

**THE HISTORY, BASIS AND CURRENT STATUS OF THE RIGHT OR
DUTY TO EXTRADITE IN PUBLIC INTERNATIONAL AND
SOUTH AFRICAN LAW**

by

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SUMMARY

As the only internationally sanctioned means by which a fugitive offender may be returned from one state to another, extradition as a public international law process has received surprisingly little attention in South African legal literature.

The major trends in European extradition law are identified and a parallel is drawn with South African extradition from 1652 to the present.

Extradition has a dual basis : treaty and non-treaty. Traditionally South Africa preferred treaty-based extradition, but with the adoption of the Extradition Act in 1962 this base was broadened. In a detailed analysis of section 3(2) of the Act it is shown that extradition is here in fact an act of comity. This has not always been recognised by the authorities who have confused section 3(2) comity with reciprocity. This may be ascribed to a basic misunderstanding of a reciprocal undertaking to extradite as an informally concluded treaty commitment.

Most of South Africa's extradition treaties are inherited. State succession to bilateral treaties resulting from annexation and cession, devolution agreements, and dismemberment or secession is consequently traced through the various "successions in fact" occurring within South Africa from 1652-1961. Particularly within the South African courts, a misconception of the role of consent in succession has led to considerable confusion. An alternative approach to the succession process which emphasises the role of consent and gives due credit to succession as a separate international law phenomenon is proposed. Namibian succession to extradition treaties is addressed briefly.

The termination of extradition treaties is examined and an assessment is made of the individual treaties appearing on the South African Treaty List culminating in a re-evaluation of states to which South Africa owes a duty to extradite and from which it may demand extradition as of right.

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CHAPTER I

EXTRADITION DEFINED AND DISTINGUISHED

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1 INTRODUCTION

As one of international law's oldest institutions, extradition has at some or other stage, affected virtually every nation in the world. Although the popularity of extradition treaties has waxed and waned through the course of history, the core perception that perpetrators of crime should not go unpunished, has remained. It is this basic sociological perception, coupled perhaps cynically, with the realisation that no nation wishes to be seen as a dumping-ground for "the worst that other countries have to export", (1) that has enabled the nations of the world to transcend considerations of self-interest and politics and to make extradition a vital force for international cooperation.

It is consequently surprising to find that in South African literature, extradition in its international perspective has received scant attention. On the other hand, a fair measure of information is available on extradition as a process of municipal law. (2) In these, largely procedural, discussions the international perspective is either ignored or glossed over. A question which must consequently arise is whether extradition is indeed a topic which falls to be considered within the perimeters of international law at all, or whether it should not be considered purely as part of a state's municipal dispensation.

There is no easy answer to this question; all the more so in a legal system such as the South African where the conclusion of a treaty or other international agreement, does not automatically imply municipal application.⁽³⁾ For this reason, shortly after South Africa assumed Republican status in 1961, the legislature adopted the Extradition Act 1962 to give municipal effect to South Africa's extradition arrangements both past and future.⁽⁴⁾ It is to this Act that one must consequently turn to ascertain the true nature and role of extradition in South African law.

In assessing extradition in South African law a three-dimensional approach is required. The first phase of the examination covers the extradition agreement concluded between two or more sovereign states - South Africa and a foreign state/s. Although section 6(3)(e) of the Republic of South Africa Constitution Act 110 of 1983 confers on the State President the general power to conclude treaties, in the case of extradition, this is qualified by section 2 of the Extradition Act which specifically provides that the State President may conclude treaties for the surrender of suspected or convicted criminals. The fact that the Extradition Act prescribes certain requirements which such a treaty must satisfy, in no way detracts from the nature of the State President's action in concluding a treaty.⁽⁵⁾ The State President is here entering into an international agreement binding in international law. This phase of extradition is governed solely by public international law.

The second phase of the process is where problems of municipal application are first encountered. If a foreign state requests extradition from South Africa on the basis of the treaty concluded by the State President, a South African court will be powerless to consider the request unless the treaty has been translated into municipal terms. (6) For this purpose the Extradition Act 1962 was adopted and provides in section 2(3) what requirements must be met before a treaty will be of "force and effect". (7) All that the Extradition Act in fact does, is to clothe an international agreement concluded between two public international law subjects with municipal legitimacy. The application for extradition is then further dealt with by a combination of municipal and international law. The municipal branch of the extradition process is largely procedural and has, as pointed out above, received considerable attention in South African literature. The municipal phase of the proceedings closes with a magistrate's decision as to whether there is sufficient evidence to justify the extradition of the person requested. This brings one to the third phase of the process.

Once the presiding officer has decided that the person whose extradition has been requested is in fact liable to be extradited, the Minister must be informed accordingly (the extraditee either being held in custody or released on bail). (8) The actual question of whether or not the individual is to be extradited rests with the Minister. Two sections of the Act refer to the Minister's decision in this regard. In section 10(1) it is clear that in each and every case in which a foreign state (as opposed to an associated state) is

concerned, the decision to extradite falls to the Minister. (9) No mention is made of what considerations the Minister may take into account in reaching his decision and it must consequently be assumed that any matters which he regards as relevant, including for example, embarrassment to the South African government, could serve as the basis for his decision.

More specific is section 15 which provides for the political offence exception to extradition. The Minister may order the release of any person detained under the Act if he is satisfied that the offence with which the person is charged is "of a political character" or that his extradition will not be requested.

If one examines the actions of the Minister in terms of these two sections and attempts a classification, it is immediately clear that one is dealing with what is termed an "act of state". Wade (10) defines an act of state as "(A)n act of the executive as a matter of policy performed in the course of its relations with another state, including its relations with the subjects of that state...". Although it is not typically a function of the Minister of Justice to act in relations affecting foreign states, this task usually falling to the Minister of Foreign Affairs, there is no doubt that he forms part of the executive. The question then remaining is whether we are here dealing with "a matter of policy"? Again there can be little doubt that the decision of whether or not to extradite - either in terms of section 10(1) or section 15 - will involve policy considerations. In terms of section 10, South Africa could have an active policy of

cooperation with a particular state, or of non-cooperation for that matter. Similarly under section 15 where the Minister is called upon to consider whether the crime charged is a political offence, he will again take policy considerations into account. Finally, one must consider whether the Minister's act is performed in the course of relations with another state. Yet again there can be little doubt. The extradition request emanates from a foreign state and is delivered to the South African Foreign Affairs Department through diplomatic channels. The decision to extradite or otherwise will also undoubtedly have international repercussions. All the more so when one considers that under section 15, before the Minister reaches his decision he must of necessity pass a subjective judgment on the policy, political situation and crime perception of the requesting state; a decision which could have far reaching consequences on the international plane.

However, sight should not be lost of the fact that although the Minister is acting in terms of municipal legislation when deciding whether or not the extradition should be granted, there is a presumption of statutory interpretation which provides that in certain circumstances, legislation must be interpreted to give effect to the country's international obligations. (11)

Furthermore, an extradition treaty must be read together with the Extradition Act. Consequently, were the treaty in terms of which extradition is being sought to lay down criteria which the Minister should consider, (12) or were a rule of customary international law

to impose an obligation on the Republic to grant extradition in the case of a certain type of offender, (13) the Minister's statutory discretion should ideally be exercised with due consideration to international law obligations arising from the treaty or custom.

From the above it is clear that the act of extradition is far from simple or clear-cut. To dismiss its intrinsically international character is to misunderstand its true nature; to disregard its municipal ramifications is to deny it practical application and relevance. It is consequently submitted that the time is ripe for an investigation of the international aspects of extradition in the South African perspective. However, before detail can be considered one must establish exactly what is meant by extradition. It is to this question that we shall now turn.

2 EXTRADITION DEFINED

There is certainly no dearth of definitions of the concept of extradition in either legal writings or reported cases. These vary both in comprehensiveness and in complexity.

The Harvard Research publication on extradition tersely defines the concept as :

"The formal surrender of a person by one State to another State for prosecution or punishment." (14)

The *British Digest* (15) expressly introduces into its definition the fact that a process is involved and that this follows upon a formal request. In a widely cited definition, a United States' court includes references to the place of the commission of the extraditable offence and the capacity of the courts of the country requesting surrender. (16) Both Stanbrook (17) and *Halsbury* (18) attempt some limitation of the extraditable crime by providing that only serious crimes can constitute the basis for extradition proceedings, while Bassiouni (19) introduces as the basis of the request, treaty, comity or reciprocity.

Within the context of public international law, South African writings on extradition have, by and large, been restricted to a discussion of specific aspects of the process arising in cases before the courts, (20) or to a general discussion of the principles involved without specific definition of the term. (21) Writing on the South African Extradition Act, Sanders (22) defines the process in terms strongly reminiscent of the Harvard Research. (23) In his work on Criminal Procedure, Dugard (24) adopts the definition offered by Oppenheim stressing the jurisdictional aspect emerging from the place of commission of the extraditable offence. The most comprehensive of the South African definitions of extradition is that of Lansdown and Campbell who, again within the context of criminal procedure, (25) incorporate, albeit in somewhat general terms, the formal nature of the process, the seriousness of the offence, the basis of the application, and the place of commission.

From the above it can be seen that although each writer approaches extradition from his own perspective, stressing that particular aspect he finds of the greatest significance, there is little in principle to distinguish between the different definitions. Certain general characteristics inherent in extradition can therefore be abstracted from the definitions offered.

- * In general, extradition is not intended to be an isolated, once-and-for-all act by a single state, but is rather a series of acts "partly judicial and partly administrative". (26)
- * This series of acts can be initiated only through a formal request directed by one sovereign to another. The inter-state request is one of the elements guaranteeing extradition its position as an important tool in the field of international cooperation and its continuing importance above and beyond political expediency, in the regulation of international behaviour. (27)
- * The requesting state must establish a sufficient nexus between itself and the individual whose surrender is sought. This will be established through the jurisdictional approach followed by the respective states. (28)
- * The extradition process is reserved for serious criminal offences. (29)

For the purposes of this thesis, a working definition of extradition within the South African context, which encompasses these elements can be formulated in the following terms :

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

Unfortunately, definitions seldom provide all the solutions and, in fact, often raise more questions than they answer. The one postulated here is no exception. Questions immediately arising are on what basis do the request and subsequent surrender, or refusal to surrender rest? Is a state under an obligation recognised by and enforceable under international law, to surrender an individual to a requesting state? If so, is this an absolute duty, or is it rather a moral duty or imperfect obligation resting on comity or goodwill between nations? Lastly, is extradition really necessary and could a state not as effectively use other means to secure the return of the offender?

Before considering extradition in its historical perspective it is consequently necessary to distinguish briefly between extradition and other methods used to secure the attendance of an accused fugitive at his trial.

3 EXTRADITION DISTINGUISHED

There are a number of processes which are either closely allied to extradition, or which states have resorted to when extradition has

for various reasons not been available to them. In this section these "processes" will be distinguished from the extradition process.

3.1 Extradition and asylum

The term "asylum" which means literally "freedom from seizure", (30) is defined as "The protection accorded by a state - in its territory or at some other place subject to certain of its organs - to an individual who comes to seek it". (31) The history of asylum is considerably older than that of extradition and applied first to protection accorded by ecclesiastic authorities to individuals caught up in the conflict between church and state, (32) and second, after the collapse of the dominant position of the church, to individuals in political conflict with the state. This led to the concept of political asylum (33) which still dominates the law of asylum. More recently, however, a new concept of humanitarian asylum has emerged which deals not so much with an individual seeking refuge from political persecution in the territory of some other state, as with mass movements of people displaced by war or economic necessity. (34) Ecclesiastic asylum has disappeared and humanitarian asylum (if it in fact is an established branch of the *genre*) does not really arise in the case of extradition. (35) We are consequently left with political asylum.

Political asylum is generally approached under two heads. First, territorial asylum where an individual is granted protection from

the jurisdiction of the state from which he has fled within the territory of the state to which he has fled; and extra-territorial or diplomatic asylum where the individual seeks protection within the embassy (36) of some other state while remaining within the territory of the state from which he is fleeing. The essential difference between the two would appear to lie in the fact that in the case of territorial asylum the refugee uses the jurisdictional provisions of the state to which he has fled to shield him from the acts of his own state, while in the case of extra-territorial asylum he uses the jurisdictional limitations (grant of immunity for diplomatic premises, for example) of his own state to shield him. Needless to say, the latter is a far more hazardous enterprise!

3.1.1 Territorial asylum

The question arising is what is the relationship, if any, between territorial asylum and extradition? First it must be pointed out that uncertainty exists as to whether asylum is in fact an international law issue at all. (37) Although the basis of asylum is firmly rooted in international law, both historical and modern, (38) its practical application within a state is essentially municipal in that it is the state's immigration laws which will provide who may and may not be admitted to its territory. This is also true of South Africa where a final decision on asylum is in the discretion of the executive which exercises its options without

having to furnish reasons and without its decisions being justiciable by the courts. (39)

At this point brief mention should be made of the principle of *non refoulement* in terms of which a state may not turn a refugee away at its borders or return him to a country where he will be persecuted.

(40) Article 2 of the Declaration on Territorial Asylum (41)

provides:

"no one shall be subjected to measures such as rejection at the frontier, expulsion, compulsory return to any State where he may be subjected to persecution".

Loosely comprehended, this principle would appear to grant a right to asylum (42) which will at the same time prohibit extradition. However, closer examination shows that this is not in fact the case. The state of asylum is under an international obligation not to turn the asylum seeker away or return him to the country from whose persecution he is fleeing, but is not itself obliged to accommodate him on a permanent basis. Consequently, the mere acceptance of an asylum seeker within a state's territory need not necessarily preclude the possibility of extradition. In effect, however, this will generally be the case in that the prohibition on the return of the asylum seeker facing persecution - and consequently the necessity to negotiate his acceptance by a state other than his own - will in practice mean that he will not be extradited to his country of origin which will in most instances be the state requesting extradition.

Furthermore, should a state grant a fugitive asylum, this will necessarily preclude his extradition. (43) Conversely, however, the refusal of extradition cannot be equated with the grant of asylum. (44) An apparent tension exists between a valid extradition treaty between two states and the granting of asylum to a fugitive from one of them. The treaty is concluded specifically to facilitate a fugitive's return, while asylum is specifically aimed at frustrating such action. In most instances, however, this tension will prove illusory in that in general terms asylum is granted to political refugees and most, if not all, extradition treaties prohibit extradition in the case of a political offender. Consequently, although the practical assessment of the actions of the political refugee and the perpetrator of a political offence for which extradition will be excluded may differ, the result is essentially similar.

In summary, therefore, there is close interaction between territorial asylum and extradition. If, however, one looks at the rationale behind the two institutions or processes, their basic difference emerges. Asylum is, in essence, homocentric in that it is directed at the protection of the individual. Extradition, on the other hand, is essentially sociocentric in that it is aimed at the protection of society and its norms. Although the procedures which have developed around extradition embody a strong element of individual protection, this is not the aim of the process as such.

3.1.2 Extraterritorial / diplomatic asylum

The question of so-called "diplomatic" or extraterritorial asylum also evidences the basic difference in objective identified in the case of territorial asylum. However, the concept deserves separate mention if only because it has been something of a *cause celebre* within South Africa in recent years and has led to the term "extradition" being bandied about, particularly in the media.

A basic difference between territorial and extraterritorial asylum often cited by authors, (45) is that the former is an affirmation of the sovereignty of the state granting asylum, while the latter is precisely a denial of such sovereignty. Bassiouni (46) denies the validity of this distinction, claiming that territorial asylum is extended to cover "embassies, legations, military bases, territorial enclaves, vessels and aircrafts (sic)". Grahl-Madsen, on the other hand, does not recognise the existence of diplomatic asylum outside of Latin America, (47) nor, officially, does the United States government although it may grant it in exceptional circumstances "for humanitarian reasons under conditions of urgency where the applicant's freedom or life were in danger". (48)

This problem was forcibly brought home to South Africa during 1985 when a Dutch national, Klaus De Jonge, sought refuge in The Netherlands embassy in Pretoria. De Jonge, who had close ties with

the then banned South African Communist Party and the military wing of the African National Congress, entered South Africa from Zimbabwe on 20 June 1985. He was seen to bury certain weapons which he had allegedly smuggled into the country. On 23 June 1985, he was arrested in terms of section 29 of the Internal Security Act. (49)

In assisting the police with their investigations, De Jonge and four plain-clothes policemen paid a visit to the premises of the Dutch embassy in Pretoria. He took the opportunity of trying to enter the embassy premises. While half in and half out of the embassy waiting-room, he was dragged away by the members of the police. A diplomatic furore erupted which culminated in a Dutch demand for an apology and the return of De Jonge to the embassy on the ground that the immunity of the embassy had been violated by the South African police. (50) On 19 July 1985, De Jonge was returned to the embassy and began what was to become a marathon saga of "diplomatic asylum". (51) The media had a field-day, with references to De Jonge's "extradition" from the Netherlands to South Africa epitomised by a report in the capital's leading daily newspaper on 20 July 1985 that "The Netherlands does not extradite its nationals for prosecution in other countries. And in the embassy, Mr De Jonge is technically on Dutch soil." (52)

This statement is a handy point of reference for a brief examination of the relationship between diplomatic asylum and extradition. As was seen above, extradition, like asylum, is essentially territorial. The requesting state requests the state in which the extraditee finds himself, to hand the suspect over to it. Can this happen in

the case of diplomatic asylum? The question resolves itself into an examination of where the extraditee is. That this seemingly simple question is subject to confusion, is clear from the report cited above where it is claimed that a state's embassy is "technically" part of its territory (it may be added that this approach was far from isolated in media reports on the De Jonge incident). For extradition to apply in the case of diplomatic asylum, this statement would need to be a true reflection of the position at international law. However, that this is clearly not so, is borne out by numerous cases. (53) The international law position is consequently that a state's embassy (or other premises) to which the concept of diplomatic asylum is applied, is in fact still part and parcel of the host state. That state has however voluntarily limited its exercise of sovereign power within such premises. We consequently find the anomalous position that were the host state to request extradition from the embassy it would in fact be requesting that an individual within its own state be delivered to it. It is clear from the definition of extradition proffered above, that this is not a situation in which the need for, or indeed the possibility of, extradition arises. The question of extradition should consequently not arise in the case of so-called "diplomatic asylum".

From the above it is clear that although the concepts of territorial asylum and extradition may be closely inter-related, they are not mere corollaries of one another. The processes should be clearly separated and each case must be considered on its individual merits

to determine whether asylum has indeed precluded the possibility of extradition. If the existence of diplomatic or extraterritorial asylum is accepted as an international institution deserving a distinct existence - as opposed to a mere exercise in political expediency - it must be borne in mind that the bar to delivery is not territorial as in "normal" political asylum, and that extradition is not the appropriate route for the recovery of the fugitive. On the other hand, it must be conceded that the inability of the state seeking a fugitive to "get its man" is as absolute in the case of diplomatic as in the case of territorial asylum.

3.2 Extradition and abduction/kidnapping

We have seen that through extradition there is a legally sanctioned and fully regulated process in public international and municipal law by which a fugitive sought by one sovereign state but present in the territory of another may be returned to the state seeking him for trial or punishment. However, it is also true that extradition does not always succeed. There may be any number of reasons for this : there may be no extradition arrangements between the states concerned; the costs involved may be prohibitive; the delays involved may be overwhelming; the nature of the crime may attract the political offence exception; etc. What, then, is the state seeking a fugitive to do; must it be satisfied to sit by and watch the fugitive escape justice? In an ideally regulated society, one could perhaps expect such a response; in the current international arena it is somewhat idealistic. One of the perennial criticisms of

international law is that when the system fails, states are left to resort to self-help to resolve their problems. (54) This is no less true when extradition breaks down. Faced with a failure of the extradition process, a number of states have simply taken matters into their own hands and abducted or kidnapped the individual sought. Abduction, which Shearer (55) defines as "the removal of a person from the jurisdiction of one State to another by force, the threat of force or by fraud", is the very antithesis of extradition. While extradition is a legal process, abduction is by definition, extra-legal. It constitutes not only a gross violation of the human rights of the individual seized - rights which extradition is precisely intended to protect - but also a violation of the territorial sovereignty of the state of refuge and as such, should engage international liability for the perpetrator. Nevertheless, states resort to kidnapping with such frequency that Abramovsky has stated that "the US government has pursued an official policy of sponsoring extraterritorial abductions, thereby charting a dangerous course". (56)

How is it that abduction, involving as it generally does, (57) a violation of international law, has become a viable alternative to extradition in the practice of states? The answer, it is submitted, lies in the municipal rule applied by most states when their jurisdiction to try the individual brought before them by unlawful means is questioned. Courts in virtually all jurisdictions apply the maxim *male captus bene detentus* in terms of which the court will not examine the manner in which the individual was brought within its

jurisdiction provided that his actual presence before the court is not wrongful. In other words, the court will look only whether the individual was arrested within its territory without considering the methods used to bring him within such jurisdiction. Space does not permit a detailed examination of *male captus* or kidnapping in general international law. (58) However, South Africa has had its share of these unfortunate cases and the position in this country will be briefly considered.

In one of the more celebrated cases, Dennis Higgs, a lecturer at the University of the Witwatersrand, wanted to face charges under the South African Suppression of Communism Act, fled to what was then Northern Rhodesia. (59) Some time later, Higgs disappeared from his flat in Lusaka to resurface at Zoo Lake, Johannesburg. It emerged that he had been kidnapped by South African agents and transported to within the jurisdiction of the South African courts. A diplomatic furore erupted which resulted in the return of Higgs to the British authorities. (60) Although - or perhaps because - the matter did not go to court, the *male captus* principle was not applied and international law was allowed to run its course. The return of Higgs was in accordance with the accepted principles of international law.

Mr Nduli was not so lucky when, in what was until recently the standard reference to this situation in South African law, he was kidnapped from Swaziland by members of the South African police and brought across the border into South Africa where he was duly arrested. In *Nduli and Another v Minister of Justice and others* (61)

the Appellate Division held that Nduli could indeed be tried. On the question of South Africa's violation of international law, the court found that because the policemen in question had acted without authorisation, South Africa had committed no international wrong. From an international law perspective, the validity of this finding is, of course, questionable. (62) However, apart from violating Swaziland's sovereignty in general international law terms, the police actions also have special significance from the point of view of extradition. A valid and current extradition treaty existed between South Africa and Swaziland at that time, (63) and by electing to disregard this treaty - possibly suspecting that the political offence exception would be raised to bar Nduli's return - and resorting to self-help, South Africa must be held to have breached the extradition treaty and violated international law in this regard too. Be that as it may, the position after Nduli was that the unauthorised abduction of a fugitive from the territory of another sovereign state neither incurred international liability nor barred the jurisdiction of municipal courts. From a practical point of view, abduction would consequently appear to have been a viable alternative to extradition.

During 1991, however, things changed when one Ebrahim was brought before the Appellate Division. In *S v Ebrahim* (64) Ebrahim was abducted, again from Swaziland, but on the orders of the state - a point which enabled the court to distinguish between this case and Nduli. The court consequently acknowledged that there had been a violation of international law, although it did not consider

international law strictly relevant to its consideration of the facts and based its finding on South African common law. (65) Using the principle that the state must approach the court with clean hands, (66) the court found that a South African court will not have jurisdiction to try an individual who has been brought before it as a result of a state-authorized abduction from the sovereign territory of another state. The court consequently declined to apply the *male captus bene detentus* principle - an approach which is to be welcomed.

In summary, therefore, it can be seen that abduction and extradition are mutually destructive. Not only is abduction a violation of the sovereignty of the state concerned, but where formal extradition arrangements exist between the two states it is also a breach of the extradition treaty which would allow the injured party a right to terminate the treaty. (67) The tacit sanctioning of the process of abduction by municipal courts through the application of the *male captus* principle is to be condemned. Fortunately, the South African courts would appear now to have rejected abduction - at least when it is sanctioned by the state. This will in all likelihood lead to a reduction in the incidence of the practice as it can serve no purpose.

3.3 Informal rendition

Closely allied to abduction, is what is sometimes termed informal rendition. (68) This process also involves the forcible return of a

fugitive to the state seeking him, but his capture is performed with the assistance - or at least the knowledge - of the state in which he has sought refuge. There is consequently no violation of the sovereignty of the state of refuge, although there will still be a violation of a treaty if extradition between the states concerned is governed by treaty. Here too, however, the knowledge of the states would render international repercussions unlikely. Where abduction is a conscious and flagrant violation of an extradition treaty, informal rendition is a somewhat "gentler" circumvention of the extradition formalities. There is, of course, little to choose between the two from the point of view of the victim whose human rights are trampled upon in either event!

By its nature, rendition is particularly suited to neighbouring states where contact between state officials is fairly regular. So for example, informal rendition between Mexico and the United States, (69) or Northern Ireland and the Republic of Ireland, (70) is a fairly regular occurrence.

Has South Africa attempted to evade the red-tape of extradition proceedings in this way? Of course, precisely because these proceedings are "extra-legal" in the sense that they circumvent the formal processes agreed upon for the delivery of criminals, they are likely neither to be documented in any detail nor easily traced. However, it would appear that as regards the TBVC states which from the South African perspective are true foreign sovereign states, informal rendition is a fairly frequent occurrence. (71) The

practice, although perhaps expedient, should not be sanctioned. This was in fact acknowledged by the neighbouring states and resulted in the conclusion of the Multilateral Extradition Convention (72) which provides a simplified form of extradition along the lines of the British backing of warrants procedure.

3.4 Deportation / disguised extradition

While abduction and informal rendition are extra-legal processes which are clearly illegal, the same cannot be said of the last process which will be considered. Deportation is a perfectly valid process by means of which a state rids itself of unwanted elements which have entered its territory. (73) The essential difference between extradition and deportation lies in the fact that in the case of extradition the aim of the extraditing state is to return the fugitive to the requesting state - his destination is consequently an essential element in the extradition process. In the case of deportation, however, the aim of the deporting state is merely to ensure that the unwanted alien leaves its territory - it is consequently non-directive as regards destination. It can of course happen that the result of deportation will in effect be to return the deportee to the state seeking his extradition. Where such a result is fortuitous it is essentially unobjectionable. (74) However, where the deporting state in fact acts in such a way that it ensures that the deportee is returned to a state which is seeking him, problems arise in that we are then dealing with a state's municipal law being used to effect an unauthorised result - in other

words we have a process of disguised extradition. (75) The state cannot extradite the individual concerned, for example because no extradition treaty exists between itself and the state seeking him, but it nonetheless wishes to cooperate with that state and ensure the fugitive's return. It consequently deports the individual to that state so ensuring his return. In effect an act of extradition has been performed without the individual having recourse to the normal protection available to him in the case of regular extradition - for example, the principle of speciality will not apply, nor will the political offence exception.

The classic case of "disguised extradition" generally cited is *Regina v Secretary of State for Home Affairs; Ex parte Duke of Chateau Thierry*. (76) The Duke, who was wanted by French military authorities on desertion charges, had sought refuge in England. As it was unlikely, due to either the political or military offence exceptions, that his extradition would be authorised, the British officials ordered that he be deported. While not specifying to which state he was to be deported, they did specify the ship on which he should leave. Conveniently, this ship happened to be berthing first in France. In effect, consequently, the Duke's return to France was ensured. The deportation order was challenged on the grounds that the authorities were not able to order deportation to a specific country, and that the Duke was a political refugee who would be tried for political offences in France. Although initially successful, (77) on appeal the deportation order was found to have been valid. (78)

Bassiouni (79) abstracts certain general principles from the judgment. First, deportation to a specific country may not be authorised in so many words. Second, the authorities may indeed stipulate the time, place and manner of deportation. In effect this means that extradition to a specific state may be achieved through the back door. Third, the political offence exception to extradition does not invalidate the deportation order. Fourth, the grounds on which a deportation order may be invalidated are limited almost exclusively, to a finding that the deportee is not an alien.

However, in a more recent case which bears mention if only for its bizarre facts, the Appeal Court would appear to have held a wider view. In *R v Governor of Brixton Prison; Ex parte Soblen* (80) Soblen was convicted of espionage in the United States. While on bail pending appeal he fled to Israel. Israel, however, refused to accept him and deported him to the United States on a flight to New York via London. While en route to London, Soblen stabbed himself a number of times. The result was his disembarkation in London and a sojourn in a British hospital. On his release from hospital the British ordered his deportation on a direct flight to New York as a result of his illegal entry into Britain. He challenged this order on the ground that it served the ulterior purpose of returning him to the United States to serve his sentence. Extradition would have been prohibited under the circumstances as espionage was not an extraditable crime in terms of the Anglo-American extradition treaty and his offence would in any event have qualified for exclusion under the political offence exception.

The court held that it could look behind the form of the deportation order to determine whether the motivation was anything other than purely to effect a deportation :

"If, therefore, the purpose of the Home Secretary in this case was to surrender the applicant as a fugitive criminal to the United States of America, because they had asked for him, then it would be unlawful: but if his purpose was to deport him to his own country because he considered his presence here to be not conducive to the common good, then his action was lawful...". (81)

This more liberal approach was followed in *R v Bow Street Magistrates, Ex parte Mackeson*. (82) However, in *R v Plymouth Magistrate's Court, Ex parte Driver* (83) where the government had clearly acted in a highly irregular manner to assure the return of Driver from Turkey with whom no extradition arrangements existed, the court expressly held that *Mackeson* had been incorrectly decided and that "the court has no power to enquire into the circumstances in which a person is found in the jurisdiction for the purpose of refusing to try him." (84) The position in English law would consequently appear far from settled.

In Southern Africa the leading case in point is that of *Mackeson v Minister of Information, Immigration and Tourism* (85) which involved a British subject in what was then Zimbabwe/Rhodesia. As Zimbabwe/Rhodesia was not recognised by Britain, it was not possible for Mackeson's extradition to be requested. Mackeson was taken to Salisbury Airport where he was placed (physically) on board a flight

to Johannesburg for a connecting flight to London. On landing in Johannesburg, Mackeson again refused to board the flight for London. The pilot also refused to have him as a passenger. He was returned to Zimbabwe/Rhodesia. At his subsequent hearing Mackeson indicated that he was willing to go to any country other than Britain. The court compared extradition and deportation and following the *Soblen* decision, was prepared to look at the motive behind the deportation. It found that this was in fact to serve the ulterior purpose of his illegal extradition to Britain. Accordingly, his release was ordered.

Specifically within the South African context, two cases dealing directly with this point could be traced. In *In re De Faria*, (86) De Faria a Portuguese national wanted in Mocambique for questioning, entered South Africa illegally. His deportation was ordered but he applied to the court for an interdict preventing the deportation to Mocambique and requesting that he rather be deported to Brazil where he had family. Steyn J granted the interdict and allowed De Faria rather to fly to Brazil, the destination of his choice, where he was assured entry without formality on the basis of his Portuguese nationality. The court consequently prevented what would in effect have been the extradition of De Faria to Mocambique.

Less happy is the picture presented by the second case. (87) Hisamo Gama, a Japanese national, was accused of murdering a compatriot on board the Japanese ship No 8 Tama Maru. The ship called at the Port Elizabeth harbour and Gama was arrested and after investigation, was

placed in temporary custody pending his delivery to Japan for trial.(88)

There is no extradition treaty between Japan and South Africa. However, the Japanese authorities wished to secure Hisamo's return and consequently proposed sending two escorts to accompany him back to Japan for trial. The following communique was received by the South African authorities : "As no extradition treaty exists between the Republic and Japan, it will be appreciated if you will arrange for the urgent deportation of Mr Gama." (89)

The South African authorities pointed out that deportation was at that stage impracticable as Gama did not qualify for deportation in terms of the Act. However, a solution suitable for all (except the luckless Gama) was mooted. It was proposed that a temporary residence permit, valid for ten days be issued to him. On expiry of this permit Gama would be a prohibited immigrant who could then validly be deported. This plan was set in motion when a residence permit valid until 15.10.1970 was issued by the Department of the Interior. The final outcome of the incident could not be traced,(90) but it is a striking example of the manipulation of municipal provisions to achieve a purpose for which they were not intended. At the same time it illustrates the importance of extradition arrangements being established between as many states as possible. In the latest incident found, Allan Heyl who escaped from custody and sought refuge in Britain in 1983 was deported from Britain and handed over to the South African Correctional Services. (91)

3.5 Conclusion

Extradition would appear to be the only legally sanctioned means of ensuring the return of a fugitive offender, or suspected offender, from the jurisdiction of one state to that of another. It is a carefully balanced process which looks to the interests of both the states concerned and the individual sought. When states resort to extra-legal methods of delivery, they place themselves beyond the law. That this can be dangerous both for immediate international relations between the states and in that it may lay the states open to possible reciprocal action in the future, hardly bears mention. The effect that such extra-legal actions have on the individual is also unacceptable. Consequently, while extradition exists as an international institution, it is in the interests of all - individual states; the international community as a whole; and the individual involved - that resort to "alternative" processes, effective though they may be in the short term, be rejected. Although such action is generally difficult to identify, where it is established it should be subject to the strongest censure both internationally and on the municipal plane.

We have so far defined extradition and distinguished it from other processes having similar practical effect. However, an understanding of any process requires that it be placed within its historical

perspective. In the following Chapter, therefore, extradition will be examined in its historical context with particular emphasis on the history of extradition in South Africa.

ENDNOTES : CHAPTER I

- 1 *Eain v Wilkes* 1982 *ILM* 342 ; Botha (1982) 174.
The warning was also sounded that extradition should not be lightly refused "lest our country become a 'social jungle'".
- 2 See nn 20 - 22 below.
- 3 In South Africa as in Britain, the conclusion of a treaty is an executive rather than a legislative act and treaties do not find automatic application in either legal system. To find municipal application the treaty must be translated into municipal terms by legislation : *AG for Canada v AG for Ontario* 1937 AC 326, and specifically for South Africa, *Pan American World Airways Incorporated v SA Accident Insurance* 1965 3 SA 150 (A) and *Tshwete v Minister of Home Affairs* 1988 4 SA 586 (A) at 606. For a general discussion of the English and South African positions see Booysen (1989) 61-118.
- 4 Extradition Act 67 of 1962. Section 2(1) of the Act empowers the State President to conclude treaties for extradition, while section 2(3) provides that these treaties will be operative in South African law after notice in the *Government Gazette*. Section 2(4) provides

that all British treaties applying in South Africa after the adoption of the Act will be deemed to have been concluded and promulgated under the Act.

- 5 In *Attorney-General v De Keyser's Royal Hotel* 1920 AC 508 (HL) the question arose of whether the fact that a prerogative has been embodied in legislation necessarily means that the nature of that prerogative has altered with the result that the State President (in the case of South Africa) would be performing a statutory rather than a prerogative act. Certain tests were laid down in this regard which in essence provide that if conditions and limitations are placed on the exercise of the prerogative the implication could be that it has been abolished and replaced by a statutory power. For a contrary view see Steyn (1970) 158, and Fouché (1964) 42-53. Examining the 1983 Constitution Act (Act 110 of 1983), Booysen (1989) 369ff argues convincingly that these conditions have not been met and the State President is still exercising a prerogative power when he concludes a treaty. See too, *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* 1987 2 WLR 998. The question now arising is whether the provisions of the Extradition Act 1962 have altered this situation. It is submitted that this is not the case. All that the Act in fact does is to identify one particular type of treaty which the State President may conclude. It consequently in no way limits or fetters his powers but merely defines them more closely. The provisions in section 2(3) which at first glance appear restrictive, deal not with the conclusion of the treaty but with its municipal application. It is consequently submitted that they in no way limit the prerogative powers and cannot be regarded as conditions directly applicable to such powers.

- 6 See n 3 above. See too, *S v Eliasov* 1965 2 SA 770

(T) at 772 and *S v Schwing* 1989 3 SA 567(T) 571.

- 7 Notably proclamation by the State President in the *Government Gazette* - section 2(3)(a).
- 8 Sections 8 and 10(3) of the Act.
- 9 The section provides that the "extraditee" is to be held "pending the decision of the Minister with regard to his extradition". (The distinction between a foreign and an associated state is discussed below.)
- 10 Wade (1934) 103.
- 11 Cockram (1983) 187; Du Plessis (1986) 81; and Booysen (1989) 109. See too, *Corocraft Ltd v Pan American Airways Inc* 1969 1 QB 616; *Salomon v Commissioner of Customs and Excise* 1966 3 All ER 871; *Alcom Ltd v Republic of Colombia* 1984 2 WLR 750 (HL); *Binga v Cabinet for South West Africa* 1988 3 SA 155 (A); *McLaine Watson & Co Ltd v Dept. of Trade and Industry* 1989 3 All ER 523 525.
- 12 In practice no such provisions have been incorporated into extradition treaties possibly because they would unduly fetter the Minister's discretion and impinge upon the sovereignty of the state.
- 13 See Chapter III below where limitations on the right/duty to extradite are briefly mentioned.
- 14 Harvard Research (1935) at 21. For definitions in similar terms see Cruz (1980) 202; Hackworth (1942) 1. See too, *In re Bauerle* Court of Appeals Colmar 12.11.1948, Case 93 1948 15 ILR 292 where it was simply stated that "Extradition is a contract between two sovereign nations".

- 15 British Digest (1965) 443 : "The word extradition...[is]... applied to the act or *process* by which one sovereign State, in compliance with a *formal demand*...". See too, Hartley Booth (1980) li.
- 16 See *Terlinden v Ames* 184 US 270 284 (1902) : "Extradition is 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 him*, demands his surrender." See too, Greig (1976) 408.
- 17 Stanbrook (1980) xxv : "Extradition is the formal surrender by one state to another of an individual accused or convicted of a *serious criminal offence*...".
- 18 Halsbury par 201.
- 19 Bassiouni (1974) 2 : "In contemporary practice extradition means the formal process through which a person is surrendered by one state to another by virtue of *treaty, reciprocity or comity*...".
- 20 See eg, the series of discussions in Dugard (1965) 430; Dugard (1967) 251; Dugard (1968) 1; and Dugard (1969) 88.
- 21 See eg, Booysen (1989) 282 where the various aspects of extradition mentioned above are discussed but no definition of the process is given.
- 22 Sanders 147 par 160 : "Extradition is the inter-state surrender of a fugitive person accused or convicted of a criminal offence by the requesting state".
- 23 Note 14 above.

- 24 Dugard (1977.1) 112 citing L Oppenheim (1955) 696.
- 25 Lansdown & Campbell (1982) 33 : "Extradition is the legal machinery for the formal surrender, for purposes of trial or punishment, by one country to another, based on reciprocal arrangements, partly judicial and partly administrative, of a person accused or convicted of a serious criminal offence committed within the jurisdiction of the requesting state."
- 26 Halsbury par 201.
- 27 Extradition has been regarded as a prime example of a political cooperation superseding strictly national interests. See eg, *In re Solano* 13 *ILR* 155. Whether this somewhat idealistic view can be supported particularly with regard to South Africa is a moot point.
- 28 This *nexus* is generally based on the territorial principle, see eg, Van Heeckeren (1882) 2 and the various theories of jurisdiction in Bassiouni (1974) Chapter IV 202 - 277.
- 29 Lansdown & Campbell (1982) 33.
- 30 Grahl-Madsen (1980) 1; Bassiouni (1974) 86 states that it means "inviolable place".
- 31 Grahl-Madsen (1980) 1 citing the 1950 Bath Session of the Institute for International Law.
- 32 Bassiouni (1974) 87ff.
- 33 Bassiouni (1974) 92ff.
- 34 Hailbronner (1986) 587; Goodwin-Gill (1986) 897.

- 35 Extradition is generally concerned with the return of an individual wrongdoer. As such the mass exodus of displaced groups whose only crime is often poverty and fear will generally not involve extradition. Although group extradition is not inconceivable, it has as far as could be established, never taken place.
- 36 Although an embassy or foreign legation is the most common place where such asylum is claimed, it is not restricted to these but may also be on foreign aircraft, vessels etc. The concept is based on the erroneous assumption that these places are part of the territory of the foreign state they represent - see further below.
- 37 For a discussion of this aspect see Bassiouni (1974) 93ff.
- 38 For the historical origins of asylum see Bassiouni (1974) 86 ff and Grahl-Madsen (1980) 3ff. For the position in modern international law see Grahl-Madsen (1980) 4. Notable here are the following United Nations declarations : Universal Declaration of Human Rights of 1948 GA Res 217 (III); Declaration on Territorial Asylum 1967 GA Res 2312 (XXII); Convention Relating to the Status of Refugees 1951 UNTS 189 and its amending Protocol on the Status of Refugees of 1967 UNTS 606.
- 39 *Shidiack v Union Government* 1912 AD 642 and *Tshwete v Minister of Home Affairs* 1988 4 SA 586 (A).
- 40 Grahl-Madsen (1980) 18.
- 41 1967 GA Res 2312 (XXII).
- 42 On the right to asylum in general, see Grahl-Madsen (1980) 2, 4ff and Hyndman (1986) 152 who both conclude that no such right exists.

- 43 Grahl-Madsen (1980) 18.
- 44 The reason for the refusal may be totally unrelated to the claim for asylum, for example where a state extradites only on treaty or on an undertaking of reciprocity and such a treaty does not exist or the requesting state is not prepared to give an undertaking of reciprocity.
- 45 Bassiouni (1974) 92.
- 46 Bassiouni (1974) 94.
- 47 Grahl-Madsen (1980) 2.
- 48 Bassiouni (1974) 106 quoting the special report of the Committee on Legal Aspects of Asylum of the American Branch of the International Law Association (1971-1972) 132.
- 49 Internal Security Act 44 of 1950.
- 50 *Pretoria News* 20.7.1985 1; *Beeld* 3.9.1985 5; *Pretoria News* 19.7.1986 9.
- 51 *Pretoria News* 20.7.1985 1.
- 52 *Pretoria News* 20.7.1985 1.
- 53 See for example, *Persinger v Iran* 1983 *ILM* 404 and 419; *Santos v Santos* 1987 4 SA 150 (W). See too, Botha (1983) 145 and Carpenter (1987-8) 145.
- 54 See eg, Booysen (1989) 2.
- 55 Shearer (1971) 72.
- 56 Abramovsky (1991) 152.

- 57 As will be seen below, where a state cooperates in the abduction, the principal international law violation which arises in these cases - violation of sovereignty - does not arise. However, other violations of international law may still be involved.
- 58 This rule would appear to be applied in most jurisdictions. For a brief comparative survey see Bassiouni (1974) 143. Perhaps the most famous of these cases is *Attorney-General of Israel v Adolf Eichmann* (District Court Jerusalem) 1961 ILR 5 and 277 which resulted from the abduction of the Nazi war criminal Adolf Eichmann from Argentina by a group of Israelis. For an in depth analysis of the British position see O'Higgins (1960) 279 and cases such as *Ex parte Susannah Scott* 9 B and C 446, 109 ER 166 and *R v Officer Commanding Depot Battalion RASC Colchester, Ex parte Elliot* 1949 1 All ER 373. For the United States, see *Ker v Illinois* 119 US 436 (1886). For a discussion of United States practice in this regard see Evans (1964) 77.
- 59 See JF 1/554/20/46 (Federation of Rhodesia and Nyasaland).
- 60 The then Minister of Justice, BJ Vorster, declared that Higgs would be "extradited" to the British authorities. Of course, there was in fact no question of extradition and Higgs was merely handed back to the authorities of the state from which he had been abducted - see *The Transvaler* 4 September 1964.
- 61 1978 1 SA 893 (A).
- 62 See Booyesen (1989) 253.
- 63 Extradition treaty between the governments of the Republic of South Africa and the Kingdom of Swaziland concluded on 4.9.1968 SATS 2/1969.

- 64 1991 2 SA 553 (A).
- 65 At 569 of the report
- 66 For a full discussion of this case see Booyesen (1990-1) page pending.
- 67 See Chapter V below.
- 68 See Bassiouni (1974) 128.
- 69 *United States v Sobell* 244 F ed 520-525 (1957).
- 70 See O'Higgins (1960) 294 where he describes the practice as "efficacious...but legally disreputable".
- 71 See Schoombee (1984) 719.
- 72 Convention on Extradition between South Africa, Bophuthatswana, Ciskei and Venda concluded at Pretoria 20.11.1986.
- 73 A distinction is sometimes drawn between deportation and exclusion. The latter is refusal to admit an individual at the border - also termed "deportation at the border". Exclusion differs from refusal of asylum in that the individual need not be a refugee fleeing from persecution. For a closer analysis of the difference between deportation and exclusion, see Shearer (1971) 76ff.
- 74 See eg, Shearer (1971) 78 and *Weinrich and Others v Minister of the Interior* 1923 CPD 255 and *Aronowicz v Minister of the Interior* 1950 1 SA 568 (A).
- 75 Shearer (1971) raises certain objections to the use of this term, preferring the more neutral *de facto* extradition - see

- 78ff.
- 76 1917 1 KB 552 (DC) and the appeal at 922 (AC).
- 77 In 1917 1 KB 552 (DC) Lord Reading stated that although the form of the order may be correct, the court should look beyond mere form and "where there is no doubt that the intention is to deport the alien to a particular country...we must treat it as if the order did...state that the alien was to be deported to France" (at 555-556).
- 78 1917 1 KB 922 (CA).
- 79 Bassiouni (1974) 137ff.
- 80 *R v Governor of Brixton Prison, Ex parte Soblen* 1962 3 All ER 641.
- 81 At 661 of the report.
- 82 1981 75 Cr App R 24.
- 83 *R v Plymouth Magistrate's Court, Ex parte Driver* 1985 2 All ER 681 (QBD). See too Botha (1985-6) 192.
- 84 At 697 of the report.
- 85 1980 1 SA 747 (ZR).
- 86 Cape Provincial Division of the Supreme Court 19.8.1966 per Steyn J (unreported).
- 87 *S v Hisamo Gama* case no 1/70/27/CB.
- 88 See JF 1/70/27.

- 89 *Nota verbale* 74/70 dated 20.10.1970 from Japan to South Africa.
- 90 Despite repeated requests to the Magistrate's Court, concerned, no further information could be obtained in this regard.
- 91 "Stander gangster returns : UK deports Allan Heyl : now he faces SA justice" *The Pretoria News* 6.11.1991.

CHAPTER II

HISTORICAL DEVELOPMENT OF EXTRADITION

1 INTRODUCTION

2 EXTRADITION IN GENERAL

3 EXTRADITION IN SOUTH AFRICA

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1 INTRODUCTION

It is impossible to deal with the history of extradition as a whole in any great depth within the confines of this thesis. It is consequently intended to give a brief survey of the development of extradition as a "general" practice in international law, indicating the principal streams in its evolution. An attempt will then be made to reflect these general developments in a more detailed examination of the history of extradition within the South African context.

2 EXTRADITION IN GENERAL

The earliest recorded "extradition agreement" is generally accepted as being the provision for the surrender of one another's fugitive criminals embodied in the peace treaty concluded in 1279 BC between Ramases II of Egypt and Hattusili, the Hittite prince. (1)

Records also exist of Roman requests for the surrender of Hannibal, first from the King of Syria, and later from the King of Bithynia, (2) while in 266 BC and 188 BC mention can be found of the extradition of individuals accused of violence against foreign ambassadors. (3)

Clarke lists various treaties concluded between the twelfth and seventeenth centuries but concludes that these "prove little...and...relate to political offenders, who were given up, not as criminals but as enemies of the sovereign..." (4). This would indeed appear to have been the prevailing attitude, viz that extradition as it existed in early practice was no more than a limited form of cooperation between kindly disposed sovereigns in terms of which political offenders or enemies of the state were exchanged. (5) However, more recent research would appear to indicate that this assumption was somewhat premature. (6) Nonetheless, such cases as there are, are too isolated and the records too fragmentary to serve as the basis for a clear-cut pattern from which the existence of extradition as an orderly system of cooperation on the international plane can be deduced. For practical purposes, extradition as defined in the previous Chapter we experience it today must be seen as having its origins in the turmoil of the eighteenth and nineteenth centuries.

As Shearer points out, before the eighteenth century fugitive criminals posed no appreciable threat to or problems for states, who tended to regard a criminal lost as a problem solved. (7) However, during the eighteenth century the activities of highwaymen and vagabonds - persons who had often deserted from the armies of the respective states - assumed alarming proportions. States soon perceived the advantage of coming to some agreement on the surrender of these criminals. Faced with a real threat, states began to

conclude treaties to protect themselves and their inhabitants. There had consequently already been a shift in emphasis from the pre-eighteenth century surrender of an individual so that he "may not involve his country, and to prevent reprisals" (8) to a broader based cooperation in the interests of the inhabitants of the state, and of the state as a separate entity.

De Martens (9) lists some ninety treaties embodying extradition clauses concluded between 1718 and 1830. These may be classified into three distinct categories on the basis of the individual whose extradition is sought : twenty-eight of the treaties deal with the return of "military deserters", and the remainder are divided between "criminals" and "vagabonds". As pointed out above, the need for cooperation was first conceived in an organised sense as a result of the vast numbers of military deserters roaming Europe at the time. These deserters were however not sought solely for desertion from the army - an offence for which extradition is generally refused in modern times - but rather because, having lost their livelihood through desertion, they took to crime on the roads. The danger perceived was not the essentially political danger of deserting troops, but rather the criminal danger to the general populace of soldiers turned highwaymen and robbers. As Shearer indicates, (10) the terms deserter, vagabond and criminal were most probably synonymous at that stage. A further notable point characterising these treaties is that virtually all were concluded by contiguous states or close neighbours. This is further underlined by the fact

that seventeen of the treaties deal with frontier offences, providing for a form of hot pursuit. (11)

It should be noted that for all practical purposes, neither Britain nor the United States of America had at this stage entered the extradition scene. (12) This Shearer ascribes to the fact that transport was then still primitive and fugitives from justice were restricted in their choice of refuge to nearby states - few, if any, being adventurous enough to take to the seas. (13)

The eighteenth and early part of the nineteenth centuries can consequently be regarded as the period during which the need for fairly extensive inter-state cooperation in dealing with criminal behaviour was conceived as advantageous. These first steps in the formulation of a clearly coordinated system for the extradition of criminals were to a large extent based on the exigencies of the moment and were not directed at an overall or abstract desire for cooperation in the suppression of crime in general. Things were, however, set to change.

The Industrial Revolution, spanning the latter half of the eighteenth and better part of the nineteenth centuries, led to the establishment of an extensive railway network and an improvement in marine transportation. Criminals were not long in realising that given the improved transport and communications systems, flight to foreign countries far from the long arm of the law, was no longer the daunting and hazardous undertaking of earlier times. The option of

flight to virtually any country was opened. (14) The international criminal took his first hasty steps - international extradition in the true sense could not but follow.

It was France which, from the end of the eighteenth to the end of the nineteenth centuries, emerged as the clear leader in the evolution of the doctrine of extradition. It was the French mind which both conceived of and clearly articulated for the first time many of the principles which underlie modern extradition treaties. The principles of non-extradition of nationals, speciality, the political offence exception, prescriptive limitations to extradition crimes, and the application of extradition to both convicted and suspected criminals, stemmed from French treaty practice. (15) Although the French Revolution had resulted in the termination of many of France's treaty commitments, (16) by 1870 France had restored extradition relations with some twenty-eight nations. The French influence was to be felt throughout Europe and particularly in Britain. This in turn, as we shall see presently, was of considerable importance to South Africa.

The Jay Treaty of 1794 marks the entry of Britain and the United States of America to the extradition arena of the modern era. Although not specifically aimed at extradition, the treaty provided in article 27 for the mutual surrender between Britain and the United States of persons charged with murder and forgery. (17) The Treaty of Amiens concluded in 1802 between Britain, France, Spain, and the Batavian Republic, (18) contained extradition provisions in article 20 but a renewal of hostilities ensured that this treaty never came

into force. The Webster-Ashburton treaty of 1842 concluded between Britain and the United States is generally regarded as the start of Britain's active treaty policy in the sphere of extradition. (19) Although similar in its provisions to the earlier Jay Treaty, the treaty of 1842 extended the crimes for which extradition could be sought. (20) A similar treaty was concluded with France in 1843. (21)

However, from a position of hindsight, the most significant British treaty of this period must be regarded as that concluded with France in 1852. The French influence is clear and marks the "europeanisation" of British treaty practice. Most of the modern extradition principles excluded from the Jay Treaty were, through French influence, included in this treaty. (22) Although the treaty was never implemented because of the British parliament's reluctance to pass the legislation necessary to support the evidential requirements set in it, (23) and the immediate result was a British retreat to the 1842 model in the treaties concluded with Prussia and Denmark, (24) its influence emerged clearly when the Extradition Act of 1870 was drafted on the recommendations of the 1868 Select Committee on Extradition. (25) This Act set the pattern for subsequent British treaties; a pattern which holds true even today.

Britain had entered an active phase in its treaty negotiations and between 1879 and 1910 extradition treaties were concluded with some thirty-four states. (26) As we shall see presently, many of the treaties concluded during this period were, and still are, of considerable significance for South Africa.

The nineteenth century can consequently be regarded as the period during which the extradition treaty as we know it today came into its own. More extradition treaties were concluded during this period than in either the preceding or subsequent eras. Not only had the aims of the states involved in extradition shifted from an almost total self interest to an embodiment of the growing realisation and expression of the prevention of crime as a socially desirable principle, but the scope of extradition had moved from the purely physical aspects of man in his environment, to the protection of man's economic and material well-being.

The twentieth century, too, has seen development in the law of extradition. As regards principle, however, this has not been as fundamental as that of the nineteenth century. Again, improvement in transport and communication and the coming of the computer age, have necessitated adaptations to the extradition process as criminals have become ever more astute in the use of technology to perpetrate their crimes, and of supersonic aircraft to evade the consequences of such crimes.

Bassiouni, (27) in dividing the development of extradition into various phases, takes as his last stage 1948 to the present. (28) 1948 marks the adoption of the Universal Declaration of Human Rights (29) and the entry of the individual to be extradited into the forefront of extradition practice. No longer is the individual seen merely as a shuttle to be passed between countries at the will of the sovereign. The Human Rights movement has recognised certain inalienable rights

accruing to the individual of which extradition practice must take account. Since 1948 extradition practice has to an increasing extent recognised the need "for protecting the human rights of persons and...to have international due process of law regulate international relations". (30)

Although the general attitude of states in the twentieth century would appear to be somewhat apathetic when it comes to the conclusion of specific extradition treaties with other individual states, (31) these more limited treaties would appear to be giving way to multipartite conventions and an increasing reliance on reciprocity as basis for extradition. (32)

Developments in extradition law and practice have ever mirrored the condition of man at that specific time. Consequently we have seen that in its early stages, extradition was largely a utilitarian process based on the self interest of states. As man became more criminalised, so too was the need for cooperation more keenly perceived. The needs of the twentieth century too, have given rise to the need for new trends in extradition. One thinks in particular here of the narcotics problem and of terrorism, both of which have proliferated during the twentieth century. Extradition has been expanded to meet these needs with the adoption of the narcotics provision by most countries in terms of which the concept of "extraditable crimes" was expanded to include narcotics offences. (33) Similarly, the international conventions for the control of hijacking and terrorism in general, include extradition

provisions.⁽³⁴⁾

The needs of the twentieth century have indeed raised challenges to the traditional concepts inherent in extradition, but extradition practice would appear, at least for the present, to be ready to meet these challenges and has proved surprisingly flexible in accommodating modern man's needs, aspirations and social condition.

How South Africa has fared during the developments sketched above will now be considered.

3 EXTRADITION IN SOUTH AFRICA

Early South African history can be divided into five distinct periods: 1652 - 1795 the Dutch East India period; 1795 - 1803 the First British Occupation; 1803 - 1806 the Batavian Period; 1806 - 1910 the Second British Occupation; and 1910 - 1961 the Union of South Africa. Although considerable attention has been paid to the development of private and procedural law during the various stages of South Africa's history, relatively little has been said of the territory's position under international law. To examine the position (or probable position) with regard to extradition during the various stages of the territory's history, it is necessary to determine who enjoyed sovereign power during the various stages. In short, where did South African sovereignty vest?⁽³⁵⁾ An attempt will consequently be made in this section to determine who was responsible for the

territory's international relations during the various periods of its development. Once this has been determined, the sovereign's attitude to extradition will be identified.

3.1 The Dutch East India period : 1652 - 1795

To understand who exercised sovereign power at the Cape during the supremacy of the Dutch East India Company, some attention will have to be paid to the position in the Netherlands during this period.

By 1648 the loose association of states which had "ongemerkt tot stand gekom" (36) had formally become the Republic of the United Netherlands. Within the structure of the Republic, the various territories retained absolute sovereignty over matters of internal concern. However, in matters of mutual concern responsibility was vested in the States General. This was a body made up of representatives of the sovereign regions comprising the Republic which was summoned to decide on matters of mutual interest. In terms of article 9 of the Treaty of Utrecht of 23 January 1579, the States General was responsible for the declaration of war and conclusion of peace, for the conclusion of treaties, and for the regulation of diplomatic relations. In short, within the Netherlands, the foreign relations function generally falling to the sovereign was in the hands of the States General. (37) In the words of Visagie, the States General was the "volkeregtelike soewerein". (38)

This sovereignty enjoyed by the States General extended not only over the specific regions comprising the Republic, but included the so-called "Generaliteitslande" (39) and - of particular relevance for present purposes - the Dutch East and West Indian Companies.

"Die State-Generaal was dus, as volkeregtelike soewerein, die enigste bevoegte wetgewende orgaan vir die gebiede begrepe in die Oktrooie van die Oos- en Wes Indiese Kompanjee (insluitend die Kaap die Goeie Hoop)".
(40)

Consequently, when Van Riebeeck landed at the Cape on 6 April 1652 with instructions to establish a half-way provision post for the Dutch East India Company, he brought with him as sovereign power in the region, the States General of the Netherlands. In terms of the Charter, (41) the company was empowered to trade in the territory east of the Cape of Good Hope to the Straights of Magellan. (42) These powers included the authority to conclude treaties in the name of the States General with native chiefs and potentates. (43) They, however, fell short of providing which legal system was to apply.

During the company rule at the Cape, some one hundred and forty years, powers relating to foreign affairs consequently fell under the States General. The company was specifically empowered to conclude treaties with local chiefs, and although it is certainly not inconceivable that company officials and local chiefs with whom they came into contact did indeed conclude some form of agreement for the surrender of criminals (one thinks here particularly of stock

thieves), no specific record of such agreements could be traced. The general approach of the States General towards extradition during this period is however illustrated by two cases cited by Clarke. In the first, the States General handed over persons involved in the murder of Charles I, although they were not obliged by treaty to do so. (44) In the second, *Burnet's case*, a treaty had been concluded between the Dutch and the British. (45) Burnet was wanted by Britain to face charges relating to "violent writings" against the king. He was at the time in Holland where he was serving as secretary to the Prince of Orange. Burnet had, in anticipation of the claims against him, become naturalised in Holland, and when called upon to answer the charges, claimed Dutch protection as a naturalised subject. In refusing to surrender Burnet, the Dutch replied that "naturalisation (is) a sacred thing". (46)

While these two cases do illustrate that the States General was indeed prepared to extradite if favourable circumstances existed, they do not take one much further as regards the actual position in the Cape during that period. They are, however, of interest in that they illustrate the conception of extradition prevalent in Europe at that stage, viz that it was reserved largely for crimes against the sovereign, here regicide and treason. That such considerations could in any way have prevailed at the primitive Cape settlement is virtually unthinkable. The entire basis upon which extradition in Europe was founded at that stage was thus lacking. Furthermore, the factors which had in Europe led to a broadening of the base for extradition during the seventeenth and early eighteenth centuries,

were also irrelevant at the Cape. The territory had no closely neighbouring states between whom the need for surrender could be said to arise. Treaties or agreements which may indeed have existed between company officials and local chiefs, can hardly be equated with "high policy" extradition treaties existing in Europe. (47)

On the other hand, the factors negating the development of a coordinated extradition policy, and which had influenced such a policy in Britain and the United States, were even more cogent within the South African or Cape context. Distances were vast; communication virtually non-existent; and transport and travel generally hazardous. The unpredictability and lack of communication between the "imported" white population and the indigenous locals, could indeed give full force to Shearer's summation that a criminal lost was a problem solved. (48)

For all intents and purposes, therefore, South Africa has no "extradition history" during the seventeenth and early eighteenth centuries.

3.2 The First British Occupation : 1795 - 1803

The supremacy of the Dutch East India Company, and thus of the Netherlands, came to an end in the Cape in 1795 with the First British Occupation of the territory. Alarmed by French successes in

Europe and eager to protect its maritime supremacy and valuable trade routes, Britain revised its earlier evaluation of the Cape (49) and occupied the territory in 1795. (50) The British never intended the occupation to be permanent, and although technically sovereignty over the territory passed from Dutch to British hands, the effect on the inhabitants was slight. While as regards the applicable municipal law at the Cape the change was minimal, (51) as regards international law it was still less significant.

As regards extradition, the salient factor to be considered at this period - apart from the essentially temporary view of the occupation held by Britain - was general British policy at the time. As we have seen above, Britain had not at this stage entered into extradition treaties to any great extent. Although it was during this period that Britain concluded both the Jay Treaty and the Treaty of Amiens, neither had any lasting effect on British extradition practice. (52)

It was however during this period that international law, as applied by Britain and British courts, first gained a foothold in the South African legal system through the establishment of the Admiralty Courts in the Cape Colony. (53) As Booyesen however indicates, (54) caution must be exercised before sweeping assumptions as to the application of international law in the general sense can be made from Admiralty or Prize Court decisions.

In theory, therefore, the extradition agreements by which Britain was bound during this period could have been applied against a fugitive

from justice finding himself in the Cape. However, no record could be traced of actual extradition proceedings during this period and also no direct reference to extradition. One must consequently conclude that during the First British Occupation of the Cape, South Africa was - at least as regards extradition - no further advanced after the occupation than before.

3.3 The Batavian Period : 1803 - 1806

By 1795 the government in the Netherlands had fallen and the Batavian Republic been established. (55) During the same period, the steady decline which the Dutch East India Company had been experiencing finally culminated in the disbanding of the company. (56)

Consequently when the Cape was handed back to the Dutch in 1803 (57) the sovereign authority over the region was no longer the States General or the Dutch East India Company, but the government of the Batavian Republic. On 1 March 1803, the Batavian governor of the Cape issued a proclamation expressly stating that the Cape would no longer be subject to the "Hoë Regering in Indië of enige hyandels liggaam", but would fall directly under the "opperbestuur van die Bataafse Republiek". (58)

Although the Batavian period indeed saw a few changes to the legal system at the Cape, in essence "die materiele reg (is) onaangeraak gelaat". (59) As regards international law, too, the impact must be seen as slight, or at best indirect. The nineteenth century

developments in European extradition were far reaching and, as was pointed out above, France was at the forefront of these developments. As the Netherlands had been overrun by France, it is to be expected that there was considerable French influence within the Batavian Republic. It is not inconceivable that these influences may indeed have filtered through to the Cape by means of the trained Batavian officials, steeped in European tradition, who dominated the political scene at the Cape during this period. (60) Their influence on the international law scene - and on extradition in particular - cannot be accurately determined as here too, no record of extradition proceedings or arrangements could be traced. The strongly individualistic European tradition set during this period could, together with subsequent British practice, offer some explanation of the fairly sophisticated extradition arrangements which the Boers later concluded.

Thus far it can be seen that the sovereign authority at the Cape after the initial century and a half of Dutch dominance, passed rapidly first to the British and then back to the Dutch. During this period the Cape played virtually no role as regards extradition; although theoretically it was possible for a fugitive offender seeking refuge in the territory to have been extradited, first by the States General, then by the British and finally by the government of the Batavian Republic. No record of such extradition could however be traced. The possibility also exists that a purely "local" form of surrender between, in particular, the officers of the Dutch East

India Company and "local chiefs and potentates" may have occurred. However, here too, no documentary proof could be found.

For all practical purposes, South African extradition history consequently starts with the Second British Occupation of the Cape in 1806.

3.4 The Second British Occupation : 1806 - 1910

The history of extradition in South Africa has thus far been considered purely on a temporal plane. This was possible as until fairly well into the Second British Occupation, South Africa for all intents and purposes consisted only of the Cape of Good Hope. However, during the period 1836 - 1910 (61) South Africa's borders extended considerably. Four distinct areas emerged and as their constitutional status waxed and waned so did responsibility for their foreign relations and the authorities who could conclude treaties on their behalf and perform under these agreements. Consequently, for this stage of the examination the temporal phase will have to be abandoned and a regional approach adopted to cover the period starting with the Great Trek and culminating in the unification of the various regions as the Union of South Africa. The constitutional and international status of the Cape of Good Hope, Natal, the Orange Free State, and the Transvaal will thus be considered separately to determine their positions with regard to extradition during the various stages of their development.

3.4.1 The Cape of Good Hope

Batavian rule, like the First British Occupation, was short lived. With the resumption of hostilities with France, Britain realised that if it wished to retain its maritime superiority and protect important trade routes, a permanent presence at the Cape was required. (62) Consequently on 10 January 1806, Sir David Baird occupied the Cape of Good Hope for the British - this time with the intention of remaining permanently. (63)

The question of who represented the Cape of Good Hope on the international plane from 1806 - 1910 presents few serious problems. As a British Colony, the Cape eventually acquired a measure of self government and finally representative and responsible government (64). This was, however, relevant only as regards municipal law as one of the characteristics of the British Colonial system was that a Colony was not entitled to adopt laws having extra-territorial effect. (65) Furthermore, as was pointed out in a recent case dealing with the status of Colonial possessions :

"Colonies were not competent to sign treaties. They might be consulted about treaties affecting them. They might become involved in negotiations under the aegis of the Imperial authorities, but the ultimate control and responsibility in treaty matters rested with the Imperial government." (66)

Consequently, during this period Britain was the international sovereign for the Cape of Good Hope and it was the British sovereign who concluded treaties on behalf of the Cape.

As was seen above, it was during this stage that Britain embarked upon its active extradition policy. (67) Many of the treaties concluded by Britain at this stage were made applicable to her colonies and dependencies, including the Cape of Good Hope. In this way South Africa was for the first time brought into the international extradition arena in any meaningful sense.

Treaties with the following states concluded by Britain during the period to 1910, applied to the British "Colonies and foreign possessions". A number of standard clauses were used in these treaties extending the application of the provisions to such Colonies, and providing for the procedure to be followed. These are listed in the table below. The table is preceded by a brief summary of the relevant provisions.

- a) The stipulations of the present treaty apply to the Colonies and foreign possessions of the contracting parties.
- b) Requests for the surrender of a person accused or condemned who has taken refuge in a Colony or possession shall be made to the governor or chief authority of such Colony or foreign possession by the chief consular

officer of the other party residing in the Colony or possession.

- c) If the fugitive has escaped from a Colony or foreign possession of the party on whose behalf the request is made, the request shall be made by the governor or chief authority of such Colony or possession.

- d) Such requests may be disposed of, in accordance with the stipulations of the treaty, by the respective governors or chief authorities who, however, shall be free either to grant the extradition or to refer the matter to their own governments for decision.

- e) The right is however retained to make special provisions for surrender, corresponding as closely as possible to the provisions of the treaty.

- f) Requests for the surrender of fugitive criminals emanating from a Colony or foreign possession are governed by the rules laid down in the treaty.

TREATY	DATE	ARTICLE	PROVISIONS	FOOTNOTE
Germany	1872	15	a b d e f	68
Brazil	1872	16	a b d e	69
Italy	1873	18	a b c d e	70
Denmark	1873	13	a b c d e	71
Sweden & Norway	1873	14	b c d e	72
Austria/Hungary	1873	17	a b d e f	73
Hayti	1874	15	a b d e f	74
France	1876	16	a b c d	75
Spain	1878	10	a b c d	76
Equator	1880	15	a b c d e	77
Luxemburg	1880	14	a b d e f	78
Switzerland	1880	18	a b d e f	79
Salvador	1881	17	a b d e f	80
Uruguay	1884	10	a b d e	81
Mexico	1884	17	a b d e f	82
Russia	1886	18	a b d e f	83
Guatamala	1885	17	a b d e f	84
Colombia	1888	17	a b d e f	85
Argentina	1889	17	a b d e f	86
Monaco	1891	20	a b d e f	87

TREATY	DATE	ARTICLE	PROVISIONS	FOOTNOTE
Bolivia	1892	17	a b d e f	88
Portugal	1892	17	a b d e f	89
Liberia	1892	17	a b d e f	90
Romania	1893	17	a b d e f	91
Chile	1897	17	a b d e f	92
Netherlands	1898	18	a b d	93
San Marino	1899	19	a b d e f	94
Servia/ Yugoslavia	1900	17	a b d e f	95
Belgium	1901	14	a b c d e	96
Peru	1904	17	a b d e	97
Cuba	1904	17	a b d e f	98
Nicaragua	1905	15	a b d e f	99
Panama	1906	18	a b d e f	100
Paraguay	1908	18	a b d e f	101

From the above provisions it is clear that Britain and its contracting partners intended that the treaties concluded by them should apply with full force to the various Colonial possessions, and thus to the Cape of Good Hope. The governor of the Cape Colony, a British official, both received and made requests for surrender and decided such requests as were received.

Apart from the treaties listed in the table above, mention can also be made of treaties concluded by Britain where reference was made

only to "territory of her Britannic Majesty" and can consequently be taken to include Britain's Colonial possessions. (102)

In addition to the British extradition treaties listed above which applied to the Cape by specific provision, mention must also be made of the Fugitive Offenders Act of 1881. (103) As the many British possessions of the time were not "foreign" in the sense of being sovereign independent nations, the traditional extradition treaties concluded between Britain and foreign sovereign states were inappropriate to regulate extradition between these possessions. The extradition of fugitive offenders to and from these possessions was essentially movement within Britain as a "greater state" and was consequently arranged legislatively, first by a statute of 1843, (104) and subsequently by the Fugitive Offenders Act which repealed this legislation and provided, in detail, for such surrender. (105) As this Act was of considerable importance to South Africa, and in fact has been retained to an extent in the provisions of the present South African Act, (106) its principal provisions will be briefly considered.

Part I (107) of the Act provided for the return of fugitives who, having committed an offence in one part of the Colonies, had taken refuge in another. (108) Special provision was made in section 3 for the apprehension of a fugitive under an endorsed warrant. This meant that where a warrant for the apprehension of an individual had been issued in one part of the Colonies, certain officials in another part where the fugitive had sought refuge, could, if satisfied that

the warrant had been issued by a competent authority, merely endorse the warrant which would then have full effect in the Colony in which refuge had been sought. Full provision was then made for the subsequent treatment of the offender culminating in his surrender or release. (109)

Part II of the Act dealt with the inter-colonial backing of warrants. This part of the Act applied only to "those groups of British possessions to which, by reason of their contiguity or otherwise, it may seem expedient to Her Majesty to apply the same". (110) The backing of warrants system is set out in section 13 which provides that where a warrant has been issued against a person in a possession to which this part of the Act applies, for an offence committed in that possession, and such a person is suspected of being in another possession of the same group, a magistrate in this latter possession who is satisfied that the warrant was issued by a person of competent authority, may endorse the warrant in his possession. The fugitive mentioned in the warrant may then be apprehended and brought before the magistrate in the endorsing possession. Again full provision is made for his eventual surrender or release. (111)

Part III of the Act, *inter alia*, makes special provision for offences committed in two adjoining British possessions (112), while Part IV specifically empowers the legislature[s] of British possessions to enact laws carrying the Act into effect. (113)

It can consequently be seen that during the period 1806 - 1910 the extradition of fugitives from justice was well developed in the Cape of Good Hope. As it was a British possession, all British treaties applied with full force in the territory and provision was made through the backing of warrants, for the surrender of fugitives between the various British possessions which did not qualify as independent states with whom the conclusion of treaties would have been technically possible.

As the Cape of Good Hope was, even from the earliest times, a single settled community under a clear - albeit varied - authority, few problems exist in determining who was sovereign at any given time. In the rest of what is today the Republic of South Africa, however, matters were not so simple, due in no small measure to the manner in which these areas of the country were "tamed" and eventually settled. It is to these territories that attention will now be turned.

3.4.2 Natal

The history of Natal is almost as old as that of the Cape of Good Hope. Sent by the king of Portugal to find a suitable trade route to the East, Vasco da Gama "sailed along an undiscovered coast, which they named (from the day of exploration) Natal or Christmas".⁽¹¹⁴⁾ Da Gama did not, however, disembark at that stage preferring to continue with his quest for the East. ⁽¹¹⁵⁾

From its discovery until fairly late in the seventeenth century Natal remained largely uninhabited by whites, although it would appear to have served as a haven for shipwrecked sailors, many of whom recorded their experiences in the region. Certain of these sailors in fact decided to settle and with the blessing of the local population, a small core of whites established themselves in Natal. (116) The intention of these settlers was certainly not to establish an independent state; their main interest lay in making a profit from hunting - notably for ivory. Although Simon van der Stel, the then governor of the Cape, was instructed by the Chamber XVII to purchase the bay of Natal and surrounding land, and apparently did so, (117) this acquisition would not appear to have been taken very seriously by either the Dutch or the natives. (118) Port Natal was nonetheless declared to be "subject to the government of the Cape of Good Hope and under the control of the High Indian Government in like manner as all other Indian Governments and departments are" (119) and was included in the articles of capitulation of 1806 in terms of which the Cape was handed over to the British. (120)

The period commencing in 1820 saw a considerable increase in the British population in the Cape. Many of the 1820 settlers were established on what was known as the eastern frontier. However, whether motivated by sheer adventurous spirit, or the inevitable profit motive, certain of these settlers found their way to Natal where they settled round Port Natal. Notable among these were Lieutenants Farewell and King and a Mr Flynn. The general confusion surrounding the acquisition of land in Natal during this period is

clearly apparent from the settlers' dealings with the Zulu chiefs. One consequently finds that the same tract of land was sold to different people at various stages. Thus, in 1824 Chaka, then King of the Zulu nation, made a grant of land to Farewell "extending fifty miles inland, and twenty-five miles along the coast, so as to include the harbour". (121) A few years later, however, Chaka granted King "The free and full possession of my country near the sea coast and Port Natal...with the islands in the Natal harbour...together with free and exclusive trade of all my dominions...". (122)

The Zulu nation was positively inclined towards white settlement in Natal and as a consequence the number of settlers grew. These remained largely British nationals but would appear in all dealings with the natives to have acted in a personal capacity and not as representatives of the Crown. Indeed, Britain was then, as later, reluctant to extend her influence in Southern Africa to include Natal as a Colony or formal dependency. (123) Despite the fact that Farewell was regarded by the Zulu king as the "Chief" of the whites at the settlement, there can also be no question of an independent state having been established by the British settlers ; this was neither their nor the British government's intention.

Dingaan who succeeded Chaka as the Zulu leader, was also prepared to allow white settlement. The settlers were clearly regarded by Dingaan as equals within their own territory as is evidenced by the "treaty" concluded between him as king of the Zulu and the British residents of Port Natal in 1835. (124) This agreement, which is fully

reproduced below, is the first independent agreement embodying what can loosely be regarded as extradition provisions which could be traced in South Africa. Concluded at Congella on 6 May 1835, the agreement reads :

"Dingaan, from this period, consents to waive all claim to the persons and property of every individual now residing at Port Natal, in consequence of their having deserted from him, and accords them his full pardon. He still, however, regards them as his subjects, liable to be sent for whenever he may think proper.

The British residents at Port Natal, on their part, engage for the future never to receive or harbour any deserter from the Zulu country or any of its dependancies, *and to use every endeavour to secure and return to the King every such individual endeavouring to find an asylum among them.*

Should a case arise in which this is found to be impracticable, immediate intelligence, stating the particulars of the circumstances is to be forwarded to Dingaan.

Any infringement of this treaty on either part invalidates the whole". (125)

With this agreement at hand, it is perhaps apposite to consider the status of nineteenth century "treaties" between indigenous rulers and foreign powers - more specifically between African rulers and the British government. A fresh appraisal of the problems and traditional attitudes surrounding such agreements was recently undertaken by John Mugambwa (126) and as this is an issue which will arise repeatedly in this section, his arguments deserve some attention.

As is clear from the *Island of Palmas Arbitration* case, (127) a treaty must be interpreted within its own time frame, and as emerged from the *Anglo Iranian Oil* case, (128) it must be seen against the historical context within which it was concluded. In the present instance we are consequently examining an agreement between arguably, the strongest indigenous ruler in Southern Africa at the time, and a handful of white settlers.

Traditionally such agreements were denied internationally binding status on the grounds that the primitive, pagan and uncivilised indigenous ruler, was unable to comprehend the complexity of the act he was performing. (129) The agreement was indeed no more than a scrap of paper embodying, at most, a moral obligation violable at the will of the "civilised" European power. Westlake attempted a slightly more scientific approach in that he laid down certain criteria against which the indigenous society could be tested. (130) His three-tier test was heavily weighted in favour of the white settlers and premised treaty capacity on a certain measure of civilisation which was to be determined by the answers to three questions. First, were the white settlers able to enjoy the lifestyle they had enjoyed at "home"? Second, could the territory be adequately protected from claims made by competing European powers? Third, could the natives be maintained in the security and well-being they had enjoyed before the arrival of the settlers? Applying these criteria, he had no difficulty in rejecting the African tribes as uncivilised and consequently lacking in treaty capacity. In these terms, the "extradition" treaty cited above, was to all intents and purposes

meaningless. This view is further strengthened by the fact that at the Berlin/West Africa Conference at which the thirteen states most closely concerned in the so-called "scramble for Africa", made no mention of the consent of the indigenous rulers being required before their land could be parcelled off. Any acquisition of territory required only notification to the other signatory powers. (131)

Mugambwa, however, is not convinced by these arguments. If the colonising states were secure in their convictions, and the indigenous rulers indeed lacked sovereignty, why the obsession with treaty-making during the scramble for Africa? (132) This process reached its zenith when in 1897 Major Macdonald, on the orders of the British Foreign Secretary, succeeded in getting no fewer than twenty-eight indigenous rulers to sign "treaty forms" in which they agreed not to conclude treaties with other foreign powers without the approval of the British government. If these chiefs enjoyed no sovereignty over their territories, one wonders why their sovereign authority was expressly recognised in the agreements concluded with Britain?

