A STUDY OF EXTRADITION LAW OF NAMIBIA IN THE CONTEXT OF THE CONSTITUTION

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ABSTRACT

This study is mainly based on literature review of domestic extradition legislation and the Namibian Constitution, extradition legislation from selected foreign jurisdictions, works of learned international writers on the subject as well as the analysis of judicial decisions on selected local and foreign reported cases. The study includes a brief comparative analysis of extradition legislations of the Republic of South Africa, the United Kingdom and that of Canada.

The project has been able to reveal inconsistencies between certain provisions of the Namibian Extradition Act, (hereafter referred to as the Act) and those of the Namibian Constitution (hereafter referred to as the Constitution). Further more it has been found that the Act permitted reception of certain evidential material at extradition enquiries as conclusive proof of facts alleged, which reception was found to be potentialy inconsistent with accepted rules of evidence applicable in Namibian courts.

It was also brought to light that when the Minister of Justice performed his or her functions in terms of section 10(1) of the Act, such exercise of power could amount to a failure in following the principle of *audi alteram partem*.

The study has shown that some provisions of the Act regarding administrative decisions that the Minister has to take prior to the commencement of the extradition enquiry before a magistrate render the extradition process more cumbersome and that it is necessary to simplify the process for the benefit of the extraditee and the expediency of criminal justice. Against this background, comparative perspectives between local and foreign legislation have revealed suitable alternatives in this regard.

This research project has found that the provisions of sections 10(1), 12(5) and 21 of the Act could be held to be inconsistent with those of Article 12(d) of the Constitution and that relevant provisions be amended to render them compatible with the Constitution.

Finally, this research project has investigated the Namibian extradition law in a comparative context thereby highlighting and further examining complex issues obtaining in the field of extradition.

ACKNOWLEDGEMENT

In my endeavour to carry out this study, I had to rely on the support and guidance of certain professionals in the field of criminal Justice both in public and private sector.

First and foremost, I would like to express my sincere appreciation and gratitude to Advocate Rudi Cohrssen who has been tireless in providing support and guidance to ensure a successful completion of this project. Despite his own busy schedule as an Advocate, he has never hesitated to make time to offer invaluable direction and encouragement. To him, my debt I will never be able to pay.

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I am grateful to D. M. Khama, Esq. for his support in the study and his efforts in directing me to some important materials that have proved to be very useful for this project.

DEDICATION

This study is dedicated to my beautiful wife, Bertha and our children, Tweya, Etuna and Ndeyapewa for their patience and support during my endless late nights study and writing. My achievement is yours, too.

FORMAL DECLARATION

I DO HEREBY DECLARE THAT THIS THESIS SUBMITTED FOR THE DEGREE OF MASTER OF LAWS (LLM (CRIMINAL JUSTICE)) IN THE FACULTY OF LAW, UNIVERSITY OF NAMIBIA, IS A TRUE REFLECTION OF MY OWN RESEARCH AND THAT TO THE BEST OF MY KNOWLEDGE, IT HAS NOT BEEN SUBMITTED FOR A DEGREE IN ANY OTHER INSTITUTION OF HIGHER LEARNING.

DATED AT WINDHOEK THIS 18TH DAY OF OCTOBER 2004.

SIGNATURE:.....

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CHAPTER 1

Introduction

There is a paucity of research available concerning extradition law in Namibia or concerning compliance thereof with the Constitution of Namibia and hence the need to embark on the study of extradition law of Namibia in the context of the Constitution.

The issue of extradition has become more topical, given current trends worldwide towards globalisation, the regional integration and cooperation of economies and given further the corresponding growth in multinational ventures and corporations. A climate has been created whereby trans-national crime has flourished and whereby a movement of criminals across national borders to evade justice has become less challenging.

Extradition is defined as the legal machinery for the formal surrender, for the purposes of trial or punishment, by one country to another, based on reciprocal arrangement, partly administrative and partly judicial, of a person accused or convicted of a serious offence committed within the jurisdiction of the requesting country[1]. This is probably the most desirable and concise definition of extradition though in practice certain states have been

[1] Landsdown, A V and Campbell, J "*South African Criminal Law and Procedure*", 1982 at page 33. Juta & Co. Ltd. Cape Town.

documented for having secured the accused persons from other jurisdictions by means other than through internationally accepted procedures[2]. Extradition hearing procedures differ from one country to another due to differences in laws governing extradition in each specific country and also due to the provisions of extradition treaties between states as parties[3].

Extradition is in itself an international phenomenon but it is also subject to domestic law and the Constitution, which is the supreme law of Namibia[4]. Therefore extradition legislation and international treaties are necessary as means of safeguarding the sovereignty and territorial jurisdiction of one state against the exercise by another state of its criminal jurisdiction over the former state's territorial boundaries. Legal instruments ensure the extraditee's right to natural justice, which he or she would have, had he or she been tried before a domestic court. For instance, the arrest in Namibia of a wanted Namibian national by the police of a foreign state for the purpose of trial or the imposition of any legal sanction for an act committed within the jurisdiction of that state would violate the sovereignty of Namibia, which she would seek to protect. To this end and to ensure a fair trial for the extraditee, there should be legal mechanisms for determining the fairness of the request and the nature of the offence for which such request is made. Domestic statutory instruments, extradition agreements and international conventions

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[2] Page 34, op. cit.
[3] Dugard, J., "*International Law: A South African Perspective*", (1994). at page 130 Juta & Co. Ltd. Cape Town.
[4] See Article 1(5) of the Constitution of Namibia.

on extradition usually provide for these mechanisms without which there would be jurisdictional conflicts over wanted persons for criminal offences committed within territories of foreign states.[5] The *Lotus Case* clearly demonstrates the extent of conflicts that may arise where legal instruments on extradition are not available or silent regarding an issue in dispute. This difficulty has been confirmed by critics of the decision on grounds that it empowers states to extend their jurisdictions over criminal offences taking place outside their territorial boundaries[6].

When applying the purpose for extradition and procedure thereof to the provisions of the Constitution of Namibia (hereafter the Constitution) certain conflicts arise. For instance the Extradition Act of Namibia, Act 11 of 1996 (hereafter the Act), requires that the extradition hearing be conducted before a magistrate and may be disposed of by using affidavits of witnesses from the requesting state as evidential material. It must be borne in mind that evidence on affidavit cannot be cross-examined and its accuracy cannot be tested during the inquiry, which limits the requested person's constitutional

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[5] For example the Lotus Case, quoted in Dugard, J., see note 6 below. In this case, a French Ship, the *Lotus* collided with a Turkish Ship, the *Boz-Kourt* on international waters the result of which the Turkish ship sunk drowning many crew members and passengers. The *Lotus* saved survivors and took them into a Turkish port where a French officer of the watch was arrested by Turkish police, tried and convicted of culpable homicide. France objected to Turkey's jurisdiction over the offence committed aboard the *Lotus* over high seas. The dispute was referred to the Permanent Court of International Justice. The court held that there was no rule of international law prohibiting Turkey to try a foreign national for an offence that had produced effects on a Turkish vessel and that Turkey did not thereby violate international law by arresting the French national aboard the French ship and trying him in a Turkish court.

[6] Dugard, J. (1994), *International Law, A South African Perspective*, Cape Town, Juta & Co. at page 135.

right to cross-examine the evidence contained in such affidavit[7]. On the other hand however, one cannot expect all witnesses making the affidavits in the requesting country to come to Namibia to testify just so that the requested person may cross-examine them.

Namibia does not have many reported cases on extradition. The only case that has been reported in which some of the issues regarding the subject matter have been raised is the case of The State v Vito Bigione[8]. In the Republic of South Africa, on the other hand, several cases have been decided in which the question of extradition has been considered. These cases together with others from different jurisdictions form part of the study. The countries whose extradition schemes have been briefly considered include the following: -

a) The Republic of South Africa;

b) The United Kingdom; and

c) Canada.

Although the extradition schemes of each of these countries share similarities regarding the procedures to be followed in applying for extradition and conducting extradition enquiries, there are many differences that are of great importance for the purpose of this study. Some of the identified differences in domestic legislations of the countries referred to above have served as

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[7] See Article 12(d), op. cit.
[8] 2000 NR 127 (HC).

solutions to some dilemmas that have been introduced by certain provisions of the Constitution.

The Act that provides for the law of extradition and the procedure to be followed by courts in handling extradition enquiries has been reviewed in light of the Constitution, the Criminal Procedure Act, Act 51 of 1977 as well as in the context of international judicial decisions on extradition.

Although the Act provides safeguards for the requested person, for instance a person may not be extradited to a country where he or she may face death penalty or where he or she has been convicted in *absentia*, and although this Act does further give effect international expectation regarding efficiency with which the extradition process must take place, the Act does not however comply with the spirit and terms of the Constitution.

In view of identified basic inconsistencies with the Constitution and other domestic laws, alternative solutions to the dilemma have been identified.

CHAPTER 2

Extradition treaties

Although Namibia has not entered into any extradition treaty with any country yet, it is of paramount importance for the purpose of this study to briefly consider the nature of extradition treaties and the role they play in the extradition process.

The basis of the extradition process is, first and foremost, the domestic extradition legislation of a country and, secondly, the extradition treaty between two countries wishing to extradite requested persons to their respective countries on a reciprocal basis. This chapter will not deal with extradition legislation as such, but rather examine the nature of extradition treaties and how they relate to the process of extradition in general.

The extradition treaty is either a bilateral or multilateral agreement between states in which each state, on a reciprocal basis, undertakes to cooperate with one another in their endeavour to extradite requested criminals to each other's countries with a view to punish, prevent and control criminal activity. The extradition agreement sets out terms and conditions under which a citizen of one country may be surrendered to another country to face criminal charges committed in the requesting country or to face punishment for the offence of which he has been convicted in such country. There needs to be

legislation governing the extradition process in each individual state for the extradition agreement to be entered into. Treaties set out terms and conditions under which extradition of wanted persons may be carried out. Extraditable offences are also defined in extradition agreements for the purpose of each member state. Some extradition agreements define extraditable offences by conduct[9] while others define them by both conduct and by the minimum term of imprisonment imposed for an unlawful act concerned.[10] This is one of the causes of difficulties in the process of extradition between many countries. It is in the effort to minimise these difficulties that some countries enter into extradition agreements that provide less complicated procedures than those normally stipulated by domestic extradition legislation of individual countries.

Extradition treaties may also provide that no party to the extradition agreement shall be obliged to surrender its citizens to any requesting state.[11]

In countries where civil law system is applicable, jurisdiction is exercised over nationals for offences committed abroad and therefore their nationals are exempted from extradition whereas many common-law countries do not

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[9] See the 1986 Supplementary Extradition Treaty between the United States and the Federal Republic of Germany, Treaty Doc.100-6, 100th Cong., 1st Session 1987.
[10] The European Union Convention relating to extradition between Member states, adopted on the 27th September 1996.
[11] Blakesley, C. L. (1996), *The Law of International Extradition: A Comparative Study*, in John Dugard and Christine van den Wyngaert (1996), *International Criminal Law and Procedure*, Dartmouth, Aldershot, page 147 at pages 165 – 175.

exercise extraterritorial jurisdiction and allow the extradition of their nationals to foreign countries to stand trial for offences committed in those countries.[12]

Due to the requirement for precision regarding extradition procedures to be followed and full cooperation, which is required between sovereign states, the extradition treaty becomes the most important vehicle in facilitating the surrender of wanted offenders to requesting countries.

Extradition treaties not only regulate the process of removing a wanted person from one country to another, they also contain various important safeguards against any abuse of this process. Such safeguards are particularly important in constitutional countries like Namibia where any person (foreign or local) is entitled to the protection guaranteed by the Bill of Rights. Safeguards, such as political offence clause, are protective mechanism for the requested offenders against being tried or punished for their political convictions. Other safeguards contained in treaties and for example the Act reflects both constitutional and common law rights which all persons in Namibia are entitled to, irrespective of what their position in the requesting country is.

The Act also provides for conditions a court may impose relating to the trial the extraditee will receive in the requesting country. While some states are

[12] See note 6 supra at page 159.

willing to extradite their nationals to other jurisdictions for adjudication, others stipulate by way of treaties providing specific exemption of their citizens from extradition.[13] One of the examples is the 1909 Treaty between the United States of America and France, which absolutely barred the extradition of their citizens to the jurisdictions of each other.[14]

The trend has recently started shifting towards a more positive attitude regarding the extradition of wanted persons from one jurisdiction to another for purposes of dispensing criminal justice. The European Convention on Extradition of 1957[15] has as its first article the obligation to extradite which provides as follows: -

> The contracting parties undertake to surrender to each other, subject to the provisions and conditions laid down in this convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.

Under the convention, parties are placed under an obligation to extradite to the jurisdiction of each other wanted criminals in respect of relevant offences.[16] This obligation is qualified however, by the restrictions and safeguards found in the requirements of double criminality,[17] the political offence exception and the restrictions by the provisions of discrimination

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[13] For example, France – Extradition Law of March 10, 1927, *La loi Relative a l'Etrangers* [1927] D.P.IV, art. 5(2).
[14] The 1909 United States of America – French Extradition Treaty, art. v.
[15] European Treaty Series, No. 24.
[16] Ibid, Art 2.
[17] Op.cit.

clause,[18] the non-return of wanted criminals for purely military or fiscal offences[19] the rule of specialty,[20] and restrictions in the circumstances where the death penalty might be imposed by the requesting state.[21] Due to ever pressing need to provide for new crime forms and sophisticated *modus operandi* that criminals employ in carrying them out, the European Convention on Extradition has been supplemented by two Additional Protocols. The first Protocol[22] redefining political offences[23] and further interpreting the principle of *non bis in idem*[24] and the second Protocol[25] dealing with accessory extradition,[26] judgments in *absentia* and allowing parties to extradite wanted persons for fiscal offences.[27]

Due to the complex nature of the extradition process and the serious consequences of crime, the United Nations General Assembly has, by its resolution 45/116 of 14 December 1990, adopted the Model Treaty on Extradition (Annexed hereto). The model is part of an initiative by the United Nations to help and encourage countries to enter into treaties for both extradition and mutual legal assistance for purposes of improving

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[18] Ibid, Art. 3.
[19] Ibid, Art. 4 – 5.
[20] Ibid, Art. 14.
[21] Ibid, Art. 11.
[22] Council of Europe: Additional Protocol to the European Convention on Extradition of the 20th day of 1979, (European Treaties Series No. 86).
[23] Ibid, Art. 1.
[24] Ibid, Art. 2.
[25] Council of Europe: Second Additional Protocol to the European Convention on Extradition of the 5th day of May 1983 (European Treaties Series No. 98).
[26] Ibid, Art. 1.
[27] Ibid, Art. 2.

international co-operation against organised crime.[28] The United Nations Model on Extradition is therefore envisaged to serve as an important guideline for states desiring to enter into either bilateral or multilateral agreements on co-operation relating to criminal justice and the prevention of crime in general.

The United Nations General Assembly was prompted by, *inter alia*, the new international economic order, the escalation of organised crime and the need for states to increase their activities in combating new forms of organised crime and the need to establish bilateral and multilateral extradition arrangements in order to develop a more effective international co-operation for the control of crime.[29]

Most countries have domestic legislation on extradition, which is adapted to such country's legal system. Local legislation prescribes requirements and procedures to be followed when considering requests for persons to be extradited and it is the differences in this regard that the process falls into a dilemma causing undue delays for the effective co-operation between states in their endeavour to control and suppress crime. Extradition treaties narrow down these procedural requirements by adopting simpler mutually acceptable requirements for a successful extradition of wanted offenders. Such treaties prescribing less procedural safeguards and formalities are

[28] Gane, C. and Mackarel, M. (1997) *Human Rights and the Administration of Justice*, The Hague, Kluwer Law International, page 611.
[29] Preamble to the United Nations Model Treaty on Extradition.

appropriate between countries which share similar legal systems or principles of justice common to their respective legal systems, thus eliminating the need to deal with mutually recognised principles such as the abolition of the death penalty, double criminality, substantive fair trial requirements and so forth.

CHAPTER 3

Domestic Legislation

3.1 Early Legislation

Before Namibia became independent on March 21, 1990, the South African extradition law was applied to the territory by virtue of section *22* of Act 67 of 1962, the *Extradition Act of South Africa*. This Act was used to regulate the extradition process in Namibia until July 16, 1996 when the *Extradition Act of Namibia*, Act No. 11 of 1996 was promulgated.

3.2 Current Extradition Law of Namibia

The extradition process in Namibia is regulated by an Act of Parliament, Act 11 of 1996, hereafter referred to as the Act, which sets out procedures to be followed in dealing with extradition requests. Various provisions of the Act, which will be discussed, are consonant with the legislative intention:

(a) Not to subject Namibian citizens to a trial in a foreign country where they will enjoy less rights to a fair trial than they could have in Namibia; and

(b) To ensure that foreign nationals resident in Namibia at the time of their extradition will enjoy essentially the same rights to a fair trial they would have in Namibia, once they are extradited to foreign country.

According to Dugard,[30]

> Civil-law countries, which exercise personal jurisdiction over their nationals for offences committed abroad, favour the exemption of their own nationals from extradition. Common-law countries, which in most circumstances do not exercise extraterritorial jurisdiction over their nationals, adopt a different approach and allow the extradition of their nationals. These divergent attitudes undermine the important principle of reciprocity. The compromise is for a treaty to include a clause that gives either state the discretion to refuse to extradite its own nationals. This allows civil-law countries to refuse extradition of their nationals and to try such nationals themselves, while at the same time permitting common-law countries to extradite their nationals for offences committed abroad beyond their criminal jurisdiction.

Due largely to such international law principles of state sovereignty and the special position which a citizen of a state occupies in such a state, many states do not allow or encourage the extradition of their own citizens. In Namibia, however, a citizen may be extradited, but subject to strict criteria.

In terms of Section 2 of the Act any person in Namibia, other than a Namibian citizen, who –

a) is accused of having committed an extraditable offence within the jurisdiction of a country contemplated in subsection (1) of section *four* of the Act; or

b) is alleged to be unlawfully at large after having been convicted of such an offence in such country, may, upon request made by such

[30] See note 6 above, at 159

country, be arrested and returned to that country in accordance with the provisions of this Act, or where applicable, the terms of an extradition agreement existing between Namibia and such country. For the purposes of this Act, it is immaterial whether or not such offence was committed before or after the date upon which the relevant extradition agreement came into operation.

Notwithstanding the provisions of Section 2 referred to above, the Minister may, in terms of Section 6(3), *infra*, authorise a magistrate to proceed under Sections 10 and 12 of the Act against a Namibian citizen whose return has been requested under Section 7,[31] if in his or her opinion, such return is warranted due to –

a) the seriousness of the extraditable offence;
b) the cost involved in bringing the necessary witnesses and other evidence to Namibia; or
c) any other circumstances justifying extradition,

provided that such Minister is satisfied that the order for the return can lawfully be made in accordance with the Act.

