CASE NO.: SA 6/2004

IN THE SUPREME COURT OF NAMIBIA

In the matter between

THE STATE	APPELLANT
versus	
MOSES LIMBO MUSHWENA	1ST RESPONDENT (ACC 12)
FRED MAEMELO ZIEZO	2ND RESPONDENT (ACC 25)
ANDREAS MULUPA	3RD RESPONDENT (ACC 26)
RICHARD LIBANO MISUHA	4TH RESPONDENT (ACC 48)
OSCAR MUYUKA KUSHALUKA PUTEHO	5TH RESPONDENT (ACC 49)
RICHARD JOHN SAMATI	6TH RESPONDENT (ACC 53)
JOHN SIKUNDEKO SAMBOMA	7TH RESPONDENT (ACC 54)
OSBERT MWENYI LIKANYI	8TH RESPONDENT (ACC 57)
THADEUS SIYOKA NDALA	9TH RESPONDENT (ACC 70)
MARTIN SIYANO TUBAUNDULE	10TH RESPONDENT (ACC 71)
OSCAR NYAMBE PUTEHO	11TH RESPONDENT (ACC 72)
CHARLES MAFENYAHO MUSHAKWA	12TH RESPONDENT (ACC 73)
CHARLES KALIPA SAMBOMA	13TH RESPONDENT (ACC 119)

CORAM: Strydom, ACJ, O'Linn, AJA, Mtambanengwe, AJA, Gibson, AJA et Chomba, AJA.

HEARD ON: 10-12/05/2004

DELIVERED ON:

APPEAL JUDGMENT

MTAMBANENGWE A.J.A.: The state appeals against Hoff J's judgment in favour of the thirteen respondents that the court did not have jurisdiction to try them.

The application leading to the court *a quo's* ruling began as an application on notice of motion supported by various affidavits deposed by the respondents. The notice of motion sought an order declaring *inter alia* that the respondents apprehension and abduction from Zambia and Botswana respectively, and their subsequent transportation to Namibia and their arrest and detention pursuant thereto was in breach of international law, unlawful and that they had not been properly and lawfully arraigned before the court for trial on the charge preferred against them. The court *a quo* directed that the notice of motion and the supporting affidavits be regarded as respondents pleas in terms of section 106 (1) of the Criminal Procedure Act 57 of 1977, namely that the court *a quo* had not jurisdiction to try the 13 respondents.

The respondents, and 117 other persons were facing 278 charges of which the most serious are high treason, murder, attempted murder seduction, robbery with aggravating circumstances, public violence unauthorized possession of firearms and ammunition, theft and malicious damage to property. All the charges arise from an incident at Katima Mulilo on 2 August 1999 when Government institutions, including the Mpacha military base, the Kautonyana Special Field Force base, the Wanela border post, the building housing the Namibian Broadcasting Corporation, the Katima Mulilo Police Station, the Central Business area of the town of Katima Mulilo and the house of a police officer were attacked by groups of armed men resulting in the death of several people and damage to properties. The respondents and their co-accused were part of an exodus of people from the Caprivi Region into neighbouring countries that took place as a result of and prior to the incident. The state of emergency at the time declared in the Caprivi Region was revoked on 26 August 1999 after order was restored by the Namibian Security Forces. Besides the respondents a number of other people were arrested in the country.

It is common cause that all the respondents left Namibia illegally and were all granted asylum in Botswana where they were accommodated at various refugee camps. It is also common cause that at various dates during 1999 all

except Osbert Likanyi left the refugee camps illegally, and all had subsequently been apprehended at various locations and at different times by Zambian authorities. At different times subsequent to their apprehension and detention in Zambia, they were handed over to the Namibian authorities. Respondent Likanyi was handed to the Namibian authorities by the Botswana authorities as an illegal immigrant.

All the respondent's claimed in their affidavits that they were abducted by the Namibian authorities and unlawfully surrendered to Namibia. In the proceedings before Hoff J to determine the jurisdictional issue, the State, conceding it had the onus to prove that the court had jurisdiction to try the respondents, led evidence from various witnesses who on various occasions dealt with the respondents. These included police and or Immigration officials from Zambia and Botswana. Only two of the respondents testified, namely Oscar Muyuka Kashaluka Puteho and Fred Maemelo Zieso. The evidence dealt with the respondent as belonging to in all 5 groups according to the way and dates they were apprehended and handed over to Namibia.

The first group included Steven Mamili (since deceased) Moses Limbo Mushwena, Thaddeus Siyoka Ndala, Martin Siyano Tubaundule, Charles Mafenyaho Mushakwa and Oscar Nyambe Puteho. No one from this group was called to testify. At this stage it is worth noting that throughout the cross examination of state witnesses counsel for the respondents devoted all his effort at trying to show that all the respondent's were abducted from Zambia or Botswana and that the Namibian authorities connived in the abduction. This was of course in line with the allegations of respondent's as recorded in their affidavits. The most explicit of the affidavits on that score was that of Charles Mafenyaho Mushekwa and that of Charles Kalipa Samboma, each of which details how they say they were abducted. They read in part as follows:

1. "We were separated and placed in different camps in Botswana. Others and myself were taken to Dukwe Refugee Camp. Although we had been granted political asylum we still reported to the Police Station three times a day, that is at 6 am, 2pm and 6pm. I was not happy with the treatment I received in the camp including the continuous routine of reporting to the Police Station. We were not given enough food so we were starving.

Because of these difficulties I decided to leave the country to Zambia. I left with my friend Oscar Puteho for Zambia. We crossed the border into Zambia. When we were in Zambia we went to the Police Station and reported ourselves there. This was on the 18 of June 1999. We informed the police that we were claiming political asylum. We advised the police that we had previously been granted political asylum status in Botswana but had left because of hardship. We were later transferred to Mongu Prison. At Mongu prison we were interviewed by members of Zambian Intelligence Office. We told them the same story we had told the police the previous day. While we were being interviewed by the State Security Officers, the Namibian Police came and wanted to take us back to Namibia. The Commander of the Zambian Police refused. We had told him that United Nations Regulations do not allow the Namibian Police to take us to Namibia to leave the country. The Namibian High Commission requested to see us. Again the Zambian Police refused. We were taken to Lusaka Kamwala Remand Prison. Photographs were taken of us. On the 7th of August we were called by the prison officers to the prison reception where we were handed to an officer from the Office of the President of Zambia. We were initially asked to collect all our belonging as we were made to believe we were being taken to Europe. We then proceeded to the Zambian Airport. We boarded the plane. But before we boarded the plane we enquired whether the plane was suitable to take us all the way to Europe. The plane was a military plane and we were sure that it could not manage to fly all the way to Europe. The pilot assured us that we were right in thinking that the plane would not reach Europe on a single flight, but told us that we would be making a stop over in a number of countries to refuel and that our first stop was Uganda. When we were airborne we saw that we were going in the wrong direction. We landed at Sesheke Air Strip. We found the Zambian Police had surrounded the Air Strip. A few minutes later Namibia Police also arrived. At that time we were six of us. After disembarking from the plane we were surrounded by both Zambian and Namibian Police. One of my colleagues asked the Zambian Police why they had lied. The Zambian Police said that it was not their problem. The Namibian Police then forcibly took us into their custody. The Namibian Police then forcibly marched us to the Namibian side. During this period, I protested to both the Zambian and Namibian Police that their conduct was

unlawful and contrary to the United Nation Charter on Status of Refugees. My protests fell on deaf ears. After crossing the border into Namibia we arrived at Katima Mulilo where our hands were tied by pieces of ropes. They started beating us using their hands and booted feet. I remember specifically being assaulted by Inspector Therone and Chief Inspector Erasmus Shishanda. They were shouting saying they were going to kill us because our people killed their officers. We told them that we had nothing to do with the killing of the officers. We were taken to Mpacha Military Base. At Mpacha Military Base we were handed to the army officers. We spent four days without food except water and we had our hands tied behind our backs.

On the 10th of August 1999 we were taken to Grootfontein Military Base and late to Grootfontein Prison. I have been in Prison since and appeared in other Magistrate Court and High Court more than 23 times.

I had been granted Political Asylum Status, which I held at the time of abduction from Zambia territory.

I pray the Honourable court to grant me an order in terms of the draft order.

I submit that I was unlawfully brought from the Zambian territory to Namibia.

CHARLES MAFENYAHO MUSHAKWA"

and,

1. "I have read the Affidavit of Charles Mafenyaho Mushakwa and as far as it relates to me, I adopt its contents.

2. Due to the harassment by the Namibian police and security officers I left for Zambia in 1999.

3. I stayed with relatives in Zambia at Mutomena.

4. I subsequently reported myself to Katima police control in Zambia on 19th March 2001.

5. Whilst I was still in the care of Zambian police officers at the Katima police control, at about 13:00 hours that afternoon, I was surprised to see two Namibina police officers one of whom I knew by the name of Sergeant Evans Simasiku.

6. Later I saw the Namibian police leave the police post.

7. The Namibian police officers returned to the police post later the same evening. Immediately thereafter, Zambia police officers took me from my cell and handed me to the Namibian police.

8. I resisted because I was not aware of any documents authorizing my extradition from Zambia to Namibia.

9. The two Namibian police officers forcibly sat me in between them in the front of the bakkie.

10. The Zambian police officers jumped in the open back of the vehicle giving directions to their Namibian counterparts on how to escape immigration.

11. The immigration gate was locked and the security guard guarding it refused to open the gate saying he had instructions from the Chief Immigration officer not to open without his authority.

12. The Chief immigration officer finally came and questioned the Namibian police officers.

13. One of the Namibian police officers I later came to know as Popyenawa pointed a pistol at me in the vehicle saying I should not say anything.

14. Some discussion took place between the Namibian and the Zambian police officers and the Chief immigration officer. But no documentation was

shown to the Chief immigration officer at all. The Chief immigration officer then instructed the watchman to open the gate.

15. I was driven to Katima Mulilo Police station.

16. Upon my arrival at Katima Mulilo Police station I was questioned by Biven Tuwelo the Chief of State security and Commissioner Maasdorp.

17. Whilst still at Katima Police station I was severly beaten and forced to sign some statement.

18. I spent about 14 days there confined alone in a cell. Thereafter I was taken to Grootfontein police station. I eventually appeared in the Magistrate Court and was detained at Grootfontein.

19. It is submitted that my abduction from Zambia to the Republic of Namibia was unlawful as no extradition proceedings were ever instituted all that transpired was that I was simply and purely abducted from Zambia into Namibia.

20. In the circumstances, I pray the honourable court for an order in terms of the draft order.

CHARLES KALIPA SAMBOMA"

The court *a quo* rightly identified the issue it was called upon to determine:

> "Whether the accused persons had been abducted by members of the Namibian Police Force and or members of the Namibian Defence Force". "The State's reply to this issue", he continued, "is that the accused persons had been deported to Namibia by the authorities in Zambia and in Botswana and that this was done without any influence from the authorities in Namibia." The learned Judge *a quo* then went on to describe what deportation and extradition involved and how they relate or are distinguished one from the other, before finally coming to describe abduction of fugitives across international borders and referring to a number of decisions

on how such abduction impacts on the jurisdictional issue. I will hereunder discuss some of the decisions the judge *a quo* looked at. I must first note that at the end Hoff J referred to the position taken by respondent's counsel, namely:

> "It was submitted by Mr. Kauta that if one considers the circumstances under which the thirteen accused persons had been brought into Namibia from neighbouring countries the only inference to be drawn is that there was a collusion or connivance between the respective authorities to abduct the accused persons."

However, the court went on to conclude that:

> "Whatever suspicions there may be in this regard I am unable to find on the facts represented to this Court that there was indeed a connive or a collusion between the respective authorities to abduct the accused persons."
>
> In respect of those accused persons who alleged that they had been abducted in the absence of evidence to the contrary, the evidence presented by the state witness stand uncontradicted since they said they had never been arrested by the Namibian authorities on foreign soil.
>
> In respect of those accused persons who allege that they had been abducted the evidence presented by the State was that they had never been arrested by the Namibian authorities on foreign soil.
>
> This evidence stands uncontradicted.
>
> I cannot find that those accused persons had been abducted, in the sense used in the Ebrahim case, by members of the Namibian Police and / or members of the Namibian Defence Force. I come to this conclusion with due consideration of the evidence presented by the defence."

Because, despite this conclusion, the court *a quo* went on to find that there was disguised extradition and, therefore, that the court had no jurisdiction to try the respondents, and because before us Mr. Kauta submitted that the court *a quo* erred in finding that there was no collusion or connivance between Namibian and Zambian authorities or between Namibian and Botswana authorities to abduct the respondents, it becomes necessary to review the evidence and the law on which the conclusion by the court and the arguments by counsel are based.

In passing I would like to dispose of Mr. Gauntlet's submission on behalf of the state to the effect that unless there was a cross appeal by respondents they should not be allowed to rely on the issue of disguised extradition. This of course is based on his submission that: "the court held that a disguised extradition existed in this case even though this aspect was never raised in argument before it," and that the court *a quo* had not sought further submission from counsel in accordance with Kuesa v Minister of Home Affairs. I do not think that much turns on this submission. I say so simply because the court *a quo's* conclusion, right or wrong, is in my view based on the inference that the court drew from the evidence, and which Mr. Kauta still maintained should be drawn. Whether that inference is the only one that can be drawn from the evidence is another matter. In a sense it is a matter of what label you attach to the submissions by defence counsel in the court *a quo,* and the fact that Mr. Kauta appears to have exclusively canvassed abduction in his cross examination of state witnesses and in his submissions before the court *a quo* is neither here nor there as long as evidence was led either in Chief or in cross examination of witnesses, which would warrant the conclusion reached by the court *a quo* and the raising of the issue on appeal. The passage referred to in Kuesa v Minister of Home Affairs 1996(4) SA 965 (MmSC) appears at 974J and says in part:

> "It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions."

While the present case is a criminal matter there are dicta in civil judgments, where application is made on affidavits (evidence), to the effect that a litigant will not be precluded from relying on a ground of appeal raised first on appeal as long as the facts on which he relies are covered by the evidence or are not disputed. (See Kruger v Die Landboubank van Suid Afrika 1968(1) SA 67(9) (Headnote) Gimonis No V Gilbert Ho and Co Ltd. 1963 (1) SA 897 (N) (Headnote); Van Rensburg v Van Rensburg en Andere 1963(1) Sa 505 (A) (Headnote) and Argus Printing and Publishing Co. Ltd. v Die Pers Korporasie van Suid Afrika BPK 1975(4) SA 814 (Headnote).

In the present case the facts on which the court *a quo* came to the legal conclusion that there was disguised extradition are not really in dispute, they are listed in the judgment *a quo* as follows:

(a) there are in existence extradition agreements or treaties embodied in reciprocal statutory provisions, between Namibia and Zambia and between Namibia and Botswana respectively. (See Botswana Extradition Act 18 of 1990, the Zambian Extradition Act, Chapter 94 of the laws of Zambia and the Namibian Extradition Act 11 of 1996).

(b) no proceedings were initiated by the Namibian State with the aim of having anyone of the accused persons extradited to Namibia;

(c) all thirteen accused persons, with the possible exception of Osbert Likanyi, were prohibited immigrants at the time of their respective arrest;

(d) no accused person had been asked by any State witness whether he voluntarily consented to return to Namibia;

(e) no State witness had informed any one of the accused persons that he would handed over to the Namibian authorities in order

to face criminal charges in Namibia, and in particular on the charge of high treason;

(f) no State witness had informed any accused person of the procedures prescribed in terms of Zambian and Botswana immigration law;

(g) there is no documentary proof that any accused person had been deported to Namibia neither is there any proof which immigration official or other statutory body ordered such deportation;

(h) no accused person had been informed of his right to legal representation.

(i) The Namibian Police and Army Officers, prior to receiving the accused persons, had been aware of the fact that the accused persons would face criminal prosecution for specific crimes once returned to Namibia."

It was on these facts together with the evidence led by the state that Mr. Kauta relied to advance respondent's main contention, namely that they were abducted from Zambia and Botswana. I refer particularly to the evidence of Major General Shali, which also forms the basis of the learned judge, *a quo's* conclusion that there was disguised extradition.

At this juncture I would like also to dispose of Mr. Kauta's argument in reply to Mr. Gauntlet's submission that the court should not, save in most extreme cases, embark on a determination of the lawfulness of actions of functionaries of a foreign State in accordance with the municipal laws of the state as the court *a quo* did. Mr. Gauntlet described the principle involved in his submission as the "act of state doctrine", and Mr. Kauta's response was that -

> "The arrest collection or removal of a person from foreign soil by Namibian authorities is not a matter which falls outside the competence of the Namibian courts because of the act of state doctrine."

I understand this response to subsume that this was done in collusion with Zambian and Botswana authorities. In other words Mr. Kauta maintained that it was proper for the court *a quo* to determine the legality of actions by functionaries of a foreign state as was done in this case in regard to the deportation of the respondents. That was the thrust of his submission. That a court, in accordance with its municipal law, can inquire into the actions of the state's own agents or functionaries to determine the legality of the role the state played, if any, in securing a fugitive's return goes without saying. The inquiry into the legality of a foreign state's actions within its own territory is another matter. Various decided cases seem to place what, in this case, is alleged to have been done by Zambian or Botswana authorities within the doctrine.

The act of state doctrine was discussed by Lord Reid in Nissan v Attorney-General (1970) AC 179 H.L. (E) at 211-213. His Lordship described it as a 'loose phrase' used to denote various acts; suffice to say that His Lordship did not come up with an "entirely satisfactory' definition of the term. In that case the following passage appears at 217 H-218 E (per Lord Morris of Borth -y-Gest, who also discussed the doctrine):

> "In his speech in Johnstone v Pedlar (1921) 2 A.C 262 Lord Sumner (at p 290) said that Buron v Denman (1848) 2 Exch 167 was a case rather of the inability of the court than of the disability of the suitor:
>
> > 'Municipal courts do not take it upon themselves to review dealings of state with state or sovereign with sovereign. They do not control the acts of a foreign state done within its own territory in the execution of sovereign powers, so as to criticize their legality or to require their justification."

He did also add that:

> 'What the crown does to foreigners by its agents without the realm is state action also, and is beyond the scope of domestic jurisdiction.'

Lord Kingsdown who delivered the Judgment of the Privy Council in Secretary of State in Council of India v Kamahee Boye Sahaba (1859) 13 Mbo. Pa C.C. 22, 75 had this to say.

> 'The transactions of independent states between each other are governed by other laws than those which municipal courts administer: such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may take.'

In Underhill v Hermandez 168 US 250 (1897) 252 the US Supreme Court stated the same principle as follows:

> "Every foreign state is bound to respect the independence of every other sovereign state, and courts of one country will not sit in judgment on the acts of the Government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed by sovereign powers as between themselves."

In Buttes Gas & Oil Co v Hammer and Another (Nos 2 and 3); Occidental Petroleum Corporation and Another V Buttes Gas & Oil Co and Another (Nos 1 and 2) (1981) 3 All ER 616 (HL), at 628 g-j, Lord Wilberforce held that "there exists in English law a more general principle that the Courts will not adjudicate on the transactions of foreign sovereign States. Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if existing, not as a variety of 'act of State' but one for judicial restraint or abstention ...In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalized in the law of USA, which is effective and compelling in English Courts. This principle is not one of discretion, but is inherent in the very nature of the judicial process.

It would not be difficult to elaborate in these considerations, or to perceive other important interstate issues and/or issues of international law which would face the Court. They have only to be stated to compel the conclusion that these are not issues in which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which it can be said have not been drawn to the attention of the Court by the Executive), there are, to follow the Fifth Circuit Court of Appeals, no judicial or manageable standards by which to judge these issues, or, to adopt another phrase (from a passage not quoted), the Court would be in a judicial no man's land: the Court would be asked to review transactions in which four foreign States were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law. I would just add, in answer to one of the respondents' arguments, that it is not to be assumed that these matters have now passed into history, so that they now can be examined with safe detachment."

See also a discussion of the doctrine in R v Bow Street Magistrates; ex parte Pinochet Ugarte (1998) 4 All ER 897 (at 918-9 per Lord Slynn)
The Court *a quo* found it necessary to investigate the conduct of the Namibian authorities after finding:

(a) That there was not collusion or connivance by Namibian authorities with either Zambian or Botswana authorities to abduct the respondents.

(b) That the respondents "were not arrested by the Namibian authorities on foreign soil".

The court then proceeded thus:

> "However the issue between the parties before Court cannot be laid to rest on this finding.
>
> I must in addition consider whether the conduct of the Namibian authorities had not been in breach of the

> principles of public international law. It is therefore in my view important to consider whether the accused persons had been deported as claimed by the State.
>
> It is common cause that no extradition proceedings were initiated by the Namibian authorities.
>
> I remind myself in this regard that the State relying on the fact that the accused persons had been deported must prove same in order to prove the ultimate objective that the accused persons are lawfully before Court and that this Court had jurisdiction to try them."

It is at this point that, in my respectful view, the court went off on a tangent. It did so by initially asking the right question- "whether the conduct of the Namibian authorities had not been in breach of the principles of public international law," but then by going on to lay the wrong premises on which to answer that question, namely: "It is therefore in my view important to consider whether the accused persons had been deported, as claimed by the state." This in my view was the wrong premises first because the state did not claim that the respondents were properly deported whether in terms of Zambian municipal law or that of Botswana; secondly because the inquiry the court *a quo* went on to make involved the conduct by functionaries of two foreign states acting on behalf of their state within their own territories; thirdly because the allegations that they were unlawfully deported (transported) to Namibia was made by respondents and it was incumbent on them to prove on balance what they alleged. It was they who bore the evidential burden.

In Ocalan v Turkey Ect HR APP No 46221/99 (at p. 325 par 92 the European Court of Human rights stated:

> "Independently of the question whether the arrest amounts to a violation of the law of the state in which the fugitive has taken refuge- it must be established to the court 'beyond reasonable doubt' that the authorities of the state to which the applicant has been transferred have acted extra-territorially in a manner that is inconsistent with the sovereignty of the host state and therefore contrary to international law." (See *mutatis mutandis,* Stocke v Germany

> (App No 11755/85 12 October 1989 report of the Commission at paragraph 54)

The applicant in that case was arrested by members of the Turkish security police inside an aircraft in the international zone of Nairobi Airport directly after he had been handed over by Kenyan Officials to the Turkish Officials.

In the Stocke case the European Court of Human Rights referred (at Par. 37) to the following statement by three judges of the German Constitutional Court that refused to entertain Stocke's appeal on the grounds it had no prospects of success:

> "The court held that there was no rule of international law to prevent a State's court from prosecuting a person brought before them in breach of the territorial sovereignty of another state or of an extradition treaty. It was apparent from American, Israeli, French and British case law that in such an event a court did not decline jurisdiction unless the other state had protested and sought the return of the person concerned. The fact that there were a few decisions in which courts ordered that the proceedings should be stayed was not sufficient to establish a real practice to that effect."

R v Staines Magistrates Court and Others, ex parte Westfallen, R v Staines Magistrates Court and others, ex parte Soper, R v Swindon Magistrates Court and others, ex parte Nangle (1998) 4 ALL ER 216 QBD are cases where applicants were deported from foreign states (Norway and Canada), and were arrested on arrival in the United Kingdom. They alleged that they were brought within the jurisdiction by improper collusion between the Norwegian and Canadian Authorities and the British authorities. Lord Bingham CJ, who delivered the main judgment, reviewed dicta in Bennett v Horseferry Road Magistrates Court (1993) 3 All ER 138, (1994) AC 42 and referred to the fact that when the case was remitted to the Divisional Court the facts were rather different from those assumed by the House of Lords. At 221j-222a, he quoted the conclusion of Lord Justice General (Lord Hope) from the case reported as Bennett v HM Advocate 1995 SLT 510, as follows:

"In his conclusion he said (at 518):

> 'In our opinion it would be unreasonable where there has been no collusion, to insist that the police must refrain from arresting a person who is wanted for offences committed in this country when he arrives here simply because he is in transit to another country form where he could then be extradited. As Lord McLaren pointed out in Sinclair v HM Advocate (1890) 17R(J) 38 at 43), we must be careful to apply the rules about the transfer and delivery of persons under arrest in a reasonable way. The flouting of extradition procedures by collusion with the foreign authorities is one thing. To allow a person to escape prosecution and punishment for his alleged offences in this country on the ground of the steps taken to arrest him where there has been no such abuse is quite another. It is of course necessary that the petitioner should receive a fair trial if he is to be brought to trial in Scotland, but we are not concerned with that question at this stage. We are concerned only with the question whether to enforce the warrant would be an abuse of the processes of the Scottish court." (emphasis supplied)

His Lordship continued at 222:

> "Certain of the cases draw a contrast between official kidnapping and extradition. In R v Governor of Brixton Prison, ex p Soblen (1962) 3 ALL ER 641 at 661, (1963) 2 QB 243 at 302 Lord Denning MR briefly expressed the difference between extradition and deportation. He said:
>
> > 'So there we have in this case the two principles: on the one hand the principle arising out of the law of extradition under which the officers of the Crown cannot and must not surrender a fugitive criminal to another country at its request except in accordance with the Extradition Acts duly fulfilled; on the other hand, the principle arising out of the law of deportation, under which the Secretary of State can deport an alien and put him on board a ship or aircraft for his own country if he considers it conducive to the public good that that should be done. How are we to decide between these two principles? It seems to me that it depends on the purpose with which the act is done. If it was done for an authorized purpose, it was lawful. If it was done professedly for an authorised purpose, but in fact for a different purpose with an ulterior object, it was unlawful.'