The British legal advisors of the period, too, seem reasonably ambivalent on the question of the sovereignty of indigenous rulers. Particularly as regards Southern Africa, the Colonial Secretary stated in a question on the validity of certain treaties concluded with the indigenous ruler in Bechuanaland, that the chiefs were "completely independent...[and]...competent to cede or delegate their sovereign authority...". (133) The advisors confirmed that rights

could be acquired by the British from the local rulers by way of treaty.

Judicial opinion would also appear to support the sovereignty of indigenous rulers under certain conditions. (134) Most notable in this regard is the *Masai* case. (135) Here the court was called upon to decide on the enforceability against the Crown, of a treaty concluded with the leader of the Masai tribe. The judge held that as the Masai possessed an "entity of their own as a tribe" and were a "military people who could put up a force of some thousands of spearmen into the field", there could be no doubt that they and Britain could come to an agreement "in the nature of a treaty". Although it is not quite clear what is meant by an agreement in the nature of a treaty, a separate judgment delivered in the case clearly stated that the agreement between the Crown and the Masai "was a treaty". (136)

Closer to home, in the *Re Southern Rhodesia* case, (137) Lobengula was recognised as "the king of the country", and no one was able to exercise jurisdiction in the territory without his permission.

If the decisions of municipal tribunals are considered unconvincing on the international plane, one can turn to the *Western Sahara* case (138) which should dispel any remaining doubts. There the court held that :

"Whatever differences of opinion there may have been

among jurists, the state practice of the relevant period indicates that the territories inhabited by tribes or people having a social and political organisation were not regarded as *terra nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as affected unilaterally through "occupation" of *terra nullius* by original title but through agreements concluded with local rulers".

The conclusions to be drawn from the above are that it would be premature to classify all agreements between foreign powers and indigenous rulers or chiefs as unenforceable and indeed violable at the whim of the foreign power. Although this could indeed be the case with certain of these agreements, each should be considered on its merits, the capacity of both parties being tested.

In applying these criteria to the agreement under consideration, it is ironic that the lack of capacity should lie not at the door of the "primitive" ruler Dingaan - indeed, although he would have been found wanting in terms of Westlake's arrogant and idealistic standards of "civilisation", he would certainly meet the requirements set in both the *Masai* and *Western Sahara* cases - but rather at that of the "civilised" white residents of Port Natal represented by Gardiner at the signing of the agreement. Although the white settlers in Natal wished to be placed under British protection and to bind the Crown through their agreements, the British government was at this stage unwilling to extend its influence, (139) and the agreement can be considered as no more than an undertaking between an indigenous

ruler, Dingaan, and a group of individuals who happened to be British.

Having overcome the initial disappointment of having to reject the treaty status of South Africa's first "extradition treaty", we can see that the document nonetheless remains of some practical interest in that it reflects the prevailing attitude to and perceptions of extradition held by the inhabitants of Natal.

In the first place, the agreement shows that extradition was not perceived as a reciprocal obligation. The obligation to surrender is undertaken only by the white settlers. This is perhaps understandable when one considers that there were no more than a handful of whites in the settlement and that for them escape to some other territory was impracticable, to say the least. The position is loosely analogous to that in pre-eighteenth century Europe sketched above. (140) Secondly, the agreement provides for extradition in one instance only - that of a military deserter. Again this harks back to early European arrangements (141) but in modern-day terms is the one category generally excluded from extradition. (142) Furthermore, modern conceptions of asylum, which interestingly enough is mentioned *eo nomine*, are also violated. (143)

All this aside, the agreement does show that the concept of extradition was from an early date perceived by the inhabitants of the region to be an issue on which negotiation on the highest level - albeit not international in the true sense - could and should take

place. It is interesting to note that the agreement did not hold for any length of time. When Dingaan issued a request in terms of the agreement for the return of a number of his subjects who had fled to the white settlement for protection, the British residents were deeply divided on whether or not to accede to his request. (144) Eventually a number of persons, including a woman and two children, were handed back to the Chief. This signalled the end of the agreement, however, as the white residents felt unable to sanction the delivery-up of women and children to certain death. (145)

Despite various requests for the area inhabited by the British settlers to be recognised by Britain as a Colony, the British authorities were reluctant to extend their influence in Southern Africa. (146) At this stage a new element was introduced into the Natal scenario. From as early as 1834, rumblings of discontent had been mounting among the Afrikaner population at the Cape who felt constricted under what they perceived as the British yoke. This culminated in 1837 in, if not a mass exodus, at least a substantial departure of a number of leading Afrikaners and their families from the Cape in search of new territories free from British influence. A number of these Trekkers moved to Natal and settled among the British inhabitants. (147)

Their intention in leaving had been to escape British domination and to be free to establish a state of their own, subject to their own laws. Notable among these Trekkers was Piet Retief who soon established himself as the leader in Natal. As such he set out to

negotiate a treaty with Dingaan which would allow the Trekkers to settle permanently and in peace with the black inhabitants of the region. (148) The attitude of the British at this stage was that "the pretension which they make to constitute a free and independent state is so extravagant, that I can hardly suppose it was seriously intended." (149)

Negotiations with Dingaan were initiated and although he declared himself "almost inclined" to cede the territory to the Boers, he first required that cattle stolen from him be recaptured and returned to him by the Trekkers. (150) This was duly done, and after the murder of Retief and his men by the Zulus, a document ceding the territory to the Boers was found among their remains.

As it is largely on this document the Boer claims to sovereignty over the Republic Natalia rest, the agreement is reproduced in full before the validity of these claims is considered. (151)

" Umgungundhlovu 4th February, 1838.

KNOW ALL MEN BY THIS - - That whereas Piet Retief, Governor of the Dutch immigrant South Africans, has retaken my Cattle, which Sikonyela had stolen; which Cattle he, the said Retief, now deliver unto me : I, Dingaan, King of the Zulus, do hereby certify and declare that I thought fit to resign unto him, Retief, and his countrymen (on reward of the case hereabove mentioned) the Place called "Port Natal" together with all the land annexed, that is to say, from Tugela to the Umzimvubu River westward; and from the sea to the North, as far as the land may be useful and in my

possession. Which I did by this, and give unto them for their everlasting property."

Although this agreement does not fit the mould discussed above in that no European power is involved, it being what could almost be termed an agreement between two indigenous leaders, it may nonetheless be tested against the criteria set as to the capacity of the parties. On the side of the Zulus, there can be little doubt that on the criteria discussed above, Dingaan was a leader of an organised tribal society, living under a strictly hierarchical system, subject to stringent discipline. Dingaan must therefore be regarded as the sovereign of the region who could freely transfer power to the Boers. The question arising, however, is to the capacity of Retief, as leader of the Boers. As was seen above, the earlier "treaty" could be flawed on the basis of the lack of capacity of the British residents to either represent or bind Britain which refused to acknowledge their existence as part of the British Empire. In the case of the Boers no such problem existed. As is clear from the wording of the document, in both his own and in Dingaan's perception, Retief was acting as the representative of an independent group of people. It is perhaps strange that in attempting to shake off the Colonial yoke, the Boers should have chosen to term their leader "governor", but the intention is clear. We are thus dealing with an agreement between a "king" on the one hand, and a self-styled independent leader on the other.

This however, is merely one element to be taken into account.

Although *prima facie* one may be dealing with a valid cession of land,

the acquisition of which could give rise to valid title, the crucial question is whether the land so acquired could indeed be regarded as a separate independent state. In other words, did the Republic Natalia in fact exist as an independent viable state capable of granting or refusing extradition requests and concluding treaties?

The requirements for statehood as enunciated in the Montevideo Convention are well known and may briefly be summarised as a permanent population, living within a defined or definable territory, with a government of their own, which is capable of acting independently on the territory's behalf on the international plane. (152) The element of recognition is often crucial, although its status as a separate requirement is not without controversy. (153)

That the Boers intended their settlement to be permanent is clear from statements made by leaders at the time. (154) This is further borne out by the wording of the document, viz that the territory was to be given to the Boers as their "everlasting property". It is also clear that a form of government was established by the Boers. (155) Although this government was a largely local affair with little thought of external relations, the Trekkers did expressly declare themselves free from all British influence, and in concluding the agreement under discussion, they were, at least in their own perception, acting as independent sovereigns. (156)

However, problems arise when one comes to consider the territorial basis for the Boers' claims for Natal as an independent republic. The

territory claimed by the Boers in terms of the treaty with Dingaan, had at various stages been annexed by the Dutch, ceded to the British, re-sold to the British residents (on various occasions!) and then finally given to the Boers. Although Britain had declared itself unwilling to regard Natal as a separate Colony, and made no effort to set up an administration in the territory, it had accepted cession from the Dutch and later in fact raised this acquisition to support its claim to title. (157)

The Boers in turn based their claim to title on the treaty and on annexation following upon conquest. Although Du Plessis (158) sees this as sufficient to establish valid claim to territory, it is submitted that the position was at best uncertain, and in fact, given the British attitude to allegiance prevalent at that period, doubtful. (159)

Similarly the question of recognition presents problems. Whether recognition is regarded as declaratory or constitutive of international capacity and thus sovereignty for present purposes, is largely irrelevant within the Natal context. In either event there cannot be said to have been any meaningful recognition of the Republic of Natalia. Two "acts of recognition", both indirect, could be traced. The first is the treaty with Dingaan cited above. Although it has been submitted that the Zulu nation was indeed sovereign at that stage, what status its recognition of Boer claims to independence would be accorded internationally - given the prevailing perceptions - must be regarded with circumspection. Furthermore, its

act of recognition is embodied in a document purporting to transfer territory to which the Zulu nation's title was, at least, suspect. The second is recognition embodied in a treaty with the Free State Republic concluded in 1840. (160)

On the other hand, Britain, the only world power directly involved, expressly refused any form of recognition to the Boers as an independent state and even refused them an identity free from their allegiance to the Crown. (161)

In summary, therefore, the Republic Natalia was, it is submitted, never an independent state capable of concluding or acting under extradition treaties with other independent nations. The only extradition agreement dating from this period, viz the agreement between Dingaan and the British residents of Port Natal, was not an international agreement in the true sense and was in any event abrogated by the residents before the Boer settlement of the area. It could consequently not have been "inherited" by the Boers even were its original validity not in question. In any event the myth of an independent Natalia was short lived. In 1844 the territory was finally formally annexed by Britain and took its place in the South African scene as a separate British colony. (162)

As a British colony, British extradition laws would find full application in the territory and what was said of the extradition agreements applying at the Cape, applies with equal force to Natal (163). As in the case of the Cape Colony, the British treaties were

given municipal application within Natal by virtue of Law 6 of 1892.
(164)

Many of the Boers who had initially intended settling permanently in Natal found that they were no longer willing to do so after the British take-over. (165) They consequently moved on to join their fellows who had initially settled in the hinterland of what is today known as the Orange Free State and the Transvaal. Although the histories of these two regions are interwoven, they will be considered separately in as far as this is practicable.

3.4.3 The Orange Free State

The territory classed as the Orange Free State was first inhabited on a permanent basis by emigre Broer farmers from both the Cape and Natal in 1839. (166) Although in settling here, too, the Boers had intended shaking off the British shackles and establishing a state of their own, they were in fact faced with much the same problems encountered by their compatriots in Natal. Here too, they were still regarded as British subjects owing allegiance to Britain but receiving little in the way of the benefits accruing to that status. (167) On 3 February 1848 the British governor in South Africa, Sir Harry Smith, proclaimed the territory as a British possession. (168)

The Boers, however, still hankered after true independence and after numerous representations, eventually got round the conference table

with the British in 1854. (169) The result was the Bloemfontein Convention signed between Britain and the Orange River Sovereignty at Bloemfontein on 20 February 1854. Article 1 of the Convention provided that the inhabitants of the "Orange River Territory" were free of their allegiance to the British Crown and were for all intents and purposes "a free and independent people, and their government to be treated and considered, thenceforth as a free and independent Government." (170) Through this document the Orange River Sovereignty had been transformed from a British dependency into the Orange Free State, a Boer Republic. (171)

One need not look far for the effect of this action on extradition. Indeed, article 5 of the convention provides expressly that both governments would within their respective territories:

"wederzijdsch do uiterste vermogen gebruiken, om kwaad voortekomen en de vrede te onderhouden door het opvangen en overleveren van alle crimineelen die ontsnapt zijn, of die vlugten de geregtigheid, aan beide zijden van den Oranje Rivier". (172)

Although now an independent nation, responsible for its own foreign affairs, including extradition, the difficulties facing the state were far from past. The natives in the region, notably Moshesh, were restive. Eventually, through the mediation of Sir George Grey, a "treaty of peace" was concluded between Moshesh and the Volksraad. Here again, specific provision is made for extradition in that article 6 provides that "Basotho criminals" fleeing to the Free State

shall, on demand, be delivered to Moshesh, and all criminals fleeing from the Free State shall, on demand, be delivered to the Free State authorities. (173) That this peace treaty in fact did little to keep the peace is history. Interesting, however, is that article 6(2) was violated, and its violation was given as one of the "causes" of the war which ensued.

Full reports of the relevant incidents do not appear to exist. However, from the fragmentary comments available it would appear that Phillip Venter, a venerable Free State resident, was murdered by two of Moshesh's tribesmen who then sought refuge in Moshesh's territory. When requested to surrender the murderers by a deputation sent from the President, Moshesh refused. Second and third deputations were sent, but all met with the same response. Finally Moshesh offered the traditional Basotho recompense in the form of cattle, an offer which the Free State authorities declined. (174) So too, reference can be found to the Basotho chief Paulus Mopeli refusing to give up the murderers of a child. (175)

Matters came to a head on 9 June 1865 when the President issued a proclamation to the nation stating that the hour had arrived for the Free Staters to "take up arms for the vindication of our sovereign rights against the Basothos". (176) Among the reasons given for the declaration of war was "the murders of Venter and young Fourie". (177) The war that followed was short, peace negotiations being concluded on 3 April 1866. One of the terms of the Peace Treaty of Thaba Bosigo was that Moshesh would "deliver up to the state, on the

production of proper 'criminal warrants' all criminals from the state who had fled to His Country". (178) This treaty was, however, no more diligently observed than its predecessor and war again erupted in 1867. Letters were exchanged between the Volksraad and the Cape governor. In one of these, reference is again found to what would appear to be an "extradition issue". It would appear that certain persons, Bush and Krijnauw, were murdered by the Basutho and that attempts to have the murderers extradited failed. Although the full facts surrounding the incidents are not available, the governor of the Cape, Wodehouse, refers to it in a letter to the Volksraad dated 11 February 1868 in the following terms:

"Ik bemerk uit uw brief, day gij onwillg zijt om de vijandelikheden te staken, voordat het grondgebied, dat beweerd word veroverd en afgestaan te zijn geweest, van de Basutu's zal zijn gezuiverd, *en de moordenaars van Bush en Krijnauw uitgelewerd zullen zijn*". (179)

Feeling that the Cape governor was siding with the Basutos against them, President Brand addressed a letter to the British Colonial Secretary in which he traced the entire history of the Free State Republic, and protested against the acceptance of Moshesh as a British subject and the annexation of his territory as British territory. (180) In May 1868 two representatives of the Volksraad travelled to England to state the Free State's case. The result of their meeting with the Colonial Secretary was the appointment of a commission to investigate the entire Basuto question. Almost inevitably, yet another convention, the Second Convention of Aliwal

North, was signed on 12 February 1869. In article 10 of this convention the parties (Britain and the Free State) agreed that "from both sides criminals will be delivered up", but the exact terms of the delivery were to be determined in a "special convention" between the Free State and Basutoland governments once the latter had been established. (181)

This then was the position in the Free State Republic until it finally lost its independence to Britain in 1900 during the Second Anglo-Boer War. The territory was known as the Orange River Colony until it was united with the other South African territories in the greater British Union of South Africa. It is clear that for the major part of its early history there is little doubt as to the sovereign independence of the Orange Free State. As an independent state, it was also responsible for its own extradition grants and requests. Although there are few separate extradition agreements, virtually every one of the many peace treaties concluded by the state after 1854 contains either a specific extradition provision or some or other reference to the practice. Indeed, extradition was perceived as so important, that the nation was prepared to take up arms in its defence!

As was seen above, by 1854, the date of Free State independence, Britain had entered the extradition arena with full force and this must be seen as one of the factors influencing the importance attached to the practice in the independent state where British influence - as opposed to interference - was considerable. The

possibility must also be considered that the newly independent state succeeded to treaties concluded by Britain during its colonial period. However, as the question of state succession is canvassed fully in Chapter IV, no detailed discussion will be undertaken here.

After the final annexation of the state by Britain in 1900, the territory was again a British Colony to which the treaties listed above (182) and the Fugitive Offenders Act 1881, applied with full force. (183)

3.4.4 The South African Republic/Transvaal

While in international law terms, the status of the Orange Free State was never seriously questioned, the same can certainly not be said of the sister Boer Republic established to the North. Although a good deal of literature exists on the constitutional development of the territory during the early years of its existence, attention will here only be given to the status of the territory as a subject of international law capable of acting independently on the international plane and consequently of concluding and performing under extradition agreements. (184)

On leaving the Cape, the trekkers had declared their earnest desire and conviction that "[T]he English Government has nothing more to require of us and will allow us to govern ourselves without interference in future". (185) We have already seen, however, that this had proved to be no more than a pipe dream. The attitude of the

British to their erstwhile colonial inhabitants was clearly spelled out when they stated explicitly that the Boers "have no right or claim to be recognised as an independent^s state or people". In British eyes the Boers owed allegiance to the Crown. (186) This attitude was reiterated after the annexation of Natal which, it was stated, should not be seen as "a tacit renunciation" of control over British subjects who might decide to leave the territory and settle elsewhere. (187)

The Transvaal was populated by the diehard element among the Boers who rather than live under British rule had trekked North after the annexation of Natal and the Orange Free State; (188) taking with them a leader with a price on his head. (189) Despite initial British opposition to independence, circumstances conspired to favour the Boers and a combination of anti-colonial foreign policy in Britain and native unrest in both the Cape and Orange Free State, culminated in a meeting between British and Transvaal representatives at Sand River on 16 January 1852. The upshot of this meeting was the conclusion of the Sand River Convention between Britain and the Transvaal, or the South African Republic as it had then termed itself. (190) However, before considering the effect of this convention, it is necessary in the light of subsequent events, to consider the position of the Boers prior to the conclusion of the agreement.

Reference has already been made to the British attitude to the Boers in the Transvaal prior to the conclusion of the Sand River

Convention. Hofmeyr (191) examines the proposition that former subjects of a state living outside of its borders and not enjoying its protection, nonetheless owe allegiance to the state. He concludes that although a state is entitled in international law, to control its subjects in *terra nullius*, (192) it must be in a position to do so effectively. He cites Westlake who, in discussing the position of the inhabitants of the Transvaal at this stage in its history, concluded that :

"[I]f the emigrants were left to fight against the savage tribes without any support, and to battle the material difficulties attendant upon any new settlement, until such time as they had instituted (brought together) a government and conferred on it all that is necessary in the circumstances, for it to fulfil the functions of a state, then one could contend that, in justice, the old nationality no longer exists, and that the new state should be recognised as free and independent". (193)

If one were now to test British behaviour, as opposed to declarations, against these criteria and the general criteria for statehood identified above, (194) the status of the Transvaal, even prior to the Sand River Convention will emerge.

One finds, in the first place, a considerable population which had every intention of remaining permanently in the territory. (195) Furthermore, the territory inhabited, if not fully and finally defined, was sufficiently circumscribed to fulfil the requirements for statehood. (196) Government, albeit of a somewhat rudimentary

form, had been established, (197) and while foreign affairs were not directly addressed in so many words, they were conducted independently as will emerge presently. Finally, applying Westlake's criterion of leaving the new settlers to sink or swim, it is clear that this was the prevailing British attitude. (198)

Applying the declaratory approach to statehood (199) it is consequently clear that even before the conclusion of the Sand River Convention, the Transvaal - or the South African Republic as it had then styled itself - could be regarded as an independent state entitled to international legal personality and enjoying treaty capacity.

If one were to follow the constitutive approach to statehood, any doubt which may have existed is resolved in the Transvaal's favour by the terms of the Sand River Convention. Indeed, in initiating negotiations with the Transvaal leadership, Britain in fact acknowledged, even before formal conclusion of the treaty, that she was negotiating with, at very least, a *de facto* regime imbued with international legal personality. (200)

Article 1 of the Convention leaves no doubt as to the status of the parties or their intention. The Boers were guaranteed "het recht om hunnen eigen wetten, zonder eenige bemoeienis van den kant van Harer Majesteits Gouvernement". A clearer indication of British acknowledgment of Transvaal independence would be hard to imagine. The impression arising from the wording of the convention was

strengthened still further by subsequent British statements when preparing the treaty granting independence to the Orange Free State. Expressing the wish that the treaty should have binding authority as between two sovereigns, the British representative cited the Sand River Convention as an example to be emulated in achieving this goal. Consequently, whatever the position before the conclusion of the Sand River Convention, it is clear that after that date the Transvaal was a fully-fledged member of the international community. Although "Engeland was daarop aangewese om die eerste te wees om die erkenning te doen", (201) this was not the case for long.

It has been claimed that during the first few years of its independence the South African Republic actively followed an isolationist policy. (202) This is, however, not entirely borne out by the facts. The Republic, while mistrustful of foreigners wishing to enter its borders, actively engaged in a policy of diplomatic and consular representation. Consequently one finds that in 1857 the country's first Honorary Consul in the Netherlands was appointed, (203) while in 1870 a Consul was appointed in Britain. (204) In 1875, a Treaty of Commerce and Friendship was concluded between Portugal and the South African Republic. (205)

Specifically on the extradition front there would appear to have been little activity during this period. The only direct reference to extradition which could be found was embodied in the Sand River Convention itself where it was provided that :

"It is agreed, that so far as possible all criminals and other guilty parties who may fly from justice, either way across the Vaal River shall be mutually delivered up, if so required". (206)

Although all appeared peaceful and stable in the South African Republic for a number of years, this changed when gold was discovered in the region in 1871. The realisation of the potential profits from the goldfields coincided with with a period of calm in Britain with the result that the British government had time in which to reassess her views on the value of Southern Africa. At the same time, the South African Republic was not without problems of its own; notably financial ruin. (207) All these factors converged, resulting in the formal annexation of the South African Republic by Sir Theophilus Shepstone for the British on 12 April 1877. (208)

The question arising is how Britain, having acknowledged the independence of the Boers in the Sand River Convention, could now, by the stroke of a pen, revoke this status. (209) Heavy back-peddalling by British officials during this period was clearly aimed at denying Britain's original intention in concluding the convention. (210) The arguments are unconvincing and contrived and must have appeared even more so to the Boers involved in the situation. Consequently the Boers, who had not immediately taken up arms against the British as they believed the annexation was due to a misunderstanding, sent two deputations to Britain to negotiate for a restoration of their independence. These negotiations failed with the inevitable consequence. The South African Republic took up arms against Britain

in December 1880 (211) in an attempt to regain the independence of which they had been deprived.

After a number of defeats at the hands of the Boers, culminating in the Battle of Majuba on 27 February 1881, Britain was ready to negotiate. The result was the Pretoria Convention signed at Pretoria on 3 August 1881. (212) The convention allowed the Boers self-government subject to the suzerainty of Britain. The Convention embodied a number of provisos, the most relevant of which for present purposes was article 2(c) which retained for Britain :

"Het toezicht op buiten-landsche betrekkingen van genoemden Staat insluitend het aangaan van tractaten en het regeelen van het diplomatieke onderhandelingen met vreemde Mogendheden, moettende zulke onderhandelingen gevoerd wordor door middel van H.M.'s diplomatieke en consulaire ambtenaren buitelands". (213)

Needless to say the Boers were far from satisfied with this convention which they regarded as a violation of both the 1852 Sand River Convention and the undertakings given by the British at the time of the cease-fire agreement. Although prepared to accept a certain measure of British supervision over their foreign relations, the Boers were opposed to the British conducting these relations for them, which was what the Convention provided in article 2(c).

Deputations to Britain again fell on deaf ears and, reluctantly, the Boers ratified the Convention on 25 October 1881 - but only as a temporary measure and for a trial period. (214) After some two years

the Boers addressed a letter to the British government in which it was pointed out that the :

"Convention in its entirety...[was]...a document which neither in origin, nor in tendency, nor in practical working, meets the requirements of the country". (215)

Britain too, had realised this and the upshot was the London Conference (216) which resulted in the signature of the London Convention on 27 February 1884.

In this Convention no mention is made of Britain's suzerainty over the South African Republic. As regards foreign affairs, the only apparent restriction placed on the Boers was that contained in article 4 which reads as follows :

"De Zuid Afrikaansche Republiek zal geen verdrag of verbintenis aangaan met eenigen Staat of Natie, behalve met den Oranje-Vrijstaat, noch met eenigen inboorlingen-stam ten oosten of ten westen van de Republiek, voordat het zal zijn goedgekeurd door Hare Majesteit de Koningin."

Article 16 of the Convention specifically provided that extradition arrangements to provide for the mutual surrender of criminals - and also, interestingly, for the surrender of British military deserters - would be concluded separately at a later stage. (217)

It is perhaps apposite at this stage to stop for a moment and take stock of the variations in the status of the South African Republic during the period just sketched.

It has been clearly established that even before the conclusion of the Sand River Convention in 1852, the Transvaal could validly have laid claim to the status of an independent state enjoying sovereignty and treaty-making capacity. This status was confirmed beyond doubt in the Sand River Convention - despite subsequent British attempts to deny this. Consequently from its inception until the First British Occupation in 1877, sovereignty and the foreign affairs function - including extradition - fell to the government of the South African Republic. (218)

The exact status of the territory after annexation in 1877, is somewhat problematic. Whether the annexation can in fact be said to have been completed is a moot point as both negotiations for the "resumption" of independence, and eventually also hostilities, continued between Britain and the Republic. (219) It can consequently be cogently argued that until the signature of the Pretoria Convention in 1881 the Boers retained a measure of international capacity, although traditionally this must be ascribed to the British. For present purposes, the Pretoria Convention settled the question of sovereignty in that both the preamble and article 2(c) clearly placed Britain at the helm as regards foreign relations and consequently treaty-making capacity. This position was maintained until the signature of the London Convention in 1884.

The question now arising is whether the London Convention signalled any change in the status quo. Views differ on the question, (220) but on a purely literal reading of the two Conventions, certain differences do in fact emerge.

The Pretoria Convention clearly placed all foreign relations in the hands of the British. Both the conclusion of treaties and diplomatic negotiations were to be conducted by Britain. The London Convention, on the other hand, provides only that the conclusion of treaties will be subject to a British right of veto. In other words, the negotiations leading up to the signature of the treaty, and the signature itself, could be conducted independently by the South African Republic. (221) That even this provision was open to interpretation, is clear from state practice at that time.

In the first place, the London Convention specifically empowered the Republic to conclude treaties with the Orange Free State free from British approval. As was established above, the Orange Free State was at this stage a sovereign nation, recognised as such by Britain and other powers. This in itself is indicative of a measure of international capacity for the Republic. Secondly, the method by which British approval or ratification of treaties concluded by the Republic was to be obtained - for example, the fact that ratification or approval could be assumed in the absence of cancellation or objection within six months - fits rather with a "rubber stamp" function than with true involvement in treaty policy. The nature of this approval is, however, dependent on the effect of the "approval"

provision on third parties entering into treaties with the South Africa Republic.

Hofmeyr (222) claims that there was a positive duty on the Republic to ensure that third parties with which it was negotiating were aware of the limitation imposed by article 4 of the Convention. This was indeed fully satisfied in the treaty of 1885 concluded with Switzerland (223) and that of 1886 with Italy, (224) where the operation of the treaties was expressly subjected to British approval. However, in other instances the Republic was not as scrupulous. (225)

Apart from the principle that British approval was required, the question of exactly when this approval had to be requested is of some practical significance. Could the Republic, for example, simply not request approval and if and when challenged, answer that it still intended doing so?

This very question arose in the case of an extradition treaty concluded between the Republic and Portugal in 1893. (226) After some two years no request for approval had been received by the British. On being taken to task, the Boers replied that they were awaiting Portuguese ratification before submitting the treaty to Britain. The British government responded that a treaty should be submitted before ratification. Similarly, the extradition treaty concluded between the Republic and the Netherlands on 9 November 1895, was submitted to Britain only after ratification and on the same day as it appeared in

the Netherlands *Government Gazette*. (227) As a result of these two treaties, Britain stipulated that the procedure laid down in article 4 of the Convention was to be strictly applied. However, in an extradition treaty concluded with Natal (228) authority was, according to the preamble, drawn from a Natal Act (6 of 1892) and a Transvaal Act (9 of 1887). No mention is made of the London Convention, indeed article 19 of the treaty provides specifically that the treaty shall take effect on publication in the *Government Gazettes* of the respective territories. The British attitude to article 4 of the Convention would consequently appear somewhat pragmatic.

The Republic attempted to assert its independence from the restrictions of article 4 in one other respect, viz in the case of multilateral treaties to which Britain was a party. First, the Republic acceded to the World Postal Convention concluded in Vienna on 4 July 1891, the argument being that as Britain had already acceded to the agreement, its approval of the Republic's accession was unnecessary and article 4 did not apply. (229) Second, on 30 November 1896, the Republic acceded to the Belgian Treaty for the Suppression of Slave Trade. (230) Finally, in 1896, Britain learned in a Swiss circular that the Republic had acceded to the 1864 Geneva Convention on the Treatment of Soldiers Wounded in the Field. (231)

Analysing the specific accession provisions in these treaties, Hofmeyr (232) comes to the conclusion that it was not for the Republic to interpret these treaties. Article 4 of the London

Convention provides for mere factual British recognition of agreements concluded by the Republic; specific procedure - albeit somewhat loose and vague - is demanded and more specific provision made for tacit acceptance. A specific obligation imposed on a state in an agreement with another state, cannot be said to have been waived by a general invitation to all states to accede to a treaty. However, although Britain objected to the Republic's accession to the latter two treaties, no objection was raised to its accession to the Postal Convention of 1891. (233) In so doing, Britain can be taken either to have ratified that specific act by the Republic, or at least, to have cast some doubt on the necessity of following the proviso procedures laid down in article 4 in cases such as the present.

Be that as it may, it is clear that after the London Convention, the South African Republic was, as regards its treaty-making capacity, freer than it had been under the Pretoria Convention, although not as fully independent as it had been in terms of the Sand River Convention.

Specifically as regards extradition, it is clear from the treaties mentioned above, that the practice was actively pursued in the South African Republic. Legislation, too, was enacted to deal with extradition during this period. The following laws may be mentioned in this regard.

Law 5 of 1871 adopted on 5 December 1871 was aimed at governing the extradition of fugitive criminals from "naburige staten". Article 1 provided that extradition could be requested from states with whom the Republic had concluded "overeenkomsten" to that effect. Section 5 of the Law specifically empowered the State President to conclude extradition treaties with foreign powers or states. (234)

Law 1 of 1873 adopted on 28 February 1873 provided for the arrest and extradition of criminals specifically to the British colonies of the Cape of Good Hope and Natal. No mention is here made of the necessity of a treaty forming the basis for such extradition.

Law 2 of 1881 adopted on 31 January 1881 was designed to simplify extradition between the Transvaal "Provincie" and the Independent Orange Free State. Again no treaty basis is mentioned.

Law 14 of 1886 adopted on 1 February 1887, provided for the extradition of criminals to the Cape Colony, again on the basis of the Law and not on treaty.

Law 9 of 1887 adopted on 1 June 1887, provided for "de algemene voorwaarden waarop, ten aanzien van uitlevering van misdadigers, verdragen met vreemde staten of Kolonien kunnen worden gesloten". Section 1 specifically authorised the State President, acting on the advice of the Executive Council, to conclude extradition treaties. (235) It further provided in section 19 that all existing extradition

laws would remain operative until repealed by the State President by proclamation.

As will be seen, these Laws cover the full period of the existence of the Transvaal Republic. To find some common factor in the varying bases of extradition in terms of the various Laws is somewhat problematic. The first two laws date from the period after the Sand River Convention and are thus the laws of a sovereign independent state. In the first (1871), the basis for extradition lies in a treaty concluded with the state requesting surrender. In the second (1873) however, the extradition would appear to be purely on the basis of the Law itself. This was indeed confirmed in the case of *In re Foy* (236) where the Cape authorities requested the extradition of Foy to stand trial on a charge of murder. The court was called upon to consider certain formalities laid down in the law in assessing Foy's request for his release. Kotze CJ applied the law, with no reference to any treaty, in reaching his decision to reject the application.

On the other hand, the necessity of treaty for the basis of extradition under Law 5 of 1871 was clearly illustrated in the case of *Ex parte Lithauer* (237) where the court refused to allow Lithauer's extradition to Grikwaland West on charges of fraud and perjury, as there had been no request from the Grikwaland West government for his extradition and no extradition treaty existed between the South African Republic and Grikwaland West. The Law

required both such a request and such a treaty and as neither existed, Lithauer's release was ordered.

The next Law, 2 of 1881, falls within the period of Transvaal history after annexation by Shepstone but before the signature of the Pretoria Convention. As indicated above, this law refers to the Republic as a "province" and provides, apparently, for extradition on the basis of the Law itself. An interesting case arose in this regard, viz *De Villiers v Attorney General; Bands v Attorney General*. (238)

De Villiers was charged with theft, and Bands with a contravention of section 74 of Law 9 of 1878, both committed within the Orange Free State. Warrants for the arrest of the respective accused had been issued by the magistrates of Kroonstad and Boshoff. After they had fled to the Republic, the Free State President requested their return in writing from the government of the Republic. The Transvaal President then issued a *fiat* to the Attorney-General for their arrest. The Attorney-General issued warrants which were duly executed. Both appealed against their arrests on certain technical irregularities. Although it was on the grounds of these irregularities that the accused were eventually released, interesting arguments were raised on other points.

For De Villiers it was argued that no extradition treaty existed between the Republic and the Orange Free State. (239) Furthermore, even if such a treaty were to exist, it would have no effect until

incorporated into the law of the territory as "Without the sanction of the Legislature" the government has no right "to deliver up a stranger accused of having committed a crime outside this state".

(240) It was further argued that Law 1 of 1873 (see above) authorising extradition to the Cape and Natal, showed that without such legislation extradition was not possible. Although the existence of Law 2 of 1881 was conceded, it was claimed that in the absence of an extradition treaty between the two territories "the Law must be considered as having been annulled".

Delivering judgment, Kotze CJ, pointed out that a treaty had indeed been concluded between the Republic and the Orange Free State in 1880. He could however find no evidence that it had been ratified by the Free State Volksraad. That this was fatal as far as Law 2 of 1881 was concerned, he did not find convincing.

"The entering into of the treaty may have been the reason why Law No 2 of 1881 was subsequently passed, but it does not follow that, because the Volksraad of the Free State did not ratify the treaty, this law has ceased to be of force. In the Law itself I find no such provision. It is distinctly provided that the law shall take effect from its publication in the Gazette. In February 1881 this law became of force...This being so the simple question is, whether the provisions of Law No 2, 1881, have been complied with." (241)

These requirements had in fact not been met and the warrants were set aside. The case had a sequel during August of the same year in *Bands v Attorney-General* (242) where Bands was discharged as the offence

with which he had been charged was not listed in Act 2 of 1881, as an offence for which extradition could be granted.

The last two Laws (14 of 1886 and 9 of 1887) were enacted after the conclusion of the London Convention and thus at a time when the South African Republic was empowered to conduct its own foreign relations subject only to the British veto. The legislative basis for extradition adopted in Law 14 of 1886 is in line with the British backing of warrants system operative under the Fugitive Offenders Act of 1881. (243) Law 9 of 1887, on the other hand, harks back to the earlier 1871 Law enacted during the currency of the Sand River Convention in that it again authorises the President to conclude extradition treaties. As the South African Republic had in any event been granted this power in terms of article 4 of the London Convention, the Law would appear to be largely tautologous in this respect. However, as in the case of the 1871 Law, in *Attorney-General v Andreson* (244) the absence of a treaty between the South African Republic and Portugal proved fatal to the application for Andreson's extradition to face fraud charges. It is interesting to note, however, that in this Law no mention is made of the restriction contained in article 4 of the Convention. As was shown above, extradition treaties were concluded with a number of states, and the provisions of article 4 were met in only two of the instances.

To return to the classification of these Laws, the one point emerging is that the two Laws in which treaties are specifically mentioned as the basis for extradition and in which the State President is

specifically empowered to conclude extradition treaties, both deal with extradition in the "broader" sense. Law 9 of 1887 refers to "vreemde Staten", while Law 5 of 1871 refers to "naburige Staten". The Laws in which no treaty is mentioned involve only the Republic's sister states or Colonies. This would seem to imply that even at this stage, there was a difference in perception in that "real" foreign states, for example Portugal, deserved a different treatment to the areas which would eventually constitute a single South Africa.

In the meantime, however, peace between the Boers and the British did not hold and the Second Anglo-Boer War broke out. For the Boers, however, it was a losing battle which culminated in the final annexation of the Republic by Britain in 1900 and eventually in peace through the Treaty of Vereeniging signed at Pretoria on 31 May 1902. From this period, what has been said of the British extradition provisions applying in the Cape, Natal and the Orange Free State applied to the Transvaal with equal force. Developments within the various British South African Colonies between the Treaty of Vereeniging in 1902 and the eventual Act of Union in 1910 are for present purposes largely irrelevant. Although the Colonies were assured of civil government and representative institutions leading to responsible government as soon as possible, as regards foreign affairs, treaty-making capacity and, in particular, extradition, the Colonies were firmly under the British government.

It can consequently be seen that during the few brief years of independence enjoyed by the various South African Republics,

extradition had come the full circle. It started off as an essentially British affair, and ended as an essentially British affair. The necessity of considering the various territories separately ceased to exist with the South Africa Act of 1909 and the region can consequently once again be considered as a whole in what follows.

3.5 Union of South Africa 1910 - 1961

Although one would expect that with the adoption of the South Africa Act in 1909, (245) the position as regards the conduct of foreign affairs in general and extradition in particular, would be reasonably clear cut, this is not in fact the case. Technically the Union of South Africa was a dependent British Colony and as such was totally subordinate to Britain in the sphere of international relations. (246) In practice however, things were somewhat different during the fifty-year history of the Union.

It is consequently necessary to trace the development of treaty-making capacity in the British Dominions to determine who was able to conclude extradition treaties for the Union of South Africa, at what stage this capacity was acquired, how it was acquired and what practical implications it held for the Union. Although, the sphere of foreign affairs is obviously the more important for present purposes, as will emerge presently, purely municipal provisions cannot be ignored.

Lord Durham's concept of responsible government (247) had found full effect in the four regions which were united by the South Africa Act. (248) Although having a measure of internal "sovereignty", the fact remained that the British parliament could legislate either for the empire as a whole or for a particular Colony, without the consent of that Colony, Colonial legislation could be overridden particularly in the case of repugnance, the British parliament retained the rights of veto, disallowance and reservation, and Colonial officials were appointed by the Crown. (249) In short, although the Colonies enjoyed a measure of self-government, this was on the municipal level only with no thought of the surrender of British sovereignty over "matters of the utmost importance" under which were included "issues of foreign relations and defence." (250)

We have already seen that in the case of the Transvaal Republic, practice resulted in a *de facto* erosion of British control over treaty making. (251) This can be regarded as a microcosm of events in the Colonies as a whole.

Cracks in Britain's absolute power were not long in coming. Lord Durham had earmarked three areas which would remain under British control. These were public lands, trade and navigation, and foreign relations. (252) Differences soon arose and by 1848 land control had been recognised as an aspect which of necessity would need to be regulated by the Colonies themselves. (253) Inevitably, control over finances and navigation also proved problematic with the result that

between 1849 and 1869 shipping and trade in general were considerably liberalised. (254)

Conflicts between the Colonies and the Imperial government were inevitable in such a situation and in 1865 the Colonial Laws Validity Act was adopted to "remove doubts as to the validity of colonial laws". (255) In essence this "Charter of Colonial legislative power", (256) provided that no Colonial law would be invalid as being repugnant to British legislation unless it was clear that the British parliament had intended that legislation to apply within the Colony in question. Although this Act certainly led to a liberalisation of the position of the Colonies, they were still unable to adopt extra-territorial legislation or legislation conflicting with British enactments applicable to them, and all Colonial legislation had still to receive royal assent.

During the latter half of the nineteenth century, a new phenomenon emerged - the so-called Imperial Conferences, the first of which was held in 1887 to mark Queen Victoria's Golden Jubilee. (257) These conferences were aimed at bringing together the officials of the Colonies and the British government to discuss matters of mutual concern and to iron out problems which had arisen. It was through these conferences that the third of Durham's reservations, viz that of foreign relations, underwent its greatest development.

We have already seen that as regards trade, the position of the Colonies had been considerably liberalised. As much of this was

conducted by means of treaty, the Colonies at an early stage had a measure of input in the negotiation of treaties, although the actual conclusion was still in British hands. Gradually, however, the Colonies continued to encroach upon this traditionally British preserve. So, as a result of the 1902 Imperial Conference, the "major" Colonies (258) were authorised to establish their own land forces. (259) At the 1907 conference, which was chaired by the British Prime Minister personally rather than by a subordinate minister, the distinction between Colonies and self-governing Dominions was introduced. It was also decided that the Dominions could enjoy separate representation at certain "non-political" international conferences. (260) The conference held in 1911 provided that the Dominions should be consulted in the instruction of British delegates to meetings of the Hague Conference and should also be allowed to consider the terms of conventions entered into. (261)

However, perhaps the single most important event in the evolution of treaty-making capacity for the Dominions, was the First World War. The declaration of war and conclusion of peace were clearly matters of high policy falling within the exclusive purview of the British government. If the British government declared the Empire to be in a state of war, the Dominions were also at war - whether they liked it or not. Consequently, when Britain declared war on Germany in 1914, all the Dominions - without having been consulted - were also at war. Once the war had been declared, it had to be waged and to do this an Imperial War Cabinet was established. This Cabinet was made up of

British and Dominion ministers acting on equal footing. (262) At the 1917 Imperial War Conference it was realised that relations between the various members of the British Empire were in need of revision, and it was accepted in principle that once peace had returned, this would be done and would be based "upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth". (263)

When peace came in 1919, the Dominions signed the Treaty of Versailles as independent entities. (264) Furthermore, they also enjoyed independent membership of the League of Nations and signed treaties concluded under the auspices of the League as independent states. Du Plooy (265) consequently states that by 1920, the Dominions were "in the position of *de facto*, if not *de iure* sovereign states...".

Another adjunct of independent statehood is, of course, the right of legation and this too was not long in coming. As early as 1920, Canada had - possibly because of her "special relationship" with the United States - been allowed to accredit a Minister to Washington. (266) The Irish Free State claimed a similar right in 1924. (267) Clearly some regulation was required.

The 1926 Imperial Conference is generally acknowledged to be the most important of the conferences as regards the status of the Dominions. (268) In terms of the so-called Balfour Declaration, Dominion status was defined to mean that the Dominions were :

"autonomous communities within the British Empire, equal in Status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations". (269)

Consequently, the 1926 Conference acknowledged that the Dominions could have interests separate from those of Britain or the Empire as a whole. Where an issue was the sole concern of a particular Dominion, that Dominion would be able to negotiate and conclude agreements independently, subject only to a duty to inform Britain and the other Dominions. In addition, it was agreed that no Dominion could bind any other part of the Commonwealth without the express consent of that Dominion, and that the Dominions could negotiate independent diplomatic representation. (270)

It can consequently be seen that at this stage in their development the Dominions had, almost imperceptibly, eroded British control over their foreign affairs. They had through practice and convention evolved an independent treaty-making capacity, an independent right of legation and eventually, acknowledgment from the Imperial Conference that they were indeed autonomous states within the British Commonwealth.

There can be little doubt that although the member states of the Commonwealth had achieved a great measure of independence, the treaty-making power for these territories vested in the king. (271) By convention, these powers were exercised by the King on the advice

of his Ministers of State (272) which has led Du Plooy to aver that in fact treaty-making fell to the Cabinet to whom the royal prerogative had been transferred in this regard. (273)

At this stage it is apposite to move away from the position of the Dominions in general, and to examine the position within the Union in greater detail.

The only section of the South Africa Act (274) to deal directly with treaties is section 148(1) which provides that:

"All rights and obligations under any conventions or agreements which are binding on any of the Colonies shall devolve upon the Union at its establishment."

The general treaty-making power must be read into section 8 of the Act which embodied the Royal prerogative by providing that the executive government of the Union was vested in the King and administered by him or by the governor-general as his representative.

(275) The governor-general enjoyed such powers as were delegated to him by the King. As the powers in fact transferred to the governor-general did not include the power to conclude treaties for the Union, this power must be taken to have remained with the King.

(276) However, it is also clear that as the governor-general was appointed on the advice of the Union cabinet, and acted on the advice of the cabinet when acting as "Governor-general-in-council". This has led Du Plooy (277) to conclude that :

"For all practical purposes therefore, as opposed to

the theoretical residence of treaty-making power, that power is exercised by the Cabinet who will of course, normally follow the advice of the Minister of External Affairs. In order to maintain the theoretical order of things, however, the treaty is made in the name of [the King] and [he] issues the Full Powers and causes the Instrument of Ratification to be deposited, when advised to do so by His Ministers in the Union".

However, the question must arise whether the fact that the Dominions, and the Union of South Africa in particular, had arrogated to themselves an independent treaty-making capacity meant that they were indeed totally free of British constraint in the conduct of their foreign affairs. The view which is adopted in this regard will, as Wiechers points out, (278) depend largely on one's conception of law. The independence (or lack of it) of the Union can be based on three basic approaches. First is the argument that the independence of the Union - and consequently also its independent treaty-making capacity - can be ascribed to the adoption of the Statute of Westminster alone as before this date the British Parliament remained supreme within the Dominions. (279) Second, it is argued that the Dominions were independent even before the adoption of the Statute, their independence stemming from the evolutionary process outlined above. While Keith (280) sketched a third scenario in terms of which the possibility of British supremacy remained, even after the adoption of the Statute, in that the British parliament was free to repeal the Statute at any time.

At this stage it is apposite again to consider the fact that although treaty making capacity is an adjunct of sovereignty, the resultant treaties do not operate in the same sphere as general parliamentary legislation. Consequently, for an assessment of the "international status" of the Dominions, it is also crucial to consider the interaction between municipal law and public international law both within Britain and within the Union of South Africa. As was pointed out in the introduction, (281) treaties do not find automatic application within either British or South African law. Before a treaty can find municipal application a process of transformation is necessary to bring it within the South African municipal sphere. Consequently, while the Union might indeed, in terms of certain of the theories posited above, have been free to conclude treaties contrary to the wishes of the British government, the municipal application of these treaties could, while the resolutions of the Imperial Conference were no more than resolutions - ie while they did not enjoy the force of law - still be effectively blocked by the British parliament. In fact, in terms of Keith's thesis, (282) this could have been done even after the enactment of the Statute.

As regards treaties, consequently, the Union was struggling under a double disability, first in the form of the formal requirement that treaties be concluded by the King, and second, in terms of the power of the British parliament to prevent any treaty of which it did not approve from acquiring the necessary municipal application. This latter point may indeed prove crucial in the case of extradition treaties. (283)

Realising that things needed to be regularised, the British parliament adopted the Statute of Westminster in 1931 (284) to give effect to the principles agreed upon at the Commonwealth Conferences between 1923 and 1930.

The Statute provides in section 2 that the Colonial Laws Validity Act will no longer apply within the Dominions. Section 2(2) provides that no law made by the parliament of a Dominion after the commencement of the Act (285) will be void for repugnance with British common law or existing or future statutory law. It further expressly provides that the Dominion parliament may repeal any such legislation which is part of its law. Through this provision, therefore, the objection raised above in terms of which the British parliament would theoretically have been able to block the operation of a treaty concluded by the Dominion from coming into operation by disallowing the municipal legislation required to accord the treaty municipal application, was removed.

Section 3 conferred the power to legislate extra-territorially on the Dominions, while section 4 provided that no British Act could be extended to the Dominions without expressly stating that the Dominion in question had requested and consented to its enactment.

Can it safely be assumed that after 1931, the Union was indeed free to conclude treaties on its own behalf and to ensure their application? While it would indeed appear to be so, this was clearly not the feeling of the Union Parliament which, perhaps *ex abundanti*

cautela, felt that only through the adoption of the Status of the Union Act (286) would they at last be free of British constraint and independent in the true sense of the word. By the Status Act, the Statute of Westminster was incorporated into South Africa law thus rendering the possibility of future British repeal meaningless; the Union parliament was expressly recognised as the supreme legislature for the Union - thus ensuring that the Union parliament would now be in a position to give municipal effect to any international obligations which the Union might undertake; and the convention that the governor-general acted on the advice of the Union ministers was entrenched by statute.

It is at this stage - and only at this stage - it is submitted, that one can truly speak of the Union of South Africa being an independent state within the broad Commonwealth of Nations and having a meaningful independent treaty-making capacity.

In the section dealing with the Cape of Good Hope above, the pre-Union extradition treaties concluded by Britain and made applicable first to the Cape, and subsequently to the other Colonies, were listed. (287) It is now necessary to consider and classify those extradition treaties applicable within the Union of South Africa between 1910 and 1961 when republican status was achieved.

It has already been pointed out that in terms of the South Africa Act all obligations under conventions and agreements binding on the Colonies, devolved upon the Union. (288) Consequently the treaties

identified in previous sections were of full force and effect within the Union of South Africa. This presents no problems when one is dealing with the agreements between Britain and foreign states which were made applicable to the Colonies. However, there are two situations which demand closer attention in this regard.

The first is the status of treaties concluded independently with foreign sovereign states by either the Transvaal or Orange Free State during their respective brief periods of sovereignty. Although on annexation these treaties, too, would have fallen to the British (289) the question arises whether, if Britain already had treaty arrangements with such a state, the original British treaty or the "inherited" treaty between the now-British colony and the foreign state would apply. This question appears to be one of priority in cases of succession, and as succession to treaties in its various forms, constitutes a major part of the consideration of present-day South African extradition agreements undertaken in Chapter IV, no answer will be attempted at this stage.

The second, too will merely be identified, and will be considered in greater depth in Chapter IV. It will be remembered that in article 4 of the London Convention, the Transvaal was prohibited from concluding treaties with any state or nation, but that the the Orange Free State was expressly excluded from this prohibition. (290) It has also been established that at this stage the Orange Free State was acknowledged as a sovereign independent state. (291) We consequently find the somewhat anomalous position that in terms of section 148(1)

of the Union of South Africa Act, a treaty of extradition existing between two of the constituent parts of the Union - the Transvaal and the Orange Free State - devolved upon the Union as a whole. (292)

Returning specifically to treaties concluded by or on behalf of South Africa after Union, the following picture emerges.

In the following instances treaties were concluded by Britain and made applicable to the Union. The pattern identified above will be followed here. (293)

TREATY	DATE	ARTICLE	PROVISIONS	FOOTNOTE
Greece	1910	18	a b d e f	294
Siam	1911	16	a b d e f	295
Czechoslovakia	1924 (1927)	17 & 18	a b d f	296
Finland	1924 (1925)	17 & 18	a b d f	297

In the case of the United States of America (298), and Israel, (299) treaties were concluded directly between the Union of South Africa and the foreign state concerned.

A brief analysis of these treaties shows that they in fact bear out the development sketched above. The treaties concluded immediately after Union - ie those with Greece (1910) and Siam (1911) - were concluded by the British government in the regular way and made

applicable to the British territories, including the Union. However, in the case of the two treaties concluded in 1924, that is after the 1923 Imperial Conference, (300) the need for the independent treaty-making powers of the Dominions which had been identified at that Conference and was to be concretised in the Statute of Westminster following upon the 1926 Imperial Conference, was in fact put into effect. Although the treaties with Czechoslovakia and Finland were concluded by Britain, their application to the Dominions - and the Union in particular - was specifically suspended and made dependent upon accession by the Union parliament. Finally, in the treaties with the United States of America (1952) and Israel (1960), the role of the British government is purely symbolic the treaties being concluded *eo nomine* between the foreign states and the Union of South Africa.

4 CONCLUSION

This, then, brings us to the end of the pre-republican development of extradition within South Africa. It has been seen that the general development of extradition within the "civilised nations" of the world is mirrored by parallel developments within what came to be the South African society. The problems which faced Europe and which either retarded or promoted extradition were mirrored in the South African society - albeit at a somewhat later stage. After a slow start, South Africa had by the time of its emergence as an

independent sovereign state an extensive and well developed network of extradition agreements.

In 1961 the Union of South Africa opted for a republican form of government outside of the British Commonwealth. The state of extradition within the Republic from its inception to the present day will be considered in Chapter IV. However, the history of extradition has thus far been largely the history of extradition treaties and the question which of necessity arises is whether treaty is indeed the only basis on which extradition may rest. In the following Chapter certain of the questions raised at the outset of this thesis when the concept of extradition was defined - most notably the basis of extradition - will be considered.

ENDNOTES : CHAPTER II

- 1 King (1980) 247 gives the date of this treaty as 1279 BC. Shearer (1971) 1; 5 dates it at 1280 BC. He is followed in this by Bassiouni (1974) Van der Heijden (1954) 12 n 1 lists a further treaty concluded between Ramases II and the Cheta leader, but fails to put a date to it.
- 2 Clarke (1888) 17ff. It is interesting to note that neither application succeeded. In the case of Syria, Hannibal managed to escape before his surrender, while in the case of Bithynia, he chose a more permanent escape through suicide. See too, Stanbrook (1980) xxvi.
- 3 Clarke (1888) 18. He cites two Romans surrendered to the Apolliniate in 266 BC and two Carthaginians in 188 BC.
- 4 Clarke (1888) 22.
- 5 See eg, Bassiouni (1974) 4; Shearer (1971) 5 and the writers he cites in n 3.
- 6 See British Digest (1965) 445 where it is pointed out that "there were in fact many English extradition treaties between the fourteenth and seventeenth centuries providing for the surrender of ordinary criminals".
- 7 Shearer (1971) 7.
- 8 See *East India Company v Campbell* 1 Vers Senr 246.

- 9 De Martens (1801-26) and (1802-42) in Shearer (1971) 8.
- 10 Shearer (1971) 9ff where he shows convincingly that the various terms are applied equally to criminals in the conventional sense of the term and to military deserters.
- 11 Shearer (1971) 10. In terms of these treaties, if a crime was committed within a certain distance of the state's border but on the territory of some other state, the offender could be pursued into that other state. An interesting corollary provision applied in South Africa by way of the jurisdictional provisions of the Fugitive Offenders Act 1881 (44 & 45 Vict c 69) in terms of which the courts of a British territory enjoyed jurisdiction over crimes committed within 500 yards of the borders of their territory.
- 12 Shearer (1971) sees 1794 (the Jay Treaty) as the date marking British and United States' entry into the extradition arena. He is supported in this by Bassiouni (1974) 26; Stanbrook (1980) xxvi; and British Digest (1965) 445. Hartley Booth (1980) lvii, on the other hand, regards all pre-1842 treaties as ancient history and classifies the start of modern British extradition law as the conclusion of the Webster-Ashburton treaty between Britain and the United States in 1842. See too, Clarke (1888) 123.
- 13 Shearer (1971) 7ff.
- 14 In Harvard Research 35ff, these developments and their relevance for extradition are fully evaluated. The scope of this thesis does not permit so detailed a treatment.

- 15 See Shearer (1971) 14 and particularly 17ff.
- 16 Shearer (1971) 17-18. He indicates that in 1841, for example, France had extradition treaties with only Belgium, Sardinia, Spain and Switzerland but that this changed dramatically during the latter part of the nineteenth century.
- 17 See n 12 above. The Jay Treaty dealt with amity, commerce and navigation. Article 27 which provided for the mutual surrender of persons charged with murder and forgery was successfully invoked in 1799 in the case of *Jonathan Robbins alias Thomas Nash* who was handed over to Britain by the United States on charges of murder and eventually hanged - see Wharton's State Trials 392-456; Clarke (1888) 37. In British Digest (1965) 454 mention is also made of the extradition of *Ryan* and *Pheps* under this article of the treaty. On the other hand, the surrender of one *Barnes* was refused on the ground that highway robbery, the crime for which he was sought, fell outside the ambit of the treaty. The treaty contained a termination clause - article 28 - and expired after twelve years. Although article 28 was re-enacted as article 21 of the treaty concluded in 1807, it never came into operation.
- 18 See British Digest (1965) 445.
- 19 Clarke (1888) 123; British Digest (1965) 446; Shearer (1971) 14.
- 20 Article X of the treaty (the implementation of which was authorised in Britain by 6 & 7 Vict c 76) provides for extradition in the case of murder, assault with intent to murder, piracy, robbery, arson, forgery or the uttering of forged papers. Britain successfully

applied for the surrender of *Christiana Cockram alias Gilmour* for the murder of her husband. Later applications were not as successful - British Digest (1965) 446; Clarke (1888) 128.

- 21 See British Digest (1965) 446 for a summary of the relevant provisions.
- 22 Shearer (1971) 14 "(F)or the first time in British practice the exemption of political offenders, the non-extradition of nationals, the principle of speciality and the resolution to clarify requisitions were included...French influence in the shaping of this treaty is obvious." The list of extradition crimes was considerably extended - see Clarke (1888) 132 - 3.
- 23 Shearer (1971) 15. See too, British Digest (1965) 447; Clarke (1888) 134 - 5; and 1852 *Hansard* cxxii 192, 498 and 561.
- 24 Shearer (1971) 15.
- 25 33 & 34 Vict c 52. See British Digest (1965) 789 and Clarke (1888) iii for texts of the Act which remains - in amended form - the basis for extradition between Britain and foreign states even today. The Commonwealth, for as long as it may still continue to exist, does not fall under this Act, but rather under the Fugitive Offenders Act 1963 as amended.
- 26 See 63-64 and 118 for a full tabulation of these treaties.
- 27 See Bassiouni (1974) 4.
- 28 The other phases are ancient times to the seventeenth century - a period of almost exclusive concern for

religious and political offenders; eighteenth and first half of the nineteenth century - treaty making concerned chiefly with military offenders, so characterising the condition of Europe during that period; 1833 to present (which must be taken to mean pre-1948) - a period of collective concern in suppressing collective criminality; post-1948.

- 29 Universal Declaration of Human Rights GA Res 217(III) of 10 December 1948, UN Doc a/811 (1948).
- 30 Bassiouni (1974) 5.
- 31 From a purely South African perspective this is illustrated by responses to the Republic's attempts to update extradition agreements during the 1970s. The following are some of the more directly relevant replies received. *Britain* declared it unlikely that extradition would receive attention "in the foreseeable future" - JF 9/11/2 (Britain) letter dd 27/6/1972; *Switzerland* expressly stated that it had no interest in negotiating a new treaty - JF 9/11/2 (Switzerland) letter dd 4/7/1979; *Canada* was considering no extradition negotiations at that time - JF 9/11/2 (Canada) letters dd 23/5/1973 and 6/6/1973; *Portugal* and South Africa would appear to have been negotiating a new treaty between 1972 and 1974 but nothing came of the negotiations - JF 9/11/2 (Portugal); *Denmark* renounced all her treaties as from 1/5/1968 and does not appear to be in a hurry to replace these - JF 1/554/20/21; *Austria* too, was unwilling to consider a new treaty - JF 9/11/2 (Oostenryk) letter dd 15/12/1976; *Norway* did not consider it expedient to conclude a new treaty with South Africa - JF 9/11/2 (Norway); while *New Zealand* felt that there was "no practical need for such a

treaty with South Africa" - JF 9/11/2 (New Zealand) letter dd 6/7/1976 - a further letter (JF 1/554/20/48), states that while New Zealand had no objection in principle to the conclusion of an extradition treaty, it was not a matter of urgency and South Africa would have to wait in line; France saw "no place" for a new treaty - JF 1/554/20/13 letters dd 11/5/1967 and 5/7/1968; although approaches were made to the *Republic of Ireland* as early as 1949 on the possibility of the conclusion of a treaty nothing came of the requests - JF 1/554/20/12 letter dd 16/5/1949 following on the attempted extradition in the case of *R v Lewis and Mason* PM 115/1/32.

In general it can consequently be seen that countries are not particularly anxious to conclude new treaties on extradition as these are not perceived as "matters of urgency".

- 32 For a full discussion of the applicable multipartite treaties and reciprocity see Chapter III on the basis of extradition.
- 33 See Bassiouni (1974) 14 n 45 and the sources cited there.
- 34 See eg, article 16 of the Convention on Offences and Certain Other Acts Committed on Board Aircraft in Flight (Tokyo Convention) 704 *UNTS* 219 which, while not providing for compulsory extradition, facilitates the process; and article 7 of the Convention for the Suppression of the Unlawful Seizure of Aircraft (Hague Convention) 860 *UNTS* I- 12325, which provides for either extradition or municipal punishment. For a detailed and up to date assessment of the role of terrorism in international law generally and in extradition in particular see Bassiouni (1988); McWhinney (1987).

- 35 "Sovereignty" in the present context is used exclusively to refer to the authority to conduct foreign relations; in other words who was entitled to conclude and act under extradition treaties for the territory. It is acknowledged that this is a somewhat simplistic approach and for a full discussion of the incidence and ramifications of sovereignty with particular emphasis on the South African context reference may be had to Olivier (1986).
- 36 Visagie (1969) 2.
- 37 Visagie (1969) 9, although as he points out this was not always fully applied. See too, Wessels (1908) 92-3 where the functions of the States General are discussed. Van Zyl (1979) states at 229 that "Die State Generaal se vernaamste funksies was die reëling van buitelandse sake...".
- 38 Visagie (1969) 8 and 13. See too, Wessels (1908) 92.
- 39 Visagie (1969) 6-14; Van Zyl (1979) 425.
- 40 Visagie (1969) 13.
- 41 The VOC originally received its charter from the States General on 20 March 1602. The Charter was for a period of 21 years but was renewed repeatedly until it was eventually abolished on 1 March 1796 in terms of a Plakkaat of 24 December 1795. See Visagie (1969) at 24 n 8 for details of the renewals, and see Van Zyl (1979) 425 generally.
- 42 See articles 34 and 35 of the Charter.

- 43 The so-called "Heeren Seventien" constituted the executive branch of the VOC and it was through these seventeen directors that the VOC acted. Treaties were thus concluded by the Heere Seventien on behalf of the States General. See Van Zyl (1979) 425-6 for further refinements in this regard.
- 44 Clarke (1888) 20.
- 45 A treaty had been concluded between the British and the Dutch on 14 September 1662. Burnet's extradition was requested in 1687. See Clarke (1888) 21 ff.
- 46 Clarke (1888) 21 ff.
- 47 There are of course arguments which would accord the chiefs *de facto* international status. These are considered below in dealing with the first recorded South African "extradition treaty". However, it is submitted that particularly in the very early stages of development here under consideration, these arguments carry little weight. For a somewhat technical and formalistic distinction between "high policy" treaties and other inter-state agreements see Du Plooy (1958) 43 ff.
- 48 Shearer (1971) 7.
- 49 For the various forces operating at the time see Van Jaarsveld (1971) 11ff.
- 50 The Cape was occupied by Britain on 16 September 1795. See Van Zyl (1979) 443.
- 51 Visagie (1969) 91; Van Zyl (1979) 444.

- 52 See above.
- 53 See Visagie (1969) 94 and Van Zyl (1979) 445. The Admiralty Courts with their international law basis were introduced into the Cape in 1797 and were to try cases "according to the civil law and the methods and rules of Admiralty" - Commission appointing a Court of Admiralty at the Cape of Good Hope 6 January 1697.
- 54 Booysen (1973) 241.
- 55 Visagie (1969) 98.
- 56 With effect from 1 March 1796: Plakkaat of 24 December 1795.
- 57 In terms of the Treaty of Amiens 1802.
- 58 Kaapse Plakkaatboek Vol VI 1803-6 cited by Visagie (1969) 99.
- 59 Van Zyl (1979) 447.
- 60 For the role of Governor De Mist see Visagie (1969) 99ff and Van Zyl (1979) 446ff.
- 61 The year 1836 marks the generally accepted start of the "Great Trek" during which the frontiers of the hinterland were extended. 1910 marks the date of Union.
- 62 Van Jaarsveld (1971) 11ff.
- 63 Scholtz (1967) 415; Cameron (1986) 79.
- 64 See Kennedy (1935) 9-18.

- 65 Wiechers (1981) 124; Du Plooy (1958) 5.
- 66 *Jurisdiction over the Seabed and Subsoil of the Continental Shelf off Newfoundland* Supreme Court of Canada 8 March 1984; 1984 *ILM* 288. See too Botha (1984) 194.
- 67 See above at 47.
- 68 Treaty between Great Britain and Germany for the Mutual Surrender of Fugitive Criminals signed at London 14.5.1872; ratified at London 11.6.1872.
- 69 Treaty between Great Britain and Brazil for the Mutual Surrender of Fugitive Criminals signed at Rio de Janeiro 13.11.1872; ratified at Rio de Janeiro 28.8.1873.
- 70 Treaty between Great Britain and Italy for the Mutual Surrender of Fugitive Criminals signed at Rome 5.2.1873; ratified at Rome 18.3.1873 : 1873 63 BSP 19-30. (Provisions not applicable to Malta.)
- 71 Treaty between Great Britain and Denmark for the Mutual Surrender of Fugitive Criminals signed at Copenhagen 31.3.1873; ratified at Copenhagen 26.4.1873 : 1873 63 BSP 5-18.
- 72 Treaty between Great Britain and Sweden and Norway for the Mutual Surrender of Fugitive Criminals signed at Stockholm 26.6.1873; ratified at Stockholm 28.8.1873 : 1873 63 BSP 175-179.
- 73 Treaty between Great Britain and Austria/Hungary for the Mutual Surrender of Fugitive Criminals signed at Vienna 3.12.1873; ratified at Vienna 10.3.1874 : 1873

63 BSP 213-218.

- 74 Treaty between Great Britain and Hayti for the Mutual Surrender of Fugitive Criminals signed at Port-au-Prince 7.12.1874; ratified at Port-au-Prince 2.9.1875 : 1874 65 BSP 44-48.
- 75 Treaty between Great Britain and France for the Mutual Surrender of Fugitive Criminals signed at Paris 14.8.1876; ratified at Paris 8.4.1878 : 1876 67 BSP 5-19. Special provisions in article 16 of the treaty exclude its application from France's East Indian Possessions - see article 9 of the Anglo/French treaty of 7.3.1815.
- 76 Treaty between Great Britain and Spain for the Mutual Surrender of Fugitive Criminals signed at London 4.6.1878; ratified at London 21.11.1878 : 1878 69 BSP 6-13.
- 77 Treaty between Great Britain and the Republic of Equator for the Mutual Surrender of Fugitive Criminals signed at Quinto 20.9.1880; ratified at Quinto 19.2.1886 : 1881 72 BSP 137-143.
- 78 Treaty between Great Britain and Luxemburg for the Mutual Surrender of Fugitive Criminals signed at Luxemburg 24.11.1880; ratified at Brussels 5.1.1881 : 1880 71 BSP 45-53.
- 79 Treaty between Great Britain and Switzerland for the Mutual Surrender of Fugitive Criminals signed at Berne 26.11.1880; ratified at Berne 15.3.1881 : 1880 71 BSP 54-62. The relevant provision (art 18) was amended by a convention entered into between Great Britain and Switzerland in London on 29 June 1904. The periods

provided for colonial possessions in the original treaty were amended to 6 weeks under article 3 par 3 (originally 30 days) and 3 months under article 8 (originally 2 months) - 1904 97 BSP 92-3.

- 80 Treaty between Great Britain and Salvador for the Mutual Surrender of Fugitive Criminals signed at Paris 23.6.1881; ratified at London 8.11.1882 : 1881 72 BSP 13-19.
- 81 Treaty between Great Britain and the Continental Republic of Uruguay for the Mutual Surrender of Fugitive Criminals signed at Montevideo 26.3.1884; ratified at Montevideo 13.12.1884 : 1883-4 75 BSP 18-24.
- 82 Treaty between Great Britain and Mexico for the Mutual Surrender of Fugitive Criminals signed at Mexico 7.9.1884; ratified at Mexico 22.1.1889 : 1885-6 77 BSP 1253-1258.
- 83 Treaty between Great Britain and the Emperor of all the Russias for the Mutual Surrender of Fugitive Criminals signed at London 24.11.1886; ratified at London 2.2.1887.
- 84 Treaty between Great Britain and Guatamala for the Mutual Surrender of Fugitive Criminals signed at Guatamala 4.7.1885; ratified at Guatamala 6.9.1886 : 1884-5 76 BSP 72-77.
- 85 Treaty between Great Britain and Colombia for the Mutual Surrender of Fugitive Criminals signed at Bogota 27.10.1888; ratified at Bogota 21.8.1889.
- 86 Treaty between Great Britain and the Argentine Republic

- for the Mutual Surrender of Fugitive Criminals signed at Beunos Aires 22.5.1889; ratified at Beunos Aires 15.12.1893 : 1889-90 81 BSP 1305-1311.
- 87 Treaty between Great Britain and Monaco for the Extradition of Criminals signed at Paris 17.12.1891; ratified at Paris 17.3.1892 : 1891-2 83 BSP 66-72.
- 88 Treaty between Great Britain and Bolivia for the Mutual Surrender of Fugitive Criminals signed at Lima 22.2.1892; ratified at Lima 7.3.1898 : 1896 88 BSP 27-33.
- 89 Treaty between Great Britain and Portugal for the Mutual Surrender of Fugitive Criminals signed at Lisbon 17.10.1892; ratified at Lisbon 13.11.1893 : 1892-3 84 BSP 83-88. (See the amending convention of 20.1.1932 signed expressly "on behalf of South Africa" 1932 BSP 135.)
- 90 Treaty between Great Britain and Liberia for the Mutual Surrender of Fugitive Criminals signed at London 31.1.1892; ratified at London 31.1.1894 : 1892-3 84 BSP 103-109.
- 91 Treaty between Great Britain and Roumania for the Mutual Surrender of Fugitive Criminals signed at Bucharest 21.3.1893; ratified at Bucharest 13.3.1894 : 1893 85 BSP 69-75.
- 92 Treaty between Great Britain and Chile for the Mutual Surrender of Fugitive Criminals signed at Santiago 26.1.1897; ratified at Santiago 14.4.1898 : 89 BFSP 20-25.
- 93 Treaty (replacing the treaty of 19.6.1874 : see Clarke

- (1888)) between Great Britain and the Netherlands for the Mutual Surrender of Fugitive Criminals signed at London 26.9.1898; ratified at London 14.12.1898 : 90 BFSP 51-58. Special mention is made of the various colonies and the period allowed for provisional arrest is extended to 60 days in the case of the colonies.
- 94 Treaty between Great Britain and the Republic of San Marino for the Mutual Extradition of Fugitive Criminals signed at Florence 16.10.1899; ratified at Rome 5.12.1899 : 91 BFSP 95-101.
- 95 Treaty between Great Britain and Servia/Yugoslavia for the Mutual Surrender of Fugitive Criminals signed at Belgrade 6.12.1900; ratified at Belgrade 13.3.1901 : 92 BFSP 41-47.
- 96 Treaty (replacing the treaty of 20.5.1876 :see Clarke (1888)) between Great Britain and Belgium for the Mutual Surrender of Fugitive Criminals signed at Brussels 29.10.1901; ratified at Brussels 6.12.1901. In a convention signed at London on 5.3.1907 and ratified on 17.4.1907, the parties made special provisions for criminals arrested in the Dominions : 100 BFSP 472-473.
- 97 Treaty between Great Britain and Peru for the Mutual Surrender of Fugitive Criminals signed at Lima 26.1.1904; ratified at Lima 30.11.1906 : 99 BFSP 963-968.
- 98 Treaty between Great Britain and Cuba for the Mutual Surrender of Fugitive Criminals signed at Havana 3.10.1904; ratified at Havana 10.1.1905 : 1904 97 BFSP 26-31.

- 99 Treaty between Great Britain and Nicaragua for the Mutual Surrender of Fugitive Criminals signed at Managua 19.4.1905; ratified at London 13.2.1906.
- 100 Treaty between Great Britain and Panama for the Mutual Surrender of Fugitive Criminals signed at Panama 25.8.1906; ratified at Panama 15.4.1907.
- 101 Treaty between Great Britain and Paraguay for the Mutual Surrender of Fugitive Criminals signed at Asuncion 12.9.1908; ratified at Asuncion 30.1.1911 :
102 BFSP 340-345.
- 102 Treaty of Friendship between Her Majesty and Tonga signed at Nukualofa 29.11.1879; ratified at Nukualofa 3.7.1882. Article iv of the treaty provides for the surrender of persons guilty of certain crimes. In a protocol dated 5.7.1882 extradition is made dependent on the procedure in the Acts applying within the dependencies. See too, the treaty with the United States of America signed at Washington 9.8.1842 and ratified at London 13.10.1842, where mention is made of the "territories of the other".
- 103 44 & 45 Vict c 69 adopted on 27.8.1881. See British Digest (1965) section IX 768ff.
- 104 For a discussion of whether formal treaties and inter-governmental arrangements can be concluded between members of the Commonwealth *inter se* see Du Plooy (1958) chapters VI and VII 68-104.
- 105 6 & 7 Vict c 34 (1843).
- 106 The backing of warrants concept has been retained in section 12 of the current South African Extradition Act

67 of 1962 with regard to "associated states".

107 British Digest (1965) 768.

108 Insofar as Part I is concerned, the Act applied automatically between the several parts of the British Dominions.

109 See sections 5-10 of the Act.

110 Part II section 12. For a full list of the possessions to which this part of the Act was made applicable, see British Digest (1965) 775.

111 Part II sections 14-19.

112 Section 20 provides that where a person is charged with the commission of an offence within 500 yards of a boundary common to two British possessions, he may be tried in either. See too, n 36 above.

113 See Part IV section 32.

114 Bird (1965) 23. De Gama sailed past the area on Christmas Day 1497 and somewhat Quixotically named it after the nativity.

115 A detailed description of Natal was nonetheless sent to the King of Portugal. See *Decades of Joao de Barros* Royal Typographical Office Lisbon (1778) 1st Decade Cap 3 Bk iv reproduced in Bird (1965) 24.

116 Bird (1965) reproduces a number of letters and reports in this regard, notably those of the survivors of the *Johanna* wrecked in 1683 (at 25) and the *Stavenisse* 1687

(at 27). The "local population" was made up of the indigenous tribes living in a strictly ordered social system which, although lacking written laws, "in their customs possess laws which meet every conceivable crime" (at 118). Given the finding of the International Court of Justice in the *Western Sahara* case (1975 ICJ Rep) that "territory inhabited by tribes or people having a social or political organisation is not regarded as *terra nullius*" (at 39 par 80), the Zulu must be regarded as sovereigns at that stage.

- 117 See *Extracts of Despatch from the Chamber XVII to Commander Simon van der Stel and Council of 1689* (Bird (1965) 54), for the Chamber's instructions and Van der Stel's response (Bird (1965) 55) to the effect that he had "solemnly purchased that bay with some surrounding land from the king and chief of these parts...".
- 118 See comment by Bird (1965) at 4 (footnote). The king's successor commented as follows on the land grant "My father...is dead...and as to what he agreed to, it was for himself : I have nothing to say to it." (Bird (1965) at 60).
- 119 Extract from a despatch from the directors of the Dutch East India Company to the Governor and Council of Policy at the Cape of Good Hope dated 23.12.1719, reproduced in Bird (1965) 257.
- 120 See article 1 of the Articles of Capitulation 19.1.1806 in Bird (1965) 257.
- 121 See Bird (1965) 193 for a copy of the grant dated 8.8.1824. See too, at 259 where Farewell reported his purchase of the land.

- 122 Bird (1965) 94 for a copy of the grant dated February 1828.
- 123 There are numerous references in Bird (1965) to Britain's reluctance to colonise Natal. See eg, the petition from the "householders" of Port Natal requesting that the territory be colonised (at 312) and the reply (at 315) where it is expressly stated that "Lord Glenelg states that Her Majesty's Government are so persuaded of the inexpediency of engaging in any scheme of colonization, or of acquiring further territory in South Africa, that he feels himself precluded from offering any encouragement to the project."
- 124 See Bird (1965) 307 where the text of the treaty is reproduced.
- 125 Emphasis added.
- 126 Mugambwa (1987) 79-93.
- 127 1928 AJIL 883.
- 128 1953 ICJ Rep 3 105.
- 129 Wheaton (1866) eg, talks of treaty-making capacity being limited to Christian Europeans; while Hall (1884) at 295 requires admission to the "European club" for such capacity.
- 130 Westlake (1914) 143-5. This amounted to a three-tier test weighted heavily in the favour of the white settlers. The arrogance of the prevailing

attitude is, however, clear as the capacity of the black population is premised on the level of "civilization" the white population can enjoy in their territories.

