups. The clearest example of this last risk is the pharmaceutical industry, which charges astronomical prices for medicines protected by patent laws, effectively preventing access to health for entire populations. The privatization of scientific production by publishers of academic journals is another example. The issue gained notoriety recently with the death of Aaron Swartz, an American activist who allegedly committed suicide while he was the defendant in a prolonged case of copyright violation. Sérgio Amadeu da Silveira opens this issue of SUR with a profile of Swartz (**Aaron Swartz and the Battles for Freedom of Knowledge**), linking his life to the current struggles for freedom of knowledge given the toughening of intellectual property laws and the efforts of the copyright industry to subordinate human rights to the control of the sources of creation.

Since the internet has taken on a crucial role in the production and dissemination of information, it is natural for it to have become a battleground between the public interest and private interests, as illustrated by the Swartz case. On this point, civil society and governments have sought to adopt regulations intended to balance these two sides of the scale, such as so-called Internet Freedom, the subject of another article in this issue. In **Internet Freedom is not Enough: Towards an Internet Based on Human Rights**, Alberto J. Cerda Silva argues that the measures proposed by this set of public and private initiatives are not sufficient to achieve their proposed goal, which is to contribute to the progressive realization of human rights and the functioning of democratic societies.

The importance of the internet as a vehicle of communication and information also means that internet access is now a key aspect of economic and social inclusion. To correct inequalities in this area, civil society organizations and governments have created programs aimed at the so-called "digital inclusion" of groups that face difficulty accessing the web. Fernanda Ribeiro Rosa, in another article from this issue's dossier on Information and Human Rights, **Digital Inclusion as Public Policy: Disputes in the Human Rights Field**, defends the importance of addressing digital inclusion as a social right, which, based on the dialogue in the field of education and the concept of digital literacy, goes beyond simple access to ICT and incorporates other social skills and practices that are necessary in the current informational stage of society.

Non-thematic articles

This issue also carries five additional articles on other relevant topics for today's human rights agenda.

In **Development at the Cost of Violations: The Impact of Mega-Projects on Human Rights in Brazil**, Pétalla Brandão Timo examines a particularly relevant contemporary issue: the human rights violations that have occurred in Brazil as a result of the implementation of mega development projects, such as the Belo Monte hydroelectric complex, and preparations for mega-events like the 2014 World Cup.

Two articles address economic and social rights. In **Land Rights as Human Rights: The Case for a Specific Right to Land**, Jérémie Gilbert offers arguments for the incorporation of the right to land as a human right in international treaties, since to date it still only appears associated with other rights. In **Reaching Out to the Needy? Access to Justice and Public Attorneys' Role in Right to Health Litigation in the City of São Paulo**, Daniel W. Liang Wang and Octavio Luiz Motta Ferraz analyze legal cases related to the right to health in São Paulo in which the litigants are represented by public defenders and prosecutors, in order to determine whether the cases have benefited the most disadvantaged citizens and contributed to the expansion of access to health.

Another article looks at the principal UN mechanism for the international monitoring of human rights. In **The United Nations Human Rights Council: Six Years on**, Marisa Viegas e Silva critically examines the changes introduced to this UN body in the first six years of its work.

In **Human Rights, Extradition and the Death Penalty: Reflections on the Stand-Off between Botswana and South Africa**, Obonye Jonas examines the deadlock between the two African nations concerning the extradition of Botswana citizens who are imprisoned in South Africa and accused in their country of origin of crimes that carry the death penalty.

Finally, Antonio Moreira Maués, in **Supra-Legality of International Human Rights Treaties and Constitutional Interpretation**, analyzes the impacts of a decision in 2008 by the Supreme Court on the hierarchy of international human rights treaties in Brazilian law, when the court adopted the thesis of supra-legality.

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ABSTRACT

The procedure of extradition has not escaped restraints placed by human rights law on states in their dealings with the liberties of individuals. This is because human rights notions are considered to be part of the public order of the international community and as such enjoy a superior relational position to treaty obligations. One of the principal norms that have been adopted in extradition treaties concerns the death penalty. This paper discusses this norm within the context of South Africa, an abolitionist State, and Botswana, a retentionist one. Extraditions where the death penalty is involved have caused a diplomatic controversy between the two countries, with South Africa insisting that Botswana must furnish it with satisfactory assurance that the death penalty will not be imposed on the extraditee, or that if imposed, it will not be carried out. Botswana is on record declining to give such assurances. Thus, an impasse has developed between the two countries in this regard. This article offers reflections on the extradition regime between the two countries with specific reference to the death penalty in the light of the present stand-off. It argues that the position adopted by South Africa in insisting upon assurances is in line with international best standards and practice and that Botswana must acquiesce to this demand.

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KEYWORDS

Death penalty – Right to life – Extradition – Botswana – South Africa

HUMAN RIGHTS, EXTRADITION AND THE DEATH PENALTY: REFLECTIONS ON THE STAND-OFF BETWEEN BOTSWANA AND SOUTH AFRICA

Obonye Jonas

1 Introduction

The Republic of South Africa has abolished capital punishment as a competent sentence for any offence.[1] In other words, South Africa is an abolitionist state. On the contrary, Botswana is a retentionist one,[2] and according to section 26 (1) of the Penal Code of Botswana (1964, cap 08:01), the method of execution is by hanging.

Under the Penal Code of Botswana, the death penalty is a competent sentence for offences such as murder (s 203(1)); treason (s 34(1)); committing assault with intent to murder in the course of the commission of piracy (s63 (2)); instigating a foreigner to invade Botswana (s35); cowardly behaviour (s29) and mutiny (ss34-35). As a limitation, the death penalty may not be imposed on persons below eighteen years (s 26(3)) and pregnant mothers (s 26(3). It also may not be imposed where there are extenuating circumstances.[3]

The penological difference between South Africa and Botswana in relation to the death penalty has created a diplomatic schism between the two countries, with South Africa insisting through its courts that it cannot sanction any extradition for offences attracting the death penalty to a retentionist state like Botswana, save where such retentionist state has given the requisite assurance that upon conviction on the offence on which extradition was sought, the death penalty will not be passed on the extradited person, or that if it is passed, it will not be implemented.