[31] The Act.

3.3 *Prosecution of Namibian citizens for extraditable offences committed abroad*

As a compromise to the norm that a Namibian citizen may not be extradited to another country and as a compromise to the Minister refusing to exercise his discretion in favour of the extradition of a national in terms of Section 6(3) of the Act, a Namibian citizen may be prosecuted and punished in Namibia in accordance with the laws of Namibia for any extraditable offence that he or she may have committed within the jurisdiction of a foreign country. However there may be no such prosecution instituted unless –

a) a request for the return of that person has been made in accordance with the provisions of the Act; and
b) the Prosecutor-General has in writing authorised the institution of such prosecution.[32]

For the purposes of the proceedings under this section, the conduct constituting the extraditable offence is deemed to have taken place in the district of Windhoek.

The Act accordingly grants jurisdiction to a local court to deal with a case in respect of which it would not normally have jurisdiction. This procedure has not been resorted to yet in Namibia, and will probably only be used in exceptional circumstances, for instance, where a Namibian diplomat is alleged to have committed a crime abroad and the Namibian state has waived his immunity, but does not wish to subject the diplomat to a system of

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[32] Ibid, Section 6(4).

law in such state where the accused has less rights to a fair trial than the rights he enjoys in Namibia. The practicalities of such a trial will also be prohibitive in that the admissibility of foreign obtained evidence, the bringing of witnesses to Namibia as well as many other administrative and logistical requirements will present difficulties for Namibia.

3.4 The offence

According to Section *3* of the Act, *"extraditable offence"* is defined as an act, including an omission committed within the jurisdiction of a country contemplated in Section 4 (1) of the Act which constitutes under the laws of that country an offence punishable with imprisonment for a period of 12 months or more and which, if it had occurred in Namibia, would have constituted under the laws of Namibia an offence punishable with imprisonment for a period of 12 months or more.

This section is of great importance in that, apart from providing guidance to role players in the extradition process regarding the type of offences for which a person may be extradited from Namibia to a foreign country for trial, the section also provides a safeguard for Namibian citizens to be extradited for trial or punishment for conducts that does not constitute a criminal offence in Namibia. The also prevents imposition of a criminal sanction which is not permissible in terms of the law of Namibia. For instance, Article *6* of the

Constitution prohibits the imposition of a death sentence by any court or tribunal in Namibia and as such it would be unconstitutional and immoral for Namibia to extradite her nationals to stand trial in a foreign country for an offence for which a death sentence may be imposed. Furthermore, this section protects Namibian citizens from being extradited to foreign countries to be tried for trivial offences.

According to Section 4 of the Act, extradition of persons from Namibia may be effected to any country which has entered into an extradition agreement with Namibia and any other country which has been designated by the State President by proclamation. The following countries have been duly designated by Presidential proclamation:[33]

- Australia
- Botswana
- Brazil
- Canada
- Germany
- Ghana
- India
- Italy
- Jamaica
- Kenya

[33] See Proclamation numbers 5 of 1997, 11 of 1999 and 22 of 2001.

- Lesotho
- Malawi
- Malta
- Mauritius
- Mozambique
- New Zealand
- Nigeria
- Seychelles
- Sierra Leone
- Singapore
- South Africa
- Sri Lanka
- Swaziland
- Tanzania
- Uganda
- United Kingdom and Northern Ireland
- Zambia
- Zimbabwe

The advantage of designating certain countries to which Namibian nationals may be extradited and vice versa is the provision by agreement of a simplified procedure for extradition of nationals of member states to that agreement.

3.5 Restrictions on return

Part II of the Act provides for restrictions on return of requested persons from Namibia. According to Section 5(1) of the Act, no person may be returned to a requesting country, or be committed or be kept in custody for the purposes of such return, if the Minister or magistrate concerned is of the opinion: -

a) that the offence for which such return was requested was an offence of a political nature ;
b) that the offence for which such return was requested is an offence under military law which is not also an offence under criminal law of the requesting country;
c) that there is substantial evidence suggesting that the requesting country is likely to prosecute or punish the person on account of his or her race, religion, nationality, or political opinion;
d) that the person will be or may be liable to a death penalty or any other type of punishment that is not applied in Namibia if he or she is so

returned, unless the requesting country guarantees that the death penalty or such other type of punishment will not be imposed or, if imposed, will not be carried out;

e) ...;

f) that the offence of which such return was requested is regarded under the laws of Namibia as having been committed in Namibia, and in respect of which –

i) proceedings are pending in Namibia against that person;

ii) a final judgement has been passed; or

iii) the Prosecutor General has decided not to institute or has terminated that proceedings against that person;

g) that such return or such custody would be irreconcilable with humanitarian considerations in view of the age or health of the person;

h) that the granting of the request for such return would be in conflict with Namibia's obligations in terms of international convention, agreement, or treaty;

i) that such person would be entitled to be discharged under any rule of law relating to previous acquittal or previous conviction if charged in Namibia with the offence for which his or her return was requested; or

j) that the person has been sentenced or would be liable to be tried or sentenced in the requesting country by an extraordinary or *ad hoc* court or tribunal.

These restrictions are provided for in the Act for various reasons including the objective of ensuring compliance with constitutional and common-law rights enjoyed in Namibia. Each restriction will be discussed below with reference to these legal rights.

Offence of a political character[34] (Paragraph (a))

The rule against extradition for offence of a political character was adopted to protect political asylum seekers from being returned to authoritarian states they fled from. The principal reasons for the rule being that the states should not intervene in internal political affairs of other states by assisting in the rendition of political opponents of the government concerned.[35] Political offenders generally threaten the criminal justice system of the state fled and not that of the state of asylum. Therefore assistance in returning requested political opponents rendered by the state of asylum might constitute interference in internal affairs of the requesting state.

As an exception to the rule, however, according to Section 5(1)(a) referred to above, the offence of a political character may not apply to any offence declared not to be a political offence for purposes of extradition by a multilateral international convention to which both Namibia and the requesting country are parties.

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[34] Cf. Chapter 4 hereof.
[35] Dugard, supra, at 162. See also Chapter 2 hereof at page 9 and 10 above.

Offence under military law (Paragraph (b))

This restriction is clearly aimed at protecting the requested person from being extradited for a military offence that may not necessarily be a criminal offence in Namibia. Military offences are generally created by decrees that regulate specific conducts against the military of the requesting state. The extradition of a person to a foreign country to be tried or to be punished for an offence under military law, which is not a criminal offence in Namibia, would be inconsistent with the principle of double criminality as well as the provisions of Section 5(1) *supra*. Military law is also usually characterized by its lack of due process.

Prosecution or punishment for racial, religious reason, nationality or for political opinion (Paragraph (c))

The Constitution guarantees equality of all Namibian citizens and residents before the law as well as freedom from discrimination on grounds of race, religion, creed,[36] freedom to participate in peaceful political activity.[37] It would therefore be unconstitutional for anybody to extradite a Namibian citizen for prosecution or for the imposition of a punishment against such person for

[36] See Article 10 of the Constitution.
[37] Ibid, Article 17.

reasons set out above. Discrimination of this nature is also the subject matter of prohibitions contained in various international legal instruments.[38]

Death penalty or other penalty not applied in Namibia (Paragraph (d))

The importance of this provision is that it safeguards the extraditee's right to life, which is protected by the Constitution.[39] Furthermore the restriction ensures respect for the extraditee's human dignity as guaranteed by Article 8 of the Constitution. Where for instance, the justice system of the requesting state allows for imprisonment with hard labour or for mandatory minimum sentence as forms of punishment, this may provide reason for refusing the request for extradition in that the imposition of such punishment would not have been applicable had the imposition of such punishment been awarded by a Namibian court. Minimum sentences, a common type of sentence outside Namibia, is unconstitutional in Namibia. In the case of *S v Likuwa*[40] *1999 NR 151 (HC)* the minimum term of imprisonment imposed by Section 38(2)(a) for possessing a machine rifle for the protection of livestock from predators was held to be unconstitutional. Obviously, if an extraditee could have been requested from Namibia for a similar offence for which a statutory provision imposes a similar minimum penalty, the provisions of Section 5(1)(f) *supra*, would be applied in that regard to refuse such request.

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[38] See for example, Articles 3, 4 and 11, Council of Europe: European Convention on Extradition of 1957 ((1960) 359 UNTS 273) and Article 3, UN Model Treaty on Extradition.
[39] Ibid Article 6.
[40] 1999 NR 151 (HC). See also, S v Vries 1996 (2) SACR 638 (Nm).

Territorial jurisdiction (Paragraph (f))

This restriction provides the legal option for Namibia to assert her criminal jurisdiction over certain offences, which may be committed within her territory as well as over the person responsible for such offences.

Humanitarian considerations (Paragraph (g))

The inclusion of the restriction against extradition of persons for reasons of being immature, advanced age or ill health in the Act is consistent with the provisions of Article 15(5) of the Constitution, which reflects the humanitarian nature of the Namibian community in general.

Inconsistency with Namibian international obligations (Paragraph (h))

Before the requested person may be extradited to the requesting country, it is necessary to ensure that no international obligations of Namibia may be violated thereby. Due to the fact that when Namibia accents to an international statutory instrument or where she enters into an agreement with another state, such agreement is deemed to be part of the Namibian municipal law[41] and as such it should be strictly complied with. Therefore the provisions of this paragraph are enacted to ensure compliance with these obligations when considering extradition requests. Namibia is a signatory to

[41] Article 144 of the Constitution

various international human rights conventions, which form part of the law of Namibia by operation of Article 144 of the Constitution.

The rule relating to previous acquittal or previous conviction (Paragraph (i))

This provision safeguards the important rule of *autre fois acquit* and *autre fois convict* which, Article 12(2) of the Constitution also protects. According to the Constitution, a person may not be subjected to trial for the offence of which he or she has already been acquitted or convicted by a competent court of law. It would be unconstitutional for any court to order extraditable any person for an offence for which he or she has been acquitted or convicted in Namibia. The rule against double jeopardy for one criminal act, which is applicable to Namibia, would equally be violated by such an order of extradition.

Trial and sentence by an extraordinary or ad hoc court or tribunal (Paragraph (j))

According to the Constitution, which is the supreme law of the land, judicial power is vested in the Courts of Namibia.[42] The Constitution provides for the independent functioning of the judiciary only subject to the Constitution and the law.[43] Therefore, where there is evidence that the extraditee will be liable to be tried or sentenced by an extraordinary or *ad hoc* court or tribunal in the

[42] Article 78.
[43] Sub-Article 78(2).

requesting country, the provisions of this section empowers the Minister or magistrate not to order the extraditee extraditable for such order would be inconsistent with the provisions of the Constitution as indicated above. Clearly the provisions of this paragraph are enacted to protect the extraditee's right to fair trial as guaranteed in Namibia.

Furthermore Section 5(2) above, provides that no person who is alleged to be unlawfully at large after conviction of an extraditable offence may be returned to a requesting country, or be committed or kept in custody for the purposes of such return, if in the opinion of the Minister or the magistrate concerned: -

the conviction was obtained in such person's absence;

it would not be in the interest of justice to return such person on the ground of that conviction; or

a period of less than six months of the sentence in question remains to be served.

The provisions of subsection (2) above are in keeping with the right to fair trial as enshrined in the Constitution.[44] These provisions are also consistent with common law and statutory law[45] (trial in presence of acc) as applied in Namibia and thus ensure accordance of this right to every person before being extradited to a foreign country for trial or sentencing as the case may be.

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[44] Article 12.
[45] See section 158 of the Criminal Procedure Act

It is further provided for under Section 5(3) of the Act that no person may be returned to the requesting country except where the Minister consents in writing to such return. The granting of such consent is subject to provision being made in the relevant laws of the requesting country or to an arrangement being made with that country that the requested person may not be surrendered to any other country seeking his or her return for the offence for which, he or she has been requested by the former country. This Sub-section seeks to protect the sovereignty of Namibia to exercise criminal jurisdiction over the extraditee even after he or she has been surrendered to a foreign country.

Section 5(4) of the Act also restricts the return of any person to the requesting country except where provision is made in the relevant laws of the requesting country or it has otherwise been arranged with that country that such person may not, unless he or she has first had an opportunity to leave the requesting country, be detained, charged with, or punished for any offence other than: –

a) the offence in respect of which such return was sought;
b) any lesser offence proved on the facts on which such return was sought; or
c) an offence committed after such person has been so returned.

Where a requested person should be tried for any other offence other than the offences specified in terms of paragraphs (a), (b) or (c) above, it is

required that the Minister consents in writing to that person being dealt with in respect of such offence by the requesting country.

Furthermore, where a person has been extradited to Namibia, he or she may not be prosecuted or punished in Namibia for any offence other than: -

a) the offence for which he or she was returned;
b) any lesser offence proved on the facts;
c) any offence committed in Namibia after his or her return; or
d) any other offence in respect of which the returning country has consented to that person to be tried.[46]

If however such person be availed the opportunity to leave Namibia, he or she may be liable to prosecution for any other offence, provided that the same procedure laid down by the Act regarding extradition to Namibia is complied with. This section is of paramount importance in that it offers the same protection to the requested person as it seeks to secure for a Namibian extradited to a foreign country and thus it ensures effectiveness of restrictions set by the Act and safeguards of constitutional and common-law rights applicable in Namibia while, at the same time, it allows the judiciary of another country to prescribe to judicial norms of Namibia.

3.6 Initial Procedure

Part III of the Act sets out the procedure applicable in considering requests for the extradition of persons to requesting countries.

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[46] Ibid, Section 17 (1).

Section 7 of the Act provides that a request for the return of a person be made in writing to the Minister in such a manner as may be specified in an extradition agreement that may be applicable, or by a diplomatic or consular representative of the requesting country accredited to Namibia. This provision confirms and further emphasises the importance that Namibia, like other common-law countries, place on territorial jurisdiction over their nationals. It is also in recognition of the territoriality principle that the request for extradition be made by a duly authorised person acting on behalf of the requesting state.

It is required that a request made under section 7 above, be accompanied by the following: -

a) the full particulars of the person whose return is requested, his or her identity and location, if any;
b) the full particulars of the offence of which the person is being accused or was convicted, a reference to the relevant provision of the law of the requesting country which were breached by the person and a statement of the penalties that may be imposed;
c) a statement or statements containing information setting out *prima facie* evidence of the commission of the offence contemplated in paragraph (b), above, by the person whose return is requested;
d) the original or certified copy of the external warrant issued for the arrest of the person whose return is requested; and
e) in case of a person who is un lawfully at large after conviction of an extraditable offence –
    i) the original or certified copy of the record of conviction and sentence and a certificate stating any outstanding period of any such sentence; or
    ii) in the absence of any sentence imposed, the original or certified copy of the record of the conviction and a statement by a competent judicial or public officer of the requesting country affirming that the competent court intends to impose a sentence.

Where any of the documents referred to above have been drown up in a language other than the English language, such document should be accompanied by a sworn translation in English.[47]

Paragraph (c) of this section is of particular importance as it brings into play the requirements of double criminality principle which is one of the determining factors on whether the requested person should be extradited or not.

Authentication of Foreign Documents

The founding documents of an extradition request need to be duly authenticated. The original foreign document bears the official seal of the appropriate government institution and the signature of a responsible official duly authorised by the requesting state. The rules of evidence as applied in Namibia, require that a document be duly signed by its author for it to be admissible as evidence in a court of law.[48] This requirement is also consistent with one of the exceptions the provisions of the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.[49]

Section 18 of the Act provides for the authentication of foreign documents as follows: -

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[47] Section 8(2) of the Act.
[48] See Hoffmann, L H and Zeffertt, D T (1988), *The South African Law of Evidence* 4th Edition, Cape Town, Juta & Co. at page 399.
[49] Article 3 of The Hague Convention of October 5, 1961.

(1) No deposition, statement on oath or affirmation taken, whether or not it is taken in the presence of the person whose return has been requested, or any document, or any record of any conviction, or any warrant issued in a requesting country, or any copy or translation thereof, may be tendered under section 8 or be received in evidence at an appeal under section 14 or at an inquiry, unless such deposition, statement, affirmation, document, record, or warrant, or any copy or sworn translation thereof –

(a) has been authenticated in the manner in which foreign documents may be authenticated to enable them to be produced in any court in Namibia or in the manner provided for in the extradition agreement concerned; or

(b) has been certified as the original or as true copies or translations thereof by a judge or magistrate, or by an officer authorised thereto by one of them, of the requesting country concerned.

(2) Any –

(a) record of conviction and sentence by a court of competence jurisdiction;

(b) statement by a competent judicial or public officer of the law of a requesting country; or

(c) deposition, statement, or affirmation which has been made, sworn or affirmed by any person,

which has been authenticated or certified in the manner contemplated subsection (1) shall on its production in an appeal under section 14 or in any enquiry be *prima facie* proof of the facts stated therein.

The authentication of a document is the verification of a signature appearing on such document by a person competent to do so in terms of the Act.[50] If documents are not duly authenticated, they are inadmissible[51], as they constitute hearsay evidence.

Given the fact that the extradition request in Namibia is determined primarily by considering depositions received from foreign countries, authentication of foreign documents becomes very important for any extradition hearing process. It is obviously impractical to insist that all witnesses in such foreign countries are brought to Namibia to testify, yet one cannot merely rely on the

[50] Mahamat v First National Bank of Namibia Ltd 1995 NR 199 HC at 207 A-F
[51] Rule 63(1)(b) of Rules of the High Court of Namibia.

ipse dixit of a foreign prosecutor that there is a case against an extraditee. Authentication provides a procedural safeguard in ensuring that the witness himself or herself signed the sworn statement.

CHAPTER 4

Pre-hearing procedure

The procedure followed in determining whether a person is liable to be extradited or not, is conveniently divided into two categories, being the pre-hearing and the judicial hearing process.

The pre-hearing process in Namibia is initiated by a written request made to the Minister of Justice by a diplomatic or consular agent for extradition of a wanted person to a foreign country.[52] Based on documents accompanying the request, the Minister concerned takes a decision whether the requested person is liable to be extradited or not. Where the Minister is satisfied that the order for the return of the requested person can be made in terms of the law, he or she issues the magistrate with authority to proceed[53] with the actual extradition enquiry.

In deciding whether to issue authority to proceed and whether the requested person is extraditable to the requesting country, the Minister relies on information contained in written statements from a foreign state.

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[52] Section 7 of the Act
[53] Op. cit., Section 10(1)

Although the alleged offender may not be arrested on the decision of the Minister in terms of Section 10(1) referred to *supra*, he is subjected by such decision to the possibility of being arrested and eventual extradition enquiry before court.