- 131 Mugambwa (1978) 81-2.
- 132 Mugambwa (1978) 82. Of course a possible explanation could be that it was to serve merely as notification to the world at large. One then wonders, however, why a simple note between the European states concerned was not adopted.
- 133 Mugambwa (1978) 85. The arguments raised with regard to British jurisdiction over "foreigners" will be considered in greater detail below in dealing with the Transvaal.
- 134 Mugambwa (1978) 86ff.
- 135 *Oi le Njogo and Others v The Attorney General* 1913-14 KLR 70, 89-91.
- 136 Mugambwa (1978) 87.
- 137 1918 AC 211 ff.
- 138 1975 ICJ Rep 12 at 39.
- 139 See n 123 above.
- 140 See above n 7. The phrase "a criminal lost is a problem solved" must surely be seen as finding its fullest application in such a situation as the likelihood of individual white survival outside the perimeters of the white settlement was remote.
- 141 See Shearer's classification of treaties concluded between 1718 and 1830 above. The difference in the case

of the Zulu, however, lies in the fact that political rather than criminal aspects were paramount.

- 142 See eg, Bassiouni (1974) 400 ff.
- 143 One thinks particularly of the principle of non-refoulment, see eg, Bassiouni (1974) 102; Grahl-Madsen (1980) 40ff.
- 144 In a letter from the original white settlers to the *Graham's Town Journal* c April/June 1837 (reproduced in Bird (1965) 322) it was stated that "we are all agreed to reject the treaty as most cruel and utterly impracticable".
- 145 Bird (1965) 323, where the delivery-up of a woman and her two infant daughters is recorded.
- 146 See eg, extract from the minutes of the Executive Council meeting of 20.3.1837, Bird (1965) 315-6.
- 147 See Du Plessis (1965) 117 and a letter in the *Graham's Town Journal* giving Retief's arrival date as 19.10.1837; Bird (1965) 326.
- 148 Du Plessis (1965) 19; Bird (1965) 326.
- 149 Draft letter to the officer administering the government, Cape of Good Hope 29.10.1837 reproduced in Bird (1965) 327-8.
- 150 Bird (1965) 361; Du Plessis (1965) 123.
- 151 This text is taken from Bird (1965) 366. The somewhat quaint spelling of placenames and the names of individuals has been corrected. For a Dutch version of the agreement, see Hofstede (1876) 38.

- 152 See eg, Akehurst (1987) 53; Starke (1989) 95; Booysen (1989) 120. For a full discussion of the principles of the Montevideo Convention see the recent Bophuthatswana case of *S v Banda and others* cc63/88 (B) 1989 4 SA 519 (Bop) in which the requirements for statehood are exhaustively discussed by the judge.
- 153 For a discussion and comparison of the merits and demerits of the constitutive and declaratory theories of recognition and their effects see *S v Banda* above and the authors cited in n 152.
- 154 See Bird (1965) 389 where a statement by Andreas Wilhelmus Pretorius made in his capacity as "Chief Commandant of all the Burghers of the Right Worshipful Volksraad of the South African Society of Port Natal" is reproduced. See too, Du Plessis (1965) 218 ff.
- 155 Du Plessis (1965) 162 - 184 where a detailed exposition of the government and government structures is given.
- 156 See the reference in the treaty to Retief as "Governor of the Dutch immigrant South Africans".
- 157 Through art 1 of the Articles of Capitulation 1806.
- 158 Du Plessis (1965) Chapter VI.
- 159 The British attitude in this regard is clearly spelled out in the Cape Proclamation of 2.12.1842 "They cannot by their removal from this colony to any other place whatever, divest themselves of the allegiance...to the British Crown" - cited in Hofmeyr (1933) 2.
- 160 See below for a full consideration of the treaties

concluded by the Free State.

- 161 See n 159 above.
- 162 See Bird (1965) 394 for a copy of the relevant letters patent dated 31.5.1844.
- 163 See 61-67 above.
- 164 Bell (1905) 568.
- 165 Hofstede (1876) 87 n 176 notes that on 17.11.1844 when the first British Governor arrived in Natal, only a third of the original Boer "emigranten" remained, the other two-thirds having trekked to areas north and south of the Vaal River respectively.
- 166 Collins (1907) 8.
- 167 See generally Hofmeyr (1933) Chapter 1.
- 168 Collins (1907) 7 and 8. Smith's proclamation annexing the territory to Britain was confirmed on 20.6.1848 although it should be remembered that Sir Peregrine Maitland, Governor of the Cape, had informally assumed authority over the territory as early as 1845. The territory was named the Orange River Sovereignty. See too, Botha (1926) 2.
- 169 The wish for independence was certainly not unanimous among the inhabitants of the Orange River Sovereignty as is evidenced by various letters in Collins (1907) 49ff. The motives of the British government in wishing to withdraw were, as always, largely economic. See too, Hofmeyr (1933) 9.
- 170 Letters Patent of 30.1.1854. Collins (1907) 53ff for an

English text of the Convention. A text in Dutch may be found in Hofstede (1876) 106ff.

- 171 See Hofmeyr (1933) 10 where he states that "Dit word so algemeen erken dat die Oranje-Vrystaat vanaf 1854 en gedurende haar hele bestaan die status geniet het van 'n "sovereign international state" dat dit onnodig is om verdere bewys aan te voer."
- 172 Hofstede (1876) 107-8. See too, Collins (1907) 55 for the English equivalent.
- 173 Signed at Aliwal North on 29.9.1858. See Collins (1907) 145 for the text of the treaty.
- 174 Collins (1907) 188ff.
- 175 Collins (1907) at 195ff. However, there is in this case no evidence of a formal request or deputation as in the previous case. On the whole, the facts would appear to engender a measure of suspicion on both sides!
- 176 The text is reproduced in Collins (1907) 211.
- 177 Collins (1907) 211.
- 178 In article 6 of the treaty reproduced in Hofstede (1876) 192 and Collins (1907) 232. The term "criminal warrants" used here is reminiscent of the "backing of warrants" system in the Fugitive Offenders Act discussed above.
- 179 Hofstede (1876) 213, emphasis supplied. Mention is first made of the Basuto's refusal to surrender the murderers at 203. At 215 Woodhouse pronounces himself unable to judge the issue as he was unacquainted with the facts - although he concedes that they must be

compelling if they are regarded as a hindrance to peace.

- 180 Shrewdly, Moshesh had asked that he and his people be declared British subjects, thus bringing them under the British umbrella. See Collins (1907) 248 and 253-9. Basutoland was formally annexed to Britain in March 1868 and in 1871 became part of the Cape Colony.
- 181 Collins (1907) 263-7 for the text of the Convention. The Convention was confirmed by the Volksraad on 5 May 1869.
- 182 See 61-67 above.
- 183 See Bell (1905) 569.
- 184 For present purposes use is made principally of the following works Botha (1926) ; Hofmeyr (1933); Garrett-Fisher (1900); and Nixon (1885) - a highly partisan account reflecting more radical British sentiment at the time.
- 185 Nixon (1885) 17.
- 186 Cape Proclamation of 12.12.1841 cited in Hofmeyr (1933) 1.
- 187 Proclamation by Sir Perigrine Maitland 21.8.1845 in Hofmeyr (1933) 2.
- 188 Nixon (1885) 22ff, points out that the Transvaal originally consisted of four separate mini-states with their capitals at Lydenburg, Zoutpansberg, Utrecht and Potchefstroom. By 1860, however, they had united and as this distinction is irrelevant as regards extradition, it is not further pursued. See too, Garrett-Fisher

(1900) 137.

- 189 As a result of his armed opposition to the British annexation of the Orange Free State, a price of two thousand pounds had been placed on Pretorius's head. This does not however appear to have concerned him unduly in his subsequent negotiations with the British. See Garrett-Fisher (1900) 134 ff.
- 190 The text of the Convention which was concluded on 17.1.1852 can be found in Botha (1926) 697ff Annexure 1.
- 191 Hofmeyr (1933) 3ff.
- 192 Whether the territory was in fact *terra nullius* in present day terms is not considered here. See above for the position in Natal under the indigenous leaders.
- 193 Westlake "L'Angleterre et La Republique Sud-Africaine" 28 RDI 270 cited in Hofmeyr (1933) 3ff (translation).
- 194 See the authorities cited in n 152 above.
- 195 See for the general mood of the Boers, Hofmeyr (1933) Chapter 1.
- 196 A state's territory need not be finally determined before it can validly lay claim to statehood. The classic example is, of course, the state of Israel which was widely recognised in 1946 before its borders were finalised. Closer to home, are the Southern African states of Transkei, Bophuthatswana, Ciskei and Venda which are conducting on-going territorial negotiations. For a full discussion of this aspect see *S v Banda* 1989 4 SA 519 (Bop).

- 197 Botha (1926) 8-9 states baldly that on "...23 Mei 1849, was die Suid-Afrikaanse Republiek as staat behoorlik ingerig met die goedkeuring van die Drie-en-Dertig Artikelen...Hierdie artikels van staatsinrigting...maak die ordening uit van 'n baie eenvoudige, maar behoorlik ingerigte samelewing".
- 198 This is in contrast to Natal where Britain had maintained a military presence at Port Natal although not wishing to annex the territory formally.
- 199 For a discussion of the various approaches to the role of recognition in the acquisition of statehood see *S v Banda* above, and the exhaustive list of authorities cited there.
- 200 For a discussion of the position of *de facto* regimes see eg, Booysen (1989) 152.
- 201 Botha (1926) 8 states "Die bestaan van die Suid-Afrikaanse Republiek was reeds voor die tyd al 'n feit." See too, Hofmeyr (1933) 6.
- 202 Hofmeyr (1933) 31.
- 203 *SAR Staatskoerant* 636 26.4.1876. The Free State had appointed a consul to the Netherlands in 1854.
- 204 *SAR Staatskoerant* 314 22.2.1870.
- 205 Hofmeyr (1933) 30.
- 206 Hofmeyr (1933) 29 n 4 and 5ff; Botha (1926) 4 where the text of this article of the Convention is reproduced. The Convention was confirmed by a Proclamation issued by General George Cathcart on 15

- April 1852 - *Blouboek* no 1646 of 1853 at 37, 59 and 115.
- 207 For a brief survey of the circumstances leading to the annexation see Botha (1926) 95ff.
- 208 Botha (1926) 101.
- 209 For a general discussion of the principles involved see Vorster (1974) 27ff.
- 210 See Hofmeyr (1933) 6-7 where he cites Shepstone's proclamation (at 6) and Lord Derby's description of the Sand River Convention as a declaration by the Queen accepted by certain of her subjects, of *conditions* under which they could be allowed to manage their own affairs. How this could be reconciled with the terms of article 1 (see above) is something of a mystery.
- 211 Botha (1926) 105.
- 212 Hofmeyr (1933) 11; Botha (1926) 107.
- 213 Hofmeyr (1933) 12; Botha (1926) 108.
- 214 Botha (1926) 111-2. The Convention was ratified on 25.10.1881.
- 215 Reproduced in Hofmeyr (1933) 13.
- 216 Negotiations began in London between Lord Derby, Minister of Colonies and the Boer deputation made up of Kruger, Smit and Du Toit on 28.9.83 - Botha (1926) 113ff.
- 217 See Botha (1926) Annexure C 704-12 for the Dutch text

of the treaty.

- 218 An example of a treaty concluded during this period is the Treaty of Friendship and Commerce between the South African Republic and Portugal signed on 11.12.1875. Although the treaty was not ratified, it is clear from correspondence cited by Hofmeyr (1933) 91ff, that after annexation and even after the Pretoria Convention 1881, the treaty was still considered valid by the Portuguese. So too, the Treaty of Friendship and Commerce between the Transvaal and Belgium which came into operation on 19.8.1876. The treaty remained in force after the annexation, the Pretoria Convention and the London Convention - Hofmeyr (1933) 94.
- 219 For the effect on one of the parties to a treaty of annexation by or incorporation into some other state, see Hofmeyr (1933) 92-3 where an analogy is drawn with the brief "demise" of the Netherlands between 1810 and 1813.
- 220 Compare eg, the different approaches of Hofmeyr (1933) and Botha (1926).
- 221 See Hofmeyr (1933) 99 where he cites a question in this regard directed to Britain by Belgium. The British reply was that the Republic could act independently, Britain having only a right of veto.
- 222 Hofmeyr (1933) 100 ff. As *bona fide* agreements, he claims that not only is a party bound to comply with specific provisions of the treaty, but also to guarantee that all elements necessary to ensure that the "spirit" of the treaty can be met and to do nothing which could complicate or negate the application of the treaty. An analogous situation arises today

in the case of article 46 of the Vienna Treaty Convention which provides that a state may not invoke the fact that its consent to be bound by a treaty was expressed in violation of a rule of its internal law unless the violation was manifest and concerned a rule of fundamental importance. Although article 4 was not part of the Transvaal Constitution, were the criteria set in article 46 of the Vienna Convention to be applied to an article 4 situation, the consent would, it is submitted, be both manifest and of fundamental importance.

- 223 Treaty concluded between the Transvaal and Switzerland 6.11.1885; Hofmeyr (1933) 100.
- 224 Treaty concluded between the Transvaal and Italy 6.10.1886; Hofmeyr (1933) 100.
- 225 The treaty concluded with France (10.7.1885) mentions only "constitutional requirements", while that concluded with Germany (22.11.1885) makes no mention at all of the provision - Hofmeyr (1933) 101.
- 226 Hofmeyr (1933) 101; Walker (1968) 467. It is uncertain whether this treaty ever received British assent. In *Attorney-General v Andreson* 1897 Off Rep 287, the court found that no treaty existed between the Transvaal Republic and Portugal (at 289). It does consequently appear doubtful whether Britain in fact approved the treaty.
- 227 Hofmeyr (1933) 102. However, Britain still ratified

this treaty. The treaty was presumably superseded after final annexation of the Transvaal by the Anglo/Netherlands extradition treaty of 1898 (see n 93 above).

- 228 Traktaat voor de Wederkeerige uitlevering van Voortvluchtige Misdadigers van uit Natal en van uit de Zuid-Afrikaansche Republiek signed at Pietermaritzburg 18.11.1897 and Pretoria 20.11.1897 and operational from 20.11.1897.
- 229 Hofmeyr (1933) 103.
- 230 Hofmeyr (1933) 104.
- 231 Hofmeyr (1933) 104.
- 232 Hofmeyr (1933) 103ff.
- 233 Hofmeyr (1933) 103 n3 citing Leyds *Eerste Correspondensie* 229.
- 234 The President was in any event empowered by the Constitution to conclude treaties. See Introduction to Chapter I above in this regard.
- 235 Again a power he already possessed.
- 236 2 SAR 44 heard on 10-18.8.1885.
- 237 1877-81 Kotze's Rep 38 heard on 25.4.1878.
- 238 1 SAR 144 heard on 12-26.5.1884.
- 239 This he concluded from a statement made to the Volksraad by the President of the Orange Free State that he had been unable to conclude such a treaty;

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- 240 At 145-6.
- 241 At 147.
- 242 1 SAR 157.
- 243 See Cape Colony above. For an application in terms of this Act (14 of 1886) see *J Goldberg v The State* 2 Off Rep 107.
- 244 1897 Off Rep 287 heard on 4-10.9.1897.
- 245 The South Africa Act 1909 (9 Edw 7 c 9) an Act to constitute the Union of South Africa, adopted by the British parliament 20 September 1909.
- 246 See the recent Canadian advisory opinion *Jurisdiction over the Seabed and Subsoil of the Continental Shelf off Newfoundland* Supreme Court of Canada 8 March 1984; 1984 *ILM* 288; Botha (1984) 194, where the status of British possessions is discussed at length within the context of Newfoundland.
- 247 The Durham Report (House of Commons Paper 3/1839) was the result of an investigation commissioned by the British government into uprisings in Canada during 1837/8; see Keith (1912). The task fell to Lord Durham, the governor of Canada. He found that the root cause of the problems was the representative system in terms of which the executive had responsibility for government but no power to make the necessary laws, while the legislature enjoyed legislative power but no responsibility for government. He proposed a system of "responsible government" in terms of which the executive was responsible to the representatives of the Colonial populace,

rather than to the British government. For a summary and evaluation of the report and its effect see Roberts-Wray (1966) 248ff.

- 248 The Cape of Good Hope was granted responsible government in 1872; Natal in 1893; the Transvaal in 1906 and the Orange Free State in 1907. Keith (1933) points out that in the case of the South African possessions the concept of responsible government assumed a new connotation in that the interests of the predominantly black population were "placed in the hands of the local European minorities" (at 4).
- 249 See Du Plooy (1958) 5ff. See too, Wiechers (1967) 186; Keith (1933) n 274 3ff; and Roberts-Wray (1966) 248.
- 250 Keith (1933) 5 n 274.
- 251 See in this regard nn 218 - 233 above and the accompanying text.
- 252 See Roberts-Wray (1966) 250ff and Keith (1966) 5 n 274.
- 253 Du Plooy (1958) 6; Roberts-Wray (1966) 250.
- 254 Although colonial statesmen had been involved in the negotiation of bi-lateral trade agreements as early as 1852, and Canada had negotiated a reciprocal trade agreement with the United States in 1854, it was Canada's adoption of the so-called "Caley Tariff" in 1858 (Statutes of Canada 1858 22 Vict C 76), in terms of which Canada raised her tariff against British imports, that spelled the end to absolute control over trade. Although Britain retained overall control, the individual Colonies were allowed to deal with their coasting trade in

1869. See Keith (1933) 5-6; Roberts-Wray (1966) 250; and Du Plooy (1958) 5-6.
- 255 Colonial Laws Validity Act 1865 28 & 29 Vict c 63 ,
adopted on 29.6.1865
- 256 Dicey (1948) xlix.
- 257 Similar conferences were held in 1894 and 1897. In 1902 it was suggested that the conferences should be held every four years and in 1907 it was formally resolved that the Colonial ministers would meet every four years under chairmanship of the British Prime Minister to discuss matters of mutual concern. Du Plooy (1958) 8 regards this conference as particularly significant for the development of an independent status for the Dominions as it was for the first time chaired by the British Prime Minister - thus lending greater prestige or weight to the proceedings - and was referred to as a conference "between His Majesty's Government and the Governments of the self-governing Dominions beyond the seas".
- 258 Olivier (1986) 242 - 243 distinguishes between the older Colonies which were after 1907 known as Dominions, and other British possessions. South Africa, together with Canada, Australia and New Zealand fell into the Dominion category. The position of Ireland was somewhat different in that it was not first a Colony but assumed Dominion status directly.
- 259 See eg, Du Plooy (1958) 8.
- 260 Du Plooy (1958) 8 mentions the Radio Telegraphic Conference of 1912 as an example. It will be remembered that the Transvaal Republic had in any event arrogated to itself the right to accede to treaties of this nature by acceding to the World Postal Convention 1891, the Belgian Treaty for the

Suppression of Slave Trade of 1896, and the Geneva Convention on the Treatment of Soldiers Wounded in the Field of 1864.

- 261 Keith (1933) 7.
- 262 Although Britain retained the right to declare war, the various Dominions were accorded the right to decide the extent of their participation. Du Plooy (1958) 9; Keith (1933) 9; Roberts-Wray (1966) 252; Olivier (1986) 243.
- 263 Wiechers (1981) 117 citing Resolution IX Imperial War Conference 1917.
- 264 Wiechers (1981) 117ff. Although in 1919 the Dominions took part in both the Treaty of Versailles and the creation of the League of Nations, Wiechers claims that they were not full parties. In the Treaty of Versailles a distinction is drawn between allied and associated powers on the one hand, and high contracting parties on the other. The British Empire is listed as one of the Powers without separate mention of the Dominions. The treaty was concluded between the allied heads of state and Germany rather than between Germany and the individual states. As the King was head of state of the Dominions the treaty was signed on his behalf by British and Dominion ministers. In the case of the Covenant of the League of Nations, although the Dominions are generally regarded as being independent members of the League, their names appear under that of the British Empire and not alphabetically as independent states - Olivier (1986) 243 n 195.
- 265 Du Plooy (1958) 11.
- 266 Du Plooy (1958) 11; Wiechers (1981) 119.
- 267 Although Canada had been accorded the right to set up a legation in Washington, she had not in fact done so.

Ireland claimed a similar right in 1924 and was granted it; while the Union appointed a consul to Mocambique - Keith (1933) 12 and 55; Roberts-Wray (1966) 253.

- 268 Although it is generally agreed that the Imperial Conference of 1926 represents the high-point in the development of the status of the Dominions, it must be remembered that this conference was in fact the culmination of moves initiated at the earlier conferences, notably that of 1923. At the 1923 conference particular attention was paid to the treaty-making capacity of the Dominions and it was decided that they would be able to conclude treaties on their own behalf with foreign powers but only after notification to the other members of the empire. Where a treaty would effect more than one Dominion, full consultation was required. See in general Wiechers (1981) 119 -120; Roberts-Wray (1966) 252.
- 269 Report of the Inter-Imperial Relations Committee 1926 Imperial Conference par 1 - the so-called "Balfour Declaration"; Keith (1933) 13; Wiechers (1981) 121.
- 270 Du Plooy (1958) 12ff.
- 271 Du Plooy (1958) 29.
- 272 Du Plooy (1958). The three notable exceptions were India, Pakistan and Malaya the first two of which had Presidents of their own, while the latter had a "Royal Ruler".
- 273 Du Plooy (1958) 30.
- 274 9 Edw 7 c 9.
- 275 This power was redefined more clearly in section 4 of

the Status of the Union Act 69 of 1934. See Du Plooy (1958) 34 - 5.

- 276 Du Plooy (1958) 35 - 6, cites the 1937 Letters Patent & Royal Instructions in this regard. There is an exception in terms of the Royal Functions and Seals Act 70 of 1934 in terms of which if the King is unable to sign a document requiring his signature, or awaiting his signature would cause undue delay, the Governor-General may sign on his behalf.
- 277 Du Plooy (1958) 39. He notes an exception in this regard viz, the ratification of a peace treaty with the prior concurrence of parliament in terms of section 3(1) of the Treaties of Peace Act 20 of 1948.
- 278 Wiechers (1981) 127ff.
- 279 This would appear to be the prevailing view - see eg, *Ndlwana v Hofmeyr* 1937 AD 229 and *Harris v Minister of the Interior* 1952 2 SA 428 (A).
- 280 Keith (1933) 38 states that "the mere fact that the Imperial Parliament can remove restrictions implies that it can at will reimpose them."
- 281 See Chapter I Introduction.
- 282 See n 280 above.
- 283 See *S v Schwing* 1989 3 SA 567 (T).
- 284 The Statute of Westminster 1931 (22 Geo V C 4): An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930.
- 285 11 December 1931.

- 286 Status of the Union Act 69 of 1934.
- 287 At 63-64 above.
- 288 Section 148 (1) South Africa Act (9 Edw 7 C 9).
- 289 See Bell (1905) 566ff.
- 290 At 94 above.
- 291 At 83 above.
- 292 In Chapter IV attention will be paid to the position of the independent southern African states of Transkei, Bophuthatswana, Ciskei and Venda which have concluded both bi- and multilateral extradition arrangements with one another and with South Africa. If the popular press is to be believed (!), the possibility exists of certain or all of these states again amalgamating with the "new South Africa". If this were to happen one would be faced with a situation closely analogous to that arising between the Union and the old Boer Republics.
- 293 See 61-62 above for the content of the various provisions.
- 294 Extradition Treaty between the United Kingdom and Greece concluded at Athens 24.9.1910; ratified at Athens 30.12.1911.
- 295 Extradition Treaty between the United Kingdom and Siam concluded at Bangkok 4.3.1911; ratified at London 1.8.1911.
- 296 Treaty for the Extradition of Criminals between the

United Kingdom and Czechoslovakia concluded at London 11.11.1924. This treaty represents an important departure in that it provided in article 17, that it would not apply in certain of Britain's Dominions - including the Union of South Africa - unless "notice to that effect shall have been given on behalf of the government of such Dominion". Provision was also made for the independent termination of the treaty by the Dominions. The treaty was, however, extended to the Union of South Africa as from 12.6.1927; see GN 26 *Government Gazette* of 6.1.1928.

- 297 Treaty between Finland and the United Kingdom for the Extradition of Criminals concluded at London 30.5.1924. This treaty also contained the clause identified in the previous footnote suspending the operation of the treaty in the Union - see article 17. Again, the treaty was made applicable to the Union by agreement between the governments of Finland and the Union - article V GN 1677 *Government Gazette* 29.9.1925.
- 298 Extradition Treaty between the Union of South Africa and the United States of America concluded at Washington 18.12.1947; ratified at Washington 1.3.1951 - see GN 91 *Government Gazette* 20.4.1951.
- 299 Extradition Treaty between the Union of South Africa and the State of Israel concluded at Pretoria 18.9.1959; ratified at Pretoria 7.1.1960 - see GN R14 *Government Gazette* 6362 5.2.1960.
- 300 See above n 268.

CHAPTER III

THE BASIS OF EXTRADITION : LEGAL NORM OR MORAL PRECEPT?

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5 CONCLUSIONS

ENDNOTES

1 INTRODUCTION

Having defined extradition, and placed it in its historical perspective both internationally and from the South African point of view, the time has now come to return to the questions posed above, and notably to the question of the basis of extradition. Is there a duty on states to extradite a fugitive criminal if requested to do so? If there is such a duty, on what does it rest? Is it a legally enforceable duty attracting sanction for its breach; or is it no more than a moral obligation: that which a state "should" do?

The polemic surrounding the so-called "duty" to extradite is certainly not new. Although many contemporary authors have tended to dismiss the question as merely "academic" in that the majority of countries today regulate extradition by treaty, (1) this approach in fact begs the question. A number of countries, among them South Africa, (2) either in their practice or specifically in their municipal legislation, allow for extradition in the absence of treaty arrangements. In these instances the basis upon which the extradition is effected remains crucial.

In considering the duty to extradite a distinction must consequently be drawn, first of all, between extradition based on treaty and extradition in the absence of treaty provisions.

2 EXTRADITION BASED ON TREATY PROVISIONS

That a state is sovereign within its own territory hardly bears repeating. As a natural adjunct to this sovereignty is the absolute discretion which a state enjoys, at least in theory, to admit whom it pleases within its borders. (3) Furthermore, having admitted an individual the state may protect that individual in any way it deems necessary or expedient. (4) However, sovereignty cannot today be regarded as the absolute concept it was during the eighteenth and nineteenth centuries. States may, and all states have, limited their sovereignty by agreement or treaty.

In the Vienna Treaty Convention (5) a treaty is defined as :

"...an international agreement concluded between States in written form and governed by international law (6)...[which is] ...binding on the parties to it and must be performed in good faith". (7)

Consequently, by concluding a treaty a state voluntarily undertakes an enforceable international obligation to act in accordance with the provisions of the agreement. Where, therefore, a state has concluded a extradition treaty with some other state, it has to the extent of and subject to the provisions embodied in that treaty, limited its sovereign right to admit whom it pleases to its territory, and to protect individuals within its territory in the manner it deems appropriate. (8)

Although traditionally the extradition treaty is perceived as a bilateral arrangement between two states, the tendency among states to conclude such agreements would appear to be on the wane.⁽⁹⁾ This does not however, mean that the extradition of fugitive criminals faces a similar fate. Apart from multilateral extradition arrangements which have been common for a number of years,⁽¹⁰⁾ the modern trend would appear to be towards the conclusion of multilateral conventions, not necessarily aimed specifically at extradition, but embodying provisions allowing for the inter-state surrender of persons contravening the terms of the convention.⁽¹¹⁾ These alternative forms of treaty will be considered presently once the more traditional bilateral treaty has been examined.

2.1 Extradition by bilateral treaty

Treaty as the source of the obligation to extradite has been so strongly perceived that in the United States of America, for example, a court has declared :

"The modern view and the one maintained in this country is that the state is under no obligation to surrender fugitives accused of crime unless it has contracted to do so".⁽¹²⁾

In British practice too, one encounters this reluctance to extradite in the absence of treaty commitment. Despite a few earlier pronouncements to the contrary,⁽¹³⁾ by 1839 it was clear that the

Crown was reluctant to surrender in the absence of treaty provisions. During that year, when faced with a request to surrender one *Lett* to the United States of America, the Queen's Advocate declared that :

"...[A]s there is no treaty...between Great Britain and the United States of America, for the delivery up of persons...this country (Britain) has not, by the law of Nations or otherwise, a right to insist upon the delivery up of Mr. Lett".(14)

The British position was again clearly illustrated when the slaves on the *Creole* rebelled, and having murdered a passenger, forced the crew to take them to the Bahamas. The Law Officers stated that :

"It is the practice of some states to deliver up persons charged with crimes, who have taken refuge or been found within their Dominions, on demand of the Government of which the alleged criminals are subjects, but such practice does not universally or even generally prevail, nor is there any rule of the Law of Nations rendering it imperative on an Independent State to give up persons residing or taking refuge within its territory".(15)

Clearer still, is the case of *James Thornley* a British subject resident in Russia who, having committed fraud and forgery, fled St Petersburg for Paris where he was arrested pending his extradition to Russia. In hearing the application, the Law Officers refused to acknowledge "even an imperfect obligation by international law" to surrender in the absence of treaty commitment.(16)

South African courts have also on occasion, refused to extradite in the absence of a treaty. In *Ex parte Lithauer*,⁽¹⁷⁾ Isaac Lithauer had been arrested in Pretoria under a warrant issued by the Resident Magistrate of Kimberley, Grikwaland West. He had allegedly committed fraud and forgery. The warrant had been countersigned by the attorney-general of the Transvaal. Asked to judge on the validity of the arrest, the court found that two requirements had to be met for the arrest to be valid: firstly an application from the government of Grikwaland West to the government of the Transvaal; and secondly, the existence of an extradition treaty between the Transvaal and Grikwaland West. Ordinance 5 of 1871 made both requirements peremptory and as neither had been met, the arrest was set aside.⁽¹⁸⁾

In yet another case - *Andreson v Attorney General* ⁽¹⁹⁾- Arthur Andreson was employed by a company in Lorengo Marques, the then capital of Mocambique. He was arrested there by the Portuguese government on charges of abuse of trust but was released on bail and journeyed to South Africa. The surety withdrew his guarantee and the bail lapsed. At the request of the Portuguese government, Andreson was arrested and detained in Pretoria pending his extradition. Esser J granted an application for Andreson's immediate release on the ground that no extradition agreement existed between Portugal and the South African Republic at that stage. The attorney-general appealed claiming that in the absence of treaty provisions, the government had an inherent right to grant extradition.

Delivering the majority judgment,⁽²⁰⁾ Kotze CJ found that :

"It is...clear that...the extradition of offenders can only take place by means of treaty...The law of the land and the practice under it, are therefore against the request of the Attorney-General. Consequently, in the absence of an extradition treaty, the respondent must be released from custody."

Although from South Africa's point of view, the position has changed since the enactment of the Extradition Act 67 of 1962, South African applications for extradition continue to come up against the absence of treaty provisions, particularly in the case of Commonwealth countries.

So, for example, when in 1965 South Africa requested the extradition of *Thomas Clements Usher* from Canada for securing money under false pretences, one of the reasons given for the refusal to extradite was the absence of treaty arrangements.⁽²¹⁾ Similarly, *William Edward Spencer Lewis*, wanted in South Africa to face charges for theft and fraud amounting to some R72 000, could not be extradited from Australia as no treaty existed between the countries.⁽²²⁾

The Republic of Ireland, too, in the case of *R v Lewis and Mason*, refused to extradite Mason as no extradition treaty existed,⁽²³⁾ while in the case of *Lionel Stander alias S Lyons*,⁽²⁴⁾ where Stander was wanted in South Africa for theft of trust monies totalling some R49 000, proceedings for extradition were not instituted as on advice it was felt that in the absence of an extradition treaty between South Africa and Eire, there was no way in which his extradition could be contrived.⁽²⁵⁾

The system for the backing of warrants which applied between the Union of South Africa and the countries of the British Commonwealth fell away when the Union became a Republic and left the Commonwealth in 1961.(26) The following is a random selection of the many cases which arose in this regard.

Mabatu Enoch Zulu participated in the murder of Chief Gqobosa and then fled to Maseru, Basutoland. As there was no treaty operative between the two territories, his extradition was refused.(27) So too, one *James Lefule*, who had been sentenced in Basutoland to twelve years' hard labour, was wanted in Paarl for escaping from custody. In reply to a request made to the British embassy for his surrender, it was stated that:

"The Department [of Foreign Affairs] will be aware that an agreement for extradition between the Republic of South Africa and the High Commission Territories is at present being negotiated but that in the meantime applications for the removal of persons from the High Commission Territories cannot be considered".(28)

Similar problems arose with the dissolution of the Federation of Rhodesia and Nyasaland as appears from the cases of *John George Fraser Lang*,(29) *Dennis Higgs*, (30) and others.(31)

Bilateral treaty provisions consequently appear to retain their position as the mainstay of extradition policy although they are not the sole source of a duty to extradite. The ideal, mooted by the majority of writers on extradition, of a "common law of extradition"

(32) based on a universal and unified extradition practice among all nations, is acknowledged by these writers as belonging to the future. However, steps towards its realisation have been taken through the conclusion of multilateral regional arrangements which bring a number of nations together with a single policy governing the surrender of fugitive criminals. Discussing "regional extradition arrangements", Shearer, (33) distinguishes two types of arrangement ; the multilateral extradition convention, and similarly structured reciprocating national legislation employed jointly for the surrender of fugitives. To this classification must be added a third variant, viz the multilateral international convention covering a topic other than extradition but either explicitly or by necessary implication incorporating some extradition provision. South Africa's position as regards these various forms of treaty commitment requires closer attention.

2.2 Multilateral extradition conventions

The multilateral extradition convention is an agreement between a number of states which can either institute extradition obligations for the first time, or can replace or supplement bilateral treaties existing between the states concerned. (34) Although South America must be regarded as the continent most active in the conclusion of such conventions, (35) the best-known must surely be the European Convention on Extradition signed in Paris on 11 December 1957. (36)

If one examines the typical situation giving rise to a multilateral convention, certain characteristics can be identified. Traditionally multilateral conventions are concluded, first and foremost, between neighbouring states or states within close proximity to one another. Secondly, states party to such a convention generally share a basic ideology and general philosophy of government which makes for cordial cooperation in the suppression of jointly perceived criminal activity. Thirdly, a measure of economic cohesion generally exists between the states involved.

Transposing these requirements onto the South African situation has interesting consequences. First, the proximity characteristic means that were South Africa to be party to such a convention, the obvious partners would include the so-called "Front Line States" of Zimbabwe, Mocambique, Angola, Zambia and Namibia, to name only the most obvious. Although South Africa has through the Southern African Customs Union with the so-called BLS countries, (37) shown that cooperation is indeed possible; cooperation and ideology cannot realistically be separated where national survival is not at stake.

This raises the second characteristic identified above, and the one which must be regarded as crucial as far as a multilateral extradition arrangement is concerned. In a field where a state's perception of crime and criminal behaviour is of paramount importance for any form of meaningful cooperation, agreement based on such perceptions must of necessity be still-born in a community where

South African policies have to date been universally condemned and even classed as criminal.(38)

The third characteristic - economic cohesion - appears at first glance more positive. Mention has already been made of cooperation between South Africa and the BLS countries on this plane, and current realities with the rest of Africa too, would appear to support this requirement.(39) However, cooperation born of necessity is one thing; ideological cooperation another altogether. Furthermore, when it is borne in mind that one of the most dynamic of the African inter-state arrangements has as its primary aim the abolition of South Africa's dominant economic position in the continent, this characteristic too, cannot be said to hold positive prospects for success.(40)

Consequently, although South Africa is ideally placed geographically to function as a party to a multilateral extradition arrangement, and the necessary economic *nexus* would appear to exist and already have generated a measure of cooperation, the traditionally hostile relations between South Africa and her neighbours is still a real inhibiting factor.

In recent times, cooperation between South Africa and her traditionally hostile neighbours has shown some improvement, (41) and there have indeed been indications that specifically in the field of extradition, there is a realisation on the part of these states of the need for some form of cooperation.(42) Nonetheless, although the climate for African cooperation must at present be regarded as more

propitious than it has been for a number of decades, it is too soon and negotiations are far too precarious for any definite prediction of any form of meaningful joint action in the form of a multilateral convention in the often contentious field of extradition.

As was seen in Chapter II, and will be considered in greater detail in Chapter IV, many of the extradition treaties which South Africa regards as binding were inherited through succession from the British during the Colonial era. Had Britain been a party to a multilateral extradition convention before the emergence of the Republic of South Africa as a Republic in 1961, the possibility would now exist of South Africa being (or regarding herself as being) party to such an arrangement. However, as the British government has ever followed a bilateral preference when dealing with extradition, this possibility too is excluded for South Africa.⁽⁴³⁾ At this stage, consequently, South Africa is not, and cannot in the foreseeable future realistically be regarded, as a party to a multilateral convention on extradition *which would be recognised as such by the international community as a whole.*

The latter part of the previous paragraph was emphasised for a specific purpose as within the South African context, the position is not so simple. In terms of current South African policy, the independent national states of Transkei, Bophuthatswana, Ciskei and Venda have been created.⁽⁴⁴⁾ Although the sovereign independence of these states is recognised by no member of the international community,⁽⁴⁵⁾ as regards both their own and South African

perceptions they must, for the time being, be regarded as fully independent sovereign states. (46)

If the characteristics of the multilateral extradition convention are again briefly considered it will immediately be clear that all three of the most striking are satisfied. The TBVC-states are in fact totally surrounded by South African territory : their considerable borders consequently providing ideal "escape routes" for fugitives from justice; they and the Republic share political ideologies to a large extent; (47) and finally, they are virtually wholly dependent on South Africa for their economic needs. From the theoretical point of view consequently, there would appear to be much to commend the conclusion of a multilateral extradition arrangement between South Africa and these states. (48)

This has indeed occurred between South Africa and the states of Bophuthatswana, Ciskei and Venda with the conclusion of the Multilateral Convention on Extradition 1986. (49) This convention, aimed at facilitating the delivery up of criminals between the three states along the lines of the old British backing of warrants system, replaces the individual extradition treaties formerly operative between the Republic and these states. (50) It is notable, however, that the Republic of Transkei declined to be party to the Convention, preferring to maintain extradition procedures on the bilateral level in terms of the existing treaty. (51)

From the above it is clear that as regards multilateral treaties as a basis for extradition, South Africa is at present poorly placed. Although an attempt has been made to involve Southern Africa, this has fallen on deaf ears to a large extent, the Republic not even being able to muster unanimous support from the unrecognised "states" which it has itself created. The question of the need for a convention of this type with these "states" must of necessity arise. Is there not some other form of cooperation which would better serve the South African needs in this regard. One thinks here immediately of what Shearer (52) and Bassiouni (53) regard as the alternative form of inter-regional cooperation, viz reciprocating national legislation governing extradition.

2.3 Regional arrangements employing municipal law

In concluding such an agreement, the states involved do not enter into a formal extradition convention as discussed in the previous section. Rather, they agree via their national legislatures to follow common rules and procedures to deal with the extradition of fugitive criminals finding themselves in the territory of one of the participating states. Shearer (54) points out that the principal advantage of the system is a simplified procedure for extradition ; essentially a reduction in the "red tape" surrounding and often smothering extradition applications. Furthermore, an agreement of this type requiring for its amendment merely an ordinary act of the

parliaments of the states concerned, can more easily keep abreast of modern needs.

The best-known, and certainly the most relevant of this type of arrangement from South Africa's point of view, is the Commonwealth Scheme to which South Africa was a party until her departure from the Commonwealth of Nations in 1961. A detailed discussion of this scheme is not called for at this stage. What is important, however, is the Inter-Colonial Backing of Warrants system which prevailed under the Fugitive Offenders Act of 1881.⁽⁵⁵⁾ In terms of Part II of this Act, a warrant issued in one part of the Dominions could, simply by being endorsed in another, result in the person sought being arrested in the Colony where he found himself and returned to the scene of his alleged offence without his having to be tried. Once returned he would stand trial for the offence charged.⁽⁵⁶⁾

Although South Africa made free use of the system in its dealings with fellow African Commonwealth states,⁽⁵⁷⁾ once the Republic left the Commonwealth, the continued existence of the scheme was threatened.⁽⁵⁸⁾ The importance with which its continued application was viewed is, however, illustrated by the provision incorporated into the South African Extradition Act 67 of 1962, perpetuating a type of backing of warrants system; and by the inclusion of a backing of warrants system within the Convention on Extradition with Bophuthatswana, Ciskei and Venda above.⁽⁵⁹⁾

In the Extradition Act one consequently finds the distinction drawn between a foreign state on the one hand, and an associated state on the other. In terms of section 6, an associated state is an African state with which the Republic has agreed, on a reciprocal basis, that warrants issued in that country will be endorsed for execution in the Republic and vice versa. This distinction is carried further by the provisions of section 12 in terms of which a South African magistrate before whom a person suspected of having committed an extraditable offence in an associated state is brought, shall, where he finds the person so before him liable to be surrendered, order his surrender subject to a fifteen day period allowed for appeal.

This system would appear to meet the need for a simplified extradition process identified in the previous section. The proof required in dealing with cases originating in an associated state is considerably lighter than for cases involving foreign states,⁽⁶⁰⁾ and the decision to extradite is made by the presiding magistrate and not by the Minister of Justice as is the case with a foreign state.⁽⁶¹⁾

South Africa has, however, made very little use of this backing of warrants system in its post-Republican dealings with fellow African states. Apart from the provisions of the Convention on Extradition between South Africa and Bophuthatswana, Ciskei and Venda, in fact only two states would at present appear to qualify as associated states within the definition of the Act.⁽⁶²⁾ Thus in *S v Eliasov*,⁽⁶³⁾ involving a treaty between South Africa and Rhodesia (as it then

was), the court in dismissing the appeal against an order for Eliasov's surrender in terms of section 12 of the Act, stated that :

"An associated state is defined in sec.1 of the Act as any foreign state in respect of which sec.6 applies and sec.6 in terms, applies in respect of any foreign State in Africa which has concluded an extradition agreement with the Republic which provides for endorsement for execution of warrants of arrest on a reciprocal basis. Article 9 of the extradition agreement...between the Republic and Rhodesia...contains such a provision".
(64)

However, from such information as is currently available, it would appear that Zimbabwe, as the successor to Rhodesia in this instance, no longer regards itself bound by this treaty. (65)

The cases of *S v Bull* (66) and *S v Devoy* (67) dealt with extradition between South Africa and Malawi (the Nyasaland component of the former Federation of Rhodesia and Nyasaland). In *Bull* it was stated that :

"The warrant was duly endorsed for execution under and by virtue of the provisions of art.9 of the agreement and sec. 6 of the Extradition Act, Malawi being a foreign State in Africa and thus an associated state within the meaning of sec.1 of the Act"; (68)

while in *Devoy* it was similarly stated that :

"Malawi is an 'associated State' within the meanings of secs. 1 and 6 of the Act". (69)

In its extradition dealings with other states which could qualify as associated states within the definition of the Act, South Africa has traditionally followed the conventional bilateral treaty mould.⁽⁷⁰⁾ While this is regrettable, it is for the political reasons postulated above understandable in the case of internationally recognised African states. This mould was broken in the case of Bophuthatswana, Ciskei and Venda where the South African authorities expressly included an internal backing of warrant system. However, given the international attitude towards these states, this deviation from the general practice must be regarded as being of limited significance.

From the above it can be seen, that although South African law allows for the use of concordant municipal arrangements, in practice the system is under-utilised. In fact, within the current South African context, the Republic is party to only one such arrangement.⁽⁷¹⁾

There remains one type of treaty by which a state may undertake an obligation to extradite, viz the multilateral treaty dealing with an issue other than extradition but embodying within its provisions an extradition clause. This type of agreement will now be considered more closely.

2.4 Multilateral conventions embodying extradition provisions

Through the years a number of issues have arisen which the international community has clearly felt are of sufficient importance to require specific regulation. The resulting conventions generally deal with crimes of a universal nature in the sense that they affect the well being of nations as a whole or may continue in effect across national boundaries. They are concerned with criminal action potentially harmful to a large number of persons rather than the traditional extradition offence, for example fraud, where generally only a small number of persons is affected.

One consequently finds, for example, the White Slave Traffic Conventions of 1910 and 1921 which provided that states should do all possible to extradite persons guilty of offences specified in the Convention;⁽⁷²⁾ the Convention for the Suppression of Counterfeiting Currency of 1929;⁽⁷³⁾ and the Convention for the Suppression of Illicit Traffic in Dangerous Drugs of 1936.⁽⁷⁴⁾ What all these Conventions have in common is that through their provisions they widen the scope of existing extradition treaties by including the offences emerging from the Conventions within the crime definition of existing treaties. Although South Africa was not an independent party to these treaties in its own right, it was, as part of the British Empire, subject to Britain's membership.⁽⁷⁵⁾

In recent years international attention has come to focus more closely on international terrorism and its effects - epitomised by aircraft hi-jacking - and on the international suppression of the drug trade.⁽⁷⁶⁾ A general abhorrence of terrorism has led to the adoption of a series of conventions aimed at controlling the phenomenon and ensuring that hi-jackers will not escape punishment. These conventions serve as a good illustration of the multilateral agreement not aimed specifically at extradition, but embodying extradition provisions within its wider ambit. The most notable in this regard are the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft in Flight of 1963;⁽⁷⁷⁾ the Hague Convention on the Suppression of the Unlawful Seizure of Aircraft of 1970;⁽⁷⁸⁾ and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971.⁽⁷⁹⁾

As in the case of Britain and other jurisdictions where treaties do not find automatic application as part of the municipal law of the land, in South Africa a process of transformation is required before a treaty may be applied municipally.⁽⁸⁰⁾ Consequently, in 1972 the Civil Aviation Offences Act was adopted by the legislature to give effect to these three conventions.⁽⁸¹⁾ In 1974 the section of the Act dealing with extradition was amended to extend the courts' jurisdiction over certain aircraft for the purposes of the Extradition Act 67 of 1962.⁽⁸²⁾

The Extradition Act itself was also amended in 1974 by the insertion of section 2(5) which provides that an offence indicated in a

multilateral international convention to which the Republic is a party, shall be deemed to be an offence specified in any extradition agreement between the Republic and any other state party to such a convention. (83)

That these Conventions have a potentially profound effect on South Africa's position with regard to other convention countries can be illustrated by the following hypothetical situation. As has already been seen above and will be discussed more fully below, Britain will not extradite in the absence of a treaty. (84) As South Africa has entered into no extradition arrangements with Britain, a South African offender may seek refuge in Britain with impunity. However, so seriously does Britain regard her obligations under the Hague and Montreal Conventions, that if the individual involved were shown to have "unlawfully, by the use of force or by threats of any kind, seize[d] the aircraft or exercise[d] control of it", (85) he could indeed be extradited to a country with whom Britain had no bilateral extradition treaty. (86)

It can consequently be seen that South Africa is indeed party to multilateral conventions dealing with problems not related to extradition, but from which a duty to extradite arises and is accepted.

Thus far the traditional or non-problematic forms of treaty as a source of obligation to extradite have been considered. It has been seen that the obligation to extradite based on treaty can arise from

a specific bilateral treaty; from a multilateral extradition convention; from a regional arrangement; or from a multilateral convention not directly related to extradition as such. South Africa, with her multifaceted basis for extradition indeed utilises all these sources of obligation. However, given the overwhelming support for treaty as the prime - if not the sole - source of the obligation to extradite, it is hardly surprising that the terms treaty and extradition have become virtually synonymous in general usage. The problem remains, however, that if a criminal from one state flees to another state with whom the former has no extradition agreement, the interests of both states, as well as those of fairness and justice, demand that he should not go unpunished. The general attitude of states can perhaps best be reflected in the words of a United States' court which, when considering the extradition of a terrorist who had sought refuge in United States' territory, declared :

"The law is not so utterly absurd...We have enough of our own domestic criminal violence with which to contend without importing and harbouring with open arms the worst that other countries have to export".(87)

Consequently, where no treaty provisions exist the question of whether a fugitive criminal may, or indeed must, be returned to his country of origin remains as relevant in the latter half of the twentieth century as it was in the era preceding the proliferation of extradition agreements.

3 EXTRADITION IN THE ABSENCE OF A TREATY

3.1 A duty to extradite

Most modern writers on extradition ascribe the duty to extradite in the absence of treaty provisions, in the first instance to Hugo de Groot (88) who stated that :

"But since states are not accustomed to permit another state to enter their territory armed for the sake of exacting punishment, nor is that expedient; it follows that the city where [the fugitive] abides...ought to do one of two things - *either* itself being called upon, it *should* punish the guilty man, or it *should* leave him to be dealt with by the party who makes the demand; for this is what is meant by 'giving him up', so often spoken of in history".(89)

As a source of binding legal obligation, this text cannot be considered particularly convincing. Grotius here speaks not of what a state must do, but rather of what it ought to do; not that the state must punish or deliver, but rather that it should do so. The impression created is of a directory or moral guideline performed on considerations of expediency, rather than a peremptory duty resting on a legal obligation.

Vattel is more emphatic in his assertion that "Assassins, incendiaries and robbers [are] seized everywhere at the desire of the sovereign in whose territories the crime was committed, and are delivered up to his justice".(90) Other sources generally cited in

support of these views are Heineccius, Burlemanqui, Rutherford, Schmelzing and Kent.(91)

As indicated above, British practice recognises no duty to extradite in the absence of a treaty although it must be conceded that early authority exists for the contrary view. So in the fifteenth century *Brown case*,(92) a Dutch captain fishing for herring off the coast of Scotland but within what were regarded as Scottish waters, arrested Brown, a messenger of James I, and bore him off to Holland. James I demanded that the captain "be remanded unto himself here to receive as to justice shall pertain." The Crown Counsel, although acknowledging the existence of contrary views, declared that:

"there are good authorities that if a subject of one State commits a heinous crime within the territory of another state...the subject so offending ought to be remitted to the place where the crime was committed".
(93)

In subsequent cases practice tended to vary but in the case of the *Schooner Fairy*(94) the crew was surrendered on charges of murder, while in *Re Joseph Fisher* (95) the Canadian court approved the *Kent dictum* (96) in *Re Washburn* to the effect that the Jay Treaty was merely declaratory of customary international law. Here too, however, there can be little question of an absolute duty to surrender as extradition by the requested state was regarded as being in fulfilment of a "social compact which directs that the rights of nations as well as of individuals shall be respected and a good understanding maintained between them".(97)

The question of a duty to extradite without treaty provisions has, as indicated earlier, also arisen within the South African jurisdiction. Although the majority decision in the *Andresen* case (98) rejected such a duty, Ameshoff J delivered a dissenting judgment. He found that the first question to be answered was "[W]hat is the general principle of law which governs the present case?".(99) Here he referred to an opinion by one Prof. Hamaker of Utrecht delivered in 1885. There are two possible ways of looking at extradition. In terms of the one, extradition constitutes an act of assistance by one state to another in the exercise of the latter's jurisdiction. In terms of the other, extradition is an "act of criminal procedure, so that in the interests of civilized society, that which we consider to be a crime and deserving of punishment should not escape being punished". (100) Extradition is then based on a tacit agreement between civilised states to deal with crime in a certain way.

In assessing the first approach, Hamaker made the somewhat sweeping statement that :

"[A]lmost all the States of the civilized world deliver up criminals to nearly all other countries...Extradition has become a fixed rule, and no State, which values the respect and friendship of the other members of the great Republic of States, will violate this rule".(101)

From this Ameshoff J drew the rather surprising conclusion that :

"In accordance with this practice, the most authoritative writers of the present day - criminalists

as well as professors of international law - have adopted in the science an obligation to extradite, which, *even independently of treaty*, should rest on every civilized state towards all others...".(102)

He continued that the duty to extradite does not depend on an obligation to legal assistance bordering on favour, but on a general human interest which is involved whenever the suppression of crime is concerned. This is a "universal concern which all states are equally bound to protect" and which would be "precisely violated by a refusal to extradite".(103) The theories on which the majority based their views he regarded as "antiquated".

As pointed out earlier, the majority judgment was based on two principal considerations : first, the fact that the "laws of the South African Republic provide for extradition on the basis of a treaty";(104) and second, that the court felt itself bound by precedent.(105) That neither of these considerations can be regarded as antiquated, hardly bears mention. Without again entering into the question of whether public international law is part of the law of South Africa, (106) there can be no doubt that in the event of a conflict between South African municipal legislation and customary public international law, the former will prevail.(107) Furthermore, the doctrine of *stare decisis* is firmly established in South African law and it too, will exclude the application of public international law in the case of conflict.(108) Based as they are on a nebulous level of civilisation which must of necessity be judged subjectively by the presiding official concerned, Ameshoff's views cannot be

supported. The inescapable conclusion from the cases is that a duty to extradite in the absence of a treaty has never been recognised as an absolute and binding legal obligation.

3.2 A right to extradite

The fact that states are not under an obligation to extradite where no treaty exists does not, of course, mean that states may not extradite if they so elect. Although certain statements in early British authorities do perhaps suggest this, notably that of Lord Coke :

"...divided kingdoms under several kings are sanctuaries for servants, or subjects flying from one kingdom to another, and upon demand made by them are not by the laws and liberties of the kingdoms to be delivered", (109)

it is clearly accepted that states may, except where expressly prohibited by their municipal legislation or practice, deliver up a fugitive from justice to a country which requests his delivery but with whom no extradition treaty exists.

Even Britain has on occasion requested extradition under such circumstances, although generally in very cautious terms. (110)

In *State (Duggan) v Tapley* (111) it was held that "There was no rule of international law which forbade extradition in the absence of a treaty of extradition"; while in *Re Tribble* (112) it was still more

clearly stated that "Although there is no extradition treaty with the Republic of Panama, this fact need not impede the submission of an extradition request...".

The majority of states would appear to be prepared both to request extradition and to consider requests for extradition from other states in the absence of treaty commitment. When such proceedings are encountered, the delivery up or refusal is generally based on what is loosely termed "the rules of public international law uniformly accepted by both states", (113) the "uniform practice of nations", (114) or "universally accepted principle". (115) Although these phrases are difficult to define with any measure of precision, within the context of extradition they would appear generally to refer to extradition based on comity between nations, or on the principles of reciprocity.

3.3 Comity as a basis for extradition without treaty

Although comity between nations can be said to lie at the heart of international cooperation, in the sphere of extradition it means little more than that the requested state will receive and consider requests for extradition from other states. (116) As such, it provides at best a somewhat precarious basis on which to build international relations of a lasting nature.

In *Fiocconi and Kella v Attorney General of the United States*, (117) the United States requested the extradition of the appellants from Italy to face narcotics charges. The offences were not among those listed as extraditable in the treaty operative between the two states, but Italy nonetheless delivered the criminals to the United States. It was found that Italy had granted the extradition "as a matter of comity". Such clear reference to comity as an independent basis for the grant of extradition is, however, rare.

The reason for this limited reliance on comity as a basis for extradition must be sought in the nature of the concept of comity itself. Within the law of extradition, the basis of comity is the unfettered discretion of the requested state either to grant or refuse the extradition request. In the case of comity the position of the individual refuge seeker is consequently almost wholly dependent on the goodwill of the sovereign within whose territory he seeks refuge. It is for the executive to decide whether or not it will grant extradition and in making this decision it is largely free from constraint of any kind. A general feeling of goodwill between nations and not a concern for the individual involved, appears to be the determining factor.

The idea of a sovereign with unfettered power over those within his territory has however been eroded by the conception of the individual as a being with certain inalienable rights and freedoms. As the international community's concern for human rights and individual freedoms blossomed into the full-scale and all-pervading doctrine it

is today, so the realisation among the nations of the world that individuals finding themselves within the territory of a foreign state enjoyed certain basic rights, grew. While within the framework of international law as a whole the protection of the rights of the alien has remained largely uncodified, (118) in the extradition sphere, the ideal of an asylum-seeker entitled to certain minimum rights vis á vis other states has found concrete expression in municipal legislation prescribing certain procedures to be followed and certain requirements to be met when a state is faced with a request for extradition. The absolute discretion enjoyed by sovereigns in former times in deciding whether or not to extradite, has been circumscribed by domestic legislation. The rights of the individual to a fair trial, against arbitrary prosecution, and to protection of, for example, political beliefs and religious convictions have consequently superseded the absolute rights of the sovereign. Although within most jurisdictions the sovereign retains a discretion as to the surrender of the individual, this discretion is circumscribed and can only be exercised within the bounds of the interests of the individual.(119) It is within the state's municipal sphere that these limitations are defined and extradition based on comity can consequently today be regarded as acceptance by the state of the possibility of extraditing without treaty provisions through use of its municipal law. The "right" to extradite may be clearly enunciated in the relevant municipal provisions, or it may be inferred from the absence of a prohibition on extradition without treaty.(120)

Although slightly premature at this stage, a preliminary distinction must be drawn between comity on the one hand, and what Rezek (121) terms the "standard form" of reciprocity on the other. Although in both instances the municipal law of the requested state is made available to the requesting state in the interests of ensuring the punishment of the suspected offender, the difference lies in the fact that in the case of comity there is no question of an on-going relationship of mutual surrender developing between the parties. In the case of comity, the extradition is not granted on the understanding or in the expectation of a similar counter-performance at some future stage. It is rather to be regarded as a one-off concession to the requesting state which does not give rise to a duty of counter-performance. It is an act of courtesy performed by one state towards another in the broad interests of justice.

The question now arising is whether South African extradition law has recognised comity as a basis for extradition and whether this has in fact been used in practice. As will emerge presently, (122) the concept was foreign to pre-republican South African extradition. Following the British practice, South Africa extradited only in the presence of a treaty obligation to do so. (123) However, with the promulgation of the Extradition Act 67 of 1962, a fairly radical departure from this practice was adopted in our law.

Section 3(2) of the Extradition Act provides that :

"Any person accused or convicted of an offence

contemplated by sub-section (2) of section two and committed within the jurisdiction of a foreign state not a party to an extradition agreement shall be liable to be surrendered to such foreign state, if the State President has consented in writing to his being so surrendered."

It is clear from the wording of this section that reciprocity is not demanded. In section 2 of the Act, an extradition agreement is defined as an agreement concluded by the State President with any foreign state providing for the surrender of fugitives on a reciprocal basis. Without this reciprocal undertaking, there can be no extradition treaty in the defined sense of the term, and conversely, where such an undertaking exists, one will be dealing with an extradition treaty. Consequently, as section 3(2) of the Act has its basis in neither treaty nor reciprocity, and as the basis of extradition has been established as treaty, reciprocity or comity, this basis must in the present instance be sought in comity.⁽¹²⁴⁾ As section 3(2) does not in fact authorise the State President to order the extradition of the person sought, but merely classifies him as a "person liable to be surrendered", it avoids the pitfalls inherent in comity and allows the individual full protection of the law. He is merely brought within the ambit of the Act and the hearing follows its normal course.⁽¹²⁵⁾ It should further be borne in mind that section 3(2) is regarded by the executive as an exceptional measure and not as a viable alternative to the conclusion of bilateral extradition treaties.⁽¹²⁶⁾ It is, however, a measure which has been applied on a number of occasions ⁽¹²⁷⁾ and through its application, a

formalised strain of comity can be seen to have become fairly firmly established in our law.

It is submitted that the formalised *ad hoc* extradition arrangements involving South Africa which have been concluded or mooted in recent times would qualify as extradition based on comity. Particularly relevant in this regard is the *ad hoc* arrangement between South Africa and Australia for the extradition of Mr Gert Rademeyer, a former employee of the electricity giant ESCOM, to face fraud charges totalling some R11 million.⁽¹²⁸⁾ Although this agreement was not available for analysis, it would appear to have been an agreement between the respective governments providing only for the surrender of Rademeyer and envisaging no on-going reciprocal relationship.⁽¹²⁹⁾ From what has been said above, this would best qualify as an act of comity on the part of the Australian government. Zimbabwe, too, has raised the possibility of "some arrangement" being made in the future also on an *ad hoc* basis.⁽¹³⁰⁾

Brief mention has already been made of reciprocity in indicating how this differs from comity. However, as one of the most universally accepted bases for extradition in the absence of an express extradition treaty, the concept of reciprocity must be examined more closely.

3.4 Reciprocity as a basis for extradition

Rezek, discussing reciprocity as an independent source of obligation,

distinguishes between the standard form of reciprocity and certain variants.⁽¹³¹⁾ In its standard form reciprocity involves the requesting state asking the host state to "open the doors of its internal extradition law to the actual case stated in the requisition".⁽¹³²⁾ It undertakes to do likewise should a request be received from the host state.

There are few instances of extradition in the absence of a treaty where some or other reference to reciprocity is not found. Although formerly reciprocity would appear to have been regarded as something in the nature of a stop-gap, to fill *lacunae* in extradition treaties, frequent recourse to it in recent times has led to voices being raised for the recognition of reciprocity as a basis for extradition independent of comity or treaty. It is consequently necessary to examine what exactly is meant by reciprocity in the extradition sphere and whether it can in fact be regarded as a source of obligation independent of treaty. In this "pure" form reciprocity is thus based entirely on the municipal legislation of the respective states. Instead of treaty provisions being consulted in the extradition of a fugitive, this is achieved by the municipal legislation of the requested state being used as if it constituted treaty provisions, subject to similar treatment by the requesting state should the occasion arise.

This immediately calls to mind the third variant identified above in considering extradition based on treaty, viz regional arrangements

employing municipal law. The two can, however, be distinguished in that the reciprocal agreement, unlike the municipal scheme, does not involve a conscious attempt between the two states to bring their municipal extradition provisions into line with one another. It is a pragmatic, rather than a concerted or conscious form of cooperation with each state retaining its autonomy with regard to the exact form of its own municipal regulation of extradition.

Rezek further identifies three variant forms of reciprocity. First, there is the case where the two states agree merely to consider future requests for extradition. As pointed out by Rezek(133), this is largely meaningless as it amounts to no more than "the minimum of comity due by every state to other members of the international community." Second, there is the undertaking to grant reciprocity on the basis of the principle of *mutatis mutandis*; in other words, together with its request for surrender, the requesting state undertakes that should identical circumstances arise in the case of the requested state, it would also surrender the individual concerned. The limited application of this approach is clearly illustrated by the somewhat bizarre example raised in the case of *Re Wagner*. (134) In this case Israel had requested Brazil to surrender Wagner, a Nazi war criminal. As no treaty existed between the two states, Israel offered reciprocity but only on a *mutatis mutandis* basis. As pointed out in the case, this would mean that were a Nazi war criminal to settle in Israel, and were Brazil to request his surrender, the request would be favourably considered!

The most important of the variant forms identified by Rezek is where the offer of reciprocity is made subject to certain additional conditions.⁽¹³⁵⁾ The request is consequently no longer merely that the host state consider extradition on the basis of its municipal legislation, but that in addition to such legislation, it also consider special conditions laid down in the request for extradition. This is best illustrated by an example.

During 1974 the Barton brothers, Alexander and Thomas, fled from Australia to Brazil after the failure of certain companies.⁽¹³⁶⁾ When Australia wished to request their extradition from Brazil to face charges in New South Wales, it found itself up against a problem. Like its British predecessor,⁽¹³⁷⁾ the Australian Extradition (Foreign States) Act 1966, provided for extradition on the basis of treaty only.⁽¹³⁸⁾ Brazil, on the other hand, allows extradition on the basis of treaty or on an undertaking to grant reciprocal treatment.⁽¹³⁹⁾ The former did not exist and the latter was effectively excluded by the Australian legislation. After a somewhat curious offer of reciprocity based on deportation which failed to have any effect,⁽¹⁴⁰⁾ Australia enacted the Extradition (Foreign States) Act 1974. In terms of this Act the Governor-General is empowered to give assurances of reciprocity "Subject to limitations, conditions, exceptions or qualifications" embodied in regulations issued by him bringing the Act into operation between Australia and the foreign state concerned.⁽¹⁴¹⁾ Regulations were accordingly passed bringing the Act into operation between Australia and Brazil subject to three qualifications which may be briefly summarised as : a

minimum sentence of one year's imprisonment required for extraditable offences; no death penalty to be imposed; and no extradition to a third state without prior Australian consent. (142)

Examining this more closely it is clear that we are not dealing with "pure" reciprocity as sketched at the outset. The request for and subsequent undertaking to grant extradition is to be determined not by the municipal law of Australia and Brazil alone, but rather by that municipal legislation read together with and supplemented or amended by limitations imposed in the offer of reciprocity. It is consequently hardly surprising that Rezek acknowledges that one is here concerned with "treaty elements...being added" to the reciprocal undertaking. (143)

However, the question arising is whether Rezek's view that we are concerned here with no more than the addition of certain elements to an independent reciprocal agreement and that "[t]he relationship existing between the two states under the reciprocity system is not to be assimilated to a bi-lateral treaty of indefinite duration", (144) can be supported.

He bases his view on article 2 of the Vienna Treaty Convention, (145) and more notably on the requirement in that article that a treaty be "in written form". While it is freely conceded that extradition treaties are *par excellence* treaties generally embodied in written form, this is certainly not an absolute requirement for the conclusion of an extradition treaty, or any other treaty. In fact, as

is clear from article 3 of the Convention, the requirement of writing laid down in article 2 "shall not affect the legal force of such [unwritten] agreements".(146) The general rules applicable to the conclusion of international agreements, viz consent between two or more public international law subjects; the creation of obligations; and the subjection of these obligations to public international law (147), must consequently be seen to apply with equal force to the conclusion of an extradition treaty. While writing is necessary for the formal registration of the treaty with the Secretariat of the United Nations and for the enforcement of the treaty before the International Court of Justice, this aspect is of less importance within the realm of extradition. It is indeed difficult to conceive of an extradition treaty being brought to the international court since, as we have seen, within most if not all, extradition agreements the states concerned retain a discretion - albeit limited - in the eventual decision to surrender. On the basis of writing alone one can consequently not distinguish clearly between a treaty and a reciprocal undertaking to extradite.

Rezek's argument further rests on the assumption that the reciprocal agreement need not be in writing. While this is - as in the case of a treaty - correct in the sense that writing is not an absolute requirement for validity, the courts would appear to demand some tangible proof of negotiations between the two states concerned to ensure reciprocal treatment. As certain courts demand that this be a fact which can be objectively determined, it would appear that a written exchange of some or other kind - be it exchange of notes,

telegrams, or whatever - is in fact required. Thus in the case of *In re Kozil* (148) it was found that as no extradition treaty existed between Brazil and Argentina, the application by Brazil would have to be considered on the basis of reciprocity. However, it was held that as there was no proof of diplomatic exchange between the parties as regards the conditions of reciprocity, the request had to be denied. Consequently, although reciprocity does not demand the formal negotiation and signature of a treaty dealing specifically with extradition, some concrete exchange evidencing the consensus of the parties as well as the content of that consensus is as necessary in the case of reciprocity as it is in the case of treaty.

In addition Rezek maintains that the exchange of notes between two states cannot be construed as a treaty as it does not require an immediate answer. (149) Furthermore, until such time as the requested state itself requests the surrender of a fugitive from the requesting state "there is...a relationship where obligations are unilateral, and can remain so indefinitely". On the other hand, "just one requisition made in the reverse direction is enough to perfect the reciprocal bond, so that thereafter both parties have duties to each other". (150) This reasoning can perhaps be better illustrated by an hypothetical example.

State A, for example, requests State B - with whom it has no extradition treaty - to extradite a fugitive offender to A, at the same time undertaking that should B at some future stage request

extradition from A, this will be granted. Without any formal reply B extradites the offender to A.

In terms of Rezek's hypothesis no binding mutual obligations exist between A and B until such time as B in its turn requests extradition from A and the request is acceded to. Rezek's reasoning must be regarded as suspect on this point. The existence of an obligation does not depend for its validity on the fulfilment of the obligation. To borrow an example from the private law sphere: there is little doubt that a mutual duty of support exists between parent and child. The fact that in most western societies the child is seldom - if ever - called upon to fulfil this obligation and in fact support its parents, in no way detracts from an enforceable obligation to do so if and when the need arises or a demand is made. A made B an offer which the latter accepted through its conduct. Consensus exists between the parties. The object of the consensus is the extradition of fugitive criminals which falls within and is governed by principles of international law - albeit in the instant case through the application of specific municipal provisions embodied in the states' respective domestic extradition legislation.

The position was more correctly stated in the case of *In re Zahabian*. (151) Zahabian, an Iranian national resident in Switzerland, was wanted by Iran to face charges of fraudulent bankruptcy and obtaining credit by false pretences. No extradition treaty existed between the two countries but Iran offered reciprocity in the event of Zahabian's extradition. The court found that :

"The effect of a declaration of reciprocity, as of a treaty, is to make extradition obligatory in the cases referred to in the declaration. However, such a declaration creates international obligations only when it is formulated in concordant manner by the two States who wish to establish reciprocal obligations...Only if extradition is granted and made subject to reciprocity, and if the reciprocity offered by the Iranian government is thus accepted, will the declaration of reciprocity between Switzerland and Iran become effective and create *binding treaty* obligations for the two states in the future". (152)

It is consequently submitted that reciprocity cannot be regarded as a truly independent source of obligation to surrender. It should rather be seen as a loosely structured and informal means of treaty conclusion. The offer of reciprocity coupled to the request for extradition, once acted upon, gives rise to "binding treaty obligations" for both parties involved and can consequently - subject always to the intention of the parties - not be regarded as anything other than an internationally binding treaty.

There are a number of advantages inherent in a system based on reciprocity and certain of these are particularly relevant to a state finding itself in the unfortunate international situation which South Africa has occupied for the past few years.

As pointed out above, not all states regard the conclusion of extradition treaties as a matter of pressing urgency. Official records show that negotiations for the conclusion of a treaty are

time consuming and often, even after many years, fruitless.⁽¹⁵³⁾ The offer of reciprocity and the surrender or refusal to surrender arising from it are in essence matters designed to meet the immediate and often pressing needs of a specific, urgent situation. Faced with an actual situation states would of necessity be more inclined to cut through the "red tape" and inordinate delays often smothering treaty negotiations, and come to a swift and satisfactory solution focussing on the essentials involved. While this indeed holds the potential of prejudicing the individual refuge seeker in that his intrinsic human right to live where he wishes, to liberty, etcetera might be impinged upon, there is in fact a safeguard built into the system. This is that the content of the agreement to grant reciprocity is to be found principally in the municipal legislation of the states concerned. This means that the refuge seeker has at his disposal the full process of the criminal and procedural law of the state in which he chose to seek refuge. He is consequently assured of a fair hearing at which certain basics must be proved, for example, the competence of the court which will be hearing his case, whether there is a *prima facie* case for him to answer, evaluation of the nature of his offence, etcetera. The pitfalls of the traditional comity approach to extradition are thus avoided and the individual is accorded full recognition and protection of his rights.

From the South African point of view, reciprocity should be seen as an attractive alternative to the formal bilateral extradition treaty largely because of the lack of publicity surrounding the proceedings.

With South Africa's international isolation at this stage still a reality, many states, either from moral conviction or from considerations of political expediency, are reluctant to be seen to be dealing with the Republic. International law and politics being so closely allied, any system by which international cooperation can be promoted while a measure of anonymity is maintained, should be exploited to the full. The fact that registration of reciprocal agreements is not possible is, from the current South African perspective, an advantage rather than a drawback. (154)

This notwithstanding, the official position of the South African executive would at present appear to be against the use of reciprocity to any great extent. The attitude of the government appears clearly from the case of *Mario Guassardo*. (155)

Guassardo was a director of the Boerebank Beperk. In 1962 the bank was placed under provisional and subsequently under final liquidation. Guassardo's personal estate was sequestered and a Johannesburg magistrate issued a warrant for his arrest on charges of theft and fraud amounting to some R500 000. (156) It was established that Guassardo was then living in Brazil. Although there was no extradition treaty operative between South Africa and Brazil, Brazil was prepared to extradite if South Africa furnished an assurance of reciprocal treatment in suitable cases.

When approached on the matter, the South African authorities set out their views on assurances of reciprocity in the following terms. (157)

South Africa could give no absolute assurance of reciprocity for three main reasons :

- (a) When the occasion arose South Africa might not be willing to extradite and the fact that a definite assurance had been given could place the government in an awkward position as regards what is, and should remain, an essentially discretionary act.
- (b) Were the assurance to be given it would mean that the extradition would have to take place under section 3(2) of the Act. (158) It was felt that section 3(2) was intended for exceptional cases only and that it should not be the norm upon which extradition is based.
- (c) It was the ideal of the South African government to conclude as many bilateral extradition treaties as possible. It would be contrary to this aim were section 3(2) to be used here.

Although South Africa was not averse to reciprocal treatment in principle, it was stressed that the government was not prepared to give any definite or absolute assurance of reciprocity. (159) This was reiterated in 1974 when in the case of *Franz Podezin* (160) it was again stressed in response to an extradition request from the Federal Republic of Germany, that no general undertaking of reciprocity could be guaranteed in terms of section 3(2) of the Act.

How realistic is the approach adopted by South Africa as reflected in these statements? Taking the first statement, the logic is somewhat suspect. Why should a difference exist between the consequences of an undertaking to extradite in terms of a treaty (which the authorities are eager to conclude) and those arising as a result of an undertaking to act reciprocally which is, as has been shown, no more than an informally concluded treaty? In both instances the government may be unwilling to extradite in a particular instance. In the case of a formal bilateral treaty the grounds on which extradition can be refused may indeed be spelled out. The major ground will generally be the so-called political offence exception. As was shown in the Australian Barton brothers case, however, certain riders can indeed be added to the reciprocal agreement and provided these are within the normal confines of what is encountered in extradition treaties generally, no objections are likely to arise. The "political offence" exception, for example, will, it is submitted, apply here with equal force. In short, the mere fact of agreeing to reciprocal behaviour need not place unrealistic limitations on the discretionary nature of the state's decision to extradite or otherwise.

As to the second objection, it was shown above that the section 3(2) procedure in terms of which the State President certifies the person sought as a person who may be subject to extradition proceedings, is in fact more closely related to comity than to reciprocity. Indeed if the true nature of reciprocal undertakings is recognised, section 3(2) will not come into the picture at all. The fact that in the minds of the authorities concerned, the distinction between

reciprocity and section 3(2) of the Extradition Act has become blurred should not paralyse the state through the dogged adherence to an unwarrantedly narrow approach to the granting of undertakings of reciprocity.

In the third instance, the key word is undoubtedly "ideal". It is understandable that the state would prefer a specific extradition treaty, signed and sealed, as apart from evidencing a measure of international recognition, this is also simpler from the point of view of proof. However, given South Africa's international isolation (at least for the present), opportunities for cooperation must be seized where they arise. If the result achieved informally is no less effective than the result achieved through formalised negotiation, the former should not be rejected solely for the sake of what is in essence an outdated conception of the institution of extradition. The current form of reciprocity which the Republic is prepared to offer, is largely meaningless and cannot lead to any meaningful development in extradition within the Republic.

3.5 Other possible bases for extradition

A further basis for extradition raised by Bedi (161) requires some consideration. He lists "morality" as a possible independent basis. (162) Law is premised on the "external authority of society" and carries a legal penalty. Morality, on the other hand, relies for implementation on "conscience, or other social institutions not identified with the state". (163) This is for Bedi "moral law". One

must, however, question whether we are in fact here dealing with an independent source of obligation.

In the first place, it may be questioned whether any useful purpose is served by introducing a term such as "moral law" - indeed it may be asked whether linking morality and law in this way is not in fact a misleading exercise in semantics. As Bedi points out, the crucial distinction between what is traditionally termed "law" on the one hand, and what is termed "morality" on the other, is to be found in the basis and measure of enforcement. He at no point denies that in considering the practical application of extradition one is dealing with a legal rather than a moral question. Does the introduction of the term "moral" in this context change the legal nature of the process; or is the highly subjective issue of a commonly perceived morality made any more concrete or enforceable by the addition of the term "law"? This would not appear to be the case.

On the basis of what has been said in the preceding pages, it is submitted that the introduction of morality as an independent basis for extradition is at best unhelpful. Morality as understood by Bedi is, it is submitted, in fact not a "new" or independent basis on which extradition may rest. If one considers phrases such as "universally accepted principle";⁽¹⁶⁴⁾ and "uniform practice of nations" ⁽¹⁶⁵⁾ it will appear that we are in fact dealing with the familiar concepts of comity or reciprocity which, as recognised bases for extradition, have already developed a reasonably fixed meaning within the confines of extradition. Indeed in the *Haya de la Torra*

case (166) which Bedi cites as support for the moral basis of extradition, we encounter a clear distinction between rights and duties, and what Bedi terms "courtesy and good neighbourliness". Courtesy and good neighbourliness are in fact nothing more than, in the former case, the most basic form of reciprocity, (167) and in the case of the latter, the generally perceived nature of comity.

It is submitted that the desire to elevate morality to the status of a separate basis for extradition is at best confusing. It stems from a falsely universalised, and highly idealised perception of the international community's response to criminal behaviour. While this may be an ideal towards which the international community should strive, in the present state of international relations, it is neither a recognisably separate, nor a legally enforceable, basis upon which extradition may be premised, as is indeed borne out by the numerous instances in which extradition is refused on purely "technical" grounds (168).

One further possibility remains to be examined, particularly in view of the practice of extraditing in terms of section 3(2) of the Extradition Act 67 of 1962 identified above. (169) This is the question whether, in terms of this section, the possibility exists that a customary rule of public international law may be said to have developed which could bind the Republic to extradite in the future and consequently constitute a basis independent of treaty, comity or reciprocity.

Custom as a source of a binding public international law obligation is enunciated in article 38(1)(b) of the Statute of the International Court of Justice. This section provides that in deciding disputes "in accordance with international law", the Court shall apply :

"international custom, as evidence of a general practice accepted as law;".

From this definition, it is generally accepted that custom stands on two pillars. First there must be a general practice; and second this practice must be accepted as law.

It falls outside the present scope to examine custom and its origin in any great detail. However, within present confines it is worth noting the following. The number of states involved in the development of a customary rule is not crucial.⁽¹⁷⁰⁾ Furthermore, although the concept of custom generally demands repeated action, even a single act may be sufficient to establish a customary obligation.⁽¹⁷¹⁾ Applying this to the situation arising in terms of section 3(2) of the Extradition Act one finds the following.