For its part, the government of Botswana has taken a deliberate "decision to stop signing any undertakings papers for murder suspects who have to be extradited from South Africa to Botswana" (PITSE, 2010). With both countries stuck in their respective positions, the end result has been that fugitives who committed offences

Notes to this text start on page 202.

attracting the death sentence in Botswana and fled to South Africa remain untried, as South Africa has been refusing to hand them over to Botswana to stand trial. In addition, South Africa is unable to prosecute them owing to the absence of legislation in that country that vests its court with the necessary powers or jurisdiction to put accused persons on trial for offences they committed outside South Africa's frontiers.

This article analyses the present stand-off between South Africa and Botswana in relation to extraditions of fugitives who have committed offences in Botswana that attract the death penalty and fled to South Africa. The article's claim is that South Africa's insistence on assurances from Botswana that the latter will not implement or enforce the death penalty is properly situated within the normative framework of international law and best practice. Thus, Botswana must comply with such requests for assurance in order to ensure that the extradition system between the two countries is not undermined. If the present stand-off persists unabated, criminals will be victors and justice, the loser.

2 Brief overview of the status of the death penalty under international law

Death penalty abolitionist efforts have been traced back to Cesare Beccaria during the Enlightenment era, and public debates around the issue have been recorded in Greece as early as 427 B.C.E. (DEVENISH, 1990, p. 1). The first international instrument seeking to limit the use of the institution of the death penalty was the 1929 Geneva Convention Relative to the Treatment of Prisoners of War,[4] but it circumscribed its application to prisoners of war taken in armed conflict (ROTHENBERG, 2004). According to some scholars, such as William Schabas, more systematic, consolidated and real efforts to abolish the death penalty began only in the twentieth century around the late 1940s. In the wake of untold loss of life in the Second World War, the abolition movement gained popular support, and several states began moving towards that end, with numerous former pariah states in Europe, such as Germany, Austria and Italy, outlawing capital punishment as part of the process of 'transitional justice' to close chapters of human rights abuses of the previous decade. (SCHABAS, 2002, p. 2).

The mid- twentieth century was also the time in which human rights law started to gain credence as the controlling normative system for the newly established international institutions like the United Nations (UN) and the Council of Europe. While drafting the Universal Declaration of Human Rights (UDHR), the UN General Assembly planned to call for the prohibition of the death penalty under article 3, which enshrines the "right to life". Hardly any voice was raised during the course of the debate "to claim that capital punishment was legitimate, appropriate or justified" for any offence. However, the majority of states were not yet willing to abolish it, and to appease both opponents and proponents of the death penalty and avoid a stalemate in the negotiations towards the adoption of the Declaration, negotiators treated the death penalty "as an inevitable and necessary exception to the right to life, but also one whose validity was increasingly open to challenge" (SCHABAS, 2002).

When the International Covenant on Civil and Political Rights (ICCPR) was adopted in 1966, many hoped that it would abolish the death penalty (SCHABAS, 2002). However, abolition was not made mandatory due to 'the prudence of its drafters, aware of its anomaly but fearful of alienating retentionist States and discouraging them from ratification' (SCHABAS, 2002). Despite the ICCPR's failure to abolish the death penalty, Schabas observes that "there is an unmistakable trend towards abolition," and that this trend finds expression "in State practice, in the development of international norms, and in fundamental human values [that] suggest that… [the death penalty] will not be true for very long" (SCHABAS, 2002, p. 377).

It is worth noting that scholars are divided on the question of whether or not capital punishment is outlawed under international law. According to Dugard and Van den Wyngaert, (1998, p. 196) no international human rights law instrument outlaws the death penalty, although protocols to the ICCPR, the European Convention on Human Rights (European Convention) and the American Convention on Human Rights (American Convention) do so. The two authors further contend that neither *usus* nor *opinio juris* of states support an embargo on capital punishment under international law (DUGARD; VAN DEN WYNGAERT, 1998, p. 196). Consistent with this view, in *Prosecutor v. Klinge,* the Supreme Court of Norway held that the enforcement of the death penalty in Norway was permissible as it was not prohibited by international law (NORWAY, *Prosecutor v. Klinge*, 1946, p. 262).[5] Schabas, on the other hand, argues that to say international law does not outlaw capital punishment is imprecise, 'because several international treaties now outlaw the death penalty'. Whereas he concedes that these instruments are far from attaining universality, Schabas points out that approximately seventy states are now bound 'as a question of international law and a result of ratified treaties, not to impose the death penalty' (SCHABAS, 2003).

While the present author is not necessarily seeking to reconcile the divergent views of scholars set out above, it is clear that the sentencing trend in the world is inclined towards disuse or abolition of death penalty.[6] In 2003, the European Court of Human Rights ruled in *Öcalan v. Turkey* that despite the fact that article 2(1)[7] of the European Convention expressly recognises the death sentence, the practice of members of the Council of Europe means that this form of sentencing is outlawed by the European Convention on Human Rights (EUROPEAN COURT OF HUMAN RIGHTS, *Öcalan v. Turkey*, 2003, paras. 188-199), as all Western European states have either abolished the penalty *de facto* or *de jure* (VAN DEN WYNGAERT, 1990).

According to Schabas, even though it is still premature to say that the death penalty is prohibited by customary international law, the dynamics of international norms suggest that it will soon be so (SCHABAS, 2002, p. 2). For instance, the founding statute of the International Criminal Court (ICC) and United Nations Security Council Resolutions establishing the International Criminal Tribunals for the Former Yugoslavia and for Rwanda do not provide for the death sentence among the range of penalty options, despite the fact that these judicial tribunals have been established to try the most heinous crimes that have shaken the conscience of mankind. The United Nations Human Rights Committee has also remarked

that the ICCPR "strongly suggest[s] that abolition is desirable" (ROTHENBERG, 2004, p. 65). In fact, since the adoption of the ICCPR, nations of the world have moved with remarkable speed towards ending capital punishment such that by the mid-1990s, abolitionist states had outnumbered retentionist states (SCHABAS, 2002, p. 2). The movement towards abolition continues to date, with an average of three states per year ending capital punishment throughout the last two decades (BADINTER, 2004). Consistent with this trend, as of last the quarter of 2011, about 16 countries in Africa have abolished the death penalty (KAYTESI, 2012). In Southern Africa, six countries have abolished the death penalty,[8] and about three of them have placed a moratorium on it.[9]

Despite these developments on the international plane, however, Botswana continues to use the death penalty as a viable form of punishment for select offences. Coherent with the movement for abolition, the African Commission urged upon Botswana in the case of *Interights & othrs v. Botswana* (TANZANIA, 2003, p. 84) that:

> *…it would be remiss for the African Commission to deliver its decision on this matter without acknowledging the evolution of international law and the trend towards abolition of the death penalty.… The African Commission has also encouraged this trend by adopting a 'Resolution Urging States to Envisage a Moratorium on the Death Penalty' and therefore encourages all states party to the African Charter to take all measures to refrain from exercising the death penalty.*
>
> (AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS. *Interights et al. v. Botswana*, 2003).