The Act does not provide for the requested person to be heard before the Minister's decision to issue authority for the magistrate to proceed with the enquiry is reached. The process through which the Minister reaches his decision, therefore, raises questions regarding the requirement for natural and administrative justice, which is entrenched in the Constitution.

Article 12(1)(a) of the Constitution provides as follows: -

> In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial or competent Court or Tribunal established by law...

In the first place the decision by the Minister authorising the magistrate to proceed is considered by him or herself in private and not in public as required by the provisions Sub-Article 12(1)(a) referred to above. In the second place, the Minister does not constitute an independent, impartial and competent Court or Tribunal established by law as envisaged by the Constitution. The decision of the Minister must however, be made subject to common law and Article 18 of the Constitution as it is an administrative decision subject to the rules of natural justice.

In the case of *Aonin Fishing*,[54] O'Linn, AJ, providing reasons for his order regarding an interlocutory application for review and setting aside the decision of the respondent refusing the applicants an extension of their right of exploitation of demersal hake for a certain period of time, stated the following: -

> There can be no doubt that art 18 of the Constitution of Namibia pertaining to administrative justice requires not only reasonable and fair decisions based on reasonable grounds, but inherent in that requirement fair procedures which are transparent. Even more important is art 12 of the Namibian Constitution which requires as a fundamental right, not only fair trials in criminal matters, but fair and public hearings by an independent, impartial and competent Court or Tribunal established by law, when determining civil rights and responsibilities of any person.

O'Linn, AJ, further stated in his reasons for the order referred to earlier that it could even be argued that although there is no express provision providing for the mandatory submission of the reasons, the duty to provide for the reasons for the decision is clearly implied from the provisions of Articles 12 and 18 of the Constitution.[55]

The remark made by O'Linn, AJ above, confirms the earlier decision in the case of *Kersten t/a Witvlei Transport v National Transport Commission*[56] where the court decided as follows: -

> Effective judicial review must in many cases depend on the court being properly informed as to what moved the administrative body to decide as it did. It seems to me that a body which is required to act 'fairly and reasonably' can in most instances if those affected by its

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[54] Aonin Fishing (Pty) Ltd and another v Minister of Fisheries and Marine Resources 1998 NR 147 (HC).
[55] Ibid, page. 151.
[56] 1991 NR 234 at page 239.

decisions are apprised in a rational manner as to why that body has made the decision in question.

In South Africa, for instance, the Minister notifies the magistrate of any request from a foreign country for the surrender of the person to be surrendered and upon receipt of such notice; the magistrate concerned issues the warrant for his or her arrest.[57] Upon arrest of the person whose surrender has been requested, he or she is brought before the magistrate for conducting of the enquiry[58] with a view to the surrender of such person to the requesting country concerned. The procedure provided for by sections 5 and 9 above is clearly more efficient than the one available in terms of section 10 of the Act.

However the position is not the same in respect of Section 3 of the South African Act where the President of South Africa may consent to the surrender of the requested person without considering the side of the person concerned before such consent is granted. In the case of *Harksen*,[59] the President of South Africa consented to the extradition of the requested person in terms of Section 3(2) of the South African Extradition Act after the Federal Republic of Germany requested his return for trial. In this matter it was argued for the appellant that the presidential consent to his or her surrender was contrary to the principle of *audi alteram partem*. The judge stated in his judgment that the extradition application in terms Section 3(2) referred to above, merely

[57] Section 5 of the South African Extradition Act.
[58] Op. cit., Section 9(1).
[59] Harksen v President of the Republic of South Africa and others 1998 2 SA 1011 (CPD).

serves to bring the person whose extradition is sought under the ambit of the South African Extradition Act, which may ultimately lead to an extradition order being granted.[60] It was also one of the considerations of the court that had the appellant been given the opportunity to be heard by the President before his or her decision in terms of Section 3(2), the Federal Republic of Germany would also have been entitled to a reply. In the opinion of the court, this would have caused a further delay of the proceedings. In the premises, it was held as follows: -

> For all these reasons we are satisfied that the fact that Harksen was not given a preliminary hearing by the President does not constitute procedural unfairness which warrants the setting aside of the President's consent in terms of section 3(2).

Clearly this does not mean that the principle of *audi alteram partem* was complied with, but only that the degree at which it was infringed was not sufficient to warrant the setting aside of the President's consent to the extradition of the alleged offender.

In light of the decision in *Harksen*'s case, it should be noted that the meaning of Article 12 of the Constitution does not confine its application to situations where a person's rights are being determined by a court of law or Tribunal duly established by law. The ambit of Article 12 is wider in its application and should apply to every instance where the rights of an individual are being determined.

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[60] Op. cit, page 1041 C.

In the matter of *G2 Joint Venture v The Chairperson of the Tender Board of Namibia*[61] it was argued for the applicant that at common law the *audi alteram partem* was a rule of natural justice which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty, property or existing rights or when ever such an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates the contrary.

Furthermore, failure to adhere to the requirements of *audi alteram partem* principle renders the decision of the repository of a power fatally defective and a nullity.[62] The person in whom the power is vested has a duty to disclose all the information adverse to any applicant which he or she has in his or her possession and which could adversely or prejudicially affect the rights of such applicant and is required to give the applicant the opportunity to respond hereto, prior to making any decision.[63]

It is for this reason that the President's decision to certify the requested person as being extraditable in terms of Section 3(2) of the South African Extradition Act would remain contrary to the principle of fair trial as guaranteed by Article 12 of the Namibian Constitution.

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[61] Unreported case no. A 254/2000, NmHC.
[62] Du Preez and Another v Truth and Reconciliation Commission 1997 (3) SA 204 (A) at pages 231-235.
[63] Op cit.

Similarly, the Constitutional Court of South Africa has considered the issue regarding the nature of judicial review of administrative action on several occasions and has expressed its opinion in this regard.

In the case of *President of the Republic of South Africa and others v SARFU and Others*,[64] the Constitutional Court stated the following; -

> Public administration, which is part of the executive arm of government, is subject to a variety of Constitutional controls. The constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public.

The issue was also considered by the South African Constitutional Court in the case of *Pharmaceutical Association of South Africa and Others; In Re: Ex parte application of the President of the Republic of South Africa and Others*[65] in which the following was stated: -

> The control of public power by the courts through judicial review is and always has been a Constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common-law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common-law that previously provided for grounds for judicial review of public power have been subsumed under the constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.

In order to avoid the inconsistency between Section 3(2), *supra* and the provisions of Article 12 of the Constitution which is brought about by the presidential certification of the requested person as being extraditable, the

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[64] 2000 (1) SA 1 (CC). page. 62.
[65] 2000 (3) BCLR 241 (CC), page 257 B -C.

procedure as set out by Section 8[66] of the Extradition Act of Botswana may be employed in this regard.

The urgency of the request for the extradition of the appellant to the Federal Republic of Germany was referred to in the judgement as being one of the reasons for their conclusion in *Harksen's* case. It is submitted in this regard that rather than to certify the requested person extraditable, the provisions of Section 5(1)(b) of the South African Extradition Act or Section 11 of the Extradition Act of Botswana may be considered to redress the inconsistency.

Another question of inconsistency is raised when the Minister decides to exercise his powers in terms of Sections 11(b) or 15,[67] as to whether such exercise of power does not interfere with the magistrate's judicial decision making process of issuing warrants of arrest, detention or in finding that the person concerned is liable to be surrendered to a foreign state.

In attempting to answer this question, it is important to determine whether extradition proceedings are administrative or judicial in nature.

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[66] Section 8 of the Extradition Act of Botswana provides as follows: -

1) A requisition for the surrender of the fugitive criminal of any country, who is or suspected of being in Botswana, shall be made to the Minister by a diplomatic representative or consular officer of that country.

2) The requisition shall be accompanied by a warrant for the arrest of the fugitive criminal issued in that country with the request that the warrant be endorsed for the arrest of fugitive criminal.

3) The Minister may transmit the warrant to a magistrate to endorse it for the apprehension of the fugitive criminal.

[67] Section 11(b) of the South African Extradition Act.

On the outset, the Act, the South Africa Extradition Act[68] and that of Canada[69] are consistent in as far as the commencement of the extradition proceedings are concerned. In respect of each of the countries referred to above, a request for extradition is received by the executive authority of the requested country through a diplomatic agency or the executive body of a requesting state. On receipt of such request, a decision is made at the executive level whether to proceed with the enquiry that will eventually lead to the surrender or discharge of the requested person. Obviously the sovereignty of states is at stake and as a result it seems reasonable that the process be handled politically. However it should be noted that the executive is not a competent organ for the holding of enquiries in terms of the Act or the interpretation of extradition treaties where such treaties are involved. It is submitted therefore that the judiciary being the body that possesses the requisite competence for considering evidence and the application of law regarding extradition, only judicial officers and not the executive that may play a role in the application of the Act and the interpretation of extradition treaties and other international instruments.

The case of *Abel v Minister of Justice and others*[70], confirms the submission made above. In this case the Minister of Justice acceded to the request to surrender the applicant to the United States of America. The basis of the

[68] See pages 85 - 86 infra.
[69] See pages 98 - 101 infra.
[70] 2001 (1) SA 1230 (C)

application was, *inter alia*, that the Minister's consent to the request and the subsequent notification to the magistrate violated the applicant's constitutional right to remain in South Africa as a South African citizen and further that the presiding magistrate failed to properly apply his mind to the facts and the law in that his decisions were tainted by the irregularities regarding the Minister of Justice's acts. Although in his judgment Traverso, J was not called upon to decide on what the roles of the executive and the judiciary should be, he has expressed an important *dicta* that bears relevance to the difference between the roles that the executive and the judiciary play in the extradition process. Traverso, J stated, *inter alia*, as follows: -

> In terms of section 11 of the Act an order for the surrender of a person can only be made by the Minister. A prerequisite for such an order by the Minister is the holding of an enquiry by the magistrate in terms of s 9 and an order for committal to prison under s 10 of the Act.[71]
>
> ...Before he can make an order of committal, the magistrate must, after considering all the evidence adduced at the enquiry, find that the person in question is liable to be surrendered to the foreign State concerned and that there is sufficient evidence to warrant the prosecution for the offence in the foreign State.
>
> The provisions of ss 9 and 10 are clearly designed to ensure that the statutory prerequisites are complied with before any person is extradited. The magistrate is accordingly the person who is enjoined to in terms of the general scheme of the Act to properly consider the evidence and the requirements of the Act and, where applicable, the extradition treaty in question. It is not the Minister who is so enjoined.[72]

The preceeding paragraphs demonstrate the difference between the roles played by the executive and the judiciary in the extradition scheme applied in South Africa.

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[71] Paragraph 42, page 1241.
[72] Paragraphs 47 and 48, page 1242.

The pre-hearing procedure according to Sections 8 and 9 of the Extradition Act of Botswana is more consistent with the provisions of Article 12 of the Constitution of Namibia in that the Minister does not take any administrative decisions regarding the liability of the requested person to be extradited. Upon receipt of a request under Section 8 referred to above, for the person whose surrender is sought, the Minister concerned transmits the warrant of arrest received from a foreign country to the magistrate for endorsement and execution. According to the Extradition Act of Botswana, the Minister does not have to satisfy him or herself with complicated requirements of the law of extradition or international instruments concerned before the request is finally transmitted to the magistrate.

In respect of Canada, before a request for extradition is made, it is necessary for the requesting country to enter into an extradition agreement with Canada.[73] Where the requesting state is not a designated extradition partner in terms of Section 9(1) of the Canadian Extradition Act,[74] it needs first to enter into an agreement through the Ministers of Foreign Affairs and Justice for the purpose of making such request for a particular case.[75]

However, where the requesting country is a designated extradition partner, the Minister does not only consider the provisions the extradition agreement

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[73] Section 3(1)(a) of the Canadian Extradition Act.
[74] See Chapter 4 hereof
[75] Section 10(1) of the Canadian Extradition Act.

but also the provisions of the domestic law of the requesting country.[76] After the Minister has satisfied him or herself with these requirements, he or she would then authorize the Attorney General to apply for a provisional warrant of arrest for the person whose extradition is requested.

Applying the provisions of Section 12(a) of the Canadian Extradition Act to the extradition scheme of Namibia and the Constitution, it becomes evident that there is an inconsistency with the Constitutional provisions regarding fair trial in the Minister's assessment of the provisions of the extradition agreement between Canada and the requesting designated extradition partner. As argued earlier, Article 12 of the Constitution enshrines the principle of fair trial and where civil rights and obligations or where criminal charges are being determined, every person is entitled to a fair hearing by an independent and competent court or tribunal.

The fact that the Minister does not constitute a court of law, he or she is therefore incompetent to hear the requested person whose rights are affected by his or her decision and thus his or her action, if they were taken in Namibia, would be unconstitutional.

[76] Ibid, Section 12(a).

It is evident that courts in Canada hold a negative view regarding the argument advanced above and the case of *McVey*[77] is one of those that confirm this observation. In this case the United States of America requested for McVey's return from Canada for a string of criminal charges. The extradition proceedings were initiated pursuant to the extradition agreement between the United States of America and Canada[78] After the enquiry the extradition judge ordered him committed for extradition. McVey based his application for *habeas corpus* on the argument that the charges he faced were not extraditable under American law and his application was upheld. However the chambers judge concluded that one of the offences was extraditable under American law. On appeal to the Court of Appeal for British Columbia, the chambers judge's decision was overturned.

It is obvious that this case is not dealing with the roles that the executive or the court plays in the extradition process *per se* but it is rather concerned with specific issues arising from the interpretation of the treaty between the United States of America and Canada and the application of domestic legislation of both countries to the extradition request. However it bears relevance to the argument referred to earlier by virtue of opinions expressed in the judgement regarding the tasks of a judge and those of the executive in the extradition request involving a treaty. These opinions are expressed in this regard in the following words: -

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[77] McVey (Re); McVey v. United States of America, [1992] 3 S.C.R.475.
[78] Canada Treaty Series 1976, No. 3.

[I]t was not intended by the Act that the extradition judge monitors all variegated conditions, qualifications and restrictions to which states, through their extradition treaties, have qualified their obligations to other states to surrender fugitive criminals... [For] [t]his could lead to endless delays in a procedure intended to be expeditious, and the courts should not reach out to bring within their jurisdictional ambit matters that the Act did not assign to them... By statute this task is assigned to the Minister of Justice.[79]

However the Constitution of Namibia provides, in this regard, as follows: -

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and by other relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress from a competent Court or Tribunal.[80]

There is no doubt that the Minister is not conducting an extradition enquiry envisaged by Section 24 of the Canadian Act when he or she decides on the meaning of the extradition agreement in issue, but it is not deniable that the rights of the requested person concerned are directly affected by his or her decision and that such person may be aggrieved as a result of such decision.

The questions that arise in this regard are, firstly, whether the Minister acted fairly and complied with the requirements imposed upon him or her by common-law and relevant legislation when his or her interpretation of the provisions of the treaty brought the requested person in the ambit of extradition enquiry and secondly, whether the aggrieved person has any recourse for redressing his or her grievance.

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[79] McVey (Re), McVey v United States of America [1992] 3 S.C.R. 475
[80] Article 18 of the Constitution

In considering the first question, above, the argument advanced earlier regarding the fairness of trials[81] as required by the Constitution is equally applicable in this instance and for that reason the Minister's function in this regard cannot be said to have been carried out constitutionally.

Article 18 of the Constitution, referred to above provides that where a decision of an administrative body or administrative official aggrieves any person, such person is entitled to seek redress before a competent court or tribunal.

Being fully aware that any request for extradition brings the rights of the individual concerned and the sovereignty of the state in question, it is not being submitted here that executive authority of the state be ignored in the whole extradition process, but its role needs to be streamlined and clearly separated from that of the judiciary. Complicated legal issues that are involved in the extradition process are better dealt with by the judiciary, which it is submitted, is a more competent body to determine such issues.

4.1 Discretion of the Minister and Authority to Proceed

Upon receipt of a request made in terms of Section 7, *supra*, the Minister is obliged, provided that he or she is satisfied that an order for the return of the person requested can lawfully be made in accordance with the Act, to

[81] See pages 29 – 36 supra.

forward the request together with the documents contemplated in Sections 8 and 9 of the Act to a magistrate and issue to that magistrate an authority in writing to proceed with the hearing in accordance with Section 12 of the Act.

On receiving the documents and authority to proceed, the magistrate may, if he or she is satisfied that the external warrant accompanying the request is authenticated, endorse that warrant. After such endorsement, the warrant may be executed in any part of Namibia as if it were issued in the court of that magistrate in accordance with the laws of Namibia.[82]

In terms of Section 11 of the Act, a provisional warrant of arrest may be issued on grounds of urgency by application to the Minister for the arrest of a person who is accused or was convicted of an extraditable offence in a country contemplated in Section 4 of the Act pending the communication of a request for his or her return in accordance with Section 7, *supra*.

The following entities may apply for a provisional warrant of arrest: -

- any diplomatic representative of a country contemplated in subsection (1) of section *four* above;
- the International Police Commission (Interpol), on behalf of such a country; or
- the government of a Commonwealth country contemplated in subsection (1) of section *four*, *supra*, or any person acting on its behalf.[83]

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[82] Section 10(2) and (3) of the Act
[83] Ibid, Section 11(1)

The application for a provisional warrant of arrest referred to under Section 11, *supra*, has to fulfil the following criteria: -

- it has to be made in writing;
- it has to state the grounds for its urgency;
- it has to state the full particulars of the person whose arrest is requested and information, if any, to establish that person's location and identity;
- it has to specify the nature and particulars of the extraditable offence, the time and place at which such offence is alleged to have been committed or, if such person is alleged to be at large after conviction of and sentencing for such an offence, the period of such sentence which remains to be served; and
- it has to state that the return of the person will be requested in accordance with sections *seven* and *eight*.[84]

The request for a provisional warrant of arrest may be transmitted by post or telegraphic or similar written or printed communication providing proof of such request.[85] After the Minister has received the application for the issuance of a provisional warrant of arrest, he or she may forward such application to a magistrate who, if satisfied that a state of urgency exists in regard to that application and that the return of the person concerned is not prohibited under Part II referred to above, he or she may issue a warrant of arrest of that person.

The magistrate in question may refuse to issue the provisional warrant of arrest and whether or not he or she decides to issue such warrant of arrest, such magistrate is obliged to inform the Minister of his or her decision and the reasons therefore.

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[84] Ibid, section 11(2).
[85] Subsection (3), op cit.

A warrant of arrest issued under Section 11 takes the form as any other warrant of arrest issued in accordance with the *Criminal Procedure Act, Act 51 of 1977*. Although the provisional warrant of arrest is issued on the request of the Minister, as opposed to the traditional sworn declaration of reasonable suspicion of a criminal offence having been committed, the question of such warrant of arrest being unconstitutional may not arise. The risk of the provisional warrant of arrest being unconstitutional is eliminated by the fact that a magistrate, who is duly empowered to exercise judicial discretion, considers the Minister's application in determining whether or not the law prohibits the issuance of such warrant of arrest and whether such issuance would be unconstitutional or not.