As regards the first "leg" of customary rule development, it is clear from the *Esser, Gebhart, and Kraul* cases,⁽¹⁷²⁾ that the willingness of the South African authorities to extradite on the basis of section 3(2), particularly in dealings with Germany, may give rise to the impression that there is a practice - or at least a propensity - for South Africa to extradite in the absence of treaty commitment to do so. The question now arising, is

whether this propensity can be seen as something more - something upon which states may come to rely as a matter of right. In other words, has South Africa created a customary rule of public international law with which she must comply and on which a foreign state may rely as of right?

Even if a repeated practice, or usage, were able to develop with regard to extradition in terms of section 3(2) of the South African Extradition Act, this would not constitute a binding customary rule unless it was followed by the state because it felt under a legal obligation to do so - the so-called *opinio iuris sive necessitatis*-requirement. That there is certainly no place for the development of such a conviction on the part of the South African authorities is abundantly clear from the *Case of Mario Guassardo* (173) where it was clearly stated in a letter from the state legal advisors that section 3(2) was "intended for exceptional cases only and that it should not become the norm upon which extradition is based". (174)

It can consequently be seen that in South African law as it is presently interpreted, custom as a basis upon which extradition can be sought or granted, is unlikely to play a meaningful role.

4 LIMITATIONS ON THE RIGHT OR DUTY TO EXTRADITE

We have established that states may have a self-imposed duty to extradite originating from treaties they have concluded or to which they have become party. We have also established that failing the existence of such a duty, states may (depending on their municipal dispensations) also retain a right to extradite in the absence of a treaty commitment to do so. Although, strictly speaking, this thesis is limited to the history, basis and current status of the right or duty as such, it would be incomplete without some mention of possible limitations to which the right or duty may be subject. Unfortunately, space allows no more than a brief identification of these limitations, together with an indication (for reference purposes) of where they may be found in the treaties to which South Africa is party.

In broad terms the limitations on the right or duty to extradite may be classified into limitations relating to the person of the extraditee, and limitations relating to the crime for which extradition is sought.

4.1 Limitations relating to the person of the extraditee

Under this head we may classify the nationality of the extraditee; humanitarian considerations; and his current position within the state of refuge.

4.1.1 Nationality

The question of the exclusion of the extradition of a state's own nationals has a long history. (175) In Britain, the 1878 Royal Commission detailed to examine all aspects of extradition, came up with four reasons in favour of the refusal to extradite own nationals. These were that a subject should not be withdrawn from his natural judges; that subjects were entitled to the protection of their states' laws; that foreign states' laws were not above suspicion; and that a subject would be unduly disadvantaged if he were to be tried in foreign territory. (176) These reasons were not found particularly convincing by the British authorities, who despite their generally xenophobic tendencies, elected to follow a policy allowing the extradition of their nationals. (177) It was argued that a person finding himself in foreign territory is entitled to the protection of the laws of that territory but should in return respect those laws. South Africa, with its strong British extradition tradition, has adopted a similar position. This does not, however, mean that either Britain or South Africa will in all instances extradite its own nationals. The determining factor is the provision made in the treaty governing extradition. The point of departure in both states is, however, that there is no principle objection to the extradition of their own nationals.

As regards South Africa, we consequently find Sanders stating that "in the absence of a compelling treaty provision to the contrary" extradition of own nationals is allowed. (178) The issue arose

specifically for decision in *S v Pirzenthal*. (179) Here Pirzenthal, a South African citizen by birth, was serving a sentence in Beira, Mocambique for fraud. He escaped from custody and fled to the Republic. Boshoff J, delivering judgment on an appeal from a magistrate's finding that Pirzenthal be extradited to Mocambique, discussed the role Pirzenthal's South African nationality had on his extradition. The relevant treaty (180) provided in article 3 that :

"the contracting parties shall not in any case or under any pretext be compelled to surrender their own subjects or citizens whether by birth or by naturalisation, provided that the naturalisation took place previous to the commission of the crime or offence giving rise to the application for extradition." (181)

The court found that the executive had a discretion in deciding whether or not to extradite its nationals and dismissed the appeal.

The passage cited above justifies a number of inferences. First, there is no difference in the treatment accorded persons who are citizens by birth and those who have been naturalised before the commission of the extraditable offence. However, where naturalisation takes place only after the commission of the offence, nationality will not exclude extradition. Second, whether or not the state will refuse extradition on the ground of nationality will depend on the wording of any prohibition which may exist in the specific treaty. In this regard, the treaty may expressly authorise extradition of nationals; may allow a discretion; or may prohibit it in absolute

terms. The decision in this regard will consequently depend on the provisions of the treaty. The position with regard to South Africa's treaties is set out in the table below.

4.1.2 Humanitarian considerations

Although no South African treaty contains a clause which prohibits extradition on humanitarian grounds, the state's inherent discretion in granting extradition will cover such an instance. Under this head is included the ill health of the person sought, or the fact that a considerable period has elapsed and the harm resulting from prosecution would outweigh possible advantages. (182)

In the *Case of Mannie Becker*, (183) Becker, a Johannesburg attorney appropriated some R25 000 from his trust accounts and fled to Israel. Some seven years after these events the South African authorities requested Becker's extradition from Israel. In considering the request the Israeli authorities specifically took account of the fact that some seven years had elapsed before the request for Becker's return had been made. Furthermore, Becker had become a "model" citizen in Israel and had repaid R15 000 of the money owed. In the result :

"The Israeli Minister of Justice has reached the conclusion that it would not be equitable to continue with proceedings aimed at uprooting Becker in order to stand trial in South Africa for offences committed over

ten years ago." (184)

The Israeli authorities were however, at pains to point out that the outcome of the application should not be seen as setting a precedent or establishing a line of future conduct. It was based solely on the specific considerations in Becker's case.

4.1.3 The current position of the extraditee

The position in which the extraditee finds himself when the request for his extradition is received, may also limit the duty of the requested state to deliver him - or at least the time at which that duty must be performed. So for example, if the extraditee is awaiting trial in the state of refuge on an offence other than that for which his extradition is sought, or if he is serving a prison sentence, his extradition will generally not take place. What occurs in such a case is that the extradition hearing continues and a finding is made, but the actual delivery up is suspended pending the outcome of his trial or the completion of his sentence. The extradition then takes place along normal lines.

So for example, in the *Case of Nkosinathi Sikhondo* Transkei requested South Africa to extradite Sikhondo who had been sentenced to two years' imprisonment for possession of stolen property. On enquiry it was ascertained that he was in prison at King William's Town in South Africa serving a sentence for theft of a motor vehicle. The Transkei authorities were informed that he would be available for extradition

on completion of his sentence in South Africa. He was released on 27.1.1983 and handed over to Transkei on the same day. (185) A similar result was achieved in the *Case of Bangile Hontoti* who was also requested by Transkei but was at the time serving a gaol sentence in South Africa. The Transkei authorities were informed that he would be available for extradition on 21.9.1982 after completion of his South African sentence. (186)

That things also work the other way round, is illustrated by South Africa's request to the United States in the *Case of Frans Jacob Smit Theron*. (187) Theron was wanted in South Africa to face charges under the Insolvency Act and for fraud totalling some R300 000. The United States authorities, while willing to extradite Theron, indicated that there were charges pending against him in the United States and that his extradition could only be considered after these had been answered and any sentence served. He has since been returned. (188)

The incidence of this provision in South Africa's extradition treaties appears in the table below.

4.2 Limitations relating to the nature of the crime for which extradition is sought

Under this head are included political offences; fiscal offences; military offences; and offences which attract the death penalty.

4.2.1 Political offences

The best known of the instances in which extradition will not be granted is the so-called "political offence exception" in terms of which an extraditee will not be returned to the requesting state if the offence with which he is charged is political. The evolution of this exception and exactly what should be understood under "political", has been the subject of many thorough studies and cannot be considered here.⁽¹⁸⁹⁾ Suffice to say that at this stage the political offence exception has transcended the bounds of optional clauses in a treaty and assumed the status a general and essential principle of extradition.⁽¹⁹⁰⁾ The political offence exception is embodied in the South African Extradition Act ⁽¹⁹¹⁾ and appears in all extradition treaties to which South Africa is a party.

It is however, notable that the exception has not been defined in either treaty or municipal legislation with the result that its precise meaning is generally left to the courts to determine.⁽¹⁹²⁾ This allows a measure of flexibility, the concept being extended or restricted to meet the political vicissitudes of the day. This also means that to some extent the political offence exception is seen by extraditees as a "last hope" and some attempt will generally be made to give the offence for which extradition is sought a political colour. That this is generally unsuccessful appears from South African case records where no successful appeal to the political offence exception to block extradition could be found.

In one of the few extradition cases to address the problem directly, *Ex parte Rolff and Others*, (193) the extradition of the accused was sought to face charges of murder and theft. One of the claims raised to prevent their extradition to German South West Africa was that their offences had been of a political nature. De Villiers CJ rejected this claim finding that :

"...they acted the part of marauders, and not that of patriots fighting for the independence of their country... [their actions] were wanton acts of violence committed, not against officials of the State, but against peaceful and harmless citizens, and without any apparent political object in view." (194)

In *S v Devoy* (195) it was also argued, "though faintly" to use the court's words, that the crime for which extradition was sought (theft of copper wire!) fell under the political offence exception in that the wire had been removed from Zambia in violation of of Zambian law and United Nations' sanctions and that Devoy was likely to be punished for this. The court had little difficulty in rejecting this tenuous link to the accepted meaning of political offence.

Most recently, in *S v Graham* (196) it was alleged that some vague CIA plot existed against Graham which would render him liable to political persecution should he be returned to the United States to face theft charges. The magistrate before whom the case was heard rejected the contention and it was not pursued on appeal to the Supreme Court.

4.2.2 Fiscal offences

Fiscal offences are offences against the internal revenue, customs and excise and exchange control laws of a state. As such, they are generally not regarded as suitable for extradition by the state to whom the request is addressed. In the words of a leading British case on the matter : "No country ever takes notice of the revenue laws of another". (197) This harsh approach would appear to have been tempered somewhat in recent times, (198) and should perhaps in the light of the numerous double taxation agreements concluded between the nations of the world be regarded as something of an anachronism.

4.2.3 Military offences

As a general rule, an individual accused of a purely military offence would not be extradited. (199) In *In re Girardin* (200) Argentina wished to request the extradition of Girardin from Uruguay for having violated a law requiring him to undergo compulsory military training. The court refused to sanction the request as the offence was purely military.

A problem may well arise in the case of so-called "draft-dodgers" who for political reasons refuse to serve in the armed forces of their country and seek asylum in a friendly state. Bassiouni (201) mentions the example of American draft-dodgers fleeing to Canada and Sweden during the height of the Vietnam War, but of course South Africa experienced a similar phenomenon with draftees fleeing to various

European countries, notably the Netherlands, rather than serving in the South African Defence Force under the apartheid system. However, no specific cases of the extradition of such individuals having been sought by South Africa could be traced. In such a case there is, of course, a conflict between the military and political offence exceptions and interaction between the principles of political asylum and extradition. (202) In any event, the individual would not be extradited.

4.2.4 Offences attracting the death penalty

States which have abolished capital punishment are often unwilling to extradite to states where an accused may be sentenced to death for the crime for which he is extradited. Consequently, when faced with such a request the state will either refuse to extradite or will extradite on condition that the death penalty will not be imposed or will be commuted to life imprisonment in the event of conviction. (203)

As one of the few Western countries where the death penalty is still fairly frequently imposed, South Africa will be subject to this exception. Although not common, a specific exclusion in the case of the death penalty is found in certain of South Africa's extradition treaties. (204) No specific cases where extradition was refused on this ground could be traced.

4.2.5 Miscellaneous limitations

Apart from the few limitations mentioned above, there are a number of others which are not discussed as they are felt to be either out of date, for example religious and press offences (205); or because they are largely technical relating to the prosecution of the offence, for example prescription of the offence; (206) double criminality; (207) double jeopardy or *ne bis in idem*; (208); etc. However, where relevant these will be included in the table below for reference purposes.

4.3 Universal offences for which extradition may not be refused despite apparent exceptions

One final point must be considered in the context of limitations on the right or duty to extradite and this is whether there are any crimes which are by their nature so universally condemned that a duty rests on a state to extradite the criminal involved irrespective of the existence of a treaty and irrespective of the provisions in an existing treaty allowing for the political offence exception. In other words, are there instances in which the duty to extradite is absolute?

The problem in such an instance remains finding a basis on which to hang such an absolute duty. (209) Although there are a number of Conventions which expressly exclude certain behaviour from the political offence exception and consequently create a type of

absolute duty to extradite (210), they are not binding on non-signatories. Bassiouni lists aggression, crimes against humanity, war crimes, piracy, hijacking, slavery, counterfeiting, kidnapping of internationally protected persons, international trade in narcotics, and racial discrimination as international crimes involving an absolute duty to extradite. (211) However, it is submitted that international criminal law has not yet developed into a universally accepted and sufficiently binding whole for it to be said that states are prepared to surrender their sovereignty to the extent necessary to support an absolute duty to extradite.

4.4 TABLE OF LIMITATIONS AS OCCURRING IN BILATERAL TREATIES TO WHICH SOUTH AFRICA IS A PARTY

The table below reflects the article in each treaty where the limitations on the right or duty to extradite corresponding to the letter in the "key" below are to be found.

KEY TO TABLE

- a - Non-extradition of own nationals.

- b - Acquisition of nationality after the commission of the offence for which extradition is sought is no bar to extradition.

- c - No extradition for political offence
- d - No extradition for an offence carrying the death penalty.
- e - No extradition for military offences.
- f - Extradition for fiscal offences allowed only if the parties have so agreed.
- g - No extradition if the offence for which extradition is sought has been tried, or punished or is under trial in the state of refuge.
- h - If the extraditee is in detention or under trial in the state of refuge for a crime other than that for which extradition is sought, his extradition shall be deferred until the law has taken its course.
- i - No extradition if the crime for which extradition is sought has prescribed under the law of the state of refuge.

Treaty	a	b	c	d	e	f	g	h	i	Note
Germany	3	-	6	-	-	-	4	4	5	212
Italy	3	4	5	-	-	-	8	7	6	213
Denmark	1	-	7	-	-	-	-	10	9	214
Sweden & Norway	3	-	6	-	-	-	4	4	5	215
Austria/ Hungary	3	-	6	-	-	-	4	4	5	216
Hyati	3	-	6	-	-	-	4	4	5	217
France	2	-	5	-	-	-	11	-	13	218
Spain	1	-	4	-	-	-	12	14	12	219
Equator	-	7	8	-	-	-	-	12	10	220
Luxemburg	1	-	5	-	-	-	3	3	4	221
Switzerland	1	-	11	-	-	-	13	14	12	222
Salvador	3	-	6	-	-	-	4	4	5	223
Uruguay	1	-	5	-	-	-	11	13	11	224
Mexico	3	-	6	-	-	-	4	4	5	225
Guatamala	3	-	6	-	-	-	4	4	5	226
Colombia	3	-	6	-	-	-	4	4	5	227
Argentina	3	-	6	-	-	-	4	4	5	228
Monaco	3	-	6	-	-	-	4	4	5	229
Bolivia	3	-	6	-	-	-	4	4	5	230
Portugal	3	3	6	2	-	-	4	4	5	231
Liberia	3	-	6	-	-	-	4	4	5	232
Roumania	3	-	6	-	-	-	4	4	5	233
Chile	3	-	6	-	-	-	4	4	5	234

Treaty	a	b	c	d	e	f	g	h	i	Note
Netherlands	3	-	6	-	-	-	4	4	5	235
San Marino	3	-	6	-	-	-	4	4	5	236
Servia/ Yugoslavia	3	-	6	-	-	-	4	4	5	237
Belgium	1	-	7	-	-	-	-	11	9	238
Peru	3	-	6	-	-	-	4	4	5	239
Cuba	3	-	6	-	-	-	4	4	5	240
Nicaragua	3	-	6	-	-	-	4	4	5	241
Panama	3	-	6	-	-	-	4	4	5	242
Paraguay	3	-	6	-	-	-	4	4	5	243
Greece	3	-	6	-	-	-	4	4	5	244
Siam	3	-	5	-	-	-	4	4	-	245
Czechos- lovakia	3	-	6	-	-	-	4	4	5	246
Finland	3	-	6	-	-	-	4	4	5	247
USA	-	-	6	-	-	-	4	4	5	248
Swaziland	-	-	3	6	4	5	7	8	9	249
Botswana	-	-	3	6	4	5	7	8	9	250
Malawi	3	-	4	6	5	-	8	7	9	251
Israel	2	2	-	-	-	-	4	4	4	252
Transkei	-	-	3	5	4	-	8	7	9	253
BVC states Multi	-	-	3	5	4	-	8	7	9	254
Taiwan			3		4		5	6	8	255

5 CONCLUSIONS

In this Chapter it has been seen that the basis of extradition can be divided into two broad categories : extradition based on treaty; and extradition in the absence of treaty provisions.

It has been established that a duty to extradite arises only in the context of a treaty commitment to do so. However, the term "treaty commitment" must be understood to include an offer of reciprocity duly made by one state and acted upon by the other state which then gives rise to a binding treaty commitment. It has been submitted that because of a misconception of the true nature of reciprocity, the distinction between the extradition of an individual under section 3(2) of the Extradition Act 67 of 1962 - which is an act of comity, albeit of a special nature - and the treaty obligations arising from reciprocity, has become blurred. This has led to an unwarrantedly narrow approach to the granting of undertakings of reciprocity by the South African authorities.

Reciprocity aside, it has been established that a duty to extradite can arise from bilateral treaty arrangements; multilateral extradition conventions; regional arrangements; and multilateral conventions not dealing directly with extradition. The Republic has, at various stages, made use of all these bases. Of these, bilateral treaties constitute the basis most favoured by the authorities.

As regards extradition in the absence of a treaty, it emerged that despite well-established arguments to the contrary, states are under no obligation to extradite in the absence of a treaty. However, this does not mean that they are not free to do so. Although both comity and reciprocity were discussed under this head, this was done solely on traditional grounds as it was established that reciprocity is in fact a treaty commitment to extradite.

It was established that South Africa in fact fairly often utilises comity as a basis for extradition through an application of the provisions of section 3(2) of the Extradition Act. This is, however, not the classical form of comity where all was dependent on the discretion of the head of state. Although the application of section 3(2) is in fact dependent on the written consent of the State President, this consent does no more than bring the individual whose extradition is sought, within the ambit of the Act after which the normal extradition process runs its course. The possibility of a customary rule of public international law between South Africa and another state developing around the provisions of section 3(2) is also considered ; as is the theory of morality forming the basis of extradition. Both of the latter options are rejected.

Certain limitations on the right or duty to extradite are identified and tabulated.

In conclusion it would appear that as regards the basis on which extradition can take place, South Africa has well and truly broken

free of her Colonial past. The country has a hybrid and vibrant extradition policy embracing virtually all the recognised bases for extradition.

Having defined extradition, attempted to place the South African situation in historical perspective, and determined the basis on which the institution rests, the following Chapter will be devoted to a consideration of the acquisition of treaty rights and obligations.

ENDNOTES - CHAPTER 111

- 1 See Shearer (1971) 22-3.
- 2 See section 3(2) of the South African Extradition Act 67 of 1962 which expressly provides that the State President may consent to the extradition of a person to a state with whom the Republic does not have an extradition treaty. Norway, too, for example, would appear to follow a similar system - JF 9/11/2 (Norway).
- 3 Starke (1989) 348; *Musgrove v Chun Teeong Toy* 1891 AC 272; *Fong Yue Ting v US* 1893 149 US 698.
- 4 Subject, of course, to the minimum standards required by international law for the protection of aliens within the territory of a state. See Booyesen (1989) 112 ff, and Bedi (1966) 27ff.
- 5 Vienna Convention on the Law of Treaties 1969 in Brownlie (1975) 233. The treaty came into operation in January 1980 with British ratification. Although South Africa is not a party to the Convention, it is generally accepted that the provisions of the Convention represent a codification of existing rules of customary public international law. The Republic would appear to follow its provisions in practice;

Booyesen (1989) 34 n 11.

- 6 Article 2. Although, generally speaking, a treaty need not be reduced to writing (Booyesen (1989) 28ff), extradition treaties are by their very nature likely to be written agreements.
- 7 Article 26. Good faith is particularly important in the field of extradition where terms such as the "comity of nations" are frequently encountered.
- 8 Treaty must here be given a wide interpretation to include agreements based on reciprocity - see below.
- 9 South Africa would appear to be one of the few states which is today actively pursuing a policy for the conclusion of bilateral extradition treaties with as many states as possible. The response to approaches for the conclusion of such treaties has been largely apathetic and reflects the importance attached to such agreements by many states. So eg, when approached by South Africa to conclude a new extradition treaty France replied that there was "no place for the conclusion of a new treaty" - Letter from French Ministry of Foreign Affairs 5.7.1968 JF 1/554/20/13.
- New Zealand replied that although there was no objection in principle to the conclusion of such a treaty, it was not regarded as a matter of urgency and South Africa would have

to wait in line. The line would appear to be a lengthy one as no treaty has to date been concluded! - JF
 1/554/20/48. In a letter dated 27.6.1972 (JF 9/11/2 (Britain)), the South African authorities were informed that there was no likelihood of a treaty with Britain being concluded in the near future. Switzerland (JF 9/11/2 (Switzerland) letter dated 4.7.1979); Austria (JF 9/11/2 (Austria) letter dated 15.12.1976); and Canada (JF 9/11/2 (Canada) letters dated 23.5.1973 and 6.6.1973) were also not prepared to enter into new bilateral extradition agreements.

- 10 See Shearer (1971) 22; Bassiouni (1974) 19. The most commonly cited agreements of this type are the *Arab League Extradition Agreement* of 14.9.1952 operative since 23.8.1954; the *Benelux Extradition Convention* of 27.6.1962; the *Scheme relating to the Rendition of Fugitive Offenders within the Commonwealth* of 1966; the *European Extradition Convention* in force since 18.4.1960; the *Inter-American Conventions* which include the *Montevideo Convention* (1889), the *Mexico Convention* (1902), the *Bolivarian Convention* (1911), the *Bustamante Code* (1928) and the *Second Montevideo Convention* (1933); the *Nordic States Scheme* of 1962; and the *Organisation Communale Africaine et Malgache Convention* of 1961.

- 11 One thinks here, in particular of conventions concluded to control the new breed of international crimes such as

terrorism and drug offences. As example, one may cite the Convention for the Suppression of Crimes on Board Aircraft in Flight of 1968 to which South Africa is a party. The Convention provides that member states will punish or extradite offenders. Specifically as regards terrorism, see Bassiouni (1975); McWhinney (1987); Bassiouni (1988).

- 12 *Green et al v United States* 154 Fed 401, 410 (CCA 5th 1907).
See too, *Factor v Laubenheimer* 290 US 276 287 (1933);
Williams v Rogers 57 ILR 315.
- 13 See "Extradition in the absence of a treaty" below.
- 14 *British Digest* (1965) 455.
- 15 *British Digest* (1965) 456.
- 16 *British Digest* (1965) 460. Although initially the British authorities appeared to expect that Thornley would be released as they claimed that France should not detain a British subject when no extradition treaty existed between them and Russia. When they discovered that he had been naturalised in Russia, they dropped their demands for his release but their opinion remained clear. For further examples see Morgenstern (1949) 328ff and McNair (1951) 172ff.

- 17 1878 SALR 38 heard on 25.4.1878.
- 18 At 39.
- 19 *Attorney-General v Andreson* 1897 Off Rep 287. The judgment of Esser J against which the appeal is noted is summarised at 289.
- 20 *Andreson* above at 289. Morice J concurred in Kotze J's judgment. A dissenting judgment was delivered by Ameshoff J and is discussed below.
- 21 As no extradition treaty existed between Canada and South Africa, Part II of the Fugitive Offenders Act 1887 (backing of warrants - see below) would have had to have been utilised to effect Usher's extradition. However, as this part of the Act had never come into operation in Canada, this was impossible. Furthermore, Usher had acquired Canadian citizenship and was thus not open to deportation. "It would appear...that there is no means under Canadian law whereby Mr Usher could be returned to South Africa" : communication from the Canadian Under Secretary for State Affairs dated 29.7.1965 - JF 1/554/20/49.
- 22 Lewis was wanted to stand trial on eight charges of fraud and one of theft. A warrant for his arrest had been issued in Johannesburg on 30.9.1964 - JF 1/554/20/47.

- 23 As the Republic of Ireland was not part of the Dominions, the Fugitive Offenders Act did not apply to it. In any event, it was in conflict with article 50(1) of the Irish Constitution. In a letter dated 16.5.1949 it was suggested that the conclusion of a treaty be considered - JF 554/20/12. Nothing appears to have come of this.
- 24 Marshall Square ROM 282/2/62 - JF 1/554/20/12.
- 25 The Irish response to these two requests is difficult to explain when one considers the finding in *The State (Duggan) v Tapley* 1951 ILR 315 that "There is no rule of international law which forbade extradition in the absence of a treaty of extradition".
- 26 The various extradition schemes and their application to South Africa have been discussed in Chapter II above.
- 27 Case heard before the magistrate of Cofimvaba. When he sent the certified warrant through, the Chief Commissioner learned that there could be no extradition between the Republic and Basutoland - letter dated 3.6.1963 - JF 1/554/20 (Misc).
- 28 Note 295 of 29.5.1964 - JF 1/554/20 (Misc).
- 29 Lang was wanted to face charges of theft of trust funds

totalling some R14 000 (Marshall Square ROM 1144/4/64 dated 7.7.64). The warrant for his arrest was certified on 16.7.1964. In reply the Lusaka Assistant Commissioner CID stated on 15.8.1964 that "I am directed to say that as there are at present no arrangements for extradition between Northern Rhodesia and the Republic...no action to detain Lang is practicable." - JF 1/554/20/46.

- 30 When South Africa requested the return of Higgs, a former lecturer at the University of the Witwatersrand who had fled to Lusaka, the British ambassador replied that "The government of Northern Rhodesia have indeed expressed serious doubts as to whether the necessary legal steps have in fact been taken to make the extradition treaty operative..." - JF 1/554/20/46. Higgs was not extradited.
- 31 Most of the other cases centre around the question of the succession to treaties which is considered in Chapter IV.
- 32 See eg, Shearer (1971) 51-2; Bassiouni (1974) 47ff ; Van der Heijden (1954) 29-30; and Bedi (1966) 53, although he terms this "morality" - see below.
- 33 Shearer (1971) 51ff. See too, Bassiouni (1974) 19.
- 34 Shearer (1971) 51.

- 35 See n 10 above for a list of the most important of these conventions.
- 36 Council of Europe, European Treaty Series 24 ; 359 UNTS 273.
- 37 For a discussion of the Customs Union(s) between South Africa and Botswana, Lesotho and Swaziland, see Thomas (1977) 1 ff.
- 38 For a review of the resolutions adopted by the United Nations evidencing the generally hostile attitude of the international community see Botha (CJ). The rhetoric culminated in the adoption of the International Convention for the Suppression and Punishment of the Crime of Apartheid GA Res 3068 of 1973 on 30.11.1973, operative from 18.7.1976. For a full discussion of the convention see Booysen (1976) at 56. See too "Dakar call for trial of Apartheid" lead story in *The Pretoria News* 10.7.1987. Since the watershed speech delivered by the South African State President on 2 February 1990, general relations between South Africa, her immediate neighbours, and the international community as represented by the United Nations, have certainly shown some improvement. However, at the time of writing, although rhetoric has subsided to some extent, and changes have occurred, no final solutions have yet been reached.

- 39 Apart from the obvious dependence of the so-called TBVC states on South Africa, trade figures with the rest of Africa, too, show a great measure of dependence on the Republic. See Thomas (1977) n 37.
- 40 Again the events of 1990 would appear to have softened attitudes to some extent although it is still too soon to discern real progress. For the latest comments with regard to SADCC see Van der Merwe (1991) forthcoming, and Mahone (1991) forthcoming.
- 41 The most notable successes in recent times must be seen as the Nkomati Accord concluded between the Republic and Mocambique on 16.3.1984 - Beukes (1983) 116; positive response to South Africa's cooperation in the implementation of Security Council Resolution 435 for the independence of Namibia; and the role the Republic played in negotiating an end to the Angolan civil war. Since the events in South Africa of February 1990, the South Africa/Africa scenario appears to be changing at a considerable rate - *Pretoria News* 14.11.90; 29.10.91 and 30.10.91 for example.
- 42 Stephen and Elizabeth Anstee, former Zimbabwean residents, were charged with the murder of their three month old daughter in East London, South Africa. Having been released on bail, they fled to Zimbabwe, where they were arrested for entering the country illegally. In an interview with the

Zimbabwe Broadcasting Corporation during June 1985, the Zimbabwean Minister of Home Affairs, Simbi Mubako, stated that although there was no extradition treaty between Zimbabwe and South Africa, "the situation will arise in future when irrespective of political differences Zimbabwe and South Africa would be able to exchange common criminals." Report in *Zimbabwean Sunday Mail* 2 June 1985. See too, "Zimbabwe gee egpaar dalk terug" *Beeld* 3.6.1985. In this report Mr Felix da Silva, senior Zimbabwean public prosecutor, is reported to have said that although there is no extradition agreement between South Africa and Zimbabwe, the two states would shortly negotiate "extradition arrangements". No record could be found of this indeed having been done. See too, *Pretoria News* 9.5.90.

- 43 Stanbrook (1980) 79 and Hartley Booth (1980) 12. Hartley Booth points out that although the term "arrangement" is used in the British Acts and should, in theory, include both treaties and less formal agreements, over the years this has been interpreted so as to restrict extradition to treaties only. Latterly Britain has indeed been party to multilateral conventions (see below) but not to one dealing specifically with extradition.
- 44 See Status of Transkei Act 100 of 1976; Status of Bophuthatswana Act 89 of 1977; Status of Venda Act 107 of 1979; and Status of Ciskei Act 110 of 1981.

- 45 See UN GA Res 341 (XXX) D calling on all member states to refrain from recognising the independence of these states; Booysen (1989) 262 ff ; and the recent British case of *GUR Corporation v Trust Bank of Africa Ltd (Government of Republic of Ciskei, third party)* 1986 3 All ER 449; Botha (1986-87) 156.
- 46 Booysen (1989) 262. Again, in the light of recent constitutional developments within South Africa, there would appear to be a move towards the reincorporation of the "independent states" within the Republic. However, at this stage these entities must be judged from the South African perspective and be regarded as sovereign independent states. Indeed it should be noted that at the opening of the CODESA negotiations for a Democratic South Africa on 20.12.1991, the President of Bophuthatswana, Lucas Mangope, declared himself unable to sign the Declaration of Intent as he could not agree unconditionally to the reincorporation of his country into South Africa : SABC - TV live coverage 20.12.1991.
- 47 Although generally regarded as no more than extensions of the South African government (see *GUR Corporation v Trust Bank of Africa* above) relations between the Republic and these states have not always been cordial. In 1978 Transkei in fact broke off diplomatic relations with Pretoria - a breach which has subsequently been mended.

- 48 A disadvantage of such agreements is that they often omit procedural requirements - see the criticism of the European Extradition Convention on this score in Council of Europe (1970). It is interesting to note further that at the Commonwealth Council meeting in 1966 held to review the provisions of the Fugitive Offenders Act 1881 governing extradition within the Commonwealth, the delegates rejected the adoption of a multilateral convention opting rather for a retention of the backing of warrants system - Shearer (1971) 55.
- 49 See Convention on Extradition concluded between the Republics of South Africa, Bophuthatswana, Ciskei and Venda, *Government Gazette* 10586/1987 23.1.1987.
- 50 See article 13 of the Convention - "Reciprocal endorsement of warrants of arrest".
- 51 Agreement of Extradition between the Republic of Transkei and the Republic of South Africa concluded at Pretoria 24.4.1987 - *Transkei Government Gazette* Vol 12 8.6.87. New treaties were also concluded with Bophuthatswana : Agreement on Extradition between the Government of the Republic of Bophuthatswana and the Government of the Republic of Transkei concluded at Mankwe 27.9.1989 - *Transkei Government Gazette* Vol 14 Sp 66 1.11.1989; and Venda : Agreement of Extradition between the Government of the

Republic of Venda and the Government of the Republic of Transkei concluded at Mankwe 26.9.1989 *Venda Government Gazette* 24 16.2.1990.

- 52 Shearer (1971) 51 ff.
- 53 Bassiouni (1974) 19 ff.
- 54 Shearer (1971) 51; see too, Bassiouni (1974) 19.
- 55 44 & 45 Vict c 69.
- 56 See eg, Stanbrook (1980) 37 ff.
- 57 See the cases referred to in nn 27-30 above.
- 58 See letter from Lusaka Assistant Commissioner dated 15.8.1964 in which it was stated that no extradition arrangements had existed between South Africa and Northern Rhodesia since South Africa's departure from the Commonwealth JF 1/554/20/46. See too, the Lusakan response to South Africa's request for the extradition of Higgs JF 1/554/20/46 and n 30 above.
- 59 Section 6 of the Extradition Act 67 of 1962, and article 13 of the Extradition Convention.

60 Section 10 of the Act which deals with offences committed in a foreign state other than an associated state, demands sufficient reason for putting the person on trial in the Republic had the offence been committed here. Section 11 on the other hand, dealing with associated states, does not require this degree of proof.

61 The person found to be extraditable is referred to prison pending the decision of the Minister in the case of foreign states; in the case of an associated state the decision is taken by the magistrate. See Lansdown and Campbell (1982) 52 and Sanders 158 par 206.

62 Radesich (1984) 279.

63 1967 4 SA 583; see too, 1965 2 SA 770 (T).

64 At 592 *per* Botha JA.

65 See the statement by the Zimbabwean Minister of Home Affairs n 42 above.

66 1967 2 SA 636 (T).

67 1971 3 SA 899 (A) and 1971 1 SA 359 (N).

68 At 640 *per* Boshoff J.

- 69 At 909 *per* Ogilvie-Thompson CJ.
- 70 See eg, the treaty with Swaziland and the case of *S v Bagattini and Others* 1975 4 SA 252 at 256 where it was stated that "It was common cause before us that Swaziland is a "foreign state" but not an associated state in terms of the definition in sec. 1".
- 71 As Zimbabwe no longer considers herself bound by the Rhodesian treaty with South Africa - see above - only the treaty with Malawi would appear to fit the mould.
- 72 Article 5 of the 1910 White Slave Traffic Convention 103 BFSP 244 and article 4 of the 1921 Supplementary White Slave Traffic Convention 9 LNTS 415.
- 73 Article 10 of the 1929 International Convention for the Suppression of Counterfeiting Currency 112 LNTS 371.
- 74 Article 9 of the 1936 Convention for the Suppression of the Illegal Traffic in Dangerous Drugs 198 LNTS 299.
- 75 See Chapter II. Note however that the Transvaal Republic indeed acceded to certain treaties independently.
- 76 See McWhinney (1987) and Bassiouni (1975) and (1988)

and the Convention for the Suppression of Illegal Traffic in Drugs.

- 77 Convention on Offences and Certain Other Acts committed on Board Aircraft concluded on 14.9.1963 entered into force 4.12.1969. Although article 16 (2) of the Convention states clearly that no obligation to extradite is created, article 16(1) provides that an offence committed in terms of the Convention will, for purposes of extradition, be regarded as having been committed both where it occurred and in the territory of the registering state. The Convention was incorporated into South African municipal law by means of the Civil Aviation Offences Act 10 of 1972 (as amended).
- 78 Convention for the Suppression of the Unlawful Seizure of Aircraft concluded 16.12.1970 entered into force 14.10.1971. In terms of article 7 "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution". Article 8 provides that any offence under the Convention is deemed to be an offence in terms of the extradition treaties of the contracting states. Those states which allow extradition only on treaty, may in terms of article 8(2) regard the Convention as a sufficient basis for extradition. This

Convention too was incorporated into South African law by the Civil Aviation Offences Act 10 of 1972.

- 79 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation concluded 23.9.1971 entered into force 26.1.1973. In article 7 of this Convention too the duty either to extradite or prosecute is established. The Convention was incorporated into South African law by the Civil Aviation Offences Act 10 of 1972.
- 80 See for example, *Pan American World Airways Incorporated v SA Fire and Accident Insurance* 1965 3 SA 150 (A).
- 81 Long title to Act 10 of 1972 as amended by section 5 of Act 63 of 1978.
- 82 As amended by section 19(b) of Act 29 of 1974.
- 83 As amended by section 15 of Act 29 of 1974.
- 84 See introduction above and "Extradition in the absence of a treaty" below. See too, Hartley Booth (1980) lii; Stanbrook (1980) xxv.
- 85 Section 1 of the British Hi-jacking Act 1971 c 70.
- 86 This possibility exists only under the Hague and Montreal

Conventions. In the case of the Tokyo Convention Act 1967, Britain will extradite only to a country with whom it has operative bilateral treaty arrangements. See nn 77 - 79 above and Stanbrook (1980) 81ff.

87 See *Eain v Wilkes* 1982 ILM 342 and Botha (1982) 174.

88 See eg, Shearer (1971) 23; and Bedi (1966) 29.

89 Bk ii c 21 s 4. The original reads :

"Cum vero non soleant civitates permittere ut civitas altera armata intra fines suos poenae expetendae nomine veniat, neque id expediat, sequitur ut civitas apud quem degit qui culpa est compertus, alterum facere debeat, aut ut ipsa interpellata pro merito puniat nocentem, aut ut eum permittat arbitrio interpellantis. hoc enim illud est dedere, quod in historiis saepissime occurrit."

90 Vattel (1959) Bk ii s 76.

91 Shearer (1971) 24; Bassiouni (1974) 7
and 54 n 13 both of whom rely on Wheaton (1866) 188.

92 British Digest (1965) 453.

93 British Digest (1965) 453. Unfortunately, who the "good

authorities" were is not mentioned.

- 94 British Digest (1965) 454.
- 95 1827 1 Stuart 245.
- 96 In the case of *Re Washburn* (1819) 4 Johnson 106 where Chancellor Kent declared *obiter* that the Jay Treaty was merely declaratory of customary public international law and that any person held in the United States on a theft charge in Canada, could not be released on a request for *habeas corpus*; Clarke (1888) 454.
- 97 Clarke (1888) 454. See too *R v Arton (no 1)* 1896 1 QB 108 at 111 where it was stated that "it is part of the comity of nations that one State should afford to another every assistance towards bringing persons guilty of such crimes to justice".
- 98 *Attorney General v Andreson* 1897 Off Rep 287.
- 99 At 292.
- 100 At 292.
- 101 At 293.

102 At 293 (emphasis added).

103 At 294.

104 See the majority judgment at 290. These laws were considered in Chapter II.

105 At 291.

106 There has been a somewhat heated debate among certain academics on this point. See eg, Sanders (1977) 369 and (1978) 198, as opposed to Booysen (1975) 315. Dugard (1971) 13 follows the golden mean. Although the decision of the Appellate Division in *Nduli and Another v Minister of Justice and Others* 1978 1 SA 893 (A) was hailed by some as settling the issue (see Sanders (1978) 198), it in fact fell far short of the mark - see Botha (1978) 170. For the latest contributions on this topic, see Devine (1987-88) 119; Schaffer (1983); Dugard (1989); Booysen (1990-91) and *S v Ebrahim* 1991 2 SA 553 (A).

107 This was finally expressly stated by a South African court in *Inter Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 2 SA 111 (T), a judgment which was followed in the same year by *Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia* 1980 2 SA 709 (E); Carpenter (1980) 125. A recent

decision illustrating this point is *Binga v Administrator-General SWA and Others* 1984 3 SA 949 (SWA).

- 108 See Booysen (1989) 77 ff; and *Cheng Chi Cheung v R* 1939 AC 160 at 168 where Lord Atkin declared that rules of customary international law would be applied "so far as [they are] not inconsistent with rules...finally declared by their tribunals".
- 109 British Digest (1965) 454.
- 110 A number of instances are cited in British Digest (1965) 462, notably the extradition of one Nielsen to Scotland from New York on forgery charges in 1825, and the case of *Holmes v Jennison* (1839) 14 Pet 540, while France was also apparently approached in 1822. This practice is, however, no longer followed and has not been for a considerable period as is clear from the 1866 Report to the Select Committee, where it is stated that : "No; we never act under any circumstances where there is not a treaty...we never act at all in the way of making a demand upon a foreign government...".
- 111 Eire Supreme Court 12 December 1950 1951
ILR 336.
- 112 Venezuela Federal Court 26 May 1953 in 20

- ILR 366. See too, *Factor v Laubenheimer* 290 US 276 at 287 (1933) where it is clearly stated that a country may "if agreeable to its own constitution and laws, voluntary (sic) exercise the power to surrender a fugitive from justice...".
- 113 *In re Vilca* 1931-2 Annual Digest 293 decided by the Chilean court on 15.5.1929. See too *Extradition : Germany & Czechoslovakia* 1919-22 Annual Digest 259; *In re Beytia* (Chilean Supreme Court) 1919-22 Annual Digest 261.
- 114 *In re Lepage* 1931-2 Annual Digest 294.
- 115 *In re Nikoloff* 1933-4 Annual Digest 351.
- 116 Starke (1989) 20 states that the rules of comity are "for the most part rules of goodwill and civility, founded on the moral right of each state to receive courtesy from others". Akehurst (1987) 50 n 1 somewhat cynically describes comity as "a wonderful word to use when one wants...to eliminate clarity of thought."
- 117 464 F 2d 475 (2nd Cir 1972). See too *R v Arton* 1896 1 QB 108.
- 118 Although there are any number of treaties granting aliens certain rights, there is to date no codified general standard of treatment which may be enforced against states; largely because most states would regard this as

unacceptable interference with their sovereign rights. See generally Booyesen (1989) 168 ff.

119 See eg, Bassiouni (1974) 2 ff.

120 For example, the South African Extradition Act specifically empowers extradition in the absence of a treaty in section 3(2), while article 1, para 1 of the Swiss Federal Law of 22 January 1892 concerning Extradition, empowers the Federal Council to grant extradition to states with whom no extradition treaty has been concluded and "in exceptional cases even without reserving the right of reciprocal treatment" *N v Public Prosecutor of the Canton of Aargau* Swiss Cour de Cassation 20.5.1953 in 1953 ILR 363. France, on the other hand, appears to demand neither reciprocity nor formal arrangement - see letter from the French Ministry of Foreign Affairs dated 5.7.1968 - JF 1/554/20/13.

121 Rezek (1981) 173.

122 See below.

123 See Stanbrook (1980) xxv for British practice.

124 As will emerge presently, the government legal advisors would appear to hold a different view.

- 125 As provided in particular by sections 9, 10, 13 and 14 of the Extradition Act 67 of 1962. See Lansdown and Campbell at 40 who support this interpretation.
- 126 See eg, the *Case of Mario Guassardo* letter dated 23.7.64 on JF 1/554/20/4.
- 127 Notably in dealings with what was the Federal Republic of Germany. See the *Case of Franz Joseph Esser* case 8/1356/81 heard in the Johannesburg Magistrate's Court on 27.1.1982 - JF 9/11/3-1; the *Case of Hans Dieter Gebhardt* heard in the Windhoek Magistrate's Court 15.12.1980 - JF 9/11/3; and the *Case of Franz Joseph Kraul* case 08/00784/817 heard in the Johannesburg Magistrate's court 17.6.1981 - JF 9/11/3. In all three instances the accused were extradited to Germany despite the absence of a current treaty between South Africa and the Federal Republic. In the case of Norway, too, contrary to the approach adopted in the *Guassardo* case above, it was in fact suggested that section 3(2) be utilised in preference to the negotiation of a new treaty - JF 9/11/2 (Norway).
- 128 The amounts, which Rademeyer claimed were due to him as commission had been placed in various overseas accounts after which he and his family had "moved" to Australia where he had taken out Australian nationality. The case was heard from 20.5.1985 and Rademeyer was returned to South Africa

in July 1985.

- 129 See "Extradition hearing starts" *Pretoria News* 20.5.1985 at 1 where it is stated that "Australian officials drew up an extradition agreement with South Africa to handle the case, but it prohibits extradition if it would be politically motivated". As far as could be established, this was not an extradition treaty but merely an agreement to cover the specific Rademeyer case - as is borne out by the wording of the report which makes no mention of a treaty and restricts it to the specific case.
- 130 See comments on the *Anstee* case in n 42 above.
- 131 Rezek (1981) 173.
- 132 Rezek (1981) 173.
- 133 Rezek (1981) 175.
- 134 14 ILR 305..
- 135 Rezek (1981) 173.
- 136 For details of the case - and the analogous British case concerning the notorious Great Train Robber Robert Briggs who had also been in Australia and Brazil - see Shearer

(1975) 116.

- 137 Sections 2, 4 and 5 of the United Kingdom Extradition Acts 1870 - 1935 and *R v Wilson* 1887 3 QBD 42.
- 138 Section 10 Australia Extradition (Foreign States) Act 1966 -1973 (Cth).
- 139 Art 114 of Decree Law 66.689 11.6.1970 provides that extradition may be granted on request from a state which invokes "a convention or treaty signed with Brazil and, in the absence of it, the existence of reciprocity of treatment".
- 140 The Australian authorities attempted to by-pass their statutory block by offering to use deportation procedures were Brazil to request extradition at some future date. They stated that "...there are deportation procedures under the Migration Act which, with the approval of Ministers, could be applied in the event of a fugitive being sought by Brazil from Australia." - Shearer (1975) 116. This "offer" was squarely rejected by the Australian courts in *Barton v Commonwealth of Australia* 1974 3 ALR 70 at 91 and 48 ALJR 161 at 171 where it was held that "the powers conferred by the Migration Act can be exercised only for the purposes authorized by that Act". See too, *Ex parte Duke of Chateau Thierry* 1917 1 KB 552 where a more subtle form of

the same procedure was used and Stanbrook (1980) xxvii.

This issue is discussed more fully in Chapter I above.

141 Section 10(4) of the Australian Extradition (Foreign States)
Act 1966.

142 Statutory Rule 130 of 1974 - see Shearer (1975) 117.

143 Rezek (1981) 173.

144 Rezek (1981) 176.

145 Vienna Convention on the Law of Treaties operational as
from 1980 see n 5 above.

146 Article 3 Vienna Convention on the Law of Treaties.

147 Booyesen (1989) 33 and the writers he cites in n 7. See too,
the *Legal Status of Eastern Greenland* case, where the
Permanent Court expressly recognised the validity and
binding force of an oral undertaking : 1933 PCIJ Ser A/B 53
at 71.

148 40 ILR 211 case of *Camara Federal de la Capital*
(Penal Chamber) heard on 26.5.1964.

149 Rezek (1981) 177.

- 150 Rezek (1981) 177.
- 151 *In re Zahabian* (Switzerland Federal Tribunal) 32 ILR 290.
- 152 At 290-291.
- 153 See n 9 above and in particular the New Zealand response to South African approaches.
- 154 South Africa has in any event not registered her treaties with the Secretariate for a number of years.
- 155 Application for extradition addressed by South Africa to Brazil - JF 1/554/20/4.
- 156 Marshall Square ROM 143/4/62.
- 157 The views of the government legal advisors were sought in a letter dated 23.7.1964; they replied in letter 42/37 dated 19.8.1964 - JF 1/554/20/4.
- 158 As pointed out above, this is not in fact the case.
- 159 This is in fact no more than the minimum form of reciprocity identified by Rezek (1981) above. What the authorities are in fact doing by adopting this restrictive approach is

placing themselves in the position faced by Australia and Britain in their dealings with Brazil (in the *Barton Brothers* and *Briggs* cases respectively - see n 140 above).

160 *The Case of Franz Podezin* - JF 9/11/2.

161 Bedi (1966) 53

162 Bedi (1966) 53.

163 Bedi (1966) 53 and the authorities cited at n 137.

164 See n 133 above.

165 See n 132 above.

166 *Haya de la Torre* case 1951 ICJ Rep and Bedi (1966) at 55.

167 See above where reciprocity and comity are discussed.

168 See eg, in the case of South Africa in particular, the extradition of *Frans Jacob Smit Theron* wanted to stand trial in South Africa for fraud totalling some R300 000 and contravention of the Insolvency Act. Despite the United States apparently having no objection in principle to the extradition of Theron, technical problems surrounding the formalities attendant upon the request caused delays of

several months - JF 9/11/3 (USA).

169 See 191-193 above.

170 The determining factor is the attitude of the affected states - see *North Sea Continental Shelf* cases 1969 ICJ Rep.

171 Here, too, the particulars of a specific case will have to be examined - see the *Asylum* case 1950 ICJ Rep. As Wallace (1986) puts it at 10 : "For instance, a state which is able to cite two examples of state practice to support its contention that the practice is law, will be in a better position than a state which can cite no such examples."

172 Case 8/1356/81 (Johannesburg Magistrate's Court) - JF 9/11/3-1; case heard in Windhoek Magistrate's Court 15.12.1980 - JF 9/11/3; case 08/00784/817 (Johannesburg Magistrate's Court) - JF 9/11/3 respectively.

173 JF 1/554/20/4 - extradition request from Brazil.

174 Letter 42/37 dated 19.8.1964 JF 1/554/20/4.

175 For a full discussion of the historical development from Greek and Roman times, see Shearer (1971) 95ff.

- 176 *Report of the Royal Commission on Extradition 1878 Vol 24*
Parliamentary Papers 907-917.
- 177 Shearer (1971) 97ff. So strongly did the British perceive
this matter that in the Anglo-Swiss Extradition Treaty of
1880 (71 BFSP 54) provision is made for the non extradition
of Swiss nationals to Britain while British nationals may
still be extradited to Switzerland - Shearer (1971) 99.
- 178 Sanders par 184 at 152.
- 179 1969 2 SA 224 (T).
- 180 Anglo / Portuguese Extradition Treaty of 1892 as amended by
Convention 20.1.1932.
- 181 At 224 of the judgment.
- 182 Bedi (1966) 207.
- 183 JF 9/11/3 (Israel).
- 184 Letter from the Director General Foreign Affairs and
Information dd 22.1.1982 - JF 9/11/3 (Israel).
- 185 JF 9/11/3-1 (Transkei).

- 186 Case C1495/82 heard in the East London Magistrate's Court
5.8.1982.
- 187 JF 9/11/3 (United States of America).
- 188 JF 9/11/3 (United States of America). See too, *Rand Daily Mail* 9.7.1983 "Theron to be Extradited" and *Rand Daily Mail* 21.7.1983 "SA exile arrested in US". He was extradited to South Africa on 23.6.1988 - *Beeld* 27.6.1988.
- 189 See for a discussion of the political offence, Van den Wijngaert (1980); Bassiouni (1974) 370ff; Shearer (1971) 166ff; Bedi (1966) 179ff; and Van der Heijden (1954) 79ff. For the South African approach, see Trichardt & Cilliers (1989-90) 69 particularly from 91. See too, Barrie (1969) and Radesich (1984).
- 190 Trichardt & Cilliers (1989-90) at 75.
- 191 Article 15 Act 67 of 1962.
- 192 Trichardt & Cilliers (1989-90) come to the conclusion that South Africa will in all probability follow the interpretation of the British courts.
- 193 1909 SC 433.
- 194 At 437 and 439 of the judgment.

- 195 1971 1 SA 359 at 363.
- 196 Case no 1500/86 TPD 23.10.1986 (unreported).
- 197 *Holman et al v Johnson* 98 ER 1120 and *Ivey v Lalland* 42 Mississippi Law Reports 444 for an American equivalent.
- 198 Bedi (1966) 198; Van der Heijden (1954) 92.
- 199 Van der Heijden (1954) 91; Bedi (1966) 196; Bassiouni (1974) 429. The offence must not be a crime under the normal penal law of the land and must also not be classifiable as a crime against the laws of war.
- 200 1933-34 Annual Digest 357. See too *Ex parte Duke of Chateau Thierry* 1917 1 KB 552.
- 201 Bassiouni (1974) 429.
- 202 For a full discussion of these aspects see Tate (1968) 337.
- 203 For a general discussion see Bedi (1966) 193 and Bassiouni (1974) 459.
- 204 The fact that this provision is fairly uncommon must be ascribed to the fact that the majority of South Africa's treaties are old and were inherited from Britain where the

death penalty was also applied until fairly recently.

- 205 For a general discussion see Bedi (1966) 203-209; Van der Heijden (1954) 93 and 94.
- 206 For a general discussion see Bassiouni (1974) 443; Bedi (1966) 165; and Van der Heijden (1954) 56.
- 207 See Bedi (1966) 178; Bassiouni (1974) 322; and Shearer (1971) 137.
- 208 See Van der Heijden (1954) 60; Bassiouni (1974) 452; and Bedi (1966) 171.
- 209 See Bassiouni (1974) 416ff.
- 210 Many of these conventions provide that the individual should either be extradited or punished locally. A sympathetic state could consequently undertake to punish the accused and then merely let things slide with few real repercussions.
- 211 Bassiouni (1974) 420-1.
- 212 Treaty between Great Britain and Germany for the Mutual Surrender of Fugitive Criminals signed at London 14.5.1872; ratified at London 11.6.1872.

- 213 Treaty between Great Britain and Italy for the Mutual Surrender of Fugitive Criminals signed at Rome
5.2.1873; ratified at Rome 18.3.1873 : 1873 63 BSP
19-30. (Provisions not applicable to Malta.)
- 214 Treaty between Great Britain and Denmark for the Mutual Surrender of Fugitive Criminals signed at Copenhagen
31.3.1873; ratified at Copenhagen 26.4.1873 : 1873 63
BSP 5-18.
- 215 Treaty between Great Britain and Sweden and Norway for the Mutual Surrender of Fugitive Criminals signed at Stockholm 26.6.1873; ratified at Stockholm 28.8.1873 :
1873 63 BSP 175-179.
- 216 Treaty between Great Britain and Austria/Hungary for the Mutual Surrender of Fugitive Criminals signed at Vienna 3.12.1873; ratified at Vienna 10.3.1874 : 1873
63 BSP 213-218.
- 217 Treaty between Great Britain and Hayti for the Mutual Surrender of Fugitive Criminals signed at Port-au-Prince 7.12.1874; ratified at Port-au-Prince
2.9.1875 : 1874 65 BSP 44-48.
- 218 Treaty between Great Britain and France for the Mutual Surrender of Fugitive Criminals signed at Paris

14.8.1876; ratified at Paris 8.4.1878 : 1876 67 BSP
5-19. Special provisions in article 16 of the treaty
exclude its application from France's East Indian
Possessions - see article 9 of the Anglo/French treaty
of 7.3.1815.

219 Treaty between Great Britain and Spain for the Mutual
Surrender of Fugitive Criminals signed at London
4.6.1878; ratified at London 21.11.1878 : 1878 69 BSP
6-13.

220 Treaty between Great Britain and the Republic of
Equator for the Mutual Surrender of Fugitive Criminals
signed at Quito 20.9.1880; ratified at Quito
19.2.1886 : 1881 72 BSP 137-143.

221 Treaty between Great Britain and Luxemburg for the
Mutual Surrender of Fugitive Criminals signed at
Luxemburg 24.11.1880; ratified at Brussels 5.1.1881 :
1880 71 BSP 45-53.

222 Treaty between Great Britain and Switzerland for the
Mutual Surrender of Fugitive Criminals signed at Berne
26.11.1880; ratified at Berne 15.3.1881 : 1880 71 BSP
54-62. The relevant provision (art 18) was amended by a
convention entered into between Great Britain and
Switzerland in London on 29 June 1904. The periods

provided for colonial possessions in the original treaty were amended to 6 weeks under article 3 par 3 (originally 30 days) and 3 months under article 8 (originally 2 months) - 1904 97 BSP 92-3.

- 223 Treaty between Great Britain and Salvador for the Mutual Surrender of Fugitive Criminals signed at Paris 23.6.1881; ratified at London 8.11.1882 : 1881 72 BSP 13-19.
- 224 Treaty between Great Britain and the Continental Republic of Uruguay for the Mutual Surrender of Fugitive Criminals signed at Montevideo 26.3.1884; ratified at Montevideo 13.12.1884 : 1883-4 75 BSP 18-24.
- 225 Treaty between Great Britain and Mexico for the Mutual Surrender of Fugitive Criminals signed at Mexico 7.9.1884; ratified at Mexico 22.1.1889 : 1885-6 77 BSP 1253-1258.
- 226 Treaty between Great Britain and Guatamala for the Mutual Surrender of Fugitive Criminals signed at Guatamala 4.7.1885; ratified at Guatamala 6.9.1886 : 1884-5 76 BSP 72-77.
- 227 Treaty between Great Britain and Colombia for the

- Mutual Surrender of Fugitive Criminals signed at Bogota
27.10.1888; ratified at Bogota 21.8.1889.
- 228 Treaty between Great Britain and the Argentine Republic
for the Mutual Surrender of Fugitive Criminals signed
at Beunos Aires 22.5.1889; ratified at Beunos Aires
15.12.1893 : 1889-90 81 BSP 1305-1311.
- 229 Treaty between Great Britain and Monaco for the
Extradition of Criminals signed at Paris 17.12.1891;
ratified at Paris 17.3.1892 : 1891-2 83 BSP 66-72.
- 230 Treaty between Great Britain and Bolivia for the Mutual
Surrender of Fugitive Criminals signed at Lima
22.2.1892; ratified at Lima 7.3.1898 : 1896 88 BSP
27-33.
- 231 Treaty between Great Britain and Portugal for the
Mutual Surrender of Fugitive Criminals signed at Lisbon
17.10.1892; ratified at Lisbon 13.11.1893 : 1892-3 84
BSP 83-88. (See the amending convention of 20.1.1932
signed expressly "on behalf of South Africa" 1932 BSP
135.)
- 232 Treaty between Great Britain and Liberia for the Mutual
Surrender of Fugitive Criminals signed at London
31.1.1892; ratified at London 31.1.1894 : 1892-3 84 BSP

103-109.

- 233 Treaty between Great Britain and Roumania for the Mutual Surrender of Fugitive Criminals signed at Bucharest 21.3.1893; ratified at Bucharest 13.3.1894 : 1893 85 BSP 69-75.
- 234 Treaty between Great Britain and Chile for the Mutual Surrender of Fugitive Criminals signed at Santiago 26.1.1897; ratified at Santiago 14.4.1898 : 89 BFSP 20-25.
- 235 Treaty (replacing the treaty of 19.6.1874 : see Clarke (1888) cxlvii) between Great Britain and the Netherlands for the Mutual Surrender of Fugitive Criminals signed at London 26.9.1898; ratified at London 14.12.1898 : 90 BFSP 51-58. Special mention is made of the various colonies and the period allowed for provisional arrest is extended to 60 days in the case of the colonies.
- 236 Treaty between Great Britain and the Republic of San Marino for the Mutual Extradition of Fugitive Criminals signed at Florence 16.10.1899; ratified at Rome 5.12.1899 : 91 BFSP 95-101.
- 237 Treaty between Great Britain and Serbia/Yugoslavia for

the Mutual Surrender of Fugitive Criminals signed at Belgrade 6.12.1900; ratified at Belgrade 13.3.1901 : 92 BFSP 41-47.

238 Treaty (replacing the treaty of 20.5.1876 :see Clarke (1888) xlii) between Great Britain and Belgium for the Mutual Surrender of Fugitive Criminals signed at Brussels 29.10.1901; ratified at Brussels 6.12.1901. In a convention signed at London on 5.3.1907 and ratified on 17.4.1907, the parties made special provisions for criminals arrested in the Dominions : 100 BFSP 472-473.

239 Treaty between Great Britain and Peru for the Mutual Surrender of Fugitive Criminals signed at Lima 26.1.1904; ratified at Lima 30.11.1906 : 99 BFSP 963-968.

240 Treaty between Great Britain and Cuba for the Mutual Surrender of Fugitive Criminals signed at Havana 3.10.1904; ratified at Havana 10.1.1905 : 1904 97 BFSP 26-31.

241 Treaty between Great Britain and Nicaragua for the Mutual Surrender of Fugitive Criminals signed at Managua 19.4.1905; ratified at London 13.2.1906.

242 Treaty between Great Britain and Panama for the Mutual

Surrender of Fugitive Criminals signed at Panama
25.8.1906; ratified at Panama 15.4.1907.

- 243 Treaty between Great Britain and Paraguay for the Mutual Surrender of Fugitive Criminals signed at Asuncion 12.9.1908; ratified at Asuncion 30.1.1911 :
102 BFSP 340-345.
- 244 Extradition Treaty between the United Kingdom and Greece concluded at Athens 24.9.1910; ratified at Athens 30.12.1911.
- 245 Extradition Treaty between the United Kingdom and Siam concluded at Bangkok 4.3.1911; ratified at London 1.8.1911.
- 246 Treaty for the Extradition of Criminals between the United Kingdom and Czechoslovakia concluded at London 11.11.1924. This treaty represents an important departure in that it provided in article 17, that it would not apply in certain of Britain's dominions - including the Union of South Africa - unless "notice to that effect shall have been given on behalf of the government of such Dominion". Provision was also made for the independent termination of the treaty by the Dominions. The treaty was, however, extended to the Union of South Africa as from 12.6.1927; see GN 26 *Government Gazette* of 6.1.1928.

- 247 Treaty between Finland and the United Kingdom for the Extradition of Criminals concluded at London 30.5.1924. This treaty also contained the clause identified in the previous footnote suspending the operation of the treaty in the Union - see article 17. Again, the treaty was made applicable to the Union by agreement between the governments of Finland and the Union - article V GN 1677 *Government Gazette* 29.9.1925.
- 248 Extradition Treaty between the Union of South Africa and the United States of America concluded at Washington 18.12.1947; ratified at Washington 1.3.1951 - see GN 91 *Government Gazette* 20.4.1951.
- 249 Extradition Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland concluded at Cape Town and Mbabane 4 & 5 .9.1968 - see *Government Gazette* 2179 4.10.1968.
- 250 Extradition Treaty between the Republic of South Africa and the Republic of Botswana concluded at Cape Town 7.2.1969 ratified at Cape Town 8.4.1969 - see GN R 118/1969 *Government Gazette* 2379 2.5.1969.
- 251 Extradition Agreement between the Government of the Republic of Malawi and the Government of the Republic of South Africa concluded at Pretoria 25.2.1972 ratified at Pretoria

10.3.1972 - see *Government Gazette* 3424 24.3.1972.

- 252 Extradition Treaty between the Union of South Africa and the State of Israel concluded at Pretoria 18.9.1959; ratified at Pretoria 7.1.1960 - see GN R14 *Government Gazette* 6362 5.2.1960.
- 253 Agreement of Extradition between the Government of the Republic of Transkei and the Government of the Republic of South Africa concluded at Pretoria 24.4.1987 - see *Government Gazette (Transkei)* vol 12 8.6.1987.
- 254 Convention on Extradition entered into between the Government of the Republic of South Africa and the Governments of the Republics of Bophuthatswana, Ciskei and Venda 28.1.1988 - see Proc 1/1988 *Government Gazette (Venda)* Vol 19 5.2.1988.
- 255 Treaty of Extradition between the Government of the Republic of South Africa and the government of the Republic of China concluded at Taipei 30.12.1987 *Government Gazette* 11316 24.5.1988.

CHAPTER IV

THE ACQUISITION OF TREATY RIGHTS AND OBLIGATIONS : STATE SUCCESSION

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ENDNOTES

1 INTRODUCTION

In the previous Chapter the basis upon which a request for extradition or a decision to extradite may rest was examined in some detail. It was determined that, particularly in the case of South Africa, treaty must be regarded as the most important basis for both requests for and grants of extradition. However, how South Africa came to acquire the treaty rights and obligations she currently enjoys - or claims to enjoy - must be examined more closely.

In assessing how a state acquires treaty rights and obligations, a preliminary distinction may be drawn between acquisition by original means - where the state itself is an original party to the conclusion of a treaty - and derivative acquisition - where the state party to a treaty acquires its rights and duties under the treaty from some other state which was an original party. In dealing with extradition, this distinction is crucial in the case of the Republic of South Africa since, as has been shown above, the vast majority of the extradition agreements which the Republic regards as binding, are in fact derived from Britain, the erstwhile mother country.

2 ACQUISITION BY ORIGINAL MEANS

In determining how a state acquires original rights and duties under a treaty the natural starting point is the Vienna Treaty

Convention. (1) Article 2(1)(b) of the Convention is not particularly helpful in defining the various terms used to denote acceptance of treaty commitments providing merely that "ratification", "acceptance", "approval" and "accession" mean "the international act so named". The conclusion and entry into force of treaties are, however, dealt with in detail in Part II of the Convention.

Article 6 provides that every state has the capacity to conclude treaties. (2) Article 11 provides that this capacity may find its concrete expression either by:

"signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed".

Each of these means is dealt with separately in articles 12 to 15. In essence the common characteristics emerging from these provisions are that the treaty should provide for the particular method of consent; or that it may be established from other evidence that the party states intended the particular method of consent to apply. The intentions of the parties consequently emerges as the cardinal determinant. (3)

In all these instances, save one, it is further clear that we are concerned with an original method of acquisition. The one possible exception, given the definition attached to the term "original acquisition" above, which requires some explanation is accession.

When a state expresses its desire to be bound by a treaty through accession, the acceding state is of course not an original party in the sense mentioned above. Article 15 of the Treaty Convention provides that in such a case consent to be bound may be expressed by accession - or joining the treaty - if the treaty provides for this possibility; the negotiating states were agreed that consent could be so expressed; or the parties subsequently agreed that consent could be so expressed. In this instance, consequently, we find that although the acceding state is not an original party to the treaty, the rights and obligations accruing to it under the treaty are original in the sense that they are not rights deriving from some other state or international organisation. The state derives its right to consent to the treaty from the agreement of the other states involved, but does not derive the actual rights and duties inherent in the treaty from these other states - these rights accrue to it in original form. Accession, too, can consequently be regarded as an original acquisition of rights and duties. It should however be noted that within the traditional bilateral extradition mould, accession is generally of limited importance being restricted as it is to multilateral treaties - or to treaties which after the accession become multilateral. (4)

Within the evolution of the treaty-making capacity of the Union of South Africa, however, accession did have a role to play in the case of extradition. It will be remembered that after the 1926 Imperial Conference (5) the British policy was that treaties it concluded would no longer be directly applicable in the Dominions. The

Dominion governments would be given the option of acceding to such treaties. This was indeed put into practice in the extradition treaties concluded by Britain with Czechoslovakia (6) and Finland (7) in 1924. The Union acceded to the Finnish treaty in 1925 and to the Czech treaty in 1927. (8)

These two treaties apart, within the South African context, (9) original acquisition of extradition treaty rights and obligations can be classified into two main groups viz, those concluded by the Union of South Africa after its creation in 1910; and those concluded by the Republic of South Africa after independence and departure from the "British fold" in 1961.

Two treaties fall within this first grouping, viz the Extradition Treaty between the Union of South Africa and the United States of America concluded at Washington on 18 December 1947, (10) and the Extradition Treaty between the Union of South Africa and the State of Israel concluded at Pretoria on 18 September 1947. (11)

There are a number of treaties within the second grouping, ie treaties concluded by the Republic of South Africa after 1961. In the case of these treaties, the State President's power to bind the Republic internationally is, as was pointed out earlier, (12) derived from his prerogative to conduct the state's foreign relations as embodied in the Republic of South Africa Constitution Acts 32 of 1961 and 61 of 1983 read together with section 2 of the Extradition Act 67 of 1962.

The following extradition treaties concluded between the Republic of South Africa and the states listed below fall within this category (13) :

Federation of Rhodesia and Nyasaland; (14) Southern Rhodesia; (15) Swaziland; (16) Botswana; (17) Malawi; (18) Israel; (19) Transkei; (20) Bophuthatswana; (21) Venda; (22) Ciskei; (23) Multilateral Extradition Convention - Ciskei, Bophuthatswana and Venda; (24) Republic of China. (25)

3 ACQUISITION BY DERIVATIVE MEANS : SUCCESSION

3.1 General

In this section we consider what is, from the South African perspective on extradition, the most important means for the acquisition of treaty rights and obligations. The extradition rights and duties which the present-day Republic of South Africa enjoys are derived, by and large, not directly from a treaty concluded between the Republic and a foreign state, but were acquired by the Republic from Britain, the original party to the treaty and the erstwhile South African "mother state". The question is consequently one of succession.

In modern international law, state succession is an extremely wide and nebulous concept dependent on many and varied factors. (26)

Dealing with the general theories of succession Poullose (27) states that:

"Succession is said to take place in international law, when a change of territorial sovereignty leads to the devolution of any rights and obligations of one state or government on another".

This definition is useful in that it highlights one of the essential considerations in dealing with succession, viz that the question will arise only when there has been some or other change in the sovereignty of an international law entity. However, Poullose's contention that this change of territorial sovereignty - which may occur in various ways - of itself "leads to" a devolution of rights and obligations, may be misleading to the extent that it implies that succession is an automatic adjunct of a change of sovereignty. In fact, change in sovereignty does no more than create the circumstances under which the question of succession arises; it does not in itself automatically result in succession. Succession remains, as shall be seen, a conscious act by the states involved.

Within the parameters of extradition in general, and the South African perspective in particular, a consideration of the question of succession may be considerably narrowed. In the first place, it was determined in the preceding Chapter that there is no general international law duty to extradite. (28) Particularly in the case of South Africa, the duty to extradite rests firmly on the basis of a treaty commitment to which the state regards itself as bound. For extradition purposes, consequently, the question of succession is

limited to succession to treaties. Furthermore, even this delimitation is too wide for present purposes since it was shown above (29) that during the relevant period Britain, which constitutes the principal predecessor state for South African questions of succession, was not party to multilateral extradition conventions and there is therefore no question of the Republic succeeding to multilateral agreements in this regard. Consequently, from the extradition point of view, succession may be approached solely from the perspective of succession to bilateral treaties.

3.2 Theories of succession

Although it has become customary for any examination of state succession to be prefaced by the statement that there is little or no consensus among either international law writers or state practice with regard to the topic, (30) this no longer necessarily reflects the true position. The year 1978 saw a codification of contemporary thinking on state succession to treaties through the adoption of the Vienna Succession Convention. (31) In this convention succession is defined as :

"the replacement of one state by another in the responsibility for the international relations of territory." (32)

The Succession Convention may indeed be regarded as a handy source of reference when considering problems of succession. However, a number of factors militate against its provisions being accorded

undue weight. First, the Convention is not, as in the case of the Vienna Treaty Convention, a codification of customary public international law, being rather a codification of new trends, particularly among the younger nations of the world. Second, the Succession Convention does not enjoy the general recognition accorded the Treaty Convention even before it came into operation, and is in any event, itself not yet in operation.(33)

Specifically from the South African perspective, two factors negative undue reliance on the Succession Convention and its provisions when considering state succession. First, South Africa is not a party to the Convention; and second - specifically as regards extradition - most of the Republic's succession problems arose before the adoption of the Convention. In this regard special note should be taken of article 7 which expressly provides that :

"...the Convention applies only in respect of a succession of States which has occurred after the entry into force of the Convention...".(34)

Consequently, in assessing the succession of South Africa to British extradition treaties, the Succession Convention must be read together with the general theories of succession developed through the years.

Traditionally, three theories on state succession to treaties are postulated.(35) These theories vary from what Menon (36) terms the "traditional view" in terms of which a state starts its existence

with a clean slate bound by none of the treaties concluded by its predecessor; through what O'Connell, (37) somewhat picturesquely, terms the "pick and choose" approach in terms of which a state may unilaterally elect which of its predecessor's treaties it chooses to regard as binding and which not; to the theory of universal succession where all the rights and duties of the predecessor state devolve upon the successor. (38) However, any attempt to find a universal working definition of these theories is doomed from the outset. Each emphasises an aspect of particular relevance to the states concerned within a particular political time-frame - with emphasis generally falling on the interests of the "new" state - and each holds its own disadvantages.

The clean slate or *tabula rasa* theory, for example, holds considerable attraction for the newly independent colonial countries particularly on the African continent, as it stresses the principles of self-determination and the importance of their newly-won sovereign independence. It however has the inherent drawback that a legal hiatus ensues which, given the traumatic adjustments to independence, can result in a highly unsatisfactory period of uncertainty which can last a number of years. This is particularly true in the case of extradition, which is generally not regarded as a matter of pressing urgency to a new state intent upon balancing its books! (39) In modern practice, few states have indeed opted for this approach, Israel being a notable exception. (40) However, that the idea of a clean beginning in fact holds considerable sway in contemporary international relations is clear from article 16 of the

Succession Convention (41) which embodies the traditional *tabula rasa* principle.

The "pick and choose" approach holds the obvious drawback that the will of third states which originally contracted with the predecessor state is almost wholly negated in that by its unilateral decision, the successor seeks to involve the third states in a treaty relationship which was not necessarily envisaged when the original treaty was concluded. So high a premium is placed on the sovereign independence of the "new" state, that sight is often lost first, of the equally valid sovereign independence of the third state, and second, of the essentially consensual nature of a treaty commitment.

The universal succession theory too, holds obvious drawbacks in that it negates the sovereign independence of the new state. Very few of the emergent African states would have been prepared to accept all treaties concluded by the predecessor state which was generally perceived as an alien oppressor.

What is consequently needed is a theory which will ameliorate the excessively one-sided effect of the "pick and choose" approach, while at the same time modifying the effects of universal succession. This was found in the theory generally referred to as provisional succession. This approach eliminates the legal vacuum arising from the *tabula rasa*, the arbitrary consequences of the unilateral declaration, and the threat to new-found sovereignty of

universal succession. A state electing to follow this option will generally agree to be bound by the predecessor's treaty commitments for a period during which it retains the right to review all treaty commitments and either accept or reject them after negotiation with the other party concerned. The successor state is consequently not faced with a legal vacuum and has time in which to consider its interests. The rest of the international community too, is better able to gauge where they stand. A notable example of such an approach is Malawi's "Declaration Relating to Treaty Obligations" issued by that country on its attainment of independence.⁽⁴²⁾ This declaration provides in material part :

"As regards bilateral treaties validly concluded by the Government of the United Kingdom or by the Government of the former Federation of Rhodesia and Nyasaland, on behalf of the former Nyasaland Protectorate, or validly applied or extended by either of the said Governments to [such] territory...the Government of Malawi is willing to continue to apply within its territory, on a basis of reciprocity, the terms of all such treaties for a period of eighteen months from the date of independence...unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of Malawi will regard such of these treaties which could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated."

The question of the status of treaties during this "limbo" period arose in the case of *Molefi v Principal Legal Advisor*.⁽⁴³⁾ In this case the question on appeal before the Privy Council was whether Molefi, a member of the banned Pan African Congress who was as a

consequence subject to persecution in his mother country South Africa and fled to Lesotho, was a refugee deserving of protection under the 1951 Convention Relating to the Status of Refugees. The Convention had been extended to Basutoland (as Lesotho then was) on 9 February 1961.⁽⁴⁴⁾ On Lesotho's independence a declaration in terms identical to that of Malawi, was submitted by Lesotho to the United Nations setting out the new government's attitude towards treaties, both bilateral and multilateral, concluded by Britain its predecessor.⁽⁴⁵⁾ In it Lesotho declared that in the case of multilateral treaties, each would be reviewed individually. However, during the interim period :

"...any party to a multilateral treaty which has, prior to independence been applied or extended to the country formerly known as Basutoland, may, on a basis of reciprocity, rely as against Lesotho on the terms of such treaty".

Whether this was to be regarded as an accession to the treaty, was, the court held, to be determined from an interpretation of the letter itself.⁽⁴⁶⁾ The declarations made, were made on the understanding that Lesotho was a fully independent state and wished to maintain legal continuity with regard to treaty relations between itself and the states with which the former Basutoland had relations.⁽⁴⁷⁾ The court consequently had little difficulty in deciding that the Refugee Convention was of full force during this interim period.

Identifying the applicable theories is one thing; actually applying these theories to a concrete case is another altogether.

Consideration of the practical application of succession demands a two-pronged enquiry. First, the nature of the treaty involved in the succession must be considered to determine whether or not it is susceptible to succession. Second, the nature of the act giving rise to the succession must be considered to determine whether or not the successor state is capable of succeeding to the treaty commitments.

3.3 Characterising extradition treaties

As regards the first question, ie the type of treaty involved, reference is often encountered to "personal treaties", "real treaties", "economic treaties", "judicial treaties", "political treaties", "dispositive treaties", etc. The issue to be determined is consequently under which of these heads the extradition treaty can be classed. This demands an examination of the nature of an extradition treaty.

That there is certainly no unanimity on the nature of an extradition treaty, or on its suitability for purposes of succession, is clear from the writers. So, for example, O'Connell (48) classes an extradition treaty as judicial, equating it with the enforcement of foreign judgments. Discussing the possibility of articles of accession being deposited so ensuring a successor's membership of a treaty, he further states that :

"This expedient is unavailable in the case of, say, extradition treaties, and the practice of maintaining these has recently become so widespread as to be almost universal."(49)

A different view is taken by Starke (50) who states that extradition treaties do not pass to a successor state "unless some strong consideration requires this" as it would be unreasonable to bind a successor to apply the predecessor's conception of criminal behaviour and its specific municipal law procedure which may differ from that of the successor. Hoijer, (51) classifies extradition as falling within the class of "political" treaties and consequently lapsing with a change of sovereignty.

Bassiouni (52) on the other hand, claims that doubts surround the effect of state succession on extradition treaties; a view shared by Shearer. (53) Neither of these writers, however, would appear to consider the nature of the extradition treaty as of particular importance.