During Botswana's first appearance before the Universal Periodic Review (UPR) in 2008, members of its review team[10] urged it to abolish the death penalty, to which it responded by declaring that it has no plans to do so. Following the execution of murder convict, one Zibane Thamo on 31 January 2012, the Special Rapporteur for the African Commission's Working Group of Experts on the Death Penalty, Commissioner, Zainabo Sylvie Kayitesi, stated that "the African Commission regrets the execution that took place in Botswana […] at the time when many African countries observe a moratorium on the death penalty and some are in the process of completely abolishing the death penalty" (KAYITESI, 2012). She continued to observe that, the death penalty represents, the "most grave violation of fundamental human rights, in particular the right to life under Article 4 of the [African Charter]" (KAYITESI, 2012).

3 Botswana and the tide of abolition of the death penalty

As indicated above, it appears Botswana is swimming against the tide of abolition of the death penalty, as the country seems to be impervious to international legal efforts in this direction. However, it is important to note that Botswana is not party to any instrument that abolishes the death penalty, and as such, it can be argued that its enforcement of the death penalty does not fall foul of principles of international law since it has not incurred any responsibility under international law either to

abolish or place a moratorium on the death penalty. Thus, commenting on the impact of international law on the enforcement of the death penalty in Botswana, the Botswana Court of Appeal observed in *Ntesang v. The State* (BOTSWANA, 2007, p. 387) that developments in the international arena are not and cannot be decisive so as to sway it from upholding the constitutional imperatives that enjoin it to impose the death penalty in statutorily designated cases. In its own words, the court observed:

> *Of course this Court … cannot and should not close its eyes to the happenings in other parts of the world and among the international community to which we belong. But this Court must keep within the role assigned to us as a purely adjudicating and not legislative body under the Constitution which is the basic law of this country; and it is the interpretation of that basic law that we are called upon to decide in this proceeding.* (BOTSWANA, *Ntesang v. The State,* 2007, p. 158).

Tshosa argues that the attitude of the *Ntesang* Court demonstrates judicial restraint in the invocation of international law to abolish the death penalty (TSHOSA, 2001, p. 107). He argues that this "[…] form of restraint is an indirect judicial confirmation of the classical theory that international and national law are distinct legal orders each governing a different legal sphere" (TSHOSA, 2001, p. 107).

South African Courts have adopted the same position as Botswana courts, namely that international law does not outlaw the death penalty (SOUTH AFRICA, *State v. Makwanyane*, 1995, para 36). It is important to note however that South Africa's refusal to surrender to Botswana criminal fugitives that face possible death sentences is grounded on the imperatives of its Bill of Rights and the customary international law principle of comity, but not on human rights provisions of international instruments. It was explained in the case of *Hilton v. Guyot* (UNITED STATES, 1895, p. 133), quoted in the High Court decision in the case of *Minister of Home Affairs & Othrs v. Emmanuel Tsebe & Others* (SOUTH AFRICA, 2012, p. 16), that the principle of comity entails a recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or other persons who are under the protection of its laws' (UNITED STATES*, Hilton v. Guyot*, 1985, p. 136).

4 Botswana-South Africa extradition arrangements

The Republic of South Africa and Botswana entered into an Extradition Treaty in 1969. Despite the existence of this treaty between the two countries, South Africa refuses to hand over any person accused of having committed an offence attracting the imposition of the death penalty to Botswana, or any other country for that matter, because it believes that the institution of capital punishment is violatory of fundamental human rights, such as the rights to life, dignity and freedom from cruel, inhuman and degrading treatment, contained in its Constitution's Bill of Rights. Besides South Africa's prohibitive constitutional

imperatives, article 6 of the Extradition Treaty between Botswana and South Africa states that: 'Extradition may be refused if under the law 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 law of the requested Party.' In addition, Botswana and South Africa, together with other countries in the Southern African region, have concluded the Southern African Development Community (SADC) Protocol on Extradition (2006). In terms of article 5 (j) thereof, extradition may be refused:

> *If the offence for which extradition is requested carries a death penalty under the law of the Requesting State, unless that State gives such assurance, as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out […]*
>
> (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, 2006, article 5 (c), p. 5).

To this end, the Bill of Rights of the Constitution of South Africa, taken together with the Extradition Treaty between the two countries and the SADC Extradition Protocol place beyond reproach the view that South Africa is not constrained by the applicable law to surrender any extraditee facing the death penalty to Botswana in the absence of an assurance from the latter that the person will not be executed if found guilty. Between South Africa and Botswana, the problem of extradition in situations where the extraditee faced a possible death sentence arose in the *Tsebe* case (SOUTH AFRICA, *Minister of Home Affairs & Others v. Emmanuel Tsebe & Others*, 2012, p. 16). Given the cardinal importance of this case for present purposes, it is apposite to discuss it, albeit briefly.

In this case, the applicants, Mr Tsebe[11] and Mr Phale, were charged by Botswana authorities for having 'brutally' murdered their love partners in separate incidents. In an attempt to evade being prosecuted, the applicants skipped the border from Botswana into South Africa. They were later arrested in South Africa with a view to extraditing them to Botswana upon the latter's request. The South African Minister of Justice sought an assurance from Botswana that, upon extradition, the death sentence would not be imposed on the applicants and that if it was, it would not be executed. This request was refused. Despite of Botswana´s refusal, South Africa sought to extradite the applicants. In resisting their extradition, the applicants approached the South Gauteng High Court (the High Court) in South Africa for an order declaring their intended extradition unconstitutional.

