

Extradition in the absence of state agreements

Provisions in international treaties on extradition

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By virtue of state sovereignty, states exercise authority over all persons and things within their territories. This includes individuals suspected of committing or charged with crimes in foreign states. International law generally imposes no obligation to surrender individuals suspected of or charged with committing crimes in foreign states. Fugitives may only be returned when an agreement exists between the states concerned. As such, states are increasingly ratifying international treaties mandating cooperation to ensure that individuals responsible for certain categories of crimes are brought to justice. It is worth noting that some of these states lack extradition treaties with each other. For example, South Africa and the United Arab Emirates (UAE) are party to the United Nations Convention Against Corruption (UNCAC) which mandates that they cooperate with each other in ensuring that crimes related to corruption are prosecuted. However, there is no extradition treaty between South Africa and the UAE. In these circumstances, a question arises as to whether they can they rely on the UNCAC to extradite individuals for corruption-related crimes. If they can, what is the nature of the international obligation entrenched under the UNCAC? Overall, what is the standing of international treaty clauses on extradition for states without extradition treaties?

On 15 February 2018, the Hawks confirmed that a warrant for the arrest of Ajay Gupta

had been issued. Reports circulated that Ajay Gupta has fled South Africa... Subsequently it was suggested that if he has fled to Dubai in the United Arab Emirates [UAE], surrendering him in order to extradite him from Dubai to South Africa to stand trial for corruption would not be possible or feasible – because no bilateral extradition treaty is in force between SA and the UAE. However, that is not correct. Extradition between the UAE and SA may

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not only be possible but compulsory for corruption-related matters [...]. In the Gupta case, it is necessary to consider that both South Africa and the UAE have signed and ratified the United Nations Convention Against Corruption [...]. Article 44 of the UN Corruption Convention sets out the rules regarding extraditing those persons who are accused of corruption... If the law of a state party, such as the UAE, makes extradition dependent on the existence of a bilateral treaty and receives a request from another state party, such as South Africa, it may consider the UN Corruption Convention as the legal basis for extradition in respect of corruption type crimes.¹

The above quote from the *Daily Maverick* may contain speculation, for example on the whereabouts of Ajay Gupta. The matter is still unfolding, which makes it difficult to draw conclusions, but it does illustrate the lack of clarity regarding extradition, particularly where states do not have bilateral treaties with each other, but both are parties to international treaties, which contain provisions on extradition.

As the quotation suggests, 'if the law of a state party... makes extradition dependent on the existence of a bilateral treaty and receives a request from another state party, ... it may consider the [UNCAC] as the legal basis for extradition in respect of corruption type crimes.'² While this is indisputable, some issues remain far from clear. In this particular instance, the enforcement of the UNCAC may be faced with two obstacles. The first pertains to the status of the UNCAC in South Africa's municipal law. There continues to be a debate on whether extradition treaties are self-executing.³ Some constitutions, including South Africa's, contain provisions on the self-executing nature of some international treaties.⁴

What then is the implication of this debate for South Africa, bearing in mind provisions such as section 231 of the Constitution, which make it explicit that international agreements become law in South Africa when they are 'enacted into law by national legislation?' Secondly, although some states are party to international treaties, such as the UNCAC, they have made reservations to the section on extradition. With regards to such states, the prospects of South Africa relying on the UNCAC would appear to ring hollow. In light of these issues, the purpose of this article is to critically analyse the status of provisions on extradition as contained in international treaties in South Africa's municipal law. This discussion will demonstrate that, despite provisions on self-execution of treaties in South Africa's Constitution, domestic implementation of extradition provisions in treaties is not simple. To appreciate the argument advanced in this paper, it is necessary to undertake an overview of the notion of extradition and state sovereignty.

General rules on extradition in light of the notion of state sovereignty

Extradition may be defined as the delivery of an accused or convicted person to the state where he is accused of, or has been convicted of, a crime by the state in which he is resident at the time.⁵ The extradition process of South Africa is primarily governed by the Extradition Act 67 of 1962. Under this Act, extradition takes place only by way of an agreement between states.⁶ The Constitutional Court, in the case of *The President of the Republic of South Africa and Others v Nello Quagliani and others (Quagliani 2)*,⁷ has described the notion of extradition as follows: '[i]t involves... acts of sovereignty on the part of two States; a request by one State to another ... and the delivery of the person requested...'⁸ International law allows each state liberty to exercise control on matters within its territory and this includes matters pertaining to extradition. This is rooted in the principle of sovereignty of states.