The question of whether, in principle, an extradition treaty is suitable for succession must consequently depend on the perception one has of the nature of the treaty. The extradition treaty, like any treaty, is essentially a consensual, contractual agreement. The treaty can only be characterised on the basis of what the parties consented to when they concluded the treaty. The cardinal issue is consequently the aim or intention of the parties in concluding the

treaty - and in this regard the intention of both the original contracting parties and that of the successor must be borne in mind.

As was seen above, various classifications of treaties are made when questions of succession arise. On analysis, however, two broad categories may be identified. These are treaties which may be classed as "personal" and treaties which may be classed as "real or dispositive".

A dispositive treaty is a treaty which impresses upon a territory a status which is intended to be permanent and exists independently of the personality of the state which is at that time sovereign over the territory.⁽⁵⁴⁾ As was claimed in the *Free Zones of Upper Savoy* case⁽⁵⁵⁾ such a treaty creates or transfers a real right - a right relating to territory which will apply against all states. So too in the *Right of Passage over Indian Territory* case,⁽⁵⁶⁾ the International Court confirmed that successor states are bound by territorial provisions arising from dispositive treaties. O'Connell⁽⁵⁷⁾ asserts that a dispositive treaty is a conveyance rather than an agreement. The maxims *nemo plus iuris ad alium transferre potest quam ipse haberet* and *res transit suo onere* will apply to this type of treaty with the result that it will "run with the land". Consequently, a change in sovereignty over territory subject to a dispositive treaty will result in the automatic succession of the new state to the dispositive treaty obligations. Included within this classification are, for example, border treaties,⁽⁵⁸⁾ or treaties instituting servitudes.⁽⁵⁹⁾

A personal treaty, on the other hand, is a treaty which can be said to attach to the person of the state. These treaties do not limit the sovereignty of the state, as dispositive treaties can be seen to do, and depend for their viability on the continued existence of the state as a contracting party to the original treaty.⁽⁶⁰⁾ Notable among such treaties would be a treaty of friendship and cooperation which would depend for its existence on the relationship between the states concerned. Such treaties, it is generally agreed, do not necessarily survive changes in the sovereignty of the state parties, and indeed cannot survive the disappearance of one of the parties.⁽⁶¹⁾

What therefore, is the essential difference between what is classed as a personal treaty and what is classed as a dispositive treaty and on what basis are they accorded different classification? The determining factor can be either the intention of the parties or the nature of the treaty. Hurst,⁽⁶²⁾ writing on the effect of war on treaties, notes that whether or not a treaty will be abrogated by war,

"is to be found in the intention of the parties at the time when they concluded the treaty, rather than in the nature of the treaty which they concluded."

Replying to this, McNair⁽⁶³⁾ comments correctly that it is all much of a muchness in that whether one uses either intention or nature as the criterion, the same result will be achieved in most instances :

"for the nature of the treaty is clearly the best evidence of the intention of the parties".

In dealing with both the history and the basis of extradition some attention was paid to the intention with which the parties concluded extradition treaties. It was seen that the motive of personal vengeance or the maintenance of a specific state system, which initially served as the basis for extradition - and which could truly be classed as a personal transaction in the interests of and attaching to the specific "prince" concerned - has long since disappeared. On the other hand, the ideal situation in which an extradition agreement is concluded with the intention of waging a universal war on a commonly perceived conception of crime in the interests of an harmonious and universally accepted world public order, has not yet dawned. A present-day extradition treaty can consequently be seen as no longer entirely personal, nor yet dispositive. It is rather a hybrid slotting in somewhere between the two.

O'Connell's classification of an extradition treaty as "judicial" (64) would appear sound. The aim of the parties in concluding the treaty is to ensure that the perpetrator of a crime committed within their respective territories will be brought to justice before their courts. The states are agreeing that they will help one another to bring their judicial processes to fruition. Consequently, slotting into the states' judicial system, an extradition treaty is to an extent distanced from the day to day political existence of the state. In this sense the extradition treaty may be regarded as the

international law of a state's judicial process. To class an extradition treaty as "political", and consequently not suited to succession is, it is submitted, neither an accurate evaluation of the intention or aims of the parties, nor a true reflection of the nature of the treaty. Although political factors may on occasion come into play, they will of necessity be subordinate to the aims of the parties when the conclusion of an extradition treaty is considered. Political factors may prevent a party from concluding an extradition treaty with a particular state but will seldom, if ever, be the direct aim or intention of the parties in concluding the treaty although they may affect the willingness of a particular state - because of its perception of the political milieu in the other state - either to conclude the treaty in the first place, to act in terms of it, or to agree to succession in respect of such a treaty.

In answer to the question "Can extradition treaties be succeeded to?" there would appear to be no inherent characteristic in an extradition treaty which would bar succession by one state to an extradition treaty concluded by another. Similarly, however, there would also appear to be no inherent characteristic which would render succession to extradition arrangements an automatic adjunct of change in sovereignty. Succession may consequently be a theoretical possibility, but may in practice be frustrated by the will of the third party involved. Unfortunately, when and how the theory and the practice of succession will coincide and result in a successful succession cannot be determined on the basis of a handy

formula. The succession must be judged in each case by a reasoned and realistic interpretation of the treaty concerned, together with an examination of the process by which the need for succession arose.

3.4 Characterisation of the act giving rise to succession

Mervyn Jones (65) distinguishes between what he terms "succession in fact" and "succession in law". Succession in fact occurs when "one state follows another in possession of territory".(66) This consequently requires an evaluation of the factual process by which one sovereign replaces another as the controlling authority over certain territory. This factual situation may be followed by succession in law which is "the juridical substitution in such circumstances of the successor state for its predecessor".(67) The problem, for Jones, is succinctly, and correctly, defined in the statement that :

The practical issue is how far is a successor in fact bound...in law under...treaties of his predecessor?" (68)

This can be established by the consideration of certain questions involving the nature of the treaty in issue, the predecessor state, the successor state, and other parties to the original treaty. One may consequently ask whether the nature of the treaty allows of succession (as was done in the previous section); whether the predecessor state - or the successor - will still be in a position,

factually, to act under the treaty; whether action under the treaty will fit in with the new state's conception of itself and its role in the international community; and - important in the case of South Africa - whether the other party to the original treaty will be prepared to maintain the treaty commitments it undertook with the predecessor state?

Although there are a number of stereotyped situations which are traditionally considered in assessing succession in fact, (69) within the South African context it would be counterproductive and confusing to consider each of these in detail. O'Connell (70) points out that like so many branches of public international law, "trends" in the law of succession are in fact reflections of the political ideology prevalent in the milieu in which they occurred. Consequently, from the South African perspective, three "successions in fact" will be considered - each reflecting the political realities of the period during which they occurred and during which the question of succession arose and must be judged.

These factual situations are, first, annexation and cession which should be seen as covering the early - and varied - acts transferring sovereignty over South African territory. Second, and most important from the extradition point of view, is the unique system which developed around succession within the British Commonwealth which will encompass the formation of the Union of South Africa in 1910 and the emergence of the Republic of South Africa in 1961. Lastly, attention will have to be paid to

dismemberment or partition which should be seen as covering the partial realisation of the South African government's "Bantustan" or "Homelands" policy which led to the establishment of the independent states of Transkei, Ciskei, Bophuthatswana and Venda in the 1970s.

At this stage no more will be attempted than the identification of a possible overall or general approach with regard to succession to treaties in each of these situations. This will be further refined by an examination of state practice with regard to extradition treaties. In the final section, the principles established will be applied to the specific question of South African succession to extradition treaties.

3.4.1 Annexation and cession

Annexation may be defined as the acquisition of sovereignty over the territory of some other state as a result of military conquest.⁽⁷¹⁾ Cession, on the other hand, is defined as "the transfer of sovereignty over State territory by the owner State to another State".⁽⁷²⁾ Although we are dealing with two distinct concepts, each with its own requirements, the two may coincide in that a cession of territory often follows on the subjugation of a certain territory after the cessation of hostilities in a conflict situation. In such an instance, one is dealing with what may be classified as forced cession or disguised annexation.

In contemporary thinking, annexation - in all its forms - is no longer regarded as a valid form of succession in fact.⁽⁷³⁾ In so far as the Succession Convention 1978 embodies modern thinking on succession, it is interesting to note that the Convention contains no provision with regard to the succession of states in the case of annexation. In fact, annexation and those instances of cession which may be regarded as disguised annexation, are expressly excluded by the provisions of the Convention where it is stated that:

"The present Convention applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations".⁽⁷⁴⁾

However, in view of what Akehurst⁽⁷⁵⁾ terms "inter-temporal law", the question of succession to treaties must be considered in the light of the law prevailing at the time when the question arose. When the South African issues involving succession in fact resulting from annexation and cession arose, these were still considered valid means by which the balance of sovereignty over territory could be shifted. It is consequently necessary to determine whether any general rules governing succession in law following upon such successions in fact can be abstracted from the practice of states at that time.

When the effect of cession and annexation on sovereignty over territory is examined, it will be seen that there is in fact little to choose between the two as in both instances the territory in

question ceases to exist as an identifiable international law subject which can exercise international functions, including performance in terms of an existing treaty. (76)

It is generally agreed that on annexation, treaties existing between the annexed state and third states cease to exist. (77) Two possible exceptions exist in the form of what were termed "dispositive treaties" above; and an independent treaty obligation resting on the annexing state to maintain the treaty. The reason for the termination of these treaties is self-evident. A treaty depends for its performance on the existence of the parties. If one of the parties ceases to exist - is annexed by or ceded to another state and so loses its independent international identity - it is no longer in a position to perform in terms of the treaty which then fails.

Examples supporting this point of view abound. When France conquered and annexed Algiers in 1830, the British had to consider the status of treaties existing between themselves and Algiers. Responding to a query, the King's Advocate advised that the conquest of Algiers by France had the effect that British treaties "ceased to be operative". (78) In 1885 Burma was conquered by Britain and in response to a request on the status of treaties between Burma and other states the Law Officers replied that if the Crown were to extinguish the independent existence of Burma - as it was entitled to do - "all treaties which the King [of Burma] or his predecessors may have made with foreign Powers will thereupon cease to

exist".(79) Similarly, French annexation of Madagascar in 1896 resulted in the termination of the region's treaties with Britain.(80)

The American view in this regard was expressed on the occasion of its annexation of Hawaii in 1898. After citing various examples, it was stated that the treaties ceased to exist. However, "The treaty of annexation does not abrogate these [treaties] it is the fact of Hawaii...ceasing to exist as an independent contractant that extinguishes these contracts".(81)

On the annexation of Korea in 1910, Japan adopted a similar approach stating that "Treaties hitherto concluded by Korea (sic) with foreign Powers ceasing to be operative, Japan's existing treaties will, so far as practicable, be applied to Korea (sic)". (82) The annexation of Austria by Germany in 1938 resulted, from both the British and United States' perceptions, in the termination of treaties with Austria and the automatic application of German treaties to the territory.(83)

It would consequently appear that with the possible exception of dispositive treaties, if the question of succession arises as a result of the annexation or cession of a territory performed while such actions had not yet been outlawed by public international law, the treaties of the territory which is annexed or ceded will terminate automatically and the treaties of the annexing power or of the cessionary, as the case may be, will find automatic application

in the annexed or ceded territory. In effect this means that extradition treaties which, as was established above are not dispositive, will cease to exist and be replaced by the treaties of the "new" sovereign.

3.4.2 Independence within the Commonwealth : succession through devolution agreements

Independence and succession to treaties during the mid-twentieth century has shown that the questions surrounding succession in fact in the case of annexation, cession, union, or whatever other means was used to achieve a shift in sovereignty, which had seemed so important during the period of imperial expansionism, became largely academic as the emphasis in questions relating to such succession swung towards the drive for independence among the former Colonial territories. (84) The days of a single, readily identifiable act which could be classed as giving rise to succession in fact, gave way to a gradual process of evolution through which the colonies insidiously arrogated to themselves the status of successor states. Foremost in this process were what are termed the "old Dominions" of the British Empire among whose number was the Union of South Africa. O'Connell (85) has termed this process "succession by evolution".

Certain writers have claimed that, at least in the case of the old Dominions, the question of succession to the treaties of the mother state does not arise as there has been no change in the

international identity of the new state. The gradual evolution of the former colony and its acquisition of treaty-making capacity and an independent international personality has resulted in no disturbance of the international status quo on the actual act of independence being performed. The question of succession does not arise - or more accurately does not arise at that point. (86)

While such an approach indeed may explain the acquisition of treaty-making capacity by the dependency, and consequently the dependency's capacity to enter into a devolution agreement with the mother state, it does not provide an adequate answer to how the mother state and the dependency - through their devolution or inheritance agreement - bind third states which were the original parties to the treaty with the mother state which is purportedly succeeded to. In virtually every instance of independence of the former British Dominions and Colonies within the Commonwealth some specific provision has been made for the devolution of treaty rights and obligations either by means of British legislation or an agreement between the government of Britain and the government of the newly independent state. (87) This devolution agreement may be defined as an agreement entered into between a mother state and its former dependency on the latter's formal break with the mother state, in terms of which the rights and duties arising from treaties concluded by the mother state on behalf of the dependency, either directly or with the mother state acting in a supervisory capacity, are transferred to and assumed by the dependency. The question to be answered is consequently how two states (the mother state and the

former dependency) may through their agreement bind third states who are not party to the devolution agreement.

O'Connell (88) states that:

"Until very recently it was taken for granted that at least the the primary effect of these [devolution agreements] was to secure between the signatories a complete assignment of all treaties which, upon construction, were susceptible of devolution".

However, the problem immediately arising is the perennial one of the nature of a treaty and the fact that it is essentially *res inter alios acta* as regards third parties and cannot without more ado bind third parties. Can two states by mutual agreement, bind a third which may be unwilling to contract with the "new" state? Clearly, this traditional approach is in need of re-evaluation.

The question now arising is how these devolution agreements should be classified. An initial distinction must be drawn between three possible legal constructions to explain the process by which one state may replace another in a treaty relationship. These are novation, assignment and vicarious performance. An hypothetical extradition treaty concluded between France and Britain - as the original parties - and South Africa - as the successor state - will be used by way of illustration.

Novation (89) is a process whereby France and Britain having concluded a treaty, then agree that South Africa should replace

Britain in the agreement. South Africa also agrees to this arrangement. If this is transposed to the typical devolution agreement, the difference will immediately be seen. In the typical scenario for a novation of treaty rights and obligations the agreement is between the original parties to the treaty (France and Britain). In the devolution agreement the agreement is between one of the original parties (Britain) and the successor state (South Africa). The active cooperation of France - the other original party - which then becomes the "third state/party" to the agreement, does not feature at all within the terms of the agreement. Its role is at best indirect or assumed.

Assignment,⁽⁹⁰⁾ on the other hand, occurs where France and Britain are parties to a treaty. Without France's consent, Britain transfers or attempts to transfer her rights in terms of the treaty to South Africa. This is certainly more closely related to what in fact occurs in the typical devolution agreement. However, as Mann⁽⁹¹⁾ points out, assignment is not feasible in the case of extradition treaties. McNair further points out that there is no authority for the proposition that a state may unilaterally assign rights under a treaty without the consent of the other party to the treaty.⁽⁹²⁾

In the case of vicarious performance,⁽⁹³⁾ we again have the position where a treaty exists between France and Britain. Britain, again without French consent, arranges with South Africa that she will perform Britain's obligations under the treaty. This would also not appear feasible in the case of extradition treaties where the treaty

is intended to create an on-going relationship of cooperation between the states concerned and not a one-off act which can in essence be performed by any state. (94)

It would consequently appear that none of the traditional processes used for the transfer of existing treaty rights really fits the devolution agreement mould of the British Commonwealth. The crucial element emerging would appear to be that a state cannot be bound without its consent. The question now arising is how this consent may be achieved within the context of the typical devolution agreement.

Given the principles identified above, the effect of a devolution agreement cannot be simply to bind third states to treaty commitments to which they did not originally agree.

The document must consequently serve some other function.

At first glance the devolution agreement appears to be solely a statement by Britain on the one hand, and the successor state, South Africa in our example, on the other, to the effect that the successor state will assume responsibility for treaties which applied to it at the date of independence. Consequently, it is an agreement involving only these two parties. Closer examination, however, shows that it in fact has a dual character. Because Britain is also a party to the agreement, it is in fact sending a message of its own to third states with whom it originally contracted. The tenor of this notification is that as far as Britain is concerned, the treaty operative between itself and the third states will in

future no longer apply to Britain insofar as the territory of the newly independent state is concerned. The example set out above may better illustrate the point.

Britain and France conclude an extradition treaty in terms of which they undertake to deliver up to one another persons found in their respective territories who have committed offence X in the territory of the requesting state. At the time of conclusion of the treaty the Union of South Africa formed part of British territory and the application of the treaty was specifically extended to the Union. Consequently, were a criminal to commit offence X in Paris and flee to Cape Town, the French government could secure his extradition by approaching the British authorities. However, on South Africa attaining Republican status in 1961, Britain and the newly formed Republic agreed that performance in terms of the extradition treaty falls to the South African government. Were France now to request the British government to extradite the same criminal hiding in Cape Town, the British government would be unable to comply as a result of its inability to act within the territory of another sovereign state.⁽⁹⁵⁾ The devolution agreement is consequently not only a notification by the successor state (South Africa) that it is willing and able to comply with the extradition treaty, but also a notification by the predecessor state (Britain) to the other party to the original treaty (France) of the predecessor's withdrawal from the treaty to the extent that it applied within the territory of the newly independent state.

The crucial issue in the case of a devolution agreement is consequently not so much the path followed to achieve the succession in fact, as the other state's reaction to the emergence of the new state. It is this reaction which will determine whether succession in law can and will follow upon the succession in fact which has taken place. In assessing the third state's reactions to the devolution agreement and the purported succession, three possibilities should be considered.

First, the third state may expressly accept the devolution agreement and agree to be bound by it. Second, the third state may through its actions, indicate that it accepts the devolution agreement. Third, and most problematic, the third state may do nothing at all. The question then arising is whether its lack of objection may be construed as tacit consent. In the international fora, the standard reference to tacit consent is the majority judgment in the *Reservations to the Genocide Convention* case (96) in which it was decided that failure to object to an incompatible reservation, could be construed as tacit consent. Applied to devolution agreements, this would mean that provided that the third state was aware of the devolution agreement, its failure to object would be construed as tacit consent. In the result, the devolution agreement would first, absolve the predecessor state from any obligations with regard to the successor's territory owed by it to the third state in terms of the original treaty, and second, bind the third and successor states to perform in terms of the treaty. The third state could then well, after a number of years, be

estopped from claiming that it did not wish to be bound by the devolution agreement.

Although this is termed a novation by O'Connell, (97) such a classification is possible only through a creative process of interpretation which tends to stretch the facts of the devolution agreement somewhat. To use the example above, one would have to construe the agreement between Britain and South Africa as also constituting an agreement between Britain and France to which South Africa acquiesced - a situation clearly not borne out by the facts. The question now arising is whether this process can be explained in any other way. The first requirement for all three of the possibilities considered below, is that the third state must agree to the devolution in one of the three ways identified above.

First it may be considered whether the arrangements governing accession to a treaty provided in the Vienna Treaty Convention could apply to this situation. In this regard article 15 (c) may find application through a somewhat tortuous construction. This article provides that a state may be bound to a treaty by accession if "all the parties have subsequently agreed that such consent may be expressed by that state by means of accession". The use of the term subsequently is significant in this regard. By agreeing to the devolution agreement France, in the example above, has met this requirement. South Africa then accedes to the original treaty between Britain and France. The treaty consequently becomes a tri-

or multi-lateral agreement. This situation is however of very brief duration as in concluding the devolution agreement, Britain is also putting third states on notice that it will no longer be in a position to perform in terms of the treaty as regards South African territory. By accepting this, France is in fact agreeing to the termination of the treaty provisions between itself and Britain as regards the territory of the successor state. Britain then withdraws from the treaty again rendering it a bilateral treaty between France and South Africa.

Accession as a possible explanation of the devolution process was touched upon, although it was neither analysed nor discussed in any detail, in the case of *Lansana v Reginem*.⁽⁹⁸⁾ There, commenting on whether Sierra Leone had succeeded to an extradition treaty concluded between Britain and Liberia, the judge stated that

"This treaty was binding between Liberia and Sierra Leone in 1961 and the continuity was kept up by a well-known form of accession recognised by international law, the mutual exchange of letters published in PN 191 of 1961".⁽⁹⁹⁾

This exchange of letters contained an undertaking by Sierra Leone "to be bound by the obligations created by all treaties entered into between Great Britain and a foreign country, so far as they applied to Sierra Leone when it was under the sovereignty of Great Britain...".⁽¹⁰⁰⁾

A second possibility which may be considered is a construction relying on the provisions of article 31 of the Treaty Convention which governs the interpretation of treaties. Treaties are to be interpreted in good faith, in accordance with the ordinary meaning of the terms used in their context and in the light of the object and purpose of the treaty.⁽¹⁰¹⁾ In terms of article 31(3), together with the context, the interpreter may consider

- "(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

Once the third state has agreed to respect the devolution agreement - in other words, has agreed that succession will take place - the devolution agreement will fall within the provisions of (a) above, while where its consent is tacit or assumed it could fall within the "subsequent practice" of (b) above. The original treaty between the predecessor state and the third party would then be interpreted in the light of the devolution agreement as a subsequent agreement and Britain could no longer be held responsible for performance within South African territory.

However, by far the simplest construction to explain the operation of the devolution agreement is that the agreement should be regarded as an invitation by the successor (new) state, to third party states to conclude a treaty with it, the terms of which are identical to

those of the treaty concluded with the predecessor. Through acceptance, either expressly, through conduct, or tacitly through lack of objection, a new treaty comes into being between the two states. In the example above, the agreement between Britain and South Africa is, first, an invitation by South Africa to France to conclude an extradition treaty having the same tenor as the treaty existing between Britain and France. At the same time, the agreement is a notification by Britain to France that as regards the territory of South Africa, it will no longer act in terms of the original treaty. By accepting both the invitation to contract and the notification to terminate, France, to all intents and purposes, is bound to performance as against South Africa, and Britain is released from the obligation to perform as regards the territory now constituting the new state.

This approach was discussed in the Jamaican case *R v Director of Public Prosecutions : Ex parte Schwartz* (102) where the court in considering a devolution between Britain and Jamaica concluded after the latter's independence in 1965 and the effect of that agreement on the United States / United Kingdom extradition treaty of 1931, held as follows :

"Even if the devolution agreement amounts to no more than an offer to treat then the requisition by the United States must certainly be an offer which was accepted and acted upon by the appropriate Minister of our [the Jamaican] government when, acting under the provisions of the Extradition Acts, he forwarded his warrant to the resident magistrate to proceed with the extradition proceedings".

This issue is also addressed in the Succession Convention where the conclusions reached above are in fact confirmed. Article 8 provides :

"The obligations or rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State towards other States parties to those treaties by *reason only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations or rights shall devolve upon the successor State*" (emphasis added).

Similarly in Part III, dealing with newly independent states, article 16 provides that a newly independent state is not bound to maintain the predecessor's treaties or to become party to a treaty merely because the treaty was in force in respect of the territory at the date of independence. In the case of bi-lateral treaties, article 24 provides that their continued application between the successor and third states rests either on express consent, or on conduct which can be seen as constituting tacit consent. The mere fact of agreement between the predecessor and third states will not bring the treaty into operation between the successor and the third state. (103)

The conclusion to be reached is consequently that a devolution agreement does not automatically result in the passing of rights and obligations in terms of a treaty between the predecessor and third

states. The acid test is the consent of the third party concerned, and each case must be judged on its own facts.

However, consent within this context requires closer examination. In dealing with treaties generally, the term consent is normally taken to mean consent to enter into a treaty commitment; in other words, consent to conclude a treaty. This fits in with the theory that a devolution agreement is an "offer" to third parties identified above. It also fits with the views, raised right at the start of this section (104) that the formerly dependent state has through a process of evolution, acquired international legal personality and that the question of succession does not really arise as the "new" state is in fact not new at all but is bound by the mother state's treaties with third states through the evolutionary development of its international status. The devolution agreement is then merely a rubber stamp confirming the completion of the evolutionary process.

Although both these approaches are initially attractive, the question arises whether they satisfactorily explain the process involved in the devolution structure. In a country such as South Africa, where treaties require incorporation to find municipal application, such an approach indeed gives rise to considerable problems. For example, if the devolution agreement is seen as an offer to conclude a new treaty, albeit in identical terms, that treaty would have no municipal application within the Republic until such time as it had been re-promulgated by the State President in the *Government Gazette*. Indeed, as will be shown presently, this

approach was adopted - incorrectly it will be submitted - by certain South African courts.⁽¹⁰⁵⁾ The result of this is that succession is not actually in issue, but rather the capacity to conclude a new treaty. What then is the role of consent when dealing with succession based on a devolution agreement?

Sight should not be lost of the fact that what we term consent of the parties, is no more than the outward manifestation of their intention at that time. When a party "consents" to be bound by a devolution agreement within the confines of succession to treaty commitments, his intention is not to conclude a treaty, but rather to succeed to an existing treaty. The intention of the parties, as outwardly manifested in their consent is to effect a succession to existing treaty rights and obligations. The consent is consequently no more than a mechanism through which the principles governing succession are set in motion. To use Jones's ⁽¹⁰⁶⁾ terminology : succession in fact having taken place, the consent of the parties opens the way for succession in law to be considered. The consent is no more than evidence which may be used to explain whether or not the parties intended this succession in law to take place.

The question whether succession in fact will be followed by succession in law in the case of devolution or inheritance agreements is succinctly summarised by Lester ⁽¹⁰⁷⁾ where he states that :

"There have indeed been cases where a treaty was regarded as

remaining in force by tacit consent of one contracting party and a state successor to the other party...and such an explanation of the United Kingdom inheritance agreements seems plausible provided that they constitute an offer...capable of acceptance...Certainly, it is difficult to accept the view that they 'remove the question [of succession to treaties] beyond all doubt'".

3.4.3 Dismemberment and secession

The third act achieving succession in fact and raising the question of succession in law which needs to be considered relates to those cases which Jones (108) describes as "A new state or a number of new states spring[ing] out of an 'old' one". He distinguishes between a new state or number of states formed by secession from the mother country, and states formed by the dismemberment of an existing state or union of states.

As regards secession, the general tendency would appear to be away from the automatic application of the treaties of the mother state to the new territory. Examples most often cited are the United States of America and Great Britain; (109) Colombia and Panama; (110) Russia and Finland. (111) Jones concludes that where there has been a violent secession, the resulting new state "starts with a clean slate, and the treaties of the mother country cease to apply to the seceding territory". (112) The position is akin to that in the cases of annexation and cession above. Jones's statement is however, too wide in that treaties "running with the land" would survive the separation and continue to bind the new state. (113)

Dismemberment of an existing state or union of states raises somewhat different questions. The distinguishing feature in these cases would appear to be the agreement between the former mother state or the union as a whole and the new state. In fact, whether such actions should indeed be regarded as a separate category is debatable. If the new state "springs" into being through dismemberment, is one not in essence dealing with a cession of rights from the mother state to the new entity; and will this not generally be accompanied by agreements governing existing treaties? Indeed, Jones concedes that the devolution agreements of the Commonwealth discussed above are in fact a form of what he terms dismemberment. (114)

In the case of dismemberment where, for example, a state grants a certain part of parts of its territory independence, the original state will generally, although not necessarily, continue to exist. The problems raised above in the case of the Commonwealth apply here with equal force, and the crucial determinant of succession in law will be the consent of the third party involved in the original treaty. This question will be considered more fully when South African succession is considered below.

However, this is not the position adopted within the Vienna Succession Convention. Part IV of the Convention deals with the unification and separation of states. Article 34 provides that :

"When a part or parts of the territory of a State separate

to form one or more States, whether or not the predecessor State continues to exist:

- (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;
- (b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor state which has become a successor State continues in force in respect of that successor State alone."

The provisions above do not apply if the states agree otherwise, or application to the successor state would be incompatible with the object and purpose of the treaty or would radically alter the conditions for the operation of the treaty. (115)

However, as shown above, (116) the application of the Convention is at this stage uncertain and its application to the South African situation even more questionable. As will emerge presently, the position under general public international law will have to be taken into account.

To date the discussion has attempted to sketch in broad principle - insofar as such theory exists - how a new or successor state may come to be bound by treaties in general concluded by its predecessor. What is required at this point is an examination of

state practice with regard to extradition treaties in particular and it is to this practice that we shall now turn.

3.5 Practice with regard to succession to extradition treaties

From the literature and case law surrounding state succession to treaties in general, and to bilateral treaties in particular, it is interesting to note that the question of succession to extradition treaties plays a prominent role. It is interesting too, that a far from consistent picture is presented by state practice in this regard.

Panama which had seceded from Colombia in 1903, refused to be bound by an extradition treaty concluded between Colombia and the United States. Although it was prepared to hand over the individual sought, this was done as an act of comity as in the Panamanian view "there exists no extradition treaty between the United States and Panama".⁽¹¹⁷⁾ This was also the view adopted by Britain with regard to the extradition treaty existing between itself and Panama.⁽¹¹⁸⁾ In her dealings with Finland too, Britain did not regard the extradition treaty concluded between herself and Imperial Russia (the former Finnish motherland) as continuing, and a new treaty was concluded in 1924.⁽¹¹⁹⁾ A similar situation arose between Czechoslovakia and the United States after the former's break with the Austro-Hungarian empire in 1919. In 1925 the United States negotiated a new extradition treaty with the Czechs, despite an

existing treaty with the empire.(120) In the case of the Ivory Coast after its split with France, there also appears to have been no succession to extradition provisions existing between the United States and France as the government of the Ivory Coast declared that it did "not feel bound by that [extradition] treaty and desire[d] that such matters be raised *de novo*".(121)

On the other hand, the extradition treaty between the United Kingdom and Argentina (122) was regarded as binding between Argentina and Pakistan;(123) and the extradition treaty between the United States and the United Kingdom was regarded by both the governments of the United States and of Ghana as binding between them after the latter's break with Britain in 1956.(124) India too agreed to be bound by British extradition treaties after its independence.(125)

The case most often cited in discussions of state succession to bilateral treaties and which involved extradition is *Re Westerling*.(126) Westerling, a Dutch national, was accused of having committed extraditable offences in Java, Indonesia. He had fled to Singapore and his extradition was sought by the Indonesian authorities to allow him to stand trial for his offences. The application turned on the continued validity of the 1898 Anglo-Netherlands Extradition treaty. Indonesia claimed to have succeeded to Britain's rights and duties under the treaty. Westerling attempted to have the application rejected in that he claimed that there was no valid extradition treaty between Britain and Indonesia, and even if there were such a treaty, the Extradition

Act 1870 had never been extended to Singapore. The view of the British government was that Indonesia had succeeded to the rights and obligations of the Kingdom of the Netherlands under the treaty and that it applied between Britain and Indonesia. Although Britain regarded the treaty as having been succeeded to, extradition was refused as there had been no Order in Council incorporating the treaty into municipal law. A later request also failed as the Netherlands refused to extradite its own nationals. (127)

The Netherlands was again involved in an extradition dispute involving succession in *DC v Public Prosecutor*. (128) A Rotterdam district court had declared DC's extradition to Yugoslavia admissible based on an 1896 Extradition Treaty between the Netherlands and Serbia. DC appealed to the Dutch Supreme Court on the ground, *inter alia*, that the 1896 treaty on which the application for his extradition had been based did not govern the relationship between the Netherlands and Yugoslavia. The Supreme Court rejected his plea. It found on evidence that the Netherlands regarded the Kingdom of Yugoslavia which was established at the end of the First World War as a continuation of the State of Serbia. No separate act of recognition was consequently required of the Netherlands government. When in 1923 the Yugoslavian government asked officially whether the Netherlands government still regarded Serbian treaties as operational, the Netherlands replied in the affirmative. The Kingdom of Yugoslavia was consequently a valid successor to Serbia. However, DC further contended that the Socialist Federal Republic of Yugoslavia, was not the same entity as

the Kingdom of Yugoslavia and that the treaty consequently had no application with the Netherlands. This too the court rejected, citing various Dutch statements (129) to show that although the Republic of Yugoslavia and the Kingdom of Serbia indeed differed as regards constitutional make-up, and even extent of territory, the extradition treaty continued to apply.

In *R v Director of Public Prosecutions and Another : Ex parte Schwartz*, (130) the United States requested the extradition of Schwartz from Jamaica. She was wanted in the United States to stand trial on charges involving conspiracy to import, sell and transport dangerous drugs within the USA. On being held in Jamaica pending extradition to the US, Schwartz, a Jamaican national, applied for a writ of *habeas corpus*. One of the grounds raised was that the 1931 extradition treaty between the United States and Britain - Jamaica being a British colony at that time - no longer applied to Jamaica. These issues were argued at some length and bear consideration.

It was argued for Schwartz that when Jamaica became independent "at the stroke of midnight" 5 August 1962 all treaties contracted for Jamaica by Britain "died". (131) Jamaica was a "new juristic creature" which was not bound by what were termed "treaties in *personam*" - a category which it was claimed, included extradition treaties. The application of the clean slate approach was consequently advocated with the forerunner to article 16 of the Succession Convention also being cited in support. (132) The devolution agreement concluded between Britain and the new Jamaica,

it was argued, could not be said to keep the United States/United Kingdom treaty alive as this treaty had died alongside all the others at independence, ie before the devolution agreement had been concluded. Furthermore, the United States was not a party to the devolution agreement and could consequently not be bound by it. Even were the agreement found to carry the express or tacit consent of the United States, it was argued that this form of consent was insufficient to qualify as "the formal *actus* so as to create treaty relations in international law".(133)

The court found that before Jamaican independence, the 1931 treaty was part of the law of Jamaica. Indeed, state practice between the United States and Jamaica showed that on at least two occasions(134) there had been unchallenged requests for extradition. "That being so, the Extradition Acts and the Treaty of 1931 were still in full force and effective at the date of this requisition". The court was unconvinced that it could yet be said that the clean slate approach had "hardened into a 'customary rule' of international law".(135) However, even if it had so hardened, the court felt that to incorporate it into the Jamaican municipal law would be "flying in the face of our statutory provisions".(136) The magistrate's view that Jamaica had succeeded to Britain's extradition rights and duties embodied in the 1931 treaty was consequently confirmed.(137)

As indicated above, the 1931 United States / United Kingdom extradition treaty and succession by Jamaica were also in issue in *R v Commissioner of Correctional Services : Ex parte Fitz Henry*.(138)

In this case Henry was wanted in the United States to stand trial for dealing in counterfeit ten dollar notes. He fled to Jamaica where he was apprehended in consequence of an extradition request from the United States, found to be extraditable, and remanded in custody pending his extradition. Henry applied for a writ of *habeas corpus* claiming that the 1931 extradition treaty on which the United States' request was founded had not been succeeded to by Jamaica.

The court had before it a document from the Ministry of Foreign Affairs stating that an extradition treaty existed between the United Kingdom and the United States, that the treaty was still in force, and that it applied to Jamaica. (139) In terms of a devolution agreement between Britain and Jamaica, the latter had agreed :

"(a) to assume all obligations and responsibilities of the Government of the United Kingdom which arose from any valid international instrument by virtue of authority vested in the United Kingdom Government and made applicable to Jamaica;

(b) to enjoy all rights and benefits heretofore enjoyed by the United Kingdom Government in virtue of the application of any such international instrument to Jamaica." (140)

Discussing the demise of British treaties argued for on Henry's behalf, (141) the court set out its understanding of the clean slate theory. An independent state possesses unlimited treaty-making powers. A new state is not bound to maintain or become a party to the treaties of its predecessor. However, should the new state perceive a treaty concluded by its predecessor as advantageous,

"there cannot be anything...[in the theory]...to disentitle the newly independent state from becoming a party to it". If the clean slate principle were to apply as argued, it would result in "chaos, uncertainty and economic debility...The newly independent state would find it impossible to start its existence...".(142) The court found that the clean slate theory was no more than a basic concept which must, in the final analysis, give way to "reality, common sense and international utility".(143) It was consequently found that Jamaica had succeeded to Britain's extradition rights and duties under the 1931 treaty with the United States.

On the other hand, in *McGann v United States Board of Parole*, (144) this same treaty was applied by the court without question.

In the case of *Lansana and Eleven Others v Reginam* (145) the question arising was whether Sierra Leone had succeeded to an extradition treaty concluded between Britain and Liberia. Lansana had been extradited to stand trial for false imprisonment but was charged with treason and treason felony, duly convicted and sentenced to five years' imprisonment. He claimed that in terms of the treaty between Britain and Liberia to which Sierra Leone had acceded on the attainment of independence in 1961, his trial should be declared null and void on the ground of violation of the principle of speciality embodied in the treaty, in that he was tried for an offence other than that for which he was extradited.(146) In upholding the appeal, the court held that the treaty had been

succeeded to by Sierra Leone through an exchange of letters between that country and Britain. (147)

The extradition treaty concluded between Britain and Italy in 1873, and its applicability to India on the attainment of independence was the question before the Italian Court of Appeal in *Re Bottali*. (148) Bottali, an Italian national, had been convicted in Bombay on certain drug related offences. The public prosecutor of the Rome Court of Appeal requested that the sentence imposed on Bottali be recognised in Italy. Bottali objected, *inter alia*, on the ground that there was no extradition treaty between Italy and India after the latter's independence. (149) The court found that no specific extradition treaty had been concluded between Italy and India after that latter's independence on 15 August 1947. The issue consequently turned on whether or not the treaty concluded between Italy and Britain on 5 February 1873 now applied between Italy and an independent India which the court stated had been "born of dismemberment". (150) The court gave a brief but lucid review of the possibilities surrounding the emergence of a new state, concluding with the Italian approach to the issue as reflected in a letter to O'Higgins in reply to his query as to whether the Italian government regarded extradition treaties concluded by Britain binding on an independent Eire. The Italian view was that:

"In this [Italy] follows that general doctrine according to which successor States are not held bound by international obligations contracted by their predecessors unless they make an explicit declaration to the contrary. (151)

This the court supported pointing out no customary rule in terms of which a successor state succeeded to the treaties concluded by its predecessor had yet developed. It found that there was no treaty operative between Italy and India and that the judgment against Bottali could consequently not be recognised. The fact that there was no record of extradition having taken place between the two countries was, for the court, further confirmation of its finding. (152)

A similar approach was adopted by Germany in *Extradition (Germany and Czechoslovakia)* case (153) where on a query based on the principle of speciality, (154) the court held that states arising on the territory of the former Austrian Empire cannot be regarded as having succeeded automatically to the treaty rights and duties of the Empire.

In the *Extradition (Jurisdiction) case Germany* (155) the question was whether extradition between Germany and Switzerland was governed by a treaty concluded on 24 January 1874. The court held that the reorganisation of the German Empire in 1934 by means of which Germany became a unitary state, had resulted in the extinction of existing extradition treaties with the former German states as they had "ceased to exist in their capacity of subjects of international law". (156) In *N v Public Prosecutor of the Canton of Aargau* (157) the Swiss authorities, in considering whether the extradition treaty between Switzerland and the Austro-Hungarian empire had devolved

upon Czechoslovakia, held that it could not "without more ado" be applied to Czechoslovakia as a successor state.

The termination of a state and the effect on extradition was also involved in the case of *Rex v Abdul Hasan* (158) where a magistrate in Shahjahanpur, India received a warrant from a Bopal court for the arrest of three persons. They were duly detained to await their extradition to India. However, before they could be extradited, Bhopal was merged with the Union of India on 1 June 1949. The question of their extradition had consequently become somewhat academic. The court held that:

"In view of the merger of the State of Bhopal in the Union of India no question of extradition can arise. By reason of this merger the State of Bhopal has ceased to exist". (159)

Finally, in the case of *M v Federal Department of Justice and Police* (160) the question arose whether an extradition treaty concluded between Britain and Switzerland in 1880 (161) still applied after South African independence. As this is one of the few reported cases directly involving South Africa, it will be considered in some detail.

During 1977 M, a South African national, was arrested in Zurich for cashing a number of stolen American Express travellers' cheques. These cheques, which formed part of a consignment sent to Johannesburg from Britain, had been stolen by M in Johannesburg. He had also fraudulently acquired a number of passports which he had

used freely both in leaving South Africa and for various transactions in Switzerland - including the cashing of the travellers' cheques. He was convicted of fraud and sentenced to three years' imprisonment. (162)

In the interim the South Africa authorities had requested M's extradition to stand trial on various charges. (163) The Anglo-Swiss extradition treaty of 1880 was cited as the basis for the request. M objected to his extradition claiming that no formal extradition treaty had been concluded between South Africa and Switzerland, and that the Anglo-Swiss treaty which applied between Britain and Switzerland did not continue to apply between Britain's former Colony, South Africa, and Switzerland, largely for want of tacit consent.

The court rejected his arguments. It found that the task of the court in this case was not merely to decide whether certain acts fall within the ambit of the treaty or to interpret the treaty, but rather to assess "the very applicability of the Treaty". This the court should do by considering not only doctrine and jurisprudence but also the opinions of the relevant political authorities which are "exclusively competent to conclude or denounce treaties and...perform acts which, according to the circumstances, constitute tacit further application of a treaty and thereby bind Switzerland under international law". (164) In dealing with what it termed the problem of state succession, the court placed considerable emphasis on the Succession Convention. (165) It stressed that the general

rule that a state is not automatically bound by the treaties of its predecessor, is in many respects impracticable. This does not however mean that a customary rule in favour of succession exists.

"A bilateral treaty between a predecessor State and a third State will only be considered as being in force between the third State and the newly independent State *if those two States so agree*. Such an agreement may either be express or result from their conduct".(166)

It was shown that between 1949 and 1975 there had been no less than five instances of extradition between South Africa and Switzerland. In each of these cases the Anglo-Swiss treaty had been invoked without questions being raised as to its applicability. Furthermore, during 1978-9, in contacts between the Swiss Embassy in Pretoria and the South African Department of Foreign Affairs, the question of extradition had been raised. Although it was acknowledged that no formal treaty had been concluded, the Swiss authorities made it clear that the Anglo-Swiss treaty still applied between the two states, but suggested that this be formalised by an exchange of notes. South Africa, on the other hand, while also acknowledging the continued application of the treaty, proposed that a new treaty be concluded as the provisions of the 1880 treaty were not in line with modern trends. This the court interpreted as indicating tacit consent to the continuation of the Anglo-Swiss treaty on the part of both states.

M, however, claimed that the extradition requests delivered and entertained by the two states through the years after South African

independence, (167) were not performed by organs of state competent to bind their respective states internationally. While the court conceded that in principle only Heads of State, Heads of Government and Ministers of Foreign Affairs may consent to their states' being bound by treaty, (168) this principle does not apply to what it termed the "tacit further application of a treaty". Consent to this process may be effected by "those organs which are normally called upon to apply the treaty". (169) In the present case this is what had in effect occurred and the treaty between Britain and Switzerland had been succeeded to by South Africa and continued to apply between the Republic and Switzerland. (170)

An analysis of this judicial response to the problem of succession to extradition treaties, shows that opinion is fairly evenly divided between acceptance of succession in the *Westerling, DC, Schwartz, Fitz Henry, McGann, Lansana* and *M* cases, and rejection of succession in the *Bottali, Germany & Czechoslovakia* case, *Extradition (Jurisdiction)* case, and *Abdul Hassan*. It is well nigh impossible to abstract a single overriding principle from judicial decisions spanning so varied a collection of "successions in fact". However, if some general principle were to be stated, it must surely be that the problem of succession is to be resolved in the light of the intention of the parties involved as manifested in their consent to succession. This consent is the parties' consent to the objectively determinable "succession in fact" which opens the way for possible "succession in law".

Against this background, South African succession to extradition treaties will now be considered. The examination will be limited to the acquisition of treaty rights by the various territories which have made up South Africa throughout the history of the country and no attempt will at this stage be made to evaluate the current status of the treaties so received as this can only be undertaken meaningfully once the termination and re-emergence of treaty rights and duties have been considered and all three processes can be synthesised into a realistic perception of the current position.

3.6 Succession to extradition treaties in the South African context

If ever a society was designed as a prototype for the problems surrounding succession, South Africa, through the various stages of its development, must be regarded as such a society. Throughout the history of the territory, virtually every form of succession which could be imagined has arisen at one stage or another. However, in considering the various acts constituting "succession in fact" within the South African context, it must be emphasised that much turns on the interpretation placed on the events giving rise to the succession. For example, what one person may regard as annexation, another may regard as cession; one man's devolution agreement may be another's dismemberment, etcetera. In this regard the interpreter faced with a succession problem must decide for himself into which category the succession in fact should be classified. The approach adopted in this section will, as in the historical section, be

chronological, an attempt being made to determine whether the act performed indeed gave rise to succession in fact, and then whether the potential such a situation holds for succession in law, was realised.

3.6.1 Early history

3.6.1.1 The First British Occupation

As emerged from Chapter II, the first instance in which succession could have arisen within the South African context was the change in sovereign authority resulting from the First British Occupation of the Cape during the period 1795-1803.

It is difficult to classify this change in any watertight compartment. As pointed out earlier, the *animus* of the British in occupying the territory fell short of that generally demanded for either annexation or cession, (171) which are the two most obvious "successions in fact" applicable to such a situation.

If this takeover of the Cape by the British cannot be regarded as a true example of annexation - which at that stage resulted in the automatic termination of the treaties of the annexed state and the application of the treaties of the annexing state (172) - how is it to be classified? Discussing succession of states in the case of complete annexation, McNair (173) raises the case of Upper Burma

which was conquered by the British in 1885. Asked to comment on the procedure which would have to be followed to effect a termination of the treaties concluded by the former Burmese ruler, the Law Officers replied that the Crown had by its conquest of Burma acquired the right to extinguish the independent existence of the state of Upper Burma. If this were not done, the Law Officers felt that foreign powers who had contracted with the King of Burma could claim that British action in Burma was "mere military occupation as distinguished from a conquest" (174) resulting not in the extinction of Burmese sovereignty but in its suspension. This in turn would mean that treaties with foreign powers which applied at the time of the occupation would, for its duration be suspended or held in abeyance to be revived and of full force were Britain to cede the territory to the King of Burma.

When occupying the Cape for the first time, the British made it clear that their stay was intended to be temporary only. Their actions, as in the scenario sketched in the case of Burma, can consequently be regarded as military occupation rather than conquest and annexation. Such treaties as there may have been between the Dutch-East India Company and foreign powers - and whether agreements with local potentates are to be regarded as such treaties remains a moot point - were consequently in abeyance during the period of occupation. It cannot with certainty be said that these treaties lapsed or that British treaties found automatic application. No succession in fact which could give rise to succession in law occurred.

In any event, in examining the writings of the period, no provisions directly governing treaties could be found and, as was shown in Chapter II, extradition was of little practical significance at the time.

3.6.1.2 The Batavian Republic : The Dutch return to the Cape

Three years later, however, problems surrounding the First Occupation became academic when the second possible instance of "succession in fact" arose. At the close of the war with France, Britain formally handed the Cape back to the Dutch under the terms of the Treaty of Amiens 1802. If it is accepted that the First British Occupation was indeed no more than a form of military occupation, treaties existing between the Dutch East India Company and foreign powers which were in limbo during the occupation would have revived automatically on British withdrawal.

A question arising in this regard is whether the fact that while the British were occupying the Cape, the government in the Netherlands fell and the Dutch East India company was finally disbanded, (175) had any effect on the position. The situation is consequently that one of the original parties to any treaty concluded at that stage in the Cape - always assuming that meaningful treaties existed - the Dutch East India Company responsible to the States General, had ceased to exist and been replaced by the government of the Batavian Republic. Can one claim that the Batavian government succeeded to the treaties of the States General concluded on its behalf by the

Dutch East India Company? The question centres on whether or not the Batavian Republic was a "new" state in public international law terms, or merely a continuation of the Netherlands as it existed under the States General. In the case of *DC v Public Prosecutor* (176) a Netherlands court (fittingly enough) was faced with a double change of identity where the Kingdom of Serbia changed first to the Kingdom of Yugoslavia and then to the Socialist Federal Republic of Yugoslavia. The court found that although Yugoslavia had a constitution which differed from that of the former Serbia, and even its territory had changed, the state as such had continued to exist. (177) A change in the government, government structure, or constitution of a state, has no effect on the international obligations of the state. (178)

Consequently, the fact that the Netherlands had changed its name to the Batavian Republic and was functioning under a different constitution, did not change the existence of the state as a separate international entity which was still bound by treaties it had concluded but which were in abeyance as a result of the temporary British occupation : such obligations as may have existed re-emerged when the territory was handed back to the Dutch.

On the other hand, if the above explanation is not accepted, the situation could be typified as a cession following on the close of hostilities. It is again firmly established - taking into account both the time-frame and the fact that there was then no prohibition on the use of force to acquire territory - that in such a situation

the treaties of the former sovereign (Britain) are extinguished automatically and those of the new sovereign (the Batavian Republic) find automatic application. (179) The Cape of Good Hope would consequently have succeeded to the treaties of the Batavian Republic applicable at that stage.

Again, however, research into the actual existence of treaties or of extradition proceedings in the Cape during this period, proved fruitless and the question must also be regarded as academic.

3.6.2 The Second British Occupation : The Boer Republics

The third succession scenario within the South African context, is considerably more complex and was set in motion by the Second British Occupation of the Cape in 1806, and the subsequent establishment of the Boer Republics of Natal, the Orange Free State and the Transvaal.

3.6.2.1 Succession in the Cape of Good Hope

In 1806 the Cape of Good Hope was formally annexed for Britain by Sir David Baird. It is clear from the terms of the Treaty of Capitulation of 1806 that in this case the intention of the British government differed radically from that held at the time of the First Occupation. The intention was that the territory be occupied permanently by the British, a full administration was established, and the territory became a British Colony. As was customary in

international law at the time, the treaties of the former sovereign (the Dutch) terminated automatically and those of the new sovereign found automatic application. (180) The extradition treaties which Britain had concluded through the years were, as was shown above, (181) extended to the Cape and became fully applicable within the territory.

3.6.2.2 Succession in Natal

As emerged in Chapter II, (182) the territory of Natal offers a particularly interesting, if rather confusing, picture when succession to treaties is considered. Throughout the territory's history various acts occurred which hold the potential of succession problems.

The area around the present-day port of Durban was purchased by Simon van der Stel for the Dutch. By analogy with the other famous purchase in international law - the United States' purchase of Alaska from Russia - one would expect that at least in theory, Dutch extradition provisions would have applied to the territory. (183) However, the lack of subsequent interest shown by the Dutch, coupled with their failure to establish any sort of administration in the territory, leads to the conclusion that the sale was a change in sovereignty - a succession in fact - in name only. The cession which one would expect to follow on such a purchase must be regarded as never having been "perfected", to borrow a term from the law of

contract. Consequently there was indeed neither a true succession in fact, nor any question of succession in law. For practical purposes, the territory was never subject to Dutch authority and it is doubtful, to say the least, that Dutch treaties found application there.

The next significant event was that in terms of article 1 of the Articles of Capitulation handing the Cape to the British in 1806, the territory of the Cape of Good Hope was defined as including the territory in Natal purchased by Van der Stel. Again in theory, this should mean that the Dutch treaties which could have applied to the area would terminate automatically and automatically be succeeded by those of Britain. However, as in the case of the First Occupation of the Cape, the British were not interested in incorporating Natal into their territory and did not regard it as a colony. As in the case of the Dutch, they established no permanent administration. For the reasons advanced above, it can consequently not be said that British treaties applied in the territory at this stage.

A further possibility for succession may be seen in the attempt by the emigre Boers to establish the Republic of Natalia. This too, is fraught with problems if a traditional classification is attempted. Had Natal indeed been British territory at the time, the case could have been classified as an attempted secession and failing agreement, the clean slate principle would have applied and no succession to treaties would have occurred.⁽¹⁸⁴⁾ However, it has just been submitted that the territory was in fact no more British

than it had been Dutch, and that there were no treaties applicable. The question of succession can consequently not be said to arise.

It is necessary at this stage to consider once again, the nature of the entity which was termed the Republic Natalia. From the agreement concluded between Dingaan and Potgieter, on which the claims to an independent status rest, (185) we would appear to be dealing with the purchase of land from an indigenous ruler. The fact that the purchase price was cattle and assistance rather than money, should in principle not affect the validity of the transaction. It should consequently represent a cession of territory with the result that any treaties applicable to the "new" sovereign would apply to the territory. If, as in this case, the new sovereign purported to be a totally new entity, there would be no treaties and it would start with a clean slate. (186) However, as in the case of the First British Occupation above, the requirements for a valid cession, and in particular the *animus* required for cession would again appear defective. In this case intention to accept the cession was not lacking on the part of the Boers, but a true intention to cede on the part of the indigenous rulers would not appear to have existed. That the Zulu leaders lacked the necessary intent to transfer the land - or rather that they failed fully to comprehend the nature of the transaction - is the only logical conclusion to be drawn from the facts. This is indeed a case where, examining the agreements on their merits, they prove to be what Mugambwa terms "scraps of paper" rather than valid treaties. (187) The same territory had been annexed by the Dutch, transferred to the British, sold to Farewell and King

(by the Zulu leader Chaka), and then again given to the Boers by Chaka's successor, Dingaan. As was shown above, the Republic Natalia was never an independent subject of international law capable of concluding valid treaties or meeting international obligations.

The only extradition treaty concluded during this period which could be traced, that between Dingaan and the residents of Port Natal, was in point of fact not a valid treaty; was abrogated by the British residents; and could in any event not have been succeeded to by the Boers as their "republic" cannot be regarded as having enjoyed international legal personality.

The final act in the Natal scenario occurred in 1844 when the territory was formally annexed by the British. Again as in the case of the Cape of Good Hope, the treaties of the annexing state superseded any treaties which may formerly have applied in the territory. The British extradition treaties applying in the Cape consequently applied with full force to the new British territory of Natal.

3.6.2.3 Succession in Orange Free State

Although initially the Orange Free State was in much the same position as the Cape and Natal in that after 1848 it was a British possession and the British extradition provisions which applied at

the Cape and in Natal would have applied here too, this situation was set to change.

In 1854, in terms of the Bloemfontein Convention, the Boer aspirations were realised and the territory was granted full independence by the Crown. There are two ways of interpreting the British action giving rise to the "succession in fact". First it could be seen as secession of the Free State from the British Empire; second it could be seen as a forerunner of the drive for independence which was finally realised in South Africa with the attainment of Republican status in 1961.

The question arising is consequently whether the new state of the Orange River Sovereignty succeeded to British extradition treaties which had formerly applied by virtue of its being British territory. McNair (188) points out that in the case of secession the general rule is that the new state starts life with a clean slate with the exception of rights or obligations arising from dispositive treaties, or rights and obligations to which it expressly consents. British extradition treaties are not dispositive and there was certainly no wish among the Boers to be bound by British treaties - on the contrary they wished to be free of British interference. No reference could be found to a devolution agreement or similar arrangement between the two states having been concluded and it would consequently appear safe to assume that no succession to British extradition treaties occurred on the independence of the Free State.

As was shown in Chapter II (189) the new republic was active on the extradition front. Extradition arrangements were concluded with Britain herself, with Moshesh (on various occasions), and with the Transvaal in 1880. What happened to these treaties when the state was finally annexed by Britain in 1900?

McNair (190) deals specifically with the question of the Free State annexation and declares that "the British Government regarded treaties between them [the Free State] and other States as having lapsed by the fact of annexation" - a solution in line with the generally accepted international thinking at that time.

The Law Officers were also called upon to consider the other side of the coin, ie whether treaties applicable to British possessions were automatically extended to cover the Free State on its annexation by Britain. (191) Asked to give a ruling on whether the Copyright Convention of 9 September 1886 applied in the Orange River Colony, the Foreign Office replied in 1903 that British accession on behalf of her colonies applied to all colonies irrespective of the date of their acquisition of that status. The Orange River Colony had consequently automatically become a party to the Convention but would, should it at some later stage be accorded self-governing status, also acquire the right of separate denunciation.

O'Connell (192) also considers the effect of the annexation of the Free State on treaties with foreign powers, and comes to the same conclusion as McNair. Of particular interest, in this regard, is a

Belgian enquiry addressed to the British Government in 1903 in which the Belgians asked whether a treaty concluded with the Orange Free State in 1894, still found application and whether extradition proceedings between Belgium and the region were governed by the Extradition Treaty concluded between Belgium and Britain in 1901. The British replied that "treaties of commerce and extradition made by the late Republics [Free State and Transvaal] were no longer in force, and that the new Colonies were under the British treaties of commerce and extradition". (193)

It would appear, therefore, that like the Cape and Natal, any extradition treaties applicable to an independent Free State lapsed automatically on the annexation of the territory by Britain, and British treaties existing at the time of annexation found automatic application within the territory.

3.6.2.4 Succession in the Transvaal Republic

The Transvaal Republic, the most controversial of the Boer Republics, is certainly the most problematic. From its inception, the territory enjoyed a stormy relationship with Britain. Where in Natal the Boers had failed to establish an independent state, in the Transvaal they succeeded in doing so. (194) This independence was confirmed by the terms of the Sand River Convention and was internationally recognised, *inter alia*, by Britain herself. The question is consequently whether this independent state succeeded to

British treaties operational at the time. Again the general rules applicable in the case of secession identified above in the case of the Free State, must be seen to apply here. The territory had no wish to succeed to British treaties, including extradition treaties, and cannot be held to have done so automatically. It would consequently appear that the Transvaal, too, started its international existence with a clean slate.

The Transvaal's independence was short lived as in 1877 the area was "brought under the Government of the Crown as a dependency acquired by cession".⁽¹⁹⁵⁾ One would expect the now familiar scenario of cancellation of treaties concluded by the Transvaal Republic between 1853 and 1877 (which included treaties of Commerce and Friendship with Belgium and Portugal)⁽¹⁹⁶⁾ and automatic succession to British treaties to have followed. The picture is however, not that simple. As was shown in Chapter II,⁽¹⁹⁷⁾ the status of the Transvaal during this period is uncertain. While in the eyes of the British the territory had been ceded to the Crown, in the eyes of the Boers this would not appear to have been the case. The British conquest cannot be regarded as sufficiently decisive to ensure successful annexation. In fact, hostility between Boer and British continued together with negotiations for the resumption of independence and culminated in a declaration of war between the parties in 1880.

Although this was followed by "peace" in terms of the Pretoria Convention in 1881, this too was not an unequivocal acceptance by

the Boers of British dominance as is borne out by the fact that the Boers considered it a temporary or interim solution and the Convention was ratified for a trial period only.⁽¹⁹⁸⁾ Further negotiations followed culminating in the signature of the London Convention in 1884. This too did not last and the Second Boer War broke out to be settled finally by the annexation of the Transvaal in 1900.

What was the fate of Transvaal and British treaties during the period 1881 - 1900? There are two distinct perceptions which should here be borne in mind. First, from the British perspective Transvaal treaties should have terminated and been replaced by British treaties. In extradition terms this would mean that all the treaties identified as applying to the Cape of Good Hope (and subsequently to Natal and the Free State) would find automatic application in the Transvaal. From the Boer perspective, this would not be the case as the "annexation" had not been perfected as a result of the defective intent of one of the parties. The situation may from this view be regarded as analogous to that applying in the case of the First British Occupation, or in the case of early Natal history.

It would consequently be premature to talk of an automatic termination of Transvaal treaties and the application of British treaties to the territory. On the other hand, to dismiss the British presence as military occupation (resulting in the suspension of Boer treaties) also appears somewhat simplistic in the light of the fact

that the Boers had consciously accepted that their foreign relations would be conducted by Britain or with British approval. (199)

Such speculation is, however, academic since it is certain that at the close of the Second Boer War the Transvaal was, like the Free State, well and truly annexed by Britain. There is no question as to the validity of this annexation and the normal consequences attendant upon such a succession in fact must be seen to follow. In other words as a result of the annexation the treaties of the Boer Republics, including any extradition treaties, lapsed and were replaced by British treaties existing at the time. The full range of extradition treaties which were seen to apply to the Cape, Natal and Orange Free State found automatic application within the annexed British territory of the Transvaal.

A question which arises in regard to the treaties concluded by the Transvaal while subject to the terms of the Pretoria and London Conventions, is whether the fact that Britain was required to approve such treaties, (200) had any effect on the question of succession. In response to an enquiry in this regard the British Foreign Office replied that :

"The fact that her late Majesty, as Suzerain, assented to the completion of a Treaty between the Transvaal Government and another Power in no way affects the question of the lapse of such Treaty owing to the annexation of the South African Republic...The Treaty was one with the Government of the Transvaal as a separate Power...and the consent of Her Majesty was given merely as Suzerain of the Transvaal. The

fact of such assent can...in no way affect the question of the lapse of the Treaty, when the Transvaal became part of His Majesty's dominions".(201)

Specifically as regards extradition, the Law Officers replied in the affirmative to a Belgian enquiry as to whether extradition between Belgium and the Transvaal was regulated by the 1901 Anglo-Belgian treaty. Extradition treaties made by the Transvaal were no longer in force and the territory fell under the relevant British treaties.

In summary, therefore, we can see that by the time of Union of the four British colonies in 1910, all British treaties relating to extradition applied in each as a separate British territory.

3.6.3 The formation of the Union of South Africa

When it became apparent to the British that their four possessions in the southernmost part of Africa could better be administered as a single unit, it was decided that they should be united to form the British Dominion of the Union of South Africa. Was there any succession by the Union to first, the treaties of the individual colonies, and second to British treaties generally?

The question of British succession to extradition treaties concluded by the independent Republics was raised, but not further considered, in Chapter II.(202) The answer appears relatively straightforward. It has already been established that after their annexation by

Britain any treaties applicable to the territories of Cape, Natal, Orange Free State and Transvaal, as independent sovereign nations were extinguished and that British treaties applied with full force within these territories. The same principle would apply not only to treaties concluded between the Republics and foreign states - for example the extradition treaty between the Transvaal Republic and the Netherlands concluded in 1895 (203) - but also to treaties concluded between the Colonies themselves - for example the extradition treaty of 1880 between the Free State Republic and the Transvaal and that of 1897 between Natal and the Transvaal.(204)

The only succession issue in regard to Union is consequently whether the Union, as a separate British entity, succeeded to British treaties applicable to the four separate colonies, and if so, by what form of succession in fact.

An analogous situation arose in 1900 with the unification of the seven separate Australian states to form the Commonwealth of Australia.(205) Asked whether a treaty existing between Japan and Queensland (one of the seven states) had terminated through the incorporation of Queensland into the Commonwealth, the Law Officers replied that :

"The case is not one in which an independent Power has become merged by conquest or cession in the territories of another Power. The portion of His majesty's dominions known as Queensland has combined with other portions of His Majesty's dominions to form the Commonwealth of Australia

which is itself a part of His Majesty's dominions." (206)

The position, according to McNair, (207) should be seen as a change to the internal administration of the territory, rather than a change in the essential nature of the territory itself, and the question of succession does not really arise.

Dealing with the Union of South Africa, O'Connell (208) first categorises the union process under the effect on treaties of entry into a federation. He however continues his discussion together with a consideration of treaty devolution in the older Dominions (209).

In line with this thinking, section 148 of the South Africa Act (210) provides as follows :

" (I) All rights and obligations under any conventions or agreements which were binding on any of the Colonies shall devolve upon the Union at its establishment."

This is the typical devolution provision employed by Commonwealth nations at the time. It may be accepted, subject to the limitations identified above with regard to succession in the case of devolution agreements, that the Union of South Africa succeeded to all British extradition treaties operative at that stage. The general international sentiment at the time seems to have been towards acceptance of succession in the case of former Colonies.

3.6.4 The establishment of the Republic of South Africa

In 1961 South Africa opted for republican status outside of the British Commonwealth.⁽²¹¹⁾ The Republic of South Africa Constitution Act was adopted on 25 April 1961 and came into effect on 31 May 1961. Section 112 of the Act provided that:

"All rights and obligations under conventions, treaties or agreements which were binding on any of the Colonies incorporated in the Union of South Africa at its establishment, and were still binding on the Union immediately prior to the commencement of this Act, shall be rights and obligations of the Republic, just as all other rights and obligations under conventions, treaties or agreements which immediately prior to the commencement of this Act were binding on the Union."

Through this legislation South Africa assumed all rights and obligations arising from the British extradition treaties which as we have seen were binding on all of "the Colonies incorporated in the Union of South Africa at its establishment". However as the change from Union to Republic involved no change in legal personality, the question must be asked whether succession is indeed relevant in this context.

The decisions in *DC v Public Prosecutor* and *Shehadeth et al v Commissioner of Prisons Jerusalem*⁽²¹²⁾ are immediately called to mind. In the case of *DC* it was found that treaties with Serbia survived the transition first from Serbia to Yugoslavia and then to the Socialist Federal Republic of Yugoslavia. While in *Shehadeth* it was held that a change in government or constitution had no effect on the state's international obligations.

While this reasoning may indeed acceptably explain the position of those treaties which the Union signed independently once its treaty-making capacity had evolved sufficiently, (213) it does not explain the position with regard to the earlier extradition treaties which make up the bulk of South Africa's extradition commitments. In these cases we still have an agreement concluded between Britain and a foreign country which, through section 112 of the 1961 Constitution - which represents the standard form of devolution agreement encountered in former British dependencies at the time - South Africa has unilaterally made applicable to itself.

It goes without saying that a state which may have been prepared to engage in extradition dealings with Britain in the 1800s, was not necessarily willing to engage in extradition dealings with South Africa in the 1960s - particularly as even at that stage many states were ideologically opposed to South Africa's domestic policies.

If the two-stage approach to succession advocated above is applied here, we find that "half a succession" has taken place in most instances. In the case of the Union, succession in fact had evolved over a period of time resulting in international personality independent of Britain although no specific date or event can be identified as the act of succession in fact. The 31st of May 1961, the date South Africa became a Republic, is merely the point at which the evolutionary process towards full independence came to fruition and the status quo as regards succession in fact was officially confirmed.

However, as was seen above, succession in fact is only the starting point which sets the succession process in motion. The consent of the "other" states involved in the original treaty - that is the states with which Britain concluded the original treaty to which the Republic wished to succeed - opens the way to succession in law. However, as was pointed out above, whether the devolution agreement - that act giving rise to (or in this case confirming) succession in fact - indeed succeeded in effecting a succession in law, depends to a large extent on the attitude of the third states involved. As this is an issue which can only be determined finally once the grounds upon which a treaty may be terminated have been considered, and this forms the topic of the next Chapter, the exact position as regards individual treaties will not be considered here. When an assessment of the current status of South Africa's extradition treaties is attempted at the end of Chapter V, these responses will be considered, together with other relevant factors, in the case of each individual treaty. For present purposes it is accepted that the Republic of South Africa succeeded to British extradition treaties applicable at that stage.

3.6.5 Succession and the independent states

Transkei, Bophuthatswana, Ciskei and Venda

The final question giving rise to succession to treaties within the South African context came about as a result of the grant of independence by the South African government to the independent Homelands of Transkei, Bophuthatswana, Venda and Ciskei.

In the process of granting independence to these states the South African government, as the mother state, and the Homelands, as the new states, attempted through their respective legislatures to ensure that all treaties applicable in the Republic prior to the independence of these states, would remain binding on them after independence.

The first of the Homelands to gain independence, Transkei, will serve as a prototype of this attempt at succession.

The Transkei Status Act 100 of 1976, sets out the position of the South African government when it provides in section 4 that :

"All treaties, conventions and agreements binding on the Republic immediately prior to the commencement of this Act and capable of being applied to the Transkei shall be binding on Transkei, but the government of the Transkei may denounce any such treaty, convention or agreement."(214)

On its part, the position of the new state of Transkei is set out in section 68 of the Republic of Transkei Constitution Act 1976 which provides that :

"All rights and obligations under conventions, treaties and other similar agreements which were binding on the government of Transkei immediately prior to the commencement of this Act, shall be the rights and obligations of the Republic of Transkei." (215)

In this way South Africa and the TBVC states attempted to make use of the classic devolution agreement which evolved in British Commonwealth practice during the anti-Colonial period. These provisions have been exhaustively analysed elsewhere and this analysis will not be repeated here.⁽²¹⁶⁾ Rather, in keeping with the pattern adopted throughout the Chapter, before it can be established whether these devolution agreements were successful and the treaties were succeeded to, it must be established whether the states created are in fact entities capable of succeeding to treaties. In other words, was the creation of the TBVC states a valid succession in fact which could through the consent of the third states involved, set the scene for a succession in law through an application of the principles governing succession?

To answer this question some attention will have to be paid to the nature of the independent Homelands. In this regard two diametrically opposing approaches may be identified : the first that of South Africa and the Homelands; the second that of the international community which constitutes the third parties whose consent to the succession is sought. Two recent cases, one in Bophuthatswana and one in Britain, may be used to illustrate these divergent points of view.

The status of Bophuthatswana as a state in international law was recently considered in the case of *The State v Sando Johannes Banda and Others* ⁽²¹⁷⁾ in which the accused were charged with treason following upon an attempted coup d' etat in the Homeland. Friedman J

followed the traditional approach and after applying the general requirements for statehood embodied in the Montevideo Convention, came to the conclusion that Bophuthatswana satisfied all four requirements. The requirement that a state should have the capacity to conduct its foreign relations, received considerable attention. The court distinguished between a state's capacity to enter into foreign relations (for present purposes, the state's capacity to succeed to extradition treaties) and whether it has in fact successfully done so. It held that "the fact that [a state] has capacity to enter into relations with others is not nullified by the refusal of other states to enter into relations with it". (218)

The court's acceptance of Bophuthatswana's capacity in this regard, although at first glance wholehearted, is somewhat tempered by the fact that it was prepared to take judicial cognisance of the fact that the Homeland is recognised by no state other than South Africa. (219) In fact, the Homeland is recognised not only by South Africa, but also by the other three Homelands created by the South African government. Not only is it recognised by these states, they have at various stages concluded separate extradition agreements and are currently parties to a Southern Africa's only multi-lateral extradition convention. (220) If the other Homelands, which followed precisely the same road to independence and treaty succession as Bophuthatswana, are not regarded as states, where does that leave the Homeland? (221) This anomaly aside, the view of Bophuthatswana is clearly that the grant of independence by South Africa resulted in a

valid succession in fact which could be followed by a valid succession in law. This view is shared by South Africa. (222)

The British position, on the other hand, is illustrated in the case of *GUR Corporation v Trust Bank of Africa Ltd (Government of the Republic of Ciskei, third party)* (223) where the British Court of Appeals was called upon to consider the status of the Republic of Ciskei, one of the independent states created by South Africa within her territory. On being approached for a certificate clarifying British thinking on the status of the Homeland, the Foreign Office replied that :

"Her Majesty's Government does not recognize the 'Republic of Ciskei' as an independent sovereign state, either *de iure* or *de facto*, and does not have any dealings with the Government of the Republic of Ciskei". (224)

In a subsequent certificate the Foreign Office was still more explicit stating that the British government "has not recognized as sovereign independent states Ciskei or any of the other Homelands established in South Africa". (225)

Consequently, from the British point of view - and this must be regarded as a fair reflection of international thinking on the issue - the Homelands are not international law subjects. (226) The South African action in creating these Homelands is consequently not action which can, from the international perspective, be seen to

have given rise to succession in fact, and still less, to succession in law.

What, then, is the essential feature which distinguishes the devolution process followed by Britain in granting independence to the Republic of South Africa - which is generally regarded as having effected a successful succession to British treaties applying within the Union - and the devolution process followed by the Republic of South Africa in her creation of the independent Homelands - which is generally regarded as having failed to effect a successful succession to South African treaties applying within the Republic?

In dealing with devolution agreements and dismemberment above, (227) it was found that irrespective of how one typifies the agreement - whether it is regarded as an offer to accede to the original treaty, an offer to conclude a new treaty, or whatever - the success of such agreements will depend upon the attitude of the other states to the original treaty. This attitude will determine, first, whether the succession in fact - a necessary precedent for succession in law - has occurred and then, whether the potential for succession in law arising from the succession in fact has been concretised through the consent of the parties concerned.

It is here that the difference between succession to British treaties by South Africa on the attainment of Republican status in 1961, and succession to the Republic's treaties by the TBVC states on their attainment of independence during the 1970s is to be found.

It will be remembered, that mention was earlier made of the fact that "trends" in the law of succession are reflections of political perceptions prevailing at the time. (228) In the case of the transformation of the Union into the Republic the international community was, on the whole, positively inclined towards the emergence of independent states. South African independence from Britain was perceived as a part of the on-going liberation of peoples in their drive away from Colonialism and Imperialism. The international community at large, was consequently prepared to accept treaty continuity on the part of South Africa. (229) South Africa's succession in fact was a manifestation of an internationally acceptable process, and the consent of the parties which had originally contracted with Britain to this process, triggered South African succession in law to Britain as party to the international agreements.

However, when the Republic of South Africa created the independent Homelands of Transkei, Bophuthatswana, Venda and Ciskei, the opposite sentiment prevailed - and still prevails. The Homelands were seen as a realisation of the South African policy of apartheid. Condemnation was vociferous, culminating in the adoption of United Nations General Assembly Resolution calling on all states to refrain from granting any form of recognition to the independence of these homelands - a call which did not go unheeded! (230)

What then is the effect of this scenario on the succession process identified above? In the first place, a distinction must be drawn

between the position with regard to South Africa and the position with regard to the rest of the international community.

As regards South Africa and the Homelands themselves, succession in fact has occurred and the way is open to succession in law. However, as regards the international community as a whole, there has been no succession in fact. The process in terms of which the TBVC states were created is perceived by the international community as a violation of the principles of international law. The Succession Convention expressly prohibits succession where it would not be "in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations".⁽²³¹⁾ Consequently, the possibility of succession in law - which as we have seen above is triggered by the third party's consent to an application of the principles of succession - does not arise. This is even more true in the case of extradition treaties which of necessity demand a measure of confidence in the constitutional dispensation of the new state. The TBVC states have consequently not succeeded to South Africa's extradition rights and duties with third states as far as the international community as a whole is concerned.

The current climate within South Africa has changed dramatically since the State President's peace initiatives of February 1990. This has not been without effect in the TBVC states. It would appear that the "new South Africa" will include the territory currently constituting the TBVC states as there is a general acceptance that

reincorporation is inevitable. (232) Although at present any such moves must be regarded as speculative, an interesting international parallel has recently occurred which could bear consideration as a pointer of the possible theoretical framework within which to consider the effect on treaties of reincorporation of territory earlier separated from the metropolitan.

On 31 August 1990, the German Democratic Republic (East Germany) which had for some fifty years been separated from the Federal Republic of Germany, ceased to exist and the two Germanies were once again united to form a single state. (233) Clearly, the Federal Republic of Germany was the dominant of the two and how treaties operating between the German Democratic Republic and foreign states have been dealt with should prove interesting if we are to be faced with the reincorporation of the TBVC states into a unitary South Africa.

Although far apart, both ideologically and geographically, the two situations are not without striking parallels. First the partitioning of Germany was carried out without the consent of the majority of the German population and has long been a thorn in the side of the German people. The TBVC states too, although ostensibly created as a realisation of the right to self-determination of the ethnic groups involved, were in the eyes of many, a self-determination imposed externally against the will of the majority of South Africans. As in the case of the Germanies, voices against the artificial partitioning of the unitary state have never

been silenced. Lastly, the government of the German Democratic Republic was initially not accorded general recognition, at least not by Western states. The governments of the TBVC states, too, are not recognised internationally.

The parallel becomes still more striking if the decision in *GUR Corporation v Trust Bank of Africa Ltd (Government of the Republic of Ciskei, third party)* (234) is considered. In this case an attempt was made by a British court to secure *locus standi* for Ciskei (one of the Homelands created by the South African government) through use of the so-called *Carl Zeiss* theory. This theory was developed by the British courts in the case of *Carl Zeiss Stiftung v Keeler and Rainer*, (235) to explain the relationship between the German Democratic Republic, which was unrecognised by Britain, and the USSR which was recognised, so allowing British courts to give effect to the enactments of the GDR. In *GUR Corp* this same reasoning was applied to allow Ciskei access to the British courts.

What approach was adopted in the case of the reunification of the two Germanies and does this practice hold any lessons for South Africa?

In the Unification Treaty (236) the question of international treaties is dealt with in Chapter IV articles 11 and 12. These articles provide :

"Art 11 Verträge der Bundesrepublik Deutschland. Die Vertrags-

parteien gehen davon aus, dass völkerrechtliche Verträge und Vereinbarungen, denen die Bundesrepublik Deutschland als Vertragspartei angehört, einschliesslich solcher Verträge, die Mitgliedschaften in Internationalen Organisationen oder Institutionen begründen, ihre Gültigkeit behalten und die daraus folgenden Rechte und Verpflichtungen sich mit Ausnahme der in Anlage I genannten Verträge auch auf das in Artikel 3 genannte Gebiet beziehen. Soweit im Einzelfall Anpassungen erforderlich werden, wird sich die gesamtdeutsche Regierung mit den jeweiligen Vertragspartnern ins Benehmen setzen.

Art. 12 Verträge der Deutschen Demokratischen Republik.(1) Die Vertragsparteien sind sich einig, dass die völkerrechtlichen Verträge der Deutschen Demokratischen Republik im Zuge der Herstellung der Einheit Deutschlands unter den Gesichtspunkten des Vertrauensschutzes, der Interessenlage der beteiligten Staaten und der vertraglichen Verpflichtungen der Bundesrepublik Deutschland sowie nach den Prinzipien einer freiheitlichen, demokratischen und rechtsstaatlichen Grundordnung und unter Beachtung der Zuständigkeiten der Europäischen Gemeinschaften mit den Vertragspartnern der Deutschen Demokratischen Republik zu erörtern sind, um ihre Fortgeltung, Anpassung oder ihr Erlöschen zu regeln beziehungsweise festzustellen.