> Lord Denning MR was, of course, referring to deportation from this country, but the same approach in principle must apply in the case of deportation to this country, and there must be grounds for objection if the British authorities knowingly connive at or procure an authorized deportation from a foreign country for some ulterior or wrongful purpose.
>
> The question in each of these cases is whether it appears that the police of the prosecuting authorities have acted illegally or procured or connived at unlawful procedures or violated international law or the domestic law of foreign states or abused their powers in a way that should lead this court to stay the proceedings against the applicants." (my emphasis)

Lord Bingham CJ's concluding remarks in these cases are interesting:

> "The Norwegians were entitled under their own law to deport these applicant. The propriety of the deportations is acknowledged and indeed could not be challenged. It is difficult to see why the Kingdom of Norway should be obliged to keep the applicants whilst the British applied for extradition if they wished to deport them. It was indeed a natural step for Norway to send the applicants back to where they had come from. There is in the material before us nothing to suggest that the British authorities procured or influenced that decision. It is true that they did not in any way resist it, and there is no reason why they should have resisted it. It is very probable that they welcomed the decision, but in my judgment they would have been failing in their duty as law enforcement agencies if they had not welcomed it. In my judgment there is nothing to suggest any impropriety such as would attract application of the ratio in Bennett v Horseferry Road Magistrates' Court (1993) 3 ALL ER 138, (1994) 1 AC 42 in this case.
>
> So far as the applicant Nangle is concerned, it is relevant to remind oneself that the recommendation to deport him was made at the time of conviction, and that the deportation order was made shortly afterwards. The decision was taken to deport him to Ireland, which is where the applicant wished to go, and the Canadian authorities bought him a ticket to that destination.

> They chose an obvious route in the absence of a direct flight from Canada to Ireland. There were, as is pointed out, other possible ways by which he could have reached Ireland without travelling through the United Kingdom. But it is not suggested, and could not be suggested, that the flight via Glasgow was in any way contrived or sinister or other than an ordinary route to choose in order to reach that destination. There is nothing whatever to suggest that the British authorities influenced the Canadian authorities to deport or procured the choice of route. Again, they did not resist it and probably welcomed the outcome. But again there is no reason why they should have resisted that decision and no reason why they should not have welcomed it. There was in my judgment no illegality, no violation of international law, no violation of the domestic law of Canada, and no abuse of power." (emphasis mine)

It is not necessary to quote the passages quoted by Hoff J from Bennett's case supra, and from S v Beahan 1992(1) SA 307 (ZS), but only to point out important passages that the Judge omitted. In Bennett's case Lord Griffiths concluded his opinion as follows at p151:

> "In my view Your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party." (emphasis mine)

In Beahan's case Gubbay CJ had this to say at 317h -318.

> "Upon it being ascertained that the authorities in Zimbabwe were anxious that he be returned to stand trial, he was conveyed in the custody of the Botswana Police to the border between the two countries and voluntarily surrendered to the Zimbabwe Republic Police, who promptly arrested him. That conduct did not constitute a violation of international law for it involved no affront to the sovereignty of a foreign State.

> Even if it were assumed that a member of the Zimbabwe Republic Police had interrogated the appellant at the main police station in Gaborone and thereafter requested that he be returned, such action does not avail the appellant. It is irrelevant to the issue.
>
> The immutable fact is that the appellant was recovered from Botswana without any form of force or deception being practised by the agents of this country. The decision to convey him to Zimbabwe was made, and could only have been made, by the Botswana Police in whose custody he was.

Where agents of the State of refuge, without resort to extradition or deportation proceedings, surrender the fugitive for prosecution to another State, that receiving State, since it has not exercised any force upon the territory of the refuge State and has in no way violated its territorial sovereignty, is not abreach of International law. See Morgenstein 1952 The British Year Book of International Law 262 at 270-1; Oppenheim International Law 8th ed vol 1 at 703. In O'Connell International Law 2nd ed vol 2 at 834 the matter is put thus:

> 'The case of a voluntary surrender of the offender, but in violation of the municipal law of the State which makes it, is different from that just discussed (i.e. illegal seizure on foreign territory). Even if the surrender is contrary to an extradition treaty it is still not a violation of international law since no sovereign is affronted, and the offender has no right other than in municipal law.'

The proposition is well supported by authority. In the Savarker case (cited fully in Harris cases and Materials on International Law 3rd Ed at 233) an Indian revolutionary who was being returned to India from Great Britain under the Fugitive Offenders act of 1881, escaped and swam ashore in Marseilles harbour. A French policeman arrested him and handed him over to the British policeman who had come ashore in pursuit. Although the French Police in Marseilles had been informed of the presence of Savarkar on board, the French policeman who made the arrest thought he was handing back a member of the crew who had committed an offence on board. France alleged a violation of its territorial sovereign and asked for the return of Savarkar to it as

restitution. The Permanent Court of Arbitration decided in favour of Great Britain for the following reasons:

> '..(I)t is manifest that the case is not one of recourse to fraud or force in order to obtain possession of a person who had taken refuge in foreign territory, and that there was not, in the circumstances of the arrest and delivery of Savarkar to the British authorities and of his removal to India, anything in the nature of a violation of the sovereignty of France, and that all those who took part in the matter certainly acted in good faith and had no thought of doing anything unlawful. While admitting that an irregularity was committed by the arrest of Savarkar and by his being handed over to the British police, there is no rule of international law imposing in circumstances such as those which have been set out above any obligation on the Power which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that Power.'

In the case of Sinclair v H M Advocate (1890) 17R (JC) 38 (conveniently referred to in the judgment of Stephen Brown LJ in R v Plymouth Magistrate's Court and Others: Ex parte Driver (supra at 692f-694j) Sinclair was found in Portugal and arrested by the Portuguese authorities, who had been informed that a warrant had been issued by a Scottish magistrate for his arrest on charges of breach of trust and embezzlement. Although there was no extradition treaty at the time between Portugal and Britain, Sinclair was detained for a month by the Portuguese authorities without any charge being made against him or inquiry instituted or warrant produced. They ultimately placed him on a British ship and he was brought to Scotland. Having been convicted by a court, Sinclair applied to the Scottish Court of justiciary to have the proceedings quashed on the ground, *inter alia,* that his arrest in Portugal was unwarranted, illegal and oppressive. The application was dismissed. Lord MacLaren, giving one of the judgments, said at 43:

> 'With regard to the competency of the proceedings in Portugal, I think this is a matter with which we really have nothing to do. The extradition of a fugitive is an act of sovereignty on the part of the state that surrenders him. Each country has its own ideas and its own rules in such matters. Generally, it is done under

> treaty arrangements, but if a state refuses to bind itself by treaty, and prefers to deal with each case on its merits, we must be content to receive the fugitive on these conditions, and we have neither title nor interest to inquire as to the regularity of proceedings under which he is apprehended and given over to the official sent out to receive him into custody.'

> To the same effect is the decision of the Palestine Supreme Court in; anpaYooussef Said Abu Dourrah v Attorney-General Annual Digest 1941-1942 case No 97, in which it was held that once a person has been surrendered he cannot raise any irregularity in the procedure adopted by the surrendering State as a bar to the courts of the requesting State exercising criminal jurisdiction over him."

In the present case the evidence on how each group was handed over to the Namibian authorities has been summarized in counsel's submissions and in Hoff J's judgment. It shows that-

(a) The first group (already referred to above illegally entered Zambia and were all apprehended by the Zambian authorities on 18 June 1999, before the incident at Katima Mulilo on August 2, 1999. On 25th June 1999 Chief Inspector Goraseb Regional Commander of Police of the Caprivi Region went to Zambia (Mongu) to ascertain their presence there and requested the Zambians to heighten their vigilance. On his return he informed the Inspector General of the police. On 6th August 1999 a Zambian police delegation visited Chief Inspector Goraseb at Katima Mulilo Namibia to say they were aware of the attacks at Katima Mulilo and to seek ways in which they could assist in curbing the problem. On 7th August 1999 Chief Inspector Goraseb was instructed to receive this group at Katima Mulilo. The Zambian Police accompanied the Namibian authorities up to Mpacha Army Base in Zambia with this group. This group had been flown from Lusaka where they had been held in custody at Kamavala Prison. On an unspecified date Major General Shali of the Namibian Army asked the Zambian authority

to hand over the people (the suspect) he was looking for. He said the Zambian authorities did exactly what they were asked to do.

(b) The second group - the Samboma Group comprised Richard Musuha, Oscar Muyuka Kushaluka Puteho, Richard John Samati and John Sikundeho Samboma. They were handed over according to state evidence at a no-mans-land - a strip of territory between the two countries border posts, on 6th November 1999. They had been arrested by Zambian authorities as illegal immigrants and held pending a decision to return them to Namibia.

(c) The third group was made up of Fred Maemelo Ziezo and Andreas Mulupa. They had also entered Zambia illegally from Botswana. They were handed over to the Namibian authorities at Katima Mulilo (Zambia).

(d) The fourth group comprised Charles Kalipa Samboma. He handed himself over to the Zambian Police and expressed regret for what he did. He was seen at Katima Mulilo Police station (Zambia) by Namibian Detective Sergeant Simasiku to whom he complained that he was unhappy in Zambia and stated that he wished to return to Namibia. Despite the allegations in his affidavit (partly reproduced herein) he did not testify in the proceedings before Hoff J. The evidence about his regret and that he was suffering in Zambia and wished to return was thus never challenged.

Two State witnesses a Zambian Police Officer and a Namibian Police Officer gave evidence to that effect.

(e) The fifth group comprised Cobert Mwenyi Likanye. He was handed over by Botswana Police Officers to Inspector Goraseb. The handover took place at a Weigh Bridge. He had been arrested in Botswana.

The court *a quo* came to the conclusion that "twelve of the accused persons are before this court through a process of disguised

extradition and that in respect of Charles Samboma, there was no proper consent."

This conclusion is based on the fact that Hoff J was "not persuaded that the evidence before me in any way proves that anyone of the twelve accused had been deported form Zambia or Botswana to Namibia in compliance with the relevant statutory provisions of those countries. As regards Charles Samboma the conclusion was based on the following statement by the court *a quo:*

> "It is clear from the evidence that the Police Officer who offered him this lift knew beforehand that (Osbert Likanyi) (sic) was wanted by the Namibian Police on a charge of high treason.
>
> He conveniently failed to inform him of the fact that he would certainly be arrested and would face criminal prosecution once inside Namibia on a charge of high treason.
>
> By his silence he deceived (Osbert Likanyi) (sic) in believing that he was not wanted by the Namibian Police.
>
> This was nothing else but a stratagem to get Charles Samboma in Namibia and cannot be regarded as consent in the legal sense of that word and is unlawful."

As to the courts' conclusions regarding Charles Samboma it is my view that the conclusion was not warranted by the evidence because Charles Samboma was not called to dispute the evidence of Simasiku, namely-

> "I came back to Charles Samboma, I greeted him for the second time by shaking his hand. I further told him 'so you are also here.' He said 'Yes but I want to go back to my country' I said 'Why do you want to go back to your country.' He said he is suffering in Zambia and he is in Zambia since the 2nd of August 1999 so he want to be joined with is family. I further informed Shipango that the colleague seated in their office or Charles Samboma seated in their office wants to go

> with us to Namibia. Deleclute Sergeant Shipango said we could come up with him to Namibia for the fact that they've got nothing to do with him and he is not arrested by them. We drove myself Sergeant Popyeninwa and Charles Samboma in the same vehicle POL 5545 through Wenela Border Post to Katima Mulilo at our Police station. At the time of leaving Zambia I did not arrest Charles Samboma. I gave him a lift as a passenger -----"

In cross-examining Simasiku counsel put to him certain allegations, Samboma would say in evidence; it was, however, never put to Simasiku that Charles Samboma would deny the above evidence. Nor was Charles Samboma called to deny the evidence of the Zambian Police Officer Detective Sergeant Dick Shipango who testified:

> "I asked this man 'what can I help you with' this man said, 'I'm handing myself over to the law'----I asked him 'what do you mean handing yourself over to the law?'----he said, 'I'm a Namibian."----I regretted what I did, so I want to hand over myself. 'I have regretted what I had done, I want to hand over myself."

And further:

> "He said, 'I am suffering in the bush. I myself I'm suffering my children are suffering and my wife. So I have regretted what happened on 2nd August."

Later Shipango testified:

> "We told them (Simasiku & Popyenawa) 'there is your fellow Namibians, you can go with him."

Simasiku's further evidence in cross-examination was that he arrested Samboma not as soon as they entered Namibia 'but it was later after further interrogation with him.' The record of the proceedings shows that Shipango was not even cross-examined by Mr. Kauta. In light of this evidence I find it incomprehensible that the court *a quo* could come to the conclusion that Simboma did not consent to come back to Namibia, let alone that he was deceived to believe that he was not wanted by the Namibian Police.

In addition to what the learned judge *a quo* said about the "twelve of the accused being before this court through a process of disguised extradition", he went on later in the judgment to link Namibia with that process by saying (before discussing the issue):

> "In my view on the facts of this case, the deportation of twelve of the accused persons (the exception is (Charles Samboma) was indeed a disguised extradition. Major General Shali requested his counterparts in Zambia to immediately hand over specific fugitives they were looking for and according to his testimony the Zambians did exactly what they were asked to do."

This link led the learned judge to his ultimate conclusion namely:

> "In my view the protest by the Namibian authorities that they had no part in irregularities which occurred during the deportation procedures in Zambia and Botswana, in itself, cannot come to their rescue since their own initial conduct, by informally requesting the handing over of fugitives and thus bypassing formal extradition proceedings tainted those very deportation proceedings they now want to put at a distance. Even if one accepts, in favour of the State, that the accused persons had been arrested by the respective neighbouring authorities, a decision had not been taken and they had not been deported until some time after the Namibian authorities had requested their return." (my underlining)

I go along with appellant's counsel's submission that the court *a quo* erred both in fact and in law in reaching its conclusion that the acts of the Namibian authorities in securing the return of the respondents were tainted, more particularly given the fact that the court concluded that no conspiracy or connivance was established between Namibian authorities and Zambian or Botswana authorities. This is so because the evidence does not establish that either Botswana or Zambia rendered the fugitive respondents because of the request by Mayor General Shali; no causal link is shown to have existed between the request and the handing over of the respondents by Zambia or Botswana. The inference sought to be drawn by respondents' counsel from the evidence, and drawn by the court *a quo,* from the fact that

some of the respondents had been arrested by respective neighbouring countries authorities and a decision had not been taken and they had not been deported until after the Namibian authorities had requested their return, is not warranted on a proper review of the evidence. While it is clear that the request by Major General Shali took place after the attack on August 2, 1999 the court *a quo* itself puts no date to the request, nor could Mr. Kauta for the respondents when specifically asked if he could do so during his oral submission before this court. Major General Shali's evidence that:

> "I did exactly what I was supposed to do in my capacity as Army Commander to immediately contact my counterparts on the other side of the border and ask them to immediately hand over the group of terrorists that I was looking for because I wanted them to be brought to book.",

cannot be read in isolation, it must be read in the context of the totality of his evidence and that of other State witnesses on the issue. His evidence starts where, in chief, he was asked to explain how it happened that certain people were handed to the Namibian authorities and he answered:

> "It was simple, simple in the sense that Zambian authorities informed us that they have, they are holding people we were looking for as a result of which the Zambian authorities decided to hand them over to the Namibian authorities and at no stage did we cross the Zambian border."

He was again asked, "As a result of the information from Zambia what did you do? And he answered:

> "I did exactly what I was supposed to do. To get in charge (touch) with my counterparts on the other side of the border and immediately asked them to immediately to hand over those group of terrorists that I was looking for and for them to be brought to book as we are witnessing today."

In cross-examination he insisted that at no stage did the Namibian authorities cross the border to arrest the fugitives. More importantly he stated, when asked if extradition was requested:

> "Your Honour I'll repeat that. I said there was no need to ask for extradition because as far as the Zambian authorities are concerned, they were holding illegal immigrants whom they were ready to deport to Namibia. As for as we were concerned, this is a group of terrorists that we so badly wanted to apprehend."

Asked what authority in law the Namibian authorities had to cross the border and arrest Nationals in Zambia, he said:

> "We did not cross the borders, even if it was few meters, to arrest these people. We were not pursuit, it not an operation. The Zambians were simply saying: "We are here, we have the people you're looking for, come and collect them", and that's what we did. Now what law have we broken? What law? What act according to the Namibian Constitution or indeed that of Zambian, have we broken?"

and again:

> "Let me try to clarify this once more, to say that the purpose, there are two things here, these are terrorists who are wanted here in Namibia for crimes they have committed. Now they were in the hands of the Zambian authorities who wanted to deport them as illegal immigrants and the Zambian authorities asked us to go and collect them and they were only arrested after they were on the Namibian territory."

And further, asked if the police collected them before they were deported, he stated:

> "Nowhere in the law does it state that a person have to be deported only on the borders. He could be deported right from international airports in the centre of that particular territory.

> "INTERPRETER: Sorry, can he repeat his (intervention)---- 'Ja, I will repeat that. I was saying that we went there to collect them during the process of deportation, that's why I've mentioned to you to say that these are people who had no choice in any case they had to be returned to Namibian authorities in any case, whether it was legal, because they (were) in Zambia illegally and the law does not say that the person has to be deported form point A to point B of the country, it can be anywhere."

Lastly he clarified:

> Yes, please. ----Okay. I said I don not know how much you know of deportation processes. Before you deport any person or a group of them, you communicate a list. It was when we got the list that we realised that on that list indeed were this group of people we're looking for and mind you, these were not the only people on the deportation list, there were a lot more, but these were the only ones that were on our terrorist list. (all underlining mine)

In the course of that cross-examination Shali also denied that he and his "counterparts" (in Zambia) had planned and prepared that the respondents "must be arrested as illegal immigrants and deported back to Namibia.

Colonel Henry Kaleji of the Zambian Defence Force was asked about connivance between Zambia and Namibian authorities. He answered Mr. Kauta as follows:

> "All the actions which I took were not influenced by any external authorities. We arrested them because they were a threat on our side and that was one of my functions as Regional Commander to protect the security of the country."

According to Kaleji's evidence under cross-examination it was a Zambian decision to hand over the respondents in the first three groups to Namibia. In cross-examination Kaleji's evidence went as follows:

> "The western side of Zambia is inhabited by Lozi's as well. Is that correct? ----That's very correct, My Lord."
>
> And in that region there has always been political tension with respect to the Lozi's. Is that correct? ----That's correct, My Lord.
>
> As a senior ranking officer in the Army you knew full well that what happened or what is alleged to have happened in Katima Mulilo in Namibia could have very well happened in western Zambia. Is that correct? ----That's correct, My Lord.
>
> There has been, will I be correct to say there has been propagation especially among the Lozi's and western Zambia for self-determination? ---My Lord, that self-determination was not very serious for us in the Army Forces to take it seriously.
>
> But it is nevertheless there. I'm talking about in western Zambian, your region. ---Yes.
>
> Can you say that again? Is your answer yes? ---Sorry, can you say it again?
>
> I am saying, nevertheless this issue of self-determination by Lozi's and western Zambia is there? ---Well, I said so, yes. I would say (no)."

Mr. Mundia, a Zambian Immigration Officer at Katima Mulilo (Zambia) was cross-examined as follows:

> "Now, Mr. Mundia, one last aspect. As an Immigration Officer do you have knowledge of any specific Namibian person that caused problems in the region where you were or in Zambia? ---My Lord, yes.
>
> Do you have a name? --- I wish not to mention names here for security purposes. But I would like to elaborate that what was happening on the Caprivi Region was also taking root in the western province of Zambia. And as an Immigration Officer who is an integral part of security in my country would not allow the foreigners to come and infiltrate my area to cause similar problems. Easier (inaudible) in the bud than later.

> As an officer, security officer, you say you were unhappy with the spill-over effect that any secession may have in Caprivi to the Western Province in Zambia? ---That's right."

These questions by counsel in cross-examination of course arises as an acknowledgement of the fact that the state of insecurity in that border area between Zambia and Namibia, arising from secessionist aspiration or both sides of the border was notorious, and, looked at in proper context, would explain why the Zambian authorities were eager to cooperate with their Namibian counterparts and, on their own accord, to take the decision to hand over the three groups of fugitive Namibians found on their territory which they entered illegally and carrying arms. The fact that Kaleji eventually said he would not dispute Shali's evidence (already quoted) is colourless. The statement was not made to him. The cross questioning of him on that evidence also lacks any specificity as to dates and as to which Zambian counterparts the request was directed. The list of people being deported from Zambia prior to Shali's request would have been provided in the spirit of the cooperation between the states in security matters. On this evidence I do not agree when the court *a quo* says: "The 'deportation' of twelve of the accused persons was clearly preceded by a request from officers acting of behalf of the Namibian State and it cannot with any conviction be argued that the Zambian authorities acted unilaterally when they deported the Namibians."

Be that as it may, in R v Brixton Prison (Governor) ex parte Soblen (1962) 3 ALL ER 641 in discussing the law of deportation Lord Denning M.R. said the following (at 660 H - 661 F):

> "It was suggested before us that there was a common law shackle on this power of deportation. It was said that a man could not be deported even to his own country, if he was a criminal who had fled form it. No authority was cited for this proposition. It cannot stand examination for one moment. Supposing no other

country but his own is willing to take him. Are we to keep him here against our will simply because he is, in his own country, a wanted man? Clearly not. If a fugitive criminal is here, and the Secretary of State thinks that, in the public good, he ought to be deported, there is no reason why he should not be deported to his own country, even though he is there a wanted criminal. The Supreme Court of India considered this very point in 1955 in Muller v Superintendent, Presidency Jail, Calcutta (54) and in an instructive judgment made it quite clear that in their opinion, the right to expel an alien could be exercised even though he was wanted by his own country for a criminal offence. I go further. Even though his home country has requested that he should be sent back to them, I see no reason why the Home Secretary should not still deport him there, if his presence here is not conducive to the public good. The power to deport is not taken away by the fact that he is a fugitive from the justice of his own country, or by the fact that his own country wants him back and has made a request for him.