After taking into consideration the relevant international instruments, foreign case law, its domestic legislation and case law, the High Court upheld the applicants' application and refused extradition. It held that the extradition of the applicants to Botswana, which refused to give an assurance that the death penalty would not be imposed - or, if imposed, would not be carried out - would be unlawful and constituted a violation of their rights to life, dignity and freedom from being treated in an inhuman and degrading manner, as enshrined in the South African Constitution. In handing down its decision, the court noted that:

> *As indicated above, [Botswana's position on capital punishment] is out of synchrony with the trend worldwide to abolish the death penalty; it has an appalling history of "secret executions" in regard to its implementation of the death penalty; its constitution does not induce confidence that the clemency provisions are applied in a humane and independent manner; the international investigative reports as to the quality and fairness of its judicial system when dealing with capital crimes are less than complimentary; the international instruments that binds it contemplate that extradition would be refused by the Republic; the national law of the republic to its knowledge prohibits the extradition; and there is no international law which would force the republic to extradite under these circumstances.*
>
> (SOUTH AFRICA, *Minister of Home Affairs & Others v. Emmanuel Tsebe & Others*, 2012, para. 19).

On appeal, the Constitutional Court upheld the decision of the Court *a quo* reasoning that to extradite individuals to a place or country where they may be executed would be antithetical to the ethos of South African society, which is founded on the "values of human dignity, the achievement of equality and the advancement of human rights and freedoms […] and the supremacy of the Constitution and the rule of law" (SOUTH AFRICA, *Mohamed and Another v. President of the RSA and Others,* 2001, para. 17). In criticising the death penalty, both courts just stopped short of calling it barbaric. In deciding the *Tsebe* case, both courts relied on an earlier decision of the South African Constitutional Court, namely, *Mohamed v. President of the Republic of South Africa* (SOUTH AFRICA, 2001, para. 18) which is the first case in South Africa to set the principle that South Africa is required by its laws to decline extradition when the requesting state is a retentionist and is unprepared or unwilling to give the requisite assurance to South Africa that the death penalty will not be imposed on the fugitive or that if imposed, it will not be carried out.

Given the importance of the *Mohammed* decision, it is also important to briefly discuss the case for completeness. In that case, Mr. Mohamed, a Tanzanian national, was accused of acting in cahoots with other terrorists in the bombing of US embassies in Nairobi and Dar es Salaam, where a number of people were killed. After the bombings, he fled to South Africa. Fully seized with the knowledge that, if taken to the US, Mr. Mohamed would be sentenced to death if found guilty on the serial murder charges, the South African authorities surrendered him over to US officials without requisitioning the US government to give an assurance that the death penalty will not be imposed on him upon conviction or that, if imposed, it would not be carried out. In handing down its decision in the matter, the Constitutional Court deprecated South Africa's failure to make 'an acceptable arrangement' in ensuring that Mr *Mohammed* would not face the death penalty in the US. The Court further reasoned that in handing the extraditee to the US, the South African government facilitated the imposition of the death penalty on him and that that conduct was in breach of its obligations contained in section 7(2) of the Constitution which requires the government to 'respect, protect, promote and fulfil the rights in the Bill of Rights' (SOUTH AFRICA, *Mohamed and Another v. President of the RSA and Others*, 2001, paras. 58-60).

The Court proceeded to state that in handing Mr. Mohamed over to the US

authorities to be prosecuted in that country while fully knowing that in the event of conviction he would suffer death, without demanding the requisite assurance from the US government, the South African government violated Mr Mohamed's constitutional right to life, right to human dignity and right not to be treated or punished in a cruel, inhuman or degrading manner (SOUTH AFRICA, *Mohamed and Another v. President of the RSA and Others*, 2001, para. 37, 58 and 60). A comparable approach was adopted by the Court of Appeal of Canada in *Canada (Minister of Justice) v. Burns & Anor* (CANADA, 2001, p. 19). In this case, the court held that the issuance of an order by the Canadian Minister of Justice to extradite fugitive respondents to the US, where they were being wanted to stand trial on a murder charge, in the absence of an assurance from the latter state that the respondents would not be condemned to death, constituted an infringement on their rights to life, liberty and security of the person guaranteed under article 7 of the Canadian Charter. The Court of Appeal thus set aside the extradition order on ground that it was unconstitutional (CANADA, *Canada (Minister of Justice) v. Burns & Anor.*, 2001, para 20).

5 Harmonising extradition with human rights

As shown above, there is now vast jurisprudence in international human rights law that supports the view that concerns about the human rights of the fugitive must be taken into account before extradition is effected. According to Plachta, the development of human rights discourse has inevitably impacted the area of international cooperation in criminal justice, whose prominent feature – extradition - has for several centuries been dominated by concerns deeply engraved in 'state interests, such as sovereignty, maintaining power and domestic order, keeping external political alliances, etc.' (PLACHTA, 2001, p. 64). Accordingly, under classical international law, human rights were protected to the extent that their protection would be consistent with the stated priorities or interests of the State (PLACHTA, 2001). This is because under conventional international law, emphasis was being placed on the protection of the state and not the individual (MURRAY, 2004, p. 7). With the human rights movement gaining prominence on the world stage, this state-eccentric perspective has changed radically. This change coincided with the strengthening of the position of a human being on the international plane and the shrinking of state dominance on the global affairs. Today, human rights are so critical that even extraditees who have committed or are suspected to have committed the most heinous crimes must be treated in a manner that is sensitive to their rights (DUGARD, 2011, p. 226).

As some nations remain keen on protecting extraditees' rights, it must also be appreciated that the levels of transnational and international crimes have grown significantly in the last decade in the wake of globalisation and technological advancement (EKMEKCIOGLU, 2012, p. 204). The international community has responded to the scourge of trans-frontier crime by putting in place institutions such as the European Police Office (Europol)[12] and International Criminal Police Organisation (Interpol)[13] and other bilateral and multilateral treaties devised to 'outlaw transnational crime, promote extradition and authorise mutual assistance' (DUGARD; VAN DEN WYNGAERT, 1998, p. 1). The construct of extradition presents

an unavoidable tension between the need to combat crime and the observance of human rights notions in criminal justice, thus the importance of establishing a criminal system in which crime is addressed or suppressed in a manner that is sensitive to human rights. This observation was made by the European Court on Human Rights in *Soering v. United Kingdom* (EUROPEAN COURT ON HUMAN RIGHTS, 1989, p. 161) when it opined:

> *[I]nherent in the whole of the [European] Convention [on Human Rights] is a search for a fair 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 interests of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition.*
>
> (EUROPEAN COURT ON HUMAN RIGHTS, *Soering v. United Kingdom*, 1989, para. 89).