Kelsen defines state sovereignty as a state's legal independence from other states.⁹ As such, no state has a right to dictate or command any state to take any particular action. Being one of the fundamental principles of international law, sovereignty is considered a crucial principle in the shaping of international law.¹⁰ The notion of sovereignty also finds force in article 2(7) of the UN Charter,¹¹ which protects matters that are within the domestic jurisdiction of a state from any external interference. This notion comes into play when another state is interested in the person of the accused within the territory of another state. Here the rights or interests of two states converge as they both are interested in the accused – one state's interests emanate from the accused's presence, whereas the other's interests originate from the act of crime committed within its jurisdiction or territory. Usually in the absence of an extradition treaty, states are not obliged to surrender an alleged criminal to a foreign state due to the principle of sovereignty.¹² This has been the norm under international law. It is no wonder then that the court, in *Factor v Lanbenheimer*,¹³ emphasised that no right in international law is recognised in extradition, apart from a treaty.

Despite the notion of sovereignty, the development of international law has brought some changes to the absolute sovereignty of states. This is attributed largely to globalisation, which fosters interdependence and co-operation between states.¹⁴ Sovereignty is sometimes seen to be undermined where an extradition treaty is in existence when the state to which the request is being made cannot extradite due to the likelihood of death sentence being executed on the wanted person. This was seen in the case of *Tsebe and Another v Minister of Home Affairs and Others*, *Phale v Minister of Home Affairs and Others*¹⁵ where Botswana's sovereign right to make laws applicable and be able to execute them (sentencing the accused to death) was limited

by South Africa's need to respect its own laws within the territory under its sovereignty (i.e. within the borders of South Africa). In this instance, to evade the death penalty in Botswana, the accused had fled to within the borders of South Africa. South Africa is bound by its Constitution to protect every person within its territory, including protecting them from any inhumane and degrading punishment, which is, inter alia, how the Constitutional Court viewed a death sentence in *S v Makwanyane and Another*.¹⁶ Other legal factors like the universality of human rights also limit state sovereignty. Different scholars underscore the need for reforms to the concept of sovereignty in line with recent developments. For instance, Fassbender contends that since sovereignty may be considered an umbrella term demonstrating rights and duties afforded to a state by international law at a given time, it is essential that it be highly flexible and adaptive.¹⁷ Ferreira-Snyman adds that sovereignty is neither 'natural' nor static.¹⁸ Bodley submits that the fact that states are sovereign does not suggest that international law does not bind them.¹⁹ A state that signs an extradition treaty may be viewed as ceding or voluntarily giving up a portion of its sovereignty.²⁰ Strydom contends that 'sovereignty is always legally circumscribed, internally by the law of the state, and externally by the legal claims that other states are entitled to as equal members of the international legal order'.²¹ Bearing this in mind, the question that arises in relation to extradition in the absence of treaties may be whether or not a state may be compelled to extradite an alleged criminal. In other words, whether there is a duty to extradite. And if such a duty exists, whether it conflicts with the international principle of sovereignty or not. In an effort to address these complexities the 'duty to extradite' is explored below.

The duty to extradite

Despite the sovereignty of states, states may not harbour criminals in their territories. International

law requires states to either exercise jurisdiction over the alleged suspects of certain categories of crimes²² or to extradite them to a state able and willing to prosecute or alternatively to surrender the alleged suspect to an international tribunal with jurisdiction over the suspect and the crime. Hence the existence of the phrase *aut dedere aut judicare*, which, when translated, literally means 'either surrender (or deliver) or try (or judge)'. The obligation to prosecute or extradite, unlike universal jurisdiction which is permissive, is mandatory.²³ States are obligated to either prosecute or extradite certain alleged suspects, and their failure to do so results in an internationally wrongful act. The case of *Belgium v Senegal* (Habre case)²⁴ illustrates how the duty to prosecute is firmly emphasised in international law and the need to initiate a standard to assess compliance with the duty to prosecute by the custodial state. The case involved the former president of Chad (Hissène Habré) who during his time had established a brutal dictatorship which was responsible for the death of thousands of people. When proceedings were commenced against him, Senegal, where Habre was resident at the time raised the defence that Habre enjoyed immunity and as such could not be prosecuted. Belgium thereafter instituted proceedings against Senegal in that it violated its obligation to prosecute or extradite as pronounced by the Convention against Torture.²⁵

The *aut dedere aut judicare* maxim finds expression in multilateral treaties aimed at promoting or securing international cooperation in law enforcement and the suppression of certain criminal acts.²⁶ Despite the difference in the phrasings of the obligation in different treaties, the obligation generally requires states to either extradite or prosecute alleged suspects of crimes of international concern in their domestic courts.