(2) Das vereinte Deutschland legt seine Haltung zum Übergang völkerrechtlicher Verträge der Deutschen Demokratischen Republik nach Konsultationen mit den jeweiligen Vertragspartnern und mit den Europäischen Gemeinschaften, soweit deren Zuständigkeiten berührt sind, fest.

(3) Beabsichtigt das vereinte Deutschland, in internationale Organisationen oder in sonstige mehrseitige Verträge einzutreten, denen die Deutsche Demokratische Republik, nicht aber die Bundesrepublik Deutschland angehört, so wird Einvernehmen mit den jeweiligen Vertragspartnern und mit den

Europäischen Gemeinschaften, soweit deren Zuständigkeiten berührt sind hergestellt."

The German approach would consequently appear to be based on a free negotiation and agreement between the united Germany and the other parties who had contracted with the German Democratic Republic without undue regard to the provisions of the Succession Convention. Succession in fact has occurred and been acknowledged internationally. The question of succession in law has been left for negotiation - in other words will be determined by the consent of the other parties involved. This solution is in line with what has been advocated above. Unfortunately, however, the situation is still too new for any practical examples to have arisen. Of course, for those states which refused to recognise East Germany as an independent international law subject, the question of succession does not arise.

In the case of the TBVC states the same principles hold true, although the situation is somewhat simpler in that no state, other than South Africa and the Homelands themselves, has recognised the independent existence of the TBVC states.⁽²³⁷⁾ Consequently the original succession in fact was never such that it could give rise to valid international claims to succession in law. From the international point of view, the re-unification of South Africa through the reincorporation of Transkei, Bophuthatswana, Venda and Ciskei will be no more than a change in the constitutional set-up of South Africa. As such, the question of succession will not arise.⁽²³⁸⁾

Internally, the problem is not so simple. South Africa and the Homelands have throughout maintained that four independent international law subjects have existed. Dealings between South Africa and the TBVC states have been conducted on the same basis as dealings with other sovereign independent states. Extradition treaties have been concluded with these "states" and something will have to be done with these treaties. At this stage discussion of the process by means of which these states will be reincorporated into the Republic must of necessity be purely conjectural; indeed, whether all the states will be willing to accept reincorporation is far from certain.⁽²³⁹⁾ However, if reincorporation is sought, the most likely method will be through cession of the territories to South Africa. In such an event the treaty question will presumably follow the general rules identified above with regard to cession. On cession, the territory ceded will cease to exist as an international entity capable of performing in terms of a treaty, and any treaties applying to it will terminate automatically. At the same time South African extradition treaties will find full application within the re-unified South Africa. The end result will consequently be a restoration, within South Africa, of the perception of the situation currently prevailing in the international community as a whole.

3.6.6 South African judicial practice with regard to succession to extradition treaties

Although mention has been made of extradition treaties in the consideration of succession in the South African context, no

attention has been paid to the approach adopted by South African courts. In this section the major cases dealing with succession to extradition treaties which have come before South African courts will be analysed in the light of the principles applicable to succession identified in the preceding pages of this Chapter. (240)

In *S v Eliasov* (241) Hiemstra and Colman JJ sitting in the Transvaal Supreme Court, heard an appeal from a magistrate's decision ordering Eliasov's extradition to Rhodesia (as it then was). Eliasov was wanted to face fraud charges totaling some R100 000. His extradition was sought by Rhodesia on a warrant in terms of sections 9 and 12 of the Extradition Act 67 of 1962. (242) The question arising was whether the extradition agreement entered into between the Republic of South Africa and the Federation of Rhodesia and Nyasaland (243) remained in force after the dissolution of the Federation. In other words, had the three individual members of the Federation - Zambia, Malawi and Rhodesia - succeeded to the treaty rights and duties of the erstwhile Federation?

The court cited a letter from Mr Winston Field, then Prime Minister of Southern Rhodesia, addressed to the South African authorities on 23 December 1963, in which he proposed that the existing extradition treaty "should continue to apply as between the Republic of South Africa and Southern Rhodesia" and that if the Republic agreed, its reply reflecting this agreement "should be regarded as constituting an agreement between our Governments with effect from the dissolution of the Federation...". The South African representative

replied in the affirmative, agreeing to the proposal in identical terms. (244) This agreement was later confirmed by Rhodesia in a Proclamation containing the full texts of both letters. (245)

The court drew a number of conclusions from this exchange of letters. In the first place, Hiemstra J concluded that the letters showed that the two states felt that the dissolution of the Federation would mean the end of the extradition arrangements between them. The court considered the question "a simple matter". A treaty had been concluded with the Federation as a single state. The Federation had disbanded into three territories. When this took place, the Federation ceased to exist as a state with treaty-making capacity. With this, its treaties also ceased to exist. The court conceded that treaties can survive the dissolution of a Federation if the parties concerned continue to act under the terms of the treaty - consequently by the tacit consent of the parties. In the present case the court felt that the opposite had indeed been done. By exchanging letters, the parties had made it known that they in fact regarded the treaty as having terminated. Were this not so, no declarations would have been required. We consequently find the somewhat anomalous situation that a treaty may continue to exist on the basis of the tacit consent of the parties - a process which is difficult to determine and of necessity involves a judgment call - while an express statement by the parties that the treaty will continue to exist, results in its termination! In Hiemstra J's view the parties had attempted to conclude a new treaty with the same

content as the old, but had failed in this attempt as "something essential was missing".(246)

This "essential something" was, according to the court, promulgation of the agreement by the South African State President. Section 2(3) of the South African Extradition Act 67 of 1962, provides that no treaty will be of force or effect until it has been published by the State President by Proclamation in the *Government Gazette* (or will no longer be of effect after publication of a like proclamation that it is no longer in force). This the court found was "a prerequisite to validity of any extradition agreement".(247) The obvious error in failing to distinguish between the existence of a treaty - which is an international law issue - and the municipal application of the treaty - which is a question for national law and is governed by section 2(3) of the Extradition Act, has been canvassed fully elsewhere.(248) Suffice it to say that the court erred in holding that promulgation is a prerequisite for the validity of a treaty. A treaty may indeed be valid in the international sphere but lack municipal application - as was the case here.

However, a question which requires some further attention is the assumption identified above that a treaty may survive through tacit consent, but must terminate if the parties expressly state that it is to survive. How can the court's approach be explained? It is submitted that two basic points must be borne in mind in attempting to assess the judge's reasoning in this particular instance. First, public international law is a consensual system in which the

cardinal consideration must always remain the intention of the parties; it is also a permissive system which allows all that is not prohibited. (249) Consequently, if the parties consent to a specific course of action, and that course of action is not expressly prohibited by international law, there is no bar to an international agreement embodying that to which the parties have consented coming into existence. Second, there are two ways of looking at most situations : a negative and a positive. The court's reasoning turned on an interpretation of the letters exchanged by Southern Rhodesia and South Africa. In interpreting these letters the court's approach was essentially negative. The reasoning was to the effect that if the treaty continues to exist, there is no need for the states involved to say so. If the states declare that the treaty continues to exist, what they in fact mean is that the treaty terminates and that they are offering to conclude a new treaty on identical terms.

This is the approach encountered earlier on in this Chapter in an attempt to explain how a state, which was not party to the original extradition agreement may come - through the actions of the original treaty parties - to be bound by that agreement. It was briefly indicated there that regarding a devolution agreement as an offer to conclude a new, albeit identical, treaty is not without dogmatic problems. These problems are of real significance in a legal system like the South African where a treaty depends for municipal application on a process of incorporation. The role of the court is to determine the intention of the parties and give effect to

it. (250) This may be done in a number of ways. Although the most conclusive is probably by requesting an executive certificate, (251) there is nothing to preclude the court from determining the intention of the parties from statements they have made. (252) If one examines the statements made in the present case, notably that the existing extradition agreement "should continue to apply as between the Republic of South Africa and Southern Rhodesia" (253) there would indeed appear no bar to the continuation of the treaty. Rhodesia may be taken to have succeeded to the extradition treaty between the Federation and South Africa. This was clearly the intention of both parties and violates no norm of international law. The problems inherent in the court's reasoning in this case centre around its interpretation of the role of consent within the succession process. If a clear picture is maintained of exactly what the parties are consenting to, as evidenced by their express statements, the confusion surrounding Hiemstra J's reasoning in *Eliasov* may be avoided. The parties consented, not to the conclusion of a new treaty, but to the continuation of an existing treaty : they were attempting to effect a continuation of existing rights and duties arising from an existing treaty, or differently phrased, they were attempting to effect a succession, not to conclude a new treaty. By adopting the approach he did, Hiemstra J was blinded by the fact that he was dealing with a treaty, and lost sight of the type of treaty concerned. The parties were facing an imminent succession in fact which, both from their statements and from their actions, they regarded as valid. This succession in fact opened the way to a succession in law. As was seen above, the possibility of a

succession in law is activated by the consent of the parties. The consent of the parties consequently serves merely as a catalyst through which the way is opened for the application of the principles of succession to the extradition arrangements already existing between them. In this way, the emphasis is shifted from consent as a requirement for the conclusion of a treaty, to consent to the continuation of existing treaty commitments. The parties are in fact ratifying an existing regime and their consent is of no more than evidentiary value : it provides evidence of their intention to abide by the rights and duties brought into being by their substantive consent to the original treaty.

This approach also places Hiemstra J's "essential something" which was in his view lacking, in perspective. If the consent of the parties in this instance is seen for what it is, ie as consent to succeed to existing extradition rights and obligations, the need for re-promulgation of the treaty falls away. The original treaty between the Federation and South Africa is succeeded to by the parties - it continues to exist with full municipal application and there is no need for re-promulgation.

It is consequently clear, that the conclusion reached by Hiemstra and Colman JJ in the *Eliasov* case cannot be supported. It is essentially illogical, confuses principles of public international law with those of municipal law, denies the fundamentally consensual basis of public international law and is based on a misconception of

the nature of succession to treaties as an independent public international law process.

The problems surrounding the *Eliasov* case, were recognised in *S v Bull*(254) where the extradition agreement between the Republic and the Federation was again in issue. In this case Malawi sought the extradition of Bull from South Africa. He was wanted to stand trial on charges of having stolen a relatively small amount of money from the Malawi government while employed by the Minister of Works at Mzuzu. The first question Boshoff J was called upon to decide was whether the treaty between South Africa and the Federation had survived the demise of the Federation and now applied to Malawi.

In this case the court had before it an executive certificate from the Minister of Justice, Police and Prisons to the effect that in the view of the South African government, the treaty continued in force after Malawi's independence. The defence relied on the *Eliasov* decision that the agreement with the Federation had terminated with the dissolution of the Federation. Distinguishing this case, the court declared :

"The learned Judge...stated a very wide proposition, but I do not think that it can in its context be said that he intended to lay down a principle which applied in international law irrespective of the nature and objects of the treaty, the nature of the Federation, the nature of the personalities of the constituent States to adopt the treaty and the manner in which the Federation was dissolved. The proposition concerns matters of great complexity in

international law in so far as it relates to the continuity of and the succession to treaties, matters upon which there is much controversy probably due to the number of factors which influence them or have a bearing on them."(255)

Boshoff J pointed out that past state practice is of little assistance in assessing the position of a new state such as Malawi as the succession resulting from the independence of Colonial territories is "contextually novel". He identified three possible attitudes to succession. First that most treaties survive independence, but with certain exceptions, (256) are easily "got rid of". He added that "[s]carcely any practical political problem arises from continuity of commercial extradition and judicial assistance treaties, which are the ones most easily denounced". (257) Second, a state selects those treaties which it wishes to continue and regards the others as having lapsed. Third, a restricted number of treaties survive as a matter of law. The general policy adopted by new states appears to be to face problems as they arise. In practical terms, this means "continuity of treaty operation".

In the case of Malawi, that state had taken all the steps necessary to ensure municipal continuation. In this way, the court held, "continuity was ensured as also succession to the agreement". (258) South Africa, as the other party involved,

"at all times desired such continuity and succession, and accepted that there was such continuity and succession to the agreement. In the circumstances the conclusion is unavoidable that the agreement never lapsed despite the

dissolution of the Federation. There is thus no room for the contention advanced on behalf of the appellant that a new agreement had to be concluded in respect of which the formalities of sec. 2(3)(a) had to be complied with before the extradition agreement can be revived and brought into operation. The extradition agreement must, therefore, be regarded as still being of full force and effect".(259)

In effect, what the court did in this case was to recognise the essential nature of succession as an instrument for transferring existing rights and duties flowing from an international agreement and give effect to the intention of the parties, as, it is submitted, should have happened in the first *Eliasov* case.

In 1967, *Eliasov* was again before the courts, this time on appeal to the Appellate Division.(260) Here it was confirmed that as of the date of independence of Rhodesia, a valid international agreement indeed existed between the Republic and Rhodesia, although this agreement had no municipal application until proclaimed in the *Government Gazette* by the State President. (261) What the court attempted to do was to correct Hiemstra J's misconception that the existence of a valid international law treaty is dependent upon its municipal promulgation. Botha JA, delivering the judgment of the court, consequently concluded that:

"Though the agreement thus concluded with effect from the dissolution of the the Federation on 31st December 1963, constituted a valid international agreement with effect from that date, it only became of force and effect within the Republic as part of its municipal law with effect from the

25th June 1965". (262)

With all due respect, one must ask whether this judgment takes us any further in understanding the nature of succession and whether it in fact corrects the misconceptions arising from the first *Eliasov* case. The answer would appear to be in the negative for the following reasons.

What the court, quite correctly, stated in the appeal case is that the intention of the parties creates a valid international treaty. In this sense, the obvious flaw in the initial *Eliasov* case was corrected. However, problems arise when one comes to consider the content of this treaty. The judge himself stated that the treaty was concluded by the exchange of letters between the Rhodesian and the South African authorities. He furthermore expressly quoted the content of the Rhodesian letter to the effect that :

"...the *existing* extradition agreement...*should continue to apply* as between the Republic of South Africa and Southern Rhodesia". (263)

There can surely be no clearer statement of intent than this. The parties intended that the existing treaty should continue to operate and not that a new treaty should be concluded. Southern Rhodesia was thus making a declaration that it had succeeded to the treaty between the Federation and the Republic, it was not offering to conclude a new treaty.

In this light, the court's conclusion that prior to promulgation of the "new" treaty, there was no operative extradition agreement in force between the Republic and Rhodesia is, at least in theory, incorrect if this agreement is - as the court indeed claimed - based on the exchange of letters quoted above. As was pointed out above, if the parties intended the existing agreement to continue - if their intention was to effect a succession - no re-promulgation was in fact required.

In the previous paragraph it was stated that the judgment of the court was incorrect in theory. This was done advisedly. In all fairness, the intention of the South African authorities, although clearly in favour of the continued application of an existing treaty when the letters were exchanged and the agreement to succeed reached, had become somewhat blurred by the time the Appellate Division was faced by *Eliasov*. In the original *Eliasov* decision, Hiemstra J closed with the following statement :

"The conclusion is that we have at the present moment no extradition treaty with Rhodesia. That can be remedied by a presidential proclamation and the request for extradition can be renewed. The authorities could also act in terms of sec. 3(2) of the Act, which provides for the extradition of an accused or convicted person in cases where no extradition treaty exists. In such a case the State President need merely consent in writing".(264)

Clearly in accordance with the judge's advice, and possibly with the maxim "better safe than sorry" in mind, the South African authorities did both! (265)

Consequently, in the second *Eliasov* case, the appeal court was faced with conflicting messages. It had the clear intention of the parties in the exchange of letters which points clearly to succession. On the other hand, it had a certification from the State President in terms of section 3(2) of the Extradition Act which arises only in the event of South Africa and the requesting state having no extradition arrangements. Lastly, matters were still further complicated by the re-promulgation of the extradition agreement which points to the intention on the part of South Africa that a new treaty had been concluded. It is to be regretted that, having the decision in *S v Bull* (266) available, no mention was made of Boshoff J's dogmatically sound judgment. Although at that stage, the confusion in the courts had already spilt over into the actions of the South African authorities, a clear ruling on the nature of succession would have been helpful.

The next reported case to deal with extradition was *S v Pirzenthal*. (267) Pirzenthal, a South African national, had been convicted of fraud and theft in Beira, Mocambique and sentenced to six years' imprisonment. While serving his sentence, Pirzenthal escaped and fled to South Africa. Mocambique requested his extradition to serve the remainder of his sentence.

The governing treaty was the treaty concluded between Britain and Portugal in 1892.⁽²⁶⁸⁾ The question was consequently whether the Republic of South Africa had succeeded to the Anglo-Portuguese treaty. The question of succession was not considered at all. The court merely stated that the treaty was binding upon the Republic "under and by virtue of the provisions of sec. 2(4) of the Extradition Act 67 of 1962".⁽²⁶⁹⁾ The appeal against the extradition order was dismissed which can be seen as a confirmation of South Africa's succession to the 1892 treaty.

The extradition arrangements between the erstwhile Federation and the Republic were before the courts again in the *Devoy* cases. Malawi was again the foreign state involved. In *S v Devoy* ⁽²⁷⁰⁾ James JP (Harcourt J concurring) delivered judgment in the Natal Provincial Division on a decision by a magistrate ordering Devoy's surrender to Malawi officials to stand trial on charges of conspiracy to steal and theft of copper wire. The court had again to consider the continued existence of the treaty between South Africa and the Federation.

The court had before it a certificate from the Malawian Director of Public Prosecutions, countersigned by the Attorney-General, stating that from Malawi's point of view the treaty continued to exist, and a certificate from the South African Minister of Justice declaring that as far as South Africa was concerned, the treaty between the Republic and the Federation continued as a treaty between Malawi and South Africa. On the basis of the first *Eliasov* case, *Devoy*

contended that the treaty had ceased to exist on the attainment of independence by Malawi. The court pointed to Hiemstra J's contention that the treaty had ceased as "the natural and normal sequel" to the dissolution of the Federation. However, James JP found the fact that in *Eliasov* the court had acknowledged that treaties may be continued by conduct significant. (271) After due consideration of Boshoff J's analysis of the position in *Bull's* case, the court found itself in full agreement with that decision. In other words, Malawi had succeeded to the treaty operative between South Africa and the Federation.

It was further argued for Devoy that before it achieved independence Malawi did not have the power to recognise an extradition agreement made by the Federation. The court found this unconvincing. The certificate from the Minister of Justice showed that the South African authorities felt that Malawi had this power and their decision must prevail in such an instance. For the court, the recognition of Malawi's capacity was:

"a function of the Executive branch of government; it is a political act entailing legal consequences. Once that recognition has been granted by the Executive branch of any country it is not for the judicial branch to consider whether the recognition was competent". (272)

Finally, the court considered an interesting proposition which of necessity arises if the totally divergent approaches towards Rhodesia (as reflected in the *Eliasov* decisions) and Malawi (as reflected in the *Bull* decision) are taken into account. This is that

because the South African authorities had decided that in the case of Rhodesia a new treaty had been concluded, the same must necessarily hold true of Malawi as both dealt with a single treaty. The court did not regard this conclusion as axiomatic. In fact it questioned - albeit in subtle terms - the reasoning behind the South African authorities' decision to conclude a new treaty in the case of Rhodesia, in the following terms :

"I have little doubt that the South African authorities agreed to the suggestion of Southern Rhodesia that a new agreement should be entered into *simply as a matter of caution and international courtesy and not because it regarded the earlier agreement as no longer binding upon Southern Rhodesia*". (273)

The appeal was dismissed.

This was however, not the end of Devoy and in 1971 the matter came before the Appellate Division. (274) Ogilvie-Thompson CJ (Rumpff JA and Corbett AJA concurring) delivered the judgment of the court. He pointed out that two conflicting decisions exist in the Transvaal: *Eliasov* where the treaty with the Federation was held to have terminated; and *Bull* where the treaty with the Federation was held to have continued. After a thorough review of the authorities cited in both decisions, the court concluded that no general rule could be formulated and that each case should be judged on its particular facts. However, specifically in the case of extradition treaties, the court felt that "the existence of a general tendency

in favour of their continuance" (275) should also be borne in mind.

In assessing the continuation of a treaty :

"it is...a sound general working rule...to ascertain what was the intention of the State or States concerned as to the continuance or passing of any rights or obligations".(276)

Against this background, the court considered the continuation of the extradition agreement with the Federation yet again.

The judge found that Malawi had exhibited "a consistent and continuous" intention to be bound by the agreement. In the case of South Africa, the court had before it an executive certificate certifying that the treaty continued after Malawian independence. Ogilvie-Thompson JA found that :

"[I]n extradition cases a certificate from the Minister is an appropriate method of informing the Court of the Government's attitude. In the present case the Court accordingly accepts the certificate of the Minister as a statement of the matters therein mentioned".(277)

One of the points raised by Devoy was that the views expressed in the certificate with regard to Malawi, conflicted with the intentions of the government as reflected in its dealings with Rhodesia. Citing the provisions from the letters exchanged, Ogilvie-Thompson too found that the exchange of notes constituted "an express, new, contract" between South Africa and Rhodesia that as from the date of dissolution of the Federation, the extradition agreement would continue in force. He also appeared to have considered

re-promulgation in the *Government Gazette* crucial in the case of Rhodesia. (278) Again one experiences certain difficulties with these statements. The existence of the treaty is premised upon the fact of the exchange of letters, and the court was in fact correct in stating that it was dealing with a fresh new contract. However, problems again arise with the content of this "contract". If the content of the new contract was, as the court correctly found, the continuation of an existing and promulgated treaty, the need for its re-promulgation is somewhat of a mystery. The fact that the South African Department of Foreign Affairs would appear, in the confusion attendant upon the first *Eliasov* decision, unnecessarily to have decided upon the path of re-negotiation and re-promulgation of the treaty, should not affect the fact that, if one is dealing with the concept of succession - as the court in fact acknowledged - the treaty continued to exist. If the court was in fact judging the issue in the light of subsequent executive action - notably, re-promulgation - it should have made this clear.

It is interesting to note that the judge continued to state that :

"The fact that these notes were exchanged certainly lends colour to appellant's submission that, in the absence of any such Notes in regard to Nyasaland, the agreement lapsed upon the dissolution of the Federation...". (279)

In other words, the absence of the exchange of notes denoted an intention to terminate the treaty. This is the exact opposite of

Hiemstra J's finding in the first *Eliasov* case where he held that the exchange of notes had indeed resulted in the termination of the treaty! However, this approach would appear to cast some doubt upon the possibility of tacit consent to succession.

Ogilvie-Thompson CJ continued by pointing out that an exchange of notes between Rhodesia and South Africa, does not necessarily result in the termination of a treaty between Malawi and South Africa. Both parties had sought to maintain the agreement and as :

"[w]hat cannot be attained on the level of international customary law, can always be achieved by way of consent...[which is]...the safe road which...the practice of States has chosen", (280)

he found that the extradition agreement between Malawi and South Africa remained in force. In so doing he expressly confirmed the decision in *Bull* and although distinguishing *Eliasov*, declared that any contrary statements in that decision were incorrect.

What, then, is the conclusion to be drawn from these judgments regarding the approach of the South African courts to succession to extradition treaties? There are to my mind two distinct lines of thought emerging from the decisions. The one, epitomised by the decision in *Bull*'s case, is that where the true consensual nature of public international law is correctly perceived and borne in mind, and the concept of succession is recognised as an independent international law phenomenon, the judgment will reflect the true

intention of the parties and serve justice both internationally and municipally. The other, epitomised by *Eliasov*, is that where sight is lost of the basic precepts of international law and the nature of the concept of succession is misunderstood, confusion will follow. It is perhaps symptomatic of the complexity of succession that this confusion may spread from the courts to the executive as is clearly borne out by the latter's over-hasty and ill-conceived reaction to Hiemstra J's closing recommendations in the first *Eliasov* case - a judgment clearly based on a misconception, not only of international law, but also of the nature of succession.

Fortunately, the Appellate Division has restored the balance with the decision in the *Devoy* appeal and has again placed the question of succession in the correct perspective, viz "the safe road" of the intention of the parties involved. Succession in South African municipal law, is consequently in line with succession as reflected above in courts throughout the world.

4 SUCCESSION IN THE CASE OF NAMIBIA

Although Namibia is now an independent state responsible for its own international relations, including extradition, no consideration of succession in the southern half of the African continent would be complete without some mention of the position of Namibia. There are two compelling reasons for this. First, until the independence of Namibia, South African extradition treaties applied within South

West Africa as the territory then was. Second, as the newest member of the international community to acquire independence, the approach adopted by Namibia to succession to treaties is the latest reflection of international practice in this regard. (281)

Despite vociferous attacks on South Africa's administration of and authority to act internationally for the territory through the years, there is little doubt that South Africa was the *de facto* authority within the mandated territory (282) and that in practice an application for extradition emanating from one of the treaty parties, addressed to the administering authorities in South West Africa would have resulted (all things being equal) in the factual extradition of the offender.

With the attainment of Namibian independence on 21 March 1990, one of the major questions to be answered is what has happened to the treaties applicable within the territory before independence. In the Namibian Constitution (283) the question of international agreements is dealt with in article 143 titled "Existing International Agreements". This article provides :

"All existing international agreements binding upon Namibia shall remain in force, unless and until the National Assembly acting under Article 63(2)(d) hereof otherwise decides."

Article 63(2)(d), in turn provides that the National Assembly shall have the power, subject to the Constitution,

"to consider and decide whether or not to succeed to such international agreements as may have been entered into prior to independence by administrations within Namibia in which the majority of the Namibian people have historically not enjoyed democratic representation and participation."

The question arising is into which of the theoretical approaches to succession identified in this Chapter, Namibian practice may be slotted. As was pointed out earlier, the prevailing perception in the Succession Convention would appear to be the clean slate approach.⁽²⁸⁴⁾ If one examines the few new states which have in fact opted for this approach, a pattern can be discerned. In all instances the clean slate was adopted by states whose independence could be termed "hard earned", in other words their succession in fact was preceded by a long and often bloody struggle generating a certain measure of resentment which found expression in the rejection of the transactions of the former state. The acrimony characterising their successions in fact left no room for succession in law. Given the Namibian history, it could well have been expected that a similar reaction would have set in. However, at first reading, the provisions of the Namibian Constitution appear eminently reasonable and restrained. It indeed appears as a textbook expression of what was termed provisional succession above.⁽²⁸⁵⁾ In other words, on paper at least, Namibia has succeeded to all treaties applicable within the territory of South West Africa but retains the right to terminate these treaties after review.

The actual provisions in the Constitution, however, bear closer analysis. As regards section 143, two phrases in particular are

crucial. These are the phrase "existing international agreements", and the phrase "binding upon Namibia". The questions arising in this regard are first, what may be regarded as an existing international agreement and second, what may be regarded as an agreement binding on Namibia. Our first task is consequently to attempt a classification of the treaties purportedly applying within South West Africa on the date of its transition to independence as Namibia. As Szasz points out, an exhaustive classification has been made by the United Nations Institute for Namibia.⁽²⁸⁶⁾ This body classified the treaties in five categories.

Category A encompasses treaties concluded on Namibia's behalf by the United Nations Council for Namibia from its inception in 1967 to independence in 1990,⁽²⁸⁷⁾ and certain multilateral humanitarian treaties entered into by South Africa and extended to Namibia before the termination of South Africa's mandate over the territory in 1966.⁽²⁸⁸⁾ For our purposes, this category need not be further considered as no extradition treaties fall within its ambit.

Category B consists of treaties extended to Namibia by South Africa before 27 October 1966 and in force on that day. Treaties containing continuing provisions or which have not been terminated - although operations under the treaties may have ceased on the above date - are also included. It is within this category that most extradition treaties may be classed - although such a classification is not without problems. Szasz⁽²⁸⁹⁾ considers whether succession is possible in regard to these treaties. One of the consequences of

the 1971 Advisory Opinion was that as regards Namibia, states were called upon not to deal with South Africa, and in particular, not to invoke or apply bilateral treaties involving "active intergovernmental cooperation".⁽²⁹⁰⁾ Clearly extradition treaties would fall squarely within this definition. Such treaties should be regarded as "terminated on the ground that they are in conflict with a peremptory norm of international law".⁽²⁹¹⁾ Although it was conceded that Namibia could elect to succeed to these treaties, this would be "inconsistent with UN policy towards Namibia".⁽²⁹²⁾ Szasz points out, however, that a sounder legal argument is that because the United Nations resolutions on Namibia after 1966 (interpreted in the light of the 1971 Advisory Opinion) call only for the suspension, and not the termination of these treaties, they in fact remain "existing international agreements" binding in Namibia at the date of independence. This approach is strengthened by the fact that the reason for their suspension - protest at South Africa's illegal administration of the territory - fell away on attainment of independence.

Secondly, Szasz points to the argument that because South Africa was expressly not regarded as Namibia's predecessor at the 1977 Conference to the Succession Convention, it should not now be so regarded.⁽²⁹³⁾ However, as these are political statements made at a time when Namibia was struggling to achieve independence they should be assessed in the light of the approach adopted in the Namibian Constitution which represents the only Namibian "statement" on succession to date.⁽²⁹⁴⁾ In this light, the concrete approach

advocated in the Constitution should take precedence over earlier political rhetoric.

Lastly, the argument is raised that between the dissolution of the League of Nations and the termination of the mandate, South Africa was claiming to act under the mandate but refusing to act in accordance with the mandate. Internationally, its actions were consequently illegal and to recognise such acts would be to legitimise them *ex post facto*. However, as Szasz points out, (295) this argument does not mean that the treaties did not exist on independence.

Category C encompasses treaties extended to Namibia by South Africa before the termination of the mandate but which had themselves been terminated before 27 October 1966. These present few problems as they are clearly not treaties applicable within Namibia on independence.

Category D consists of dispositive, localised or territorial treaties which are regarded as applicable within Namibia. However, as it was established early on in this Chapter that an extradition treaty cannot be classed as localised, dispositive or territorial, this category too is of no concern for present purposes.

Category E is the final category and encompasses treaties which South Africa extended to Namibia after the termination of the

mandate. From the international perspective these treaties are in violation of international law and cannot be regarded as valid international agreements as envisaged in section 143.

What conclusions are to be drawn from the above categorisation of treaties, particularly with regard to extradition? First it is clear that categories A and D find no application as no extradition treaties fall within their ambits. Second, as regards category C, there are a number of extradition treaties extended to Namibia which fall within this category. These are the British extradition treaties with, for example, Denmark, (296) Paraguay, (297) and Germany. (298) However, as these treaties were terminated before Namibian independence, it may safely be assumed that they do not qualify as treaties applicable within Namibia at the date of independence. Third, as regards category B, it is here that the majority of the extradition treaties may be classified. However, from a technical point of view, it should be noted that the UNIN classification provides only for treaties extended to Namibia "by South Africa". Certain problems arise with this classification in that, specifically as regards extradition, far and away the majority of the treaties which may be grouped under this head were in fact extended to Namibia by Britain and not by South Africa. Consequently the applicability of a number of the arguments reflected by Szasz, particularly those premised on the illegality of South African actions in respect of the mandated territory, may be open to question. It has been pointed out elsewhere that the validity of a treaty should be judged within its own time-frame (299) and at the

time when the majority of the extradition treaties in question were accorded application within South West Africa, there would have been no objection to such action - particularly not when such extension was common practice in Britain and other Imperialist countries. It is consequently submitted that there should be no objection to regarding British extradition treaties extended to Namibia as existing international agreements binding upon Namibia at the date of independence.

However, within this category one also encounters extradition treaties concluded independently by South Africa before it became a Republic but after it acquired adequate treaty-making capacity, and treaties concluded by South Africa after 1961 and applicable within Namibia on termination of the Mandate in 1966. In this regard it should be noted that the South African Extradition Act 67 of 1962, includes in article 1 under the definition of the Republic "the territory of South West Africa". Consequently, treaties concluded by South Africa after the adoption of the Extradition Act and while the Republic's mandate over South West Africa had not yet been revoked also fall within the classification of treaties applicable within the territory at date of independence.

As regards category E, it may be assumed that the extension of any extradition provisions to South West Africa between the termination of the mandate in 1966 and the attainment of independence in 1990 was invalid from an international point of view and that these were

not "international agreements binding upon Namibia" as required by section 143 of the Constitution.

In light of the above, extradition treaties with the following countries may be classified as "existing international agreements" to which Namibia may be taken to have succeeded in terms of section 143 of its independence Constitution. The countries are listed chronologically in accordance with the date of extension of the relevant treaties to South West Africa/Namibia.

British extradition treaties with the following countries were extended to South West Africa by British action : Netherlands, (300) Luxembourg, (301) Spain, (302) Greece, (303) Austria, (304) Yugoslavia (Serbia), (305) Hungary, (306) Norway, (307) Roumania, (308) Liberia, (309) Nicaragua, (310) Peru, (311) Chile, (312) Haiti, (313) Panama, (314) Siam, (315) Bolivia, (316) Belgium, (317) Guatamala, (318) Switzerland, (319) Cuba, (320) El Salvador, (321) Monaco, (322) Ecuador, (323) and Portugal. (324)

Union extradition treaties extended to South West Africa :
United States of America (325) and Israel. (326)

South African extradition treaties extended to South West Africa before termination of the Mandate : Federation of Rhodesia and Nyasaland (327) and Southern Rhodesia. (328)

Having identified the extradition treaties to which Namibia may be said to have succeeded, it must be emphasised, however, that this succession must be regarded as provisional. Section 63(2)(d) of the Constitution provides the tools by which a review of these treaties is to be conducted and their termination effected. In this section the phrases "administrations within Namibia" and "the majority of the Namibian people have historically not enjoyed democratic representation and participation" require closer attention. Although we have already established that category A treaties are not concerned with extradition, it is interesting to note that a strong case can be made out for these treaties not falling within the ambit of section 63(2)(d) in that the Council for Namibia was never an "administration within Namibia" operating as it did at all times outside of the country. In fact, it would appear that only South Africa and the various organs created by the South African government to administer the territory at various stages qualify as such administrations. It is consequently the treaties concluded by these bodies which are liable to review and repudiation. What then, one may well ask, of the extradition treaties extended to the territory by British action? Unless one is to work with agency, or some related concept, Britain cannot realistically be regarded as ever having established an "administration within Namibia". This is borne out to some extent by the UNIN's exclusive mention of South Africa in its treaty categorisation. Does this mean that the extradition treaties applicable by British action are in a similar position as category A treaties concluded by the Council for Namibia, in other words that they must be succeeded to?

On the other hand, the qualification of these administrations as those "in which the majority of the Namibian people have historically not enjoyed democratic representation and participation", casts the net extremely wide. The clear intention of the drafters of the Constitution was that the people of Namibia should not be bound by treaties which they find unacceptable and which they had no part in making. Furthermore, the general desire of Namibia to run its affairs in accordance with international law (329) suggests that in the decision as to whether or not a particular treaty should be subject to consideration for termination should be one acceptable in terms of the "general rules of public international law" as enunciated in article 144 of the Constitution. It would appear that the prevailing sentiment in international law as regards the succession of new states to treaties is the clean slate (330) and consequently that a mere technicality as to who was responsible for the extension of a treaty to Namibia should not stand in the way of the National Assembly cleaning its slate of treaties which it finds unacceptable. Support for this view may be found in the first Namibian judgment to deal with succession. In *Mwandingi v Minister of Defence Namibia*, (331) the Acting Judge President of Namibia, Justice Strydom, found - although not within the context of succession to treaties - that an interpretation of the Namibian Constitution called for "a generous interpretation avoiding...the austerity of tabulated legalism". (332) Consequently, it is submitted that under the provisions of article 143 of its constitution, Namibia has succeeded to the treaties listed above. However, under the provisions of article 63(2)(d) these treaties may

be reviewed by the National Assembly and either continued or terminated.

To date Namibia has made no general declaration as to which treaties it regards as having been succeeded to and which not. As was pointed out earlier, (333) extradition is not generally perceived as a matter of pressing urgency by newly independent states. However, it is interesting to note that Namibia would appear to be somewhat of an exception in this regard. An application from the Namibian government for the extradition from South Africa to Namibia of three men wanted, *inter alia*, on charges of murder, is currently before the Johannesburg Magistrate's Court. As there is no extradition treaty between the two states, (334) the matter is being dealt with in terms of section 3(2) of the South Africa Extradition Act 67 of 1962 which empowers the State President of South Africa to certify that the person whose extradition is sought, is a person liable to be extradited. At the time of writing the extradition hearing has again been postponed due to the ill health of the three potential extraditees.

Although there have as yet been no cases before the courts dealing with succession to treaties generally, or extradition treaties in particular, there has indeed been a case dealing with succession. In *Mwandingi v Minister of Defence, Namibia* (335) the question before the court was whether Namibia had succeeded South Africa in delictual liability for injuries suffered by Mwandingi at the hands of the South African Defence Force prior to Namibian independence.

The court found in favour of Namibian succession, despite a general perception in international law that the delictual liability of a predecessor state is not succeeded to by the new state. (336)

Although this does not impact directly on treaty succession, and succession to extradition in particular, it does show that the general willingness to accept succession evident from the Namibian constitutional provisions, is carried through in practice. If Namibia is to succeed to onerous "duties" which in terms of general international law it is under no obligation to do, how much more readily will it not be prepared to succeed to extradition provisions which place no undue burden on the state?

In conclusion therefore, the following points should be noted.

First, Namibia has concluded no specific devolution agreement with South Africa as the erstwhile *de facto* government of the territory. The question of treaty succession should consequently be decided on the basis of general principles of international law which in terms of the Namibian Constitution form part of the law of Namibia. (337)

Second, Namibia has not acceded to the Succession Convention and the principles embodied in that document will consequently find no direct application within the Republic. The clean slate approach advocated for new states by the convention (338) and encouraged by the United Nations Council for Namibia (339) is consequently also not necessarily binding on the independent state. Namibia has chosen, as its initial reaction to treaties concluded by its predecessors or extended by them to the territory, the more realistic approach of provisional succession. The Namibian courts,

in the only case to date to deal with succession, have adopted a view which supports succession. It is consequently submitted that Namibia has succeeded to the extradition provisions extended to the territory of South West Africa by both Britain and South Africa from the inception of the mandate to its termination by the International Court of Justice. In fact, in view of the decision in *Mwadingi* Namibia could well be said to have succeeded to South African treaties after 1966. Although Namibia retains the right to terminate any of these treaties, as far as could be established this has not to date been done. Further, it would appear that extradition is a topic which is receiving the attention of the new government in that a formal extradition treaty with South Africa, drafted along traditional lines, is purportedly ready for signature. At present, however, the uncertainty surrounding the extradition of the three individuals sought by Namibia, would appear to be holding up its formal signature.

5 CONCLUSION

The acquisition of treaty rights and obligations should be approached on two levels : firstly, original acquisition in terms of which the state acquires its rights directly from the other contracting party or parties; and secondly, derivative acquisition - which may also be termed state succession - where the party acquiring the rights and duties is not a party to the original treaty.

In the case of South Africa's right or duty to extradite based on treaty, both original and derivative acquisition come into play. Under original acquisition three distinct "groupings" may be identified. These are first, treaties concluded by South Africa before it became a Republic but after it had acquired a measure of independent treaty-making capacity. Second, are all extradition treaties concluded by the Republic after 1961. Third, are the extradition treaties concluded between South Africa and the TBVC states. These treaties are *sui generis* in the sense that they are premised upon actions not recognised by the international community. Consequently, from the international perspective these treaties enjoy no international viability, although within the South African municipal sphere they are regarded as creating binding international rights and duties to extradite.

Derivative acquisition of the right or duty to extradite within the South African context, is highly relevant as it accounts for South Africa's claim to be bound by the extradition treaties concluded by Britain with virtually all the leading countries of the world. South Africa claims to have succeeded to these rights and in order to assess these claims a close examination of the concept and process of state succession is required.

An evaluation of succession demands that a number of questions be answered. First it must be established whether the treaty in question is susceptible to succession. In answering this question in the context of extradition, it was found that an extradition treaty

is neither dispositive nor truly personal but a hybrid of the two. In principle, there would appear to be no inherent characteristic in the nature of an extradition treaty which would bar succession by one state to an extradition treaty concluded by another. On the other hand, there is no inherent characteristic which would render succession to extradition treaties automatic. Consequently, extradition treaties are open to succession.

The second question flowing from this answer, is by what action this succession may be effected. This is in fact a complex issue which must be approached in various stages. First, the act giving rise to succession must be characterised. In this process - which is termed "succession in fact" - the act giving rise to a change in sovereignty must be evaluated to determine whether the resultant entity is one which is capable of succeeding to treaties. In this phase of the examination, three potential "successions in fact" are examined. These are annexation and cession; Commonwealth devolution agreements; and dismemberment or partition.

Although annexation is no longer regarded as a valid means for changing sovereign authority, these changes and the resultant potential for succession must be judged in terms of the time-frame of the event. It was established that a general rule exists that the treaties of the annexed or ceded state cease to exist and those of the annexing state apply within the territory. The reason for this is that the former state ceases to exist and is consequently not in a position to act in terms of the treaty. The act which gives rise

to the potential of succession, is consequently not a true "succession in fact".

In the case of devolution agreements, the evaluation of the success or otherwise of the succession in fact can be judged only by having account of the attitudes of the third states involved. The touchstone is consequently the consent of the parties. It is here that an evaluation of succession as an international law process is required. Unless it is recognised that consent within the succession scenario is not consent to a new treaty, but rather evidence of the intention of the parties, problems arise. A clear vision of what the parties to the devolution agreement are consenting to must be maintained at all times. The parties are consenting, not to the conclusion of an extradition treaty, but to the continuation of an existing treaty. This consent, which may be either express or tacit, serves as a catalyst which brings the principles of succession into operation. Because consent is merely evidence of the intention of the parties, no general rule with regard to succession in the case of devolution agreements can be established. The existence of a valid "succession in fact" depends on the attitude of the parties involved.

In the case of dismemberment and secession, the general rule established is that in the case of secession the treaties of the mother state apply automatically to the new territory. In the case of dismemberment, no general rule can be established and the

principles identified with regard to devolution apply with equal force.

Once it has been established that a valid "succession in fact" has occurred, the way is open for "succession in law". Whether this succession in law is in fact realised, depends again on the consent of the parties involved and this can be established only by an examination of the facts surrounding the specific problem in issue.

An examination of state practice and international judgments reveals that views are evenly split between succession and non-succession, again with consent as the touchstone.

These principles are then applied to the various possible succession scenarios occurring within South Africa throughout its history. The point is reached where all the relevant British extradition treaties are found to have applied within the individual territories of Cape of Good Hope, Natal, Orange Free State and Transvaal. These in turn found application within the Union of South Africa in 1910 and the Republic in 1961.

Succession in the case of the TBVC states requires special consideration and the conclusion reached is that there was in these cases no valid succession in fact and that internationally, ie as far as the international community - the third parties in a succession arrangement - is concerned the question of succession in law does not arise.

In the South African courts, succession has had a chequered history. Confusion surrounding succession as an international law process and the true role of consent in this regard has led to patently incorrect and contradictory judgments. Although in effect, this has been remedied, dogmatically the position is not as clear as could be wished.

For the sake of completeness, the position of Namibia, as a territory in which all South African extradition treaties applied and one of the newest states to gain independence, is also considered, and the applicable extradition treaties are identified.

ENDNOTES : CHAPTER IV

- 1 Vienna Convention on the Law of Treaties 1969 in Brownlie (1972) 233ff. The convention has been in force since British accession in 1980 and although South Africa is not a party, it adheres to the principles which are generally regarded as a codification of customary public international law - see Booyesen (1989) 34 n 11.
- 2 As was determined in Chapter II above, in the South African context the term "state" should be given a more fluid interpretation. The question is rather which entity exercises sovereign rights - including the right to conclude treaties - over a particular territory. Within the saga of Colonial expansionism, certain territories which today form part of South Africa, indeed had a measure of treaty capacity. After 1961 the problem is purely academic as, despite occasional references to the South African "regime", the capacity of the South African government to act internationally for the territory is not seriously questioned.
- 3 For signature, see article 12(1)(a) and (b); for exchange of instruments, see article 13(a) and (b); for ratification see article 14(1)(a) - (d); and for acceptance article 14(2). Article 15 deals with accession - see below.
- 4 As was pointed out above, South Africa has a strong bilateral bias when it comes to extradition treaties. However, as was also noted above, the international trend would appear to be towards multilateral extradition provisions - whether in specific extradition agreements or other instruments of international cooperation which merely include extradition procedures in their provisions.

- 5 See Chapter II 110 and the authorities cited there.
- 6 Treaty for the Extradition of Criminals between the United Kingdom and Czechoslovakia concluded at London 11.11.1924.
- 7 Treaty between Finland and the United Kingdom for the extradition of Criminals concluded at London 30.5.1924.
- 8 In the case of Finland by article V GN 1677 *Government Gazette* of 29.9.1925; and in the case of Czechoslovakia by GN 26 *Government Gazette* 6.1.1928.
- 9 South Africa here means South Africa as a unitary state - ie as Union after 1910 and Republic after 1961. The status of the treaties concluded by the Boer Republics during their brief periods of independence is essentially a problem of succession and will be dealt with in the following section.
- 10 Ratified at Washington 1.3.1951, GN 91 *Government Gazette* 20.4.1951.
- 11 Ratified at Pretoria 7.1.60 GN R14 *Government Gazette* 6362 of 5.2.60.
- 12 See the Introduction (Chapter I) where the nature of extradition as an international act is examined.
- 13 This list represents all the extradition arrangements made by the Republic since independence. The interrelation between the various treaties and their continued validity will be considered in Chapter V.
- 14 Extradition Treaty concluded between the governments of the Republic of South Africa and the Federation of Rhodesia and

Nyasaland on 19.11.1962 *Government Gazette* 445/1962; *SATS* 9/1962.

- 15 On 23.12.1962 notes were exchanged between the governments of the Republic of South Africa and Southern Rhodesia to ensure the continued operation of the treaty concluded with the Federation of Rhodesia and Nyasaland - n 14 above - *Government Gazette* 1156 of 25.6.1965.
- 16 Extradition treaty between the governments of the Republic of South Africa and the Kingdom of Swaziland concluded on 4.9.1968; *SATS* 2/1969.
- 17 Treaty of Extradition concluded between the governments of the Republic of South Africa and Botswana on 27.2.1969; *SATS* 2/1969.
- 18 Treaty of Extradition between the governments of the Republic of South Africa and Malawi on 25.2.1972; *SATS* 1/1972.
- 19 The Extradition treaty concluded between the states on 18.9.1957 - see n 11 above - was amended on 2.5.1976; *SATS* 1/1976.
- 20 Extradition treaty concluded between the governments of the Republic of South Africa and Transkei on 2.11.1977 - *Government Gazette* 5813 of 25.11.1977. This treaty has been superceded by the Extradition Treaty concluded between the governments of the Republic of South Africa and Transkei of 1987.
- 21 Extradition Treaty between the governments of the Republic of South Africa and Bophuthatswana concluded on 15.11.1977 - GN R375 *Government Gazette* 5846 of 30.12.1977. This treaty has been superceded by the Convention on Extradition

concluded between the Republic of South Africa and the governments of Bophuthatswana, Ciskei and Venda on 20.11.1986.

- 22 Extradition treaty between the governments of the Republic of South Africa and the Republic of Venda concluded on 13.8.1979 - *Government Gazette* 6652 of 12.9.1979. This treaty has also been superceded by the Extradition Convention n 21 above.
- 23 Extradition treaty between the governments of the Republic of South Africa and the Republic of Ciskei concluded on 4.12.1981 - *Government Gazette* 8204 of 14.5.1982. This treaty has also been superceded by the Extradition Convention above.
- 24 Convention on Extradition concluded between the governments of the Republic of South Africa, the Republic of Bophuthatswana, the Republic of Ciskei and the Republic of Venda at Pretoria on 20.11.1986 - *Government Gazette* 7/1988 of 5.2.1988 (Venda).
- 25 Treaty of Extradition concluded between the governments of the Republic of South Africa and the Republic of China concluded at Taipei 30.12.1987 Proc 83 *Government Gazette* 11316 24.5.1988.
- 26 The term state succession has been surrounded by considerable controversy based largely on the equation of the public law entity "state" with the private law "natural person". See eg, Starke (1989) 321; O'Connell (1967); Udokang (1972) 121ff; Poulouse (1974) 5ff; Jones (1947) 360ff. For present purposes, however, semantics will take second place and the term will be used.
- 27 Poulouse (1974) 8.

- 28 It was established above that there is no international law duty to extradite in the absence of a commitment, whether in the traditional form of a bilateral treaty, the more recent multilateral treaty, or a reciprocal undertaking to extradite. The state of course retains the right to extradite should it so elect and provided its municipal law contains no bar to extradition. When one talks of succession with regard to extradition within the South African context this can mean only succession to an extradition treaty.
- 29 See Chapter III 172 above.
- 30 See eg, Poulou (1974) 2 ff; Harvard Research 1076; De Muralt (1954) where a concise review and assessment of various writers' views is given; Udokang (1972) 121; Jenks (1952) 119 where it is stated that "In the standard books there are abundant traces of uncritical repetition, and the doctrine can be attacked as juristically faulty and historically inaccurate".
- 31 Vienna Convention on Succession of States in Respect of Treaties adopted by the United Nations Conference on Succession of States in respect of Treaties on 22 August 1978 - UN GA A/Conf 80/31 reproduced in 1978 *ILM* 1488 - 1517 (hereafter Succession Convention).
- 32 Part I, General Provisions, article 1(b). The same definition is used in the second document to emerge from the United Nations' Conference, viz The Vienna Convention on the Succession of States in respect of State Property, Archives and Debts of 23 August 1978 - art 2.
- 33 Article 49, Part VII, Final Provisions, provides that the Convention will enter into force thirty days after the

deposit of the fifteenth instrument of ratification or accession - which has not yet been achieved.

- 34 Part I article 7 headed "Temporal application of the present Convention". The article however provides further that the parties may agree otherwise (art 7(1)). Article 7(2) provides that a state may when acceding to the convention or thereafter, declare that the provisions of the Convention will apply between itself and any other state which makes a declaration accepting its declaration. Article 7(3) provides for provisional application of the convention provisions between a successor state which declares that it will apply the convention and a state accepting such a declaration. Article 7(4) provides that all the relevant declarations shall be made in writing.
- 35 See eg, Booyen (1989) 259-260.
- 36 Menon (1970) 461.
- 37 O'Connell (1967.1) 4.
- 38 Udokang (1972) 122ff discusses this theory briefly. Notable among its adherents are Grotius (1948) Bk ii chap 9 and 10; De Vattel (1959) Bk II chap 12.
- 39 The attitude of states to extradition is generally somewhat laconic as is evidenced by the New Zealand response to South African requests for the conclusion of an extradition treaty between the countries. New Zealand, while at that stage having no objection in principle, did not regard extradition proceedings "as a matter of urgency" - JF 1/554/20/48. No treaty was concluded and when the matter was again raised during 1976, the New Zealand government felt that there was "no practical need for such a treaty with South Africa" -

Letter dd 6.7.1976 JF 9/2/11 (New Zealand). The treaty with Sweden lapsed in 1952 when Sweden declared that all her treaties would lapse subject to a general review of foreign policy. No new treaty was concluded. On the other hand, a different approach has been evident from Namibia, the latest of the international community's "new" states, in that within a short period after independence the Namibian authorities raised the need for extradition arrangements with the Republic. As far as could be ascertained no such relations have yet been established - see *The Pretoria News* 4.6.1991 at 2.

- 40 O'Connell (1967.1) 4. Algeria, too, when it eventually obtained independence in 1962 after a bitter struggle lasting some eight years chose not to be bound by any French treaties. On 19 April 1962 Upper Volta also declared in a letter to the United Nations that it would not be bound by treaties concluded by its predecessor, France.
- 41 Part III, Newly Independent States, provides "A newly independent state is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates."
- 42 International Law Assoc (1965) 388. This declaration is based on the so-called Nyerere Doctrine which became the credo for African succession to treaties. For a discussion of the doctrine see O'Connell (1967.1) 116ff.
- 43 1971 AC 182, an appeal from the Lesotho Court of Appeal.
- 44 The Convention Relating to the Status of Refugees was concluded in Geneva on 28 July 1951 and extended to Basutoland (as Lesotho then was) as from 9 February 1961.

- 45 Letter dated 22.3.1967 from the Lesotho Prime Minister to the Secretary General of the United Nations. At 193 of the judgment.
- 46 At 194A of the judgment.
- 47 At 194C of the judgment.
- 48 O'Connell (1967.1) 1.
- 49 O'Connell (1967.1) 5. This statement is, of course, contradicted by Union practice as was pointed out above (see nn 6-8). However, it must be conceded that the position within the older Commonwealth Dominions, was to an extent *sui generis*.
- 50 Starke (1989) 328. See too, Verbit (1966) 119.
- 51 Hoijer cited by O'Connell (1967.1) 1 n 2.
- 52 Bassiouni (1974) 17-18.
- 53 Shearer (1971) 45-51.
- 54 The term "dispositive or real treaty" has been the subject of considerable rhetoric and is a typical example of semantics taking up time and energy which could better have been spent on principle. First used by Westlake (1904) 60-62, it is the term preferred by O'Connell (1967.1) particularly 15 where he defends his preference. However, see O'Connell (1970) 191 for his latest views. McNair (1961) 655 prefers the term "treaties creating local obligations", while Lester (1963) 489, uses the term "localised treaties". See too, Udokang (1972) 325 ff.
- 55 PCIJ Ser A/B No 46 145.

- 56 ICJ Rep 1960 6.
- 57 (1967.1) 14.
- 58 McNair (1961) 657 cites a report from the Queen's Advocate setting out the position with regard to United States' succession to a treaty between Britain and Russia with regard to the cession of certain Russian territory in the United States. He found the the United States succeeded to treaty provisions "so far as the geographical limits of the ceded territory are concerned."
- 59 See O'Connell (1967.1) 17 ff, but see too, the call by Udokang (1972) 350 for a careful re-evaluation of the position in the light of Afro-Asian practice. See too, Booysen (1989) 210-212.
- 60 See Oppenheim (1955) 159 where this distinction is emphasised. See too O'Connell (1967.1) 1ff; Kelsen (1967) 418 n 111; and Udokang (1972) 329.
- 61 O'Connell (1967.1) 3. See too, *Rex v Abdul Hasan India* High Court Allahabad 22.12.1949; case no 105 (1951) 18 *ILR* 332.
- 62 Hurst (1921-2) 37.
- 63 McNair (1961) 698.
- 64 O'Connell (1967.1) 1.
- 65 Jones (1947) 360.
- 66 Jones (1947) 360.
- 67 Jones (1947) 360.

- 68 Jones (1947) 361.
- 69 Jones (1947) 361, for example, categorises these as cession, annexation, fusion, federation, dismemberment or partition, and separation or secession. O'Connell (1967.1) covers much the same ground although he groups the acts somewhat differently. See too, McNair (1961) 587ff.
- 70 O'Connell (1970) 103.
- 71 See Akehurst (1987) 148; Wallace (1986) 85ff; Booyesen (1989) 195ff; Starke (1989) 166.
- 72 Oppenheim (1955) 547; Akehurst (1987) 144; Wallace (1986) 87; Booyesen (1989) 188; Starke (1989) 167.
- 73 As the basis of annexation is to be found in force, and force is no longer valid in international law, the basis of annexation has fallen away. The prohibition on the use of force by states is one of the few international principles which can be seen to have acquired the status of *ius cogens* as defined in article 53 of the Vienna Treaty Convention. Article 2(4) of the Charter of the United Nations is the best-known embodiment of this principle, but it has of course been enunciated on many occasions both before and after the adoption of the Charter - notably the Kellogg-Briand Pact of 1928, and article 10 of the Covenant of the League of Nations. Even an apparently valid acquisition based on force - in terms of the self-defence provisions of article 51 of the Charter - is no longer accepted internationally as is illustrated by the condemnation of Israel's annexation of the West Bank - see SC Res 242 (XXII) SCOR 22nd Yr of 22.11.1967.
- 74 Article 6 of the Succession Convention. As the use of force is clearly not "in conformity with international law" and is

clearly in violation of article 2(4) of the Charter, such "succession in fact" would be invalid.

- 75 Akehurst (1987) 152. See too, Wallace (1986) 84 and the *Island of Palmas* 2 RIIA 829 (1928), and *Western Sahara* 1975 ICJ Rep cases respectively.
- 76 See Jones (1947) 362; McNair (1961) 589; and O'Connell (1967.1) 3.
- 77 Jones (1947) 362 states that "according to a practice which is so consistent and extends over so long a period as to raise an irresistible presumption of law" the treaties of ceded or annexed states are abrogated automatically. McNair (1961) 592 states that "the treaties to which the extinct state was a party lapse and come to an end".
- 78 Report of the Kings Advocate 14.12.1830 in McNair (1961) 593. See too, O'Connell (1967.1) 28.
- 79 McNair (1961) 593; O'Connell (1967.1) 31.
- 80 McNair (1961) 596; O'Connell (1967.1) 31-34.
- 81 McNair (1961) 597.
- 82 Declaration by the Japanese Government on 29.8.1910 in McNair (1961) 599.
- 83 McNair (1961) 600.
- 84 O'Connell (1962) 85.
- 85 O'Connell (1962) 87. Although O'Connell concentrates his examination on the practices of Australia, New Zealand and Southern Rhodesia, the reason for this should be sought

in his Australian background rather than in any principle distinction between these Dominions and the Union of South Africa's move towards republican status. As was seen in Chapter II above, the process within the Union followed the same path.

- 86 O'Connell (1962) 90ff; O'Connell (1970) 125; Udokang (1970) 132-3.
- 87 O'Connell (1962) 113.
- 88 O'Connell (1962) 118.
- 89 McNair (1961) 340. The feature distinguishing novation from assignment, is that in the case of the former the consent of all three states is required.
- 90 McNair (1961) 340-2.
- 91 Mann (1953) 475 states that "It is, of course, clear that there are many treaties in connection with which it would be unthinkable to treat rights arising from them as assignable...[R]ights to the extradition of criminals [are an example where] there cannot be any question of an assignment."
- 92 McNair (1961) 341. Rights arising from dispositive treaties, so-called localised rights which "run with the land" are the one exception as it is generally agreed that they devolve automatically.
- 93 McNair (1961) 341-2.
- 94 McNair (1961) 341 points out that this is possible only in the case of impersonal duties arising from a treaty "so that it could not matter to the other State party to the

treaty who performed that duty so long as it was performed". This requirement would not appear to apply to extradition treaties where the subjective judgment of the states is involved.

- 95 See *SS Lotus* 1927 PCIJ Ser A No 10 (2WCR) 20. O'Connell (1967.1) 365-6 claims that there "must surely be a presumption that the parties intended the treaty to be performed by the predecessor state only so long as it was territorially able to perform it". Booyesen (1989) 263 applies this principle to succession to extradition in the case of the TBVC states.
- 96 *Reservations to the Genocide Convention* 1951 ICJ Rep.
- 97 O'Connell (1967.1) 356.
- 98 *Lansana and Eleven Others v Reginem Sierra Leone* Court of Appeal 11.5.1971, 70 *ILR* 2.
- 99 At 4 of the judgment.
- 100 At 4 of the judgment.
- 101 Article 31(1) of the Vienna Treaty Convention.
- 102 Jamaica Supreme Court 1.12.1976; 73 *ILR* 44 48.
- 103 See article 25 of the Succession Convention.
- 104 See 298 above.
- 105 See the *Eliasov* decisions discussed below.
- 106 Jones (1947) 360.

- 107 Lester (1963) 110.
- 108 Jones (1947) 366.
- 109 Keith (1907) 19; Jones (1947) 366.
- 110 Udokang (1972) 413.
- 116 Udokang (1972) 414.
- 112 Jones (1947) 373.
- 113 See the discussion of dispositive treaties in the text accompanying nn 54-59 above.
- 114 Jones (1947) 373.
- 115 Article 34(2)(a) and (b) respectively. Article 35 deals with the position of the predecessor state which continues to exist after the separation of the successor state. All treaties applicable at the time of succession will continue within the remaining territory unless otherwise agreed (art 35(a)); the treaties applied only to the territory which has become independent (art 35(b)); or the continuation of the treaty would be incompatible with the object or purpose of the treaty or would radically change the conditions for its operation (art 35(c)). Article 36 covers treaties not in force at the time of succession; and article 37 treaties signed by the predecessor subject to ratification, acceptance or approval.
- 116 See above 281.
- 117 O'Connell (1967.1) 97.

- 118 Udokang (1972) 413.
- 119 O'Connell (1967.1) 99.
- 120 Udokang (1972) 415.
- 121 Udokang (1972) 422.
- 122 Udokang (1972) 421.
- 123 Udokang (1972) 421 and 432.
- 124 Udokang (1972) 436.
- 125 Udokang (1972) 438.
- 126 1887 3 QBD 42.
- 127 For a full discussion of the case see Udokang (1972) 445-7.
- 128 Netherlands Supreme Court 31.8.1972; 73 *ILR* 38ff.
- 129 At 40 of the report.
- 130 Jamaica Supreme Court 1.12.1976; 73 *ILR* 44.
- 131 At 46 of the report.
- 132 At 46 of the report.
- 133 At 46 of the report.
- 134 At 47. The unreported case of *Ex Parte McGann* Supreme Court M 29/71 , and *Ex Parte Fitz Henry* 1976 Supreme Court M 16/76 - see below.

- 135 At 47 of the report.
- 136 At 48. The court cited with approval Lord Atkin's finding in *Chung Chi Cheung v R* 1939 AC 168 where it is clearly stated that customary international law could be regarded as part of municipal law except where it conflicts with statute law or precedent.
- 137 See too, *Government of the United States of America v Bowe* 1989 3 WLR 1256 where the decision in *Schwartz* was approved on this point although the case was distinguished on another point.
- 138 Jamaica Supreme Court 1.10.1976; 72 *ILR* 63.
- 139 At 65 of the report.
- 140 At 66 of the report.
- 141 Notable among these arguments was the claim that at the stroke of midnight on the day on which Jamaica attained independence, all treaties concluded by the predecessor ceased (see the *Schwartz* case above n 130). The judge was exceptionally acerbic in dealing with this viewpoint. Declaring that if he had not heard the arguments raised, he would have doubted whether they could have been propounded at all, the judge found them tainted with "academic fragrance" rather than reality. He was unable to accept that at the stroke of midnight the treaties "went overboard and [were] unceremoniously dumped into Kingston harbour" and found it difficult to understand how "by some strange ritual...an agreement is put to sleep by the ushering in of independence" at 67.
- 142 At 67 of the report.

- 143 At 70 of the report.
- 144 *Clarence McGann v United States Board of Parole* 1976 Court of Appeal 3.6.76 (unreported).
- 145 Sierra Leone Court of Appeal 11.5.1971; 70 *ILR* 2.
- 146 At 3-4 of the report.
- 147 Tambiah JA at 4; Bridges JA at 7-8; and Beccles Davis J who stated at 13 that Sierra Leone was bound "as if she had been a contracting party to the treaty".
- 148 Italian Court of Appeal, Rome 17.10 1980; 78 *ILR* 105.
- 149 Article 674 (1) No 4 of the Italian Code of Penal Procedure provides that for a foreign judgment to be enforceable in Italy, there must be either a valid extradition treaty between Italy and the state whose judgment is to be enforced, or a request from the Italian Minister of Justice. There had been no such request, and the question consequently turned on whether or not a valid extradition treaty existed between Italy and India since the latter's attainment of independence.
- 150 At 108 of the report.
- 151 At 109 of the report.
- 152 At 111 of the report.
- 153 German Reichsgericht in Criminal Matters 4.4.21; case no 182 1919-22 Annual Digest 259.
- 154 The accused was extradited from Czechoslovakia on an ad hoc basis to face charges of larceny and habitual criminality.

He was convicted of an additional offence of horse theft. The prosecutor himself appealed on the basis of a violation of the principle of speciality.

- 155 Supreme Court of the Reich (in Criminal Matters) 13.8.1936; 1935-6 Annual Digest Vol 8 348.
- 156 See report 349.
- 157 Switzerland Cour de Cassation 29.5.1953; 20 *ILR* 363.
- 158 High Court of Allahabad India 22.12.1949; case no 105 18 *ILR* 332.
- 159 At 332 of the report.
- 160 Swiss Federal Tribunal (Criminal Court of Cassation) 12.10.1979; 75 *ILR* 107.
- 161 Treaty between Great Britain and Switzerland for the Mutual Surrender of Fugitive Criminals signed at Berne 26.11.1880 ratified at Berne 15.3.1881 : 1880 71 *BSP* 54-62.
- 162 At 108 of the report. As a general rule, where the person whose extradition is sought has been sentenced to a term of imprisonment in the requested state for a crime committed there, he will only be extradited once he has served out this sentence - see Chapter III above. The request for extradition can however, still be heard and consent to his extradition granted - the execution of the extradition is merely suspended until completion of his "local" sentence.
- 163 These charges were fraud in connection with obtaining passports and visas; theft of a card notifying arrival of the parcels containing the travellers' cheques; and fraudulently obtaining the parcels by posing as an American

- Express employee.
- 164 At 110 of the report.
- 165 The court was at that stage still referring to the Draft Succession Convention which it regarded as authoritative as reflecting "a considerable level of agreement on the rules of international law governing the matter". As was indicated in the introduction to this Chapter, the court would appear to have attached a somewhat exaggerated significance to the Convention.
- 166 At 111 of the report.
- 167 Which the court gives as 1931 at 109 of the report.
- 168 See *Legal Status of Eastern Greenland* case 1933 PCIJ Rep Ser A/B no 53 at 71 and article 7 of the Vienna Treaty Convention.
- 169 At 112 of the report.
- 170 In the case of *Dharmarajah v Ministerie Publique Fédéral and Another* 22.4.1981, 1982 *Annuaire Suisse de droit international* 128, the court found that Sri Lanka had not succeeded to the British extradition treaty with Switzerland as it had not "manifested, either expressly or by conclusive acts, any intention to assume the obligations arising from the Treaty which was therefore not applicable to it."
- 171 See eg, Starke (1989) 166-167 where he states that subjugation alone does not vest title. See too, Booyesen (1989) 195. As regards the *animus* requirement in the case of cession, see Booyesen (1989) 188-9 and *R v Christian* 1924 AD 101 at 109.

- 172 See the text accompanying nn 77-83 above.
- 173 McNair (1961) 595.
- 174 McNair (1961) 595. The position in this case was somewhat novel in that Britain had conquered the territory but was apparently then uncertain of exactly what it wanted to do with it! The advice of the Law Officers was consequently called in.
- 175 See Chapter II 57 n 56.
- 176 Netherlands Supreme Court 31.8.1972; 73 ILR 38.
- 177 At 40 of the report.
- 178 Booyesen (1989) 228, and specifically as regards extradition, see *Shehadeth et al v Commissioner of Prisons, Jerusalem* Palestine Supreme Court (sitting as a High Court) 31.10.1947; 1947 ILR 42.
- 179 See n 172 above and Wallace (1986) 86 where she states that "The law applicable when the title was allegedly established will be applied".
- 180 See 294 above.
- 181 See Chapter II 68-101 and 294-297.
- 182 See Chapter II 67.
- 183 See Wallace (1986) 87 and the effect of cession on treaties at 294 above.
- 184 McNair (1961) 600 states that as a general rule "newly

established states...start with a clean slate in the matter of treaty obligations". See too, O'Connell (1967.1) 32-48 who reaches the same conclusion. Examples cited most frequently are the formation of the United States from the North American Colonies, Belgium's break with Holland in 1830 and Finland's establishment at the close of the First World War.

- 185 See Chapter II 77 for the text of this "grant".
- 186 McNair (1961) 601. See too, the establishment of Liberia which he typifies as a state "established on territory which cannot be said to belong to a recognised state."
- 187 Mugambwa (1987) 79-83.
- 188 McNair (1961) 601.
- 189 See Chapter II 83 ff.
- 190 McNair (1961) 635.
- 191 McNair (1961) 636 where the Law Officers' opinion of 16.2.1901 is cited. The treaty concerned was the Treaty of Friendship and Commerce with Portugal of 1875.
- 192 O'Connell (1967.1) 35.
- 193 O'Connell (1967.1) 36. A similar answer was given to an Italian enquiry - FO Z vol 776 (1903).
- 194 See Chapter II 87 ff.
- 195 McNair (1961) 707.
- 196 McNair (1961) 707. See too, O'Connell (1967.1) 35.

- 197 See Chapter II 95 ff.
- 198 See Chapter II 93 ff and Botha (1926) 107.
- 199 With the exception of relations with the Orange Free State.
- 200 For a discussion of the nature of this approval, see Chapter II 97.
- 201 Report of the Law Officers 11.2.1901; O'Connell (1967.1) 35; McNair (1961) 635-637.
- 202 Chapter II 117 ff.
- 203 Traktaat voor Wederkeerige uitlevering van Voortvluchtige Misdadigers van uit Nederland en van uit die Zuid-Afrikaansche Republiek signed on 9.11.1895 ratified on 19.6.1896. See too, Hofmeyer (1933) 102.
- 204 Traktaat voor Wederkeerige uitlevering van Voortvluchtige Misdadigers van uit Natal en van uit die Zuid-Afrikaansche Republiek signed at Pietermaritzburg 18.11.1897 and Pretoria 20.11.1897 and operational from this latter date.
- 205 The term "Commonwealth of Australia" is not to be confused with the generic term "Commonwealth of the British Empire". In the case of Australia the term is used to describe the union of the Australian provinces of New South Wales, Victoria, South Australia, Tasmania and Western Australia which took place in 1901.
- 206 McNair (1961) 644-645.
- 207 McNair (1961) 645. See too *Ex parte O'Dell and Griffen* 1953 ILR 40 where it was held that the Ashburton Treaty of

1842 (which it will be remembered marks British entry into the extradition scene - see Chapter II) had devolved upon Canada.

208 O'Connell (1967.1) 65.

209 O'Connell (1967.1) 122.

210 1909 9 Edward VII c 9.

211 For a general discussion of the events surrounding this decision see Kahn (1962).

212 73 ILR 38 and 14 ILR 42 respectively.

213 See Chapter II 118.

214 Similar provisions are embodied in the legislation governing the independence of the other Homelands: the Status of Bophuthatswana Act 89 of 1977 - section 4; the Status of Venda Act 107 of 1979 - section 4; and the Status of Ciskei Act 110 of 1981 - section 4.

215 The Constitutions of the other Homelands contain similar provisions : section 96 of the Republic of Bophuthatswana Constitution Act 1977; section 71 of the Republic of Venda Constitution Act 1979; and section 3 of the Republic of Ciskei Constitution Act 1981.

216 See eg, Booysen (1989) 262-264; Booysen et al (1976) 1; Wiechers & Van Wyk (1977) 85; Carpenter (1979) 40; Carpenter (1981) 83; and Booysen (1982) 56. As regards the capacity of the Homelands to conclude treaties with South Africa before independence which would on the attainment of independence become binding international treaties, see Vorster (1978) 1 and Floyd (1980) 78. At 81 Floyd discusses two extradition

- agreements falling within this category, viz the agreement between the Republic and Bophuthatswana (GN 375 *Government Gazette* 5846 30.12.1977) and between the Republic and Venda (Proc 210 *Government Gazette* 12.9.1979). However, as these have both been superceded by other extradition arrangements, they are not further considered.
- 217 CC 63/88 Bophuthatswana Supreme Court 6.2.1989; 1989 4 SA 519 (Bop). For a full discussion of this case see Botha (1988-89) 197.
- 218 Botha (1988-89) 202.
- 219 Botha (1988-89) 205.
- 220 Convention on Extradition concluded between the Government of the Republic of South Africa, the Republic of Bophuthatswana, the Republic of Ciskei and the Republic of Venda at Pretoria on 20.11.1988 *Government Gazette* 71/1988. It will be noted that Transkei was not a party to this Convention. However, Transkei concluded a separate treaty with Bophuthatswana on 27.9.1989.
- 221 See Botha (1988-89) 206.
- 222 See eg, *S v Marwane* 1982 3 SA 717 (A).
- 223 1986 3 All ER 449 (CA). For a full discussion of this case see Botha (1986-87) 156.
- 224 At 453 of the judgment. See the similar answer received in the unreported case of *Republic of Transkei v Europa Publications Ltd* 17.1.1979.
- 225 At 454a-b of the judgment.
- 226 In the light of the universal condemnation of the creation

of the Homelands, Britain with its traditionally pro-South African views, must be regarded as a moderate voice.

227 See 312 above.

228 O'Connell (1970) 103.

229 O'Connell (1967.1) 122, eg, would appear to accept succession as axiomatic in the case of South Africa; first in terms of section 148 of the South Africa Act 1909, and then in terms of section 112 of the Republic of South Africa Act 32 of 1961.

230 See eg, GA Res 31/6 A of 26.10.76; GA Res 32/105 N of 14.12.1977; GA Res 34/93 G of 12.12.1979; GA Res 36/172 of 17.12.1981 and innumerable similar resolutions.

231 See article 6.

232 It is interesting to note, however, at the recent initial meeting of the Conference for a Democratic South Africa held at Kempton Park during December 1991, the President of Bophuthatswana made it clear that he was not interested in unconditional reincorporation of his state into South Africa.

233 For the text of the treaty effecting the re-unification of the two Germanies see Von Munch (1990) at 48-49.

234 1986 3 All ER 449.

235 1966 2 All ER 536 (HL).

236 Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands 31.8.1990; Von Munch (1990) at 43.

- 237 Whether tacit recognition may be assumed from foreign contact with these "states" remains a moot point. Recently the press carried reports of a dispute between Austria and Transkei being referred to international arbitration. However, given the patent inaccuracy of the headline concerned "World Court (sic) set to hear R100-m Transkei lawsuit", any assumptions from the popular press would be suspect. See *The Pretoria News* 8.8.1991 p 2.
- 238 See *Shehadeth et al v Commissioner of Prisons, Jerusalem* (Palestinian Supreme Court) 31.10.1947; 1947 ILR 42.
- 239 See n 232 above.
- 240 Other cases have been reported subsequent to independence in 1961 but do not involve questions of succession. In *R v De Demko* 1962 1 SA 28 (WLD) the question involved the principle of speciality. The case involved the surrender of De Demko by Britain under the Fugitive Offenders Act 1881 and is consequently irrelevant for present purposes. Similarly in *Minister of Justice v Bagattini and Others* 1975 4 SA 252 (T) the court had to consider the application of the principle of *res iudicata* in the treaty between South Africa and Swaziland which was concluded after South African independence and consequently does not involve succession.
- 241 1965 2 SA 770 (T).
- 242 Section 9 provides for a person detained under a warrant to be brought before a magistrate and that an enquiry be held to determine whether he should be extradited. Section 9(4)(b) provides that where the offence is alleged to have been committed in an associated state, section 12 shall apply. An associated state is a state in Africa with which the Republic has agreed, on a reciprocal basis, that warrants issued in the respective territories will be

- endorsed for execution if the magistrate is satisfied that such warrants have been lawfully issued.
- 243 Extradition Agreement between the Republic of South Africa and the Federation of Rhodesia and Nyasaland SATS 9/1962; Proc R44/1963 *Government Gazette* 15.3.1963.
- 244 At 772 of the judgment.
- 245 Proclamation 4 of 1964.
- 246 At 773E of the judgment.
- 247 At 773F of the judgment.
- 248 See eg, Dugard (1977) 127; Rudolph (1977) 131.
- 249 See for example, *The SS Lotus* 1927 PCIJ Rep Ser A no 10.
- 250 See for example, *Government of the Republic of Spain v SS "Arantzazu Mendi"* 1939 AC 256 and for South Africa, *Inter Science Research and Development Services (Pty) Ltd v Republica Popular Da Mocambique* 1980 2 SA 111 (T) 117.
- 251 *Duff Development Co v Government of Kelantan* 1924 AC 797; *S v Oosthuizen* 1971 1 SA 823 (N); *Gur Corporation v Trust Bank of Africa* 1986 3 All ER 458.
- 252 See *Luther v Sagor* 1921 3 KB 532 and *Sultan of Johore v Abubakar* 1952 1 All ER 1261 at 1266. For a general discussion of this aspect see Lyons (1952) 227.
- 253 At 772A of the judgment.
- 254 1967 2 SA 636 (T).

- 255 At 638F-H of the judgment.
- 256 He mentions boundary and river treaties, but should be taken to intend what were termed "dispositive" or "localised" treaties above - in other words, treaties which run with the land.
- 257 At 639H of the judgment. Presumably a comma was intended between commercial and extradition treaties in this passage.
- 258 At 640C of the judgment.
- 259 At 640D-E of the judgment.
- 260 1967 4 SA 583 (A).
- 261 At 591A of the judgment.
- 262 At 591 of the judgment; 25.6.1965 was the date of repromulgation of the agreement.
- 263 At 590G of the judgment (emphasis added).
- 264 1965 2 SA 770 (T) at 773F-G.
- 265 See proc R151/1965, *Government Gazette* 25.6.1965 where the repromulgation option was followed. However, on 7.4.1965 the State President had declared Eliasov a person liable to be extradited under the provisions of section 3(2) of the Extradition Act 67 of 1962.
- 266 1967 2 SA 636 (T).
- 267 1969 2 SA 224 (T).
- 268 Treaty between Great Britain and Portugal for the Mutual

Surrender of Fugitive Criminals signed at Lisbon 17.10.1892;
ratified at Lisbon 13.11.1893 : 1892 - 3 BSP 83-88.