So there we have in this case the two principles: on the one hand the principle arising out of the law of extradition under which the officers of the Crown cannot and must not surrender a fugitive criminal to another country at its request except in accordance with the Extradition Acts duly fulfilled; on the other hand the principle arising out of law of deportation, under which the Secretary of State can deport an alien and put him on board a ship or aircraft bound for his own country if he considers it conducive to the public good that that should be done. How are we to decide between these two principles? It seems to me that it depends on the purpose with which the act is done. If it was done for an authorized purpose, it was lawful. If it was done professedly for an authorised purpose, but in fact for a different purpose

> with an ulterior object, it was unlawful. If, therefore, the purpose of the Home Secretary in this case was to surrender the applicant as a fugitive criminal to the United States of America, because they had asked for him, then it would be unlawful; but if his purpose was to deport him to his own country because he considered his presence here to be not conducive to the public good, then his action is lawful. It is open to these courts to inquire whether the purpose of the Home Secretary was a lawful or an unlawful purpose. Was there a misuse of the power or not? The courts can always go behind the face of the deportation order in order to see whether the powers entrusted by Parliament have been exercised lawfully or not. That follows from R. v Board of Control, Ex p. Rutty (55). Then how does it rest in this case? The court cannot compel the Home Secretary to disclose the material on which he acted, but if there is evidence on which it could reasonably be supposed that the Home Secretary was using the power of deportation for an ulterior purpose, then the court can call on the Home secretary for an answer; and if he fails to give it, it can upset his order. But, on the facts of this case, I can find no such evidence. It seems to me that there was reasonable ground on which the Home Secretary could consider that the applicant's presence here was not conducive to the public good." (my underlining)

This passage, and indeed the state of the evidence on the deportation enquiry undertaken by the court *a quo* in this case, highlights the futility of a municipal court attempting to pass judgment on the actions of a foreign state; it calls to mind the warning given by Lord Oliver in his dissenting opinion in Bennett's case (supra) (at 157 e-g):

> The appellant invites this House now to say that the decision in Ex p Mackeson is to be preferred and that a criminal court's undoubted jurisdiction to prevent abuses of its own process should be extended, if indeed it does not already extend, to embrace a much wider jurisdiction to oversee what is referred to

> generally as 'the administration of justice', in the broadest sense of the term, including the executive acts of law enforcement agencies occurring before the process of the court has been invoked at all and having no bearing whatever upon the fairness of the trial.
>
> I have to say that I am firmly of the opinion that, whether such a course be properly described as legislation or merely as pushing forward the frontiers of the common law, the invitation is one which ought to be resisted. For my part, I see neither any inexorable logic calling for such an extension nor any social need for it; and it seems to me to be a course which will be productive of a good deal of inconvenience and uncertainty." (emphasis supplied)

That was said with reference to "executive acts of law enforcement agencies of the United Kingdom. But the statement acquires more force when applied to "executive acts of law enforcement agencies" of a foreign state (it must also be recalled that the majority decision in Bennett's case was based on an assumption of the facts which in the later Bennett's case were found to be rather different from what was assumed.

In his oral submissions before us Mr. Kauta persisted with the argument, rejected by the court *a quo,* that 12 of the respondents were abducted. He said that the respondents case before the court *a quo* and before this court, "rest squarely and (is) on all fours (with) S v Willem. One only need to look at the facts in both cases to note the very important difference in the conduct of the police concerned respectively in the two cases. The head note in S v Willem 1993 (2) SACR 18(E) correctly summarises what transpired in that case; it reads (as to the facts), P18 h-19:

> The accused were charged in a Provincial Division with a number of offences including murder, robbery with aggravating circumstances and theft. The accused entered

> a plea in terms of s 106(1)(f) of the Criminal Procedure Act 51 of 1977 that the Court had no jurisdiction to try them as they had been apprehended in Ciskei and then brought to South Africa against their will. The evidence showed that accused No. 2 was arrested in Ciskei by members of the Ciskei Defence Force. The fact of his arrest was conveyed to the South African Police who proceeded to Ciskei where they found accused No. 2 at a police station. They informed him that he was a suspect in a murder case in South Africa and asked him whether he wished to go with them to South Africa. He was told that if he did not do so he would be kept in custody in Ciskei and a request would be made for his extradition.
>
> He was not informed of the nature and content of extradition proceedings in the Ciskei. Accused No. 2 indicated that he was willing to go to South Africa and the Ciskei police released him into the custody of the South African Police. On the following day accused No. 2 was taken back to Ciskei where he pointed out the homes of accused Nos. 1 an d3 who were arrested by a member of the Ciskei police at their respective homes. <u>The arrests took place with the assistance of the South African Police</u>. Both accused Nos. 1 and 3 were similarly informed that they were suspects in a murder case in South Africa and were asked whether they wished to return with the South African Police to South Africa, failing which they would be kept in custody in Ciskei pending extradition proceedings. Neither was informed of the nature and content of the extradition proceedings. Both elected to go the South Africa. (my emphasis)

One important difference between these facts and the facts in the present case is that no Namibian police officer took part in the arrest of any members of the first to the third group in Zambia or of Likanye in Botswana. As to the request by Shali no causal link was established before the court *a quo* between the request and the handing over. All

the actions taken by Zambia or Botswana in handing them over to the Namibian authorities was in the spirit of cooperation between (in the case of Zambia at least) two States faced with a situation that could have political and security repercussions on both sides of the border. All the decisions of deporting the concerned respondents in this case were taken by the Zambian and Botswana authorities without any influence form the Namibian authorities; alternatively it has not been shown that in taking the decision to deport, either the Zambian or the Botswana authorities were influenced by the Namibian authorities.

The court *a quo* seems to imply, by undertaking the inquiry into the legality of the deportation procedures used by Zambia or Botswana, that the Namibian authorities had an obligation in international law to underwrite the legality of the actions of a foreign state. I am not aware of any rule of international law that imposes such an obligation, and no authority to that effect has been brought to the attention of this court. In this connection see S v. Rosslee 1994(2) SACR 441 (C) especially at pp. 4461i - h, 449f - 450h and 450e - h and Beahan's case, which Mr. Kauta sought to distinguish.

The important point that clearly emerges from cases such as R v Bow Street Magistrates, Ex p. Mackeson (1981) 75 CT App R 24 Bennett's case (supra), S v Ebrahim 1991 (2) SA 553(A), R v Hartley (1978) 2 NZLR 199 and Beahan's case (supra) is that the court will exercise its power to decline jurisdiction where the prosecuting authorities, the police or executive authorities have been shown to have been directly or indirectly involved in a breach of international law or the law of another state or their own municipal law. In Prosecutor v Dragan Nikoli case No. 94-2-PT the Trial Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the former Yogoslavia since 1991, discussed the principle '*male captus bene detentus*' as applied or formally applied in various jurisdiction. The cases cited or referred to in that discussion also illustrate the point above in jurisdictions that have moved away from that principle. (See para 75-93.) In that case the Trial Chamber held

that misconduct, by somebody other than the prosecution did not form a basis of a successful challenge to the jurisdiction of the Tribunal.

It is interesting that the Appeal Chamber in the Prosecutor v Dragan Nikolic case No. IT -94-2 AR 73, Decision on Introducing Appeal Concerning Legality of Arrest 5 June 2003 upheld the above decision and further held that even if the activities of the abductors could be attributed to the UN Officers (as the defence had argued in the Chamber below) this by itself would not remove the Tribunal's jurisdiction to hear the matter. In doing so the Appeal Chamber balanced the rights of the accused against the crimes committed as follows:

> "the damage caused to international justice by not apprehending fugitives accused of serious violations of international humanitarian law is comparatively higher than the injury, if any, caused to the sovereignty of a State by a limited intrusion in its territory, particularly when the intrusion occurs in default of the State's cooperation. Therefore, the Appeals chamber does not consider that in cases of universally condemned offences, jurisdiction should be set aside on the ground that there was a violation of the sovereignty of a State, when the violation is brought about by the apprehension of fugitives form international justice, whatever the consequences for the international responsibility of the State or organization involved."

The same approach was indicated in Ocalan v Turkey supra at par. 90 P3249-325 where the European Court on Human Rights remarked:

> "As regards extradition arrangements between states when one is a party to the convention and the other not, the court considers that the rules established by the states concerned are also relevant factors to be taken into account for determining whether the arrest that has led to the subsequent complaint to the court was lawful. The fact that a fugitive has been handed over as a result of co-operation between states does not in itself make the arrest unlawful or, therefore, give rise to any problem under art 5 (see, to the same effect, Freda v Italy (App no. 8916/80) (1980) 21 DR 250; Altmann (Barbie) v France (App no10689/83) (1984) 37 DR 225;

> Reinette v France (App no 14009/88 (1989) 63 DR 189). The court reiterates that:
>
> '----inherent in the whole of the Convention is a search for a fair balance between the demand of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on larger international dimensions, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely the establishment of safe havens for fugitives would not only result in danger for the state obliged to harbour the protected person but also tend to undermine the foundations of extradition.' (Soering v UK [1989] ECHR 14038/88 at par. 89.) (my emphasis)

The remarks in the two cases above imply the exercise of discretion whether, in circumstances postulated, to decline to exercise jurisdiction. That the House of Lords in Bennett's case (supra) relied on R v Hartley (supra) when it approached the assumed facts; is made clear in the opening remarks of Lord Lowry (concurring) (at p 106 h):

> "---having had the advantage of reading in draft the speeches of Your Lordships, I accept the conclusion by my noble and learned friends Lord Griffiths and Lord Bridge of Harwick that the court has a discretion to stay as an abuse of process criminal proceedings brought against an accused person who has been brought before the court by abduction in a foreign country participated in or encouraged by British authorities.

His Lordship went on to say (at P161h):

> "I agree that *prima facie* it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings merely '*pour encourager les autres*'.

> Your Lordships have comprehensively reviewed the authorities and therefore I will be content to highlight the features, which have led me to conclude in favour of the appellant. The court in R v Bow Street Magistrates, ex p Mackeson (1981) 75 CR App R 24, while quite clear that there was jurisdiction to try the applicant, relied on R v Hartley [1978] 2 NZLR 199 for the existence of a discretion to make an order of prohibition. Woodhouse J in R v Hartley (at 217) had also recognized the jurisdiction to try the accused Bennett, but expressed the court's conclusion that to do so in the circumstances offended against 'one of the most important principles of the rule of law". (my underlining)

In his heads of argument Mr. Gauntlet (at par. 77) says:

> "It is submitted that in these circumstances the court *a quo* appears to have been unaware of the fact that it had discretion to exercise. It approached the matter, as we have said, on the basis that any inferred contravention of international law would vitiate jurisdiction. Given the failure by the court to exercise its discretion, it is submitted this court is now free to do so. Even if some basis existed for concluding that the court *a quo* had consciously exercised a discretion, it is respectfully submitted - for the reasons set our above - that it did not do so judicially: it applied the wrong legal principles and it misconstrued the material facts."

In the concluding paragraph of his written submissions he also says:

> "The respondents in this case can claim no overriding unfairness if they are tried in a Namibian court. In the circumstances, it is submitted that even if this court finds that the Namibian authorities did in some attenuated respect act in violation of the precepts of public international law, this court should still exercise jurisdiction."

In his oral submission counsel said something to the effect that the state's alternative argument was that if the court finds that in some way some illegality either in Municipal law or in International law is to be attributed to the Namibian Security Forces that was not the end of the matter 'because just as in State v Mushimba, as in Rey v Attorney-General in the South African constitutional court mere illegality in obtaining evidence or something of that kind does not mean that the trial stops. You've to weigh the two up'. In his replying submission Mr. Gauntlet appeared to abandon the argument about the court *a quo*'*s* failure to recognize the fact that it had a discretion in those circumstances. Counsel said he was doing so because section 106 of the Criminal Procedure Act does not import a discretion. I fail to understand this retraction unless it was premised on the South African Common Law basis of the decision in Ebrahim's case (supra). But Mr. Gauntlet elaborated his retraction by saying that the court *a quo* made finding of fact and the court has to form a conclusion as to what's right in law or not'. It is interesting that in this regard and in justifying the retraction counsel refers to the French case Argoud 451LR90 of June 1964 quoted in Nikoli's case thus:

> "the accused was returned to France against his will by private individuals and handed over to the French police. As the French police were not complicit to his informal rendition the court found no obstacle to it exercising jurisdiction."

The point is that if one assumes that the court *a quo* made a correct finding of the facts, particularly that the rendition of some of the respondents was a direct result of the request by Namibian police (Shali) (as in R v Hartley) the court would be entitled to say whether, on the basis of that irregularity, it had jurisdiction to try the accused, and if so, whether it should decline to exercise the discretion. That as already indicated above, is the meaning of the Bennett case, R v Hartley, and other cases cited on the same reasoning.

Mr. Kauta on the other hand did not argue that the court did not have that discretion. He in fact argued that the court had exercised the discretion without necessarily saying so. I do not agree.

In the light of my finding that the evidence did not establish a causal link between the Shali request and the rendition of the respondents, it is not necessary to pursue the discretion issue any further, except to say that the Ebrahim case does not preclude this court from having regard to principles of international law. Article 144 of the Namibian Constitution provides that "---the general rules of public international law and international agreements binding up on Namibia shall form part of the law of Namibia." As the court *a quo* itself said, "In the Ebrahim case the Appellate Division based its finding on principles of Roman Dutch law but was not insensitive (to the) principles of public international law.".

It is clear from its Judgment that the court *a quo* laid a lot of store by the fact that respondents were, by "the disguised extradition" or the bypassing of the formal extradition proceedings deprived of the benefits or safeguards embodied in extradition acts or treaties and therefore of their human rights. The answer to any such argument is first that the Zambian or Botswana authorities did not have an obligation to wait for Namibia, or to urge Namibia to initiate extradition proceedings to get rid of undesirable foreigners from their territory. Secondly, the Namibians did not have to refuse to receive the returned fugitives (see the Staines case (supra) let alone to instruct Zambia or Botswana how they should get rid of their unwanted visitors. Thirdly when one considers the question of human rights care must be taken to balance the rights of accused against these of the victims of their actions. We have in this case antecedent circumstances where some people lost their lives and property was destroyed as a result of the incident at Katima Mulilo on 2 August 1999. The public interest that those responsible must be brought to justice in a very weighty counter in the balance. I for one am not much impressed by the quotation from Mohammed v President of the Republic of South Africa and Others 2001 (3) SA 893 (cc) because the present is not such a case.

ADDENDUM

I am taking the rather unusual step to say something more than I have already said above because I have now read the judgment of my brother O'Linn AJA, and the Acting Chief Justice's concurring contribution thereto. I share their great concern about the human rights of the respondents in this case, the violation of which both of them have painstakingly emphasized throughout their judgments; both have come to the conclusion that the appeal in this matter succeeds only in respect of respondents No 13, Charles Samboma.

Marais J. in S v Rosslee 1994 (2) SACR 441 (c), said (at p447c):

> "This is an area of the law which is bound to be controversial. As remarked earlier, there are potentially conflicting societal and constitutional values involved and the opinions of reasonable people as to which societal value should be accorded the higher priority in any given case may differ sharply."

I fully endorse that observation though it may be said to be stating the obvious!

My brother O'Linn, AJA has referred to (quoted) certain passages from the case, Prosecutor v Dragon Nicolic (a case I also referred to in my main Judgment); at p83 of the judgment the following is reflected:

> "112. The Chamber must undertake a balancing exercise in order to assess all the factors of relevance in the case at hand and in order to conclude whether in light of all these factors, the Chamber can exercise jurisdiction over the Accused."
>
> The Tribunal also observed that "in keeping with the approach of the appeals Chamber in the Barayagwiza

> case, according to which in cases of egregious violation of the rights of the accused, it is irrelevant which entity or entitles were responsible for the alleged violations of the rights of the accused."
>
> Whether such a decision should be taken also depends entirely on the facts of the case and cannot be decided in the abstract." The Tribunal concluded: "Here the Chamber observes that the assumed facts, although they raise concerns, do not at all show that the treatment of the accused by unknown individuals amounts, was of such egregious nature" (my emphasis added)" (My emphasis as to the first two underlining in this passage.)

Earlier in this judgment I tried to analyse the evidence in the present matter as fully as I thought necessary, and concluded that '"On this evidence I do not agree when the court *a quo* says 'the 'deportation' of twelve of the accused persons was clearly preceded by a request from officers acting on behalf of the Namibian state and it cannot with any conviction be argued that the Zambian authorities acted unilaterally, when they deported the Namibian's." I did a review of the evidence on seeing the definite and categorical conclusions reached on it by my brothers. I regret to say that I am still not persuaded that the evidence justifies the conclusion that a disguised extradition was perpetrated by the Namibian official sin receiving respondents rendered by either the Zambian officials or those of Botswana. With great respect I certainly do not see how the evidence as a whole can be assessed to reach the conclusion reached by the Acting Chief Justice:

1. that "As for as the first two groups are concerned there can be no doubt that agents of the State were actively organizing and involved in bringing those respondents out of Zambia.

   Or

2. that "the request by Shali triggered the actions by the Zambian authorities and the way in which the groups were received, in some cases after officers of the Namibian Police first visited the stations in Zambia, is evidence of an orchestrated and organized involvement in order to obtain the handing over of the respondents."

Hoff J made no direct finding on credibility of State witnesses in this matter. There is on record clear evidence by two Zambian officials disavowing any influence by Namibian authorities on them to take the actions they took. My reading of the evidence clearly shows the Zambian and Botswana authorities taking the initiative, with the Namibian Authorities, whatever may be justifiably said about the wrongs or illegality of the former's actions in terms of their domestic laws, merely welcoming the hand over. There is also clear evidence, in some cases drawn or suggested by respondents' counsel in cross-examination, that the security situation in the Caprivi had ripples across into the Barotse Province of Zambia. One would have to be a typical armchair critic to suggest that the security forces on either side of the border should have reached with the legal niceties that academics sometimes indulge in.

On of 'the factors of relevance' in the case at hand is that the attack at Katima Mulilo on August 2, 1999 was not an imagined event or a mere allegation by the Appellant; the other is the State's allegation as appears in the High Court of Botswana Criminal Appeal Judgment No. 108/2001 delivered on 3 December 2002, that:

> "In 1998 the respondent were among other people that decided unilaterally and attempted to secede part of Namibia to be an independent state. This group of people solicited various arms and ammunition as well as other weapons of war from within and outside Namibia for the above purpose. The respondents participated heavily in misleading lots of innocent Namibian to believe that Caprivi region was not politically and legally part of Namibia that an agreement that could be enforced was existing that formed the basis of secession. Various secret camps were established within Namibia and the respondents were part of the so called Caprivi liberation army that operated these camps, they also

> co-ordinated logistics and transport needs for these camps. As a result of these false promises some of their members escaped and went back to their places but the 7th and 9th respondents brutally shot and killed Victor Falali one of the escapees from their camps were disbanded and they fled to Botswana together with their weapons. In Botswana they were all given refugee status and while in Botswana as refugees the respondents continued to plan a vicious military attack on the Republic of Namibia. Without any consideration and respect to the Republic of Botswana that offered them sylum and without compliance to the principles of the United Nations the respondents escaped from the Dukwi refugee camp thus violating the laws of Botswana, while some had requested for the voluntary repatriation process with a motive to come and organize themselves in Namibia and carry out the military attack. On the 2nd of August 1999 some of the respondents participated directly while some of them indirectly in this vicious attack on some installations in Katima Mulilo where innocent people were killed as a result of this attack. As a result of this attack many people fled the town of Katima Mulilo, business activities were brought to a halt. After this attack the respondents again fled to the Republic of Botswana thus avoiding an arrest and prosecution for this conduct....."

I hasten to admit that this is not evidence against any of the respondents, but see Hoff J's opening paragraph in the judgment *a quo*:

> "It is general knowledge that on 02 August 1999 various Government institutions including the Mpacha military base, the Katounyana Special Field Force base, the Wanela border post, the building housing the Namibian Broadcasting Corporation, the Katima Mulilo and the house of a police officer had been attacked by groups of armed men resulting in the deaths of several people and damage to properties. A state of emergency was declared in the Caprivi region and order was subsequently restored by the Namibian Security Forces. The state of emergency was revoked on 26 August 1999. People were arrested inside Namibia and a number of the inhabitants of the Caprivi region fled to neighbouring countries. It appears that the exodus of people from the Caprivi region already started prior to the attacks

> on 02 August 1999 and continued for some time after order had been restored in the region."

The report of Horn J's judgment in the Botswana High Court case was one of the authorities brought to our attention by respondent's counsel. Horn J based his consideration of the 'political exception' in terms of Extradition Acts as it applied in the case before him - an appeal from a magistrate's decision to have 13 Namibian refugees from the Caprivi extradited, at Namibia's request to face charges also arising from events of 2 August 1999 at Katima Mulilo.

In respect of respondent No. 8 Osbert Likanyi my brother the acting Chief Justice says his handover "happened despite the fact that political asylum was granted to Osbert.....and, what is more, he was handed shortly after the High Court of Botswana refused to extradite other Namibians in regard to which a formal request for extradition was made." My brother O'Linn, AJA regards Osberts evidence as unchallenged. Osbert did not testify in the court *a quo*. His affidavit in the originating motion proceedings was taken as his plea in terms of Section (1) of the Criminal Procedure Act 51 of 1997. All one need say is that the Affidavit arrearing in Vol. 1 of the record at pp32-34 while stating that he sought asylum in Botswana (apparently in 1998) and was based at the Dukwe Camp, does not say why he was not one of those Namibians requested to be that this was a sworn statement does not in my view render it automatically acceptable as evidence and subjecting himself to cross examination. This applies even more to affidavits of one two others who did not testify.

The evidence in this case would appear to justify the question posed by Marais J. in the Rossle case, supra with reference to the 'clean hands' doctrine espoused in Ebrahim's case, at 448 a:

> "Should his own hand snot be clean in that particular respect before it lies in his mouth to complain of the state of the hands of others."

I agree with the caution sounded by my brother O'Linn, AJA during our discussion of the case, that one should not, like the three apes (of the Jewish adage), adopt the attitude, particularly where the rights of the accused persons are concerned, 'See on evil, hear no evil and speak no evil.' (See also his reminder about judge's oath of office at p164 of his judgment.) However I also feel that one should not stretch the evidence in any particular case to portray a picture to fit a mould or a theory one seeks to vindicate. In this connection I note that my brother O'Linn has done a lot of research on what he considers applicable statutes (local and foreign), conventions and international agreements. He has omitted however to say anything about the Defence Acts of Namibia, Zambia or Botswana, despite the fact that there is some evidence on record that Namibia and Zambia had mutual security committees; Major General Shali in cross examination was quizzed about the state of emergency having ended on 26 August 1999, and that on 6th November 1999 some of the respondents were collected there was no state of emergency in the Caprivi": He state in reply:

> "I just want to state one thing, to put one thing clear, that the Namibian Defence Force has a responsibility and tasks to defend the people of this country at all times, with or without state of emergency."

Section 95 of the Defence Act 1957 (Act No. 44 of 1957) as amended by Section 29 of the Defence Amended Act 1990 (Act No. 20 of 1990) reads as follows:

> "any member of the Defence Force may be required to perform service at any place outside the Republic whenever it is necessary-
>
> (a) to combat, prevent or suppress any attack or act of aggression in circumstances other than those contemplated in article 26 of the Namibian Constitution.
>
> (b) to prevent the recurrence of any such attack or act of aggression."

For the last part of Shali's evidence in cross-examination, I do not better than repeat it verbatim as it appears at pp. 232-235 of the Record. It reads as follows:

"I'm sorry, let me just confirm My Lord before I excuse this witness, maybe for my learned Friend to re-examine. Major General, perhaps you can assist me with the one issue is, is it correct, is it correct if I understood your testimony correct, there was no agreement between you, the Namibian forces, or the forces under you and the police with the authorities in Zambia to give over these people to you?---OK, I'm sorry for being told to ask me this question, but I'll tell you the following:

COURT: Sorry --- I said I'm sorry for you to have been told to ask me this question but I tell you the following:

Sorry, I didn't hear the last part of your reply?

MR KAUTA: I also didn't hear the last part, maybe you could repeat it. --- I shall repeat. I said I'm sorry for you to have been told to ask me this question, but I'm going to answer it. There's been an agreement already, the two States have signed a co-operation agreement that encompasses all sorts of things and that agreement at the same time established what is known as Namibia/Zambia Joint Commission of Defence and Security. In the result, it is an instrument that can be used and has been used effectively and it's going to be used in the future, to deal with threats like this one we're talking about. I have no time to give a lecture on this one. There is an agreement.

Do you have an agreement here? --- Oh, yes, yes, it is signed and sealed.

Can I have a copy of it? --- It's not allowed to be given to individuals. Part of the agreement is that this should not be given to persons

who ought not to see it and I don't know whether your are one of those.

COURT: So this court is not allowed to see the contents of the agreement? --- Exactly you Honour.

I'm asking whether this Court is also not permitted to see the contents of the agreement? --- Your Honour, if I got you right did you say that the contents of the agreement cannot be quoted for example?