Bassiouni²⁷ extends the scope of the obligation to cover international crimes.²⁸ These are crimes

understood to be of international concern to the extent that warrants multilateral treaties to require parties to cooperate in their suppression. An example of a multilateral convention including an *aut dedere aut judicare* clause is the International Convention for the Protection of All Persons from Enforced Disappearance of 2006.²⁹ The Rome Statute of the International Criminal Court also places a duty on member states to surrender an alleged offender who is to be prosecuted by the ICC when located in their territories.³⁰ In light of modern phenomena such as organised crime, money laundering, and terrorism, international judicial cooperation and extradition have become more relevant than ever before.³¹ The main purpose of the duty to extradite or prosecute is to ensure prosecution of alleged offenders, so that they do not escape with impunity. The scope is designed in a way that ensures that the perpetrators of war crimes, crimes against humanity, genocide, torture, terrorism affecting the whole international community and transnational crimes do not go unpunished.

Generally, when states desire to prosecute an accused who is resident in a foreign jurisdiction at the time, they have recourse to bilateral extradition treaties. However, international treaties now exist which, although not devoted to extradition, contain provisions on extradition. The issue then becomes – what is the status of the extradition provisions in these treaties? Are they self-executing? If so, what happens when some states make reservations to these provisions?

Provisions on extradition in international treaties and self-execution

South Africa has ratified a number of extradition treaties that establish extradition relations with the states concerned. Notable examples of bilateral treaties between South Africa and other states include the extradition treaties between South Africa and Lesotho, between South Africa and Egypt and between South

Africa and Argentina.³² Multilateral treaties to which South Africa is party include the Southern African Development Community Protocol on Extradition.³³ South Africa is also party to a host of international treaties geared towards deterrence and prosecution of criminal activities and human rights violations. Although these treaties are not specifically devoted to extradition, they contain robust provisions on cooperation and extradition for the effective investigation and prosecution of persons engaged in proscribed conduct. Examples of such treaties are the UNCAC,³⁴ the United Nations Convention Against Torture,³⁵ the Hague Convention of 1954 for the Protection of Cultural Property in the event of armed conflict,³⁶ the Optional Protocol to the Convention on the Rights of the Child on the sale of Children, Child Prostitution and Child Pornography,³⁷ the International Convention for the Protection of all Persons from Enforced Disappearance³⁸ and the United Nations Convention Against Transnational Crimes.³⁹ For states without extradition treaties, the provisions on extradition in these treaties are a fall-back position. For instance, under article 44(5) of the UNCAC, '[i]f a State Party... receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition ...' It has been argued that provisions such as these are self-executing.⁴⁰ Nevertheless, what is the status of such provisions in South African law?

The debate on the status of international treaties in South Africa's municipal law has been ongoing and has attracted both scholarly and jurisprudential attention. Prior to the decision of the case of *Quagliani 2* (2009) profound controversy surrounded this issue. One line of argument suggested that some treaties were self-executing and as such not requiring domestic legislation to become part of municipal law.⁴¹ The other line of argument

suggested that a legislative enactment was a prerequisite for extradition treaties to become part of South Africa's national laws.⁴² This debate brought section 231 of the Constitution into perspective. This provision is as follows:

International agreements

231. (1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

The issue of whether treaties are self-executing in the context of South Africa in light of section 231(4) above has attracted jurisprudential attention. In the 2008 case of *Nello Quagliani v President of the RSA and Steven Mark Van Rooyen & Laura Brown v President of the RSA (Quagliani 1)*,⁴³ one of the overarching issues was whether the extradition agreement between the United States of America (USA) and South Africa formed part of municipal law.

In interpreting section 231(4) of the Constitution, the Court disregarded the notion of self-execution, describing it as lacking meaning in South Africa's context.⁴⁴ Consequently, in resolving the issue as to whether extradition treaties formed part of municipal law, the judge ruled that

...the plain language of the sub-section requires ... enactment into law of every new treaty ... that clearly means a new Act of Parliament for every new treaty. I appreciate that it will be a great inconvenience if there has to be a new act passed through Parliament for every international agreement ... but that is what the Constitution said and ... needs to be done.⁴⁵

Thus, although the Extradition Act, under section 2(3)ter provides for notification of a ratified treaty in the Government Gazette,⁴⁶ such notification was deemed not to measure up to the requirement of a legislative enactment envisaged by the Constitution.⁴⁷ In handing down this ruling, the Court effectively disregarded the provision of the Extradition Act, which envisioned that subsequent extradition agreements would become law on the basis of notification in the Gazette.