- 269 At 224A of the judgment. Section 2(4) of the Extradition Act 67 of 1962 provides that "any arrangement made with any foreign state which...was in force in respect of the Republic immediately prior to the date of commencement of this Act, shall be deemed to be an agreement entered into and published by the State President...".
- 270 1971 1 SA 359 (N).
- 271 At 361G of the judgment.
- 272 At 362H of the judgment.
- 273 At 363D of the judgment.
- 274 *S v Devoy* 1971 3 SA 899 (A).
- 275 At 905H of the judgment.
- 276 At 906A of the judgment.
- 277 At 907A of the judgment. See too, the cases cited in note 251 above, and *R v Bottrill: Ex parte Keuchenmeister* 1942 2 All ER 343 (CA) and *Carl Zeiss Stiftung v Rayner & Keeler Ltd* 1966 2 All ER 536 (HL) for the role of the certificate.
- 278 At 907G-H of the judgment.
- 279 At 907H of the judgment.
- 280 At 908A of the judgment.
- 281 With the dissolution of the Soviet Union and the former East

Bloc countries, this statement should be treated as somewhat provisional. However, events in these regions are still too uncertain and the position too volatile for them to offer any meaningful points for analysis at this stage.

- 282 For the views surrounding the Namibian question see Dugard (1973). For a handy synopsis of the various approaches see Erasmus (1985-6) 115 and the case of *Binga v Cabinet for South West Africa* 1988 3 SA 155 (A); see too, Carpenter (1988-9) 157; and Szasz (1989-90) 66.
- 283 Constitution of the Republic of Namibia 1 of 1990.
- 284 See in particular article 16 of the Succession Convention and Szasz (1989-90) 65.
- 285 Szasz (1989-90) 65. Whether one regards the approach adopted in Namibia as an "optional clean slate" or as "provisional universal succession" depends on the angle from which the question is approached. However, the latter does tend to stress continuity and succession, while the former stresses the negative in that non-succession is the essence of the clean slate approach. In effect, however, there is little to choose between the two.
- 286 Szasz (1989-90) 66 referring to Duggal (1989).
- 287 On 19 May 1967 by GA res 2248 (S-V), the General Assembly established the United Nations Council for Namibia to administer the territory until independence. Szasz (1989-90) 66 describes the Council as "a unique international organ...[with] certain *de iure* authority in respect of Namibia, and especially in respect of its treaty relations." For a view rejecting the validity of the Council's Decrees see Booyesen & Stephan (1975) 63.

- 288 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* 1971 ICJ Rep 16 at 52 where humanitarian treaties are expressly excluded.
- 289 Szasz (1989-90) 75 ff.
- 290 1971 ICJ Rep 16 at 55 par 121.
- 291 Szasz (1989-90) 75. As he points out, no mention is made of what should be regarded as a peremptory norm within this context. This is presumably reference to the *ius cogens* provisions in the Vienna Treaty Convention (notably article 53). Views, however differ on what may be regarded as *ius cogens* and the phrase remains inexact and uncertain.
- 292 Par 9(b) of the UNIN study above. It is interesting to note that in its own way the United Nations was as determined to advance the policies it had mapped out for Namibia as was South Africa to advance its policies. As will be seen presently, Namibia embraced neither.
- 293 Szasz (1989-90) 75.
- 294 Szasz (1989-90) 75. It is interesting to note that this and the statement in the previous note were made by officials who now hold office in the Namibian independence government. By accepting office under a constitution which does not propose these extreme views, these officials may perhaps be seen to have amended their absolutist approach and the arguments are robbed of much of their force.
- 295 Szasz (1989-90) 76.
- 296 Treaty between Great Britain and Denmark for the Mutual

- Surrender of Fugitive Criminals signed at Copenhagen
31.3.1873; ratified at Copenhagen 26.4.1873 : 1873 63
BSP 5-18. Application extended to South West Africa by
exchange of notes 5.12.1927 and 10.2.1928 : LNTS LXXXIII 135.
- 297 Treaty between Great Britain and Paraguay for the
Mutual Surrender of Fugitive Criminals signed at
Asuncion 12.9.1908; ratified as Asuncion 30.1.1911 :
102 BFSP 340-345. Application extended to South West Africa
by exchange of notes 3.1.1928 and 16.1.1928 : LNTS LXXXIII
509.
- 298 Treaty between Great Britain and Germany for the Mutual
Surrender of Fugitive Criminals signed at London
14.5.1872; ratified at London 11.6.1872. Application
extended to South West Africa by exchange of notes
10.12.1928 : LNTS C 268.
- 299 See above "Annexation and Cession" at 294 and the
authorities cited there.
- 300 Treaty (replacing the treaty of 19.6.1874 : see Clarke
(1888) at cxlvii) between Great Britain and the
Netherlands for the Mutual Surrender of Fugitive
Criminals signed at London 26.9.1889; ratified at
London 14.12.1898 : 90 BFSP 51-58. Application extended to
South West Africa by exchange of notes 1.12.1927 and
27.1.1928 : LNTS LXIX 131.
- 301 Treaty between Great Britain and Luxemburg for the
Mutual Surrender of Fugitive Criminals signed at
Luxemburg 24.11.1880; ratified at Brussels 5.1.1881 :
1880 71 BSP 45-53. Application extended to South West Africa
by exchange of notes 1.12.1927 and 28.1.1928 : LNTS LXIX
127.

- 302 Treaty between Great Britain and Spain for the Mutual Surrender of Fugitive Criminals signed at London 4.6.1878; ratified at London 21.11.1878 : 1878 69 BSP 6-13. Application extended to South West Africa by exchange of notes 3.12.1927 and 13.2.1928 : LNTS LXXXIII 469.
- 303 Extradition Treaty between the United Kingdom and Greece concluded at Athens 24.9.1910; ratified at Athens 30.12.1911. Application extended to South West Africa by exchange of notes 5.12.1927 and 19.4.1928 LNTS LXXXIII 513.
- 304 Treaty between Great Britain and Austria/Hungary for the Mutual Surrender of Fugitive Criminals signed at Vienna 3.12.1873; ratified at Vienna 10.3.1874 : 1873 63 BSP 213-218. Application extended to South West Africa by exchange of notes 8.12.1927 and 25.4.1928 : LNTS LXXXIII 495.
- 305 Treaty between Great Britain and Serbia/Yugoslavia for the Mutual Surrender of Fugitive Criminals signed at Belgrade 6.12.1900; ratified at Belgrade 13.3.1901 : 92 BFSP 41-47. Application extended to South West Africa by exchange of notes 7.12.1927 and 27.8.1928 : LNTS LXXXIII 490.
- 306 Treaty between Great Britain and Austria/Hungary for the Mutual Surrender of Fugitive Criminals signed at Vienna 3.12.1873; ratified at Vienna 10.3.1874 : 1873 63 BSP 213-218. Application extended to South West Africa by exchange of notes 8.12.1927 and 25.4.1928 : LNTS LXXXVIII 400.
- 307 Treaty between Great Britain and Sweden and Norway for the Mutual Surrender of Fugitive Criminals signed at Stockholm 26.6.1873; ratified at Stockholm 28.8.1873 :

1873 63 BSP 175-179. Application extended to the Colonies 18.2.1907 and to South West Africa by exchange of notes 8.12.1927 and 23.12.1929 : LNTS XCII 427.

- 308 Treaty between Great Britain and Roumania for the Mutual Surrender of Fugitive Criminals signed at Bucharest 21.3.1893; ratified at Bucharest 13.3.1894 : 1893 85 BSP 69-75. Application extended to South West Africa by exchange of notes 14.12.1927 and 11.1.1929 : LNTS LXXXIII 480.
- 309 Treaty between Great Britain and Liberia for the Mutual Surrender of Fugitive Criminals signed at London 31.1.1892; ratified at London 31.1.1894 : 1892-3 84 BSP 103-109. Application extended to South West Africa by exchange of notes 19.12.1927 and 16.10.1928 : LNTS LXXXIII 477; BSP LXXXIV 103.
- 310 Treaty between Great Britain and Nicaragua for the Mutual Surrender of Fugitive Criminals signed at Managua 19.4.1905; ratified at London 13.2.1906. Application extended to South West Africa by exchange of notes 19.12.1927 and 12.1.1928 LNTS LXXXVIII 410.
- 311 Treaty between Great Britain and Peru for the Mutual Surrender of Fugitive Criminals signed at Lima 26.1.1904; ratified at Lima 30.11.1906 : 99 BFSP 963-968. Application extended to South West Africa by exchange of notes 26.12.1927 and 16.1.1928 : LNTS LXXXVIII 500.
- 312 Treaty between Great Britain and Chile for the Mutual Surrender of Fugitive Criminals signed at Santiago 26.1.1897; ratified at Santiago 14.4.1898 : 89 BFSP 20-25. Application extended to South West Africa by exchange of notes 29.12.1927 and 13.1.1928 : LNTS LXXXVIII 485.

- 313 Treaty between Great Britain and Hayti for the Mutual Surrender of Fugitive Criminals signed at Port-au-Prince 7.12.1874; ratified at Port-au-Prince 2.9.1875 : 1874 65 BSP 44-48. Application extended to South West Africa by exchange of notes 29.12.1927 and 13.1.1928 : LNTS LXXXIII 465.
- 314 Treaty between Great Britain and Panama for the Mutual Surrender of Fugitive Criminals signed at Panama 25.8.1906; ratified at Panama 15.4.1907. Application extended to South West Africa by exchange of notes 3.1.1928 and 24.1.1928 : LNTS LXXXIII 505.
- 315 Extradition Treaty between the United Kingdom and Siam concluded at Bangkok 4.3.1911; ratified at London 1.8.1911. Application extended to South West Africa by exchange of notes 5.1.1928 and 27.2.1928 : LNTS LXXXIII 516.
- 316 Treaty between Great Britain and Bolivia for the Mutual Surrender of Fugitive Criminals signed at Lima 22.2.1892; ratified at Lima 7 March 1898 : 1896 88 BSP 27-33. Application extended to South West Africa 8.1.1928 and 18.2.1928 : LNTS LXXXIII 473.
- 317 Treaty (replacing the treaty of 20.5.1876 :see Clarke (1888) at xlii) between Great Britain and Belgium for the Mutual Surrender of Fugitive Criminals signed at Brussels 29.10.1901; ratified at Brussels 6.12.1901. In a convention signed at London on 5.3.1907 and ratified on 17.4.1907, the parties made special provisions for criminals arrested in the Dominions : 100 BFSP 472-473. Application extended to South West Africa by exchange of notes 28.6.1928 and 2.7.1928 : LNTS LXXXIII 297.
- 318 Treaty between Great Britain and Guatamala for the Mutual Surrender of Fugitive Criminals signed at

- Guatamala 4.7.1885; ratified at Guatamala 6.9.1886 :
1884-5 76 BSP 72-77. Application extended to South West
Africa by exchange of notes 21.5.1925 and 11.9.1929 :
LNTS XCII 420.
- 319 Treaty between Great Britain and Switzerland for the
Mutual Surrender of Fugitive Criminals signed at Berne
26.11.1880; ratified at Berne 15.3.1881 : 1880 71 BSP
54-62. The relevant provision (art 18) was amended by a
convention entered into between Great Britain and
Switzerland in London on 29 June 1904. The periods
provided for Colonial possessions in the original
treaty were amended to 6 weeks under article 3 par 3
(originally 30 days) and 3 months under article 8
(originally 2 months) 1904 97 BSP 92-3. Application
extended to South West Africa by exchange of notes
30.11.1927 and 19.9.1929 : LNTS CXII 432.
- 320 Treaty between Great Britain and Cuba for the Mutual
Surrender of Fugitive Criminals signed at Havana
3.10.1904; ratified at Havana 10.1.1905 : 1904 97 BFSP
26-31. Application extended to South West Africa by exchange
of notes 17.4.30 : LNTS CXXVI 202.
- 321 Treaty between Great Britain and Salvador for the
Mutual Surrender of Fugitive Criminals signed at Paris
23.6.1881; ratified at London 8.11.1882 : 1881 72 BSP
13-19. Application extended to South West Africa by exchange
of notes 17.7.1930, 8.8.1930, 12 and 19.11.1930 : LNTS CXXVI
557.
- 322 Treaty between Great Britain and Monaco for the
Extradition of Criminals signed at Paris 17.12.1891;
ratified at Paris 17.3.1892 : 1891-2 83 BSP 66-72.
Application extended to South West Africa by exchange of
notes 27.11.1930 : LNTS CXXI 39; UKTS 29/1931.

- 323 Treaty between Great Britain and the Republic of Equator for the Mutual Surrender of Fugitive Criminals signed at Quinto 20.9.1880; ratified at Quinto 19.2.1886 : 1881 72 BSP 137-143. Application extended to South West Africa by exchange of notes 4.6.1934 : UKTS 52/1937 ; LNTS CLXXXIV 437; SATS 12/37.
- 324 Treaty between Great Britain and Portugal for the Mutual Surrender of Fugitive Criminals signed at Lisbon 17.10.1892; ratified at Lisbon 13.11.1893 : 1892-3 84 BSP 83-88. (See the amending convention of 20.1.1932 signed expressly "on behalf of South Africa" 1932 BSP 135.) Application extended to South West Africa by exchange of notes 16.7.1934 and 14.8.1934 : LNTS CLVI 377.
- 325 Extradition Treaty between the Union of South Africa and the United States of America, concluded at Washington 18.12.1947; ratified at Washington 1.3.1951 - GN 91 *Government Gazette* 20.4.1951.
- 326 Extradition Treaty between the Union of South Africa and the State of Israel concluded at Pretoria 18.9.1959; ratified at Pretoria 7.1.60 GN R14 *Government Gazette* 6362 5.2.1960.
- 327 Extradition Treaty concluded between the governments of the Republic of South Africa and the Federation of Rhodesia and Nyasaland on 19.11.1962 *Government Gazette* 445/1962; SATS 9/1962.
- 328 On 23.12.1962 notes were exchanged between the governments of the Republic of South Africa and Southern Rhodesia to ensure the continued operation of the treaty concluded with the Federation of Rhodesia and Nyasaland - n 14 above - *Government Gazette* 1156 of 25.6.1965. As indicated above, since independence the Republic of South Africa has concluded extradition treaties with Swaziland (1968);

Botswana (1969); Malawi (1972); Israel (1976, amendment of the 1959 treaty above); Transkei (1977); Bophuthatswana (1977); Venda (1979); Ciskei (1981); Multilateral Convention (1986); and The Republic of China (1987) - see nn 16 - 25 above. However, all these treaties fall within the United Nations' category E.

- 329 See in particular, article 96(d) which provides that the state shall endeavour to ensure respect for international law and treaty obligations, and article 144 which provides that the general rules of public international law are part of the law of Namibia. See in general in this regard, Erasmus (1989-90) 81.
- 330 See in particular article 16 of the Succession Convention and Szasz (1989-90) 65.
- 331 1991 1 SA 851 (High Court of Namibia). For a full discussion of this case see Booyesen (1991) 204 and Botha (1990-91) forthcoming.
- 332 At 858A of the judgment.
- 333 See Chapter II n 9 - response by New Zealand.
- 334 See *The Pretoria News* 4.6.1991 p 2.
- 335 1991 1 SA 851 (High Court of Namibia).
- 336 See eg, *Robert E Brown claim* 1923 6 RIAA 120 and the *Hawaiian Claims* case 1925 6 RIAA 157. For a full discussion of this aspect of the case see Booyesen (1991) 204.
- 337 See article 144 of the Constitution in particular.
- 338 See article 16 of the Succession Convention.
- 339 See Szasz (1989-90) 65.

CHAPTER V

THE TERMINATION OR SUSPENSION OF TREATY RIGHTS AND OBLIGATIONS

1 INTRODUCTION

2 TERMINATION OF TREATY OBLIGATIONS

2.1 General

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ENDNOTES

1 INTRODUCTION

As was established in the previous chapters, in South African law there is no duty to extradite in the absence of a treaty commitment to do so. On the other hand, the state retains a right to extradite, even in the absence of a treaty so stipulating.

It was shown that within the South African context, the major source of the right and/or duty to extradite is bilateral treaty commitment. This is also the option favoured by the authorities responsible for extradition. What also emerged, however, was that by far the majority of the bilateral treaties which South Africa regards as giving rise to a binding duty to extradite, or right to demand extradition, are not treaties originally concluded by the Republic, but were succeeded to from Britain. A glance through the treaty list will show that many of the states with whom treaties are claimed are strange bedfellows indeed for the current South African government. One thinks in particular of a state such as Cuba, which has traditionally been regarded an "enemy" of South Africa.

The final phase of this thesis will consequently be devoted to a brief examination of relevant problems surrounding the termination of treaty commitments. From this, a realistic assessment of those treaties which South Africa regards as binding will be undertaken on an individual basis in order to determine from which states we have the right to expect extradition of suspected persons to stand trial in a South African court, and which states may demand extradition of a fugitive from South Africa.

2 TERMINATION OF TREATY OBLIGATIONS

2.1 General

In Chapter IV the termination of treaties in the case of the extinction of one of the parties through annexation or cession was considered in some detail. It was also pointed out that the continuation of a treaty through the process of succession depends to a large extent on the intention of the "third party" to the treaty.

In this Chapter we are no longer concerned with termination which may arise through the process of succession - in other words, those instances where the third party to the original treaty is not prepared to entertain treaty relations with the new state. (1) The starting point in the present investigation is that a treaty exists - in other words, the third party either expressly or through lack of objection, is *prima facie* in an extradition relationship in terms of which it may demand extradition from South Africa and must entertain extradition requests directed to it by South Africa. Our examination will consequently be directed at the question whether anything has arisen which may validly be regarded as having terminated this existing treaty relationship.

Although, as in dealing with the acquisition of treaty rights, so too in dealing with their termination, the logical starting point is the Vienna Treaty Convention, (2) a few general remarks would not be out of place.

An inherent tension exists between the most basic tenet of international law, viz *pacta sunt servanda* - agreements must be honoured - and the unilateral termination of a treaty. (3) McNair (4) states that the "normal basis of approach", specifically in the United Kingdom, but also universally is that :

"a treaty...is intended to be of perpetual duration and incapable of unilateral termination, unless, expressly or by implication, it contains a right of unilateral termination

or some other provision for its coming to an end."

Although the idea of any human creation being perpetual is intrinsically foreign, there is no principle objection to such a view. As regards treaties, British courts have reinforced McNair's view by holding that treaties dating back some two or more centuries were still "unrevoked and in full vigour". (5) The Vienna Treaty Convention also perpetuates this idea where it provides in article 56 that where a treaty makes no provision for termination or withdrawal, it is not subject to termination or withdrawal - it is in other words of indefinite duration - unless it is shown that the parties intended such a right to exist or it can be implied by the nature of the treaty.

A tentative, preliminary distinction between treaties which provide for their own termination, and the so-called perpetual treaties where no provision is made for termination appears in order at this stage. This distinction is, however, not one based on principle, but relates rather to proof of the existence of a right to terminate and the procedure to be followed by a state wishing to free itself from unacceptable treaty obligations. If this were not so, the existence of a termination clause would tend to suggest that the other internationally recognised grounds for termination would be subordinate to such a clause and would in the face of specific provision for termination in the treaty, find no application. That this is not the case is clear from the commentary of the International Law Commission on the thorny question of *rebus sic stantibus* as embodied in article 62 of the Treaty Convention. Here

the Commission, when asked to appraise the view that change of circumstances should apply only to perpetual treaties - in other words, treaties embodying no termination clause - rejected the argument. (6) The result is that termination resulting from changed circumstances - and logically the other grounds providing for termination in the Treaty Convention - may apply alongside of and simultaneously with a termination clause. The various grounds are not mutually exclusive.

However, as pointed out above, for the present day grounds upon which a treaty may be terminated, it is to the Vienna Treaty Convention that one must turn initially.

2.2 Termination in terms of the Vienna Convention

The Convention deals extensively with treaty termination in Part V under the heading "Invalidity, Termination and Suspension of the Operation of Treaties". (7)

Article 42 provides specifically that only the treaty itself or the Treaty Convention, may be used as a basis for the termination or suspension of operation of a treaty. (8) It is further provided that a state will lose its right to terminate or suspend operation of a treaty if, after becoming aware of the facts, it agrees, either expressly or through its conduct, that the treaty is valid, remains in force or continues in operation. (9)

The termination or suspension of operation of a treaty is dealt with in Section 3, articles 54 - 64 of the Treaty Convention. These articles will be considered briefly to determine their possible application to South Africa's extradition treaties.

2.2.1 Article 54 : Termination of or withdrawal from a treaty under its provisions or by consent of the parties

This article provides for two instances in which termination or withdrawal may take place. First, in terms of the treaty itself, (10) and second, at any time by consent of the parties and after consultation with the other contracting parties. (11)

The reason for the inclusion of the first of the above grounds is not entirely clear in the light of the provisions of article 42. It will be remembered that this article provides that the only valid grounds for termination are those in the treaty itself or those in the Convention. Consequently, the right to terminate in the case of article 54(a), derives not from the Convention but from the original treaty and its restatement in this article would appear unnecessary to vest the right of termination. The purpose of article 54(a) could however, be procedural in that it provides that termination shall be "in conformity with the provisions of the treaty". Consequently, the procedural requirements for termination provided in Section 4 articles 65 - 68 of the Convention, will not apply to termination in terms of the treaty. The procedure will there be governed by the treaty itself.

The phrase "in conformity with the provisions of the treaty", covers a wide variety of provisions which may be embodied in a treaty. The treaty may contain a specific expiry date on which it will terminate; (12) it may provide that it will operate for a specific period, for example for five years, after the date of conclusion; (13) or it may provide for termination on the occurrence of an uncertain future event such as the termination of another treaty. (14) The treaty may allow for indefinite operation but expressly grant the parties the right to terminate at any time subject to varying terms of notice. (15) Where a treaty is concluded for the execution of a specific object, for example a treaty between two states for the delivery of coal, it will terminate once the object has been achieved, in other words once coal has been delivered. The treaty may contain no express termination provision but reading the text as a whole it will emerge clearly that termination will be in conformity with the treaty provisions. (16) The conclusion to be drawn from all this, is that this seemingly simple provision must be approached with caution and the treaty should be studied carefully in its entirety to establish the intention of the parties.

For South African extradition treaties, termination in terms of article 54(a) is of considerable importance. All South African extradition treaties contain termination clauses which qualify them as treaties of "indefinite operation" coupled with a specific period of notice. The standard provision in these treaties reads:

"Either party may at any time put an end to this treaty

which, however, shall remain in force six months after the notice for its termination".

This clause occurs in treaties with the following countries :

Italy; (17) Sweden and Norway; (18) Hungary; (19) Haiti; (20) France
 (21) Spain; (22) Equator; (23) Luxembourg; (24) Switzerland; (25)
 Salvador; (26) Uruguay; (27) Guatamala; (28) Monaco; (29) Portugal;
 (30) Liberia; (31) Roumania; (32) the Netherlands; (33) San Marino;
 (34) Yugoslavia; (35) Belgium; (36) Greece; (37) Siam; (38)
 Rhodesia; (39) Swaziland; (40) Botswana; (41) Malawi; (42) Transkei;
 (43) Bophuthatswana; (44) Venda; (45) Ciskei; (46) Multilateral
 Treaty Convention; (47) Republic of China. (48)

An alternative provision also allowing for withdrawal at any time but providing for continuation of the treaty for a period of not less than six months but not more than one year, is contained in the treaties principally, though not exclusively, with the South American states. The following states are involved.

Mexico; (49) Colombia; (50) Argentina; (51) Bolivia; (52) Chile;
 (53) Peru; (54) Cuba; (55) Nicaragua; (56) Panama; (57) Paraguay;
 (58) Finland; (59) Czechoslovakia; (60) United States of America;
 (61) and Israel. (62)

These treaties provide no specific guidance as to what is meant by the notice required for termination. Consequently, any form of

notification, whether by public declaration or private communication, and whether written or oral should suffice to set the termination process in motion. After expiry of the period of notice, the treaty will be terminated.

As was pointed out above, the existence of a termination clause does not exclude the application of one or more of the other procedures provided for in the Treaty Convention. Where a termination clause exists, however, it is submitted that a party wishing to terminate the treaty relationship should make use of this procedure as a first line of "attack".

The second part of this article, dealing with the consent of the parties, will be considered below where the controversy surrounding desuetude as an independent ground for treaty termination is considered.

2.2.2 *Article 55 : Reduction of the parties to a multilateral treaty below the number necessary for its entry into force*

This article provides that a multilateral treaty will not terminate if the number of parties falls below that required for its entry into force. Within the South African extradition context, this provision is not of great importance. South Africa is party to only one multilateral convention dealing directly with extradition, that with the TBVC states, and this treaty contains a termination clause.

(63) South Africa is however party to a number of multilateral

conventions which affect extradition indirectly, but as there has to date been no question of these treaties terminating, they will not be considered further. (64)

2.2.3 *Article 59 : Termination or suspension of operation of a treaty implied by conclusion of a later treaty*

A later treaty will terminate its earlier counterpart if all the parties to the original treaty are concerned in the conclusion of the new treaty; the two treaties deal with the same subject matter; and it appears from the later treaty or is "otherwise established" that the parties intended the subject matter to be governed by the new treaty. (65) An earlier treaty between the same parties and covering the same topic will also be regarded as terminated if the provisions of the two treaties are so incompatible that they cannot be applied at the same time. (66) The earlier treaty will be suspended, rather than terminated, if this intention appears from the later treaty or if it is otherwise established that the parties intended suspension.

Although Plender (67) shows that the article is not without technical difficulties, (68) in practice few problems should arise in that there is no break in continuity of treaty relations between the states concerned. In South African extradition practice, instances of such termination are afforded by, for example, the

treaties with Switzerland, (69) the United States (70) and the Extradition Convention. (71)

2.2.4 *Article 60 : Termination or suspension of the operation of a treaty as a consequence of its breach*

A material breach by one party to a bilateral treaty entitles the other to raise the breach as a ground for terminating or suspending the operation of the treaty. A material breach is defined as the repudiation of the treaty not permitted by the Convention, or the violation of a provision essential for the accomplishment of the object or purpose of the treaty. (72)

Applying the definition of material breach to extradition proceedings one finds that the sole object or purpose of an extradition treaty is to effect the return of an offender, or suspected offender, to the requesting state. The first question arising is consequently whether any refusal to extradite could be classed as a material breach of the treaty in that it of necessity thwarts the purpose of the treaty. However, this argument would hold water only if the duty to extradite arising from the treaty were absolute. As was seen earlier, in extradition proceedings both parties enjoy a wide discretion when it comes to the decision whether or not to extradite. Furthermore, reasons for the exercise of this discretion need not be furnished. Consequently, a refusal to extradite does not necessarily amount to a breach of the treaty. It could possibly amount to breach if it were *mala fide*, but the chances of proving improper motive when assessing a discretionary

act where no reasons need be furnished, are so remote as to render the exercise largely meaningless.

As was shown earlier, South Africa is keen to maintain and expand her extradition relations and is not looking for ways of escaping from treaties embodying these provisions. Within the present context, therefore, we shall consider only a material breach by South Africa subsequent to its succession to or conclusion of extradition arrangements which might allow the other party to the treaty the right to terminate.

When functioning on the international plane, a state's position within the international community cannot realistically be disregarded. Consequently, although South Africa's internal policies may in theory be regarded as "domestic affairs" in which no interference will be tolerated, this approach runs contrary to current international community perceptions. (73) It is within the realisation of the generally outlawed apartheid policies, that the question should be asked whether South Africa may perhaps be regarded as having committed a material breach of the provisions of certain of its extradition treaties. (74)

Article 60(3)(b) of the Convention provides that the violation of a provision essential to the accomplishment of the object or purpose of the treaty will constitute a material breach entitling the other party to terminate the treaty. When states either agreed to South African succession or concluded extradition treaties with the state,

it was on the understanding that these treaties would have full territorial application. To borrow the words of the Convention, the treaties would be "binding upon each party in respect of its entire territory". (75) This principle is also embodied in all the country's extradition treaties. For example in the treaty between Britain and Panama, (76) succeeded to by South Africa, it is provided that:

"The High Contracting Parties engage to deliver up to each other...[persons]...accused or convicted of crimes...committed in the territory of the one Party [and] found within the territory of the other Party",

while in a more recent treaty concluded directly by South Africa with Swaziland after independence, it is provided that:

"The Contracting Parties undertake to extradite to each other...persons...who shall be found within the territory of the requested state". (77)

The ability to extradite an offender from anywhere within a state's territory consequently qualifies as a provision essential for accomplishing the objects of the treaty. For example, the extradition treaty between South Africa and Panama, would entitle Panama to request the South African authorities to return a fugitive criminal finding himself within South African territory. The South African authorities would be obliged to return the fugitive.

In Chapter IV considerable attention was paid to the creation of the TBVC states and their succession to South African extradition treaties. It was pointed out there that internationally these states simply do not exist. They are perceived as a manifestation of South Africa's "unlawful" apartheid policy and where questions as to their independent existence have arisen, they have been regarded as still constituting part of South African territory. (78) Before the creation of the Homelands, a criminal residing in what was then Mafeking could be returned to Panama by the South African authorities as Mafeking was part of the Republic of South Africa. However, after the creation of the independent state of Bophuthatswana, this would no longer be the case. Faced with such a request, the South African authorities would not be able to comply as sovereign acts cannot be performed in the territory of another sovereign state. From the Panamanian perception - and indeed from the perception of the international community as a whole - South Africa's inability to deliver the person sought may be regarded as a violation of a provision "essential to the accomplishment of the object or purpose of the treaty".

Booyesen (79) would appear to reject this approach arguing that a state is obliged to meet its commitments under a treaty only for as long as it is territorially able to do so. The fact that the state is itself responsible for its territorial incapacity, should, he claims with reliance on O'Connell, (80) not be taken into account. The practicality of both Booyesen's and O'Connell's views cannot be denied, and their veracity in general international law terms is

without doubt - for example, in the *Wimbledon* case, (81) the first case decided by Permanent Court of International Justice, it was held that a direct adjunct of a state's sovereignty is its ability to limit that sovereignty. It may alienate part or all of its territory, grant certain portions of it independence, unite with other territories, or whatever.

However, a sense of unease is generated when the state in question is South Africa and the limitation of sovereignty results from the realisation of the South African apartheid policy through the creation of the TBVC states. The possibly exceptional position of South Africa stems from the fact that unlike the instances cited by O'Connell which were a realisation of accepted international perceptions at the time, (82) the creation of the TBVC states flew directly in the face of such values and perceptions. The strength of such perceptions should certainly not be lost on South Africa where the spectre of South West Africa/Namibia is there to show that South African perceptions are not in line with those of the International Court of Justice or of the international community as a whole. It will be remembered that in the *South West Africa* case, (83) the court in fact held that South Africa's actions constituted a material breach of the treaty and the country's continued presence in the territory was outlawed. (84) Technically correct action on South Africa's part, was through international perceptions and pressure, invalidated to find a material breach of the country's treaty commitments. In the light of this precedent, (85) it is conceivable that, in theory at least, a case can be made out for

Panama having a valid claim to termination of the extradition treaty based on South Africa's breach. In practice, however, no such claim has been raised and material breach may be disregarded as a ground for termination of South Africa's extradition treaties.

2.2.5 *Article 61 : Supervening impossibility of performance*

Impossibility of performance may be invoked to terminate a treaty if it results from the permanent disappearance or destruction of an object indispensable for the performance of the treaty. The distinction between this ground and the previous one is clear. In the case of breach, the central idea is the frustration of the aim of the treaty - consequently an intangible "thing". In the case of impossibility of performance the breach results from the destruction of a physical "object" indispensable to the execution of the treaty.

Clearly this provision in the Convention is inapplicable to extradition treaties where the only "object" the destruction of which would preclude execution of the treaty would be the unfortunate extraditee himself!

2.2.6 *Article 62 : Fundamental change of circumstances*

This article provides that parties to a treaty may not invoke an unforeseen fundamental change to the circumstances existing at the

time of the conclusion of a treaty, to terminate or withdraw unless firstly, the existence of the circumstances constituted an essential basis for the parties' consent to the treaty, and secondly, the change radically transforms the extent of obligations owed under the treaty. Furthermore, changed circumstances may not be invoked in the case of treaties establishing a boundary or where the change is the result of breach of an obligation under the treaty or any other international obligation owed to any other party to the treaty.

The historical development of fundamental change of circumstance, or *clausula rebus sic stantibus*, in both municipal and international law falls outside of the scope of our present study. (86) Suffice it to say that since the adoption and coming into force of the Treaty Convention, the doctrine must be regarded as part of modern international law, and will, in suitable circumstances, be available to parties wishing to terminate an extradition treaty. (87)

Furthermore, the fact that South Africa has not formally ratified the Convention should not prevent the treaty provisions applying to its dealings with other nations. After all, South Africa has itself raised *rebus sic stantibus* before the International Court of Justice, (88) and has acknowledged the Convention as a basis for its treaty dealings with other states. (89) As Vamvoukos (90) points out :

"as a formulation of a rule to which a large number of states have already subscribed it (rebus sic stantibus as formulated in article 62) will influence the practice of even those states who may never ratify the Convention".

What, then, are the circumstances which are so fundamental that their change will adequately found a claim for termination of a treaty? Although change of circumstances has often been resorted to in disputes before the International Court, (91) the first instances in which *rebus sic stantibus* as articulated in the Vienna Treaty Convention arose, were the 1973 *Fisheries Jurisdiction* cases. (92) One of the main points to emerge from these cases is that the changes must be such that "if we had then known how these matters would evolve..." (93) the treaty would not have been concluded. Article 62 does not stress this aspect as a separate requirement merely including it through the term "and which was not foreseen by the parties" as an introduction to the requirements that the change should "imperil the existence or vital development of one of the parties" (94) and radically transform the extent of the obligations still to be performed. (95) It is, however, the point on which a possible claim to termination of an extradition treaty on this ground proves ineffective in the case of South Africa.

It is, of course, difficult to determine with any certainty whether or not circumstances were foreseen by the parties when the treaty was concluded. However, the test to be applied is not an absolute one; the adjudicator should be able to draw a reasonable inference from the circumstances surrounding the conclusion of the treaty. Like the "reasonable man" of municipal law, reliance should be placed on what a reasonable state would or should have foreseen at the time of conclusion of the treaty. (96) Furthermore, as the aim of

article 62 is to limit the instances in which a state may successfully resort to changed circumstances, a fairly liberal interpretation of what the states envisaged with their agreement which will uphold rather than terminate the agreement, should be applied. Only once it has been established that the changed circumstances were not in fact envisaged - or that their subsequent emergence should not have been a reasonable expectation on the part of the treaty partners - may the circumstances themselves be analysed to establish whether they meet the other requirements set in article 62.

Our task in assessing the applicability of *rebus sic stantibus* to South African extradition treaties is to identify whether there are circumstances which have changed so fundamentally that they could give rise to a claim for termination on this ground. Clearly, the only circumstances which could here come into play are those surrounding the South African domestic policy of apartheid and its condemnation by the international community as a whole. In other words, does the Icelandic plea "if we had known how these matters would evolve..." apply to the legislative articulation of the apartheid policy?

Can it realistically be claimed that the parties to the erstwhile British treaties, or those concluding independent treaties with the Republic, were not aware of the South African domestic policies? It is submitted not. In the year 1961 the South African apartheid ideology was alive and growing. Although it had not yet

received "domestic legitimacy" through legislative enactment, it was generally known and the "grand plan" which was to culminate in ethnic states had been articulated. Consequently, a state agreeing to South African succession to extradition treaties, must be taken to have been aware of the surrounding circumstances and the South African intention of extending its apartheid policy. Far from dealing with consequences which changed fundamentally enough to justify termination of a treaty, we are in fact faced with no change at all. The "reasonable expectations" of the parties were, or should have been, that the apartheid policy of the South African government would be fully articulated and developed after 1961. The application of *rebus sic stantibus* is consequently stymied right at the outset and need be considered no further.

2.2.7 *Article 63 : Severance of diplomatic or consular relations*

The article provides that the severance of diplomatic or consular relations between the parties will not affect "the legal relations established between them by treaty" unless these relations are indispensable for the application of the treaty.

As South Africa's apartheid policies crystallised from the 1960s onwards, the general rejection of the country's ideological basis by the international community as a whole manifested itself precisely through the severance of diplomatic and consular relations. It is important from South Africa's perception, to note that in terms of the Treaty Convention such severance cannot of itself be regarded as

a termination of extradition treaties between South Africa and its partners to these treaties.

The severance of diplomatic relations has, however, on occasion be seen as suspending extradition dealings between the states concerned. So, during the height of animosity between Cuba and the United States between 1962 and 1973, the latter adopted this attitude. (97) This is not, however, a logical interpretation of article 63 which provides in general terms that "the relations" will not be affected.

Consequently, the fact that diplomatic relations between South Africa and, for example, Cuba, have been terminated, does not automatically mean that extradition proceedings in terms of the extradition treaty purportedly existing between the two states can no longer take place. This is, of course, subject to the proviso that the existence of diplomatic relations is not essential for performance of the treaty. The practice - either for ideological reasons, or today often for financial considerations - has arisen of third states' diplomatic or consular missions acting on behalf of a state which has no direct diplomatic or consular links with the state involved. There is no principle objection to a request for extradition from a state which has no official representation within the requested state, being addressed to such a state by a third, neutral party. Consequently, one may accept that the severance of diplomatic or consular relations does not, on its own, result in the termination of extradition treaties. It may, however, provide

evidence of an intention to terminate which may, depending on the specific circumstances of each case, be brought under one of the other grounds recognised in the Treaty Convention.

2.2.8 Article 64 : Emergence of a new peremptory norm of general international law (*jus cogens*)

The last, and perhaps the most problematic ground providing for the termination of a treaty is the emergence of a new *ius cogens*.

Article 53 of the Convention defines *ius cogens* as :

"a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

Article 64 provides, in deceptively simple language :

"If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates"

It is immediately clear from this definition that identifying an international norm of this class is no easy matter. As with *rebus sic stantibus*, *ius cogens* too, has a long and involved history which falls outside the scope of our examination. (98) For present purposes, only a few of the most obvious problems surrounding the emergence of a new *ius cogens*, and specifically the condemnation of

South Africa's domestic policies as constituting such a norm will be considered.

The dominant role of human rights and their protection in the twentieth century has not been without an effect on the concept of *ius cogens*. Authors citing examples of what they regard as *ius cogens* include the violation of human rights; (99) prohibition of colonialism; (100) fundamental norms of humanitarian nature; (101) and recognition of the dignity of man. (102) It may be accepted that for the international community as a whole, South Africa's domestic policies from 1961 until early in 1990 - and possibly subsequent to that date - violate most or all of these norms. The embodiment of the international community's rejection of South African violations of these principles is encapsulated in the condemnation of apartheid. Although the validity of this action remains a moot point, for the sake of argument it will be accepted for present purposes that the prohibition on apartheid has indeed achieved the status of *ius cogens*.

How does this tie in with South Africa's extradition commitments? Much turns on the interpretation one places on the term "existing treaty" in article 64. This term may be interpreted in two ways. First, the treaty itself must by its nature or purpose conflict with the new *ius cogens* - in other words the nature or purpose of an extradition treaty must violate the prohibition on racial discrimination. (103) Clearly an extradition treaty which is aimed at the prosecution of commonly perceived criminal behaviour, does not

meet this requirement. Second, the violation of *ius cogens* is judged not by the nature of the treaty, but by performance in terms of the treaty. (104) In other words, although the actual treaty may not conflict with *ius cogens*, a state's performance in terms of the treaty may bring it into conflict with the new *ius cogens*. For example, South Africa requests a state which professes to support the concept of the prohibition of apartheid as *ius cogens*, to extradite a suspected offender for an offence specifically arising from apartheid measures or legislation such as the Immorality, Mixed Marriages, or Group Areas Acts. (105) If the requested state were then to comply with the request it would be actively advancing South Africa's apartheid policies. In such an instance a call on the fact that the prohibition of the actions criminalised by these Acts was so universally condemned that it could be seen as a new *ius cogens* would, in theory at least, justify a claim to termination on the basis of conflict with *ius cogens*.

It is conceivable in theory only, because extradition treaties themselves provide two clear mechanisms which would relieve the requested party of the duty to extradite without having recourse to the controversial and uncertain ground of *ius cogens*. In the first place, all extradition treaties specify the offences for which extradition will be granted and should the offence for which extradition is requested not fall within the parameters of such a definition, the state may not extradite the person requested. (106) Here again a broad distinction must be drawn between two methods used for offence specification in extradition treaties. (107) First

in older treaties one often encounters what is termed the "list method" where the offences for which extradition will be considered are listed specifically *eo nomine*. This approach soon fell into disfavour largely because criminal ingenuity fast outstripped diplomatic negotiation and the situation was often encountered where extradition was frustrated because the list of offences was not up to date. The second, and more general method, is where the treaty provides for extradition for any offence allowing for a certain minimum period of imprisonment on conviction, for example six months or a year's imprisonment. In this latter case, the argument above may not find application in that the penalty provided for the "apartheid" offence may indeed satisfy the requirements of the treaty. However, a state faced with this eventuality, has a safety-valve at its disposal.

The political offence exception to extradition allows states a very wide discretion - which as an executive act may not be questioned - to refuse extradition. Clearly, given perceptions of South Africa's erstwhile domestic policies, a state called upon to extradite an individual for an act constituting an offence solely in light of an unacceptable and outlawed political ideology, would refuse to do so - all the more so when no reasons for its decision have to be furnished.

In summary therefore, it may be concluded that the use of the emergence of a new rule of *ius cogens*, as a ground for terminating an extradition treaty, is unnecessarily involved and is unlikely to

be raised where the basic principles of extradition provide more suitable and effective options.

It is interesting to note that although *ius cogens* has been raised in a number of cases before the International Court of Justice, (108) it has never been used by that court to invalidate a treaty.

2.3 Termination outside of the Vienna Treaty Convention

2.3.1 Introduction

It was established earlier that particularly since the Vienna Treaty Convention came into operation, the procedures listed in the Convention are generally regarded as the only valid means by which a treaty may be terminated. This is particularly true of states party to the Convention, but may if the Convention is recognised as a codification of customary international law, extend even further to include all states. Certainly, in general terms, South Africa adheres to the Treaty Convention.

However, on reading the Convention one is immediately struck by two notable omissions from its provisions. The first is that no mention is made of the termination of a treaty through non-use or desuetude. The second is the effect of war on a treaty relations between the warring parties. Each of these will be considered briefly.

2.3.2 The effect of war on extradition treaties

The effect of war on treaties is not specifically mentioned in the Vienna Treaty Convention. This is because the parties intended it to be the topic of a separate and intensive study. (109) A detailed discussion of the topic falls outside of the scope of this work, but certain general observations may be made.

Two principal approaches may be identified when the effect of war on treaties is considered. Initially, in the older literature, states claim that war automatically terminates all treaties between the warring parties. (110) This absolutist approach showed cracks in 1823 when in *Society for the Propagation of the Gospel v New Haven and Wheeler* (111) it was stated that:

"treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as the case of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts..."

From this quote it is clear that limitation of the drastic effect of the absolute approach, is to be sought in the nature of the treaty involved. (112)

If the treaty is one which depends on a high measure of trust and cooperation between the parties, the outbreak of hostilities between them may well lead to the termination of the treaty. So, for example, a treaty of friendship, alliance, neutrality or

non-aggression between warring states would hardly survive a war situation. (113) On the other hand, a treaty governing the treatment of persons in times of war, for example, the Geneva Red Cross Convention - which is specifically premised on the war situation - would of necessity survive. (114)

Between these two extremes, are a number of neutral treaties, the continued existence of which will depend on the intention of the parties or the nature of the treaty and an interpretation of the situation as a whole.

The question arising is into which of these categories extradition treaties fall. Dealing specifically with extradition treaties, McNair (115) states that there is no "considerable judicial or diplomatic authority" indicating the effect of war on such treaties. As a minimum, he feels that treaties between the warring parties would be suspended. McNair finds continued application of an extradition treaty "undesirable". (116) Shearer, (117) on the other hand, writing some ten years later, concedes that extradition treaties fall between the two extremes identified above, and concludes that "the only generalization which can be safely made in the present state of the law is that the effect of war on treaties must be assessed in the light of the nature of the particular treaty obligation in question."

Bassiouni (118) points out that in considering the continuation or termination of an extradition treaty in a war situation, the state's

conception of the extradition process is crucial. If the state regards extradition as a tool of foreign policy to be manipulated in the promotion of its national interests, then, of course, friendly relations between the states involved are essential and an outbreak of hostilities will either terminate or suspend extradition treaties between the two. On the other hand, if a state adopts a wider conception of the function of extradition as international cooperation in the suppression of a general conception of commonly perceived criminal action, then:

"societal interest would prevail over the prevailing conditions of bilateral relations and no common criminal would benefit from the political conditions existing between the respective states at the time he is sought by justice". (119)

While in a Utopian world this latter approach might indeed find application, in United States' practice - and it is submitted in that of South Africa - this point has not yet been reached. War will consequently have an effect on the application of extradition treaties between the two states. What exactly this effect will be can only be established by an examination of the situation as it arises. Past practice may, however, provide some pointers.

No South African case law dealing directly with the effect of war on an extradition treaty could be traced. However, United States' practice in this regard may be of interest. Although in *Chandler v United States* (120) a Circuit Court of Appeal doubted whether an extradition treaty between the United States and Germany had

survived the Second World War, the same approach was not adopted in the case of the extradition treaty between Italy and the United States. In *Argento v Horn* (121) a United States court found that Argento was liable to be extradited to Italy as a result of his conviction (in absentia in 1931) for murder in that country. Argento claimed that although the United States regarded the treaty as having been revived by article 44 of the 1947 Peace Treaty, war between the parties had terminated the treaty and there was consequently nothing to revive. Extradition arrangements could be reestablished only through the conclusion of an entirely new treaty. The court approached the issue pragmatically and, premising its answer on the intention of the parties, pointed out that the possibility of revival created in the 1947 Peace treaty, together with the subsequent conduct of the parties, indicated that the extradition treaty between the United States and Italy had merely been suspended and not terminated by the state of war between the two nations.

In *Re Extradition of D'Amico* (122) the same treaty was again before an American court this time relating to conviction in Italy for robbery and kidnapping. It was found that D'Amico was liable to be surrendered. He appealed, claiming that the treaty between Italy and the United States had been terminated by the outbreak of war and had not been revived by the United States' notification. Furthermore, should the treaty be regarded as having been revived, the revival did not make it applicable to acts committed while it was in abeyance. The court concluded, confirming the finding in *Argento*,

that the treaty had been suspended by hostilities and reemerged on the formal cessation of hostilities.

Again, it is difficult to formulate any specific rules in this regard. However, there would appear to be no inherent characteristic of an extradition treaty which would lead to automatic termination in the event of war. From the cases considered there would appear to be a tendency - which conforms to the general principle that treaties should be maintained rather than abrogated - that where possible, the effect of war should be to suspend rather than terminate treaty relations between the states.

Termination or suspension resulting from "war" has not played an important part in South African extradition practice. See, however, Germany, Italy and Rumania and Hungary in South African Extradition Commitments reconsidered, below.

2.3.3 Desuetude

Of considerably greater importance to South Africa is the question whether non-use of an extradition treaty can lead to its termination.

Discussing desuetude, Vamvoukos (123) distinguishes between the concept which he terms desuetude and the concept he terms obsolescence. For him desuetude is :

"the effect of lapse of time which, when it covers a situation which is radically incompatible with the continuance in force of the obligations flowing from a treaty, justifies a finding to the effect either that a custom contrary to the treaty has been formed or that, as between the parties, a tacit agreement has arisen for the amendment or abrogation of an earlier treaty."

Obsolescence, on the other hand, is :

"a theoretical concept which denotes the effect on the obligations emanating from a treaty of an event other than the mere lapse of time, which by its nature paralyses the execution of a treaty or terminates it".

(124)

Examining these two definitions, it is clear that what Vamvoukos defines as "obsolescence" is not what we are concerned with here. In fact there is little to choose between obsolescence as he sees it, and *rebus sic stantibus* as discussed above. We are here precisely concerned with a "mere lapse of time" and to introduce "other events" can only confuse the issue.

His definition of desuetude too, appears unnecessarily complex. One must ask whether by introducing the concept of "a situation radically incompatible with the continuance in force of the obligations flowing from a treaty" he is not in fact here too dealing with a change of circumstances in another guise?(125)

Although he claims that desuetude must be clearly distinguished from

what he terms "obsolescence", no principle feature distinguishing the two concepts emerges clearly from his definitions.

However, two important points do emerge from Vamvoukos's definition of desuetude. First, is that lack of use is evidence that a custom contrary to the treaty has evolved. Second, is that lack of use may constitute a tacit agreement amending or abrogating the earlier treaty. This was also the approach adopted by the Law Commission while compiling the Vienna Treaty Convention. (126) Consequently, separate treatment of desuetude as an independent ground for treaty termination was considered unnecessary as it was perceived as a sub-species of termination by consent as embodied in article 54 of the Convention.

Both the custom and the tacit amendment approaches, however, are fraught with difficulties of proof. Again, much will depend on the nature of the treaty concerned. This may be illustrated by a simple example. States A and B conclude a trade treaty of indefinite duration governing the export of maize between them. The treaty provides for a certain procedure to be followed. For a number of years the states follow the provisions of the treaty but then find it more convenient to adopt a different procedure. This they do, without expressly abandoning the treaty but simply by not using its provisions, and continue doing so for a number of years. It may be assumed that non-use of the original treaty by States A and B can be seen either as a manifestation of their tacit consent to amend or terminate it, or as evidence of the emergence of a customary rule

between them contrary to the provisions of the original treaty. However, such a conclusion can be justified only when one is dealing with a treaty of the sort posited above - in other words a treaty which requires constant application between the parties. Only if the parties would normally perform in terms of the treaty on a reasonably frequent basis, can their non-use of the treaty constitute evidence of their intention to terminate or amend the treaty.

What then of an extradition treaty? If one examines the nature of the obligations arising from an extradition treaty it is immediately apparent that they differ considerably from those in the case mooted above. Although extradition treaties intend an on-going relationship between the parties, it is essentially an intermittent relationship. The right to request extradition and the duty to grant it, arise only when a criminal or suspected criminal places himself within the ambit of the treaty. This may occur only once in five years, once in fifty years, or never at all. Consequently, any attempt to draw a negative inference from non-use of an extradition treaty (which must be distinguished from refusal of extradition) over any specific period, is doomed at the outset. The nature of an extradition treaty is such that its non-use can only with difficulty imply consent to termination or amendment. The issue of tacit consent which is in any event approached with caution in the international law context, should be approached with even greater caution in the case of extradition and adverse inferences should not be drawn from what will often be purely innocent non-use.

As a preliminary conclusion, therefore, non-use of an extradition treaty is on its own insufficient to constitute grounds for termination of the treaty. In this regard, an obvious analogy may be drawn with the abrogation of South African municipal statutes (127) by desuetude. The maxim *cessante ratione legis, cessat et ipsa lex* is generally employed to explain this process. If the reason for the legislation falls away, the law too falls away. This maxim finds no direct application in our law as the courts have clearly held that legislation stands until it is repealed or amended by a competent legislature. (128) It is interesting to note, however, that a hybridised form of the *cessante* rule is applied but, importantly, to suspend the operation of legislation, not terminate it. (129) Consequently, a statute, like a treaty, is "eternal", continuing in force until such time as it is amended in the prescribed manner. Although non-use does not in itself terminate a statute, it may, together with the other surrounding circumstances, constitute sufficiently strong evidence that the operation of the statute may be suspended.

In similar vein, the general rule with regard to treaties is that a treaty continues indefinitely unless one of the recognised grounds for termination arises. Mere non-use of an extradition treaty cannot on its own lead to its termination or suspension. However, non-use of an extradition treaty coupled with other actions by the states concerned which may be used to interpret the non-use, may in certain cases lead to the suspension or termination of the original treaty. In such a case however, a finding of suspension will generally be

preferred to termination. Where termination is indeed proved, the ground of termination will not be non-use but one of the other grounds recognised in the treaty, for example breach, changed circumstances, or new *ius cogens* which give a specific meaning to the non-use. It is, however, often impossible to pinpoint a specific incident indicative of a negative interpretation to be placed on non-use.

3 SUSPENSION AND TERMINATION : AN OVERVIEW

In dealing specifically with extradition treaties we may draw the following conclusions.

Of the grounds provided in the Treaty Convention, the most relevant would appear to be that embodied in articles 42 and 54(a) - termination in accordance with the provisions of the treaty - as all South African extradition treaties contain a termination clause. Termination by consent as posited in article 54(b), which must on general consensus be taken to include desuetude, is set as an alternative to the termination clause in the treaty and is of less importance. Desuetude, as such, was shown to be largely incompatible with the nature of an extradition treaty. However prolonged non-use may, together with surrounding circumstances, be evidence of an intention between the parties to suspend the operation of the treaty or, in exceptional cases to terminate it.

Article 55 has not arisen in the case of South Africa's extradition obligations, while article 56 is largely academic as no disruption in treaty obligations arises in such a case. The possibility of South Africa's domestic policy constituting a material breach of her extradition obligations under article 60 was considered but found unconvincing, while a similar conclusion was reached with regard to *rebus sic stantibus* as embodied in article 62. The entire question of termination on the emergence of a new *ius cogens* as provided in article 64 is unsuited to application to an extradition treaty - apart from difficulties inherent in the concept of *ius cogens*.

On the other hand, an important point emerging from our examination is that in terms of article 63, the termination of diplomatic and consular relations cannot of itself be taken to indicate the termination of extradition treaties.

One further point to be considered is whether a distinction should be drawn between termination of a treaty and its suspension. The Treaty Convention is not particularly helpful in this regard. Articles 54, 55 and 56 speak only of termination. Article 57 provides specifically for suspension in terms identical to those governing termination in article 54. Articles 59, 60, 61 and 62 allow both termination or suspension apparently at the option of the parties involved. Article 64 of course, deals only with termination. The procedures provided in the Treaty Convention do not differ for termination or suspension. (130) As regards procedure generally, it should be noted in view of the approach adopted below, that the

provision in the Convention calling for termination or suspension to be in writing, (131) will not apply in the case of extradition treaties which contain a termination clause and lack specific formal requirements.

Whether we are indeed dealing with possible termination or suspension must consequently be determined by a consideration of all the surrounding circumstances. This will include any declarations - written or otherwise - made by the parties from which their attitudes may be determined; any actions by the parties; etc. In short, to establish the likelihood of successful application of an extradition treaty - particularly an inherited treaty which has not been applied for a number of years - one must examine the full international spectrum of dealings between the states concerned and seek some pattern in the possibly relevant factors.

Two further points should be made in this regard. In determining the continuing application of an "old, unused" extradition treaty one is of necessity negotiating shifting sands. As was seen above, the intention of the parties determines whether one is dealing with termination or suspension. In either event one will in these cases generally be working with an assumed intention. In the light of the preamble to the Treaty Convention which provides as one of the goals of the Convention :

"the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be

maintained",

it is submitted that failing direct declarations by the parties that their intention is to terminate the relevant treaty, suspension rather than termination should be assumed. In this way the obligations arising from the treaty are in essence maintained, being held in abeyance until such time as the reason for discord has been removed. Once this has been achieved, the treaty obligations will reemerge. On the other hand, if termination is premised, a new agreement will have to be concluded.

That this is particularly relevant in the case of South Africa where much of the animosity which has rendered the state a pariah nation has an ideological basis, hardly bears mention. As South Africa moves towards readmission to the international community, treaties which were merely suspended may re emerge with a minimum of formalities.

One final point which was touched upon above, (132) should also be borne in mind in an assessment of currently applicable treaties. This is the question whether there is any limitation on the termination or suspension of treaties outside of the specific provisions of the termination clauses in the Convention itself. One thinks immediately of article 45 which provides that if a state is aware of the existence of a ground of termination or suspension and consents either expressly or through its conduct to the maintenance of the treaty, it loses the right to claim termination.

This would appear to be an embodiment in the Convention of the traditional concept of estoppel, the application of which has been firmly established in international law. (133) However, it would appear that estoppel can apply only to negative a claim for termination based on consent of the parties - and notably on desuetude. Consequently, although it should be borne in mind, it should not be accorded undue weight.

4 SOUTH AFRICAN EXTRADITION COMMITMENTS RECONSIDERED

In this section, extradition treaties which appear on a print out of treaties in force obtained from the South African Department of Foreign Affairs are considered individually. An attempt is made to provide a "user friendly" summary of the treaty in question.

Space does not permit an in-depth discussion of all the possibly relevant factors reflecting on termination or suspension in the case of each treaty. Although the conclusions reached may appear somewhat abrupt, they should be read in the light of the theoretical discussion of termination above. For example, when dealing with the current status of a treaty, reference is often made to the last communication between the two states concerned which is on file with the Department of Justice. Were desuetude alone sufficient to effect the termination of a treaty, the conclusion could be drawn that after some twenty years, or so, of non-use the treaty had terminated. However, as indicated above, when dealing with

extradition treaties in particular, termination or suspension based on desuetude is controversial.

Where the treaty contains a termination clause, it is assumed that unless the clause has been invoked the treaty has not been terminated. This does not, however, mean that an application in terms of the treaty will be successful. Non-use of a treaty over a long period coupled with some extra element indicating a negative attitude with regard to cooperation with South Africa is taken to indicate that the treaty has been suspended. Where no specific evidence of intention is available, the fact of non-use is merely documented.

It is general knowledge that certain states have been, and many still are, hostile towards South Africa. Knowing this is one thing, substantiating it another. Voting patterns at the United Nations, may indeed provide evidence of the "hostile intention" necessary to transform non-use into a will to suspend, in that they reflect - at least at a political level - the avowed attitudes of the various states. With this in mind, the voting pattern of the most radical of the resolutions adopted against South Africa through the years, GA Resolution 3069 (XXVIII) of 30.11.1973, the International Convention for the Suppression and Punishment of the Crime of *Apartheid*, is taken as a barometer. Where relevant, the positive vote of the country concerned for this resolution is documented alongside the non-use. It must, however, be emphasised that the only role which Convention on Apartheid plays is to give an indication of the

state's generally professed attitude towards South Africa. It is in no way implied that by voting for a United Nations' Resolution, a state may amend, suspend or terminate an extradition treaty totally unrelated to the Convention.

Furthermore, the conclusions offered here are of necessity tentative, based as they are largely on speculation. They are also relevant only for the current time-frame. As 1991 draws to a close, international law is changing at such a rate that few can predict what states will still exist in a matter of weeks - let alone what their attitude to South African extradition treaties will be!

The various aspects are reflected under the headings : *Origin* and *Current status*. The heading *Reference* refers to the original source where the treaty may be found. Under *Practice* any practical extradition dealings between the states which were found in the files of the Department of Justice are mentioned briefly as this information is not available elsewhere. Although in many of these instances the outcome of the "case" is uncertain and case references are mostly unavailable, the mere fact that such contact took place may be indicative of the states' attitude towards extradition. Where there are fairly regular dealings between the states, only the more interesting cases will be discussed. Where the cases have been reported elsewhere, they are not mentioned.

The evaluation of the treaties is approached in two phases. First, treaties concluded before republican status was achieved in 1961, in

other words treaties which contain an element of succession as regards the Republic. These are generally the older treaties where the issue of validity is most pertinently raised and most difficult to determine. Second, the post-1961 treaties are considered briefly. As there is little question of the continued application of most of these treaties they are not considered in similar detail.

In a final section, mention is made of countries with which one would expect extradition provisions to exist, but which in fact have no such arrangements with South Africa.

Lastly, it will be noted that the style of reference followed in this section differs from that in the rest of the work in that endnotes are abandoned and references are incorporated in the text. This has been done advisedly to facilitate easy reference.

4.1 PRE-REPUBLICAN TREATIES

ARGENTINA

TREATY BETWEEN GREAT BRITAIN AND THE ARGENTINE REPUBLIC FOR THE MUTUAL SURRENDER OF FUGITIVE CRIMINALS

Reference (1889-90) 81 BSP 1305-1311

Origin The treaty was concluded between Britain and Argentina at Buenos Aires on 22.5.1889 and ratified at Buenos Aires on 15.12.1893. Application was extended to South Africa by article XVII.

Current status The last communication between the two countries on JF 1/554/20/2 is dated 1961. However it is not clear whether this contact was on the basis of the treaty or of reciprocity. The general trend in the South American states is to extradite on reciprocity but no clear indication of the treaty having been suspended could be found. Although Argentina signed the *Apartheid Convention* on 6.6.1975 (ratified on 7.11.1975) it is submitted that the period on non-use, coupled with the fact that the last contact was initiated by Argentina, militates against suspension and that

the treaty may be regarded as operative. No direct evidence of termination could be found.

Practice The Case of Hisquail Nain Ezra Sassoon JF 1/554/20/2
involved a request by Argentina to the South African authorities that Sassoon be returned to Argentina to face charges of "monopoly". It was however uncertain whether this constituted an offence under South African law and further particulars were requested on 5.10.1961. These were apparently not forthcoming and no further record could be found of the case.

AUSTRIA/HUNGARY

TREATY BETWEEN GREAT BRITAIN AND AUSTRIA/HUNGARY FOR THE MUTUAL
SURRENDER OF FUGITIVE CRIMINALS

Reference 1873 63 BSP 175-179

Origin The treaty was concluded between Britain and Austria/Hungary at Vienna on 2.12.1873 and ratified at Vienna on 10.3.1874.

Application was extended to South Africa by article XVII.

Current status In reply to enquiries from South Africa on the possibility of the conclusion of a new extradition treaty, Austria replied in a communication dated 15.12.1976 (JF 9/11/2 (Oostenryk)) that the Austrian government was not willing to conclude a new treaty with South Africa. However, it was also stated that Austria would apparently regard the British treaty as binding on South Africa but that no definite answer could be given until a specific extradition case arose.

As regards Hungary, on JF 1/554/20/19A it is recorded that South Africa attempted to resurrect an extradition treaty with Hungary which had presumably been suspended when South Africa declared war on Hungary in 1940, but met with no response - PM10/5 dated 25.3.1952.

Practice None

BELGIUM

TREATY BETWEEN GREAT BRITAIN AND BELGIUM FOR THE MUTUAL SURRENDER OF
FUGITIVE CRIMINALS

Reference (1900-01) 94 BSP 7-22

Origin The treaty was concluded between Britain and Belgium at Brussels on 29.10.1901 and ratified at Brussels on 6.12.1901. Application was extended to South Africa by article XIV. An additional convention was concluded between the two countries at London on 3.3.1911 amending the original convention by the inclusion of the principle of speciality (104 BSP 131-132). A further convention concluded at London on 15.10.1923 extended the application of the original convention to certain Belgian and British possessions - notably the Belgian Congo (Zaire), Bechuanaland (Botswana), Southern Rhodesia (Zimbabwe), and Swaziland.

Current status Surprisingly, no file for Belgium as such could be traced. However, JF 1/516/2/5 deals with the Belgian Congo to which, as was shown above, the original treaty was extended. By analogy it may be assumed that the original treaty would also apply. In 1952 Pakistan enquired whether this treaty applied between Belgium and Pakistan (as it had been extended to India) and the Belgian government replied in the affirmative (UNTS vol cxxxiii 2011). The original convention contains a termination clause in

article XV allowing either party to terminate on six months' notice.

No such notice could be traced.

Practice None

BOLIVIA

TREATY BETWEEN GREAT BRITAIN AND BOLIVIA FOR THE MUTUAL SURRENDER OF
FUGITIVE CRIMINALS

Reference (1886) 88 BSP 27-33

Origin The treaty was concluded between Great Britain and Bolivia at Lima on 22.2.1892 and ratified at Lima on 7.3.1898. Application was extended to South Africa by article XVII.

Current status No file for Bolivia could be traced. However, the treaty contains a specific termination clause in article XVIII providing for termination by either party on notice of not less than six months and not more than one year, and no such notice could be traced. Bolivia signed the *Apartheid Convention* on 6.10.1983. This, together with the lack of evidence of use of the treaty or in fact any contact between the two states with regard to extradition would tend to suggest that the treaty has been suspended and that a request for extradition would not meet with success at this stage.

Practice None

BRAZIL

TREATY BETWEEN GREAT BRITAIN AND BRAZIL FOR THE MUTUAL SURRENDER OF
FUGITIVE CRIMINALS

Reference Clarke (1888) lviii

Origin The treaty was concluded between Britain and Brazil at Rio de Janeiro on 13.11.1872 and ratified at Rio de Janeiro on 28.8.1873. Application was extended to South Africa by article XVI.

Current status In reply to a query from the South African authorities to the Brazilian authorities dated 6.10.1969 as to the continued application of this treaty between Brazil and South Africa, the Brazilian authorities replied that there is no extradition treaty between the two countries - JF 1/554/20/4. Brazil in fact denounced all its extradition treaties in 1913 (Evans (1964)). The country is however prepared to extradite on a basis of reciprocity (*Re Milton Gomes* 1929-30 Case 177 Ann Dig 280).

Practice The *Case of Mario Guassardo* arose from fraud totalling some R500 000 committed in South Africa by Guassardo, a director of Boerebank Bpk. A warrant was issued for his arrest by a Johannesburg magistrate (Marshall Square ROM 143/4/62). It was ascertained that he was living in Brazil. Despite the absence of a treaty between the

two countries, Brazil was prepared to extradite Guassardo provided that South Africa undertook a reciprocal obligation. In a letter dated 23.7.1964 the South African authorities indicated that they could not give an unconditional commitment to reciprocity. It could not be determined whether the case was proceeded with.

CHILE

**TREATY BETWEEN GREAT BRITAIN AND CHILE FOR THE SURRENDER OF FUGITIVE
CRIMINALS**

Reference (1897) 89 BSP 20-25

Origin The treaty was concluded between Britain and Chile at Santiago on 26.1.1897 and ratified at Santiago on 14.4.1898. Application was extended to South Africa by article XVII.

Current status On JF 1/554/20/7 in reply to a query from the South African authorities, Chile replied on 6.10.1969 that the treaty with Britain was regarded as valid but that there had been no requests for extradition from either side "over the past few years".

Practice None could be traced.

COLOMBIA

**TREATY BETWEEN GREAT BRITAIN AND COLOMBIA FOR THE MUTUAL SURRENDER
OF FUGITIVE CRIMINALS**

Reference (1889-90) 79 BSP 12-18

Origin The treaty was concluded between Britain and Colombia at Bogota on 27.10.1888 and ratified at Bogota on 21.8.1889.

Application was extended to South Africa by article XVII.

Current status Although a file exists for Colombia - JF 1/554/20/8 - it contains no correspondence. The treaty contains a termination clause in article XVIII allowing either party to terminate by notice of not more than one year and not less than six months. No record of such notice could be traced and the treaty is consequently assumed to be current.

Practice None

CUBA

**TREATY BETWEEN GREAT BRITAIN AND CUBA FOR THE MUTUAL SURRENDER OF
FUGITIVE CRIMINALS**

Reference (1904) 97 BFSP 26-31

Origin The treaty was concluded between Britain and Cuba at Havana on 3.10.1904 and ratified at Havana on 10.1.1905. Application extended to South Africa by article XVII.

Current status The last letter appearing on JF 1/554/20/9 is dated 22.12.1931. There have consequently been no extradition contacts between the two states for the past sixty years. However, the treaty does contain a termination clause in article XVIII which allows either party to terminate on notice of not less than six months but not more than one year. No record of such termination could be found. Cuba signed the *Apartheid Convention* on 29.8.1975 (ratified on 25.3.1976). This, together with the sixty-year period of non-use and Cuba's generally hostile attitude to South Africa, would tend to suggest that the treaty has been suspended.

Practice None

CZECHOSLOVAKIA

TREATY FOR THE EXTRADITION OF CRIMINALS BETWEEN THE UNITED KINGDOM
AND CZECHOSLOVAKIA

Reference 1927 LNTS 270-279

Origin The treaty was concluded between Britain and Czechoslovakia at London on 24.11.1924. The treaty was suspended as regards the Union of South Africa until it should decide to accede in its own right. This was done by article VI of Government Notice 26 of 6.1.1928 *Government Gazette* 6.1.1928.

Current status The last letter on JF 1/554/20/10 is dated 25.3.1952. The treaty contains a termination clause in article 20 allowing either party to terminate on notice of not more than one year and not less than six months. No record of such termination could be traced. Czechoslovakia signed the *Apartheid Convention* on 29.8.1975 (ratified on 25.3.1976). In view of the non-use for almost forty years and the negative attitude evidenced above, it is submitted that the treaty has been suspended.

Practice None

DENMARK

**TREATY BETWEEN GREAT BRITAIN AND DENMARK FOR THE MUTUAL SURRENDER OF
FUGITIVE CRIMINALS**

Reference (1873) 63 BSP 5-18

Origin The treaty was concluded between Britain and Denmark at Copenhagen 31.3.1873 and ratified at Copenhagen 26.4.1873. Its application was extended to South Africa by article XIII. The treaty expressly replaces the treaty of 1862 between the parties.

Current status On JF 1/554/20/21 (Denmark) it is stated that South Africa regards this treaty as valid. However, as from 1.5.1968 Denmark gave formal notice of renunciation of all former treaties. Article XIV accords either state the right to terminate the extradition treaty by six months' notice of its intention. This treaty consequently terminated on 1.11.1968. There is no record of a new treaty having been concluded.

Practice It is recorded on the above file that no application for extradition has ever been received from or made to Denmark.

EQUATOR/EQUADOR

TREATY BETWEEN GREAT BRITAIN AND THE REPUBLIC OF EQUATOR FOR THE
MUTUAL SURRENDER OF FUGITIVE CRIMINALS

Reference (1881) 72 BSP 137-143

Origin The treaty was concluded between Britain and Equator at Quito on 20.9.1880 and ratified at Quito on 19.2.1886. Application was extended to South Africa by article XV.

Current status Although South Africa sent a letter to the Ecuadorian government on 17.11.1969 seeking clarification of the status of extradition treaties between the two states, no response was forthcoming. Consequently, although South Africa regards this treaty as binding, the attitude of Ecuador is uncertain. The treaty does however contain a termination clause in article XVI allowing for termination on six months' notice. No record could be found of such notice having been given. Equador signed the *Apartheid Convention* on 12.3.1975 (ratified 12.5.1975) and this, together with the disregard for the South African enquiry would tend to suggest that the treaty has been suspended.

Practice None.

FINLAND

TREATY BETWEEN FINLAND AND THE UNITED KINGDOM FOR THE EXTRADITION OF
CRIMINALS

Reference 1925 LNTS 80-91

Origin The treaty was concluded between Britain and Finland at London on 24.5.1924. The treaty was suspended as regards the Union of South Africa until it should resolve to accede in its own right. This was done by article V of Government Notice 1677 of 29.9.1925 *Government Gazette* 2.10.1925.

Current status No file for this country could be traced. However the treaty does contain a termination clause in article 17 allowing either party to terminate on notice of not less than six months and not more than one year. No record of such termination could be traced and the treaty may be regarded as current.

Practice None

FRANCE

TREATY BETWEEN GREAT BRITAIN AND FRANCE FOR THE MUTUAL SURRENDER OF
FUGITIVE CRIMINALS

Reference (1876) 67 BSP 5-19

Origin The treaty was concluded between Britain and France on 14.8.1876 at Paris and ratified at Paris 8.4.1878. Application was extended to South Africa by means of article XVI. Application was extended to Tunis by agreement between Britain and France on 31.12.1889 - (1889) 81 BSP 55. A further agreement of 13.2.1896 (1896-97) 88 BSP 6-8, amended certain provisions.

Current status On JF 1/554/20/13 a letter from the French Ministry for Foreign Affairs dated 5.7.1968 responding to enquiry addressed to France by South Africa on 11.5.1967 as to whether France would be prepared to conclude a new bilateral extradition treaty, France stated that there was at that stage "no place" for the conclusion of a new treaty. France declared itself bound by the relevant British extradition treaties.

Practice In the Case of Alain Malo (JF 9/11/2 (France)) Malo, "kidnapped" his four year old daughter and fled to Cape Town. On 4.12.1976 the French Embassy sought assistance in tracing Malo for possible extradition. As he could not be found, nothing further came of the matter.

GERMANY

TREATY BETWEEN GREAT BRITAIN AND GERMANY FOR THE MUTUAL SURRENDER OF
FUGITIVE CRIMINALS

Reference 100 LNTS 268

Origin Treaty concluded between Britain and Germany at London 14.5.1872 and ratified at London 11.6.1872. Application extended to South Africa by article XV.

Current status JF 9/11/2 - At the outset of the Second World War the treaty lapsed and has not been renewed. In terms of a letter dated 16.4.1980 it is confirmed that no new treaty has been concluded with Germany and that matters will be dealt with on an *ad hoc* basis (IF Gelderblom pp Secretary for Justice). Germany is prepared to extradite on a basis of reciprocity subject to the usual provisions including non-extradition of nationals.

Practice A number of cases appear on JF 9/11/3 and as these are not reported elsewhere, they are briefly recorded here.

(a) *The case of Franz Podezin* : In response to an application from Germany for the extradition of Podezin, the Minister replied in a memorandum dated 26.6.1974 that a general undertaking of reciprocity

should not be given in terms of section 3(2) of the Extradition Act 67 of 1962.

(b) The case of *Hans Dieter Gebhardt* heard before Magistrate APJ Kotze at Windhoek on 15.12.1980. Gebhardt was charged with the rape and murder of a Korean nurse in Munich. His accomplice was apprehended in Germany and confessed implicating Gebhardt. Gebhardt admitted complicity. As there was no treaty operative the State President's consent in terms of article 3(2) was sought and granted. The extradition order was granted on 15.12.1980, the Minister consented to his extradition on 20.1.1981 and he was extradited on 18.12.1981.

(c) The case of *Franz Johannes Esser* case no 8/1356/81 heard 27.1.1982 (Johannesburg Magistrate's Court). In this case Germany requested Esser's extradition to serve a sentence passed by a Munich court. Due to various technical problems, the case was eventually thrown out of court in terms of section 10(2) of the Extradition Act - unreasonable lapse of time. Although questions were later raised as to whether the case could be reinstated, it could not be determined whether or not a new case was proceeded with.

(d) The case of *Franz Josef Kraul* case no 08/00784/817 heard in Johannesburg Magistrate's court on 17.6.1981. Charged with "sexual compulsion" and housebreaking in Germany, his extradition was sought to stand trial. After a full investigation and on obtaining consent from the State President in terms of section 3(2), Kraul was eventually extradited.

GREECE

EXTRADITION TREATY BETWEEN THE UNITED KINGDOM AND GREECE

Reference 103 BSP 297; *Union Gazette* 223 of 12.4.1912

Origin The treaty was concluded between Britain and Greece at London on 13.2.1912. Application was extended to South Africa by article 18.

Current status In JF 9/11/2 (Greece) the response of the Greek authorities in an unofficial opinion (letter dated 22.8.1972) to a tentative request for extradition was that the Anglo-Greek extradition treaty no longer binds Greece.

Practice The *Case of Vasilos Kambouris*. Application was made to Greece for the extradition of Kambouris to face charges for fraud on the Netherlands Bank totalling some R40 000 and on a paternity suit. Kambouris could not be traced in Greece and nothing further came of the application. Reference is made to one instance of extradition between the two countries on 21.5.1963 but no record of this case, or the basis on which extradition occurred, could be found.

GUATEMALA

**TREATY BETWEEN GREAT BRITAIN AND GUATAMALA FOR THE MUTUAL SURRENDER
OF FUGITIVE CRIMINALS**

Reference (1884-85) 76 BSP 72-77

Origin The treaty was concluded between Great Britain and Guatamala at Guatamala on 4.7.1885 and ratified at Guatamala on 6.9.1886. Application was extended to South Africa by article XVII.

Current status Although a file exists for Guatamala - JF 1/554/20/16 - there is no correspondence on record. The treaty contains a termination clause - article XVIII - allowing for termination by either party subject to the treaty continuing in operation for six months after such notification. No such notice of termination could be traced and consequently the treaty may be regarded as still operative.

Practice None

HAYTI/HAITI

**TREATY BETWEEN GREAT BRITAIN AND HAYTI FOR THE MUTUAL SURRENDER OF
FUGITIVE CRIMINALS**

Reference (1874) 65 BSP 44-48

Origin The treaty was concluded between Britain and Hayti on 17.12.1874 at Port-au-Prince and ratified at Port-au-Prince on 2.9.1875. Application was extended to South Africa by article XV.

Current status As far as could be established no contact has ever taken place between the two states - no file for Hayti could be traced. However, the treaty does contain a termination clause in article XVI allowing either party to terminate but providing that the treaty will remain in force for six months after notification. No record could be traced of use having been made of this provision and the continued validity of the treaty, although suspect on practical grounds, cannot be ruled out. Hayti acceded to the *Apartheid Convention* on 19.12.1977. This, together with the total lack of contact would tend to suggest that the treaty has been suspended.

Practice None

ISRAEL

EXTRADITION TREATY BETWEEN THE UNION OF SOUTH AFRICA AND THE STATE
OF ISRAEL

Reference Proclamation R14/1960 *Government Gazette* 6362 of
5.2.1960

Origin The treaty was concluded between the Union of South Africa and Israel at Pretoria on 18.9.1959 and ratified at Pretoria on 7.1.1960. The treaty was amended during 1976 by Government Notice R184/1976 in *Government Gazette* 5283 of 10.9.1976.

Current status The treaty remains valid.

Practice In the *Case of Mannie Becker* (JF 9/11/3) South Africa requested the extradition of Becker, a South African attorney who has appropriated some R24 000 from his trust fund, from Israel. In a letter dated 22.1.1982 Israel declined to extradite Becker as the authorities had waited over ten years to request his extradition, he had become a "model citizen" and had repaid a substantial amount of the money. They emphasised, however, that this was a finding solely on the facts of the case and did not set a precedent.

ITALY

**TREATY BETWEEN GREAT BRITAIN AND ITALY FOR THE MUTUAL SURRENDER OF
FUGITIVE CRIMINALS**

Reference : (1873) 63 BSP 19 - 30.