4.2 The Right to Legal Representation

The Constitution guarantees every person in Namibia the right to legal representation of his or her own choice[86] which right the Act also confers to the extraditee who is under arrest for the purpose of being returned to a requesting country. An indigent person is also entitled to legal representation at the state's expense, as this is essential for the other rights to a fair trial to be given meaning to.[87] Where such person does not instruct a legal practitioner, the Director of Legal Aid is obliged under the *Legal Aid Act of 1990, Act 29 of 1990* to instruct a legal practitioner to represent such person. Where the legal practitioner concerned is not employed in the Public Service,

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[86] Article 12(1)(e) of the Constitution.
[87] Mwilima and others v Government of the Republic of Namibia 2001 NR 307

any fees that may be incurred as a result of such representation is to be borne by the requesting country concerned.[88]

4.3 The Right to Apply for Bail

The question of bail was extensively dealt with in the case of the State v Acheson.[89] The bail application in this matter was brought by the applicant who was in detention for the alleged murder of a prominent member of SWAPO, the late Adv. Anton Lubowski. It should be stated from the outset that this bail application was not made as a result of detention in terms of Sub-sections 12(5) or 15(2) of the Act. However, Mahomed, AJ as he then was, in his judgment, among other things, identified certain factors to be considered in determining whether bail should be granted or not. He stated as follows: -

> An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in court. The court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice. The considerations which the court takes into account in deciding this issue include the following:
>
> > Is it more likely that the accused will stand his trial or is it more likely that he will abscond and forfeit his bail? ...
> > The second question which needs to be considered is whether there is a reasonable likelihood that, if the accused is released on bail, he will tamper with witnesses or interfere with the relevant evidence or cause such evidence to be suppressed or distorted ...
> > A third consideration to be taken into account is how prejudicial it might be for the accused in all the circumstances to be kept in custody by being denied bail...[90]

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[88] See section 20 of the Act.
[89] 1991 NR 1 (HC) page 1.
[90] Op cit, pages 19 – 20.

The right to apply for bail is one of the basic rights, which every person in Namibia is entitled to. Although Sub-section 11(9) of the Act confirms the extraditee's right to apply for bail prior to enquiry proceedings for committal, Section 21 of the Act stipulates the following: -

No person –

a) committed to prison under section 12(5) or 15(2) to await the Minister's decision in terms of section 16;

b) committed to prison under section 12(5) to await the Minister's decision in terms of section 16 and who has appealed against the committal order in question in terms of section 14; or

c) whose return to the designated country has been ordered by the Minister under section 16,

shall be entitled to bail.

The provisions of Sub-section 11(9) referred to above comply with the law as practiced in Namibia regarding where a person has been arrested for a suspected offence.

On the outset however, it should be pointed out that the provisions of Section 21, *supra*, are inconsistent with the provisions on Fundamental Human Rights and Freedoms enshrined in the Constitution and those of the *Criminal Procedure Act*[91] as applied to the Republic of Namibia by Article 140 of the Constitution.

[91] Act 51 of 1977.

Firstly, the Namibian Constitution provides as follows:

> No person shall be deprived of personal liberty except according to procedures established by law.[92]

It may be argued that the procedure set out under Section 12 of the Act has been duly established by law as required by Article 7 of the Constitution and therefore should be constitutional. However this argument cannot be sustainable in that it has also been enshrined in the same Constitution, as follows:

> All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.[93]

Section 12 of the Act does not provide a procedure through which a person may be convicted of a criminal offence as to be lawfully committed to prison. The finding by the magistrate in terms of Section 12(5) or Sub-section 15(2) of the Act that there was sufficient evidence to justify a committal for trial of the requested person does not constitute a conviction of a criminal offence and therefore such committal is a violation of one of the basic constitutional provisions, which states that a person charged with an offence is presumed innocent until proven guilty according to law.

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[92] Article 7 of the Constitution.
[93] Ibid, Article 12(1)(d).

Secondly, Section 60(1)(a) of the *Criminal Procedure Act* provides as follows:

> An accused who is in custody in respect of an offence shall...be entitled to bail at any stage preceding his or her conviction in respect of such offence, unless the court finds that it is in the interest of justice that he or she be detained in custody.

In terms of the subsection quoted above, the magistrate before who the application for bail is brought, has the discretion to decide whether bail should be granted or not. Any arbitrary detention of a person in custody as envisaged under Sub-section 12(5) of the Act is contrary to the letter and spirit of Section 60 of the *Criminal Procedure Act* referred to above. It is clear that Section 60 of the Criminal Procedure Act also makes provision for the refusal of bail, but such refusal is not arbitrarily imposed on the applicant, as the case is, in terms of Section 21 of the Act. Whether or not to grant bail as envisaged by Section 60, is determined according to the discretion of the magistrate, which discretion is exercised judicially. This means that whether or not bail should be granted to the extraditee, should be a decision to be made by the judicial officer conducting the extradition hearing after due consideration of all relevant circumstances of a particular case before him or her.

Furthermore Article 7 of the Constitution guarantees the personal liberty of every Namibian except where the deprivation of such liberty is imposed in accordance with procedures established by law.

It may be argued as well that the provisions of Section 21 of the Act are duly established in accordance with the law. This argument only raises the issue of whether the establishment of such a law was in line with the aspirations of the Constitution or not, particularly the provisions of Article 11(1). Clearly the provisions of section 21, *supra*, constitute an arbitrary imposition of a detention order against the requested person.

The observation above is noted while fully cognisant of the provisions of Article 21(2) of the Constitution which, it is submitted, the restriction imposed by such law on the exercise of the rights and freedoms of the requested person is neither reasonable nor is it necessary in that the requested person would not yet have been convicted of an offence as to warrant such drastic measure.

The provisions of Section 60 of the *Criminal Procedure Act* referred to above, have on several occasions been confirmed by courts. For instance in South Africa, it was held that the High Court had inherent jurisdiction under common law to grant bail to the person who has been committed to prison to await extradition pending the petition to the Chief Justice[94]. It was also

[94] S v Hlongwane 1989 (4) SA 79 (T) page 95 T-G.

reaffirmed by another South African court that the High Court had inherent jurisdiction to grant bail pending the decision to surrender in extradition.[95]

Finally the High Court of Namibia has held that although an accused person has no right to be granted bail, he or she has certainly the right to apply for bail.[96]

The question of the requested person's right to apply for bail has been dealt with in the case of the State v Vito Bigione[97] In this matter the requested person was committed to prison by a magistrate pursuant to the provisions of subsection (5) of Section 12 of the Act and decided to apply for bail pending his appeal in terms of Section 14 of the same Act. In his heads of argument counsel for the applicant, Mr Frank, SC, argued as follows: -

> It is respectfully submitted that on a proper interpretation of section 21 what it actually states is perfectly in compliance with the current position in our law relating to bail, namely that no person shall be able to claim bail as of right but will have to apply for it as is the normal requirement and happens in the area of criminal procedure. This is respectfully submitted means that a person may in terms of the Extradition Act apply for bail and the High Court will have to consider such application to decide whether to grant him bail or not and such person is not entitled to bail without satisfying the court on the normal grounds that he should be released on bail.[98]

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[95] Veenendal v Minister of Justice 1993 (2) SA 137 at 141G- 412A.
[96] See S v Timotheus 1995 NR 109 HC at 114 E – I.
[97] S v Vito Bigione 2000 NR 127 (HC).

[98] Ibid.

Counsel for the applicant furthermore emphasised the importance of the fundamental right to personal liberty and submitted that the interpretation of Section 21 of the Act in favour of upholding liberty is the one that should be applicable rather than one that encroaches and in effect abolishes the right to liberty. This view is in deed more acceptable than what has been expressly stipulated by Section 21 referred to above and moreover it is consistent with the provisions of the Constitution, especially that of Article 11(1), and those of the *Criminal Procedure Act* referred to earlier.

However in considering the proposition referred to above and the bail application in general, Gibson J had this to say: -

> In conclusion I think that if the language of S. 21 is read in the ordinary manner a normal speaker of the English language speaks the only way that he would understand the enactment is that Parliament set out to oust the jurisdiction of this Court in the particular circumstances and to take away the inherent jurisdiction that the Courts had exercised over the years, thus taking away the power to grant bail, and by implication the power to entertain an application for bail.[99]

Section 21 of the Act alters the common-law in this regard. At common-law, as applicable in Namibia, a person has the right to apply for bail pending appeal.[100] In the case of *S v Beer*, the application for bail pending appeal against sentence was allowed and reasonable prospects of success on appeal was held to be one of the decisive principles considered as in determining whether bail should be granted or not. Similarly, in *S v De Abreu*,

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[99] Ibid.
[100] See S v Beer 1986 (2) SA 307 (SE) and De Abreu 1980 (4) SA 94 (W).

the Appeal Court allowed the application for bail pending appeal against sentence holding that

> the fundamental principle which has been emphasised in many cases is the favour of the liberty of the subject and that bail should only be refused if there is a real danger that justice will not be done.

Although the two cases referred to above did not deal with extradition *per se*, both cases clearly demonstrate the common-law principle as applicable in Namibia.

It is also entrenched in the Constitution as follows: -

> (1) All persons have the right to:
>
> (a) .....
>
> (g) move freely throughout Namibia.
>
> (2) The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions in the exercise of the rights and freedoms conferred by the said Sub-Article which are necessary in a democratic society and are required in the interest of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.[101]

Clearly for any person's right to freedom of movement to be legally restricted, it is of paramount importance that the person concerned be proven, beyond reasonable doubts, to have contravened a law and that such restriction should be reasonable under the circumstances. The procedure set out under Section 12 of the Act is not capable of reaching the standard of proof required to establish a contravention of any law as to justify the restriction of

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[101] Sub-Articles 21(1)(g) and (2).

the requested person's right to freedom of movement, liberty and dignity. It is therefore submitted that such restriction is unreasonable and thus contrary to the spirit of the Constitution.

Furthermore, the restriction on the requested person's right to freedom of movement imposed by Subsection 12(5), Sections 15 and 21 of the Act is rendered unreasonable by virtue of the fact that such restriction is imposed through a procedure which does not, in terms of the constitutional requirement for a fair trial,[102] permit the magistrate to send a person to prison.

It may be proposed that extradition proceedings are administrative in nature where the standard of proof required by the law of evidence is usually lower than that which is required in criminal proceedings. The proposition may only hold so far as the relaxation of the application of rules of evidence in administrative enquiries are concerned. However the question the question would still remain as to whether authority to conduct administrative proceedings empowers the presiding officer to commit a person to prison or not. It is submitted not.

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[102] Article 12.

Regarding the proposal referred to *supra*, the Constitution stipulates the following:

> Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such act and decisions shall have the right to seek redress before a competent Court or Tribunal.[103]

Evidently, relief is available to the extraditee against the order of committal by means of an appeal to the High Court. However there is no such corresponding relief available against the arbitrary removal of the right to apply for bail. The difficulty that arises in this regard is whether the provisions of Section 21 of the Act are not in conflict with the constitutional right of the extraditee to seek redress for grievances arising from those provisions. Again it has to be submitted that the provisions of Section 21 of the Act are indeed also in conflict with those of Article 18 of the Constitution.

The Extradition Act of South Africa, on the other hand, grants any person who has been committed to prison in terms of Section 10 or 12, which are equivalents to Sections 12(5) and 15(2) of the Act, the right to apply for bail, provided that the person concerned has lodged an appeal against such committal.[104] Under this sub-section, it is only where the person committed to prison has lodged an appeal against such committal that he or she may be

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[103] Article 18
[104] Section 13(3) of the South African Act

entitled to apply for bail. However in the case of *Veenendal v Minister of Justice*,[105] the applicant was committed to prison pursuant to sub-section (1) of section *ten*[106] which is equivalent to Section 21 of the Act and applied for bail while there was no appeal lodged against his committal. Mahomed J, as he then was, held, following the case of *S v Hlongwane*[107] that the Appeal Court had inherent jurisdiction to grant bail and accordingly granted the application[108].

The factors set out in the case of *S v Acheson* referred to above, are deemed to be of general application in bail applications and when applied to the provisions of Section 21 of the Act, it clearly confirms that a person cannot be denied bail arbitrarily as envisaged by Section 21 above. There needs to be, first of all, reasonable grounds for denying such person the right to apply for bail and secondly, the decision either to grant or to refuse to grant bail should be exercised on the discretion of a judicial officer after being duly informed of all the circumstances. Therefore the provisions of Section 21 of the Act are not only contrary to those of the Constitution or the *Criminal Procedure Act* but they are also contrary to acceptable legal practice in Namibia.

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[105] 1993 (2) SA 137 (T) at page 143.
[106] South African Extradition Act.
[107] 1989 (4) SA 79 (T).
[108] Op cit, pages 141–143.

CHAPTER 5

Enquiry Proceedings

At the outset it is necessary to determine whether extradition proceedings are administrative or judicial in nature for the classification of proceedings determines the rights that each party enjoys during the hearing.

The classification of the proceedings being held before court determines the rights that the individual concerned may enjoy. There are opposing opinions regarding whether extradition proceedings are criminal in nature or not. Some courts are of the opinion that extradition proceedings are not criminal[109] and so the requested person does not enjoy the rights that are enjoyed by the accused person in criminal trials.

In *R v Governor of Brixton Prison and another, Ex Parte Levin*[110] where, among other important evidential issues, the question of the scope of hearsay rule and its relationship with computer generated evidence was raised, Lord Hoffmann was of the view that:

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[109] In R v Governor of Belmarsh Prison, *Ex Parte* Francis [1995] 1 WLR 324, where the question was considered in the situation of the application for a writ of habeas corpus, McCowan LJ appeared to be of the opinion that extradition proceedings were not criminal. It was also submitted by counsel in the same case that extradition proceedings were *sui generis*.

[110] [1997] 3 WLR 117, page 121

[E]xtradition proceedings are criminal proceedings. They are of course criminal proceedings of a special kind, but criminal proceedings nonetheless.

Also in *R v King's Lynn Justices, Ex Parte Holland*[111] the Divisional Court was of the opinion that committal proceedings were indeed criminal proceedings.

In the words of Professor Blakesley, C. F.: -

In general, because the extradition process puts not only the defendant's liberty into play, it implicates states sovereignty and the need for international cooperation, most states have a variation of a 'mixed' judicial and administrative extradition system; they have some executive and some judicial input and control. A few states provide for exclusive executive control. Some allow judicial consideration and recommendation, but no judicial power of decision regarding extradition. Some of these latter systems allow executive input at several stages, including initiation and pre or post-hearing stages. Some, such as Germany, provide that the judiciary has exclusive control over extradition.[112]

In his paper presented at the 12th Commonwealth Law conference,[113] Clive Nicholls, QC, identified some principles of extradition law that are readily identifiable from most national and international schemes that have been developed over the years. Two of these principles are deemed to be of relevance to this study and are quoted as follows: -

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[111] [1993] 1 WLR 324

[112] Blackesly, C. F (1996), *The Law of International Extradition: A Comparative Study*. In: Dugard, J. and van den Wyngaert, C. (eds.) (1996). *International Criminal Law and Procedure*, Dartmouth: Aldershot, at page 150

[113] Hosted by the Bar Council of Malaysia as of the 13th to the 16th September 1999 at Kuala Lumpur, Malaysia, entitled "*Extradition for Crime: A comment On Existing Principles – Is It Too Easy or Too Difficult?*

- That a request for extradition and a decision to surrender is a sovereign act of government. Accordingly the scheme of extradition must involve both an executive as well as a judicial process, and
- That the fugitive is to be protected from abuse and the sovereignty of the requested state respected. This dual purpose is to be found in the traditional prohibitions on extradition. Recent provisions (some described as prohibitions) are designed solely to protect the fugitive from discrimination, injustice or oppression. All prohibitions are presently enforced by the executive and the judiciary.[114]

Furthermore, according to Nicholls,[115] the scheme has developed procedural stages involving the following: -

a) a diplomatic request for extradition from the requesting state;

b) consideration of that request by the minister responsible for extradition;

c) a committal process, in which a magistrate considers whether the double criminality principle has been satisfied and whether any of the prohibitions against extradition are applicable;

d) an appeal process which reviews the committal order and considers, with limitations, whether the fugitive ought to be discharged because of abuse;

e) the responsible minister's order for return; and

f) review of the minister's order by higher courts.

It is furthermore evident that extradition proceedings are neither strictly judicial nor are they administrative in nature. Both the executive and the judiciary are involved in the process in which each plays a different but mutually complementary role.

Namibia on the other hand does not have any authority on the question whether extradition proceedings are criminal or not. However the case of *S v*

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[114] Volume I of the 12th Commonwealth Law Conference, hosted by the Bar Council of Malaysia, 13th – 16th September 1999, Kuala Lumpur, page 180.
[115] Supra.

Bigione[116] provides some guidance in this regard. In this case the appellant was committed to prison in terms of section *twelve* (5) of the Act pending the Minister's decision regarding his extradition. The appeal was then lodged against this decision. The appellant based his appeal, *inter alia*, on the meaning of the word 'evidence' as referred to in section *twelve* (7) of the Act and it was his submission that the word meant:

> [E]vidence in legally admissible form or, at very least, duly authenticated depositions or statements on oath as provided for in section *eighteen* of the Act.

Delivering their judgment on the matter, Hannah, J, duly accepted the view as being the meaning intended in terms of section 18. After a short but comprehensive analogy of cases referred to above,[117] it was generally found to be the evidence which amounted to *prima facie* proof of a criminal case having been made out against the requested person enabled the magistrate to commit him or her for trial if such offence was committed in Namibia. Their Lordships further found that the Act itself provides, in case of written evidence, what amounts to *prima facie* proof or *prima facie* evidence.

Although some guidance has been offered by Bigione's case, there is still no answer from local or regional authorities as to whether extradition proceedings are criminal or not.

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[116] 2000 NR 127 (HC).
[117] Harksen v The President of South Africa and others 1998 (2) SA 1011 (C) at 1042C – D; SA Army Fund v Umdloti Beach Health Committee 1974 (4) SA 948 (N) at 954G and Ex Parte The Minister of Justice: In Re R v Jacobson & Levy 1931 AD 466 at 478.

The classification of extradition proceedings does not seem to matter so much after all in that whatever form the proceedings take, the decision-making process remains subject to the Constitution, which requires fair trial during all proceedings held to determine civil rights and obligations or criminal charges against individuals.