The controversy surrounding the exact meaning of section 231(4) of the Constitution in regard to extradition treaties would, however, be far from being settled in the wake of this judgment. In a subsequent decision in the case of *Steven William Goodwin v Director-General Department of Justice and Constitutional Development* (*Goodwin case*),⁴⁸ which also involved an extradition agreement between the USA and South Africa, the Court decided quite differently from *Quagliani 1*. Ebersohn J ruled, inter alia, that 'the [extradition treaty between South Africa and USA] is a self-executing provision in its totality.'⁴⁹ The crucial difference between these two decisions is that, whereas the latter

considered extradition treaties as self-executing, the former deemed them non-self-executing. With these two decisions on record, the exact nature of extradition treaties in South Africa's law remained contentious. Even scholars had their word on this controversy, leaving the issue even more perplexing. Van der Vyver, for instance, is of the view that the idea of self-execution of treaties is 'nonsensical' and ought to be ignored.⁵⁰ Van de Vyver is not the first to hold such a view: as far back as 1951, Professor McDougal, in the context of the USA, was of the opinion that 'this word self-executing is essentially meaningless, and ... the quicker we drop it in our vocabulary the better for clarity and understanding.'⁵¹ Katz contends that, 'provisions dealing with the incorporation of extradition agreements appear not to satisfy the constitutional requirements concerning incorporation.'⁵² This conclusion was based on Katz's interpretation of section 2(3)ter of the Extradition Act, which provides that the Minister shall give notice of an agreement in the Gazette.⁵³ In Katz's opinion, since the Constitution envisages incorporation of international treaties by way of legislation, notice by the minister in terms of section 2(3)ter rendered the Extradition Act inconsistent with the Constitution.⁵⁴

In 2009, the Constitutional Court pronounced on this controversy, seemingly settling the matter once and for all. In *Quagliani 2* the Court underscored the unique nature of extradition. Extradition, the Court noted, 'straddles the divide between state sovereignty and comity between states and functions at the intersection of domestic law and international law.'⁵⁵ The Court alluded that under the South African law, 'it is unnecessary to consider the question whether a treaty is self-executing.'⁵⁶ Again, the Court appears to have avoided dealing with the issue, yet scholars like Botha contend, that 'South Africa has introduced the concept of self-executing treaties into its law. Therefore, like

it or not – and mostly it’s not – it is part of our law and we have to deal with it.’⁵⁷ In adopting a stance, the Court aligned itself with views of scholars like van de Vyver, who (as noted above) take the extreme view that the notion of self-execution is ‘nonsensical’ in the South African context. Thus, the Court’s point of departure was that extradition treaties required national legislative enactments to be enforceable under South African law.⁵⁸ The Court added that, whether or not the Extradition Act fulfilled the requirement of legislative enactment in terms of section 231 of South Africa’s Constitution, could be resolved as follows:

There are two ways in which this question can be answered. The first is to say that the Agreement itself does not become binding in domestic law, but the international obligation the Agreement encapsulates is given effect to by the provisions of the [Extradition] Act. The second approach is that once the Agreement has been entered into as specified in sections 2 and 3 of the [Extradition] Act, it becomes law in South Africa as contemplated by section 231(4) of the Constitution without further legislation by Parliament. It is not necessary for the purposes of this case to decide which of these approaches is correct, for their effect in this case is the same. Either the Agreement has ‘become law’ in South Africa as a result of the prior existence of the Act which constitutes the anticipatory enactment of the Agreement for the purposes of section 231(4) of the Constitution. Or the Agreement has not ‘become law’ in the Republic as contemplated by section 231(4) but the provisions of the Act are all that is required to give domestic effect to the international obligation that the Agreement creates. I conclude, therefore, that on either of the approaches identified above, no further

enactment by Parliament is required to make extradition between South Africa and the United States permissible in South African law.⁵⁹

The Constitutional Court, in light of the above ruling, reinforces the view that for an extradition treaty to have legal force at the national level, it has to draw on national legislation, which either gives it effect or anticipates it. National legislation, in this case the Extradition Act, either gives effect to the international obligation under the Extradition Agreement, or, the Extradition Act renders the extradition agreement ‘law.’ Mindful of the caveats pointed out by scholars like Botha on courts’ failure to deal with the self-execution head on, it can be said that the Court in *Quagliani 2* does not consider enactment of individual national legislation a requirement for extradition treaties entered into by South Africa to become part of municipal law.

The notion of self-execution of treaties finds its roots in the United States, where there is also a fair share of controversy regarding this notion. In fact, some commentators find it meaningless in terms of its application in the USA.⁶⁰ As in South Africa, the USA has tried to give meaning to its application. Notably, despite the recognition of self-execution, there are instances where domestic legislation is required for treaties to have effect. Examples here are where the treaties are vague, when the treaties make it explicit that legislation is required and where the goal that the treaty seeks to advance can only be advanced by a national legislation.⁶¹ Generally, however, no legislation is required to give effect to self-executing treaties. The question then is: what is the implication of this current position for provisions such as article 44(5) of the UNCAC? Notably, amidst the seemingly settled stance in the decision of *Quagliani 2* are provisions such as article 44(5) of the UNCAC, which give states the option to consider the UNCAC ‘the legal basis for