No, I'm asking whether the Court is also precluded form seeing this agreement you're referring to?
MR KAUTA: Maybe he didn't hear the question. The court is asking whether it's also precluded form seeing the agreement that you are referring to? ----- Your Honour, I'm not saying that, but I believe that it is, the (inaudible) would have known better than I do, yes, there is a restriction as to who will have access and who will not have access to this agreement.

I think Your Honour there are no further questions, we take it there is no agreement.

NO FURTHER QUESTIONS BY MR KAUTA

COURT: Just repeat that last part of the statement that you've made.

MR KAUTA: My Lord I said, I thank you for his testimony and in the absence of a copy we take it that there is no such agreement --- There is no such agreement"

The long commentary of PRO John Duggard on S v Makala (see O'Linn's judgment pp. 120-121 contains this statement:

> "This reasoning was indeed accepted in Mafokeng to which the appellate Division also failed to refer. In

> this latter case, reference is made to section 34(g) of the Police Act which creates a possibility of mutual assistance agreement between States (although none existed in that case) which would have rendered the Police action invalid."

My brother O'Linn, AJA concludes his review of the cases as follows:

"To conclude this review of the case law, I must reiterate that the Namibian Supreme Court is not bound to follow the decision of the South African Supreme Court (Appellate Division) or even the South African Constitutional Court.

One must keep in mind that the Appellate Division when considering S v Mahala and S v December were faced with appellants who had already been found guilty of the most callous, cowardly and heinous crimes of murder. To hold at the appeal stage that the court *a quo* who had rejected the jurisdiction point and then convicted and sentenced the accused on the merits, had erred in not upholding the objection to the jurisdiction, would have resulted in a grave injustice to the victims of those crimes, their families and friends. To see that justice is done not only to accused persons, but also to the victims of crime is part of the aim of the Rule of Law and the public interest." INTERESTING!!

There are many cases in which conviction and sentences were set aside when the plea to the jurisdiction failed at first instance but was upheld on appeal.

I still maintain that the appeal must be upheld and the following order made:

1. That the order of Hoff J in the court below that the court had no jurisdiction to try the accused persons and ordering their release, be and is hereby set aside.

2. That the application brought by respondents under case number (P) A268/2003 be and is hereby dismissed.

3. That the matter be and is hereby remitted to the High Court for the trial of the respondents to proceed.

_____
MTAMBANENGWE, A.J.A.

O'LINN, A.J.A.: This judgment is divided for the purpose of easy reference into various sections, as follows:

SECTION A: INTRODUCTION

SECTION B: THE POINT OF DEPARTURE OF THE COURT *A QUO* AND ITS MAIN FINDINGS

SECTION C: THE RELEVANT EXTRADITION, IMMIGRATION AND DEPORTATION LEGISLATION OF NAMIBIA, BOTSWANA AND ZAMBIA IN CONJUNCTION WITH INTERNATIONAL LAW

SECTION D: THE RELEVANT CASE LAW AND OTHER AUTHORITY

SECTION E: IS THE ABUSE OF THE LAW AND OF THE RIGHTS OF THE PERSON DETAINED IN AND REMOVED FROM THE HOST COUNTRY RELEVANT

SECTION F: THE GROSSNESS OF THE ABUSE OF THE RULE OF LAW IN THE INSTANT CASE

SECTION G: THE PARTICIPATION OF THE NAMIBIAN AUTHORITIES IF ANY

SECTION H: THE IMPLICATION OF SECTION 17 OF THE NAMIBIAN EXTRADITION ACT

SECTION I: CONCLUDING REMARKS.

SECTION A: INTRODUCTION

I will hereinafter refer to respondents in this appeal as the "13 accused" irrespective of whether or not they were also "applicants" in their notice of motion and "respondents" in the present appeal.

Similarly I will hereinafter refer to the appellant as "the State", notwithstanding that the State was "respondent" in the notice of motion proceedings and "appellant" in the present appeal.

Mr. January appeared for the State in the Court *a quo*, but Mr. Gauntlett, S.C., assisted by Mr. Borgström , both of South Africa, assisted by Mr. January, appeared for the State before us on appeal. On the other hand Mr. Kauta appeared for the "13 accused" in the Court *a quo* as well as before us on appeal.

The counsel on both sides placed before Court full and interesting argument which I am sure was extremely helpful for the Court and for which they deserve the Courts appreciation.

The 13 accused were arraigned before the Court *a quo*, together with 107 others, each facing two hundred and seventy eight (278) charges of which the most serious are: High Treason, Sedition, Murder, Attempted Murder, Robbery with aggravating circumstances, Public Violence, the Unauthorized Possession of Firearms and Ammunition, Theft and Malicious Damage to Property.

Hoff, J., presided in the Court *a quo*. He sketched the background to these charges as follows:

> *"On 2 August 1999 various government institutions, including the Mapacha military base, the Katounyana Special Field Force base, the Wanela Border Post, the building housing the Namibian Broadcasting Corporation, the Katima Mulilo Police Station, the*

central business area of the town Katima Mulilo and the house of a police officer had been attacked by groups of armed men, resulting in the death of several people and damage to properties.

A state of emergency was declared in the Caprivi region and order was subsequently restored by the Namibian Security Forces. The State of emergency was revoked on 26 August 1999.

People were arrested inside Namibia and a number of the inhabitants of the Caprivi region fled to neighbouring countries. It appears that the exodus of people from the Caprivi region already started prior to the attacks on 02 August 1999 and continued for some time after order had been restored in the region."

At their arraignment the 13 accused raised the issue of jurisdiction in the form of a notice of motion supported by founding affidavits by each and every accused in which they asked that the Court make the following order:

"1. Directing and holding that the applicants are not amenable to the criminal jurisdiction of the Court in respect of the indictments referred to in paragraph 3.
2. Declaring that the applicants' apprehension and abduction from Zambia and Botswana respectively and their subsequent transportation to the Republic of Namibia and purported arrest and detention pursuant thereto is in breach of international law and wrongful and unlawful.
3. Declaring that the applicants' have not properly and lawfully been arrested and properly and lawfully been arraigned before a court of competent jurisdiction for the purposes of trying them on the indictment's preferred by the prosecution against the applicants.
4. Declaring that the applicants are entitled to be discharged from their imprisonment and detention at present pending their trial on the said indictments.
5. *Granting the applicants further and/or alternative relief."*

The State gave notice of opposition and stated that it will present *viva voce* evidence in support thereof.

There was some initial uncertainty about the procedure used but the Court ruled that the notice of motion properly raised the issue of jurisdiction and that it should be regarded as a plea explanation. Furthermore the Court ruled that the onus would be on the State to prove by *viva voce* evidence and beyond reasonable doubt the facts in dispute pertaining to the circumstances relating to the arrest, detention and delivery of the 13 accused.

Each of the said accused recounts in his founding affidavit the events surrounding his departure from and the eventual return to Namibia. Each states that he left Namibia as a result of continued political harassment. Each portrays his return as an "unlawful abduction", consisting of a series of unlawful acts performed by Zambian and Botswana authorities in concert with the Namibian authorities.

It is unfortunate that the State did not file answering affidavits as is normally done in notice of motion proceedings, wherein it could have precisely stated which allegations in the applicants' affidavits were admitted and which it contested. The ambit of the *viva voce* evidence could then have been narrowed down considerably.

Be that as it may, the State accepted the ruling of the Court *a quo* that the onus would be on the State to prove by *viva voce* evidence and beyond reasonable doubt that the 13 accused were lawfully before Court and that the Court thus had jurisdiction to try them. Although the Court *a quo* regarded the

aforesaid notice of motion supported by founding affidavits as a clear indication to the State of the case it had to meet by *viva voce* evidence, it is not clear from the judgment whether the Court also regarded the factual allegations therein as having some evidential value.

It must be noted at this stage that it is trite law that a plea explanation has some evidential value, the weight thereof depending on the circumstances.[1]

I will assume in this appeal when dealing with any disputes of fact, that where factual allegations in the founding affidavits were not disputed in the *viva voce* evidence of the State (appellant) such undisputed factual allegations must be accepted by the Court as proven, unless there are other good reasons, recognized by law, for their rejection. On the other hand where the State has contradicted specific allegations of the 13 accused contained in their affidavits by credible *viva voce* evidence, which were not discredited in cross-examination or in credible rebutting evidence contained in any *viva voce* evidence presented on behalf of the accused, then such facts on which the State relied must be accepted as proven. The State called a number of witnesses and the accused only two.

After an extensive hearing during a period of 19 days, the Court gave judgment on 23/02/2004. In its judgment the Court upheld the plea that the Court has no jurisdiction and ordered that the 13 accused persons be released from custody. The 13 accused were released but almost immediately rearrested by the Namibian Police and detained as before.

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[1] S v Hubert Shikongo & 2 Ors, 2000(1) SACR 190

A further application to the High Court on behalf of the rearrested accused to be released was heard by the full bench of the High Court but rejected by that Court on the main ground that the issue of the correctness of the judgment of the Court *a quo* was then pending before the Supreme Court and that it would consequently not be justified to grant the order prayed for.

In respect of the appeal it must be noted that the State applied for leave to appeal to the Supreme Court immediately after judgment was given. The application was rejected by Hoff, J. The State then petitioned the Supreme Court which granted leave to appeal.

The 13 accused are at the time of this judgment still detained by the Namibian authorities, several years after their initial arrests and detention.

SECTION B: THE POINT OF DEPARTURE OF THE COURT *A QUO* AND ITS MAIN FINDINGS:

1. Point of departure

The learned presiding judge in the Court *a quo* took due notice of the difficulties caused to the Security Forces by the grave acts of rebellion in the Caprivi. He said:

> *"I appreciate the fact that Major-General Shali and all the members of the Security Forces under his command during the period immediately following the armed attacks, must have worked under difficult and dangerous conditions. The security situation in the Caprivi region had to be stabilized and it had to be done so quickly. This however, was no authority to anyone of the members of the Security Forces including Major-General Shali to turn a blind eye to the relevant extradition agreements in force."*

He also correctly endorsed the view recently expressed by the South African Constitutional Court in the case of Mohamed v President of the Republic of South Africa & Ors where that Court held that "if a deportation was in substance an extradition, it would have been unlawful because the correct procedures were not followed". (My emphasis.)

Referring to the finding that the South African Government, through its officials had acted "unlawfully", the Constitutional Court stated:

> *"That is a serious finding. South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the State lead by example. This principle cannot be put better than in the celebrated words of Justice Brandeis in Olmstead ET AL v United States:*
>
> > *'In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. ..... Government is the potent omnipotent teacher. For good or for ill, it teaches the whole people by its example. ... If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself, it invites anarchy.' (My emphasis added.)*
>
> *The warning was given in distant era but remains as cogent as ever. Indeed for us in this country, it has particular relevance: we saw in the past what happens when the State bends the law to its own ends and now, in the new era of constitutionality, we may be tempted to use questionable measures in the war against crime.*
>
> *The lesson becomes particularly important when dealing with those who aim to destroy the system of government through law, by means of organised violence. The legitimacy of the constitutional order is undermined rather than reinforced when the State acts unlawfully."*

Hoff, J. commented:

> *"This view equally applies to Namibia and I fully endorse it. I also fully endorse the judgments, referred to in this judgment, which emphasise the importance of due process when considering*

whether there had been a breach of public international law or not."

I have not heard in the course of this appeal any criticism of the approach of the South African Constitutional Court and of the acceptance of that approach or point of departure by the Court *a quo*. I also have no doubt that the Namibian Supreme Court agrees with, endorses and commends the abovequoted approach of the South African Constitutional Court.

It is against this point of departure that much of the argument for and against the judgment of the Court *a quo* must be weighed.

2. A "few traits" applicable to all accused

The Court recited the evidence before it and extracted what it called "a few traits" but which the Court apparently regarded as facts which were either common cause or otherwise not seriously disputed. These were:

(i) There are in existence extradition agreements or treaties embodied in reciprocal statutory provisions, between Namibia and Zambia and between Namibia and Botswana respectively. (See Botswana Extradition Act 18 of 1990, the Zambian Extradition Act, Chapter 94 of the laws of Zambia and the Namibian Extradition Act 11 of 1996).

(ii) No proceedings were initiated by the Appellant with the aim of having anyone of the respondents extradited to Namibia;

(iii) All thirteen respondents, with the possible exception of Osbert Likanyi (8th Respondent) were prohibited immigrants at the time of their respective arrest;

(iv) No Respondent had been asked by any State officials whether he voluntarily consented to return to Namibia;

(v) No state witness had informed any one of the Respondents that they would be handed over to the Namibian Authorities in order to face criminal charges in Namibia, and in particular on the charge of high treason.

(vi) No state witness had informed any respondent of the procedures prescribed in terms of Zambian and Botswana immigration laws;

(vii) There is no documentary proof that any Respondent had been deported to Namibia neither is there any proof which immigration official or other statutory body ordered such deportation;

(viii) Not a single respondent was informed of his right to legal representation.

(ix) The Namibian Police and Army Officers, prior to receiving the Respondents were aware of the fact that the Respondents would face criminal prosecution of specific crimes once returned to Namibia.

A few remarks to place the above findings in context, are apposite at this stage:

Ad 2(i):No express extradition agreements were placed before the Court. The "extradition agreements or treaties" referred to by the Court were probably those whose existence were inferred from the existence of the very explicit and mandatory reciprocal legislation enacted by the sovereign parliaments of Namibia, Botswana and Zambia. It may be mentioned that the South African legislation that followed, corresponds in its main principles and procedures to those of Namibia, Botswana and Zambia.

Ad 2(iii):What was probably meant by this finding was that they were "prohibited immigrants" because they left Namibia and entered Botswana and Zambia without the proper passports and papers. However, they were never declared "prohibited immigrants in terms of the Immigration Laws of Botswana and Zambia. Those who entered Botswana, did not fall under any of the classes deemed prohibited immigrants. In the case of Zambia, they may fall under classes E or F of the 2nd schedule, but were never declared as such in terms of Zambian law.[2]

They left, according to their unchallenged affidavits, because they were continuously harassed politically by government agents being police and army personnel.

[2] See section 7 read with section 27(1) of the Botswana Immigration Act CAP 25:02. See section 22 of the Zambian Immigration & Deportation Act, read with the Second Schedule to that Act.

All the accused who first entered Botswana, applied for political asylum and they were granted such asylum in Botswana. Some indicated when they entered Zambia that their purpose is "political asylum". Some, in conjunction with their lawyer were preparing to take their cases to Court, when they were suddenly removed by Zambian military personnel and handed to Namibian military and police personnel. None of them were served with arrest warrants or deportation orders in terms of the laws of Botswana, Zambia and/or Namibia. There was also no evidence that any of them were served with written documents, as the law of these countries require, that they are henceforth regarded as prohibited immigrants. It is not only the status of Osbert Likanyi which was in doubt, but certainly also that of Charles Samboma, who according to the *viva voce* evidence of the State, came to Katima Mulilo on his own steam to hand himself over.

Mr Gauntlett actually conceded that Samboma "was not returned as an illegal immigrant".

Ad v & vi:The accused were neither informed of any of their rights under the Extradition laws, nor of their rights in regard to the Deportation laws. They were also not informed of the right to appeal or to make representations and of any period of time within which to do so.

Ad vii: None were given the opportunity to engage legal representation.

3. The facts relating to the arrest, detention, removal to and handing over to Namibian officials of 5 distinct groups of accused persons.

The Court and counsel for the parties dealt with the different circumstances pertaining to the accused by dividing them into five groups.

Counsel for the State and accused substantially agree on the facts and circumstances dividing the five (5) groups as well as the facts and circumstances they have in common.

I find it therefore convenient and justified to make use of the classification in the heads of argument of counsel for the accused. In doing so, I will leave out the references to the record for the sake of brevity, after having checked against the record the references given by counsel for the accused as well as those by counsel for the State. The comment added in regard to each group by counsel for the State also appear to be substantially correct. Consequently I find it justifiable to make use of that classification, but have renumbered the paragraphs. The classification reads as follows:

3.1 "The first group – named the "Mamili group" after the late Stephen Mamili – comprised five of the thirteen respondents, being Moses Mushwena (1st Respondent); Thaddeus Ndala (9th Respondent); Martin Mumbaundule (10th Respondent); and Oscar Nyambe Puteho (11th Respondent), and Charles Mushakwa (12th Respondent).

(i) It is common cause that the members of this group left Namibia and entered Botswana and then Zambia.

(ii) This group was apprehended and detained in Zambia on the 18th of June 1999 as suspected illegal immigrants before the attack in Caprivi on the 2nd August 1999. (Mr Gauntlett stated in regard to this group: "They were all apprehended as aliens illegally present in Zambia"). Chief Inspector Goraseb went to Zambia on the 25th June 1999, to ascertain the veracity of their apprehension and detention. He then informed the Zambians to heighten their vigilance. On his return to Namibia he informed the Inspector General of Police that this group was detained in Zambia.

(iii) On the 6th of August 1999, after the attack, a Zambian delegation headed by their Criminal Investigating Officer met with Chief Inspector Goraseb at Katima Mulilo, Namibia. The purpose of this visit was two fold. Firstly to inform Chief Inspector Goraseb that they are aware of the attack on Caprivi. Secondly to seek ways in which they could assist in curbing the problem. (attack on Caprivi)

(iv) The next day 7th of August 1999, after the visits from the Zambian delegation, when their assistance was clarified, the Major General of Operations of the Namibian Police Service, Major General Nghiishililwa, instructed Chief Inspector Goraseb to receive this group (parcel) **at Secheke in Zambia**.

(v) Also after the attack, the Namibian army Commander Major General Shali got in touch with his counterparts in Zambia and

asked for the handing over of specific terrorists, he was looking for and the Zambians did exactly what they were asked.

(vi) It is common cause that the Namibian Police represented by Inspector Theron and Inspector Shishanda proceeded to Secheke in Zambia purportedly received and removed this group to Namibia and handed them to the Namibian Army.

(vii) No request was directed to the Zambian Authorities to deport and or extradite this group from the 25th of June 1999, when admittedly the Namibian Police knew about their detention at Mongu in Zambia, until after the attack on Caprivi on the 2nd of August 1999."

3.2 "The second group – known as the "Samboma Group" – comprised Richard Misuha (4th Respondent), Oscar Muyuka Kushaluka Puteho (5th Respondent); Richard John Samati (6th Respondent) and John Sikundeko Samboma (7th Respondent).

(i) This group left Namibia and entered Botswana and thereafter Zambia.

(ii) The Zambian authorities, also apprehended the members of this group as alleged illegal immigrants.

(iii) Major General Shali the Army Commander, in the Namibian Defence Force was in touch with his counterpart in Zambia and requested the handing over of this specific terrorists to face the

ruthlessness of the law in Namibia. The Zambian did exactly as requested.

(iv) Sight should not be lost of the purpose of the meeting between Chief Inspector Goraseb and the Zambian delegation of the 6th August 1999, supra.

(v) The Appellant's evidence on where the Namibian authorities received or collected this group is unclear.

(vi) The Namibian Police Officers who were present at the handing over testified that it took place in a "no man's land" area between the Namibian and Zambian border posts, and that the handover or receipt was a matter between the Namibian and Zambian Army.

(vii) The Army on the other hand, from the officer (Ndakotola) who were present there testified that the handing over or receipt was a matter between the Namibian Police and the Zambian authorities inside Zambia.

(viii) Nevertheless it is common cause that this group was handed over to the Namibia Security Forces on the 6th November 1999 and that they were then kept in military detention for six month's before their first appearance in a court of law on the 02 May 2000."

3.2 "The third group – comprizing Fred Maemelo Ziezo (2nd Respondent) and Andreas Mulupa (3rd Respondent) – were arrested in Zambia as illegal immigrants. (What was probably meant here was that the members of this group were arrested as "alleged" prohibited immigrants).

(i) It is also common cause that this group left Namibia and entered Botswana and thereafter Zambia.

(ii) It is an undisputed fact that his group was handed over or received in Namibia at Katima Mulilo. (Mr Gauntlett however stated that this group "were arrested in Zambia as illegal immigrants ….Zambian authorities handed them over at Katima Mulilo." However the uncontested evidence of Zielo, as member of this group was that "after their arrest by Zambian authorities, they were loaded onto vehicles of Namibian Special Field Force at Katima Mulilo in Zambia and taken by them to Namibia").

(iii) What is in dispute is <u>how</u> this group was handed over. The Appellant has two versions. Deputy Commissioner Maasdorp confirms that Colonel Kalezi brought this group into Namibia and at Katima Mulilo gave them over to Chief Inspector Goraseb. The other by Chief Inspector Goraseb that he did not even see this group because they were handed over directly to Deputy Commissioner Maasdorp.

(iv) The Second Respondent's unchallenged testimony is that they were received by the Deputy Commissioner Maasdorp in Zambia and then returned to Namibia (Katima Mulilo)."

3.3 "The <u>fourth group</u> consists of Charles Kalipa Samboma (13th Respondent).

(i) On the 19th March 2001 this respondent went to Katima Mulilo Police Station in Zambia with the sole purpose of handing himself

over to the law. He expressed his regret and the Zambian authorities assumed that the Respondent wished to return to Namibia.

(ii) The Namibian Police, was looking for this respondent on High Treason, charges. Detective Sergeant Simasiku went to Zambia and without informing or speaking to Charles Samboma, about his true purpose removed Charles Samboma to Namibia and then arrested him."

3.4 "The fifth group consists of Osbert Mweny Likanyi (8th Respondent).

(i) He was the only respondent who did not come from Zambia. Likanyi left Namibia and was granted asylum in Botswana.

(ii) His asylum was irrelevant to the Namibia Army because he is a terrorist. (According to Major-General Shali).

(iii) The Namibian Police received a call from their counterparts in Botswana about the presence of Osbert Likanyi. Inspector Goraseb proceeded to Botswana where he removed Mr Likanyi without speaking to him, and returned him to Namibia."

4. The finding of a "disguised extradition". The final conclusion of the Court *a quo* was stated as follows:

"In view of my finding that 12 of the accused persons are before this Court through a process of "disguised extradition" and that in respect of Charles Samboma there was no proper consent, all thirteen accused persons are irregularly before me and this Court has accordingly no jurisdiction to try them."

The State's first attack against this finding was that it never was a specific ground of the case of the 13 accused as set out in their application on notice of motion.

To this attack the Court *a quo* reacted as follows in its judgment on the initial application by the State for leave to appeal:

> *"The expression 'disguised extradition' as such was indeed first mentioned when judgment was delivered in respect of the jurisdictional issue. This however is an appellation attached to those circumstances where a fugitive is deported in accordance with deportation proceedings disguised as an extradition. What is important is not the name given to those circumstances but the nature of the act of delivery. The accused persons stated that they had been brought before this Court unlawfully since they had been abducted. The State denied that they had been abducted and justified their presence in Court on the submission that they had been deported. The onus was on the State to prove beyond reasonable doubt that they indeed had been deported, that they were thus lawfully before this Court and that this Court consequently had jurisdiction to try them. The accused has no onus to prove their abduction. On the evidence presented by the State the Court found that no such deportation had been proved.*
>
> *The inference drawn by the Court on those facts presented to it was that the accused persons were before this Court as a result of an extradition in disguise.*
>
> *In my view it is irrelevant whether the expression "'disguised extradition' appears in the plea explanation of the accused persons and it is similarly irrelevant whether the expression per se had been used during argument by either counsel for the State or counsel for the defence. It is further not entirely correct to state that the issue of 'disguise extradition' had never been canvassed or argued by either counsel and that it was brought up mero motu by this Court. Counsel for the State himself during his submissions to this Court, distinguished between deportation proceedings and extradition proceedings. Furthermore counsel for the accused persons in his heads of argument as well as oral submission referred to the importance of the compliance with rules public international law and international agreements.*
>
> *An extradition treaty is an international agreement without doubt. The Court was in this regard specifically referred to the cases of S.*

> *v Wellem* and *S v Buys & Andere* where the importance of compliance with extradition agreements had been emphasised. In addition counsel for the defence submitted in his heads of argument that in the Constitutional regime now reigning in Namibia that the human rights of the fugitive are as important as that of any other citizen and that the extradition process was designed to protect these rights.
>
> The Court was further in this regard referred to an article by Prof. John Dugard where the opinion was expressed that when extradition proceedings are ignored a person is abducted in order to bring him within the jurisdiction of the Court to try him and that in this way the human rights of an abductee are being flouted. What was submitted was that extradition proceedings must be complied with and where it is not done, in my view, the process of simulated deportation is indeed an 'extradition in disguise'."