The issue that arises as a result of the provisions of Article 12(1)(d) of the Constitution referred to earlier is, however, whether statements contained in affidavits whose accuracy has not been tested under cross-examination could be said to have established *prima facie* proof of an offence committed in a foreign country. This is especially so, where the contents of such statements have been disputed under oath by the requested person. It is submitted in this regard that such statements cannot constitute *prima facie* proof of stated allegations. Any adverse finding against the requested person based on such untested statements should be declared unconstitutional.

5.1 The hearing

The Act requires the extradition hearing to be conducted before the magistrate and should be disposed of by using, as evidential material, statements by judicial or public officers, authenticated records and affidavits of witnesses from requesting foreign countries.[118] In holding the enquiry, the

[118] Section 12 & 8 of the Namibian Extradition Act.

magistrate conducts the proceedings in the manner of holding a preparatory examination similar to a case of a person charged with a criminal offence.[119]

The test applicable in preparatory examinations is the provision of evidence sufficient to satisfy the magistrate that a *prima facie* case has been established against the person for whom such preparatory examination is held.[120]

It is of utmost importance to determine what the words '*prima facie case',* in general, entail and which party bears the onus of adducing evidence during extradition enquiries.

The term *prima facie* evidence is used in two senses.[121] Firstly, it means evidence upon which a reasonable man may find in favour of the person adducing it. It entails the amount of evidence required to prevent the accused being discharged at the conclusion of the state's evidence.[122] Where the prosecution has been unable to provided such evidence, it is considered that the there is no case for the accused to answer[123] and therefore he or she has to be discharged.

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[119] Op cit, section 12(2).
[120] See section 135 Act 51 of 1977
[121] Hoffmann L. H. and Zeffertt, L. H. (1988), 4th Edition. *The South African Law of Evidence*, Cape Town, Juta & Co, at page 596.
[122] Ibid, page 596
[123] Ibid, page 596.

Furthermore, Stratford, JA, has described '*prima facie* proof' in the following sense: -

> Prima facie evidence in its usual sense is used to mean prima facie proof of an issue, the burden of providing which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus.[124]

Prima facie evidence, in this sense denotes the evidence, which is capable of being supplemented by inferences to be drawn from the opposing party's refusal to reply[125] to the allegations against him or her.

Furthermore according to Hoffmann and Zeffertt[126], the principles of *prima facie* evidence are applicable to both civil and criminal cases but it does not mean that a conviction may be obtained without providing ordinary degree of proof. It is also the above-mentioned learned writers' opinion that the requisite standard must always be satisfied before conviction.

It has to be noted at this stage that the opinions referred to above were not expressed with regard to what evidence may amount to *prima facie* case at an extradition enquiry, but rather the opinions were expressed with regard to a criminal trial. Nonetheless, the opinions expressed above, have provided some indications as to what evidence is usually required by the courts before *prima facie* proof is established.

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[124] Ex Parte Minister of Justice: re R v Jacobson and Levy 1931 AD page 466 at 478
[125] See Hoffmann and Zeffertt, supra, at page 596.
[126] Ibid, at page 597.

With regard to the burden of proof of a *prima facie* case, it has already been shown above that the party testifying bears the burden of proving a *prima facie* case against the person the allegations are being made. It has also been shown in this regard that in the absence of a reply from the accused, *prima facie* proof of a case becomes conclusive evidence of the issue, which the evidence seeks to establish.

It is also of importance to note that except where the requested person voluntarily consents to his or her extradition to a foreign country, he or she always provides a reasonable explanation to the allegations levelled against him or her. Therefore on the basis of the opinions expressed in *In Re Jacobson and Levy*[127] above, a *prima facie* case may not be said to have been established where the requested person has provided such a reasonable reply to the allegations against him or her.

During the extradition hearing, the requested person is confronted with allegations contained in affidavits and recorded statements of witnesses from the requesting country who are not called to testify *viva voce* before court. It should be borne in mind that recorded statements and affidavits cannot be cross-examined and therefore the requested person cannot test their accuracy or the credibility of those who made them. Nonetheless the magistrate is allowed to find that a *prima facie* case has been made out

[127] See note 116

against the requested person and based on such evidence, to commit him or her to prison to await his or her surrender to a foreign country to face criminal charges. This has a curtailing effect on the constitutional right of the requested person to cross-examine the evidence tendered against him or her.

Under normal circumstances where the accused person opposes any allegation made in the affidavit, the person making such affidavit is summonsed to court in order to clarify under cross-examination those issues that are disputed.

To highlight the importance of cross-examination in criminal proceedings reference is made to the case of *S v Wellington*[128] In this matter the accused person who was not represented was charged and found guilty of fraud after a plea of not guilty. During the trial, the presiding magistrate failed to explain to the accused person his right to cross-examine the witnesses called by the state. The accused appealed to the High Court against his conviction on the ground, *inter alia*, that the court *a quo* failed to explain to him his rights relating to cross-examination of the state's witnesses. On appeal it was held, *per* Frank AJ, as follows: -

Failure to explain to an unrepresented [accused] his rights with regard to cross-examination is in my view tantamount to a failure to allow cross-examination. The latter is, of course, a gross irregularity... Failure to explain to an unrepresented [accused] his rights with regard to

[128] 1991 (1) SACR 144 (Nm).

cross-examination further, in my view, results in such person not having a fair trial, which was and still is a fundamental principle of our law.[129]

Although this case had no direct bearing on extradition law *per se*, the view expressed by Frank AJ highlights the importance of the role of cross-examination and the effect of failure to avail the opportunity thereof in criminal proceedings.

It is furthermore submitted that a magistrate who commits a person to prison in terms of Section 12 or 15 of the Act does not only violate the provisions of Sub-Article 12(1)(d) of the Constitution but also those of Article 7 thereof. It should be noted that the Constitution is the Supreme Law of Namibia[130]. Being the Supreme Law of Namibia, Sub-section 12(5) of the Act is subject to the Constitution and where the provisions of the Act become in conflict with those of the Constitution, it is submitted, the provisions of the Constitution should prevail.

In other words, the provisions of both Sections 12 and 15 of the Act are neither consistent with extraditee's right to personal liberty nor are they consistent with his or her right to fair trial as guaranteed by Articles 7 and 12(1)(d) respectively. The deprivation of personal liberty may only be constitutional if done according to procedures established by law, which procedure, it is submitted, should be consistent with the Constitution. A

[129] See note 128, at page 148 (d) - (e).
[130] Sub-Article 1(6) of the Constitution.

hearing process that does not allow the parties to cross-examine the evidence brought against them at that hearing can not be said to be consistent with Article 7 and therefore may be declared unconstitutional.

In most extradition hearings, due to various reasons and understandably so, witnesses cannot be summonsed from foreign countries to testify at such hearings just so as to be cross-examined by the requested person.

However, Article 12(1)(d) of the Constitution provides as follows:

> **All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.**

In the light of this constitutional provision, the making of a finding that there is *prima facie* case against the requested person who has been denied the right to cross-examination and that he or she is liable to be committed to prison should be declared unconstitutional.

During the extradition enquiry, the magistrate determines the sufficiency of evidence by assessing statements and affidavits received from deponents in a foreign country who are not called as witnesses before the magistrate concerned.

The requested person, on the other hand, is expected to testify *viva voce* and thereafter be subjected to cross-examination on behalf of the requesting country.

In terms of the Constitution of Namibia, a person may not be convicted of an offence based on evidence regarding which he or she was not availed the opportunity of testing under cross-examination and therefore such evidence should not be considered to be conclusive.[131]

It should however be accepted that the extradition enquiry should not replace the criminal trial, but *prima facie* proof of a criminal offence having been committed by the extraditee based on untested evidence, should certainly provide some favourable consideration for such extraditee. This consideration could, for instance, be for the presiding magistrate to place more weight on his or her reply to the allegations against him or her, or to avail the extraditee the option to apply for bail before being committed to jail pending his or her surrender to the requesting country.

5.2 The standard of proof and presumption of innocence

It is provided for by the Act that extradition enquiry should be conducted in the manner which preparatory examinations are held.[132] Chapters 19 and 20 of the *Criminal Procedure Act* set out the procedure for preparatory

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[131] Article 12(1)(d) of the Namibian Constitution.
[132] Section 12(2) of the Act

examinations.[133] The *Criminal Procedure Act* referred to above does neither provide any guidance as to what kind of evidence to be received nor does it stipulate the standard of proof to be applied at preparatory examinations. However, Section 135[134] provides some guidance. It states that where the magistrate holding an enquiry is, on consideration of available evidence, of the opinion that there is no sufficient case made out to put the accused on trial for any offence charged, such magistrate should discharge the accused in respect of the offence charged. Where there is sufficient case made out against the accused, the magistrate concerned transmits the record of preparatory examination to the Prosecutor General who would then arraign the accused for trial on the charge established at such preparatory examination[135] or for sentence, as the case may be.

The Act itself also refers to sufficiency[136] of evidence as the basis for committal to prison of a requested person. The South African Extradition Act for instance, also requires sufficiency of evidence to enable the magistrate to issue a committal order. The other selected countries simply refer to admissible evidence[137] and evidence sufficient[138] to warrant a trial if the offence in question was committed within their local jurisdiction.

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[133] Act 51 of 1977 referred to above.
[134] Ibid.
[135] Ibid, section 137.
[136] Section 12(5)(d) of the Act.
[137] Section 29 of the Canadian Extradition Act.
[138] Section 9 of the Extradition Act of the United Kingdom.

In *Al-Fawwaz*,[139] the appellants appealed to the House of Lords, *inter alia*, against their Lordships', (Buxton LJ and Elias J) decision to admit the evidence contained in the affidavit of an anonymous witness at the extradition hearing[140].

In that case the appellant was arrested in the United Kingdom following a request made by the United States of America for his extradition. The appellant was accused of conspiring with Osama Bin Ladin and members of the Al Quaeda terrorist group between the 1st day of January 1993 and the 27th September 1998, *inter alia*, to cause the murder of United States citizens in the United States of America and elsewhere.

In his affidavit before the Divisional Court, an anonymous witness claimed to have been directly involved in the conspiracy and to be in mortal fear by reason of his co-operation with the authorities. His evidence was of importance in that it directly involved *Al-Fawwaz* in the conspiracy.

Relying on the judgement of the Court of Appeal in *R v Taylor (Gary)*[141] the appellant submitted that the magistrate was wrong in law and or acted irrationally in admitting the evidence contained in an affidavit of an anonymous witness in that the appellant had a fundamental right to see and hear the identity of the witness called against him save in rare or exceptional

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[139] Re [2001] UKHL 69
[140] Al-Fawwaz [2001] 1 WLR 1234.
[141] The Times, 17 August 1994, London.

circumstances. In *R v Taylor*, the judge permitted a witness to give corroborative evidence behind the screen without revealing her name or address.

Evans LJ, in dismissing the appeal in *R v Taylor*, stated, *inter alia*, as follows:

> ...The matter was pre-eminently one for the exercise of the judge's discretion, and the following factors were relevant to the exercise of that discretion: -
>
> 1. ...
> 2. The evidence must be sufficiently relevant and important to make it unfair to make the Crown proceed without it. A distinction could be drawn between cases where the creditworthiness of the witness was in question rather than his accuracy.
> 3. The Crown must satisfy the court that the creditworthiness of the witness had been fully investigated and disclosed.
> 4. The court must be satisfied that there would be no undue prejudice to the accused, though some prejudice was inevitable, even if it was only the qualification placed on the right to confront a witness as accuser. There might also be factors pointing the other way, for example as in the present case where the defendant could see the witness on the video screen.
>
> ...The law gave the trial judge the power to make an order that a witness remain anonymous in the exercise of his discretion, and the present case was not one where there were any grounds for supposing that the witness was not impartial or had an axe to grind. In their Lordship's view the judge was entitled to conclude that the witness be allowed to give her evidence anonymously.

In the course of delivering his judgment in the case of *Al-Fawwaz*, the magistrate, referring to *R v Taylor* stated, *inter alia,* that the evidence of the anonymous witness was sufficiently important to make it unfair to make the state proceed without it and accordingly ruled the evidence admissible for the purpose of committal proceedings.

In *Al-Fawwaz, Re*, the House of Lords has, among other things, reached two important decisions that are relevant to the test for sufficiency of evidence as

well as the issue of whether an affidavit containing a statement of an anonymous and thus, uncalled witness is admissible as sufficient evidence for the purpose of committal proceedings or not.

First of all, it was the opinion of the House of Lords that the test for the magistrate to apply the sufficiency of the evidence before him is set out in paragraph 7(1) of schedule 1 to the United Kingdom Extradition Act of 1989, hereafter the United Kingdom Act. Paragraph 7(1) of the schedule referred to *supra*, provides that the test to be applied is whether the evidence produced at the extradition hearing would make a case requiring an answer by the prisoner at a trial. Secondly, it was also the decision of the House that it was up to the magistrate hearing the extradition, after due consideration of the factors referred to in *R v Taylor*, to apply his discretion whether or not to admit the affidavit of a witness not called to testify.

Having regard to the provisions reviewed above, it is evident that the standard of proof applicable at preparatory examinations is the establishment of *prima facie* case against the accused person.

Although the standard required to establish *prima facie* case against the accused person is normally lower than proof beyond reasonable doubts, the concern that should arises is whether *prima facie* evidence is sufficient enough to negate the presumption of innocence until proven guilty before a court of law. Again it is important to reiterate that the extradition enquiry is by

no means a criminal trial, however the extraditee's rights to liberty and fair trial, as guaranteed by the Constitution, are equally at stake as they are during the criminal trial. It is submitted therefore, that the Constitution being the supreme law of Namibia, its provisions in this regard could only be impugned by the highest standard of proof similar to the one that is applicable in criminal trials. Subsequently, the finding by the magistrate of the requested person being liable for extradition and the commission of such person to prison based on untested evidence contained in affidavits is totally inconsistent with the presumption of innocence as enshrined in the Constitution.

It is of utmost importance, however, to take note of the summary of the extradition proceedings in the case of *Leonard Peltier*.[142] The United States of America requested Leonard Peltier's extradition from Canada for five criminal offences that included several counts of murder and burglary charges. During his 18 days extradition hearing, some six witnesses were called to testify and about 30 affidavits were received on behalf of the United States of America.

One of the functions of the judge was to determine whether there was sufficient evidence adduced that if the conduct had been committed in Canada, the judge would order the person concerned to stand trial in

[142] Wicks, M. (1999) "*Summary of the Extradition Proceedings in the case of Leonard Peltier*", (c) 1999 AICS, posted 15th October 1999, http://www.aics.org/LP/summary.html, visited in June 2004.

Canada. According to the summary referred to above, the test to be applied by Canadian extradition judges was set out by the Canadian Supreme Court as follows: -

> [T]he extradition judge must determine whether there is any evidence upon which a reasonable jury properly instructed in the law could return a verdict of guilty. In other words, an extradition judge must order committal if there is any evidence, whether direct or circumstantial, upon which a jury could convict. In making this determination, the extradition judge cannot test the quality or reliability of the evidence, weigh the evidence, or consider the credibility of the witnesses. These are matters reserved for the judge or jury at trial in the requesting state.

Clearly the standard of proof required at extradition hearings in Canada for the determination of whether to commit the requested person to prison or not is much lower than that which is required for the determination of guilt or innocence at criminal trials.

5.3 Committal for Extradition

Section 12 of the Act provides the procedure to be followed before a person is committed to prison for his or her return to the requesting country. It is provided under this section that where the Minister authorises a magistrate to proceed, the requested person may be brought before such magistrate who would then hold an enquiry for determining whether such person may be returned to the requesting country concerned or not.

The magistrate holding an enquiry proceeds in the manner in which a preparatory examination is held in a case of a person who has committed a

criminal offence in Namibia.[143] The magistrate concerned is vested with powers in this regard including the power of committing any person for further examination and of admitting to bail any person detained, as he or she would have at preparatory examinations.[144] The Prosecutor-General or any person delegated by him or her may appear at any enquiry or any proceedings under the Act.[145]

A person whose return has been requested may in writing before a magistrate waive his or her right to an enquiry provided that such magistrate is satisfied that the person concerned has voluntarily waived his or her right to an enquiry and that such person has understood the significance and all implications of such waiver.[146] Where the person concerned waives his or her right to an enquiry in terms of this section, the magistrate may without delay commit such person to prison to await the Minister's decision with regard to his or her return to the requesting country concerned.

After the magistrate concerned has heard the evidence adduced at the enquiry contemplated under Sub-section 12(7)(b), he or she may issue an order committing the requested person to prison to await the Minister's decision regarding the return of the person concerned to the requesting country, provided that such magistrate is satisfied that: -

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[143] Sub-section 12 (2) of the Act
[144] *Supra*
[145] Sub-section 12 (3), op cit.
[146] Op cit, Sub-sections 15 (1) and (2).

a) the offence to which the request in question relates is an extraditable offence;

b) the country requesting the return of the person concerned is a country contemplated under subsection (1) of section *four* of the Act;

c) the person brought before him or her is the same who is alleged to have committed such extraditable offence in such country or to be unlawfully at large after conviction for an extraditable offence in such country;

d) in respect of a person accused of having committed an extraditable offence, the evidence adduced would be sufficient to justify the committal for trial of the person concerned if the conduct constituting the offence had taken place in Namibia; and

e) the return of the person has been requested in accordance with the Act and his return is not prohibited under Part II.[147]

However if the magistrate is not satisfied that all the requirements referred to above have been complied with, or the evidence requested[148] is not forthcoming within the period of two months from the date of the first adjournment of the hearing, the magistrate is obliged to discharge the person whose return has been requested and to notify the Minister in writing of such order and his or her reasons therefore.[149]

Unless the Minister orders his or her return, and until the expiration of the period of 15 days from the date of his or her order of committal or the conclusion of the appeal made under Section 14, a person committed to prison under Sub-section 12(5) to await the Minister's decision may not be returned to the requesting country. If however the requested person

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[147] *Supra*, Sub-section 12(5).
[148] Section 12 (4), supra.
[149] Sub-section (7), supra.

concerned consents in writing before a magistrate to such return, he or she may be returned to the requesting country without delay.[150]

The Minister is obliged to issue a written order for the return of a person committed to prison in terms of this Act to the requesting country provided that there is no appeal pending before the High Court against such committal and that the Minister concerned is satisfied that the return of such person is not prohibited under the Act[151]. However no such person committed in terms of Section 12 or 15 may be returned to the requesting country if: -

a) that person is still serving a sentence in Namibia for an offence other than the offence for which the return in question was requested; or

b) that person is charged with an offence in Namibia being an offence other than the offence for which the return was requested and that charge has not been disposed of or withdrawn or where it results in such person serving a term of imprisonment, that term of imprisonment has not been served.[152]

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[150] Section 13, op cit.
[151] Ibid, Section 16 (1).
[152] Op. cit, Sub-section (2)

The order of return directs the prison authorities to deliver on a specified date and to a named place of departure the requested person concerned for being conveyed from Namibia and the requesting country concerned is immediately notified of such date and place where the requested person is to be handed over to the authorised officials of such requesting country[153].