extradition in respect of [corruption offences proscribed under the UNCAC].’ In effect, in the absence of an extradition agreement, article 44(5) constitutes an Extradition Agreement that provides the basis for imposing on state parties to the UNCAC an international obligation to extradite. Provisions similar to article 44(5) are also evident in other treaties, such as article 16(5) of the United Nations Convention Against Transnational Organised Crime and Protocols⁶² thereto. In regard to these provisions, commentators like Bassiouni opine that whereas the other provisions of the UNCAC are not self-executing, article 44, specifically on the issue of extradition, is self-executing.⁶³ The fact that provisions such as article 44 are self-executing, Bassiouni submits, makes the further enactment of legislation unnecessary for purposes of giving the clause legal force at the national level.⁶⁴ Bassiouni’s stance would appear to be contradictory to Van der Vyver, who views it as ‘nonsensical.’⁶⁵ Bassiouni’s argument adds onto the concerns raised by commentators like Botha and Dugard who take the stance that the notion of self-execution as referred to by the Constitution should not be ignored.⁶⁶ This leaves the question: what is the status of articles such as 44(5) of the UNCAC in South Africa’s municipal law?

Despite the fact that scholars remain seemingly unsettled on the issue, the self-execution of extradition provisions in international treaties has to be measured against South Africa’s current stance on the notion of self-execution. As to whether or not South Africa would be required to enact national legislation to give effect to article 44 of the UNCAC, the decision of the Constitutional Court in *Quaglini 2* offers guidance, although it has been the subject of criticism. Botha, for instance, finds the decision ‘profoundly unsatisfactory’.⁶⁷ Dugard adds that ‘the Court has given an incomprehensible and confusing interpretation of s 231(4) and failed to throw any light on the meaning of the

term “self-executing”.’⁶⁸ He insists that courts ‘must address the meaning to self-executing treaties and not pretend that the proviso to s 231(4) does not exist.’⁶⁹ However, despite such criticism, the decision of the Constitutional Court remains the position under South African law. This means that the Extradition Act would be viewed either as giving effect to the international obligation to extradite under the UNCAC, or, the Extradition Act, in anticipation of article 44, renders article 44 of the UNCAC ‘law’ under South African law. However, that a number of states have made reservations to article 44(5). What then is the implication of this for the international obligation to extradite?

Extradition provisions in international treaties and reservations

As extradition agreements between states are created by treaties, they are governed by treaty law; the Vienna Convention on the Law of Treaties (VCLT).⁷⁰ In terms of the ‘*Pacta sunt servanda*’ rule, as entrenched under the Vienna Convention, South Africa is bound by all treaties to which it is party and is bound to perform such a treaty in good faith.⁷¹ Article 27, which bars states from invoking provisions of its domestic laws as a justification for failure to perform an extradition treaty also bears mention here.⁷² In principle, parties to international treaties are bound by the obligations contained in those treaties. It is also important to note that one of the galvanizing factors for the adoption of the UNCAC was the commitment to facilitate cooperation amongst states in the prosecution of corruption-related crimes.⁷³ The need for member states to the UNCAC to accord due regard to extradition is equally borne out by the wording of the Preamble to this treaty.⁷⁴ That said, however, international obligations may be subject to some limitations, particularly where states make reservations to certain provisions of a treaty. It is explicit in article 44(5) of the UNCAC (as is article 16(5) of the United Nations

Convention Against Transnational Organised Crime), that making the UNCAC the basis for extradition is optional. Notably, article 44(5) provides that a state party 'may consider' the UNCAC the basis for extradition. Emphasis is to be placed on the term 'may', which suggests that the provision is discretionary and as such, states parties have the option of not making the UNCAC the basis for extradition. The UNCAC is unambiguous about the optional nature of article 44(5), going as far as to provide under its article 44(6) that:

6. A State Party that makes extradition conditional on the existence of a treaty shall:

(a) ... inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition... and

(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek ... to conclude treaties on extradition with other States Parties ... to implement this article.

It is worthwhile noting that different states have exercised different options in regard to article 44(6). Some have considered the UNCAC the basis for extradition in the absence of an extradition agreement, while others have opted out. South Africa has invoked article 44(6)(a) and this has had the effect of making the UNCAC the basis for extradition with regard to crimes envisaged in the UNCAC.⁷⁵ This option is not unique to South Africa. Other state parties to the UNCAC have invoked a similar approach. Examples include Canada, the United States, Chile, Guatemala, Kuwait, Montenegro, Paraguay, Poland, Russia and Uruguay.⁷⁶ Examples of states which have exercised the option not to make the UNCAC the basis for extradition include Bolivia, Cuba,

El Salvador, Pakistan and Seychelles.⁷⁷ Bolivia submits that its legal basis for extradition is existing extradition treaties as opposed to the UNCAC.⁷⁸ Mauritius takes the view that '[t]he Extradition Act [of Mauritius] does not at present allow Mauritius to take the Convention as the legal basis for co-operation on extradition with other States Parties to the Convention.'⁷⁹ Similar reservations are evident in respect of the United Nations Convention Against Transnational Organised Crime.⁸⁰ So what does this mean for South Africa as a party to the UNCAC?