Mr. Gauntlett persisted with the argument before us that because the applicants had not claimed in their notice of motion, that there was a "disguised extradition", the Court was not entitled to base its judgment on that ground.

I find this approach very technical and not conducive to the aim of achieving justice in this case. It does not seem to me that the State was in any respect prejudiced by the Court putting a label on the conduct of the officials of the State on both sides in ensuring the attendance of the 13 accused before the Namibian Court.

I agree with the reasoning of the Court *a quo* in response to the objection.

5 THE "ABDUCTION" FINDING

The Court stated: "I cannot find that the accused persons had been abducted in the sense used in the Ebrahim case." It was also in this context that the Court held: "Whatever suspicions there may be in this regard, I am unable to

hold that there was indeed a connive or collusion between the respective authorities to abduct the accused persons."

Mr. Gauntlett seized on this finding or non-finding, in the sense that there also was no express finding of an abduction in any other sense.

Mr. Kauta, on the other hand, pointed out that this finding did not exclude "abduction" in the sense averred by the accused persons. The reason why the Court concluded as it did appears from the following reasoning by the Court, preceding the finding in question:

> *"In regard to those accused persons who alleged they had been abducted in the absence of evidence to the contrary, the evidence presented by the State witness stand uncontradicted since they said that they had never been 'arrested' by the Namibian authorities on foreign soil."*

An important feature of the facts of the Ebrahim case was that agents acting on behalf of South Africa entered Swaziland and took the appellant Ebrahim, a member of the military wing of the ANC, back to South Africa by force and there handed over to the South African Security Police, where he was then formally arrested, arraigned before a South African Court and tried and sentenced to 20 years imprisonment. The force used was that Ebrahim was first lured out to their car at night by false pretences and there the two agents then pointed firearms at him, threatened him with death should he not accompany them.

The full bench of the Appellate Division of the South African Supreme Court set this conviction and sentence aside on the ground that the objection *in limine*

that the Court had no jurisdiction because of the illegal abduction of the accused, should have been upheld already at the *in limine* stage. This decision was widely welcomed – also internationally.

Now this type of fraud and force was admittedly not used in the case of the 13 accused now before Court.

Hoff, J. thus clearly referred to such a type of abduction and that did not include other action tantamount to abduction or which was an abduction in essence and where the officials of the State requiring the persons for trial, participates in the illegal action, bypassing deliberately, applicable mandatory extradition procedures.

The South African Appellate Division held, in the Ebrahim decision, after a thorough investigation of the relevant South African and Roman Dutch common law, that the issue as to the effect of the abduction on the jurisdiction of the trial Court, was still governed by the Roman & Roman Dutch common law which regarded the removal of a person from an area of jurisdiction where he had been illegally taken prisoner to another area as an "abduction in essence" and thus constituted a serious breach of the law. A Court before which such a person is brought also lacked jurisdiction to try him.[3]

It appears from the above that "illegality" and "abduction" are equated and that "abduction" is merely a form of illegality, but illegality is not restricted thereto. An illegal taking prisoner, detention and removal, is "tantamount" to abduction or is in essence an abduction.

[3] 1991 (2) SA 553 (A.D.)
See further a discussion of the decision in Section D3.

It appears to me however, that the Court misdirected itself when it based its finding in the form formulated, when it apparently regarded as decisive, that the Namibian officials did not “arrest” the persons in Zambia or Botswana – apparently using the term arrest in the form of a formal arrest, where the necessary procedure for such an arrest is followed. For the purpose of whether or not the Namibians had carried out an abduction, or participated therein or colluded or connived with the actual abductors, such an act of formal arrest inside Botswana or Zambia would clearly not be an essential requirement. It will suffice if there was an illegal taking prisoner, detention and removal or participation therein – of which the absence of formal arrest would be corroboration – and not legal justification of such illegal taking prisoner, detention and removal over the Namibian border. The confusion may have been caused by the fact that the English version of the headnote in Ebrahim wrongly used the term “arrest” instead of “taking prisoner”. The latter is a more precise translation of the words “onregmatiglik gevange geneem”, used in the judgment written in Afrikaans.

In my respectful submission, a Court should not become bogged down in nomenclature.

When there are mandatory provisions in extradition and deportation legislation of the states involved, the failure to comply with those provisions, aggravates the illegality.

It then becomes an arbitrary action which amounts to “vigilante law” or the “law of the bush” or the “law of the jungle”, and constitute a grave inroad by

the perpetrators, not only of the rule of law but also a grave inroad on the fundamental and human rights of the persons who are the victims of such action. Furthermore such abuse also infringes on the sovereignty of the states that had made laws for the extradition and/or deportation of persons from its territory. It follows that the issue then cannot be restricted to whether or not there was a breach of the sovereignty of states, but also whether or not there was a breach of the fundamental and human rights of the individual.

In the case of such gross lawlessness, it cannot be of much importance or relevance whether the action of the perpetrators are called “abduction” or “disguised extradition” or “simulated extradition”. In such circumstances it should not really matter when a Court before which such victim is arraigned and which has to decide whether or not the Court has jurisdiction or whether or not the Court must exercise its discretion to decline jurisdiction, whether the illegality pertaining to the victim’s being taken prisoner, detention, removal and delivery, was in breach of <u>one</u> or <u>all</u> of the following categories of law: International Law, National law or domestic law, which includes statute law as well the common law.

5. <u>THE FINDING THAT NEITHER THE EXTRADITION LAWS, NOR THE DEPORTATION LAWS OF BOTSWANA OR ZAMBIA OR NAMIBIA WERE COMPLIED WITH</u>

Here the Court pointed out that the State on which the onus rest, failed to provide any written documentation whatever indicating that any of these laws were complied with. Even in the case of the arrest of a person as a suspected prohibited immigrant, such person must be properly arrested, informed why

he/she was arrested, a proper written deportation order served on such person, certain time allowed to leave the country from which deported, and time allowed to make representations and even appeal. The Court *a quo* gave extensive and convincing reasons why it found that neither the laws of extradition or those relating to deportation were complied with. There is no ground whatever to interfere with that finding and no further discussion of that finding is required at this stage.

The State did not seriously attack the finding in relation to the respective illegal actions by Zambia and Botswana. The main thrust of their defence in this regard was that whatever illegalities Zambia and Botswana officials may have perpetrated, Namibian officials were not party to such illegalities in those countries and only received the accused handed to them – not knowing and not concerned whether or not the Zambians or Botswanas acted against the law. Furthermore, State counsel argue – the Court is prevented by the doctrine of "act of state" and the International Law regarding sovereignty to enquire into the illegalities committed by Zambia and Botswana and consequently – there was no impediment for the Namibian Court to exercise jurisdiction. As a further consequence the Court *a quo*'s decision should be set aside and the trial continued on the merits.

The issue of whether or not the Namibian officials were parties to the illegalities can best be dealt with after an examination of the Namibian, Botswana and Zambian legislation in regard to extradition and immigration and deportation and the discussion of the relevant case law and its application to the issue before us.

SECTION C: THE RELEVANT LEGISLATION IN NAMIBIA, BOTSWANA AND ZAMBIA RELATING TO THE EXTRADITION OF ALLEGED FUGITIVE OFFENDERS AND THE DEPORTATION OF PROHIBITED IMMIGRANTS.

1.1 The Namibian Extradition Act 11 of 1996.

This act was passed by the parliament of the independent and sovereign Republic of Namibia in 1996, signed by the President in terms of Article 56 of the Namibian Constitution.

The Act states its aim in the heading thereof as: To provide for the extradition of persons accused or convicted of certain crimes committed within the jurisdiction of certain countries, and to provide for incidental matters.

The Act provides a comprehensive set of legal requirements and rules of law to be complied with for extradition from Namibia and in addition certain requirements and rules of law for persons extradited to Namibia.

In this regard this Act corresponds in its main features with such Acts in Commonwealth countries and in all democratic countries in the civilized world, including the countries directly involved in the present case, namely Botswana and Zambia.

There is no dispute in the present case in regard to the existence of similar statutes of Botswana and Zambia, which were handed in by consent in the course of the trial.

I will refer for the purpose of brevity only to some of the provisions of the Namibian Act, which in my view are most relevant to the issues in the case before us.

Section 2, under the heading - "Liability to extradition", provides in subsection (1)(a): "Subject to the provisions of this Act, any person in Namibia, other than a Namibian citizen, who is accused of having committed an extraditable offence within the jurisdiction of a country contemplated in section 4(1); may upon a request made by such country in terms of section 7, 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, whether or not such offence was committed before or after the commencement of this Act or before or after the date upon which the relevant extradition agreement came into operation."

Section 3, under the heading "Meaning of 'Extraditable offence', provides in its subsection (1):

> "*For the purposes of this Act, 'extraditable offence' means an act, including an act of omission, committed within the jurisdiction of a country contemplated in section 4(1) 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.”*

Section 4, under the heading 'countries to which person may be extradited', provides:

> "*(1) Subject to the provisions of this Act, the extradition of persons from Namibia may be effected to -*
>
> (a) *any country which has entered into an extradition agreement with Namibia; and*
>
> (b) *any other country, including a Commonwealth country, which has been specified by the President by proclamation in the Gazette for purposes of this Act.*

(2) *The President may revoke or amend any proclamation made under subsection (1).*"

Botswana and Zambia were two of the countries of the Commonwealth specified by Proclamation 5 of 1997 in terms of section 4(1)(b) of the Extradition Act to which extradition of persons from Namibia be effected for the purposes of this Act. Under the heading "Restrictions on return," a large number of restrictions and conditions are spelled out in section 5, amongst which are the following:

"*5(1) Notwithstanding section 2 or the terms of any extradition agreement which may be applicable, no person shall be returned to a requesting country, or be committed or kept in custody for the purposes of such return, if it appears to the Minister acting under section 6(3), 10 of 16 or the magistrate concerned acting under section 11 or 12, as the case may be -*

(a) *that the offence for which such return was requested is an offence of a political character; Provided that this provision shall not apply to any offence declared not to be a political offence for purposes of extradition by an multi-lateral international convention to which both Namibia and the requesting country concerned are parties;*

(3) *Notwithstanding section 2 or any extradition agreement which may be applicable, no person shall be returned to a requesting country, or be committed or kept in custody for the purposes of such return, unless provision is made in the relevant laws of the requesting country or it has otherwise been arranged with that country that such person shall not, unless he or she first had the 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 in respect of which such return was sought; or*

(c) *an offence committed after such person has been so returned; Provided that the Minister may give his or her written consent that such person may be so returned to be dealt with in respect of any offence not being an offence contemplated in paragraphs (a) (b) or (c).*"

Part III of the Act under the heading "Procedure", deals in section 7 with "Requests for return of persons" and provides as follows:

"*7. Subject to section 8, a request for the return of a person under this Act shall be made in writing to the Minister -*

(a) *in such manner as may be specified in an extradition agreement which might be applicable; or*
(b) *by a diplomatic or consular representative of the requesting country, accredited to Namibia, but if the requesting country is a Commonwealth country, such request may also be made by or on behalf of the government of such country.*"

Provision is made in section 8 for the particulars and documents in support of a request for return, which shall accompany the request.

Those particulars are:

"*(a) full particulars of the person whose return is requested and information, if any, to establish that persons location and identity;*
(b) *full particulars of the offence of which the person is being accused ----------a reference to the relevant provisions of the laws of the requesting country which were breached by the person and a statement of the penalties which may be imposed for such offence;*
(c) *a statement or statements containing information which set out prima facie evidence of the commission of the offence contemplated in par. (b) by the person whose return is requested;*
(d) *by the original or an authenticated copy of the external warrant issued in relation to the person whose return is requested;……"*

Subsection (2) provides:

"*All particulars and copies of all documents contemplated in subsection (1) shall be made available to a person whose return is requested*"

Section 9, under the heading "Further particulars required by Minister", provides that the Minister can require and request further information.

Section 10, under the heading

"Authority to proceed and warrant of arrest," provides that the Minister shall, if he is satisfied that an order for the return can lawfully be made, forward the request and the relevant documents to a magistrate and issue to that magistrate an authority in writing to proceed with an enquiry as provided for in section 12.

Subsection (2) provides:

"*Upon receiving the documents and authorization referred to in subsection (1) or section 6(3), as the case may be, the Magistrate shall, if he or she is satisfied that the external warrant accompanying the request is authenticated as contemplated in section 18(1), endorse that warrant, and whereupon that warrant may be executed in the manner contemplated in subsection (3) as if it were issued in the Court of that magistrate under the laws of Namibia relating to criminal procedure.*"

Subsection (3) provides that:

"*A warrant endorsed in terms of subsection (2) may be executed in any part of Namibia.*"

Subsection (4) provides that any person arrested under subsection (3) shall in accordance with Art 11 of the Namibia Constitution -

(a) be informed promptly in a language, which he understands of the grounds for such arrest; and
(b) be brought before a magistrate within 48 hours of his or her arrest, or if it is not reasonably possible, as soon as possible thereafter to be dealt with in accordance with the provision of section 12." (Section 12 related to a fair trial).

Section 11, under the heading

"*Provisional warrants of arrest on grounds of urgency," provides for a shorter and less cumbersome route in case of urgency applicable only to some specified countries.*

Subsection (1) states:

"*Notwithstanding section 7, and subject to subsection (2) of this section -*

(a) *any diplomatic or consular representative of a country contemplated in section 4(1); (which includes Botswana and Zambia) or*
(b) *The International Police Commission (Interpol), on behalf of such country; or*

(c) *In the case of a Commonwealth country contemplated in section 4(1), (which again includes Botswana and Zambia) in addition to the ways set out in paragraphs (a) and (b) of this subsection, the government of such country or any person acting on its behalf, may in urgent circumstances apply to the Minister for the arrest of a person who is accused of an extraditable offence in such a country, pending the communication of a request for the return of that person in accordance with the said section 7."*

Subsection (2) sets out the requirements for such an application.

Section 12, under the heading -

"Enquiry proceedings for committal," sets out the requirements for such an enquiry which are analogous to a preparatory examination in criminal proceedings.

If the magistrate is satisfied at the end of such enquiry after hearing the evidence tendered that -

(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 in section 4(1);*
(c) *the person brought before him or her ---------- is the person who is alleged to have committed such extraditable offence in such country;*
(d) *in the case 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 concerned has been requested in accordance with this Act and that the return of the person is not prohibited under part II, the magistrate shall issue an order committing that person to prison to await the Ministers decision under section 16 with regard to that persons return to the requesting country.*

Subsection (7) provides that if the magistrate is not satisfied that all the requirements have been complied with set out in subsection (5) or if the evidence requested in terms of subsection

(4) is not forthcoming within a period of two (2) months, the magistrate shall order the discharge of the person concerned, whose return was requested and shall forthwith inform the Minister in writing of such order and his reasons therefore.

Section 13, under the heading

"*Certain conditions for return,*" *provides that, a person committed, shall not be returned -*

(a) *unless the Minister orders such return under section 16; and*
(b) *until the expiration of period of 15 days from the date of the order of committal in question or until the conclusion of an appeal made by such person or on his or her behalf in terms of section 14, whichever is the later.*

Section 14, provides for an appeal, either by the government of the requesting country or the person against whom a committal order has been made.

Section 15, provides for a waiver by the person whose return has been requested, of an enquiry as provided for in section 12, if certain requirements are complied with.

PART IV of the Act provides *inter alia* for authentication of foreign documents, legal representation at all stages from arrest to conclusion of an appeal, bail and custody. As to legal representation the section provides if no legal representative has been instructed by the person whose return has been requested, the Director of the Legal Aid shall instruct a legal representative to represent such person and if such legal practitioner is not an

employee of the Namibian Public Service, any legal fees and disbursements shall be met by the country requesting the return.

Section 17, under the heading "Extradition to Namibia," lays down some very important conditions for the prosecution of persons extradited to Namibia in regard to their prosecution in Namibia.

Subsection (1) provides:

"*A person extradited to Namibia shall not, unless such person has first had an opportunity to leave Namibia, be prosecuted or punished in Namibia for any offence other than -*

(a) *the offence in respect of which such person was returned;*
(b) *any lesser offence proved on the facts on which such person was returned;*
(c) *an offence committed in Namibia after such persons return; or*
(d) *an offence not being an offence contemplated in par. (a), (b) or (c) and in respect of which the country returning such person have consented to the person being tried*."

The provisions referred to supra, apply *mutatis mutandis* also to cases of extradition to the requesting country of a person who had already been convicted and sentenced in the requesting country but who has escaped from custody and is at large in Namibia.

1.2 The Immigration Control Act, No. 7 of 1993.

This Act of the Namibian Parliament is the only legislation providing for the legal deportation of aliens or prohibited immigrants from Namibia.

The procedure to deport prohibited immigrants is less cumbersome than that of extradition.

In view of the fact that we are dealing in this case only with alleged prohibited immigrants, I will refer only to the provisions dealing with them and the requirements for a legal deportation in their case.

PART VI of the Act under the subheading

> *"Prohibited immigrants," in section 39(2) set out the various categories of prohibited immigrants.*
>
> *None of the categories provided corresponds to the accused in this case, were they persons who were in Namibia and were the Namibian authorities to consider their deportation.*
>
> *However, for an appropriate case, section 42 provides for the "arrest, detention and removal of prohibited immigrants".*
>
> *Subsection (1) provides for the powers of an immigration officer to arrest a person "who enters, or has entered or is found within Namibia, on reasonable grounds is suspected of being a prohibited immigrant in terms of any provision of the Act, an immigration officer may arrest such person."*

Subparagraph (b) provides that a police officer or other persons authorized in writing may also arrest in certain specified circumstances.

Subsection (2) provides *inter alia* that an immigration officer detaining a person shall *inter alia,*

(a) comply with the provisions of Art 11(5) of the Namibia Constitution which reads as follows:

"*No persons who have been arrested or held in custody as illegal immigrants shall be denied the right to consult confidentially legal practitioners of their choice, and there shall be no interference with this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security or for public safety.*"

Subsection (3)(a) provides that the person arrested may be released, if a guarantee for payment or cash is given, as surety that the person arrested will comply with conditions.

Provision is made for an investigation to establish whether or not the person is a prohibited immigrant within a specified period of 14 days, unless the Minister consent to a longer period.

Section 43 and 44 provides that in terms of Art 11(4) of the Namibian Constitution, the person detained may only be removed from Namibia if the Tribunal established in terms of the Constitution takes a decision to that effect.

Art 11(4) of the Namibian Constitution provides:

> "*Nothing contained in Subarticle (3) hereof shall apply to illegal immigrants held in custody under any law dealing with illegal immigration: provided that such persons shall not be deported from Namibia unless deportation is authorized by a Tribunal empowered by law to give such authority*."

Section 45 provides for witness and evidence before the tribunal.

Section 46 provides that the Minister may modify a decision by the Tribunal for removal.

Section 47 provides that a question of law can be reserved by the Tribunal for decisions by the High Court.

Section 48, provides for steps to be taken where removal is authorized.

These steps include *inter alia* a written notification of the period within which the deportee must leave Namibia.

Section 49 of the Act, provides for special procedures for the deportation of a person for reasons of state security, where the Minister gives the order for such deportation on the recommendation of the Security Commission.

In such a case the Minister and the Security Commission will however have to comply with Article 18 of the Namibian Constitution providing for fair and reasonable procedures and decisions. (see in this regard the decision of the Namibian Supreme Court in the case of Government of the Republic of Namibia v Sikunda, NmSc, not reported, 21-2-2002)

The Namibian Extradition Act and Immigration Control Act demonstrate the vast difference in the concept and purpose of extradition compared with deportation, although both have extensive requirements for fair and reasonable procedures safeguarding not only the public interest of the state or states involved, but safeguarding in the public interest, the fundamental rights and freedoms of the individual when the states involved seek to extradite or the states seek to deport.

The legal extradition normally envisages the involvement of two sovereign states and the person or persons to be extradited, whereas the legal deportation normally envisages only the deporting state and the person or persons to be deported.

As far as extradition is concerned, the purpose is to remove a fugitive from justice from the state where he or she is to be found to the requesting state, in order to either serve his or her sentence if already convicted and sentenced, or to be tried in the requesting state for specified offences allegedly committed in that state.

On the other hand the purpose in cases of deportation is to remove a person from a state where his or her continued presence is not regarded by the designated authorities as in the public interest of that state and consequently order such person to leave that state, irrespective of his/her destination.

Where deportation procedures are used but the real purpose is to remove a fugitive from justice to a requesting state for trial or to serve his sentence, such action is regarded as a form of "disguised extradition".[4]

2.1 The Botswana Extradition Act 18 of 1990 as amended by Act 9 of 1997

The purpose of the Act appears from the heading, which read; "An act to re-enact with amendments the law relating to the extradition of persons accused or convicted of crimes committed within the jurisdiction of other countries."

This heading in the context of the provisions of the Act indicates that "the law" is the exclusive law for the extradition and that extradition other than as provided in this law, will be illegal in Botswana.

The aim is similar to that as stated in the Namibian Extradition Act No. 11 of 1996, although the Botswana Act indicates with greater clarity that it is "an act to re-enact with amendments 'the law' relating to the extradition of persons."

The Namibian Act must nevertheless, by the clear implication from the context and the fact that it has repealed effectively, the whole of the

[4] See M.G. Cowling, "Unmasking 'disguised' extradition

previous Extradition Acts 67 of 1962 as well as the Extradition Amendment Act 46 of 1967, constitute the exclusive legal vehicle for extradition of fugitive offenders entering or found in Namibia, to countries which request their return.

The aforesaid Botswana Act embodies substantially the main features of the Namibian Act although it is not clear from the documents handed in by consent at the hearing in the *Court a quo* whether the Botswana Act was made applicable to Namibia by order of the Minister. It was apparently accepted at the aforesaid hearing that it was made applicable to Namibia in accordance with section 3 of the Botswana Act.

It was also accepted by the High Court of Botswana in the Botswana decision of Kavena Likunga Alfred v The Republic of Namibia, case No. 108/2001, 3/12/2002, that the Botswana Act, "with respect to the surrender to that country of any fugitive criminal," is applicable to Namibia.

I will refer only specifically to a few provisions that need to be emphasized.

Section 3 of the Botswana Act clearly spells out the application of the Act.

Subsection (1) provides:
"*Where an arrangement has been made with any country, with respect to the surrender to that country of any fugitive criminal, the Minister may, having regard to the reciprocal provision under the law of that country, by order published in the gazette direct*

that the Act shall apply in the case of that country subject to such conditions, exceptions and qualification, as may be specified in the order.

Section 5, under the heading "Liability to surrender" provides:

"*Where this Act applies in the case of any person who is in or suspected of being in Botswana, shall be liable to be apprehended and surrendered in the manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the commencement of this Act or the application of this Act to that country, and whether there is or is not concurrent jurisdiction in a Court of Botswana over that crime.*"

Section 7, under the heading "restrictions on surrender of criminals"

provides *inter alia:*

(a) *A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if it appears to the Court or the Minister that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character*-------"

"*(c) A fugitive criminal shall not be surrendered to any country if there is the likelihood that he may be prejudiced at his trial or punished, detained or restricted in his personal capacity by reason of his political opinions.*"

(d) A fugitive criminal shall not be surrendered if the facts on which the request was made, do not constitute an offence under the laws of Botswana;"

"*(e) A fugitive criminal shall not be surrendered to any country unless provision is made by the law of that country, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Botswana, be detained or tried in that country for any offence committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is granted.*"

"*(f) A fugitive criminal shall not be surrendered until the expiration of 15 days from the date of being committed to prison to await his surrender.*"

(2) *An offence is not an offence of a political character -*

(a) *if it is an offence in accordance with the provisions of any international convention to which Botswana and the requesting country are parties and there is an obligation on each party to afford mutual assistance to surrender a fugitive criminal accused or convicted of the commission of the offence;*

(b) if it is an offence against the life or person of a Head or State or a member of his immediate family, a Head of Government, or a minister or if it is any related offence;
(c) if it is murder or any related offence."