The decision in *Soering* is regarded as pioneering in linking extradition to human rights. A brief excursus of the material facts of this case is apt. In this case, the applicant *Soering*, a West German national, murdered his girlfriend's parents in Virginia (a retentionist US state) and fled to the United Kingdom, from where the United States requested his extradition. When the United Kingdom was preparing his extradition, the applicant approached the European Commission of Human Rights to stop the extradition on the basis that since the state of Virginia was a retentionist, the United Kingdom would have violated its obligations under article 3 of the European Convention, which outlaws the subjection of any person to torture and inhuman or degrading treatment or punishment.

The Commission referred *Soering's* case to the European Court of Human Rights. The Court upheld the applicant's contention that in surrendering him to the US, the United Kingdom would be violating its obligations under article 3 of the European Convention, arguing that the United Kingdom was proscribed from surrendering Soering to the United States because there was a real risk that he would be subjected to inhuman and degrading treatment by being kept on a death row for a prolonged period in the state of Virginia. The Court further held that the fact that the actual human rights violations would occur outside the territory of the United Kingdom did not absolve it from responsibility for any foreseeable consequence of extradition suffered outside its jurisdiction (EUROPEAN COURT OF HUMAN RIGHTS, *Soering v. United Kingdom*, 1989, para 91). In terms of this approach, a requested state incurs a responsibility under the European Convention when, despite having reasonable grounds to foresee that human rights violations will occur, it decides to proceed with the extradition of the fugitive. This approach was adopted by the United Nations Human Rights Committee (the HRC) in *Ng v. Canada* (1993b, 161). In this case, the Committee held that Canada had violated article 7 of the ICCP, which prohibits the subjection of a human being to cruel,

inhuman or degrading punishment by extraditing Ng to the United States when it was reasonably foreseeable that, if condemned to death in California, he would be executed through gas asphyxiation, a form of punishment outlawed under the script of the above quoted article 7 of the ICCPR.

Despite the desirability of reconciling extradition and human rights imperatives, the achievement of such reconciliation may prove well-nigh impossible precisely because international law has not yet put in place clearly articulated standards or guidelines and rules that must guide the decision-making process of the country having custody of a fugitive on whether or not to surrender him to the requesting state, regard being had to the human rights situation of the latter state. Dugard & Van den Wyngaert correctly argue that a balancing exercise between the two competing interests cannot be achieved by intuition or unarticulated forces but by first identifying interest(s) involved and then establishing mechanisms and procedures that should guide decision makers in the process (DUGARD; VAN DEN WYNGAERT, 1998, p. 1).

6 The rights implicated in an extradition process

The principal rights that have been invoked to obstruct extradition include the following: the right to life, the right to dignity, and the right not to be treated in a degrading or inhumane manner. These rights are implicated during the period after sentencing and before execution, in the method of execution and in the loss of life itself.

6.1 The right to life (where the fugitive will face death penalty)

In Botswana, the right to life is guaranteed under section 4(1) of its Constitution. This is also the section that permits the death penalty by way of an exception to the right to life. It provides that: "No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted." (BOTSWANA, 1996, 4(1)).[14]

Although this provision has been criticised for undermining the practical importance of the right to life (TSHOSA, 2001, p. 110), the fact is that in Botswana the death penalty is constitutional.[15] Proponents of the death penalty can therefore argue that, since the death penalty is provided for under Botswana's Constitution and not outlawed under international law, Botswana is at large to apply it as it sees fit. However, this proposition cannot be entirely correct. As indicated above, this position is now against the tide of international law. In *Kindler v. Canada* (HUMAN RIGHTS COMMITTEE, 1993a, p. 426), the HRC took the view that, 'while States Parties are not obliged to abolish the death penalty, they are obliged to limit its use.' However, international law does not compel or obligate a requested state to demand assurance from a requesting state that the latter will not enforce the death penalty. Thus, in the *Kindler* case, the Canadian government refused to insist on such assurance from the United States, and both the Canadian Supreme Court and the United Nations HRC held that Canada was under no obligation to insist

on the furnishing of an assurance. However, the powerful dissenting opinion of HRC member, Mr B. Wennergren in this case is instructive. In his view, the right to life is the most supreme one, and there is no room for derogations permitted in relation to this right under article 6, paragraph 1, of the ICCPR. Thus, he observed that Canada violated the aforesaid article 6, paragraph 1, by consenting to extradite Mr. Kindler to the United States without having secured assurances that Mr. Kindler would not be subjected to the execution of the death sentence (HUMAN RIGHTS COMMITTEE, *Kindler v. Canada*, 1993a, para 23).

The Supreme Court of Canada later re-considered and overruled its decision in *Kindler* in the *Burns* case, above. Ten years later, the HRC also re-considered its position in *Kindler* (above) in *Judge v. Canada* (HUMAN RIGHTS COMMITTEE, 1998). Departing from its position in the former case, the HRC reasoned that:

> *For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.*
>
> (HUMAN RIGHTS COMMITTEE, *Judge v. Canada*, 2003, para 10.4).

Accordingly, the HRC found Canada to be in violation of Judge's right to life guaranteed under article 6(1) of the ICCPR by deporting him to the United States, where he was facing a death sentence, without seeking prior assurance from the latter state that the death sentence would not be implemented when imposed by the courts (HUMAN RIGHTS COMMITTEE, *Judge v. Canada*, 2003, para 10.6).

The Italian courts have taken a more liberal approach. Before Italian courts, a mere assurance that the death penalty will not be implemented is not sufficient to trigger extradition or deportation processes. In *Venezia v. Ministero di Graziae Giustizia, Corte cost* (ITALY, 1996, p. 815) an Italian court ruled that assurances by requesting states that death penalty will not be applied did not constitute sufficient guarantees, and that such assurances by the executive did not bind Italian courts. Before Italian courts, once it is shown that the fugitive is being sought for offences that potentially attract the death penalty, extradition will be refused. The Italian approach underlies the cardinal importance of the right to life.

6.2 The prohibition of torture

Today the assertion that the practice of death penalty constitutes torture is gaining ground (PROKOSCH, 2004, p. 24). Some commentators have argued that execution constitutes torture, as it has extreme mental and physical impact on a person already under the control of the government (PROKOSCH, 2004, p. 26). The practice of torture is outlawed under customary international law. In fact the prohibition of torture enjoys the status of *jus cogens* under international law. Furthermore, torture has been outlawed by several international and regional human rights instruments to

which Botswana is a party, such as the UDHR (article 5), the ICCPR (article 7) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[16] and the African Charter on Human and Peoples Rights (1986, article 5), among others. In *Filartiga v. Pena-Irala* Judge Kaufman held that:

> *In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights [...].*
>
> (UNITED STATES, *Filartiga v. Pena-Irala,* 1980, p. 630).