Where authorised officials of the requesting country fail to attend on the date and at the place for the purpose of receiving the person to be returned and such country has not, within 15 days made arrangements to the satisfaction of the Minister to receive such person, the Minister responsible is obliged to discharge the concerned and no further request of that person will be entertained.[154]

5.4 Appeal

The right to appeal against any court order is one of the fundamental rights that every aggrieved party to any legal proceedings should be entitled to. To that end the Act provides that any order made in terms of Section 12 thereof is subject to appeal before the High Court by the aggrieved party and the High Court may upon such appeal make such order as it thinks the magistrate ought to have made.[155]

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[153] Sub-section 16 (3) and (4), op. cit.
[154] Section 16 (4)(b), op. cit.
[155] Ibid, Section 14

When considering the appeal in terms of this section, the High Court may discharge the person who has been committed to prison to await the Minister's decision in terms of Section 12, *supra*, if it is of the opinion that it would be unjust to return the person concerned by reason of: -

c) the violation of any of the provisions of Part II;

d) the trivial nature of the offence concerned;

e) ...; or

f) the accusation of the person concerned not having been made in good faith or in the interest of justice.[156]

It is evident from the provisions quoted above that the person may appeal to the High Court for relief against the magistrate's committal order. However the Act does not provide any further relief for an appellant where he or she is not satisfied with the outcome of the appeal before the High Court. The aggrieved extraditee cannot resort to the provisions of Section 316 of the *Criminal Procedure Act, Act 51 of 1977*, in that it only provides for the person who has been convicted of a criminal offence before a superior court to appeal to the Supreme Court.

[156] Op. cit, Sub-section 14 (2).

The Constitution itself provides another dilemma for the requested person in filing an appeal to the Supreme Court. Sub-Article 79(4) thereof provides as follows: -

The jurisdiction of the Supreme Court with regard to appeals shall be determined by Act of parliament.

The provisions quoted above clearly show that the Supreme Court does not have inherent appeal jurisdiction, but derives its appeal power from an Act of Parliament.

Conversely, Section 11 of the United Kingdom Act, which is the equivalent of Section 14 of the Act provides as follows: -

(1) Where a person is committed under section 9 above, the court shall inform him in ordinary language of his right to make an application for habeas corpus, and shall forthwith give notice of the committal to the Secretary of State.

(2)...

(5) Proceedings on an application for habeas corpus shall be treated for the purpose of this section as pending (unless they are discontinued) until (disregarding any power of any court to grant leave to appeal out of time) there is no further possibility of an appeal.

Evidently the United Kingdom Act provides unlimited possibility for the extrarditee to appeal against the magistrate's order for committal pending extradition.

In respect of Canada, the Canadian Act provides a more elaborate and unlimited appeal procedure with regard to extradition hearing. Any person

against whom a committal order has been made may appeal such order or the Attorney General, on behalf of the extradition partner, may appeal the discharge of the person or a stay of proceedings to the court of appeal.[157]

An appellant wishing to appeal against the decision of a judge in respect of a committal or discharge should give notice of appeal or of application not later than 30 days after the date of the decision.[158] Furthermore the Supreme Court may hear applications for leave to appeal or an appeal from a decision of the court of appeal on an appeal taken under section *forty-nine* or any other appeal in respect of a matter arising under the Canadian Act including the Minister's decision with respect to the surrender in terms of section *forty*.[159]

[157] Section 49 of the Canadian Act (Chapter 18 of 1999).
[158] Ibid, Section 50.
[159] Ibid, Section 56.

CHAPTER 6

Selected Foreign Legislation

Most states, as indicated earlier, have their unique extradition legislation and procedures adopted to satisfy and conform to their legal systems. A brief look at extradition schemes of each selected country will provide this study with the opportunity for analysing their extradition processes comparatively.

6.1 South Africa

The extradition process of South Africa is regulated by the Act of Parliament, *Act 67 of 1962*, (hereafter the South African Act). The extradition scheme of South Africa has undergone several amendments since its enactment in 1962 in order to adapt to changing legal and political environment of that country. The South African Act prescribes procedures for extradition as well as the circumstances under which a requested person may be surrendered to the requesting state.

Initial Procedure

In terms of the South African Act, the extradition process is also set in motion by a request for extradition made to the Minister of Justice (hereafter the

Minister) by a person recognised by him as a diplomatic or consular representative of a foreign state or any Minister of that state communicating with him or her through diplomatic channels existing between South Africa and such foreign state.[160]

However, unlike in Namibia, a magistrate in South Africa may, upon information from any person other than a diplomatic or consular representative that a person is accused or convicted of an extraditable offence committed within the jurisdiction of a foreign state, issue a warrant of arrest for such a person if, in his or her opinion, issuance of such a warrant of arrest would be justified, had the offence been committed in South Africa.[161] This option simplifies the extradition process and facilitates the prompt arrest of the extraditee to avoid such person from fleeing to another country.

In the case where a warrant of arrest has been issued on information other than by notification from the Minister in terms of Section 5 of the South African Act, the magistrate issuing such warrant of arrest or for further detention in terms of Section 7 of the same Act is obliged to furnish the Minister with the particulars relating to the issuance of such warrant.[162] The Minister concerned may direct that such warrant of arrest be cancelled or that the arrested person be discharge if, in his or her opinion, a request for the

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[160] Section 4 (1) South African Extradition Act.
[161] Op. cit, Sub-section (1)(b)
[162] Ibid, Sub-section 8(1).

extradition of the person concerned is being unreasonably delayed or for any other reason that the Minister may deem fit.[163]

Extradition Enquiry

After the warrant of arrest has been executed, the requested person is, as soon as possible brought before the magistrate for the holding of an enquiry[164]. The enquiry under Section 9 is held in the manner in which a preparatory examination is held in terms of Section 119 of the *Criminal Procedure Act of South Africa, Act 51 of 1977*. While holding such enquiry, the magistrate has the power of admitting to bail any person detained.

Any deposition, sworn or affirmed statement taken whether in the presence of the accused or not, any record of conviction or any warrant issued in any foreign State or any copy or sworn translation thereof, may be received in evidence at any enquiry provided that such documents are in compliance with prescribed requirements of authentication.[165]

Any magistrate holding the extradition enquiry is obliged to accept as conclusive proof a certificate issued by the authority responsible for prosecutions in the requesting country concerned, stating that it has sufficient evidence at its disposal to warrant a prosecution for a person concerned in

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[163] Op. cit, Sub-section 8(2).
[164] Ibid, Sub-section 9(1).
[165] Op. cit. Sub-section 9(3)

that country.[166] If the magistrate holding an enquiry under Section 9 of the South African Act finds, on the evidence before him, that the person requested is liable to be surrendered to the foreign state concerned and such evidence warrants a prosecution for the offence committed within the jurisdiction of the foreign state, the magistrate concerned is obliged to commit

that country.[166] If the magistrate holding an enquiry under Section 9 of the South African Act finds, on the evidence before him, that the person requested is liable to be surrendered to the foreign state concerned and such evidence warrants a prosecution for the offence committed within the jurisdiction of the foreign state, the magistrate concerned is obliged to commit such person to prison to await the Minister's decision either to order the surrender or to refuse such surrender of the person concerned.[167] The evidence upon which the magistrate may find the requested person liable to be surrendered to the requesting foreign state is required to be sufficient to the extent of being held as *conclusive proof*[168] and if not, the person concerned has to be discharged.[169] Despite the fact that any deposition or statement which is duly authenticated and received as conclusive proof of facts stated therein, the magistrate is still obliged to apply his or her mind in determining whether there is sufficient evidence to warrant a prosecution in the foreign state, whether the evidence produced by the foreign state would constitute an offence in South Africa and whether the certification of relevant documents was issued by an appropriate authority.[170] Where such evidence has been found to be conclusive,[171] such magistrate is called upon to forward the copy of the record of proceedings of the enquiry to the Minister immediately after the committal order has been issued.

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[166] Ibid Sub-section 10(2)
[167] Op cit, Sub-section 10(1).
[168] See Geuking v President of the Republic of South Africa, 2003 (3) SA 34 (CC)
[169] Ibid Section 10 (3).
[170] See note 168, at pages 47 C – 49 G.
[171] Section 10(4) Extradition Act of South Africa.

Upon receipt of the copy of proceedings, the Minister may either surrender the person committed to the foreign state or refuse to do so on prescribed conditions. Section 11(b) of the South African Act prescribes certain conditions under which the Minister may refuse to surrender the requested person to a foreign state.

Conclusive proof having been defined as proof of a fact for which rebuttal is no longer possible,[172] it is clear that once the deposition or statement has been received and duly admitted in evidence, the extraditee is not entitled to challenge the correctness or the credibility of its contents during the extradition enquiry. This position raises questions regarding the extraditee's right to fair trial and common law principle of natural justice. It is accepted that the extraditee will eventually be availed the right to defend him or herself in the criminal court of the foreign country making the request for extradition, but his or her right to liberty and not to be extradited is already at stake during the extradition enquiry. For instance, where a person's return has been requested for tax evasion offences committed in a foreign state, such person will end up being returned despite the fact that he or she could prove to the court that taxes allegedly evaded have actually been paid to the requesting country.

[172] S v Moroney 1978 4 SA 389 (A) 406.

Where the offence committed in a country between which there is an extradition agreement with South Africa and where, upon the enquiry, the magistrate has found that the person concerned is liable to be surrendered to the associated state, such magistrate is obliged, under the provisions of Sub-section 12(1) of the South African Act, to issue an order for such person to be surrendered to any person authorised by the associated state to receive him or her. In terms of this section, the magistrate surrenders the person concerned to the requesting associate state as opposed to Sub-section 10 (4) of the South Africa Act. However in terms of Section 12 of the same Act, the magistrate concerned may also refuse to issue the order surrendering the person found to be liable to be surrendered to the foreign state on similar conditions as those set out under paragraph (b) of Section 11 of the South African Act as grounds on which the Minister may refuse to surrender the wanted person to a foreign state.

Section 12 of the South African Act shows that apart from the Minister, a magistrate may also issue an order surrendering the requested person to a foreign state. However in respect of Namibia, it is only the Minister who is vested with the power to surrender a wanted person to the requesting foreign state.[173]

[173] See Section 16 of the Extradition Act of Namibia.

The Right to Apply for Bail

The South African Act empowers the magistrate to admit to bail the requested person both during the extradition inquiry and appeal proceedings against the order of surrender.[174] The position in Namibia regarding this matter is rather undesirable in that the requested person is denied the right to apply for bail as soon as he or she has been declared extraditable.[175]

Appeal

Any order of surrender issued in terms of Sections 10 or 12 of the South African Act may, within fifteen days, be appealed to the provincial or local division of the Supreme Court having jurisdiction.[176] Clearly the right of appeal against the order of surrender is limited only to the Supreme Court of South Africa, whereas in Namibia the appeal in this regard lies only to the High Court and not automatically to the Supreme Court of Namibia.[177]

6.2 The United Kingdom

The Extradition Act of 1989, hereafter referred to as the United Kingdom Act, provides for the legal framework for extradition process in the United Kingdom. The European Convention on Extradition, the Commonwealth

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[174] See note 171, supra.
[175] See pp 46 – 57, supra.
[176] Section 13 of the Extradition Act of South Africa
[177] See pages 80 – 83, supra.

scheme for the Rendition of Fugitive Offenders and bilateral treaties are also some of the main schemes under which extradition. However this project will mainly be confined to comparing certain provisions of the United Kingdom Act with those of the Act.

Liability for extradition

Any person in the United Kingdom who is accused of an extradition crime committed within the territory of the requesting state or who is alleged to be unlawfully at large after conviction of extradition crime by a court in that country may be arrested and returned to such country in accordance with the provisions of Part III of the United Kingdom Act.[178]

The Offence

For the purpose of the United Kingdom Act an extradition crime is defined as:-

a) [the] conduct in the territory of a foreign state, a designated Commonwealth country or a colony which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12, or any greater punishment, and which however described in the law of the foreign state, Commonwealth country or colony, is so punished under that law;

b) an extra-territorial offence against the law of a foreign state, designated Commonwealth country or colony which is punishable under that law with imprisonment for a term of 12 months, or any greater punishment.

The condition referred to under paragraph (b) of subsection (1) of this section should also constitute an extra-territorial offence against the law of the United Kingdom punishable with imprisonment for a term of 12 months or any greater punishment or an extra-territorial offence which satisfies the following conditions (as specified under subsection (3) of this

[178] Section 1(1) of the United Kingdom Act.

section):

c) that the foreign state, Commonwealth country or colony bases its jurisdiction on the nationality of the offender;

d) that the conduct constituting the offence occurred outside the United Kingdom; and

e) that, if it occurred in the United Kingdom, it would constitute an offence under the law of the United Kingdom punishable with imprisonment for 12 months or any greater punishment.[179]

Restrictions on return

Part II of the United Kingdom Act regulates the return of persons whose request has been made under Part III of this Act. In terms of Sub-section 6(1) of the United Kingdom Act, it is provided that no person may be returned if it appears to an appropriate authority –

a) that the offence of which that person is accused or was convicted is an on offence of a political character;

b) that it is an offence under military law which is not also an offence under the general criminal law;

c) that the request for his or her return is in fact made for the purpose of prosecuting or punishing him or her on account of his or her race, religion, nationality or political opinions; or

d) that he might, if returned, be prejudiced in his trial or punished, detained or restricted in his or her personal liberty by reason of his or her race, religion, nationality or political opinions.

As is the case in Namibia, the United Kingdom Act has also provided further restrictions on return relating to the extradition of the requested person being unjust or oppressive or relating to where a death penalty may be imposed for the offence for which such return has been requested.[180]

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[179] Ibid, Section 2.
[180] See section 6 of the United Kingdom Act.

"*Appropriate authority*" - means the Secretary of State, the court of committal, or the High Court on an application for *habeas corpus* or for review of the order of committal.[181]

In respect of a person who is alleged to be unlawfully at large, Sub-section 6 (2) of the United Kingdom Act provides that such person may not be returned to a foreign country or committed or kept in custody for the purpose of return to a foreign country, if it appears to an appropriate authority –

a) "that the conviction was obtained in his or her absence; and
b) that it would not be in the interest of justice to return him or her on the ground of that conviction".

The provisions of this Subsection are equivalent to those of Sub-section 5(2) of the Act and are clearly enacted to protect the requested person from unfair punishment by the foreign requesting state.

The United Kingdom Act also restricts any person from being returned, committed or kept in custody for the purposes of return, if it appears to an appropriate authority that if such person was charged with an offence in the United Kingdom he or she would be entitled to be discharge under any rule of law relating to previous conviction or acquittal.

As indicated above, the provisions of Section 6 of the United Kingdom Act

[181] Ibid, Sub-section 6(9).

are, in general terms, similar to those of Section 5 of the Act and this demonstrates the importance of extending legal rights that the extraditee enjoys in terms of common-law and local statutory provisions to the foreign jurisdictions where such extraditee might be tried.

Extradition procedure

Extradition from the United Kingdom requires decisions by Ministers as well as by courts.[182] The chief metropolitan stipendiary magistrate or any designated metropolitan magistrate, on receipt of authority to proceed issued pursuant to Sub-section 7(4) of the United Kingdom Act, to issue a warrant of arrest of a person upon information that such person is or is believed to be or on his way to the United Kingdom.

Whereas a provisional warrant of arrest in Namibia may only be issued by a magistrate after receiving the urgent application for extradition from the Minister, the magistrate in the United Kingdom is authorised to issue the same warrant without the Minister's authority.[183] Obviously this procedure simplifies the extradition process where the application is submitted on urgent basis.

The following information is generally required for the request for extradition

[182] Ibid, Section 8.
[183] Op cit, Sub-section (1)(b)

in terms of Section 7: -[184]

a) particulars of the person requested;

b) particulars of the offence of which he or she is accused or was convicted;

c) in the case of a person accused of the offence, a warrant or duly authenticated copy of a warrant of his or her arrest issued in the requesting state, or for a provisional arrest, details of such a warrant;

d) in the case of a person unlawfully at large after conviction of an offence, a certificate or a duly authenticate copy of the certificate of the conviction and the sentence, or for provisional arrest, details of the conviction. (paraphrased).

Authentication of Foreign Documents

The United Kingdom Act requires authentication by the oath of witness of foreign documents tendered in extradition proceedings relating to a person whose return has been requested.[185] For the purpose of extradition proceedings a document is deemed to be duly authenticated if it purports to be signed by a Judge, magistrate or officer of a foreign state where it was issued and if it purports to be certified by being sealed with the official seal of the Minister of Justice, or some other Minister of the State of the foreign state.[186] A duly authenticated document purporting to set out evidence given under oath in a designated Commonwealth country is admissible in evidence as proof of matters stated therein.[187]

The extradition process in the United Kingdom may involve the following five

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[184] Ibid.
[185] Ibid, Section 26.
[186] Op cit, Sub-section (1).
[187] Sub-section 27(1)(a) of the Canadian Extradition Act, (Chapter 18 of 1999)

stages: -

- The issuance of authority to proceed by the Secretary of State;[188]
- The committal proceedings held before the metropolitan magistrate;[189]
- The application for *habeas corpus* in terms of Section 11;[190]
- The application for judicial review against the committal to prison in accordance with Section 13;[191] and
- The surrender of the requested offender to the requesting country in terms of Section 12.[192]

In respect of the first and last stages, the Secretary of State makes the decision while in respect of the second, third and fourth stages, the district court, the divisional court and the House of Lords Appellate Committee make decisions respectively.

Appeal

The decisions that the district court and divisional court make and those that are made by the Secretary of State under the United Kingdom Act are subject to judicial review.

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[188] Sub-sections 7(4) and (8) of the United Kingdom Act.
[189] Ibid, Section 9 (1).
[190] Ibid, Section 11.
[191] Op cit.
[192] Op cit.

First of all, any person who has been committed to prison to await for his or her return to a foreign country is entitled to make an application for *habeas corpus* to the High Court which may order for a discharge[193] of the committed person or uphold[194] such committal order thereby authorising the Secretary of State to make the order for the return of the requested person to a foreign state. Secondly, the person whose committal has been ordered by the magistrate may file an appeal to the House of Lords for their opinions in any cause.

Unlike the Act, the United Kingdom Act provides more and better options for the extraditee to apply for judicial review where an adverse decision has been made against him or her. The provisions of the United Kingdom Act, in this regard, are clearly more consistent with the right to judicial review as guaranteed by the Constitution.[195]

6.3 Canada

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[193] Op cit, Sub-sections 11(1) and (3).
[194] Ibid, Sub-section 12(1).
[195] See *Al Fawwaz and R v Taylor (Gary)*, pages 74-76, supra.