Origin The treaty was concluded between Britain and Italy on 5.2.1873 at Rome and ratified at Rome 18.3.1873. Application of the treaty was extended to South Africa by article XVIII. The treaty was suspended during the Second World War. South Africa succeeded to the treaty in terms of the Republican constitution.

Current Status Very little information on this treaty is available in South Africa. On JF 9/11/2 note 1312 of 23.10.1968 in minute 10/17/5 it is merely stated that this treaty is an "agreement in force". No mention could be found of Italy's attitude in this regard. Article XX contains a termination clause which provides that the treaty will remain in force for six months after notice of termination. No official notice of termination could be traced.

Practice No cases could be traced.

LIBERIA

**TREATY BETWEEN GREAT BRITAIN AND LIBERIA FOR THE MUTUAL SURRENDER OF
FUGITIVE CRIMINALS**

Reference (1892-93) 84 BSP 103-109

Origin The treaty was concluded between Great Britain and Liberia at London 16.12.1892 and ratified at London 31.1.1894. Application was extended to South Africa by article XVII.

Current status No file for Liberia could be traced. However, the treaty contains a termination clause in article XVIII providing for termination by either party on six months' notice. No such termination could be traced. Liberia acceded to the *Apartheid Convention* on 5.11.1976 and this together with the absence of any contact whatsoever would imply that operation of the treaty has been suspended.

Practice None

LUXEMBOURG

**TREATY BETWEEN GREAT BRITAIN AND LUXEMBOURG FOR THE MUTUAL SURRENDER
OF FUGITIVE CRIMINALS**

Reference (1880) 71 BSP 48-53

Origin The treaty was concluded between Britain and Luxembourg at Luxembourg on 24.11.1880 and ratified at Brussels 5.1.1881.

Application was extended to South Africa by article XIV.

Current status In response to a South African enquiry as to the status of extradition between the two states dated 17.11.1969, the continued existence of British treaties was confirmed.

Practice None

MEXICO

**TREATY BETWEEN GREAT BRITAIN AND MEXICO FOR THE MUTUAL SURRENDER OF
FUGITIVE CRIMINALS**

Reference : (1885-6) 77 BSP 1253 - 1258.

Origin : The treaty was concluded between Britain and the President of the United States of Mexico on 7.9.1884 at Mexico City and ratified at Mexico City 22.1.1889. Application of the treaty was extended to South Africa by article XVII.

Current status : Although a file exists for Mexico - JF 1/554/20/25 - it contains no correspondence whatsoever. No record could be found of extradition dealings having taken place between the countries. Article XVIII contains a termination clause providing for notice not exceeding one year and not less than six months. No record of such notice could be traced. Mexico acceded to the *Apartheid Convention* on 4.3.1980 and this, together with the lack of contact would suggest that the treaty has been suspended.

Practice : No cases could be found.

MONACO

**TREATY BETWEEN GREAT BRITAIN AND MONACO FOR THE MUTUAL SURRENDER OF
FUGITIVE CRIMINALS**

Reference (1891-2) 83 BSP 66-72

Origin The treaty was concluded between Great Britain and Monaco at Paris on 17.12.1891 and ratified at Paris on 17.3.1892.

Application was extended to South Africa by article XX.

Current status The last communication appearing on JF 1/554/20/24 is notification of the extension of the application of the treaty to South West Africa dated 5.7.1931. Article XXI, however contains a termination clause allowing termination by either party on six months' notice and as no record could be found of such termination having taken place, the sixty year non-use cannot on its own justify termination. The treaty is consequently regarded as operational.

Practice None

NETHERLANDS

**TREATY BETWEEN GREAT BRITAIN AND THE NETHERLANDS FOR THE MUTUAL
SURRENDER OF FUGITIVE CRIMINALS**

Reference 90 BFSP 51-58

Origin Treaty concluded between Britain and the Netherlands at London on 26.9.1898 and ratified at London on 14.12.1898.

Application extended to South Africa by article XVIII.

Current status On JF 1/554/20/23 the continued application of the treaty with regard to South Africa is confirmed.

Practice None

NICARAGUA

TREATY BETWEEN GREAT BRITAIN AND NICARAGUA FOR THE MUTUAL SURRENDER
OF FUGITIVE CRIMINALS

Reference (1905) 98 BSP 65-69

Origin The treaty was concluded between Britain and Nicaragua at Managua on 19.4.1905 and ratified at London on 13.2.1906.

Application was extended to South Africa by article XV.

Current status On JF 1/554/20/16 dealing with Nicaragua, there is no correspondence whatsoever. However, the treaty contains a termination clause in article XVI allowing either party to terminate on notice of not less than six months but not more than one year. No record of such notice could be found. Nicaragua acceded to the *Apartheid Convention* on 28.3.1980 and this, together with the lack of contact would suggest that the treaty has been suspended.

Practice None

PANAMA

TREATY BETWEEN GREAT BRITAIN AND PANAMA FOR THE MUTUAL SURRENDER OF
FUGITIVE CRIMINALS

Reference (1906) 99 BSP 915-920

Origin The treaty was concluded between Britain and Panama at Panama on 25.8.1906 and ratified at Panama on 15.5.1907. Application was extended to South Africa by article XVIII.

Current status Although a file exists for Panama - JF 1/554/20/28 there is no correspondence whatsoever on record. However, the treaty contains a termination clause in article XIX allowing either party to terminate on notice of not less than six months and not more than one year. No record of such termination could be found. Panama signed the *Apartheid Convention* on 7.5.1976 (ratified on 16.3.1977) and this, together with the lack of contact suggests that the treaty has been suspended.

Practice None

PARAGUAY

**TREATY BETWEEN GREAT BRITAIN AND PARAGUAY FOR THE MUTUAL SURRENDER
OF FUGITIVE CRIMINALS**

Reference 102 BFSP 340-345

Origin The treaty was concluded between Britain and Paraguay on 12.9.1908 at Asuncion and ratified at Asuncion on 30.1.1911.

Application was extended to South Africa by article XVIII.

Current status On JF 9/11/2 (Paraguay) in a letter dated 1.2.1978 it is confirmed by the Paraguayan Foreign Minister that the above treaty is regarded as binding between South Africa and Paraguay.

Practice None

PERU

**TREATY BETWEEN GREAT BRITAIN AND PERU FOR THE MUTUAL SURRENDER OF
FUGITIVE CRIMINALS**

Reference 99 BSP 963-968

Origin The treaty was concluded between Britain and Peru at Lima on 26.1.1904 and ratified at Lima on 30.11.1906. Application was extended to South Africa by article XVII.

Current status Although a file exists for Peru - JF 1/554/20/31 - there is no correspondence on the file. However, the treaty contains a termination clause in article XVIII allowing either party the right to terminate on notice of not less than six months and not more than one year. No record of such notice could be traced. Peru acceded to the *Apartheid Convention* on 1.11.1978 and this together with the lack of contact suggests that the treaty has been suspended.

Practice None

PORTUGAL

**TREATY BETWEEN GREAT BRITAIN AND PORTUGAL FOR THE MUTUAL SURRENDER
OF FUGITIVE CRIMINALS**

Reference (1892-93) 84 BSP 83-88

Origin The treaty was concluded between Great Britain and Portugal at Lisbon on 17.10.1892 and ratified at Lisbon on 13.11.1893. Application extended to South Africa by article XVII. A supplementary agreement CONVENTION BETWEEN THE UNITED KINGDOM, AUSTRALIA, NEW ZEALAND, SOUTH AFRICA AND INDIA AND PORTUGAL SUPPLEMENTARY TO THE EXTRADITION TREATY OF 17 OCTOBER 1892 was signed on behalf of South Africa (and the other Dominions) at Lisbon on 20.1.1932 and ratified at Lisbon on 29.12.1932. It amends article III of the original treaty with regard to the delivery up of nationals.

Current status Although on JF 9/11/2 (Portugal) there are numerous reports of negotiations for the conclusion of a new extradition treaty spanning the period 1972-1974, to date nothing would appear to have come of these. In the interim the British treaty remains applicable. In a letter dated 19.8.1963 extradition between the two states was acknowledged.

Practice In the Case of M Kausana v BJ van Zyl en die Minister van Bantoe Administrasie JF - 1/13/22/3 - the application of the British/Portuguese treaty to South Africa and the Portuguese colonies was recognised.

ROUMANIA/ROMANIA

TREATY BETWEEN GREAT BRITAIN AND ROUMANIA FOR THE MUTUAL SURRENDER
OF FUGITIVE CRIMINALS

Reference (1893) 85 BSP 69-75

Origin The treaty was concluded between Britain and Roumania at Bucharest on 24.3.1893 and ratified at Bucharest on 13.3.1894.

Application extended to South Africa by article XVII.

Current status Although a file exists for Roumania - JF 1/554/20/33 - there is no correspondence on record. The treaty however contains a termination clause in article XVIII allowing either party to terminate on six months' notice and as no record of such termination could be traced its continued existence could be assumed. However, on a different file - JF 1/554/20/19A (Estonia) in a letter PM10/5 dated 25.3.1953 it is recorded that South Africa attempted to resurrect the extradition treaties with Hungary and Roumania but received no response. The treaty would consequently appear to have been suspended with South Africa's declaration of war against Roumania in 1940.

Practice None

SALVADOR/EL SALVADOR

TREATY BETWEEN GREAT BRITAIN AND SALVADOR FOR THE MUTUAL SURRENDER
OF FUGITIVE CRIMINALS

Reference (1881) 72 BSP 13-19

Origin The treaty was concluded between Great Britain and the Republic of Salvador at Paris on 23.6.1881 and ratified at London on 8.11.1882. Application extended to South Africa by article XVII.

Current status Although a file exists for Salvador - JF 1/554/20/34 - there is no correspondence on record. The treaty provides for termination by either side in article XVIII but remains valid for six months after notice of termination. No such notice could be traced. El Salvador acceded to the *Apartheid Convention* on 30.11.1979 and this together with the lack of contact would suggest that the treaty has been suspended.

Practice None.

SAN MARINO

**TREATY BETWEEN GREAT BRITAIN AND THE REPUBLIC OF SAN MARINO FOR THE
MUTUAL EXTRADITION OF FUGITIVE CRIMINALS**

Reference (1899) 91 BSP 95-101

Origin The treaty was concluded between Britain and San Marino at Florence on 16.10.1899 and ratified at Rome 5.12.1899. Application was extended to South Africa by article XIX.

Current status No file for San Marino could be traced. However, article XX contains a termination clause allowing either party to terminate on six months' notice. As no such notice could be traced the treaty may be regarded as operational.

Practice None

SERVIA/SERBIA

TREATY BETWEEN GREAT BRITAIN AND SERVIA FOR THE MUTUAL SURRENDER OF
FUGITIVE CRIMINALS

Reference (1900) 92 BSP 41-46

Origin The treaty was concluded between Great Britain and Servia at Belgrade on 23.11.1900 and ratified at Belgrade on 28 February 1901. Application was extended to South Africa by article XVII.

Current status No file for Servia could be traced. The treaty contains a termination clause in article XVIII which allows either party to terminate the treaty on six months' notice. No such notice could be found. However, as a result of the annexation and disappearance of Servia this treaty would also have terminated. See Chapter VI.

Practice None

SIAM/THAILAND

EXTRADITION TREATY BETWEEN THE UNITED KINGDOM AND SIAM

Reference Union Gazette 269 of 23.8.1912.

Origin The treaty was concluded between Britain and Siam at London on 10.11.1911. Application was extended to South Africa by article 17.

Current status Although a file exists for Siam (now Thailand) - JF 1/554/20/36 - it contains no correspondence. The treaty does contain a termination clause in article 17 allowing either party to terminate on six months' notice. No record of such termination could be found. The treaty is presumed to be operational.

Practice None

SPAIN

**TREATY BETWEEN GREAT BRITAIN AND SPAIN FOR THE MUTUAL SURRENDER OF
FUGITIVE CRIMINALS**

Reference (1878) 69 BSP 6-13

Origin The treaty was concluded between Great Britain and Spain at London on 4.6.1878 and ratified at London on 21.11.1878. Application was extended to South Africa by article X.

Current status In reply to a query by South Africa during 1967 as to the state of extradition between the two countries, Spain replied that it regarded the British treaties binding on South Africa - JF 1/554/20/36 letter dated 6.10.1969.

Practice No record could be found of extradition having taken place between the two states.

SWEDEN AND NORWAY

TREATY BETWEEN GREAT BRITAIN AND SWEDEN AND NORWAY FOR THE MUTUAL
SURRENDER OF FUGITIVE CRIMINALS

Reference (1873) 63 BSP 175-179

Origin The treaty was concluded between Britain and Sweden and Norway at Stockholm on 26.6.1873 and ratified at Stockholm on 28.8.1873. The treaty was extended to South Africa by article XIV. After the separation of Norway and Sweden a further agreement between Britain and Norway was signed at Christiania on 18.2.1907 providing that the 1873 treaty remains in force between Britain and Norway - (1907) 100 BSP 552-553.

Current status Sweden : On JF 1/554/20/37 in a letter dated 9.10.1951 it is stated that the extradition treaty between South Africa and Sweden would lapse on 23.3.1952. The treaty contains a termination clause providing for its remaining in force for six months after the date of notification of termination - article XV.

Norway : On JF 1/554/20/27 it is recorded that the treaty between South Africa and Norway terminated on 20.11.1975. It should however be noted that extradition from Norway may take place in the absence of a treaty in terms of the Norwegian Extradition Act 39 of 1975 operative since 1.8.1975. It is further noted in this file that

there have never been any extradition dealings between the two countries and that it is considered unlikely that there ever will be. It is suggested that if the need were to arise, section 3(2) of the South African Extradition Act could be utilised.

Practice No actual cases of extradition between South Africa and either Norway or Sweden could be traced. However, in the case of Sweden, an extradition question did arise in the case of *Robert Escalier (alias Evan Francis)* who was charged with "instigating robbery" during January 1966. He had fled to Lorenzo Marques (Mocambique) and the Swedish authorities requested permission in terms of section 21(1) of the South African Extradition Act 67 of 1962, from South Africa for the plane transporting him from Lorenzo Marques to Lisbon to be allowed to land at Jan Smuts Airport, Johannesburg. Permission was granted on 11.9.1968 but the route was later changed and use was not made of the right to travel through South African territory.

SWITZERLAND

TREATY BETWEEN GREAT BRITAIN AND SWITZERLAND FOR THE MUTUAL
SURRENDER OF FUGITIVE CRIMINALS

Reference (1880) 71 BSP 54-62

Origin The treaty was concluded between Great Britain and Switzerland at Berne on 26.11.1880 and ratified at Berne on 15.3.1881. Application was extended to South Africa by article XVIII. A supplementary convention amending certain of the periods prescribed in the original treaty was signed at London on 29.6.1904 - (1904) 97 BSP 92-93

Current status In a letter dated 4.7.1979 on JF 9/11/2 (Switzerland) from the Swiss Embassy in Pretoria it is stated that the treaty between Britain and Switzerland of 26.11.1880 is regarded as binding between Switzerland and the Republic of South Africa. The Swiss government is not interested in negotiating a new extradition treaty.

Practice In the *Case of Willi and Gertrude Wezel* Switzerland requested South Africa to extradite the two to face fraud charges involving some 150 000 Swiss francs. A Zurich court had issued a warrant for their arrest on 23.9.1960. No further reference to the case could however be traced.

UNITED STATES OF AMERICA

TREATY BETWEEN THE UNION OF SOUTH AFRICA AND THE UNITED STATES OF
AMERICA FOR THE MUTUAL SURRENDER OF FUGITIVE CRIMINALS

Reference Government Notice 91/1951 *Government Gazette* 4584 of
20.4.1951

Origin Treaty concluded between the King of England acting for the
Union of South Africa and the United States of America concluded at
Washington on 18.12.1947 and ratified at Washington on 1.3.1951.

Current status On JF 9/11/3 (United States) it is confirmed that
extradition between the two countries is regulated by this treaty.

Practice (a) In the *Case of Frans Jacob Smit Theron* wanted to face
fraud charges totalling some R300 000, South Africa requested his
extradition during July 1983 and the United States indicated its
willingness to extradite. However, various procedural problems have
bedevilled the process. The procedural problems were in the process
of being resolved during 1983 but as Theron was facing charges in
the United States as well, his extradition would have to await
completion of his sentence there. He was returned to South Africa on

26.6.1988.

(b) In the recent case of *Re extradition John Robert Graham*, case A 1500/86 (Transvaal Provincial Division Appeal) 23.10.1986 (unreported), an application for Graham's extradition to the United States was considered. In the Pretoria Magistrate's Court Graham's extradition to face theft charges was ordered. The case came before the Supreme Court on appeal and Graham was released largely on the point that the crime had not been committed within the United States as required by both the treaty and the Extradition Act 67 of 1962.

URUGUAY

TREATY BETWEEN GREAT BRITAIN AND THE ORIENTAL REPUBLIC OF URUGUAY
FOR THE MUTUAL SURRENDER OF FUGITIVE CRIMINALS

Reference (1883-4) 75 BSP 18-24

Origin The treaty was concluded between Britain and Uruguay at Montevideo on 26.3.1884 and ratified at Montevideo on 13.12.1884. Application was extended to South Africa by article X. A protocol amending certain periods was signed at Montevideo on 20.3.1891 (1891-92) 83 BSP 22-23.

Current status Although a file exists for Uruguay - JF 1/554/20/8 there is no correspondence on record. The treaty provides in article XVI for termination by either party on six months' notice. No record of such termination could be traced. It is assumed that the treaty is operational.

Practice None

4.2 TREATIES CONCLUDED AFTER THE ATTAINMENT OF REPUBLICAN STATUS

A number of treaties have been concluded by South Africa after the attainment of Republican status in 1961. Only certain of these treaties require attention, the continued validity of the remainder being above question. These treaties are consequently considered in two groupings. First, the treaty relations surrounding the Federation of Rhodesia and Nyasaland; and second, treaty relations surrounding the so-called TBVC states.

4.2.1 THE FEDERATION OF RHODESIA AND NYASALAND

On 19.12.1962 South Africa concluded an extradition treaty with the Federation of Rhodesia and Nyasaland (*Government Gazette* 445/1962; SATS 9/1962). The territory subsequently split into three separate entities : Zambia, Malawi and, initially, Rhodesia. Rhodesia subsequently attained independence as Zimbabwe. The question is consequently what became of the joint extradition treaty and are there extradition agreements with each of these states?

4.2.2 ZAMBIA When Zambia achieved independence, it decided not to conclude a devolution agreement with Britain but that succession would be governed by customary international law and that treaties were to be regarded as valid until contrary notice was given after full examination. In 1966 in the case of *In re Jere* (Columbia District Court 1966 unreported) Zambia in fact relied on the Anglo-American extradition treaty in a successful application for

the return of Jere to Zambia. It consequently regarded itself as having succeeded to at least certain of its earlier extradition arrangements. However, Zambia terminated the extradition treaty between the Republic of South Africa and the Federation by notice (O'Connell (1967.1) 177). Zambia recently enacted a new law governing extradition (Chapter 161 Laws of Zambia). As regards this leg of the Federation, consequently, no extradition treaty exists.

4.2.3 MALAWI Malawi maintained the treaty between itself and South Africa on independence - see *S v Devoy*. A new extradition treaty was concluded between South Africa and Malawi on 25.2.1972 - SATS 1/1972.

4.2.4 SOUTHERN RHODESIA/ZIMBABWE Initially the continued application of the treaty between the Federation and South Africa was confirmed (notes exchanged on 23.12.1962 - *Government Gazette* 1156 of 25.6.1965). However, after attainment of independence as Zimbabwe this treaty was terminated as is clear from the Extradition (Designated Countries) Order 1990 (SI 133 of 1990) in which a list is given of countries with which Zimbabwe has extradition arrangements and on which South Africa does not feature.

The spectre of the Extradition Treaty between South Africa and the Federation of Rhodesia and Nyasaland has now finally been laid to rest. Of the original parties, South Africa has an extradition treaty only with Malawi.

4.2.5 THE TBVC-STATES

Much of South Africa's energy has since 1961 been devoted to concluding "international" agreements with the states it has itself created. Separate extradition treaties were consequently concluded with Transkei (on 2.11.1977 *Government Gazette* 5813 of 25.11.77); Bophuthatswana (on 15.11.1977 GN R375 *Government Gazette* 5846 of 30.12.1977); Venda (on 13.8. 1979 *Government Gazette* 6652 of 12.9.1979); and Ciskei (on 4.12.1981 *Government Gazette* 8204 of 14.5.1982). However, the treaties with Bophuthatswana, Ciskei and Venda have been superceded by the Convention on Extradition concluded between South Africa and these three states at Pretoria on 20.11.1986.

Transkei declined to be part of the Convention but concluded a separate extradition treaty with the Republic in 1987 which supercedes the above treaty.

South African extradition treaties concluded with Swaziland (on 4.9.1968 SATS 2/ 1969); Botswana (on 27.2.1969 SATS 2/1968) and The Republic of China (on 30.12.1987) remain in force.

4.3 MISCELLANEOUS

There are a number of countries with which one would expect extradition arrangements to exist, but which because of their status as former British possessions in which extradition was arranged by

the Fugitive Offenders Act 1881, do not in fact have such arrangements. The following clear responses were determined in this regard.

4.3.1 AUSTRALIA

In the *Case of William Edward Spencer Lewis* (JF 1/554/20/47) the South African embassy requested the extradition of Lewis in 1967 to face fraud charges, a warrant having been issued in Johannesburg on 30.9.1964. The Australian authorities replied that as no treaty existed between South Africa and Australia, the request for his extradition could not be considered.

On the other hand, in what was arguably the most notorious extradition case in South African history, that of Gert Rademeyer wanted for defrauding the electricity giant ESCOM of millions, extradition was in fact granted. This was, however, done on an *ad hoc* basis.

4.3.2 BRITAIN

In a letter from the British Ambassador dated 27.6.1972 (JF 9/11/2) it is stated that it is unlikely that Britain "would be anxious to move in a favourable direction in respect of extradition at least for the foreseeable future".

4.3.3 CANADA

In JF 9/11/2 (Canada) letters dated 23.5.1973 and 6.6.1973 the Canadian authorities made it clear that current Canadian opinion is that extradition arrangements with South Africa cannot be considered.

In response to a South African request for the extradition in the *Case of Thomas Clement Usher* (JF 1/554/20/49) the Canadian authorities declared that no extradition treaty existed between Canada and South Africa. In a letter from the Canadian Under-Secretary of State for External Affairs dated 29.7.1965, it is stated that "It would appear...that there is no means under Canadian law whereby Mr Usher could be returned to South Africa".

4.3.4 EIRE / REPUBLIC OF IRELAND

In *R v Lewis and Mason* PM 115/1/32 South Africa applied to Eire for the extradition of Raymond Mason under the Fugitive Offenders Act 1881. Eire replied that the Fugitive Offenders Act did not apply to it as it clashed with section 50(1) of the Eire Constitution. As Eire had no extradition treaty with South Africa they were not prepared to extradite. It was suggested in a letter dated 16.5.1949 that the conclusion of such a treaty be considered. This was

confirmed in 1960 when in response to a query from Paul O'Higgins, the South African authorities declared that they did not regard the Fugitive Offenders Act applicable and that there were no treaties operative between the countries (letter dated 23.8.1960). In the *Case of Lionel Stander alias S Lyons* (Marshall Square ROM 282/2/62) too, when approached with regard to the existence of an extradition treaty, South Africa replied that there was no treaty and no way in which he could be extradited. To date no such treaty has been concluded. In the meantime, however, the Irish Extradition Act 17 of 1965 was adopted on 19.7.1965 and came into operation on 16.8.1965, and allows for extradition without treaty on the basis of reciprocity.

4.3.5 JAPAN

In the *Case of Hisao Gamo* (JF 1/70/27) the Japanese authorities stated clearly that "no extradition treaty exists between the Republic and Japan..." - *nota verbale* 74/70 dated 20.10.1970.

4.3.6 NEW ZEALAND

When approached about the conclusion of a bilateral extradition treaty with South Africa, the New Zealand authorities stated that although they had no objection in principle to such a treaty, it was not regarded as a matter of urgency. In a subsequent letter - JF 9/11/2 (New Zealand) dated 6.7.1976 - the attitude would appear to have hardened in that it was stated that there was no practical need

for an extradition treaty with South Africa.

ENDNOTES - CHAPTER V

- 1 When the individual consideration of the treaties appearing on the Treaty List provided by the Department of Foreign Affairs is considered, it may well be that certain of the treaties were in fact not succeeded to by South Africa as a result of the third state concerned finding succession unacceptable. However, as the theoretical basis of this "termination" was covered in the previous Chapter, it is not again considered here.
- 2 Vienna Convention on the Law of Treaties 1969 in Brownlie (1972) 233ff. The convention has been in force since British accession in 1980 and although South Africa is not a party, it adheres to the principles which are generally regarded as a codification of customary public international law - see Booyesen (1989) 34 n 11.
- 3 This problem relates solely to unilateral termination by one of the parties as where the parties agree to terminate, or the treaty itself provides for termination, there is either a new "pactum" or a performance of part of the existing "pactum". See too, Nahlik (1971) 746.
- 4 McNair (1961) Chapter XXX 493ff. Dhokalia (1969) 195 states, perhaps somewhat strongly, that "A perpetual treaty which contains no provision for its revision or termination gives rise to injustices". It is perhaps politic to speak of a treaty of indefinite duration rather than one of perpetual application.
- 5 McNair (1961) 517 cites *The Franciska* 1855 Spinks 287 : 2 English Prize Cases 371 at 416. See too the cases cited in

Chapter IV where succession to Colonial extradition treaties is considered.

- 6 See Commentary of the International Law Commission as reproduced in Harris (1983) 624.
- 7 In the Treaty Convention, a distinction is drawn between invalidity and termination. As there is no question of the extradition treaties to which the Republic lays claim having been concluded in any but a regular manner, the question of their being invalid does not arise and will not be further considered. Termination and suspension of operation are relevant and are considered in what follows.
- 8 Article 42(2). See too, Dhokalia (1969) 194 and Nahlik (1971) 740.
- 9 Article 45(a) and (b) for express and tacit consent respectively. This could possibly be regarded as recognition of estoppel by the Convention - see below.
- 10 Article 54(a).
- 11 Article 54(b).
- 12 See eg, the 99 year lease to Britain of the New Territories on the Chinese mainland adjacent to Hong Kong due to expire in 1997 90 BFSP 17.
- 13 Plender (1986) 135 lists the European Coal and Steel Community Treaty concluded at Paris 18 April 1951 (1952 *AJIL* 107 article 97) as an example.
- 14 The Franco-Russian Agreement of 19.8.1892 which had the same currency as the Treaty of Vienna of 20.5.1882 - see Plender (1986) 135 nn 18 and 20.

- 15 This is the case with South African extradition provisions - see below.
- 16 Plender (1986) 137 gives the example of an agreement to surrender territory which will terminate once the new sovereign has acquired sovereignty. He, however, cautions that termination must not be easily assumed as it could defeat the intentions of the parties and have far reaching effects.
- 17 Article 20 of the Treaty between Great Britain and Italy for the Mutual Surrender of Fugitive Criminals signed at Rome 5.2.1873; ratified at Rome 18.3.1873 : 1873 63 BSP 19-30. 19-30.
- 18 Article 15 of the Treaty between Great Britain and Sweden and Norway for the Mutual Surrender of Fugitive Criminals signed at Stockholm 26.6.1873; ratified at Stockholm 28.8.1873 : 1873 63 BSP 175-179.
- 19 Article 18 of the Treaty between Great Britain and Austria/Hungary for the Mutual Surrender of Fugitive Criminals signed at Vienna 3.12.1873; ratified at Vienna 10.3.1874 : 1873 63 BSP 213-218.
- 20 Article 16 of the Treaty between Great Britain and Hayti for the Mutual Surrender of Fugitive Criminals signed at Port-au-Prince 7.12.1874; ratified at Port-au-Prince 2.9.1875 : 1874 65 BSP 44-48.
- 21 Article 17 of the Treaty between Great Britain and France for the Mutual Surrender of Fugitive Criminals signed at Paris 14.8.1876; ratified at Paris 8.4.1878 : 1876 67 BSP 5-19.
- 22 Article 17 of the Treaty between Great Britain and Spain for

- the Mutual Surrender of Fugitive Criminals signed at London 4.6.1878; ratified at London 21.11.1878 : 1878 69 BSP 6-13.
- 23 Article 16 of the Treaty between Great Britain and the Republic of Equator for the Mutual Surrender of Fugitive Criminals signed at Quito 20.9.1880; ratified at Quito 19.2.1886 : 1881 72 BSP 137-143.
- 24 Article 15 of the Treaty between Great Britain and Luxembourg for the Mutual Surrender of Fugitive Criminals signed at Luxembourg 24.11.1880; ratified at Brussels 5.1.1881 : 1880 71 BSP 45-53.
- 25 Article 19 of the Treaty between Great Britain and Switzerland for the Mutual Surrender of Fugitive Criminals signed at Berne 26.11.1880; ratified at Berne 15.3.1881 : 1880 71 BSP 54-62.
- 26 Article 18 of the Treaty between Great Britain and Salvador for the Mutual Surrender of Fugitive Criminals signed at Paris 23.6.1881; ratified at London 8.11.1882 : 1881 72 BSP 13-19.
- 27 Article 16 of the Treaty between Great Britain and the Oriental Republic of Uruguay for the Mutual Surrender of Fugitive Criminals signed at Montevideo 26.3.1884; ratified at Montevideo 13.12.1884 : 1883-4 75 BSP 18-24.
- 28 Article 18 of the Treaty between Great Britain and Guatamala for the Mutual Surrender of Fugitive Criminals signed at Guatamala 4.7.1885; ratified at Guatamala 6.9.1886 : 1884-5 76 BSP 72-77.
- 29 Article 21 of the Treaty between Great Britain and Monaco

- for the Extradition of Criminals signed at Paris 17.12.1891;
ratified at Paris 17.3.1892 : 1891-2 83 BSP 66-72
- 30 Article 18 of the Treaty between Great Britain and Portugal
for the Mutual Surrender of Fugitive Criminals signed at
Lisbon 17.10.1892; ratified at Lisbon 13.11.1893 : 1892-3 84
BSP 83-88.
- 31 Article 18 of the Treaty between Great Britain and Liberia
for the Mutual Surrender of Fugitive Criminals signed at
London 31.1.1892; ratified at London 31.1.1894 : 1892-3 84
BSP 103-109.
- 32 Article 18 of the Treaty between Great Britain and Roumania
for the Mutual Surrender of Fugitive Criminals signed at
Bucharest 21.3.1893; ratified at Bucharest 13.3.1894 :
1893 85 BSP 69-75.
- 33 Article 20 of the Treaty (replacing the treaty of 19.6.1874
: see Clarke *op cit* cxlvii) between Great Britain and the
Netherlands for the Mutual Surrender of Fugitive
Criminals signed at London 26.9.1898; ratified at
London 14.12.1898 : 90 BFSP 51-58.
- 34 Article 20 of the Treaty between Great Britain and the
Republic of San Marino for the Mutual Extradition of
Fugitive Criminals signed at Florence 16.10.1899; ratified
at Rome 5.12.1899 : 91 BFSP 95-101.
- 35 Article 18 of the Treaty between Great Britain and
Servia/Yugoslavia for the Mutual Surrender of Fugitive
Criminals signed at Belgrade 6.12.1900; ratified at Belgrade
13.3.1901 : 92 BFSP 41-47.
- 36 Article 15 of the Treaty (replacing the treaty of 20.5.1876
: see Clarke (1888) xlii) between Great Britain and Belgium

for the Mutual Surrender of Fugitive Criminals signed at Brussels 29.10.1901; ratified at Brussels 6.12.1901. In a convention signed at London on 5.3.1907 and ratified on 17.4.1907, the parties made special provisions for criminals arrested in the Dominions : 100 BFSP 472-473.

- 37 Article 19 of the Extradition Treaty between the United Kingdom and Greece concluded at Athens 24.9.1910; ratified at Athens 30.12.1911.
- 38 Article 17 of the Extradition Treaty between the United Kingdom and Siam concluded at Bangkok 4.3.1911; ratified at London 1.8.1911.
- 39 Article 18 of the Extradition Treaty concluded between the governments of the Republic of South Africa and the Federation of Rhodesia and Nyasaland on 19.11.1962 *Government Gazette* 445/1962; *SATS* 9/1962.
- 40 Article 25 of the Extradition treaty between the governments of the Republic of South Africa and the Kingdom of Swaziland concluded on 4.9.1968; *SATS* 2/1969.
- 41 Article 25 of the Treaty of Extradition concluded between the governments of the Republic of South Africa and Botswana on 27.2.1969; *SATS* 2/1969.
- 42 Article 26 of the Treaty of Extradition between the governments of the Republic of South Africa and Malawi on 25.2.1972; *SATS* 1/1972.
- 43 Article 24 of the Extradition Treaty concluded between the governments of the Republic of South Africa and Transkei on 2.11.1977 - *Government Gazette* 5813 of 25.11.1977. This treaty has been superceded by the Extradition Convention concluded between the governemnts of the Republic of South

Africa and Transkei of 1987.

- 44 Article 24 of the Extradition Treaty between the governments of the Republic of South Africa and Bophuthatswana concluded on 15.11.1977 - GN R375 *Government Gazette* 5846 of 30.12.1977. This treaty has been superseded by the Convention on Extradition concluded between the Republic of South Africa and the governments of Bophuthatswana, Ciskei and Venda on 20.11.1986.
- 45 Article 24 of the Extradition treaty between the governments of the Republic of South Africa and the Republic of Venda concluded on 13.8.1979 - *Government Gazette* 6652 of 12.9.1979. This treaty has also been superseded by the Extradition Convention n 45 above.
- 46 Article 24 of the Extradition treaty between the governments of the Republic of South Africa and the Republic of Ciskei concluded on 4.12.1981 - *Government Gazette* 8204 of 14.5.1982. This treaty has also been superseded by the Extradition Convention above.
- 47 Article 32 of the Convention on Extradition concluded between the governments of the Republic of South Africa, the Republic of Bophuthatswa, the Republic of Ciskei and the Republic of Venda at Pretoria on 20.11.1986 - *Government Gazette* 7/1988 of 5.2.1988 (Venda).
- 48 Article 23 of the Treaty of extradition between the governemnts of the Republic of South Africa and the Republic of China concluded at Taipei 30.12.1987 - Proc 83 *Government Gazette* 11316 24.5.1988.
- 49 Article 18 of the Treaty between Great Britain and Mexico for the Mutual Surrender of Fugitive Criminals signed at Mexico 7.9.1884; ratified at Mexico 22.1.1889 : 1885-6 77

BSP 1253-1258.

- 50 Article 18 of the Treaty between Great Britain and Colombia for the Mutual Surrender of Fugitive Criminals signed at Bogota 27.10.1888; ratified at Bogota 21.8.1889.
- 51 Article 18 of the Treaty between Great Britain and the Argentine Republic for the Mutual Surrender of Fugitive Criminals signed at Beunos Aires 22.5.1889; ratified at Beunos Aires 15.12.1893 : 1889-90 81 BSP 1305-1311.
- 52 Article 18 of the Treaty between Great Britain and Bolivia for the Mutual Surrender of Fugitive Criminals signed at Lima 22.2.1892; ratified at Lima 7.3.1898 : 1896 88 BSP 27-33.
- 53 Article 18 of the Treaty between Great Britain and Chile for the Mutual Surrender of Fugitive Criminals signed at Santiago 26.1.1897; ratified at Santiago 14.4.1898 : 89 BFSP 20-25.
- 54 Article 18 of the Treaty between Great Britain and Peru for the Mutual Surrender of Fugitive Criminals signed at Lima 26.1.1904; ratified at Lima 30.11.1906 : 99 BFSP 963-968.
- 55 Article 18 of the Treaty between Great Britain and Cuba for the Mutual Surrender of Fugitive Criminals signed at Havana 3.10.1904; ratified at Havana 10.1.1905 : 1904 97 BFSP 26-31.
- 56 Article 16 of the Treaty between Great Britain and Nicaragua for the Mutual Surrender of Fugitive Criminals signed at Managua 19.4.1905; ratified at London 13.2.1906.
- 57 Article 19 of the Treaty between Great Britain and Panama

for the Mutual Surrender of Fugitive Criminals signed at Panama 25.8.1906; ratified at Panama 15.4.1907.

- 58 Article 20 of the Treaty between Great Britain and Paraguay for the Mutual Surrender of Fugitive Criminals signed at Asuncion 12.9.1908; ratified at Asuncion 30.1.1911 :
102 BFSP 340-345.
- 59 Treaty between Finland and the United Kingdom for the Extradition of Criminals concluded at London on 24.5.1924. Acceded to by the Union of South Africa by article V GN 1677 29.9.1925, *Government Gazette* 2.10.1925; 1925 LNTS 80-91.
- 60 Treaty for the Extradition of Criminals between the United Kingdom and Czechoslovakia concluded as London 24.11.1924. Acceded to by the Union of South Africa by article VI GN 26 of 6.1.1928, *Government Gazette* 6.1.1928; 1927 LNTS 270-279.
- 61 Treaty between the Union of South Africa and the United States of America for the Mutual Surrender of Fugitive Criminals concluded at Washington on 18.12.1947, ratified at Washington 1.3.1951; GN 91/1951, *Government Gazette* 4584 20.4.1951.
- 62 Extradition Treaty between the Union of South Africa and the State of Israel concluded at Pretoria on 18.9.1959, ratified at Pretoria 7.1.1960. Proclamation R14/1960, *Government Gazette* 6362 of 5.2.1960.
- 63 See n 47 above.
- 64 See the examples cited in Chapter II, eg, article 16 of the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) 704 UNTS 219 which, while not providing for compulsory extradition, facilitates the process; and article 7 of the Convention for the Suppression

of the Unlawful Seizure of Aircraft (Hague Convention) 860 UNTS I- 12325, which provides for either extradition or municipal punishment.

- 65 Article 59(1)(a).
- 66 Article 59(1)(b).
- 67 Plender (1986) 153.
- 68 Plender (1986) 153 shows that in essence there is no difference between consent as provided for in article 54(b) and the intention of the parties in this case. He however indicates that the International Law Commission felt that this instance - although a manifestation of consent - required special regulation. See his discussion of *Electric Company of Sofia and Bulgaria (Preliminary Objections)* PCIJ Ser A/B No 77 (1939) and the domestic case *Attorney-General v Burgoa* 1980 ECR 2787.
- 69 See n 27 above. The treaty provides that after the entry into force of the treaty, the treaty concluded between the High Contracting Parties on 31.3.1874 shall be considered as cancelled, save for any proceedings which might already have taken place or commenced under that treaty.
- 70 See n 61 above. This treaty offers a variation in that it provides for the termination of a single article (article 10 of the treaty of 9.8.1842) rather than of the treaty as a whole.
- 71 The classic example from the South African perspective must be the replacement of the individual extradition treaties with Bophuthatswana, Ciskei and Venda by the Multilateral Extradition Convention concluded between South Africa and these states.

- 72 Plender (1986) 157ff discusses the distinction between termination resulting from any breach of the treaty which was earlier regarded as sufficient, and the modern-day requirement that the breach should be material.
- 73 See *Filartiga v Pena Irala* 1980 *ILM* 966 where the court pointed out with regard to the prohibition on torture, that a time comes when the call to non-interference in domestic affairs will no longer be heeded. The history of international actions against apartheid is even more extensive than that cited by the court in this case to support the customary international prohibition on torture. For a discussion of this judgment see Botha (1980) at 150 ff.
- 74 Not all of South Africa's extradition treaties fall within this classification - clearly those with the TBVC sates themselves and the Extradition Convention between South Africa, Bophuthatswana, Ciskei and Venda are excluded.
- 75 Article 29.
- 76 Article 1 of the Treaty between Great Britain and Panama for the Mutual Surrender of Fugitive Criminals : signed at Panama City 25.8.1906, ratified at Panama City 15.4.1907.
- 77 Article 1 of the Extradition Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland signed at Mbabane 5.9.1968.
- 78 See the discussion of *Gur Corp v Trust Bank of Africa* 1986 3 All ER 458 (CA) in Chapter IV.
- 79 Booyesen (1989) 263.

- 80 O'Connell (1967.1) 365-6.
- 81 *SS Wimbledon* PCIJ Ser A no 1 163. See too, Schwartzberger (1965) at 191.
- 82 See Chapter IV above.
- 83 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* 1971 ICJ Reports.
- 84 At 46.
- 85 The term "precedent" is used here loosely and in full knowledge that the decisions of the court bind only the parties concerned and only as to the specific issue involved. The judgment does however indicate international perceptions of South Africa's policies and how these are likely to be interpreted by international tribunals generally.
- 86 Considerable attention is paid to the history and development of the *rebus sic stantibus* doctrine by Vamvoukos (1985) Part I. See too, David (1975) and Lissitzyn (1967) 895. However, as for reasons given below I do not regard this as a valid ground for the termination of South African extradition treaties, the theoretical aspects will not be considered in any detail.
- 87 Vamvoukos (1985) 28-30; Briggs (1974) 65; and *Fisheries Jurisdiction (United Kingdom v Iceland)* case 1973 ICJ Rep par 36 where article 62 is described as a codification of customary public international law.
- 88 *International Status of South West Africa (Advisory Opinion)* 1950 ICJ Rep 212-214.

- 89 Booyen (1989) 34 n 11.
- 90 Vamvoukos (1985) 151.
- 91 Vamvoukos (1985), for example, traces its attempted use in *French Nationality Decrees in Tunis and Morocco* 1923 PCIL where it was raised by France; in *Interpretation of the Treaty of Neuilly* 1924 PICJ Rep where subsequent events were raised by Bulgaria; in *Free Zones of Upper Savoy and the District of Gex* 1932 PCIL Rep, where France again resorted to the doctrine; and in *The Right of Passage over Indian Territory* 1960 ICJ Rep.
- 92 *Fisheries Jurisdiction (United Kingdom v Iceland)* 1973 ICJ Rep and *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* 1973 ICJ Rep.
- 93 *ICJ Pleadings (UK) Fisheries Jurisdiction II* 89.
- 94 1973 ICJ Rep (UK) 21.
- 95 Vamvoukos (1985) 170.
- 96 Lissitzyn (1967) 896ff talks here of "reasonable expectations".
- 97 Bassiouni (1974) 17 and 60 n 58.
- 98 For an excellent and detailed analysis of *ius cogens* see Sztucki (1974). See too, Scheuner (1967); Scheuner (1969); Schwartzberger (1965); and Verdross (1966).
- 99 Sztucki (1974) 83 and the authors he cites there. At 120ff Sztucki gives the actual voting pattern at the Vienna Conference. It is interesting to note that when theory was put into practice a considerable discrepancy can be seen. Identification of *ius cogens* was considerably less

liberal when actual voting is taken into account.

- 100 Sztucki (1974) 82 and the authors he cites there. See 119 for the actual voting pattern on this point.
- 101 Sztucki (1974) 83 and the authors he cites there.
- 102 Sztucki (1974) 83 and the authors he cites there.
- 103 Sztucki (1974) 123.
- 104 Sztucki (1974) 123.
- 105 The Immorality Act 23 of 1957 (now repealed); The Prohibition of Mixed Marriages Act 35 of 1949 (now repealed); The Group Areas Act 36 of 1966 (now repealed).
- 106 See eg, *Bands v Attorney-General* 1 SAR 157; *Fiocconi and Kella v Attorney-General of the USA* 464 F 2d 475 (2nd Cir 1972).
- 107 For a discussion of these two methods see Van der Heijden (1954) 36; Shearer (1971) 133ff; and Bassiouni (1974) 315ff.
- 108 See, for example, the *Corfu Channel Case* 1951 ICJ Rep 23; *Right of Passage over Indian Territory Case* 1960 ICJ Rep 298; *North Sea Continental Shelf Case* 1969 ICJ Rep 42; and *Barcelona Traction (Second Phase) Case* 1970 ICJ Rep 325.
- 109 Nahlik (1971) 753.
- 110 Shearer (1971) 43-5; McNair (1961) 698. In the 1801 case of *The Frau Ilsbe* 4 C Rob 64, for example, war between Britain and the Netherlands was taken to have abrogated all treaties automatically. While in the 1817 case of *The Le Louis* 1817 2 Dods 210 at 258, it is stated that :Treaties...are perishable things, and

their obligations are dissipated by the first hostility."

- 111 8 Wheaton 464.
- 112 McNair (1961) 698 discusses whether the intention of the parties or the nature of the treaty should be the determining feature. He makes the telling point that either test would give the same result "for the nature of the treaty is clearly the best evidence of the intention of the parties".
- 113 McNair (1961) 703 terms these political treaties.
- 114 McNair (1961) 704 classifies these under the heading "treaties expressly applicable to war".
- 115 McNair (1961) 716-718.
- 116 McNair (1961) 716.
- 117 Shearer (1971) 44-45.
- 118 Bassiouni (1974) 39ff.
- 119 Bassiouni (1974) 44.
- 120 1948 171 F 2d 291 AD.
- 121 241 F 2d (6th Cir 1957) cert denied 335 US 818 (1957).
- 122 177 F Supp 648 (SDNY 1959).
- 123 Vamvoukos (1985) 220.
- 124 Vamvoukos (1985) 220.

- 125 See the discussion of *rebus sic stantibus* in Lissitzyn (1967) 896ff.
- 126 Vamvoukos (1985) 263 citing 1966 YILC II 237.
- 127 See for example, Steyn (1981) 27ff and Du Plessis (1986) 152ff.
- 128 See for example, *R v Detody* 1926 AD 168.
- 129 See for example, *R v Nteto* 1940 EDL 304; *R v Gasmedi* 1947 4 SA 611 (T) and *S v Nyati* 1962 1 SA 6 (T).
- 130 Section 4 dealing with "Procedure" contains article 65 which provides a single procedure for invalidity, termination, withdrawal from or suspension of the operation of a treaty, and article 67 which similarly deals with the instruments used for declaring a treaty invalid, terminating, withdrawing from or suspending the operation of the treaty.
- 131 Article 67(1).
- 132 See n 9 above.
- 133 See for example, the *Preah Vihear Temple* case 1962 ICJ Rep 63; the *Eastern Greenland* case 1933 PCIJ Ser A/B 68; and the *Minguiers and Ecrehos* case 1953 ICJ Rep 71. The principle of estoppel is, however, not particularly suited to extradition as a whole. Extradition invariably involves a discretion on the part of the extraditing state with the result that even if a state is estopped from denying the existence of an extradition treaty, it will not be able to be compelled to extradite the person sought.

CHAPTER VI

CONCLUSIONS

Before deciding what direction extradition will take in the future, it is essential to understand the process both in its historical and in its current perspectives. With the Republic of South Africa poised on the threshold of far reaching and fundamental change, the necessity to stop and take stock of our situation has perhaps never been more pressing. For the past three decades, the country has experienced ever increasing isolation from the mainstream of public international law. Inevitably, this has coloured perceptions of and approaches to contact with other states and to public international law in general. South Africa's approach to public international law has often been both defensive and restrictive. However, the dawning of the "new" South Africa will undoubtedly bring with it the dawning of a new and more open approach to interstate relations and public international law.

We have seen that where the return of a convicted or suspected criminal who has fled to some other state is sought, there is no viable alternative to the process of extradition. Although most states, and as was shown this includes South Africa, have attempted to side-step extradition through kidnapping, deportation and various other mechanisms, this has not proved juridically satisfactory. One cannot but acknowledge that on the human rights front South Africa's

track record is far from exemplary. As we approach a new dispensation it is to be expected - in fact it is axiomatic - that human rights will play a pivotal role in the new South African society. It is consequently particularly gratifying that the decision in *S v Ebrahim* (1) has firmly established a sound moral base for the return of fugitives. South Africa, in rejecting the *male captus bene detentus* doctrine and demanding that the state approach the court with clean hands, has effectively excluded one of the major "alternatives" to extradition and confirmed extradition's continuing role in the country's international relations.

Within an historical perspective, South African society can, through its various phases, be seen as a microcosm of the broader extradition trends which flowed through Europe during the eighteenth and nineteenth centuries. As part of the British Empire, South Africa was, before independence, party to extradition arrangements with those states with which Britain had such agreements. When the country officially severed its Colonial ties in 1961, it carried with it treaties with all the major nations of the world. However, practice and perceptions of extradition within South Africa were essentially Anglocentric with a relatively restrictive approach to extradition.

As was shown, the basis for extradition within Britain - and consequently the basis which South African practice applied at independence - was that extradition takes place only in the presence of a treaty commitment to extradite. South Africa, recognising the

restrictive nature of such an approach, was quick to ring in the changes. Within a year of becoming a Republic, the legislature enacted the South African Extradition Act 1962.(2)

In terms of section 3(2) of this Act the exclusively treaty basis upon which extradition was granted under British influence was broadened to allow for extradition in the absence of a treaty. An analysis of this section shows that the basis upon which it rests is comity.(3) This has not always been recognised by the authorities with the result that confusion has arisen between extradition in terms of section 3(2) of the Extradition Act and extradition based on reciprocity. This confusion is based largely on a misconception of the true nature of reciprocity within the extradition context.(4) If reciprocity is seen for what it is - a treaty commitment undertaken by an informal procedure - it will be realised that the unwarrantedly restrictive interpretation placed on reciprocity by the South African authorities and the concomitant reluctance to extradite on this basis, is unrealistic. It is an attitude which may be attributed partly to a hangover from the stark British "bilateral treaty or nothing" approach, and partly to the South African international law psychosis where, faced with isolation, the country wished at all costs to be seen to be conducting international relations on a formalised basis and demanded official bilateral treaty commitments which would not only serve as a measure of international recognition, but also facilitate proof in case of attack.

It is submitted that the need for such extreme caution has fallen away. With South Africa becoming daily more internationally acceptable, a less formalised process of cooperation may be adopted. The South African Extradition Act, one of the best conceived pieces of legislation on our Statute Books, allows for extradition based on treaty - which should be seen to include reciprocity - and comity. The time is now ripe for the authorities to apply these provisions realistically.

It was seen that the acquisition of treaty rights should be approached on two levels : original and derivative acquisition. South Africa has at various stages "acquired" extradition rights and duties through both methods. While original acquisition presents few problems, within the extradition context derivative acquisition raises the spectre of state succession to bilateral treaties. State succession is one of the least understood and most often misconstrued structures in public international law. To explain succession to extradition treaties - particularly succession through devolution agreements which represent the majority of South Africa's treaty commitments - a two-pronged approach based on Mervyn Jones's distinction between "succession in fact" and "succession in law" (5) is advocated. However, this distinction is of little practical significance if due consideration is not given to the role of consent in succession to treaties. Too often a party's consent to succession is mistaken for consent to the conclusion of a new treaty. This may lead to considerable problems in a system like the South African where treaties depend on transformation for municipal

application. Indeed, within the extradition context in South Africa a misapprehension of the role of consent has led to confusion both on the part of state organs responsible for extradition and in the courts. (6)

Within the context of succession, consent should be seen as a catalyst. First, the third party to the treaty to which it is hoped to succeed must consent to the "succession in fact". In other words it must acknowledge that a factual change has occurred - a new state has been created, for example. This consent opens the way for "succession in law". Succession in law is set in motion when the third party consents to the process of succession taking place - consent is here merely evidence of the intention of the "third party" concerned that a treaty existing between itself and another state will now operate between itself and a different state. The process is completed once the principles of succession governing the relevant succession in fact have been applied between the parties.

Before evaluating the current status of the right or duty to extradite in South African law, it was necessary to examine how treaty rights and duties can be lost. Here it was determined that once acquired, treaty rights and duties are not easily shed. The general trend would appear to be that failing an express denunciation, acquired treaty rights and duties will in cases of doubt be regarded as having been suspended rather than terminated. The advantage in such an approach is of course that these rights and duties may be revived with the minimum of formalities.

As regards South Africa's right or duty either to extradite or to demand extradition the current position may be summarised as follows, based on the print out of treaties in force received from the Department of Foreign Affairs.

Treaties with the following countries must be regarded as operative:

Argentina; Austria; Belgium; Bophuthatswana; Botswana; Chile; Ciskei; Colombia; Finland; France; Guatemala; Israel; Italy; (7) Luxembourg; Malawi; Monaco; Netherlands; Paraguay; Portugal; Republic of China; San Marino; Siam (Thailand); Spain; Swaziland; Switzerland; Transkei; United States of America; Uruguay; Venda.

Treaties with the following countries must be regarded as having been suspended :

Hungary; (8) Bolivia; Cuba; Czechoslovakia; Equator (Equador); Hayti (Haiti); Liberia; Mexico; Nicaragua; Panama; Peru; Roumania; El Salvador.

Treaties with the following countries must be regarded as having been terminated :

Brazil; Denmark; Germany; Greece; Servia; (9) Sweden; Norway; Zambia; (10) Zimbabwe. (11)

This, then, is the current state of the right or duty to extradite within South African society. Where, however, are we going? Viewing the international scene over the past year or so, even the most sage of pundits must blanch slightly. Not only have changes occurred within South Africa which two years ago would have been unthinkable, but the entire international community as it was known is in a process of flux. Communism has disappeared as an official policy and with it the Soviet Union has literally come apart at the seams. "New" states are emerging at a rate never before experienced in international law. How these changes will eventually effect public international law as we know it today is at this stage uncertain. What is certain, however, is that for South Africa the doors of the international community which have steadily been closing over the past few decades are opening fast. Will this have any effect on South Africa's extradition commitments as identified and discussed in the preceding chapters of this work?

The answer must surely be in the affirmative. First, in assessing the extradition treaties to which South Africa claims to have succeeded, many were regarded as having been suspended owing to the foreign states' negative attitude towards the Republic. This no longer necessarily holds true. Within the past three months it has been announced that South Africa has restored diplomatic relations with Czechoslovakia, (12) and established diplomatic relations with Lithuania, Latvia and Estonia. (13) Ties have been established with Poland (14) and Finland, (15) while Japan and South Africa are also to establish full diplomatic relations. (16) Closer to home it was

announced that South Africa and Angola are to have "formal relations" for the first time in seventeen years;(17) while Namibia too is to establish formal links with the Republic.(18)

These developments hold the potential that where extradition arrangements were merely suspended, for example in the case of Czechoslovakia, they may now be reactivated with minimum formality. The assessment of the current status of extradition treaties should consequently be read against the ever changing tapestry of the "new" Europe.

Since the abandonment by South Africa of the apartheid policy, doors in Africa have also been opening. Although at present contacts are largely trade-based, as the country moves towards an acceptable ideological basis, so too will other fields, including extradition, move into the spotlight. Tentative suggestions of a return to the Commonwealth have already been heard and although it is far from certain that South Africa would wish to rejoin that organisation, one thinks immediately of the Commonwealth Extradition Scheme to which the country would then presumably subscribe. At this stage, however, these matters are purely speculative and only time can tell how and indeed if, they will evolve.

One thing is certain, whether one is in a "new" South Africa or a "new" Europe, one will still be faced with "old" criminals. The players may change their names and ideological orientation, the highwayman of the seventeenth century may have made way for the

hi-tech computer thief of today, but the basic need for the return of a criminal to answer for his crimes remains. As long as man is man, the need for extradition will exist. As long as states are states the need to regulate the return of criminals - both in the interests of the criminal as a human being with certain inalienable rights, and in the interest of his state - will exist. The extradition process within South Africa is well developed and holds the potential for being one of the most extensive and well regulated systems within the international community of states.

It is all in place, let us use it correctly, effectively, but above all, with humanity in recognition of the inalienable right of every man - criminal included - to due process of the law.

ENDNOTES - CHAPTER VI

- 1 1991 2 SA 553 (A).
- 2 Extradition Act 67 of 1962.
- 3 See Chapter III 191.
- 4 See Chapter III 203 ff.
- 5 Jones (1947). Jones however, stops short of developing the concept of consent to its logical conclusions.
- 6 See eg, the confusion arising from Hiemstra J's decision in *S v Eliasov* 1965 2 SA 770 (T) and the reaction of the

Department of Foreign Affairs. See Chapter IV 367 ff.

- 7 There is some uncertainty as regards this treaty as no direct evidence of its revival after the Second World War could be found. However it will be remembered that in both *Argento v Horn* 241 F 2d (6th Cir 1857) cert denied 335 818 (1957) and in *In re extradition D'Amico* 177 F Supp 648 (SDNY) 1958 it was accepted that the treaty had been revived by the Peace Pact. Although these are American cases, the analogy with Britain is not too remote for the assumption to be made that the treaty has been revived. On the other hand, it will be remembered that in *Re Bottali* 78 ILR 105 the Italian authorities stated clearly that the Italian policy was that successor states were not bound by the obligations of the predecessors unless they expressly stated so - see Chapter IV and the text accompanying nn 148-152.
- 8 The communication on JF 1/554/20/19A-PM 10/5 25.3.1952 speaks of attempts to resurrect the treaty. This would indeed suggest that the treaty had been suspended rather than terminated. The lack of response however indicates that the treaty is not currently operational.
- 9 Although this treaty is here recorded as terminated through the annexation of Serbia/Serbia and its subsequent incorporation into the Soviet sphere, it will be remembered that in *DC v Public Prosecutor* 73 ILR 38 it was found that an extradition treaty had survived Serbia's various transformations to end up as the Socialist Federal Republic of Yugoslavia - see Chapter IV and the text accompanying nn 128 and 129. With the current turmoil in Yugoslavia and the possibility of Serbia again emerging as an independent state, the possibility that this treaty may be regarded as having merely been suspended, cannot be totally excluded.
- 10 The Northern Rhodesia component of the former Federation of

Rhodesia and Nyasaland.

- 11 The Southern Rhodesia component of the former Federation of Rhodesia and Nyasaland.
- 12 On 29.10.1991 the Minister of Foreign Affairs, RF Botha, announced on the main television news bulletin of the day that diplomatic relations with Czechoslovakia had been restored - Television News Report - South African Broadcasting Corporation 29.10.1991.
- 13 The establishment of diplomatic relations with Lithuania, Latvia and Estonia was announced by the Minister of Foreign Affairs on the main television news bulletin of 6.11.1991. See too "SA en drie Baltiese state knoop betrekkinge aan" *Beeld* 7.11.1991 at 4; "SA ready to help Lithuania - Botha" *The Pretoria News* 6.11.1991 at 3.
- 14 "Diplomatic relations : SA, Poland sign pact" *The Pretoria News* 19.12.1991 at 5.
- 15 Diplomatic relations were agreed upon with Finland on 22.3.1991.
- 16 On 13.1.1992 it was announced on the main television news bulletin of the day that South Africa and Japan has signed an agreement establishing full diplomatic relations - Television News Report, South African Broadcasting Corporation 13.1.1992.
- 17 "Formal ties between SA and Angola" *The Pretoria News* 39.10.1991 at 3.
- 18 "Namibia to establish formal SA link" *The Pretoria News* 30.10.1991 at 4.

LIST OF ABBREVIATIONS USED

AC	Appeal Cases (Britain)
AJIL	American Journal of International Law
All ER	All England Law Reports
Australian LJ	Australian Law Journal
ALR	Australian Law Reports
Annual Digest	Annual Digest of Public International Law cases
BFSP	British and Foreign State Papers
BSP	British State Papers
BYIL	British Yearbook of International Law
CILSA	The Comparative and International Law Journal of Southern Africa
Cr App R	Criminal Appeal Reports
F	Federal Reporter (USA)
F 2d	Federal Reporter (Second Series) (USA)
F Supp	Federal Supplement
GA Res	United Nations General Assembly Resolution
GG	Government Gazette
GN	Government Notice
ICJ Rep	International Court of Justice Reports
ICLQ	International and Comparative Law Quarterly
ILM	International Legal Materials
ILR	International Law Reports
JF	Republic of South Africa: Department of Justice : Files on Extradition
KB	King's Bench (Britain)
KLR	Kenyan Law Reports
Lawsa	Law of South Africa
LNTS	League of Nations Treaty Series
Off Rep	Official Reports of the Transvaal Republic
Pet	Peter's US Supreme Court Reports (USA)
PCIL	Permanent Court of International Justice Reports
P	Probate Reports (Britain)
QB	Queen's Bench Reports (Britain)
RIAA	Reports of International Arbitral Awards
SA	SA South African Law Reports
SADCC	Southern African Development Coordination Conference

SALJ	South African Law Journal
SAR	South African Republic Law Reports
SATS	South African Treaty Series
SAYIL	South African Yearbook of International Law
TBVC	Transkei, Bophuthatswana, Ciskei and Venda
THRHR	Tydskrif vir Hedendaagse Romeins-Hollanse Reg
UKTS	United Kingdom Treaty Series
UNIN	United Nations Institute for Namibia
UNTS	United Nations Treaty Series
Virginia JIL	Virginia Journal of International Law
Wheaton	Wheaton's US Supreme Court Reports 1816-27
WLR	Weekly Law Reports
ZäoRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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- The case of M Kausana* JF 1/13/22/3 (Portugal)
- Re Extradition John Robert Graham* Case no A 1500/86 (TPD) 23.10.1986 (United States of America)
- The case of Robert Escalier (alias Evan Francis)* 1968 JF 1/554/20/37 (Sweden)
- The case of Thomas Clement Usher* 1965 jf 1/554/20/49 (Canada)
- The case of Vasilos Kambouris* 1963 JF 9/11/2 (Greece)
- The case of Willi and Gertrude Wezel* 1960 JF 9/11/2 (United States of America)
- The case of William Edward Spencer Lewis* 1964 JF 1/554/20/47 (Australia)

3 TABLE OF TREATIES

3.1 Extradition treaties

3.1.1 Multilateral extradition treaties

- 1889 Montevideo Convention (1889)
- 1902 Mexico Convention (1902)
- 1911 Bolivarian Convention (1911)
- 1928 Bustamante Code (1928)

- 1933 Second Montevideo Convention (1933)
- 1952 Arab League Extradition Agreement of 14.9.1952
- 1957 European Convention on Extradition 11.12.1957 359 UNTS 273
- 1961 Organisation Communale Africaine et Malgache Convention of 1961
- 1962 Nordic States Scheme of 1962;
- 1962 Benelux Extradition Convention of 27.6.1962
- 1966 Scheme relating to the Rendition of Fugitive Offenders within the Commonwealth of 1966;
- 1968 Convention for the Suppression of Crimes upon Aircraft in Flight 1968
- 1988 Convention on Extradition entered into between the Government of the Republic of South Africa and the Governments of the Republics of Bophuthatswana, Ciskei and Venda 1988

3.1.2 Bilateral

- 1872 Treaty between Great Britain and Germany for the Mutual Surrender of Fugitive Criminals 1872
- 1873 Treaty between Great Britain and Brazil for the Mutual Surrender of Fugitive Criminals 1873
- Treaty between Great Britain and Italy for the Mutual Surrender of Fugitive Criminals 1873
- Treaty between Great Britain and Denmark for the Mutual Surrender of Fugitive Criminals 1873
- Treaty between Great Britain and Sweden and Norway for the Mutual Surrender of Fugitive Criminals 1873
- Treaty between Great Britain and Austria/Hungary for the Mutual Surrender of Fugitive Criminals 1873
- 1874 Treaty between Great Britain and Hayti for the Mutual Surrender of Fugitive Criminals 1874
- 1876 Treaty between Great Britain and France for the Mutual Surrender of Fugitive Criminals 1876
- 1878 Treaty between Great Britain and Spain for the Mutual Surrender of Fugitive Criminals 1878

- 1880 Treaty between Great Britain and the Republic of Equator for the Mutual Surrender of Fugitive Criminals 1880
- Treaty between Great Britain and Luxemburg for the Mutual Surrender of Fugitive Criminals 1880
- Treaty between Great Britain and Switzerland for the Mutual Surrender of Fugitive Criminals 1880
- 1881 Treaty between Great Britain and Salvador for the Mutual Surrender of Fugitive Criminals 1881
- 1884 Treaty between Great Britain and the Continental Republic of Uruguay for the Mutual Surrender of Fugitive Criminals 1884
- Treaty between Great Britain and Mexico for the Mutual Surrender of Fugitive Criminals 1884
- 1885 Treaty between Great Britain and Guatamala for the Mutual Surrender of Fugitive Criminals 1885
- 1888 Treaty between Great Britain and Colombia for the Mutual Surrender of Fugitive Criminals 1888
- 1889 Treaty between Great Britain and the Argentine Republic for the Mutual Surrender of Fugitive Criminals 1889
- 1891 Treaty between Great Britain and Monaco for the Extradition of Criminals 1891
- 1892 Treaty between Great Britain and Bolivia for the Mutual Surrender of Fugitive Criminals 1892
- Treaty between Great Britain and Portugal for the Mutual Surrender of Fugitive Criminals 1892
- Treaty between Great Britain and Liberia for the Mutual Surrender of Fugitive Criminals 1892
- 1893 Treaty between Great Britain and Roumania for the Mutual Surrender of Fugitive Criminals 1893
- 1897 Treaty between Great Britain and Chile for the Mutual Surrender of Fugitive Criminals 1897
- Traktaat voor de Wederkeerige Uitlevering van Voortvluchtige Misdagigers van uit Natal en van uit de Zuid-Afrikaansche Republiek 1897
- 1898 Treaty between Great Britain and the Netherlands for the Mutual Surrender of Fugitive Criminals 1898
- 1899 Treaty between Great Britain and the Republic of San Marino

- for the Mutual Extradition of Fugitive Criminals 1899
- 1900 Treaty between Great Britain and Servia/Yugoslavia for the Mutual Surrender of Fugitive Criminals 1900
- 1901 Treaty between Great Britain and Belgium for the Mutual Surrender of Fugitive Criminals 1901
- 1904 Treaty between Great Britain and Peru for the Mutual Surrender of Fugitive Criminals 1904
- Treaty between Great Britain and Cuba for the Mutual Surrender of Fugitive Criminals 1904
- 1905 Treaty between Great Britain and Nicaragua for the Mutual Surrender of Fugitive Criminals 1905
- 1906 Treaty between Great Britain and Panama for the Mutual Surrender of Fugitive Criminals 1906
- 1908 Treaty between Great Britain and Paraguay for the Mutual Surrender of Fugitive Criminals 1908
- 1910 Extradition Treaty between the United Kingdom and Greece 1910
- 1911 Extradition Treaty between the United Kingdom and Siam 1911
- 1924 Treaty for the Extradition of Criminals between the United Kingdom and Czechoslovakia 1924
- Treaty between Finland and the United Kingdom for the Extradition of Criminals 1924.
- 1932 Convention between the United Kingdom, Australia, New Zealand, South Africa and India and Portugal supplementary to the Extradition Treaty of 1892 of 1932
- 1947 Extradition Treaty between the Union of South Africa and the United States of America 1947
- 1959 Extradition Treaty between the Union of South Africa and the State of Israel 1959
- 1962 Extradition Treaty between the Republic of South Africa and the Federation of Rhodesia and Nyasaland 1962
- 1968 Extradition Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland 1968
- 1969 Extradition Treaty between the Republic of South Africa and the Republic of Botswana 1969

- 1972 Extradition Agreement between the Government of the Republic of Malawi and the Government of the Republic of South Africa 1972
- 1976 Extradition Treaty (Amendment to the 1957 treaty above) between the Republic of South Africa and Israel 1976
- 1977 Extradition Treaty between the Republic of South Africa and Transkei 1977
- Extradition Treaty between the Republic of South Africa and Bophuthatswana 1977
- 1979 Extradition Treaty between the Republic of South Africa and Venda 1979
- 1981 Extradition treaty between the Republic of South Africa and Ciskei 1981
- 1987 Agreement of Extradition between the Government of the Republic of Transkei and the Government of the Republic of South Africa 1987
- Extradition Treaty between the Republic of South Africa and the Republic of China 1987

3.2 OTHER TREATIES

- 1579 Treaty of Utrecht 1579
- 1794 Jay Treaty 1794
- 1802 Treaty of Amiens 1802
- 1806 Articles of Capitulation Britain/Netherlands 1806
- 1835 Congella Agreement Dingaan/Gardner 1835
- 1842 Webster/Ashburton Treaty 1842
- 1852 Sand River Convention 1852
- 1854 Bloemfontein Convention 1854
- 1858 Convention of Aliwal North 1858
- 1864 Geneva Convention for the Treatment of Soldiers Wounded in the Field 1864
- 1866 Peace Treaty of Thaba Bosigo 1866
- 1869 Second Convention of Aliwal North 1869

- 1875 Treaty of Friendship and Commerce (SA Republic /Portugal)
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- 1876 Treaty of Friendship and Commerce (SA Republic / Belgium)
1876
- 1879 Treaty of Friendship (Britain /Tonga) 1879
- 1881 Pretoria Convention 1881
- 1884 London Convention 1884
- 1886 Copyright Convention 1886
- 1891 Vienna World Postal Convention 1891
- 1892 Franco-Russian Agreement 1892
- 1896 Belgian Treaty for the Suppression of Slave Trade 1896
- 1902 Treaty of Vereeniging 1902
- 1910 White Slave Traffic Convention 1910
- 1912 Radio Telegraphic Convention 1912
- 1919 Treaty of Versailles 1919
Covenant of the League of Nations 1919
- 1921 Supplementary White Slave Traffic Convention 1921
- 1928 Kellogg-Briand Pact 1928
- 1929 International Convention for the Suppression of
Counterfeiting Currency 1929
- 1933 Montevideo Convention on the Rights and Duties of States
1933
- 1936 International Convention for the Suppression of Illicit
Traffic in Drugs 1936
- 1945 Charter of the United Nations 1945
- 1951 Convention Relating to the Status of Refugees 1951
European Coal and Steel Community Treaty 1951
- 1963 Convention on Offences and certain other acts Committed on
Board Aircraft in Flight 1963 (Tokyo Convention)
- 1967 Protocol on the Status of Refugees Convention 1967
- 1969 Vienna Convention on the Law of Treaties 1969

- 1970 Convention for the Suppression of the Unlawful Seizure of Aircraft 16.12.1970 (Hague Convention)
- 1971 Convention for the Suppression of Unlawful Acts against Civil Aviation 23.9.1971 (Montreal Convention)
- 1978 Vienna Convention on the Succession of States in respect of Treaties 1978
- Vienna Convention on the Succession of States in respect of State Property, Archives and Debts 1978
- 1984 Nkomati Accord (South Africa/Mocambique) 16.3.1984

4. TABLE OF STATUTES

4.1 South African statutes

Transvaal

- Wet 5 / 1871 Tot uitlevering van Misdadigers
- Wet 1 / 1873 Voor de Inhechtenisneming en Uitlevering van Misdadigers
- Wet 2 / 1881 Tot gemakkelijk maken van het arresteren van zekere Misdadigers van die een plaats in het Grondgebied of de streken van den Oranje Vrijstaat naar deze Provincie ontsnappen
- Wet 14 / 1886 Tot uitlevering van Misdadigers aan de Kolonie de Kaap de Goede Hoop
- Wet 9 / 1887 Regelende de algemeene voorwaarden waarop, ten aanzien van uitlevering van misdadigers, vrede met vreemde Staten of Kolonien kunnen worden gesloten

Cape

- Plakkaat 24.12.1795 (Cape)
- Proc 1.3.1803 Kaapse Plakkaatboek Vol VI 1803-6
- Cape Proclamation of 12.12.1841
- Cape Proclamation of 2.12.1842
- Cape Proclamation of 21.8.1845
- Cape Proclamation of 15.4.1852

Natal

Natal Law 6 of 1892

Union and Republic

- 1934 Status of the Union Act 69 of 1934
Royal Functions and Seals Act 70 of 1934
- 1948 Treaties of Peace Act 20 of 1948
- 1949 Prohibition of Mixed Mariages Act 35 of 1949
- 1950 Internal Security Act 44 of 1950
- 1957 Immorality Act 23 of 1957
- 1961 Republic of South Africa Constitution Act 32 of 1961
- 1962 Extradition Act 67 of 1962
- 1966 Group Areas Act 36 of 1966
- 1972 Civil Aviation Offences Act 10 of 1972
- 1974 Civil Aviation Offences Amendment Act 29 of 1974
- 1976 Status of Transkei Act 100 of 1976
- 1977 Status of Bophuthatswana Act 89 of 1977
- 1979 Status of Venda Act 107 of 1979
- 1981 Status of Ciskei Act 110 of 1981
- 1983 Republic of South Africa Constitution Act 110 of 1983

4.2 Foreign statutes

- 1858 Caley Tariff Act 1858 22 Vict c 76 (Canada)
- 1847 Fugitive Offenders Act 1847 6 & 7 Vict c 34 (Britain)
- 1865 Colonial Laws Validity Act 1865 28 & 29 Vict c 63 (Britain)
- 1881 Fugitive Offenders Act 1881 44 & 45 Vict c 69 (Britain)
- 1887 Fugitive Offenders Act 1887 (Canada)
- 1892 Federal Law of 22.1.1892 (Switzerland)

- 1909 South Africa Act 1909 9 Edw & c 9 (Britain)
- 1931 Statute of Westminster 1931 22 Geo V c 4 (Britain)
- 1963 Fugitive Offenders Act 1963 (Britain)
- 1965 Extradition Act 17 of 1965 (Eire)
- 1966 Extradition (Foreign States) Act 1966 (Australia)
- 1970 Decree Law 66.689 of 11.6.1970 (Brazil)
- 1971 Hi-Jacking Act (Britain) 1971 c 70
- 1974 Extradition (Foreign States) Act 1974 (Australia)
Statutory Rules 130/1974 under Extradition Act (Foreign States) 1974 (Australia)
- 1975 Extradition Act 39 of 1975 (Norway)
- 1990 Extradition (Designated Countries) Order 1990 (Zimbabwe)
Statutory Instrument 133 of 1990 (Zimbabwe)

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**5 DEPARTMENT OF JUSTICE : REPUBLIC OF SOUTH AFRICA : OFFICIAL
FILES ON EXTRADITION**

JF 1/554/20/4 (Brazil)

Letter dd 23.7.1964

Letter no 42/37 dd 19.8.1964

JF 9/11/2 (Britain)

Letter dd 27.6.1972

JF 1/554/20/49 (Canada)

Communication Canadian Under Secretary for State
Affairs dd 29.7.1965

JF 9/11/2 (Canada)

Letter dd 23.5.1973

Letter dd 6.6.1973

JF 1/554/20/21 (Denmark)

JF 1/554/20/13 (France)

Letter French Ministry of Foreign Affairs dd 15.7.1968 Letter dd
11.5.1967

JF 9/11/2 (Republic of Ireland)

Letter dd 16.5.1949

JF 9/11/3 (Israel)

Letter dd 22.1.1983 Director-General Foreign Affairs

and Information

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Nota verbale 74/70 dd 20.10.1970

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Note 295 of 29.5.1964

JF 1/554/20/48 (New Zealand)JF 9/11/2 (New Zealand)

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Letter dd 15.12.1976

JF 9/11/2 (Portugal)JF 1/554/20/46 (Rhodesia & Nyasaland)

Note Lusaka Assistant Commissioner CID dd 15.8.1964

JF 9/11/2 (Switzerland)

Letter dd 4.7.79

JF 9/11/3-1 (Transkei)JF 9/11/3 (United States of America)

6 MEDIA REPORTS

6.1 Newspapers

In chronological order of appearance.

Zimbabwe Sunday Mail 2.6.1985*Graham's Town Journal* April June 1837

THE PRETORIA NEWS

18.2.1985 "Escom fugitive a 'victim of politics'" at 1

20.5.1985 "Extradition hearing starts" at 1

20.7.1985 "Dutch dilemma over de Jonge" at 1

26.7.1985 "Rademeyer to be extradited to face music" at 3

- 19.7.1986 "The long wait continues : A day in the life of Klaas de Jonge" at 9
- 10.7.1987 "De Jonge : nine days to go" at 3
"Dakar Call for Trial of Apartheid" at 1
- 1.6.1989 "SA asks Swiss for Shefer extradition" at 2
- 9.5.1990 "SA prepared to, consider extradition" at 4
- 14.11.1990 "Botha forging SA links with Europe" at 2
- 4.6.1991 "Extradition negotiations" at 2
- 8.8.1991 "World court set to hear R100-m Transkei lawsuit" at 4
- 29.10.1991 "Formal ties between SA and Angola" at 3
- 30.10.1991 "Namibia to establish formal SA link" at 3
- 6.11.1991 "Stander gangster returns : UK deports Allan Heyl :
Now he faces SA justice"
"SA ready to help Lithuania - Botha" at 3
- 9.12.1991 "Diplomatic relations : SA, Poland sign pact" at 4

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- 19.2.1985 "SA in delikate gesprekke oor Rademeyer" at 1
- 3.6.1985 "Zimbabwe gee egpaar dalk terug" at 4
- 26.7.1985 "Evkom man aan SA uitgelwer"
- 27.7.1985 "Platsak, alleen, uitgelewer" at 1
- 31.7.1985 "Dr Gert alleen met tassie in hof"
- 3.9.1985 "Regslui besluit oor de Jonge" at 5
- 1.9.1987 "Amerika soek sakeman in SA" at 1
- 27.6.1988 "Borgtog vir Vloog kort na sy tuiskoms" at 6
- 7.11.1991 "SA en drie Baltiese state knoop betrekkings aan" at 4

RAND DAILY MAIL

- 19.7.1983 "Theron to be Extradited"
- 21.7.1983 "SA exile arrested in US"
- 19.2.1985 "No agreement yet to extradite Rademeyer" at 1

SUNDAY STAR

- 28.7.1985 "De Jonge linked to Pretoria blast" at 1-2
 "Rademeyer flies in to police hands" at 1-2

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- 28.7.1985 "Escom man returns to face trial"
 18.8.1985 "SA drugs lawyer extradited" at 1

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