Since the death penalty constitutes torture, and torture is universally prohibited, the requested states should not experience any difficulty in declining extradition to any country where the extraditee will face torture in the form of the death penalty. Therefore, South Africa cannot be faulted for refusing to extradite a person sought by Botswana who stands accused of an offence attracting the death penalty. To acquiesce to a requisition for extradition by a retentionist state, in a case where an assurance for non-enforcement of the death penalty has not been given, would be to encourage the perpetuation of torture.

7 Cruel, inhuman or degrading treatment or punishment

Dugard and Van den Wyngaert argue that the status of the right to be free from cruel, inhuman or degrading treatment or punishment is not clear under international customary law because of its very broad nature (DUGARD; VAN DEN WYNGAERT, 1998, p. 198). However, certain forms of treatment or punishment will be readily discernible as constituting cruel, inhuman or degrading treatment or punishment. One such treatment is the death row phenomenon. There can be no doubt that when a prisoner is kept in harsh conditions for a prolonged duration, with the spectre of death hovering over his head coupled with ever-mounting anguish of the impending execution, he undergoes cruel, inhuman or degrading treatment or punishment. However, in the *Kindler* case, it was stated that, "prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies" (HUMAN RIGHTS COMMITTEE, *Kindler v. Canada*, 1993, para 15.2). The Supreme Court of Zimbabwe adopted a contrary position in this connection in *Commission for Justice& Peace, Zimbabwe v. Attorney-General Zimbabwe* (ZIMBABWE, 1993, p. 239) where it stated that:

> *It seems to me highly artificial and unrealistic to discount the mental agony and torment experienced on death row on the basis that, by not making maximum use of the judicial process available, the condemned prisoner would have shortened and not lengthened his suffering.*
>
> (ZIMBABWE, *Zimbabwe v. Attorney-General Zimbabwe,* 1993, p. 265).[17]

Although Botswana is usually swift in executing those found guilty, there has been incidents of the death row phenomenon,[18] thereby offending fundamental rights of concerned inmates. To this end, it is argued that the death penalty is a remnant of an old penological system and offends the concepts of human dignity and human rights which are today "acknowledged as the supreme principles, and as absolute norms, in any politically organised society" (YAZAMI, 2008).

8 Some observations on Botswana's application of the death penalty

Judges and writers have expressed criticism of Botswana's record in the application of the death penalty. The full bench of the Gauteng High Court in the *Tsebe* case observed that "since its independence granted in 1966, Botswana has not presented with a good track record with regard to implementing death penalties" (SOUTH AFRICA, *Minister of Home Affairs & Others v. Emmanuel Tsebe & Others*, 2012, para. 61).

Chenwi writes that it was particularly regrettable that in the case of *Interights v. Botswana*, the Botswana government secretly hanged the convict, Mrs. Bosch, while her case was pending before the African Commission. In the *Bosch* case, the accused was convicted with murder. After exhausting all local remedies, she petitioned the Commission alleging that the impending capital punishment in relation to her violated some of her rights under the African Charter. On 27 March 2001 the Chairman of the African Commission wrote to the President of Botswana appealing to him for a stay of the petitioner's execution pending the final determination of Mrs. Bosch's petition by the Commission. Despite the request, on 31 March 2001, Botswana secretly executed the petitioner.

International research institutions have also analysed the application of the death penalty in Botswana and established that the country's application of the sentence leaves a lot to be desired. For instance, in one of its reports, entitled *Hasty and Secretive Hanging*, the International Federation for Human Rights (2007) lays bare some deficiencies in the sentencing processes of Botswana's judicial system, particularly in relation to the application of the death sentence. Principally, the report notes that since Botswana's independence in 1966, "only one person has been granted clemency after being sentenced to death" (INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, 2007, p. 18). The report notes that the clemency process conducted by the Clemency Committee is less than credible. Significantly, it noted that the Clemency Committee "is an executive advisory body" (INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, 2007, p. 26) upon which *inter alia* the Attorney-General, the government's principal legal advisor, served as a member.' It therefore stands to reason that the ability of the Attorney-General to act independently without pandering to the whims and caprices of her political appointers is severely undermined. In addition, the workings of the Clemency Committee are not open to public scrutiny: the criteria and legal basis upon which the President acts are unknown to the public. This opaqueness militates against the visibility of official action which is so necessary

if the public is to have confidence in public institutions. In this connection the report remarked that: "This complete opaqueness is a serious threat to due process and the administration of justice, and violates the right to seek pardon or commutation of the sentence, enshrined in Article 6, paragraph 4, of the ICCPR." (INTERNATIONAL FEDERATION FOR HUMAN RIGHTS REPORT, 2007, p. 26).

The report also expresses concern over the fact that the low fees paid to *pro deo* counsel in murder cases compromise accused persons' rights to fair trial in that the problem of low tariffs result in cases that have grave implications on the rights of accused persons being handled by inexperienced lawyers lacking 'skills, resources and commitments to handle such serious matters and this detrimentally affected the rights of the accused.'

9 Way forward

Whereas it should be admitted that requested states must not surrender fugitives to a country where their rights will be violated, it must equally be appreciated that such fugitives must stand trial in an effort to suppress crime and avoid requested states turning into safe havens for criminals. Thus, it is important to seek strategies and methods that could be used to create a fine balance between the protection of human rights and the suppression of crime. It is suggested that South Africa and Botswana can use the procedure of conditional extradition. This procedure or mechanism is important in balancing the two interests at play, namely: protection of rights of the extraditee and prosecuting those alleged to have fallen foul of the law. Within the context of the death penalty, conditional extradition would require the requesting retentionist state to make a prior undertaking that the extraditee will not be executed on being found guilty of the offence he is being extradited for. At present Botswana has rejected this arrangement. It is hoped however that it will revisit its position on this approach and finally embrace it.