The Extradition Act of Canada, Chapter 18 of 1999 (hereafter the Canadian Act), regulates the extradition process in Canada. Extradition agreements between Canada and her extradition partners also form part of the general framework through which extradition requests are considered. Part II of the Canadian Act sets out the procedure to be followed in dealing with extradition from Canada.

In terms of Section 2 of this Act, The term '*extradition agreement*' means an agreement that is in force, to which Canada is a party and that contains a provision respecting the extradition of persons, other than a specific agreement.[196] '*Extradition partner*' means a state or entity with which Canada is a party to an extradition agreement, with which Canada has entered into a specific agreement or whose name appears on the schedule.[197]

Extradition to Canada

The Minister of Justice may, at the request of a competent authority, make a request to a State or entity for the extradition of a person for the purpose of prosecuting of, imposing or enforcing a sentence on such a person.[198] The Minister may also, on the request of the competent authority make a request to a State or entity for a provisional arrest of a person.[199]

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[196] Section 2, the Canadian Act, Chapter 18 of 1999
[197] Op cit.
[198] Ibid, Section 78.
[199] Op cit.

The word "*competent authority*" means the following: -

a) in respect of a prosecution or imposition of a sentence, the Attorney General, or the Attorney General of the province of a province who is responsible for the prosecution of the case; and

b) in respect of the enforcement of a sentence or a disposition under the *Young offenders Act,*

i) the Solicitor General of Canada, if the person would serve the sentence in the penitentiary, or

ii) the appropriate provincial minister responsible for correction, in any other case.[200]

A judge is empowered, in terms of Section 79 of the Canadian Act to make, for the purposes of acquiring evidence for a request of extradition, on *ex parte* application of a competent authority, any order that is necessary to -

a) secure the attendance of a witness at any place designated by the judge;

b) secure production as evidence of data that is recorded in any form;

c) receive and record the evidence; and

d) certify or authenticate the evidence in a manner and form that is required by the requesting State or entity.

Although there is no corresponding provision to the preceding provisions of Section 79 of the Canadian Act, these provisions provide an important judicial procedure for compelling attendance and provision of evidence before court to facilitate the requested return of a person.

Like the Act, the Canadian Act provides that except where a relevant extradition agreement otherwise provides, no person who has been

[200] Ibid, Section 77.

extradited to Canada may be detained or prosecuted, or have a sentence imposed or executed, or a disposition made or executed under the *Young Offenders Act*, in Canada in respect of an offence that is alleged to have been committed, or was committed, before surrender other than the one for which he or she was surrendered.[201] The provisions of this section are clearly consistent with those of the Act[202] and are enacted to ensure that the surrendered person will not be subjected to unfair prosecution or punishment in the foreign country,

However if the requested state or entity or the person consents to the detention or prosecution in respect of another offence, the person concerned may be detained or prosecuted under those circumstances.[203]

As is the case in Namibia, it is also provided in terms of the Canadian Act that no such person may be detained in Canada for the purpose of being surrendered to another state or entity for prosecution or for imposition or execution of a sentence in respect of an offence that is alleged to have been committed or was committed, before surrender to Canada, unless the requested State or entity consents to such detention or prosecution.[204] Obviously these provisions exist to ensure a measure of local criminal

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[201] Ibid, Section 80(a).
[202] See pages 19 – 21, supra.
[203] Supra.
[204] Ibid, section 80(b).

jurisdiction over their nationals that have been returned to foreign countries for the purpose of criminal proceedings.

Extradition from Canada

Any person may be extradited from Canada in accordance with the Canadian Act and a relevant extradition agreement on the request of an extradition partner for the purpose of prosecution or imposition of a sentence on or enforcement of a sentence imposed on the person concerned if the offence in respect of which the extradition is requested is punishable by the extradition partner with imprisonment for a maximum period of two years or for a more severe punishment and the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada.[205]

In case of a request based on a specific agreement however, the conduct of the person concerned should be punishable by imprisonment for more than five years or by a more severe punishment.[206]

Any person may be extradited, in terms of the Canadian Act, whether or not the conduct on which the extradition partner bases its request occurred in the territory over which it has jurisdiction and whether or not Canada could

[205] Op cit, section 3.
[206] Ibid, Sub-section 3(1)(b)(i).

exercise jurisdiction in similar circumstances.[207] According to the provisions of this section, it is clear that Canada holds a more liberal approach regarding dual criminality requirement and the surrender of its nationals to foreign jurisdictions whereas Namibia holds a more strict approach in this regard.

However Section 46(1) of the Canadian Act sets out restrictions on return of the requested person to a foreign country which are enacted to protect Canadian nationals from undue prosecution before courts in foreign jurisdictions.

Discretion of the Minister of Justice

Section 12(a) of The Canadian Act empowers the Minister of Justice to consider the provisions of relevant extradition agreements in determining whether a provisional arrest of the requested person may be authorised. The application of facts about an offence alleged to have been committed in a foreign country to the extradition agreement is a very complex legal function to be vested in the Minister and the exercise thereof, if carried out in Namibia, may be rendered unconstitutional for want of proper judicial process[208] at the instance of the extraditee. The functions that could be more competently carried out by the Minister, save for the issuance of a provisional warrant of arrest are, in the case of the United Kingdom, assigned to the

[207] Ibid, section 5.
[208] See pages 58 – 66, above.

judge by virtue of Section 13 of the United Kingdom Act. The functions imposed by Section 12(a) *supra*, which should be carried out by a judge are instead assigned to the Minister. In view of this observation, it is submitted that if the functions referred to under Section 12(a) *supra*, are reassigned to the judge while those set out under Section 13(1) of the United Kingdom Act are reassigned to the Minister, the potentiality of exercising such functions by the Minister of Justice under Section 12(a) being unconstitutional, if exercised in Namibia, would automatically fall away.

A request by an extradition partner for the provisional arrest or extradition of a person may be made to the Minister of Justice through Interpol.[209] Upon receipt of such a request, the Minister of Justice may authorise the Attorney General to apply for a provisional warrant of arrest, if the Minister concerned is satisfied that the offence in respect of which the provisional arrest was requested is indeed punishable in accordance with Section 13(1)(a) above. The Minister's authority in this regard is subject to the extradition partner will make a formal request for the extradition of the person concerned.[210]

On *ex parte* application of the Attorney General, a judge may issue a warrant for the provisional arrest of a person if satisfied that there are no reasonable grounds to believe that –

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[209] Section 11 of the Canadian Act.
[210] Ibid, Section 12.

a) it is necessary in the public interest to arrest the person, including to prevent the person from escaping or committing an offence;

b) the person is ordinarily in Canada, is in Canada or is on the way to Canada; and

c) a warrant for the person's arrest or an order of a similar nature has been issued or the person has been convicted.[211]

Where the Minister of Justice is satisfied that the offence for which the extradition is requested is punishable by the extradition partner for imprisonment for a maximum term of two years or more or that there is a term of at least six months imprisonment or longer remaining to be served by the requested person, the Minister concerned may, issue an authority to proceed authorising the Attorney General to seek, on behalf of the extradition partner, an order of a court for the committal of a requested person.[212]

The provisions of Sections 13 and 15 referred to above are consistent with those of the Act and both statutes highlight the role that the executive plays in play in the extradition process.

After the authority to proceed has been issued, the Attorney General may apply *ex parte* to a judge for the issuance of a summons to the person or a warrant for the arrest of the person.[213] A summons and warrant of arrest referred to above is issued by a judge in accordance with Section 507(4) of

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[211] Ibid, Section 13.
[212] Ibid, section 15.
[213] Ibid.

the *Criminal Code* of Canada (*hereafter the Criminal Code*), which provides as follows: -

> Where a justice considers that a case is made out for compelling an accused to attend before him to answer to a charge of an offence, he shall issue a summons to the accused unless the allegations of the informant or the evidence of any witness or witnesses taken in accordance with subsection (3) discloses reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused.

As is the case in Namibia, the judge before whom a person is brought following arrest under Section 13 or 16, *supra*, may order the release with or without conditions, or detention in custody of the person concerned.[214] The order for release referred to above is subject to review by the Court of Appeal, which may confirm, vary or substitute any other decision that, in its opinion, should have been made[215].

After the requested person has been declared extraditable and duly committed to await his or her surrender to the foreign country the Minister of Justice may order that the person concerned be surrendered to the extradition partner.[216]

The Canadian Act entitles the person who has been committed to await his or her surrender to make submissions to the Minister of Justice regarding

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[214] Ibid, Section 18(1).
[215] Op cit, Sub-section (2).
[216] Ibid, Section 40.

such committal before the order of surrender is issued.[217] However, the Act does not provide a similar option for the requested person, the only option for review being the appeal to the High Court of Namibia and not beyond.

The option for making a submission to the Minister concerned a available in terms of the Canadian Act a simpler review process than to embark on the appeal process which would be more costly and time consuming.

Extradition Hearing

On receipt of authority to proceed, a judge may hold an extradition hearing and in holding such hearing, he or she may, subject to the Canadian Act, have powers of a justice under Part XVIII of the *Criminal Code*. [218]

In terms of Section 2 of the *Criminal Code 'a justice'* is defined as follows: -

justice of the peace or provincial court judge and includes two or more justices where two or more justices are, by law, required to act or, by law, act or have jurisdiction.

Any judge presiding over an extradition hearing is vested with powers to compel a witness to attend the hearing and to commit the requested person to custody to await his or her surrender or to discharge such person as the

[217] Ibid, Section 43.
[218] Ibid, Section 24.

case may be. In exercising this power, he or she applies the provisions of Sections 698 to 708 of the *Criminal Code*.[219]

A person who was tried and convicted in his or her absence may, subject to provisions of a relevant extradition agreement, be committed to custody to await his or her surrender.[220]

A person who has been committed to custody to await his or her surrender is entitled to be released on bail from such custody, in terms of Section 30 of the Canadian Act. However in the case of Namibia, the magistrate is prohibited by the Act to release the extraditee on bail as soon as such person has been committed to await his or her return.

Admissible evidence under Canadian law may be admitted as evidence at any extradition hearing. The following inadmissible evidence under Canadian law may as well be admitted as evidence:

a) "the contents of the documents contained in the record of the case certified under subsection (3) of section 33;

b) the contents of the documents that are submitted in conformity with the terms of an extradition agreement; and

c) evidence adduced by the person sought for extradition that is relevant to the tests set out in subsection (1) of section 29 if the judge considers it reliable". [221]

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[219] Ibid, Section 28.
[220] Ibid, section 29(5).
[221] Ibid, Section 32.

However if evidence was gathered in Canada it is required that the rules of evidence under Canadian law be satisfied before such evidence may be admitted at any extradition hearing.[222]

There is no need for authenticating documentary evidence to be admitted at any extradition hearing in terms of the Canadian Act except where a relevant extradition agreement so requires.[223] However the Act expressly requires documentary evidence to be duly authenticated before being admitted in evidence.[224]

Furthermore the Canadian Act does not require any documentary evidence to be made under oath or affirmation for it to be admitted in evidence.[225] Although this provision simplifies accepted rules of evidence, it also marks the departure from what is accepted as the norm by Namibian and South African courts regarding admissibility of written depositions.

Appeals and Judicial Review of Minister's Order

The Canadian Act allows a person to appeal against an order of committal and the Attorney General against the discharge of the person or the order

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[222] Op cit.
[223] Ibid, Section 33(4).
[224] See pages 29 - 31, above.
[225] Section 34 of the Canadian Act.

staying the proceedings to the Court of Appeal.[226] In terms of the Act however, the appeal may lie only to the High Court of Namibia and not to the Supreme Court.[227]

It is further provided for that any decision made by the Minister of Justice in exercising of powers vested in him or her by the provisions of Section 40 [228] of the Canadian Act is subject to appeal to the Court of Appeal.[229] Unlike the Act, this provision extends the extraditee's right to judicial review of the Minister's orders made during initial stages of the extradition process.

The Court of Appeal has exclusive original jurisdiction to hear and determine applications for judicial review of decisions made by the Minister in terms of Section 40 of the Canadian Act.[230]

In determining the application for judicial review in terms of Section 57 *supra*, the Court of Appeal exercises the following powers: -

a) order the Minister to do any act or thing that the Minister has unlawfully failed or refused to or has unreasonably delayed in doing; or

b) declare invalid or unlawful, quash, set aside, set aside and refer back for determination in accordance with any directions that it considers appropriate, prohibit or restrain the decision of the Minister regarding a committal order.

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[226] See ibid, Section 49.
[227] See pages 83 – 85, supra.
[228] The provisions of this section empowers the Minister to order the surrender of the requested person to a foreign country or refuse to surrender if certain conditions to which he or she has deemed it necessary to subject such surrender have not been duly complied with.
[229] Section 57 of the Canadian Act.
[230] Ibid, Section 57.

CHAPTER 7

Conclusions

During the course of this study, questions relating to certain provisions of the Act and their relationship with those of the Constitution were investigated and subsequently certain issues have emerged especially given the comparative context of this study.

The extradition enquiry is in itself an unusual procedure in that it does not concern itself with criminal or civil law of a specific country – it concerns universal policy reasons for bringing wanted persons to justice wherever they find themselves. The extradition enquiry does not subject the requested person to criminal law and procedure of the requesting country or that of the requested country but the enquiry involves the assessment of criminal law and procedure of both countries before the requested person is extradited. The ultimate yardstick is the Constitution where rights of all people in Namibia – nationals and non-nationals are guaranteed to ensure that persons resident in Namibia are not subjected to any lesser rights when tried in a foreign country.

Regarding the classification of the extradition proceedings as a prerequisite for determining rights that a requested person enjoys during such proceedings, it has become evident that there is no universally accepted

classification of extradition proceedings upon which such rights may be determined.[231] Apart from the fact that the Act provides that the extradition enquiry be held in the manner in which preliminary enquiries are held, the same does not indicate whether the extradition enquiry is criminal, civil or administrative. It is submitted that the extradition process consists of elements of criminal procedure, civil law and procedure and administrative law – super imposed on principles of the bill of rights that are entrenched in the Constitution.

Opposing opinions exist from different foreign jurisdictions regarding whether the extradition enquiry is criminal, civil or administrative in nature. In determining rights of the requested person during extradition proceedings, the magistrate should therefore at least strictly apply the provisions of the Constitution, which is the supreme law of Namibia and common law rules of natural justice. The Magistrate should also strictly apply the provisions of the Act, as this is, after all, the ultimate source of his or her powers.

What should be accepted is that the procedural rights of a person in an extradition enquiry are not to be confused with the procedural rights of a person during the criminal trial. An extradition enquiry is something less than a criminal trial but must still be subject to Articles 12(1)(a) and 18 of the Constitution. Furthermore, where a statute is silent about the rights of a

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[231] See pages 60-65 *supra*.

person before an administrative decision affecting those rights is made, *audi alteram partem* principle is implied.[232] Therefore where the Minister considers the request for extradition in terms of sections *eight* and *nine* of the Act, he or she must, in terms of common law and Articles 12 and 18 of the Constitution, properly apply his or her mind without necessarily hearing the extraditee, i.e.: he or she must consider whether the request was properly made, the documents were properly certified and authenticated, and statutory limitations on extradition fully observed.

The provisions of Sub-section *five (1)* of the Act regarding restrictions on return are similar to those of Sub-section *six (1)* of the United Kingdom Act as well as the provisions of Sub-section *forty-three (1)* of the Canadian Act. It should therefore be accepted, in this regard that the restrictions set out in these provisions are envisaged to extend legal rights that the extraditee enjoys in terms of domestic legislation and common law to foreign jurisdictions where he or she may be tried for a criminal offence. It is further submitted that the restrictions referred to above are imposed to protect nationals from undue prosecution by foreign states for political, religious, racial or other unjustifiable reasons.

Unlike the Canadian Act, the Act does not provide for the option of issuing summons where the authority to proceed has been issued by the Minister. In

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[232] See discussions in Harksen v President of the Republic of South Africa and others 2000 (2) SA 825 (CC) and at pages 35 – 36, *supra*.

this regard, the Canadian Act provides a more desirable option to the arrest of a requested person. For instance, issuance of summons would be more appropriate in the circumstances where the alleged offence for which the extradition has been requested is not of a serious nature.

It has been shown that when the Minister decides whether or not to issue authority to proceed, he or she relies on diplomatic correspondence between the requesting state and himself. The extraditee' side of the case is not considered at this stage. The process through which he decides to issue authority to proceed does not only amount to a potential violation of the provisions of Article 12 of the Constitution, but it may also be a violation of the requirements of common law rules of natural justice as appropriately amplified earlier by O'Linn, AJ, in the case of *Aonin*.[233] In light of the foregoing, it should be accepted that the Minister's issuance of the authority to proceed in terms of Sub-section *ten* (1) of the Act will be unconstitutional and a violation of the principle of *audi alteram partem* if he or she does not properly apply his or her mind to the subject matter before him or her. In order to harmonise the provisions of Sub-section *ten* (1) *supra*, with those of the Constitution, the Act needs to be amended in order to restrict the Minister's power to arbitrarily issue the authority to proceed. Furthermore, the South African Act might offer an alternative in this regard by adopting the

[233] See pages 33 – 36 *supra*.

provisions of Sections *five* and *ten* thereof, which do not require the Minister to issue the authority to proceed.

It has also been established that the provisions of Section *twenty-one* of the Act automatically revokes the constitutional right of the requested person to apply for bail which, right he or she is entitled to in terms of the Constitution. Therefore it should be submitted that such revocation might be held to be unconstitutional. However, considering the opinion expressed in practice that the limitation of the extraditee's right to apply for bail after committal to prison is reasonable in the circumstances, it is further submitted that the provisions of Section *twenty-one* of the Act be amended in order to extend the right to apply for bail to the extraditee.

The test applicable in determining whether the requested person is liable to be extradited is the proof of *prima facie* case against such person. Such standard of proof makes inroads into the presumption of innocence of the person concerned and subsequently renders him or her liable to be committed to prison to await the Minister's decision on the surrender to the requesting state. This could constitute a violation of the constitutional provision regarding the presumption of innocence[234] and the protection of personal liberty in terms of Article 7 of the Constitution. Unlike the position in

[234] See pages 71 – 75 supra.

South Africa and the United Kingdom, where duly authenticated documents are admitted as conclusive proof of their contents, the position in Namibia is that such documents amount to *prima facie* case only and their contents remain subject to rebuttal by equivalent evidence of the requested person, which may reduce the probative value of such *prima facie* evidence.