Section 8, under the heading "Request for surrender, warrants etc and committal proceedings," provides in subsection (1):

"*(1) A requisition for surrender of a fugitive criminal of any country, who is 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 of arrest of the fugitive country with the request that the warrant be endorsed for the arrest of the fugitive offender.*

(3) *The Minister may transmit the warrant to a magistrate to endorse it for the arrest of the fugitive criminal."*

Section 9 makes provision for the refusal where the offence is too trivial.

Section 10, provides for the requirements for endorsement.

Section 11, provides for the requirements for a provisional warrant.

Section 12, provides for the requirements of detention.

Section 13, provides for the requirements of a proper enquiry in the form of a preparatory examination.

Section 14, deals with committal or discharge at the conclusion of the hearing.

Section 15, provides for the special procedure required before committal is ordered.

Subsection (2) provides for a duly authenticated record of the case prepared by a competent authority in the requesting country in accordance with the provision of subsection (3) and (4).

Subsection (3) and (4) provides for the requirements of such a record, *inter alia* the particulars of the fugitive, specifying *inter alia* date and place, legal description and relevant legal provisions, an abstract of the available evidence and a verified copy of reproduction of exhibits, the duly authentication of the record on oath or affirmation and a certificate by the Attorney-General of the requesting state that he/she is satisfied that there is a sufficient case to be tried in the Courts of the requesting country.

Section 16, provides for a report of the committal, if any, to the Minister, who can then decide on issuing a warrant of the Minister for the surrender of the fugitive to the requesting country.

Section 17, provides for an appeal by an aggrieved party to the High Court of Botswana.

Section 18, provides for the requirements of a waiver by the fugitive, which if properly given, can then dispose of the enquiry mentioned in section 13.

Section 19, provides for the surrender or discharge of a fugitive offender.

Section 20, provides for the discharge of an apprehended fugitive if he is not surrendered or conveyed out of Botswana within two (2) months of his committal, or if an appeal has been lodged, after the decision of the High Court on the matter.

It is abundantly clear that the Botswana Extradition Act provides essentially for the same principles and the same procedures as the Namibian Act.

The Botswana Act was the legal framework under which the Botswana High Court in the recent case of Kavena Likwega Alfred v The Republic of Namibia, mentioned *supra,* had to decide on appeal whether or not a group of Namibians, from the Caprivi area in Namibia and who were accused of the same crimes as the present group of 13 accused, had been correctly ordered by the magistrate to be repatriated to Namibia for trial.

In that case, all the procedural requirements set out above were met but the Court found that the crime of Treason was a political crime and that the fugitives could not be extradited for that crime in terms of section 7(a) of that Act.

In regard to the other crimes listed which were extraditable, the Court found that a case had been made by the then appellants in terms of section 7(b) that there was a likelihood that the accused may be prejudiced at their trial or punished, detained, or restricted in their personal capacity by reason of their political opinions.

Evidence of other abuses in Namibia, including hate speech by some SWAPO leaders, officials and members threatening harm and even death to the accused, were some of the reasons for the Courts conclusion.

In the result the appeal by the accused was upheld, the order for their repatriation set aside and the appellants released from custody.

It is obvious that if the same legal procedures were used in regard to accused Likanyi in this case, he may have been discharged by either the Magistrate holding the enquiry or the High Court on appeal.

Unfortunately, none of the requirements for a valid and lawful extradition in terms of Botswana law and/or Namibian law were met. The question is what is the effect of this fact on jurisdiction of the Namibian Courts in the case of the said accused, who was the only accused handed over by Botswana officials to Namibian officials. This question will be dealt in further detail in the final part of this judgment.

2.2 The Botswana Immigration Legislation Chapter 25:2.

This Botswana law once again corresponds in its main principles and procedures with that of Namibia.

Section 7(a) - (h), sets out the list of persons who "shall be prohibited immigrants and whose entry in or presence within Botswana is unlawful- --"

Only the following categories could be applicable to the Namibians who are the accused in this case:

"*(f)* *any person who, in consequence of information received from any source deemed by the President to be reliable, is declared by the President to be an undesirable inhabitant or visitor to Botswana;*

(h) *any person named in an order made under section 27(1) or of a class or description specified in such order."* *Section 27 provides for the President to name a person or a class in the Gazette, who would in his opinion, endanger the peace and security in Botswana.*

Section 10, provides for the "Detention of suspected prohibited immigrants, by Immigration officers for certain specified period whilst inquiries are made.

Subsection (2) provides for a report by the Minister within seven (7) days.

Subsection (4) and (5) provides however such person may be released on certain conditions, pending the finalization of the inquiries.

Section 11, provides for proper written notice to the suspected prohibited immigrant setting out the grounds for the order and appeals to the nearest magistrate court.

Such court may however reserve questions of law for decision by the High Court.

Section 12, provides that the President and the Minister may in certain specified circumstances, exempt prohibited immigrants.

Section 13, provides for the removal of certain prohibited immigrants by an immigration officer or by a police officer acting under the authority of an immigration officer, after conclusion of all the procedures including an unsuccessful appeal.

Section 27(1) provides:

"*The President may, by order published in the Gazette, prohibit the entry into Botswana of any person (not being a citizen of Botswana) who -*

(a) *is named in such order; or*
(b) *is of a class or description specified in such order, if in his opinion the presence within Botswana of such person, or a person of such class or description, as the case may be, would endanger the peace or security of Botswana.*

(2) *Any person named in an order made under subsection (1), or of a class or description specified in such order, who enters Botswana, except in accordance with an exemption given under section 12, may be arrested without a warrant and shall be guilty of an offence and liable to the penalties prescribed in section 32(4).*

(3) *Where any person who is named in an order made under subsection (1), or who belongs to a class or who conforms to a description specified in such order is found in Botswana, he shall be deemed to have entered in contravention of subsection (2) unless the contrary is proved in certain circumstances."*

Subsection (1) provides that subject to subsection (6), "the President may make an order requiring any alien to leave Botswana (in this section referred to as a deportation order) in either of the following circumstances-

(a) *if that alien is convicted of any offence punishable with imprisonment and the Court before which he is convicted, or any court to which his case is brought by way of appeal*

against conviction or sentence recommends that a deportation order be made in respect of that alien; ……"

(b) *if the President deems it to be conducive to the public good to make a deportation order in respect of that alien.*"

Subsection (3) provides for an appeal against such order.

Subsection (4) provides: "a deportation order shall be made in writing under the hand of the President and the President shall cause the order to be served on the person on whom it relates and shall state in the order the period that is to lapse after such service before the order takes effect.

Subsection (5) provides:
If on the expiration of the period specified in the deportation order the alien in respect of whom the order was made has not left Botswana, he shall be removed from Botswana by an immigration officer and section 13(2) and 14 shall have effect."

3.1 *The Zambian Extradition Act*

Section 5 of PART II of this Act provides:

"*Where a country in relation to which this part applies duly regards the surrender of a person who is being proceeded against in that country for an offence or who is wanted in that country for the carrying out of a sentence, that person shall, subject to and in accordance with the provisions of this part and of Part IV, be surrendered to that country.*"

Section 6 under the heading – "Request for extradition", proceeds to lay down the following legal requirements of a request:

"*A request for the extradition of any person under this part shall be made in writing to the Attorney-General and shall be communicated by -*

(a) *a diplomatic agent of the requesting country, accredited to the Republic; or*
(b) *any other means provided in the relevant extradition provisions.*"

Section 7, provides for the "Documents to support request" and lays down the mandatory requirements. It reads:

"*A request for extradition under this part shall be accompanied by the following documents:*

(a) *the original of an authenticated copy of the conviction and sentence immediately enforceable, or as the case may be, of the external warrant or other order having the same*

effect and issued in accordance with the procedure laid down in the law of the requesting country;

(b) *a statement of each offence for which extradition is requested specifying, as accurately as possible, the time and place of commission, its legal description and a reference to the relevant provisions of the law of the requesting country;*

(c) *a copy of the relevant enactments of the requesting country, or where this is not possible, a statement of the relevant law; and*

(d) *as accurate a description as possible of the person claimed, together with any other information, which will help to establish his identity and nationality."*

(Subsection (a) requires the original or authenticated copy of the external warrant or other order having the same effect and issued in accordance with the procedures laid down in the law of the requesting country.)

Section 8 lays down the procedure for the issue of a warrant of arrest by a magistrate at the request of the Attorney General.

Extensive further provisions deals with the situation when the Attorney General is not satisfied.

Subsection (4) makes it mandatory for the Attorney General to refuse extradition if he is of the opinion that the case is one in which extradition is prohibited under any provision of Part IV or under the relevant extradition provisions.

Subsection (5) provides that:

"*A person arrested under a warrant issued under this section shall be informed, in a language that he understands, of the reasons for his arrest and detention and shall be brought before a magistrate as soon as practicable.*"

Section 9 provides for the issue of a provisional warrant in certain circumstances.

Section 10, deals with the committal or discharge of the detained person by a magistrate before whom he must be brought after arrest.

The magistrate after hearing evidence, in the case of an extraditable offence, and the evidence of the accused if he testifies, if he is satisfied that the extradition has been duly requested, that this part applies to the requesting country, that extradition is not prohibited by this part or Part IV, that the documents required have been produced, shall make an order committing that person to prison, there to await the warrant of the Attorney-General for the surrender to the requesting country and shall forward a copy of such committal to the Attorney-General.

On the other hand the magistrate shall, if of the opinion that the information produced is insufficient, “order that the person claimed be discharged and shall forthwith notify the Attorney-General in writing.”

Section 11, provides for a lapse of time of at least 15 days from the date of committal to the date of surrender or from the date of the conclusion of any proceedings brought by such person.

Section 12, deals with "the surrender of the prisoner under warrant of the Attorney General" as follows:

"*(1) Subject to section 11 and 38, if the person claimed is committed under the section and is not discharged by the decision of the High Court in any habeus corpus proceedings, or pursuant to an application under subsection (2) of section 31, issue a warrant directing that the person claimed be brought to some convenient point of departure from the Republic and there to be delivered to such other person as, in the opinion of the Attorney-General, is duly authorized by the requesting country to receive him and convey him from the Republic to the requesting country; and he shall be surrendered accordingly...”*

Section 13, defines an "extraditable crime" as follows:

"*For the purposes of this part 'extraditable crime' means an offence (wherever committed) against the law in force in the Republic and punishable under the laws of the Republic, being an offence for which extradition is provided under the terms of an extradition agreement, or for which reciprocal extradition facilities are afforded between the Republic and the requested country; the requested country being one to which this part applies by virtue of an order made pursuant to section 3.”*

Section 31, deals with political offences and provides:

“(a) If the Attorney-General, believes for any reason for which extradition is sought is a political offence or

(b) Receives from a magistrate a request pursuant to subsection (2); he shall refer the request for extradition together with the accompanying documents and such other documents that he may

> *deem to be relevant and also a statement of any other relevant information he may have in that regard to the President for a ruling on the issue.*
> *This provision is in addition to the right given to the detainee at the enquiry proceedings before the Magistrate in accordance with subsection (2) of section 31, to apply to the Magistrate to submit to the Attorney-General a request for the determination of the question whether the offence "is or is not a political offence or an offence connected to a political offence."*

Section 17, deals with extraditable offences.

The crimes of Treason and Sedition are not mentioned in that schedule obviously because such offences are offences of a political nature and extradition is thus not allowed in the case of such alleged crimes.

The crime of Murder, as well as any offence connected to the alleged political offence, will then also be an offence in regard to which extradition will be prohibited.

Section 19 further provides that if the President notifies the Attorney General that he - the President is satisfied that -

(i) *the request for the surrender of the person claimed was made for the purposes of prosecuting and punishing him on account of his political opinions; or*

(ii) *if the person claimed is surrendered to that country he may be prejudiced at his trial, or punished, detained or restricted in his personal liberty, by reason of his political opinions.*"

Section 24(1) provides for the proceedings after arrest on a warrant as follows:

> "A person who is arrested under any warrant pursuant to Section 21, shall be informed, in a language he understands, of the reasons for his arrest and detention and shall, unless he is sooner discharged, be brought as soon as practicable before a magistrates court."

Section 24 provides that the Magistrate shall, if the prisoner is committed for extradition, inform the prisoner that he will not be surrendered until a period of 15 days from the date of committal or conclusion of any habeus corpus proceeding and that if he asserts that his detention is unlawful, he may apply to a Court of competent jurisdiction, for a writ of habeus corpus.

Section 49, provides for the procedure after arrest.

Subsection (1) states:

> "*A person who is arrested under an external warrant endorsed pursuant to section 46, or under a provisional warrant issued pursuant to section 47, ...shall be informed in the language which he understands of the reasons for his arrest and detention and shall as soon as practicable be brought before a magistrate.*"

Section 52 further provides a further remedy to the person who is ordered by the Magistrate to be surrendered. He/she can apply to the High Court of Zambia for a review of the order made by the Magistrate.

The judgment of Horn J in the Botswana High Court in the case of Kakena v Ors and The Republic of Namibia decided on 3 December 2002, dealt with an appeal from the decision of a magistrate to extradite to Namibia another group of 13 Namibians from Caprivi.

In that case Namibia had formally complied with all the required legal procedures to obtain extradition. The High Court set aside the decision of magistrate to make an extradition order and ordered the release of the detainees.

In the judgment the concept of “offence of a political character” was extensively dealt with and the criteria from several judgments applied, some of these were:

Hawkins J in Re Castioni (1891)/49 accepted a definition of a fellow judge Stephen J in his book "History of the Criminal Law of England" in Vol. 11, p. 70 - 71 where it is stated in regard to the Extradition Act of the Swiss Republic:

> "*I think therefore, that the expression in the Extradition Act ought, (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed part of political disturbances* ----."

Horn J further referred to the case of Kokzynski where Lord Goddard, CJ stated:

> "*-----but in my opinion the meaning is this: "If, in proving the facts necessary to obtain extradition, the evidence adduced in support shows the offence has a political character, the application must be refused, but although the evidence in support appears to disclose merely one of the scheduled offences, the prisoner may show that, in fact, the offence is of a political character. Let me try to illustrate this by taking a charge of murder.*
>
> *The evidence adduced by the requisitioning state shows that the killing was committed in the cause of a rebellion. This at once show the offence to be political; but if the evidence merely shows that the prisoner killed another person by shooting him on a certain day, evidence may be given, to show that the shooting took place in the cause of a rebellion. In other words the political character of the offence may emerge either from the evidence in support of the requisition or from the evidence adduced in answer.*"

In my respectful view Horn J correctly relied on these expositions to come to his conclusion.

However it is not necessary to take this matter further at this stage, because there was no dispute in the *Court a quo* about the true meaning of the term "offence of a political character" or offence connected to it.

The Government of Botswana has taken the matter on appeal but the judgment on appeal has not come to hand at the time of writing this judgment.

3.2 The Zambian "Immigration and Deportation Act - Chapter 123."

The introduction of the Act states:

"*An Act to regulate the entry into and the remaining within Zambia of immigrants and visitors; to provide for the removal from Zambia of criminals and other specified persons; and to make provision for matters incidental to the foregoing.*"

In Section 2 of the Act "prohibited immigrant" is defined as "a person described in section 22 as a prohibited immigrant in relation to Zambia."

(Section 22(1) in turn provides:

"Any person who belongs to a class set out in the Second Schedule shall be a prohibited immigrant in relation to Zambia." (The second schedule sets out Classes A - H, most of, which are not applicable to any of the accused).

Subsection (2) of section 22 further provides that:

> "*Any person whose presence in Zambia is declared in writing by the Minister to be inimical to the public interest, shall be a prohibited immigrant in relation to Zambia.*"

Subsection (5) of section 22 provides that the Minister may exempt any person from falling under the aforesaid classes.

Subsection 23 (1) provides:

"Any immigration officer may, or if so directed by the Minister in the case of a person to whom subsection (2) relates, shall by notice served in person on any prohibited immigrant, require him to leave Zambia."

Subsection (2) provides:

"*Any notice served in accordance with the provisions of subsection (1) shall specify:*

(a) *the class set out in the Second Schedule to which it is considered he belongs or that he is a person to whom subsection (2) of section 22 relates;*
(b) *the period within which he is required to leave Zambia; and*
(c) *the route by which he shall travel in leaving Zambia."*

Section 24 provides that "a person who has received a notice under section 24, may make written representations to the minister against such requirement to leave, and deliver it to any immigration officer, police officer or prison officer."

The Minister shall notify the person who made the representation whether or not his representations were successful.

Section 26 (2) provides that "any person who in the opinion of the minister is by his presence or by his conduct likely to be a danger to peace and good order in Zambia may be deported from Zambia pursuant to a warrant under the hand of the Minister."

Section 26(3) provides:

"*Any prohibited immigrant who -*

(a) *Having been required under section 23 to leave Zambia, fails to do so within the prescribed period; or*
(b) *Fails to comply with any condition specified in a temporary permit issued to him; may without warrant be arrested, detained and deported from Zambia by an immigration officer or police officer.*

Section 26(4) provides:

> *"An immigration officer may without warrant arrest, detain and deport from Zambia any person whom, within 7 days of appearing before an immigration officer in accordance with section nine, he reasonably believes to be a prohibited immigrant -*
>
> (a) *who is not the holder of a valid temporary permit;*
> (b) *who has not been served with a notice under section 23 requiring him to leave Zambia; and*
> (c) *with respect to whom the procedure in section 23 is inadequate to ensure the departure from Zambia of such person.*"

Section 9 however deals with entrants who arrive in Zambia by air -

> *"(a) at any prescribed airport and intends to leave the precincts of such airport shall forthwith proceed to and appear before the nearest immigration officer.*
> *(b) at any place other than a prescribed airport shall forthwith proceed to and appear before the nearest immigration officer;"*

The provisions of section 26(4) are therefore only applicable to persons who arrive in Zambia by air.

Section 35, deals specifically with "Reasons to be given for arrests and detention and provides:

> "*Every person arrested or detained under the provisions of this Act shall be informed as soon as reasonably practicable in a language which he understands of the reason for his arrest or detention."*

4. International covenant of civil and political rights

The word “covenant” is defined in the Oxford Advanced learner’s dictionary of Current English by A.S. Hornsby as “a formal agreement that is legally binding”. I adopt this definition as correct. The title “International Covenant of Civil and Political Rights” therefore means a legally binding international agreement.

The recognized sources of International Law are: Custom; Treaties; or Conventions; General Principles of Law as recognized by Civilised Nations; Equity; Judicial Decisions and Decisions of Municipal Courts; Resolutions of the political organs of the United Nations. Conventions such as the International Covenant of Civil and Political Rights and the United Nations Convention and Protocol in respect of Refugees, have indeed become part of International Law.[5]

This Covenant was acceded to by Namibia on 28/11/1994 and has became part of the law of Namibia by virtue of art. 144, read with articles 63(e) and 32(3)(e) of the Namibian Constitution.[6]

Some of its provisions have also been followed almost literally in the Namibian Constitution. Not only has it become part of Namibian domestic law by virtue of the Namibian Constitution, but some of its basic principles have been incorporated into the Namibian, Botswana and Zambian laws relating to extradition, deportation and repatriation. The Convention is also part of

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[5] International Law, 4th ed. By Wallace, pp 7028.
See also: Dugard, International Law, a South African Perspective, pp. 23 – 35.
[6] See also the decision of the Namibian Supreme Court in Government of the Republic of Namibia & o v Mwilima & O, NmSC Case No. 29/2001, delivered on 7/6/2002, not reported.

International Law and breaches of it are not only breaches of the domestic law of these countries, but breaches of International Law.[7]

Some of the provisions relevant to the issues in the instant case, are:

> *"Article 4:*
>
> *1.In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law an do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*
>
> *2.No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.*
>
> *3.Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.*
>
> *Article 5:*
>
> *1.Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.*
>
> 2. *There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, convention, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."*

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[7] International Law – A South African Perspective by John Dugard, 1994 at 1 – 13, 23 – 35.
International Law by Rebecca M.M. Wallace, 4th ed., 9 – 28, 230 – 250.

“Article 9

1. *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

2. *Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*

3. *Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.*

4. *Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*

5. *Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*

"*Article 10*

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

"*Article 12*

1. *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*

2. *Everyone shall be free to leave any country, including his own.*

3. *The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of other, and are consistent with the other rights recognized in the present Covenant.*

4. *No one shall be arbitrarily deprived of the right to enter his own country.*"

"*Article 13*

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

Art. 14 is the equivalent of part. 12 of the Namibian Constitution relating to the requirements of a fair trial.

Art. 16: "Everyone shall have the right to recognition everywhere, as a person before the law."

A few further comments on these provisions are apt:

Ad art. 9.1, art. 10, art. 13 and art. 16: not only "arbitrary arrest: is illegal but alkso "arbitrary detention".

Any "abduction", abduction in essence, or act tantamount to abduction or the act of taking prisoner or any other action depriving a person of his liberty, is a contravention of the convention and illegal in domestic law, as well as international law, except if such action was taken on grounds and in accordance with such procedures as are established by law.

Art. 16 reaffirms in effect that no person, anywhere, may be treated as a mere chattel that can be bundled across international boundaries at the whims of unauthorized officials, in defiance of their fundamental rights.

In the instant case, the action taken against the accused were not taken in accordance with legal procedures and on grounds established by law.

5. The Convention relating the status of refugees and stateless persons as supplemented by the protocol relating to the status of refugees:

The aforesaid convention entered into force on 22 April 1954 and the Protocol on 4th October 1967.

Namibia acceded to the Protocol on 17 February 1995 and Zambia and Botswana became parties prior that date.

5.1 A “refugee” after amendment by the aforesaid Protocol, is a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; “or who not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.”

In the instant case all the accused are Namibians and the lastmentioned category in the definition does not apply. All the accused, according to their own uncontested version, were such refugees.

5.2 However, par. F of the aforesaid convention, states that: The Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a)he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b)he has committed a serious non-political crime outside the country of refugee prior to his admission to that country as a fugitive.

(c)he has been guilty of acts contrary to the purposes and principles of the United Nations.

5.3 Article 16: Access to Courts:

This article provides:

"1. A refugee shall have free access to the courts of law on the territory of all contracting states.

2. A refugee shall enjoy in the Contracting state in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*."

The above exclusion does not apply to any of the accused, alternatively has not been proved by the State to apply to any of the accused.

In this regard the principle of international law that a person shall be presumed "not guilty" until proved guilty shall apply. This is also why the extradition procedures provided for by law requires the requesting state to prove a *prima facie* case for specified offences, before extradition will be ordered.

"5.3 Article 31: Refugees unlawfully in the country of refuge

1. *The Contracting States shall not impose penalties, on account of their illegal entry of presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory authorization, providedt they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*

2. *The Contracting States shall not apply to the movements of such refugees restrictions other than those, which are necessary and such restrictions, shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all necessary facilities to obtain admission into another country.*

5.4. Article 32: Expulsion

1. *The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.*

2. *The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of nations security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.*

3. *The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures, as they may deem necessary.*

5.5 Article 33: Prohibition of expulsion or return ('refoulement')

1. *No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*

2. *The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of the country.*" *(my emphasis added)*

5.6 Art. 35: Co-operation of the National Authorities with the United Nations.

35.1The contracting states undertake to cooperate with the Office of the united Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it in the exercise of its functions and shall in particular facilitate its duty of supervision the application of the provisions of the Convention.

5.7 Art. V (of the Protocol) under heading: Voluntary repatriation:

This article of the aforesaid Protocol reaffirms:

1. The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.

2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of the refugees who request repatriation." (My emphasis added.)

5.8OAU Convention governing the Specific Aspects of Refugee problems in Africa.

In its Resolution No. 10, the aforesaid UNO convention was adopted by the Assembly of Heads of State and Government, calling upon Member States of the Organization who had not already done so, to accede to the aforesaid United Nations Convention of 1957 and the Protocol of 1967 relating to the Status of Refugees, and meanwhile to apply their provisions to refugees in Africa.

The OAU convention repeated some of the principles of the international convention and elaborated on some, but did not adopt any principles in conflict with the aforesaid international convention and protocol.

In Article II, under the heading "Asylum" the following principles are stated:

> *"1. Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure settlement of those refugees who, for well-founded reasons, are unable, unwilling to return to their country of origin or nationality.*

2. The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.

3. No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1, paragraphs 1 and 2.

4. Where a Member State finds difficulty in continuing to grant asylum refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.

5. Where a refugee has not received the right to reside in any country asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.