It is, of course, indisputable that in the absence of extradition agreements between states, provisions such as article 44 of the UNCAC constitute a basis for imposing international obligations on states to extradite. But does that international obligation bind all parties to the UNCAC? To answer this, recourse is made to the VCLT, and particularly the section on reservations. Article 19 of the VCLT makes provision for reservations unless prohibited. States can therefore opt out of certain obligations under a treaty using this mechanism. In terms of article 21 of the VCLT, reservations made in terms of Article 19 have the effect of modifying the obligations of the reserving state in its relations with other states parties to the treaty. The Convention, however, makes it explicit that 'the reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.'⁸¹ When states, such as Bolivia and Mauritius, make reservations to article 44(5), it follows logically that the article has no legal obligations on them on extradition matters. Therefore, without an extradition treaty between Bolivia and South Africa, no obligation to extradite exists between these two states. This, however, as article 21 of the VCLT puts it, does not 'modify the provisions' of the UNCAC for other parties, which consider article 44(5) as the basis for extradition.

Therefore, the fact that states are party to the same international treaty that makes

provision for extradition does not guarantee the existence of an international obligation to extradite. This position may be distinguished from the extradition provision under the Draft Comprehensive Convention Against International Terrorism.⁸² Although this instrument has not been adopted, it is particularly instructive as it puts the extradition provision under treaties, such as the UNCAC, into proper perspective. Article 18 of this Draft Convention generally makes provision for extradition. State parties have no liberty to make reservations to provisions on extradition in terms of draft article 18(5). As such all parties to the Convention Against International Terrorism, if adopted, would be placed under the obligation to extradite.

Overall, the argument made in this section does not seek to challenge the basis for extradition clauses in international treaties to impose obligations on states. It is rather that there may be limitations that come with such provisions. Precisely put, the discussion only asks us not to treat extradition clauses in international treaties as a guarantee for extradition. Where possible, states that make extradition dependent on international agreements must remain alive to the need for bilateral extradition treaties. It may indeed be impracticable to enter into extradition agreements with individual states. But the limitations surrounding extradition clauses in international treaties are real and constitute reason for not rendering extradition agreements between individual states less important.

Conclusion

Extradition is generally secured by entering into extradition treaties by states. Some international treaties containing clauses on extradition, though not extradition treaties per se, may also be relied on to have alleged offenders or fugitives surrendered in an event where the concerned states do not have extradition treaties with each other. This however, may be

subject to certain limitations as discussed in the sections above. The fact that two states are party to a treaty, which has provisions on extradition, does not automatically establish an obligation to extradite.



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Notes

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- 1 A Katz and E Cohen, The Guptas can be extradited from the United Arab Emirates, *Daily Maverick*, 19 February 2018, <https://www.dailymaverick.co.za/article/2018-02-19-op-ed-the-guptas-can-be-extradited-from-the-united-arab-emirates/#.WphikIVOKUk> (accessed 1 March 2018).
- 2 Ibid.
- 3 See e.g. N Botha, Treaty-making in South Africa: A reassessment, *South African Yearbook on International Law*, 69, 2000, 91; N Botha, National treaty law and practice: South Africa in D Holliss, M Blakeslee and B Ederington (eds), *National Treaty and Practice*, Leiden / Boston: M Nijhoff, 2005, 58; J D van der Vyver, Universal jurisdiction in international criminal law, *South African Yearbook on International Law*, 24, 1999, 130; M Killander, Judicial immunity, compensation for unlawful detention and the elusive self-executing treaty provision, *South African Journal on Human Rights* 26(2) (2010), 386–394, 386; H A Strydom, The international law 'openness' of the South African constitution in G Carpenter (ed), *Suprema Lex: Essays on the constitution presented to Martinus Wiechers*, Durban: Butterworth, 1998, 93; E Ngolele, The content of the doctrine of self-execution as enforcement mechanism of international law obligations, *South African Yearbook on International Law*, 31, 2002, 153; M Olivier, Exploring the doctrine of self-execution as enforcement mechanism of international obligations, *South African Yearbook on International Law*, 27, 2002, 99.
- 4 For example section 231(4) of the Constitution of the Republic of South Africa (Act 108 of 1996).
- 5 I Brownlie, Oppenheim's International Law, Volume I: Peace, *British Yearbook of International Law*, 65:1, 1994, <https://doi.org/10.1093/bybil/65.1.465>.
- 6 Section 2 of the Extradition Act (Act 67 of 1962).
- 7 *President of the Republic of South Africa v Quagliani* 2009 2 SA 466 (CC) (*Quagliani* 2).
- 8 Ibid, para 1.
- 9 H Kelsen, The principle of sovereign equality of states as a basis for international organization, *Yale Law Journal*, 53, 1944.
- 10 F Perrez, *Cooperative sovereignty: From independence to interdependence in the structure of international environmental law*, The Hague: Kluwer Law International, 2000.
- 11 United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, <https://www.refworld.org/docid/3ae6b3930.html> (accessed 30 April 2019).