An observation has been made in respect of Section *twelve (a)* of the Canadian Act in terms of which, the Minister of Justice is obliged to interpret and apply complex legal provisions of an extradition agreement between Canada and an extradition partner in determining whether a provisional warrant of arrest may be issued or not. The interpretation of legal provisions of any bilateral or multilateral agreement could be a complex legal function of which, the Minister of Justice may not be competent in performing. In respect of Namibia and South Africa the interpretation and application of extradition agreements is conveniently left to the courts, which are more competent in considering such international legal instruments.

It has also become evident that in the absence of a limitation clause allowing the magistrate to commit the requested person to prison based solely on the establishment of *prima facie* case against him or her could potentially be contrary to the provisions of Article 12(1)(d) of the Constitution. Therefore, the power to commit a requested person to prison in terms of Section *twelve* (5) of the Act should specifically be sanctioned by a provision in the Act

permitting the magistrate to commit such person to prison on a mere finding of *prima facie* case.

In considering the extradition request, the courts mostly rely on evidence contained in affidavits received from foreign countries. Such affidavits are untested evidence, as they are not subject to cross-examination by the extraditee during the enquiry. The requested person, on the other hand, testifies *viva voce* and is subsequently subjected to cross-examination by the prosecution. The requested person has no corresponding option for cross-examining the evidence that has been produced against him or her. Clearly the methodology, which the extradition magistrate follows in assessing evidence before him or her must take into account the provisions of Article 12 (1) (d) of the Constitution, when assessing the probative value of evidence on affidavit, and the weight to be attached to the evidence. Prima facie evidence only remains so if it is not gainsaid by equivalent evidence or evidence with a higher probative value.

It has been pointed out earlier in this study that in terms of section *five* of the Canadian Act, any person may be extradited to a foreign country whether or not the conduct on which the extradition partner bases its request occurred in the territory over which she has jurisdiction and whether or not Canada could exercise jurisdiction in similar circumstances. According to the provisions of the Canadian Act referred to above, it is clear that Canada holds a more liberal approach regarding dual criminality requirements and the surrender of

her nationals to foreign jurisdictions whereas Namibia and South Africa hold a more strict approach in this regard.

In respect of Namibia, South Africa and the United Kingdom, the only available review procedure available, in the event of being aggrieved by the administrative decision of the Minister, is the appeal to the higher court for possible relief. However the Canadian Act provides a further option for the person whose surrender has been ordered to, personally, make a submission to the Minister notifying him or her of the extraditee's intention to apply for judicial review of the order of surrender before the court of appeal. This is clearly, a more desirable and simpler review procedure than to embark on the formal appeal process which could usually be more costly and time consuming.

As to whether constitutional provisions relating to fair trial, as well as the principles of *audi alteram partem*, will be complied with during both stages of the extradition process will, for the time being, depend, first of all, on the discretion of the Minister concerned to ensure that his or her mind is duly applied when taking decisions regarding whether to issue authority to proceed and whether to surrender the person whose extradition has been requested to another country. Compliance with the constitutional provisions and principles referred to above, will further depend on the discretion of the magistrate to apply his her mind on these principles in considering whether to declare the requested person extraditable or not. It is proposed that the

possible solution will be the amendment of relevant provisions of the Act to provide clear guidelines for both the Minister and the magistrate as well as to render such provisions consistent with the Constitution.

The rules of natural justice form the basis of procedural rights which individuals are entitled to in most legal systems. Due to the extraordinary nature of extradition proceedings, in essentially determining whether to subject a person to trial or not, procedural rights associated with the normal criminal trial procedure are curtailed to a greater or lesser extent depending on the legal system dealt with. What is important to bear in mind, as far as Namibia is concerned, is the unique flexibility and strong implied right giving nature of particularly Article 12 of the Constitution. In the development of the law of fair trial, courts are not limited to the instances mentioned in Article 12.[235] The courts have expressly avoided laying down precise guidelines as to precisely which procedural rights constitute fair trial rights. The significance of classifying extradition proceedings as either criminal or civil does not lie so much in the impact this would have on Article 12 rights, but rather the impact that a classification would have on Article10 rights (the right to equality before the law). Article 10 does not mean absolute between persons, but rather

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[235] See Government of the Republic of Namibia and 2 Others v Mwilima and 127 Others, Unreported Judgement of the Supreme Court of Namibia in Case No SA 29 of 2002

equality between persons equally placed.[236] In other words, if extradition proceedings are classified as criminal proceedings, Article 10 would require a person subject to an extradition enquiry being granted the same procedural rights as an accused in a criminal case. As discussed above, this would be untenable. For this reason and in order to comply with also with the general universal purpose and basic principles of extradition law, it would be advisable in the circumstances to rather consider extradition proceedings what they are ought to be a *sui generis* procedure. This *sui generis* procedure must however be given meaning and content to by the legislature and the courts in accordance with the basic rules of natural justice and the all perceived spirit of Article 12 and 18 of the Constitution of Namibia.

[236] See Muller v President of Namibia and Another 1999 NR 190 (SC)

Annex

The United Nations General Assembly Resolution 45/116.

The General Assembly,

Bearing in mind the Milan Plan of Action, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and approved by the General Assembly in its resolution 40/32 of 29 November 1985,

Bearing in mind also the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order, principle 37 of which stipulates that the United Nations should prepare model instruments suitable for use as international and regional conventions and as guides for national implementing legislation,

Recalling resolution 1 of the Seventh Congress, on organized crime, in which Member States were urged, inter alia, to increase their activity at the international level in order to combat organized crime, including, as appropriate, entering into bilateral treaties on extradition and mutual legal assistance,

Recalling also resolution 23 of the Seventh Congress, on criminal acts of a terrorist character, in which all States were called upon to take steps to strengthen co-operation, inter alia, in the area of extradition,

Calling attention to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,

Acknowledging the valuable contributions of Governments, non-governmental organizations and individual experts, in particular the Government of Australia and the International Association of Penal Law,

Gravely concerned by the escalation of crime, both national and transnational,

Convinced that establishment of bilateral and multilateral arrangements for extradition will greatly contribute to the development of more effective international co-operation for the control of crime,

Conscious of the need to respect human dignity and recalling the rights conferred upon every person involved in criminal proceedings, as embodied in the Universal Declaration of Human Rights and the International covenant on Civil and Political Rights,

Conscious that in many cases existing bilateral extradition arrangements are outdated and should be replaced by modern arrangements which take into account recent developments in international criminal law,

Recognizing the importance of a model treaty on extradition as an effective way of dealing with the complex aspects and serious consequences of crime, especially in its new forms and dimensions,

1. Adopts the Model Treaty on Extradition contained in the annex to the present resolution as a useful framework that could be of assistance to States interested in negotiating and concluding bilateral agreements aimed at improving co-operation in matters of crime prevention and criminal justice;

2. Invites Member States, if they have not yet established treaty relations with other States I the area of Extradition or if they wish to revise existing treaty relations, to take into account, whenever doing so, the Model Treaty on Extradition;

3. Urges all States to strengthen further international co-operation in criminal justice;

4. Request the Secretary-General to bring the present resolution, with the Model Treaty, to the Attention of Member States;

5. Urges Member States to inform the Secretary-General periodically of efforts undertaken to establish extradition arrangements;

6. Requests the Committee on Crime Prevention and Control to review periodically the progress attained in this field;

7. Also requests the Committee on Crime Prevention and Control, where requested, to provide guidance and assistance to Member States in the development of legislation that would enable giving effect to the obligations in such treaties as are to be negotiated on the basis of the Model Treaty on Extradition;

8. Invites Member States, on request, to make available to the Secretary-General the provision of their extradition legislation so that these may be made available to those Member States desiring to enact or further develop legislation in this field.

Model Treaty on Extradition

The.....and
the.....

Desirous of making more effective the co-operation of the two countries in the control of crime by concluding a treaty on extradition,

Have agreed as follows:

ARTICLE 1

Obligation to extradite

Each party agrees to extradite to the other, upon request and subject to the provisions of the present Treaty, any person who is wanted in the requesting State for prosecution for an extraditable offence or for the imposition or enforcement of a sentence in respect of such an offence.

ARTICLE 2

Extraditable offences

1. For the purposes of the present Treaty, extraditable offences are offences that are punishable under the laws of both Parties by imprisonment or other deprivation of liberty for a maximum period of at least one/two year(s), or by a more severe penalty. Where the request for extradition relates to a person who is wanted for the enforcement of a sentence of imprisonment or other deprivation of liberty imposed for such an office, extradition shall be granted only if a period of at least four/six months of such sentence remains to be served.

2. In determining whether an offence is an office punishable under the laws of both Parties, it shall not matter whether:

(a) The laws of the Parties place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;

(b) Under the laws of the Parties the constituent elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting State shall be taken into account.

3. Where extradition of a person is sought for an offence against a law relating to taxation, customs duties, exchange control or other revenue matters, extradition may not be refused on the ground that the law of the

requested State does not impose the same kind of tax or duty or does not contain a tax, customs duty or exchange regulation of the same kind as the law of the requesting State.

4. If the request for extradition includes several separate offences each of which is punishable under the laws of both Parties, but some of which do not fulfil the other conditions set out in paragraph 1 of the present article, the requested Party may grant extradition for the latter offences provided that the person is to be extradited for at least one extraditable offence.

ARTICLE 3

Mandatory grounds for refusal

Extradition shall not be granted in any of the following circumstance:

(a) If the offence for which extradition is requested is regarded by the requested State as an offence of a political nature.

(b) If the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person's position may be prejudiced for any of those reasons;

(c) If the offence for which extradition is requested is an offence under military law, which is not also an offence under ordinary criminal law;

(d) If there has been a final judgement rendered against the person in the requested State in respect of the offence for which the person's extradition is requested;

(e) If the person whose extradition is requested has, under the law of either Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty;

(f) If the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14;

(g) If the judgement of the requesting State has been rendered in absentia, the convicted person has not had sufficient notice of the trial or the opportunity to have the case retried in his or her presence.

ARTICLE 4

Optional grounds for refusal

Extradition may be refused in any of the following circumstances:

(a) If the person whose extradition is requested is a national of the requested State. Where extradition is refused on this ground, the requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person in respect of the offence for which extradition had been requested;

(b) If the competent authorities of the requested State have decided either not to institute or to terminate proceedings against the person for the offence in respect of which extradition is requested;

(c) If a prosecution in respect of the offence for which extradition is requested is pending in the requested State against the person whose extradition is requested;

(d) If the offence for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out;

(e) If the offence for which extradition is requested has been committed outside the territory of either Party and the law of the requested State does not provide for jurisdiction over such an offence committed outside its territory in comparable circumstances;

(f) If the offence for which extradition is requested is regarded under the law of the requested State as having been committed in whole or in part within that State. Where extradition is refused on this ground, the requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested;

(g) If the Person whose extradition is requested has been sentenced or would be liable to be tried or sentenced in the requesting State by an extraordinary or ad hoc court or tribunal;

(h) If the requested State, while also taking into account the nature of the offence and the interests of the requesting State, considers that, in the circumstance of the case, the extradition of that person would be incompatible with humanitarian considerations in view of age, health or other personal circumstance of that person.

ARTICLE 5

Channels of communication and required documents

1. A request for extradition shall be made in writing. The request, supporting documents and subsequent communications shall be transmitted through the diplomatic channel, directly between the ministries of justice or any other authorities designated by the parties.

2. A request for extradition shall be accompanied by the following:

(a) In all cases,

(i) As accurate a description as possible of the person sought, together with any other information that may help to establish that person's identity, nationality and location;

(ii) The text of the relevant provision of the law creating the offence or, where, a statement of the law relevant to the offence and a statement of the penalty that can be imposed for the offence;

(b) If the person is accused of an offence, by a warrant issued by a court or other competent judicial authority for the arrest of the person or a certified copy of that warrant, a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the alleged offence, including an indication of the time
and place of its commission;

(c) If the person has been convicted of an offence, by a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the offence and by the original or certified copy of the judgement or any other document setting out the conviction and the sentence imposed, the fact that the sentence is enforceable, and the extent to which the sentence remains to be served;

(d) If the person has been convicted of an offence in his or her absence, in addition to the documents set out in paragraph 2 (c of the present article, by a statement as to the legal means available to the person to prepare his or her defence or to have the case retried in his or her presence;

(e) If the person has been convicted of an offence but no sentence has been imposed, by a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the offence and by a document setting out the conviction and a statement affirming that there is an intention to impose a sentence.

3. The documents submitted in support of a request for extradition shall be accompanied by a translation into the language of the requested State or in another language acceptable to that State.

ARTICLE 6

Simplified extradition procedure

The requested State, if not precluded by its law, may grant extradition after receipt of a request for provisional arrest, provided that the person sought explicitly consents before a competent authority.

ARTICLE 7

Certification and authentication

Except as provided by the present Treaty, a request for extradition and the documents in support thereof, as well as documents or other material supplied in response to such a request, shall not require certification or authentication.

ARTICLE 8

Additional information

If the requested State considers that the information provided in support of a request for extradition is not sufficient, it may request that additional information be furnished within such reasonable time as it specifies.

ARTICLE 9

Provisional arrest

1. .In case of urgency the requesting State may apply for the provisional arrest of the person sought pending the presentation of the request for extradition. The application shall be transmitted by means of the facilities of the International Criminal police Organization, by post or telegraph or by any other means affording a record in writing.

2. The application shall contain a description of the person sought, a statement that extradition is to be requested a statement of the existence of one of the documents mentioned in paragraph 2 of article 5 of the present Treaty, authorizing the apprehension of the person, a statement of the punishment that can be or has been imposed for the offence, including the time left to be served and a concise statement of the facts of the case, and a statement of the location, where known, of the person.

3. The requested State shall decide on the application in accordance with its law and communicate its decision to the requesting State without delay.

4. The person Arrested upon such a application shall be set at liberty upon the expiration of 40 days from the date of arrest if a request for extradition, supported by the relevant documents specified in paragraph 2 of article 5 of the present Treaty, has not been received. The present paragraph does not preclude the possibility of conditional release of the person prior to the expiration of the 40 days.

5. The release of the person pursuant to paragraph 4 of the present article shall not prevent re-arrest and institution of proceedings with a view to extraditing the person sought if the request and supporting documents are subsequently received.

ARTICLE 10

Decision on the request

1. The requested State shall deal with the request for extradition pursuant to procedures provided by its own law, and shall promptly communicate its decision its decision to the requesting State.

2. Reasons shall be given for any complete or partial refusal of the request.

ARTICLE 11

Surrender of the person

1. Upon being informed that extradition has been granted, the Parties shall, without undue delay, arrange for the surrender of the person sought and the requested State shall inform the requesting State of the length of time for which the person sought was detained with a view to surrender.

2. The person shall be removed from the territory of the requested State within such reasonable period as the requested State specifies and, if the person is not removed within that period, the requested State may release the person and may refuse to extradite the person for the same offence.

3. If circumstances beyond its control prevent a Party from surrendering or removing the person to be extradited, it shall notify the other Party. The two Parties shall mutually decide upon a new date of surrender, and the provisions of paragraph 2 of the present article shall apply.

ARTICLE 12

Postponed or conditional surrender

1. The requested State may, after making its decision of the request for extradition, postpone the surrender of a person sought, in order to proceed against that person, or, if that person has already been convicted in order to enforce a sentence imposed for an offence other than that for which extradition is sought. In such a case the requested State shall advise the requesting State accordingly.

2. The requested State may, instead of postponing surrender, temporarily surrender the person sought to the requesting State in accordance with conditions to be determined between the Parties.

ARTICLE 13

Surrender of property

1. To the extent permitted under the law of the requested State and subject to the rights of third parties, which shall be duly respected, all property found in the requested State that has been acquired as a result of the offence or that may be required as evidence shall, if the requesting State so requests, be surrendered is extradition is granted.

2. The said property may, if the requesting State so requests, be surrendered to the requesting State even if the extradition agreed to cannot be carried out.

3. When the said property is liable to seizure or confiscation in the requested State, it may retain it or temporarily had it over.

4. Where the law of the requested State or the protection of the rights of third parties so require, any property so surrendered shall be returned to the requested State free of charge after the completion of the proceedings, if that State so requests.

ARTICLE 14

Rule of speciality

1. A person extradited under the present Treaty shall not be proceeded against, sentenced, detained, re-extradited to a third State, or subjected to any other restriction of personal liberty in the territory of the requesting State for any offence committed before surrender other than:

(a) An offence for which extradition was granted;
(b) Any other offence in respect of which the requested State consents. Consent shall be given if the offence for which it is requested is itself subject to extradition in accordance with the present Treaty.

2. A request for the consent of the requested State under the present article shall be accompanied by the documents mentioned in paragraph 2 of article 5 of the present Treaty and a legal record of any statement made by the extradited person with respect to the offence.

3. Paragraph 1 of the present article shall not apply if the person has had an opportunity to leave the requesting State and has not done so within 30/45 days of final discharge in respect of the offence for which that person was extradited or if the person has voluntarily returned to the territory of the requesting State after leaving it.

ARTICLE 14

Transit

1. Where a person is to be extradited to a Party from a third State through the territory of the other Party, the Party to which the person is to be extradited shall request the other Party to permit the transit of the person through its territory. This does not apply where air transport is used and no landing in the territory of the other Party is scheduled.

2. Upon receipt of such a request, which shall contain relevant information, the requested State shall deal with this request pursuant to procedures provided by its own law. The requested State shall grant the request expeditiously unless its essential interests would be prejudiced thereby.

3. The State of transit shall ensure that legal provisions exist that would enable detaining the person in custody during transit.

4. In the event of an unscheduled landing, the Party to be requested to permit transit may, at the request of the escorting officer, hold the person in custody for 48 hours, pending receipt of the transit request to be made in accordance with paragraph 1 of the present article.

ARTICLE 16

Concurrent requests

If a Party receives requests for extradition for the same person from both the other Party and a third State it shall, at its discretion, determine to which of those States the person is to be extradited.

ARTICLE 17

Costs

1. The requested State shall meet the cost of any proceedings in its jurisdiction arising out of a request for extradition.

2. The requested State shall also bear the costs incurred in its territory in connection with the seizure and handing over of property, or the arrest and detention of the person whose extradition is sought.

3. The requesting State shall bear the costs incurred in conveying the person from the territory of the requested State, including transit costs.

ARTICLE 18

Final provisions

1. The present Treaty is subject to ratification, acceptance or approval. The instruments ratification, acceptance or approval shall be exchanged as soon as possible.

2. The present Treaty shall enter into force on the thirtieth day after the day on which the instruments of ratification, acceptance or approval are exchanged.

3. The present Treaty shall apply to requests made after its entry into force, even if the relevant acts or omissions occurred prior to that date.

4. Either Contracting Party may denounce the present Treaty by giving notice in writing to the other Party. Such denunciation shall take effect six months following the date on which such notice is received by the other Party.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed the present Treaty.

DONE at.....on.....in.....
the.....and.....languages, both/all texts being equally authentic.

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