6. For reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin."

5.8 It should be noted that the abovestated UNO convention and Protocol on the Status of Refugees, became part of the domestic law of Namibia in the same manner as the International Covenant of Civil and Political Rights, dealt with under Section C4 *supra*. (See art. 144 of the Namibian Constitution, read with articles 63(e) and 32(3)(e).)

Similarly the said UNO convention and Protocol became part of the domestic law of Zambia and Botswana upon their accession thereto.

5.9 It should be clear from the above and the facts of the instant case, that not only have the unauthorized officials of Botswana and Zambia, in conjunction with the unauthorized officials of Namibia, failed to act in terms of the provisions of the respective domestic, extradition and deportation laws, but they have also acted in defiance of and in conflict with the International Covenant of Civil and Political Rights pertaining to persons in the position of the accused, as well as of the United Nations Convention and Protocol relating to refugees.

In so doing, these unauthorized officials have once again not only acted in conflict with domestic law, but also in conflict with International Law.

SECTION D: THE RELEVANT CASE LAW

1. Ocalan v Turkey, 15 BHRC (App. No. 46221/99)

This is a decision of the European Court of Human Rights, where the applicant, Ocalan, applied to that Court for certain relief – during his detention as well as after his conviction and sentence of death by a Turkish Court.

He was prosecuted and convicted in regard to alleged terrorist activities in the Turkish state during which there was high loss of life. He was arrested in Kenya and removed to Turkey for detention and trial. His arrest and removal was facilitated by close cooperation between Turkish and Kenyan officials which amounted to an abduction.

Distinguishing features distinguishing this case from the instant case before us are *inter alia* the following:

(i) The European Court was not deciding whether or not it or the Turkish Court had jurisdiction to try Ocalan for his alleged crimes.

(ii) The applicant asked the European Court to rule on various alleged contraventions of the European Convention by the Turkish authorities.

(iii) There was no extradition treaties or reciprocal legislation relating to extradition and/or deportation in existence applicable to Kenya and Turkey "laying down a formal procedure to be followed". The applicant was detained and removed in accordance with "informal arrangements for cooperation".

(iv) There were seven (7) formal legal warrants of arrest issued by the appropriate legal authorities for the arrest of Ocalan, as well as a so-called "red notice" circulated by INTERPOL, which amounts to a "wanted notice".

(v) The European Court had jurisdiction to decide whether or not the procedures of arrest, detention, removal trial and sentence contravened the European Convention. The aforesaid convention contained many provisions similar to those in the Namibian Constitution pertaining to breach of the provisions of that Convention. On the other hand, Kenya was apparently not a member state of the European Council and thus

not bound by its Convention and the various Protocols applicable to members. The Court thus had no jurisdiction over breaches by Kenya of the European Convention and the relevant Protocols.

(vi) The Court pointed out that although states faced immense difficulties in protecting their communities from terrorist violence, the Convention prohibited in absolute terms torture or inhuman or degrading punishment, irrespective of the victims conduct. These prohibitions are similar to fundamental rights and freedoms, but it is not clear from the available report of the Court's judgment what sanction the European Court could impose if a breach is found.

The Court in its assessment nevertheless took note of the fact that the Kenyan authorities cooperated with the Turkish authorities in the arrest and removal of Ocalan from Kenya to Turkey and that Kenya had at no stage complained that Kenya's sovereignty was breached by the Turkish officials. The Court however, did not at any stage find itself prohibited from enquiring into the facts pertaining to the arrest and removal of Ocalan from Kenya and in fact enquired into those facts.

(vii) The Court in fact found several breaches by Turkey of the requirements of a fair trial and in particular in regard to the imposition of the death sentence by the Turkish Court.

(viii) In regard to the applicant's arrest and detention the Court held as follows:

> *"It follows that the applicant's arrest on 15/2/1999 and his detention must be regarded as having been in accordance with 'a procedure prescribed by law' for the purposes of art. 5(1)(c) of the convention. Consequently there has been no violation of art. 5(1) of the convention."*

In coming to its abovestated conclusion, the Court in its assessment first stated the general principles that it would apply. In this regard the Court stated inter alia:

Par. 86 of the Court's judgment:

> *"The Court reiterates that on the question whether detention is 'lawful' including whether it complies with a 'procedure prescribed by law, the convention refers back essentially to national law and lays down the obligation to conform to the substantial and procedural rules thereof. However, it requires in addition that any deprivation of liberty should be consistent with the purpose of article 5, namely to protect individuals from arbitrariness. What is at stake is not only the 'right to liberty' but also the 'right to security of person'. ..... The Court has previously stressed the importance of effective safeguards, such as the remedy of habeus corpus, to provide protection against arbitrary behaviour and incommunicado detention..."*

Par. 89 of the judgment:

> *"The Court points out that the Convention does not prevent cooperation between states, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to justice, provided that it does not interfere with any specific rights recognized in the Convention..."*

The specific rights referred to will obviously include the fundamental rights and freedoms relating to the "rights to liberty" and the "right to security" of the person.

Arbitrary arrest and detention by vigilante and other unauthorized groups or persons, depriving a person of the aforesaid rights, freedoms and guarantees, obviously cannot be legally permissible and will thus be in conflict with the convention.

Par 90 of the judgment:

> *"As regards extradition arrangements between states when one party is a party to a convention and the other not, the Court considers that the rules established by an extradition treaty, or in the absence of any such treaty, the cooperation between the states concerned are also relevant factors to be taken into account for determining whether the arrest that has led to the subsequent complaint to the Court was lawful.*
>
> *The fact that a fugitive has been handed over as a result of cooperation between states does not in itself make the arrest unlawful or therefore give rise to any problem under art. 5…"*

This paragraph is no justification whatever to conclude that even where there is an extradition treaty or reciprocal legislation between states regarding extradition and deportation, that cooperation and action in conflict with such treaties and laws will nevertheless be lawful.

Par 91 of the judgment:

> *"The Court further notes that the Convention contains no provisions concerning the circumstances in which extradition may be granted."*

In the case before this Court, the Namibian Court is in a completely different position, because it has to decide in the light of applicable legislation – many provisions whereof are stated in mandatory form by the sovereign parliaments of the respective governments and which legislation is further similar and reciprocal.

The European Court continued:

> "It considers that, subject to its being the result of cooperation between the States concerned and provided that the legal basis for the order for the fugitives arrest is an arrest warrant – issued by the authorities of the fugitives state of origin, even an extradition in disguise' cannot as such be regarded as being contrary to the convention....."

In the instant case there were no warrants of arrest issued by the authorities pertaining to the 13 accused which provided the legal basis for their being taken prisoner, detained and removed over territorial borders.

Consequently there was no legal basis as envisaged and required by the European Court for the taking prisoner in Botswana and Zambia, their subsequent detention and handing over to Namibian officials for trial in Namibia.

Par 92 of the judgment:

> *"Independently of the question whether the arrest amounts to a violation of the law of the State in which the fugitive has taken refuge (a question which only falls to be examined by the Court (i.e. now the European Court) if the host state is*

> *party to the convention – it must be established to the Court 'beyond all reasonable doubt' that the authorities of the State to which the applicants had been transferred have acted extra-territorially in a manner which is inconsistent with the sovereignty of the host state and therefore contrary to international law……..”*

Par 101 of the judgment:

> *“In the light of these considerations and in the absence of any extradition treaty between Turkey and Kenya laying down a formal procedure to be followed, the Court holds that it has not been established beyond all reasonable doubt that the operation carried out in the instant case partly by Turkish officials and partly by Kenyan officials amounted to a violation by Turkey of Kenyan sovereignty, and consequently of international law.”*

Par 102 of the judgment:

> *“The Court holds, lastly, that the fact that the arrest warrant was not shown to the applicant until he was detained by the members of the Turkish security forces in an aircraft at Nairobi airport (in Kenya) does not deprive his subsequent arrest of a legal basis under Turkish law.”*

It should be noted that the Court concentrated in par 100 –102 supra on whether or not there was in the particular instance a breach of “international law” in regard to the arrest in and removal from Kenya to Turkey.

Its conclusion in this regard was specifically and unequivocally qualified by the fact that in the case of Ocalan – there was “no extradition treaty between Turkey and Kenya laying down a formal procedure to be followed.”

It must be obvious that when there is such extradition treaty and/or reciprocal provisions of the laws of the countries concerned pertaining to extradition and deportation, the enquiry of necessity is much wider than whether or not the conduct in question was in breach of international law or not. At any event, even the issue whether or not such unlawful conduct would be in breach of international law or not, would be much more complicated. But whether or not such lawless conduct by officials in breach of the relevant laws of their own countries is a breach of 'international law' or not, cannot lay all the issues to rest. This is so because such an approach would just brush from the table the fundamental rights and freedoms of the person affected and the procedural guarantees for his/her protection, as if all that matters is the international relations between sovereign states.

It seems to me that this was not intended by the European Court as the consequence of its formulation of par. 100 & 101 supra, particularly in view of the principles it set out in par. 86 for the protection of the individual against arbitrariness and his/her right to protection of the right to "liberty" and "security of the person."

The simple solution is that the test for a domestic Court seized with the question is not limited to an enquiry whether or not there was a breach of international law.

It must be kept in mind that the Appellate Division of the South African Supreme Court in the Ebrahim decision [8] based its decision on the South African common law, which in turn is based on Roman Dutch Law, as adapted

[8] 1991 (2) SA 553 AD.

to local circumstances. Roman Dutch Law is similarly the basis of the Namibian common law.

In its assessment and its consideration of the legality of arrest and handing over procedures where states cooperate in one form or another, the European Court made the following general observation which I can only endorse as far as it goes:

> *"Inherent in the whole of the convention is a search for a fair balance between the demands of the general interest of the community and the protection of the individuals fundamental rights. As movement around the world becomes easier and crime takes a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition....."*

The answer it seems to me is for states to enact fair but effective procedures, simplified if necessary, for extradition and/or deportation in the exercise of their sovereignty. Then to give effect to due process and the rule of law as laid down by their own laws and that of democratic countries the world over and to intensify and expedite international cooperation to this end.

In view of the above analysis, I do not find any support for the appellants' case in the decision by the European Court in *Ocalan v Turkey*.

1.2. *BOZANO V FRANCE* [9]

[9] 9 E.H.R.R. 1986 Series A, No. 111.

In this decision of the European Court of Human Rights, the question of an alleged deportation, and disguised extradition and abuse of power was dealt with.

The facts and decision is correctly summed up in the headnote – which reads as follows:

> *"The applicant was convicted in absentia in Italy of serious crimes. He was arrested in France, whence the Italian authorities unsuccessfully sought his extradition. Their application to a French Court was refused on the ground that the procedure followed in the trial was incompatible with French public policy. This ruling was final and binding on the French government, which then issued a deportation order against the applicant, who was taken by police against his will to Switzerland, and from there successfully extradited to Italy to serve his sentence. In legal proceedings before the French courts, the deportation order was quashed as an abuse of power."*

The Court, by a majority of 11 judges – 2, expressed the opinion that there was in this case a breach of Art 5(1) of the convention in that the applicants arrest and detention with a view to his deportation were not lawful within the meaning of subparagraph (f) of this provision.

Subsection 5(1)(f) provides:

> *"Everyone has the right to liberty of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
>
> *…(f) the lawful arrest or detention of a person – against whom action is being taken with a view to deportation or extradition."*

The Commission dealt with two grounds for the decision of the Administrative Court. I will only refer to its comments on the 2nd ground because it is more in point on the issue of unlawful "disguised extradition." I quote from the report the dicta of the Commission for Human Rights, when dealing with the findings of the so-called "Administrative Court."

It went on to hold that the disputed decision was a misuse of power. In this context it said:

> *'Whereas, secondly, it appears from the file – and is in any case not disputed – that after the deportation order was served on him on 26 October 1979, Mr Bozano, on the orders of the Minister of the Interior, was immediately taken to the Swiss border, where he was held in custody and then handed over to the Italian authorities, who had lodged an extradition request with the Swiss authorities; an extradition request made to the French government, however, had been vetoed by the Indictment Division of the Limoges Court of Appeal on the ground that the rights of the defence in the case had not been sufficiently secured by the Italian proceedings;*
>
> *Whereas the haste with which the impugned decision was enforced, when the applicant had not even indicated his refusal to comply, and the choice of the Swiss border which was imposed on the applicant clearly show the real reason behind the decision: in reality the executive sought, not to expel the applicant from French territory, but to hand him over to the Italian authorities via the Swiss authorities, with whom Italy had an extradition agreement; the executive accordingly sought to circumvent the competent judicial authority's veto, which was binding on the French Government; it follows from this that the impugned decision was a misuse of power (...) (translation).*
>
> *75.The Commission considers that it follows from these findings that the applicant was deprived of his liberty unlawfully.*
>
> *76.This conclusion is confirmed by the interim order made on 14 January 1980 by the President of the Paris Tribunal de Grande Instance, who, while holding that he had no jurisdiction to rule on the enforcement of the deportation order, nonetheless took the view that:*
>
> *'the various events between Bozano's being stopped by the French police and his being handed over to the Swiss police disclose*

manifest and very serious irregularities both from the point of view of French public policy and with regard to the rules resulting from application of Article 48 of the Treaty of Rome; it is surprising to note, moreover, that the Swiss border was chosen as the place of expulsion although the Spanish border is nearer Limoges;
and, lastly, it is noteworthy that the judiciary has not had an opportunity to determine whether or not there were any irregularities in the deportation order against him, since as soon as the order was served on him, Bozano was handed over to the Swiss police despite his protests; and the executive thus itself implemented its own decision (translation).'

77.From these decisions it follows also that the deprivation of liberty was unlawful from the point of view of Article 5(1)(f).

78. The Commission also points out that the Limoges Administrative Court considered that there had been a 'misuse of powers'. By Article 18 of the Convention, no permitted restriction on a secured right – such as the right to liberty – shall be applied for any purpose other than that for which it has been prescribed. The question thus arises whether the unlawfulness of the enforcement of the deportation order affects the applicant's detention in respect of Article 18 of the Convention as well.

79.The Commission considers that it is not required to express a general view on the question whether and under what circumstances what are sometimes known as 'disguised extraditions' by means of deportations might raise problems with regard to the Convention.

80.The Commission further notes that it has already had occasion to consider these problems, particularly as regards the obligations that arise for States to which persons against whom such expulsion measures have been taken are sent.

81.It points out, however, that the Limoges Administrative Court found that the enforcement of the deportation order – and hence the applicant's detention – was unlawful also on the ground that the executive, by proceeding in this way, had sought to circumvent the competent judicial authority's veto on extraditing the applicant, which was binding on the French Government.

82. *The Commission consequently considers that since detention with a view to extradition was no longer possible in French law, the applicant's detention had a purpose different from detention with a view to deportation, as provided for in Article 5(1)(f)". (My emphasis added).*

Although the European Court was not in the position of the Namibian Court a quo, it is instructive on the issues of illegality, unlawful arrest and detention, the purpose to be inferred from the circumstances.

Prof John Dugard also refers to this decision as some of the authority for saying that the practice of "disguised extradition" "achieved by deporting a fugitive to a state in which he is accused of a crime, in accordance with deportation procedures, is widely condemned." [10]

The abuse obviously is even more serious when the alleged deportation is also not done in terms of any law of the "deporting" country, but by private arrangement between unauthorized officials.

1.3 *STOCKE V GERMANY* [11]

In this decision of the European Human Rights Court, a decision of the German Federal Constitutional Court was called into question by the applicant, one Stocke. According to the European Human Rights Court report – the German Constitutional Court in 1984 had held, *inter alia*:

> *"…Even though there also existed decisions expressing the opinion that kidnapping of an accused could bar prosecution in the State the kidnapped person has been taken to, there was no established practice of the like in international law.*
>
> *Furthermore there existed no general rule in international law according to which prosecution of a person was barred because that person had been taken to the prosecuting State in violation of an extradition treaty with another State.*
>
> *The Federal Constitutional Court further stated that although the applicant had unsuccessfully laid charges of kidnapping the Federal Court nevertheless had also dealt with and correctly*

[10] Dugard – International Law – A South African Perspective (1994 at 177)
[11] 11 E.H.R.R. 46

> *denied that prosecution against the applicant had to be considered barred on the assumption that his kidnapping involved the criminal responsibility of German public officials. So far a bar to prosecution had been considered only in cases of inordinate length of proceedings and of incitement by an agent provocateur to commit an offence. Even if kidnapping was likewise to be considered as a possible bar to prosecution this could be assumed only in exceptional cases but not in the applicant's case. Even assuming that the applicant had been taken to the Federal Republic by subterfuge and not by physical force. He had been arrested by the German police on German and not foreign territory. His arrest had been based on a lawful and valid warrant of arrest. Any involvement of public officials in the alleged kidnapping related, according to the findings of the Public Prosecutor, only to unauthorised activities of lower police officers not involving responsibility of superior authorities. In these circumstances there was nothing which would have barred the proceedings against the applicant."*

At the hearing of the plaintiffs appeal, the German government, relying on the findings of the German Constitutional Court, contended that the plaintiffs appeal is inadmissible. The European Commission did not agree. The report of the case states:

> *"4. The Commission, having made a preliminary examination of the applicants complaints, finds that they cannot be declared manifestly ill-founded on the grounds invoked by the government without further investigation into the facts. The application raises difficult issues of fact and law, in particular under Article 5(1)(c) of the convention, which can only be determined by an examination of the merits of the case."*

The European Commission then declared the application in terms of Article 5(1)(c) of the Convention was admissible. It must be noted that the said Article 5(1)(c) provides:

> *"Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law. (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion*

of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so..."

It should be noted that the decision of the German Constitutional Court was taken in 1984, years before decisions such as in Bennet and Ebrahim led and confirmed a new and more enlightened approach.

2. *Prosecutor v Dragon Nicolic*[12]

The report of the case contains the following summary:

> *"Mr Nikolic was originally indicted for 24 counts of crimes against humanity, violations of the laws or customs of war and grave breaches of the Geneva Conventions. Following two amendments to the Indictment by the Prosecution, the accused now stands charged with eight counts of crimes against humanity. The crimes were allegedly committed by the accused during 1992 in the Vlasenica region of eastern Bosnia. Most of the crimes alleged are said to have occurred within the Susica camp, a former military installation converted by Bosnian Serbs into a detention camp of which Nikolic is alleged to have been the commander. In these proceedings Nikolic challenges the jurisdiction of the Tribunal to hear the allegations against him pursuant to Rule 72(A)(i) of the Rules of Procedure and Evidence ("the Rules"). By way of relief, Nikolic seeks a stay, dismissal or negation of the Indictment, his release from the custody of the Tribunal and a return to his place of residence prior to his arrest."*

The background of the case was as stated in the report of the case, particularly in the following paragraphs:

> *"10. On 4 November 1994, pursuant to Rules 47 and 55 of the Rules, Judge Odio Benito confirmed the Indictment against Nikolic. In accordance with Rules 2(A) and 55 of the Rules, two warrants for his arrest were issued, one addressed to the Federation of Bosnia and Herzegovina and the other to*

[12] Trial Chamber, of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violation of International Humanitarian Law Case No. 94-2-T.

the Bosnian Serb administration in Pale. The arrest warrants were served on the authorities, and various attempts were made by the Prosecution to serve the Indictment on Nikolic and to have them executed."

"11. On 15 November 1994, the Registrar of the Tribunal received official notification that the Federation of Bosnia and Herzegovina was unable to execute the arrest warrant. The Federation of Bosnia and Herzegovina claimed that Nikolic was residing in the town of Vlasenica. No response was received from the Bosnian Serb administration in Pale concerning its ability or willingness to execute the arrest warrants against Nikolic.

12. On 16 May 1995, Judge Odio Benito ordered the Prosecution to submit the case to the Trial Chamber for a review of the Indictment pursuant to Rule 61(A) of the Rules. On 20 October 1995, the Trial Chamber found that it was satisfied by the evidence presented to it that there were reasonable grounds for believing that Nikolic had committed the crimes charged in the Indictment. Accordingly, an international arrest warrant was issued and transmitted to all States.

13. The Trial Chamber also found that the failure of the Prosecution to effect service of the Indictment was due wholly to the failure or refusal of the Bosnian Serb administration in Pale to co-operate. In accordance with the procedure of Rule 61(E), the Presiding Judge of the Trial Chamber requested the President of the Tribunal to notify the security Council of this failure. The President of the Tribunal complied with this request and sent a letter dated 31 October 1995 to notify the Security Council.

14. The Trial Chamber invited the Prosecution to amend the Indictment in the light of the evidence presented at the Review Proceedings. The Prosecution subsequently filed its first Amended Indictment in which 80 counts of crimes against humanity, violations of the laws and customs of war and grave breaches of the Geneva Conventions were alleged, Judge Claude Jorda confirmed the Amended Indictment on 12 February 1999 and issued a new arrest warrant to the authorities of the Federal Republic of Yugoslavia ("FRY").

15. On or about 20 April 2000, Nikolic was arrested and detained by SFOR and, thereafter, on 21 April 2000, transferred to the Tribunal. How Nikolic came into the custody of SFOR is not entirely clear. It is alleged that he was kidnapped in Serbia by a number of persons and delivered into the hands of SFOR officers stationed in the Republic of Bosnia and Herzegovina.

> *16. During 2001, and following discussions with the pre-trial Judge and between Parties, the Prosecution was requested to submit a new amended indictment. On 7 January 2002, the Prosecution sought leave to file the Second Amended Indictment. This was granted on 15 February 2002 and the accused was charged with eight counts of crimes against humanity."*

The Tribunal proceeded to hear the accused's objection to jurisdiction on account of the manner in which he was brought before the Tribunal.

In its assessment, the aforesaid International Tribunal also pointed out that: "The case law described above is rather diverse. Depending on how one defines illegal abduction, probably not all of the cases described necessarily fit such a definition. In some cases, the State, which is about to exercise jurisdiction over the accused, (the Forum State) was intensively involved in the forced abduction of the accused. In others, the State where the accused was originally found was actively involved as well, for example, deported or expelled the accused – a situation sometimes referred to as a form of informal extradition or even of a circumvention of the due process of extradition. The Trial Chamber does not consider it necessary to define the various forms of cross border transfer of accused persons..."

The above once again indicates that the label "abduction" is widely used, and is not restricted to the type of forcible removal which actually took place in the Ebrahim case. In the Courts discussion on the concept of "Violation of State sovereignty" it stated:

"As the defence observes, in cross border abduction cases where there was some evidence to indicate State involvement... the violation of international

law was regarded as a breach of State sovereignty". Traditionally, such breaches were considered a possible dispute between states with no role as such for the person involved. As the defence rightly points out, however, the Appeals Chamber in the TADIC decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, held that individuals can also invoke this ground, at least before this Tribunal". The Court therefore acknowledged that the point of infringement of sovereignty and international law is not limited or dependant on the governments of the sovereign states involved, complaining or not complaining. The Court thus recognized that the accused person also have rights which need to be considered.

The Court dealt with the nature of the process it had to apply and said:

> "111. There exists a close relationship between the obligation of the Tribunal to respect the human rights of the Accused and the obligation to ensure due process of law. Ensuring that the accused's rights are respected and that he receives a fair trial forms, in actual fact, an important aspect of the general concept of due process of law. In that context, this Chamber concurs with the view expressed in several national judicial decisions, according to which the issue of respect for due process of law encompasses more than merely the duty to ensure a fair trial for the Accused. Due process of law also includes questions such as how the Parties have been conducting themselves in the context of a particular case and how an Accused has been brought into the jurisdiction of the Tribunal. The finding in the *Ebrahim* case that the State must come to court with clean hands applies

> equally to the Prosecution coming to a Trial Chamber of this Tribunal. In addition, this Chamber concurs with the Appeals Chamber in the Barayagwiza case that the abuse of process doctrine may be relied on if "in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice". However, in order to prompt a Chamber to use this doctrine, it needs to be clear that the rights of the Accused have been egregiously violated.
>
> 112. The Chamber must undertake a balancing exercise in order to assess all the factors of relevance in the case at hand and in order to conclude whether, in light of all these factors, the Chamber can exercise jurisdiction over the Accused."

The Tribunal also observed that "in keeping with the approach of the Appeals Chamber in the Barayagwiza case, according to which in cases of egregious violation of the rights of the accused, it is irrelevant which entity or entities were responsible for the alleged violation of the rights of the accused".