- 12 A Saroj, *Legal regime of extradition national and international perspective*, Unpublished PhD thesis, Punjabi University, Patiala, India, 2013, <http://shodhganga.inflibnet.ac.in/handle/10603/28180> (accessed 5 March 2018).
- 13 *Factor v Lanbenheimer* 290 US 276, 287.
- 14 MP Ferreira-Snyman, The evolution of state sovereignty: A historical overview, *Fundamina*, 12:2, 2006, https://hdl.handle.net/10520/AJA1021545X_80.
- 15 2012 (1) BCLR 77 (GSJ).
- 16 *S v Makwanyane* 1995 2 SACR 1 – see particularly the judgment of Ackerman J, para 152 ff.
- 17 B Fassbender, Sovereignty and constitutionalism in international law in N Walker (ed), *Sovereignty in transition*, Oxford: Hart, 2003.
- 18 MP Ferreira-Snyman, The evolution of state sovereignty: A historical overview, 3.
- 19 A Bodley, Weakening the principle of sovereignty in international law: The international tribunal for the former Yugoslavia, *New York University Journal of International Law and Politics*, 31:2, 1999, <https://heinonline.org/HOL/P?h=hein.journals/nyuilp31&i=425>.
- 20 B Sandeela, *Extradition and sovereignty: A story of tensions*, https://www.academia.edu/29211583/Extradition_and_Sovereignty_A_Story_of_Tensions (accessed 15 March 2018).
- 21 H Strydom, C Gewers, L Juma et al, *International law*, Cape Town: Oxford University Press, 2016, 107.
- 22 Examples of these being, corruption, organised crimes, crimes against humanity and torture.
- 23 C Mitchell, *Aut dedere, aut judicare: The extradite or prosecute clause in international law*, Genève: Graduate Institute Publications, 2009.
- 24 ICJ GL No 144 (2012).
- 25 Article 7 of the UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, UNT, vol. 1465, 85, <https://www.refworld.org/docid/3ae6b3a94.html> (accessed 7 May 2019).
- 26 MC Bassiouni and EM Wise, *Aut dedere aut judicare: The duty to extradite or prosecute in international law*, Netherlands: Martinus Nijhoff Publishers, 1995.
- 27 *Ibid.*, 5.
- 28 These are war crimes, crimes against humanity, genocide and the crime of aggression.
- 29 Bassiouni and Wise, *Aut dedere aut judicare: The duty to extradite or prosecute in international law*.
- 30 Article 89 of the Rome Statute of the International Criminal Court, UN Treaty Series, vol. 2187, No. 38544, 3.
- 31 Strydom et al, *International law*.
- 32 The texts of these treaties and related material can be viewed via the webpage of the Department of Justice and Constitutional Development, South Africa <http://www.justice.gov.za/results.htm?cx=015343561227489587018%3Awzc1thdksxm&q=extradition+treat&ie=ISO-8859-1&sa=Search> (accessed 28 March 2018).
- 33 Southern African Development Community, *Protocol on Extradition*, 2012, https://www.sadc.int/files/3513/5292/8371/Protocol_on_Extradition.pdf (accessed 7 May 7, 2019)
- 34 UN General Assembly, *United Nations Convention Against Corruption*, 31 October 2003, A/58/422, <https://www.refworld.org/docid/4374b9524.html> (accessed 7 May 2019).
- 35 Article 8(2), UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.
- 36 Article 18(2), UN Educational, Scientific and Cultural Organisation (UNESCO), *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954, <https://www.refworld.org/docid/40422c914.html> (accessed 7 May 2019) and its two (1954 and 1999) Protocols.
- 37 Article 5(2), UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 16 March 2001, A/RES/54/263, <https://www.refworld.org/docid/3ae6b38bc.html> (accessed 7 May 2019).
- 38 Article 13(4), UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, <https://www.refworld.org/docid/47fdfaeb0.html> (accessed 7 May 2019).
- 39 Article 16(4), UN General Assembly, *United Nations Convention against Transnational Organized Crime: resolution / adopted by the General Assembly*, 8 January 2001, A/RES/55/25, <https://www.refworld.org/docid/3b00f55b0.html> (accessed 7 May 2019).
- 40 MC Bassiouni, *International extradition: United States law and practice*, Oxford: Oxford University Press, 2014, 123.
- 41 See for example Ngolele, The content of the doctrine of self-execution as enforcement mechanism, 153; Olivier, Exploring the doctrine of self-execution as enforcement mechanism, 99.
- 42 See for example Van der Vyver, Universal jurisdiction in international criminal law, 130; Strydom, The international law 'openness' of the South African Constitution, 93; A Katz, The incorporation of extradition agreements, *South African Journal of Criminal Justice*, 16:3 2003, <https://hdl.handle.net/10520/EJC52787>.
- 43 *Nello Quagliani v President of the RSA and 6 Others Case 28214/06 TPD 18.4.2008*; and *Steven Mark Van Rooyen & Laura Brown v President of the RSA and 7 Others Case 959/04 TPD 18.4.2008* (unreported) (*Quagliani 1*). See detailed decision of the court for the facts and circumstances leading to this decision.
- 44 *Ibid.*, 12–18.
- 45 *Ibid.*, 18.
- 46 Section 2(3)ter of the Extradition Act (Act 67 of 1962) provides that 'The Minister shall as soon as practicable after Parliament has agreed to the ratification of, or accession to, or amendment or revocation of an agreement or the designation of a foreign State, give notice thereof in the Gazette.'
- 47 Section 231(4) of the Constitution of South Africa of 1996.
- 48 *Steven William Goodwin v Director-General Dept of Justice and Constitutional Development Case 21142/08 TPD 23.6.2008* (unreported).
- 49 *Ibid.*, 13.
- 50 Van der Vyver, Universal jurisdiction in international criminal law, 130.
- 51 Cited in J Dugard, *International law: A South African perspective*, Cape Town: Juta, 2012, 56. See also USA Supreme Court of Appeal Decision in *Medellin v Texas* 128