Conditional extradition is not uncommon. In the case of *Alberto Makwakwa & others v. The State* (SOUTH AFRICA, 2011, para. 19), the government of Lesotho furnished a satisfactory assurance to South Africa, upon the latter's request, that the extraditees who were facing a charge of conspiracy to kill the Prime Minister in Lesotho will not be executed if found guilty. Dugard and Van den Wyngaert also point out that, in October 1996, Canada extradited one Rodolfo Pacificador to the Philippines to be prosecuted for murder on condition that when found guilty, he would not be sentenced to death (DUGARD; VAN DEN WYNGAERT, 1998, p. 208).

The downside of conditional extradition is that the requesting state may not comply with its own assurances. An example in point is the case of Wang Jianye who was extradited by Thailand to China to stand trial for a capital offence on condition that if found guilty, he would be spared the guillotine or not sentenced to a term exceeding fifteen years. Hardly a year after his extradition, Jianye was executed by China (DUGARD; VAN DEN WYNGAERT, 1998, p. 208). The present stand-off between South Africa and Botswana in relation to extraditions involving the death penalty is another example of lack of political willingness to accept conditional extradition.

Another solution is the international law process of *aut dedere aut judicare* in terms of which a requested state may refuse to extradite for fear that the fugitive's rights will be violated and elect to prosecute the fugitive using its own judicial machinery. Usually, the principle of *aut dedere aut judicare* is invoked where an offender is charged with highly egregious and heinous crimes in which impunity in relation to such fugitives is considered as the most serious danger caused by the practice of non-extradition (BEDI, 2001, p. 103).

In modern international law, the principle of *aut dedere aut judicare* has been interpreted as pertaining only to widespread "crimes which in some way affect human society" in its entirety, and which in contemporary legal parlance can be regarded, to an appreciable extent, as international crimes (BEDI, 2002, p. 101). It is argued, however, that there is no practical impediment that limits the operation of the *aut dedere aut judicare* to international crimes only. However, the utility of this approach will be undercut by the fact that at present, and at a general level, purely national crimes are not subject to extra-territorial prosecution – especially in common law jurisdictions. These jurisdictions recognise the principle of territoriality as the basis for assuming jurisdiction over a criminal matter.

In recent years, South Africa has passed several pieces of legislation that seek to cloth South African courts with jurisdiction to try certain specified offences despite the fact that they had occurred outside South Africa. Examples of such legislation include the Prevention and Combating of Corrupt Activities Act (2004) and the Rome Statute of the International Criminal Court (2004). Commenting on this development in the *Tsebe* case (SOUTH AFRICA, 2012), the High Court observed that if South Africa could pass laws empowering its courts to try crimes that have been committed outside its territory, there is no reason why a similar legislation could not be passed to ensure that fugitives who are on South African soil and being sought by a requesting state that retains capital punishment for the offences that the fugitive is facing, can be tried by the South African courts when requesting states are not prepared to give the requisite assurance (SOUTH AFRICA, *Minister of Home Affairs & Othrs v. Emmanuel Tsebe & Othrs*, 2012, para 61).

Such legislation would be of immense utility value in ensuring that those who are accused of committing offences that attract the death penalty in Botswana and flee to South Africa stand trial in South Africa, whenever Botswana is not willing to guarantee that they will not be executed. This will ensure that those who commit capital offences in Botswana and cross into South Africa do not go unpunished, as is currently the case. In enacting this law, South Africa will be acting in line with the SADC Extradition Protocol with provides under its article 51 that in a case where extradition has been refused on ground that another SADC country is unprepared to give the requisite assurance for the exclusion of death penalty, "[…] the Requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested." (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, 2006, article 5 (c)).

However, concerns have been raised that this arrangement may raise

problems of evidence, especially *viva voce* evidence which features prominently in the common law world (DUGARD; VAN DEN WYNGAERT, 1998, p. 209). There is no doubt that this trans-frontier extension of criminal jurisdiction will require that witnesses who almost reside in the requesting state be brought to the requested state to testify. In the *Tsebe* case (SOUTH AFRICA, 2012), the High Court just stated that this problem was not insurmountable, since all it requires for its effective implementation is the cooperation between the requesting and the requested states. But Dugard and Van den Wyngaert argue that it is highly unlikely that a state whose extradition request has been shot down on human rights concerns will be willing to cooperate with authorities of the requested state (DUGARD; VAN DEN WYNGAERT, 1998, p. 208). In addition, these two scholars argue that, even when the evidence has been procured, the courts of the requested state may treat it with suspicion on ground of the requesting state's unattractive human rights record on capital punishment (DUGARD; VAN DEN WYNGAERT, 1998, p. 208).

Another problem relates to retroactive application of criminal law. If South Africa passes such extra-territorial criminal legislation, will it apply to crimes that pre-date it? This appears unlikely owing to the impermissibility of retrospective application of criminal law. However, one may argue that this law will not be applying retrospectively *per se* because capital offences found in Botswana criminal statutes have long been recognised as offences in the penal statutes of all civilised jurisdictions, including South Africa. The statute that gives South African courts the criminal jurisdiction to deal with offences committed outside South Africa will thus be merely putting in place machinery for trial and not creating any new offence or punishment retroactively. Consequently, problems of retroactive application of the law may not arise.

The other problem associated with extension of criminal jurisdiction of South African courts in relation to capital offences committed in Botswana is that offenders of same offences will be accorded differential treatment or punishment in that whereas those in Botswana may be executed, those being tried in South Africa are not faced with the risk of the death sentence. This lack of uniformity in sentencing between the two jurisdictions may cause grave injustices. Despite this shortcoming, if the criminal jurisdiction of South African courts is extended, the problem would become one of differential sentencing schemes rather than one of impunity, which is presently prevailing. It may be argued that it is better that a lesser sentence be imposed than for a person accused of a capital offence to go unprosecuted, since the latter entrenches an undesirable culture of impunity and undermines efforts in crime prevention.

10 Conclusion

As indicated at the opening of this article, today, notions of human rights have forayed into all spheres of human life. Human rights have become an integral feature of contemporary international law, and extradition has not escaped their reach. The invocation of human rights principles in the area of extradition has

been denounced by many nations as an obstacle to combating transnational and international crimes. Whereas sympathy may go for these concerns, they are untenable at law.

As has been shown in this article, an exquisitely delicate balance has to be made between the protection of human rights and efforts to supress crime. The two interests are both legitimate and at the forefront in world agenda, therefore one cannot be undermined in preference of the other. A better international criminal law system is the one served by an extradition arrangement that is sensitive to the rights of fugitives. To this end, Botswana and South Africa must move swiftly and agree on an extradition approach that is in line with the prevailing norms of international human rights law. The most prevalent and predominant approach in the world and easily workable or implementable is the conditional extradition that South Africa proposes. More critically, Botswana must synchronise her sentencing scheme on capital offences with emerging world trends and abolish the death penalty or place a moratorium on it.

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NOTES

1. In South Africa, the death penalty was abolished by the Constitutional Court in the seminal and well-known case of *The State v. Makwanyane* (SOUTH AFRICA, 1995, 3 SA 391 (CC)). In declaring the death penalty unconstitutional, Chaskalson P pointed out at para 144 of the judgment that by committing to human rights ethos, the society of South Africa was required to give particular premium on the rights to life and dignity and added that "this must be demonstrated by the State in everything it does" (SOUTH AFRICA, 1995, 451C-D).

2. A retentionist State is a State that that has retained death penalty as a competent sentence for an offence in its statute books.

3. Extenuating circumstances is an amorphous term covering a wide repertoire of factors in its meaning. In Rex v. Fundakubi (SOUTH AFRICA, 1948, p. 818) the court observed that "no factor, not too remote or too faintly or indirectly related to the commission of a crime, which bears upon the accused's moral blameworthiness in committing it, can be ruled out from consideration." Factors such as provocation, intoxication, youthfulness, witchcraft etc have been found by courts to constitute extenuating circumstances.

4. This instrument was signed at Geneva, July 27, 1929.

5. However, it should be noted that in 1979 the death penalty was subsequently abolished in Norway for all crimes.

6. In this connection article 6(2) of the International Covenant on Civil and Political Rights (ICCPR) is instructive. It states that those countries that have not abolished the death penalty must only implement it in the most serious crimes according to law, not in a manner inconsistent with provisions of the ICCPR and only pursuant to a judgment of a competent court. The Second Optional Protocol to the Covenant (1991) state that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights.

7. Article 2(1) explicitly recognises the death penalty.

8. These are Angola, Mauritius, Mozambique, Namibia, Seychelles and South Africa.

9. These include Malawi, Swaziland and Zambia. The last execution in Malawi was in 1992, Swaziland in 1983 and Zambia in 1999.

10. These States were: Spain, Netherlands, Brazil, United Kingdom, Italy, Canada, Australia, Holy See, Ireland and Denmark.

11. Mr. Tsebe died before conclusion of the case.

12. This is the European Union's criminal intelligence agency. It became fully operational on 1 July 1999.

13. This is an organization that facilitates international police cooperation. It was established as the International Criminal Police Commission (ICPC) in 1923 and adopted its telegraphic address as its common name in 1956.

14. See also section 203 of the Botswana Penal (above) Code (1964) which is essentially to the same effect.

15. The constitutionality of death penalty in Botswana has been declared in a long line of cases such as: *Molale v. The State* (BOTSWANA, 1995); *Ntesang v. The State* (BOTSWANA, 2007) etc.

16. Provisions of CAT prohibit torture in their entirety in all its manifestations.

17. However the view is divided on this point. Contrary to the view expressed above, see *Abbot v. Attorney General of Trinidad and Tobago* (UNITED KINGDOM, 1979) where the court said that time passing before execution can never be invoked as a basis for a finding that an inmate in death row has been treated in a cruel, inhumane degrading manner.

18. The death row phenomenon referes to: "the inhumane treatment resulting from special conditions on death row and often prolonged wait for executions, or where the execution is carried out in a way that inflicts gratuitous suffering." See SCHABAS, 1993, p. 127.

RESUMO

Procedimentos de extradição não estão imunes às restrições impostas aos Estados pelo direito internacional de direitos humanos em questões de liberdades individuais. Isso ocorre porque noções fundamentais de direitos humanos compõem a ordem pública da comunidade internacional e, como tal, possuem primazia em relação a obrigações decorrentes de tratados. Uma das principais normas adotadas em tratados de extradição diz respeito à pena de morte. Este artigo discute tal norma no contexto da África do Sul, um Estado de viés abolicionista, e Botsuana, retencionista. Extradições envolvendo pena de morte têm gerado tensões diplomáticas entre os dois países; uma vez que a África do Sul insiste que Botsuana deve garantir de maneira satisfatória que a pena de morte não será imposta ao extraditando ou, caso o seja, não será de fato executada. Botsuana tem se recusado a conceder tal garantia. Isso tem levado a um impasse entre estes dois países nesta seara. Este artigo analisa o regime de extradição entre os dois países, referindo-se especificamente à pena de morte à luz do presente impasse. Argumenta-se, neste artigo, que a posição adotada pela África do Sul está de acordo com os melhores parâmetros e práticas sobre o tema e que Botsuana deve acatar as reinvindicações da África do Sul.

PALAVRAS-CHAVE

Pena de morte – Direito à vida – Extradição – Botsuana – África do Sul

RESUMEN

El proceso de extradición no ha escapado a las restricciones impuestas por la legislación de derechos humanos a los Estados en sus relaciones con las libertades de los individuos. Eso se debe a que las nociones de derechos humanos se consideran parte del orden público de la comunidad internacional y, como tales, gozan de una posición superior respecto a las obligaciones de los tratados. Una de las principales normas adoptadas en los tratados de extradición se refiere a la pena de muerte. En este trabajo se analiza esa norma en el contexto de Sudáfrica, un Estado abolicionista, y Botsuana, que es retencionista. Las extradiciones en que está implicada la pena de muerte han provocado disputas diplomáticas entre ambos países: Sudáfrica insiste en que Botsuana debe proporcionar garantías suficientes de que no se impondrá la pena de muerte al extraditado o de que si se impone no será aplicada; Botsuana afirma no poder dar esas garantías, con lo que se ha creado un callejón sin salida. Este artículo brinda una reflexión sobre el régimen de extradición entre ambos países, con una referencia especial a la pena de muerte a la luz del actual punto muerto. Se argumenta que la posición de Sudáfrica al insistir en las garantías está en línea con las mejores normas y prácticas internacionales y que Botsuana debe transigir respecto a esa demanda.

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In the Foundation's three publications – Cadernos de Pesquisa (Research Journals), Estudos em Avaliação Educacional (Educational Evaluation Studies) and Textos FCC (FCC Texts) – this academic production features alongside the work of researchers from other institutions, providing a diversified view of the issues in the field.

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