- S Ct 1346 (2008); 170 L Ed 2d 190 (2008) in which this position was affirmed.
- 52 Katz, The incorporation of extradition agreements, 311.
- 53 Ibid.
- 54 Ibid.
- 55 *Quagliani 2*, 1.
- 56 Ibid, 37.
- 57 N Botha, Extradition, self-execution and the South African constitution: A non-event? South African judicial decisions, *South African Yearbook on International Law*, 33, 2008, 259.
- 58 *Quagliani 2*, 37.
- 59 *Quagliani 2*, 46 and 47.
- 60 Dugard, 56.
- 61 DB Hollis and CM Vázquez, Treaty self-execution as “foreign” foreign relations law? in A Bradley, *The Oxford Handbook of Comparative Foreign Relations Law*, London: Oxford University Press, 2018.
- 62 UN General Assembly, *United Nations Convention against Transnational Organized Crime*.
- 63 Bassiouni, *International Extradition*, 99.
- 64 Ibid.
- 65 Van der Vyver, Universal jurisdiction in international criminal law, 130.
- 66 Botha, Extradition, self-execution and the South African constitution, 259; Dugard, *International law: A South African perspective*, 59.
- 67 N Botha, Rewriting the Constitution: The strange alchemy of Justice Sachs, indeed!, *South African Yearbook on International Law* 34 (2009), 253–267, 253.
- 68 Dugard, *International Law: A South African Perspective*, 59.
- 69 Ibid.
- 70 United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS, vol. 1155, 331, <https://www.refworld.org/docid/3ae6b3a10.html> (accessed 7 May 2019).
- 71 Ibid, Article 26.
- 72 Ibid, Article 27.
- 73 See generally the UNCAC.
- 74 UNCAC, Preamble.
- 75 The United Nations Office on Drugs and Crime, *Declarations and Reservations made to the United Nations Convention Against Corruption*. <http://www.unodc.org/documents/treaties/UNCAC/ReservationsDeclarations/DeclarationsAndReservations14Aug2008.pdf> (accessed 28 March 2018).
- 76 Ibid.
- 77 Ibid.
- 78 Ibid.
- 79 Ibid.
- 80 Whereas states such as Latvia, Russia, Armenia and Bahamas consider the *United Nations Convention Against Transnational Organised Crime* as the basis for extradition, others such as Vietnam have opted out. On this, see United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12&chapter=18&lang=en (accessed 28 March 2018).
- 81 Article 21(2), *Vienna Convention on the Law of Treaties*.
- 82 Draft Comprehensive Convention Against International Terrorism, <https://www.ilsa.org/jessup/jessup08/basicmats/unterterrorism.pdf> (accessed 28 March 2018).