Whether such a decision should be taken also depends entirely on the facts of the case and cannot be decided in the abstract". The Tribunal concluded: "Here the Chamber observes that the assumed facts, although they do raise concerns, do not at all show that the treatment of the accused by unknown individuals amounts, was of such egregious nature". (My emphasis added)

The Tribunal's final conclusion was that, on the basis of the assumed facts, the Tribunal must exercise jurisdiction. It should be kept in mind that the

International Criminal Tribunal differs from National Court in that it was set up to deal with “serious violations of international humanitarian law”. The International Court has its own procedures and issues international warrants for the arrest of persons it wishes to bring before Court.

It is against this background that it developed the test of ‘egregious violations”. It did not deal in this context with a situation, as in the instant case, where each and every provision of the laws of the affected countries were contravened and thereby not only the fundamental rights of the accused, and their protection provided by those laws, but also an abuse of those laws amounting to a breach of the sovereignty of the states whose sovereign parliaments enacted those laws in the exercise of their sovereignty.

The great differences between a national and domestic criminal Court and that of the International Criminal Court clearly emerges from the facts set out in the judgment and quoted above. In the case of the International Court, the purpose is to try persons who are accused of international crimes against humanity such as genocide where states are enjoined and required to cooperate and assist the Tribunal in its functions: There are special procedures. One of the most important differences is that sovereign national states, can if they so wish, enact laws with mandatory provisions in regard to extradition and deportation. This was done by Namibia, Botswana and Zambia.

The International Court on the other hand functions in terms of a legal charter, agreed upon by the Security Council of the United Nations. The machinery of legal extradition and/or deportation is not available to the International Court. Its legal machinery to bring persons accused of having committed international

crimes, to justice, differs materially from those of states to achieve this. One of the features of the machinery provided, is the issue of international warrants.

In the case of the 13 accused before this Court, there were neither warrants of any nature, nor any preliminary judicial investigation to prima facie establish whether there is a case, justifying prosecution and a warrant of arrest.

The "close relationship" referred to by the Court in par 111 of the judgment is not as some contend, a relationship between the rights of the accused and the rights of the prosecution. The "relationship" is between the human rights of the accused and the obligation to ensure due process of the law. The balancing exercise "referred to in par 112, is also not stated to be between the rights of the prosecution and that of the accused.

I have been referred to the following quotation from the Appeal Chamber, which so it is argued, requires the balancing of "rights of the accused, against "the crimes committed". The passage however does not do so. What it purports to balance is "international justice" against "infringing to a limited extent in the sovereignty of states."

The passage reads as follows:

> *"The damage caused to international justice by not apprehending fugitives accused of serious violation of international humanitarian law is comparatively higher than injury, if any, to the sovereignty of a State by a limited intrusion of its territory, particularly when the intrusion occurs in default of the State's cooperation. Therefore, the Appeals Chamber does not consider that in cases of universally condemned offences, jurisdiction should be set aside on the*

> *ground that there was a violation of the sovereignty of a State, when the violation is brought about by the apprehension of fugitives from international justice, whatever the consequences for the international responsibility of the State or organization concerned".*

The Appeal Chamber confirmed the decision of the Trial Chamber to arraign and prosecute the accused.

4. *S v Ebrahim* [13]

The decision in S v Ebrahim, is not only strong persuasive authority for the applicability of the South African common law to the issues discussed, but should be followed in Namibia in so far as it applied the Roman Dutch common law.

It is necessary at this juncture to repeat the facts of the case. The appellant, a member of the military wing of the African National Congress who had fled South Africa when under a restriction order, had been abducted, in the literal sense of the word, from his house in Mbabane Swaziland by persons acting as agents of the South African State and taken back to South Africa, where he was handed over to the South African police, arrested and detained in terms of security legislation. He was subsequently charged with Treason, convicted and sentenced to 20 years imprisonment by the Circuit Local Division.

The Appellant had prior to pleading launched an application for an order to the effect that the Court lacked jurisdiction to try the case inasmuch

[13] 1991 (2) SA 553 (A.D.)

as his abduction was in breach of international law and thus unlawful. The application was dismissed and the trial continued.

M T Steyn, JA who wrote the judgment of the Court of Appeal held:

> *"In the light of the repeated exposition and wide acceptance of the aforesaid rule in its different shapes, it is in my view clear that the removal over the territorial boundaries of a person from a territory where such person has been illegally taken prisoner, to another jurisdiction, was regarded in Roman Dutch Law as an abduction in essence and as a serious breach of the law".*

The Court further held that "the above rules embodied several fundamental legal principles, viz those that maintained and promoted human rights, good relations between states and the sound administration of justice: the individual had to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction and the sovereignty of states had to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The State was bound by these rules and had to come to Court with clean hands, as it were, when it was itself a party to proceedings. This requirement was clearly not satisfied when the State was involved in the abduction of persons across the country's borders."

It was accordingly held that the Court *a quo* had lacked jurisdiction to try the Appellant and his application should therefore have succeeded. As the Appellant should never have been tried by the Court *a quo*, the consequence of that trial had to be undone and the appeal disposed of

as one of conviction and sentence. Both conviction and sentence were accordingly set aside. Some further remarks are apposite:

(i). The Ebrahim case can be distinguished from the instant case before us, in that:

(a) The 13 accused, as pointed out supra, were not abducted in a similar manner as in the Ebrahim case.

(b) In the case of the 13 accused, there existed clear reciprocal extradition and deportation legislation relating to prohibited immigration and therefore the non-compliance therewith was a decisive issue. Not so in the Ebrahim case.

(ii) However the decision in Ebrahim is not just restricted to a case where there was a literal and forceful abduction, but also where the arrest, detention and removal was illegal for other reasons, e.g. where it amounted to "disguised extradition" which was in essence an abduction.

It was also not restricted to cases where the officials of the receiving State perpetrated the abduction or illegality in the host state, but where such officials or agents of the receiving state ordered the illegal conduct, or cooperated with the perpetrators or was involved with them in achieving the purpose of removing the fugitive to the receiving state, so that such receiving state cannot be regarded as having brought the fugitive to trial with clean hands.

An important aspect raised in Ebrahim was the development of this part of the law in developed foreign democracies.

Counsel for the appellant in that case – Mohammed SC as he then was, argued that the Court of Appeals in United States in the matter of *United States v Toscanino*, 500 F 2d 267 had decided on 15th May 1974 that the former

authoritative decisions in *Ker v Illinois* 119 US 342 (1888) and *Frisbie v Collins*, 342 US 519 (1952) US 51 should no longer be followed.

It should be remembered that in *Frisbie v Collins* the approach was:

> *"Due process of law is satisfied when one present in Court is convicted of crime after being fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards."*

Against this was the dicta that: "The requirement of due process in obtaining a conviction is greater. It extends to the pre-trial conduct of law enforcement authorities."

Steyn JA, quoted the following as the reasoning in the Toscanino case:

> *"In an era marked by a sharp increase in kidnapping activities, both here and abroad …we face the question as we must whether a Federal Court must assume jurisdiction over the person of a defendant who is illegally apprehended abroad and forcibly conducted by Government agents to the United States for the purpose of facing criminal charges here."*

The Court then concluded:

> *"The Court (in Toscanino) refused to follow the decisions in Ker v Ilinols … and Frisbie v Collins … and motivated its case as follows:*
> *'Faced with a conflict between two concepts of due process, the one being the restricted version found in Kerr-Frisbie and the other the expanded and enlightened interpretation expressed in more recent decisions of the Supreme Court, we are persuaded that to the extent that the two are in conflict, the Kerr-Frisbie version must yield. Accordingly we view due process as now requiring a court to divest itself of jurisdiction over the person of the defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights. This conclusion represents but an extension*

> *of the well-recognised power of the federal courts in the civil context to decline to exercise jurisdiction over a defendant whose presence has been secured by force or fraud.'"*

The Court adopted the wise words of Justice Brandeis in his dissenting opinion in *Olmstead v United States* and invoked again in *United States v Archer* the passage, which read as follows:

> *"The Courts aid is denied only when he who seeks it has violated the law in connection with the very transactions as to which he seeks legal redress. Then aid is denied despite the defendants wrong. It is denied in order to maintain respect for law; in order to preserve the judicial process from contamination:*
>
> *Decency, security and liberty alike demand that Government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the Government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipotent teacher. For good or for ill, it teaches the whole people by its example, crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."*

The South African Court also referred to the dicta in <u>*United States v Archer*</u> where it was held:

> *"Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law…"*

4. <u>*United States v Alvares-Machain*</u>

The Court in *State v Ebrahim*, referred to the development in the law of the United States of America, as set out in the Toscanino case. That development

however, was reversed to some extent in 1992 when the Supreme Court of the United States in the case of United States v Alvares – Machain, by majority vote of 6-3, overruled two lower Courts on petition to it.

The following summary of the editors in the report on Alvarez-Marchain sufficiently reflects the facts and the ratio in the United States Supreme Court decision:

> *"The Extradition Treaty, May 4, 1978, [1979] United States-United Mexican States (31 UST 5059, TIAS No. 9656) provides (1) in Article 22(1), that the treaty shall apply to specified offences committed before and after the treaty entered into effect; and (2) in Article 9, that (a) neither contracting party shall be bound to deliver up its own nationals, but the executive authority of the requested party shall, if not prevented by that party's laws, have the power to deliver such nationals up, if, in the party's discretion, it is deemed proper to do so, and (b) if extradition is not granted pursuant to the prior provision, the requested party shall submit the case to the party's competent authorities for the purpose of jurisdiction, provided that the party has jurisdiction over the offence. A Mexican citizen and resident was indicted in the United States on numerous federal charges for allegedly participating in the kidnap and murder of a Drug Enforcement Administration (DEA) agent and the agent's pilot. The accused was forcibly abducted from Mexico to the United States and was arrested in the United States by DEA officials. On a motion by the accused to dismiss the indictment, the United States District Court for the Central District of California (1) concluded that, although DEA agents were not personally involved in the accused's abduction, they were responsible for it; (2) ruled that the court lacked jurisdiction to try the accused, because the abduction violated the extradition treaty; (3) discharged the accused; and (4) ordered that the accused be repatriated to Mexico (745 F Supp 599). On appeal, the United States Court of Appeals for the Ninth Circuit, in affirming, expressed the view that (1) the forcible abduction of a Mexican national from Mexico by an agency of the United States without the consent or acquiescence of the Mexican Government violated the extradition treaty; and (2) with respect to the abduction of the accused, the proper remedy was the indictment's dismissal and the accused's repatriation, as (a) the requisite findings of United States involvement had been made, and (b) letters from the Mexican Government to the United States Government served as official protest of the treaty violation (946 F2d 1466).*

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Rehnquist, Ch. J., joined by White, Scalia, Kennedy, Souter, and Thoma, JJ., it was held that, even if the accused's forcible abduction might have been "shocking" and in violation of general principles of international law, the abduction was not in violation of the 1978 extradition treaty, the accused did not thereby acquire a defence to the jurisdiction of United States courts, and the fact of the accused's forcible abduction did not therefore prohibit the accused's trial in the District Court for alleged violations of the criminal laws of the United States, because (1) in view of the general United States rule that a forcible abduction does not impair a court's jurisdiction to try a person for a crime, the language of the treaty, in the context of the history of negotiation and practice under the treaty, did not support the proposition that the treaty prohibited abductions outside of the treaty's terms; and (2) to infer from the treaty and its terms that the treaty contained an implied prohibition against obtaining the presence of an individual outside of the treaty's terms would go beyond established precedent and practice, with only the most general of international law principles to support such an inference.

Stevens, J., joined by Blackmun and O'Connor, JJ., dissenting, expressed the view that (1) although the treaty contained no express promise to refrain from forcible abductions in the territory of the other nation, the treaty's manifest scope and object plainly implied a mutual undertaking to respect territorial integrity; (2) this interpretation was confirmed by a consideration of the legal context in which the treaty was negotiated; (3) with respect to such abductions, the Supreme Court's opinion failed to differentiate between (a) the conduct of private citizens, which did not violate any treaty obligation, and (b) conduct expressly authorized by the Executive Branch of the Federal Government, which constituted a violation of international law; and (4) the fact, if true, that the accused had participated in an especially brutal murder of an American law enforcement agent might explain the Executive Branch's intense interest in punishing the accused in United States courts, but such an explanation provided no justification for disregarding the rule of law that the Supreme Court had a duty to uphold."

In mitigation one can at least say that the Extradition Treaty between the United States and Mexico did contain ambiguous clauses and not clear and mandatory provisions such as contained in Namibian, Botswana and Zambian reciprocal legislation. So e.g. the majority relied on the American/Mexican treaty which in Article 9 allegedly provides, that (1) neither contracting party

shall be bound to deliver up its own nationals, but the executive authority of the requested party shall have the power to deliver such nationals up, if in the party's discretion, it is deemed proper to do so, and (2), if extradition is not granted pursuant to the prior provision, the requested party shall submit the case to the party's competent authorities for the purpose of jurisdiction, provided that the party has jurisdiction over the offence. It was found by the majority that such a treaty did not exclude abduction.

It seems to me that there is a vast difference between the honouring and implementation of such treaties which are bilateral in nature and reciprocal obligations and laws enacted by the supreme and sovereign legislatures of the respective countries. In the case of the aforesaid treaties, the treaties leave the decision in the hands of the Executive, whereas in the case of the aforesaid legislation, provision is made for proper procedures, which no member of the Executive may transgress or allow or order others to transgress.

The minority opinion of the Supreme Court as formulated by Stevens J, was extremely critical of the majority decision. The minority referred with a measure of approval to the South African decision in Ebrahim. It said in conclusion:

> *"The significance of this Court's precedents is illustrated by a recent decision of the Court of Appeal of the Republic of South Africa. Based largely on its understanding of the import of this Court's cases – including our decision in KER – that Court held that the prosecution of a defendant kidnapped by agents of South Africa in another country must be dismissed…….. The Court of Appeal in South Africa – indeed, I suspect most courts throughout the civilized world – will be deeply disturbed by the "monstrous" decision the Court announces today. For every nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a decision of this character.*

The condemnation of the majority decision was fairly widespread. The Trial Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for serious Violation of International Humanitarian Law committed in the territory of former Yugoslavia since 1991, in its review of national law decisions in the case of *Prosecutor v Dragan Nikolic*, noted:

> *"The decision was not only heavily criticized in the United States but also in other states, in judicial decisions of national courts in other states and in academic circles. Still it must be considered 'the leading US case on forcible abduction by US agents".*

5. Mohamed and Another v President of the Republic of South Africa and Others[14]

This decision of the South African Constitutional Court has some features that are relevant to the issues before this Court. The headnote of the report briefly sets out the relevant facts. These were:

> *"The 1st appellant one Mohamed, was at the time of the instant proceedings standing trial in a Federal Court in the USA on a number of capital charges related to the bombing of the United States Embassy in Dar es Salaam, Tanzania in August 1998. The appellants sought leave to appeal against a judgment of a Provincial Division in which the appellants were denied an order declaring (i) that the arrest, detention, interrogation and handing over of Mohamed to US agents was unlawful and unconstitutional, and (ii), that the respondents had breached Mohamed's constitutional rights by handing him over to the custody of the US Government without obtaining an assurance that the death penalty will not be imposed or carried out in the event of Mohamed's conviction. The appellants also sought mandatory relief in the form of an order 'directing the Government of the Republic of South Africa to submit a written request ... to the government of the Unites States of America that the death penalty not to be sought. The crux of the governments contentions, which carried the day in the Court a quo, was that Mohamed was an illegal immigrant whom the Immigration Authorities had properly decided to deport and whose deportation was*

[14] 2001 (3) SA 893 (CC)

mandated by the Aliens Control Act 96 of 1991 and the regulations published thereunder. The Court a quo held that the collaboration between the South African and US officials that had led to the removal of Mohamed to the US did not make any difference to his status or his liability to deportation."

The Constitutional Court held:

"1. The validity of the deportation

There is a clear distinction between extradition and deportation. Extradition is a consensual act by two (2) states directed at the handing over by one State to another State of a person convicted or accused there of a crime so that the receiving state may deal with him in accordance with the provisions of the law. It involves a request by the first State for such delivery and delivering by the requesting State for the purposes of trial or sentence in the territory. Deportation is essentially a unilateral act of the deporting State in order to rid it of an undesired alien who has no permission to be there. The purpose of deportation is served when the alien leaves the deporting State's territory, and the destination of the deportee is irrelevant to the purpose of deportation".

The Constitutional Court further held that the deportee was not given a three (3) day period of grace, before he was removed, as mandated by Section 52 of the Aliens Control Act – which was also illegal.

The Court further emphasized the issue of the death sentence which was a permissible sentence in the USA but not in South Africa and held that the Government should have made representations to the USA to ensure that if the deportee was deported, tried and convicted, the death sentence would not be imposed, or if imposed, executed. The Court further raised the issue of the alleged consent by the deportee to be returned to the USA rather than Kenya. In this regard the Court laid down the requirements for a valid consent by the deportee, where such consent is required to legalize a step taken by the

Executive. The Court held that for a consent to be enforceable, it had to be a fully informed consent that showed clearly that the person in question was aware of the exact nature and extent of the rights being waived in consequence of the consent..... The onus of proving such waiver is on the government..." The Court further pointed out that the deportee "was at no time afforded the benefit of consulting a lawyer. It followed that M's alleged election to accompany the US agents, must have been to some extent a result of his being cut off from legal advice."

The Constitutional Court held all these features to be elements of the overall illegality of the deportation. The Court also pointed out that whether or not the removal had been a lawful deportation or an unlawful disguised extradition, the procedure followed was unlawful whether it is characterized as a deportation or extradition.

It is important to note that the Constitutional Court clearly found the action illegal, because it did not comply with the mandatory provisions of the law, irrespective whether or not it was referred to as "deportation" or "extradition in disguise". The Court finally found that the deportation was unlawful. It follows, that where the mandatory provisions of Namibia, Botswana and Zambia, are not followed for similar actions taken in those countries, such action would be illegal, irrespective of the question whether the Court of the forum state, can look into such illegalities which occurred in the host state.

The fact that the Constitutional Court was unable to reverse the course when the deportee's case was eventually brought before it, in the light of the fact that the deportee had already been brought before the USA Court, the

principles of legality laid down in this decision remain important for Courts worldwide faced with similar issues.

The warning given in conclusion by the 12 judges of the Constitutional Court, has been heeded by Hoff J in the Court a quo and remains a timeous reminder also for the Namibian State, Courts and Government, struggling to live up to Namibia's Constitution in an era, not only of growing constitutionality on the one hand, but growing criminality, terrorism and violence threatening law and order, the Rule of Law, and civilized values.

6. *R v Brixton Prison (Governor) Ex Parte Soblen*.[15]

In this decision of the Court of Appeal in the United Kingdom, Lord Denning MR stated when contrasting the power of extradition with the power of deportation:

> *"It was suggested before us that there was a common law shackle on this power of deportation. It was said that a man could not be deported, even to his own country, if he was a criminal who had fled from it. No authority was cited for this proposition. It cannot stand examination for one moment. Supposing no other country but his own is willing to take him. Are we to keep him here against our will simply because he is, in his own country, a wanted man? Clearly not. If a fugitive criminal is here, and the Secretary of State thinks that, in the public good, he ought to be deported, there is no reason why he should not be deported to his own country, even though he is there a wanted criminal. The Supreme Court of India considered this very point in 1955 in Muller v Superintendent, Presidency Jail, Calcutta (54), and in an instructive judgment made it quite clear that, in their opinion, the right to expel an alien could be exercised even though he was wanted by his own country for a criminal offence. I go further. Even though his home country has requested that he should be sent back to them, I see no reason why the Home Secretary should not still deport him there, if his presence here is not conducive to the public good. The power to deport is not taken away by the fact*

[15] Court of Appeal, 1962 (3) All ER 641

that he is a fugitive from the justice of his own country, or by the fact that his own country wants him back and has made a request for him.

So there we have in this case the two principles: on the one hand the principle arising out of the law of extradition under which the officers of the Crown cannot and must not surrender a fugitive criminal to another country at its request except in accordance with the Extradition Acts duly fulfilled; on the other hand the principle arising out of the law of deportation, under which the Secretary of State can deport an alien and put him on board a ship or aircraft bound for his own country if he considers it conducive to the public good that that should be done. How are we to decide between these two principles? It seems to me that it depends on the purpose with which the act is done. If it was done for an authorised purpose, it was lawful. If it was done professedly for an authorised purpose, but in fact for a different purpose with an ulterior object, it was unlawful. If, therefore, the purpose of the Home Secretary in this case was to surrender the applicant as a fugitive criminal to the United States of America, because they had asked for him, then it would be unlawful; but if his purpose was to deport him to his own country because he considered his presence here to be not conducive to the public good, then his action is lawful. It is open to these courts to inquire whether the purpose of the Home Secretary was a lawful or an unlawful purpose. Was there a misuse of the power or not? The courts can always go behind the face of the deportation order in order to see whether the powers entrusted by Parliament have been exercised lawfully or not. That follows from R v Board of Control, Ex p. Rutty (55). Then how does it rest in this case? The court cannot compel the Home Secretary to disclose the materials on which he acted, but if there is evidence on which it could reasonably be supposed that the Home Secretary was using the power of deportation for an ulterior purpose, then the court can call on the Home Secretary for an answer; and if he fails to give it, it can upset his order. But, on the facts of this case, I can find no such evidence. It seems to me that there was reasonable ground on which the Home Secretary could consider that the applicant's presence here was not conducive to the public good."

Mr Gauntlett relied on the decision to point out that although it is open to the Courts to enquire whether the purpose of government was lawful or otherwise, there is a "heavy onus" on the party alleging an unlawful exercise of power.

It does not seem to me from the available report of the decision that Lord Denning said anything in regard to onus. There is however a remark in the headnote of the report, in brackets, as follows:

> *"....though it is open to an applicant (the burden of proof being on him) to show that the deportation order was not made lawfully.."*

Mr Gauntlett, in his heads of argument, also relied in this regard on the Canadian case of *Halm v the Minister of Employment and Immigration* [16] in submitting:

> *"In the Canadian case in HALM this approach was adopted and the Court affirmed that 'to decide that the deportation proceedings are a sham or not bona fide, it would be necessary to hold that the Minister did not genuinely consider it in the public interest to expel the applicant.'*

Mr Gauntlett reiterated in his par 49 that there is this "heavy onus" and refers as authority in his footnote "47" to "Par 21.3 and 21.4".

Unfortunately I have been unable to trace such statement in either the Soblen decision or the Halm decision. Be that as it may. It seems that there is some confusion. I agree on general principles that when a person against whom a deportation order is made, has the opportunity before the Court of the country whose executive made the order, applies to that Court to have the deportation order set aside, the burden of proof will be on the applicant to prove the illegality. But in Namibia a person in the position of the Minister will have to comply with the provisions contained in art. 18 of the Namibian Constitution

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[16] 1996 1 FC 547

relating to administrative justice, requiring them to act "fairly and reasonably".[17]

Where however, the applicant has been removed to the requesting country to stand trial, without having had any opportunity in the deporting country to attack the "deportation" order, as happened in the instant case of the accused, then the position as to burden of proof is quite different.

In the latter case, where such applicant objects to the jurisdiction of the Court to try him, the burden is on the State to prove beyond reasonable doubt that the accused has been brought before Court in a lawful manner and that the Court consequently has jurisdiction.

It must also be noted that the reference to the executive authority in the Soblen case is to the Minister or the Home Secretary who has been given the authority to decide on deportations by Parliament, and cannot be compared with the instant case where the fate of the accused was decided by officials who were not authorized by law to take such decisions. At least, the State did not prove in this appeal that any of the policemen, army personnel or immigration officials were authorized to take such decisions or even purported to take such decisions according to the laws of the land.

In the instant case now before this Court the two differing principles relating to "extraditions" on the one hand and "deportation" on the other, does not affect

[17] See also: the decisions of the Namibian Supreme Court in the Government of the Republic of Namibia v N.R. Sikunda delivered on 21/02/2001, not reported; and Cronje v the Municipal Council of the Municipality of Mariental, delivered on 1/8/2003, not reported.

the issues to be decided because there was not only no lawful extradition but also no lawful deportation.

7.1. Bennett v Horseferry Rd Magistrate Court and Another[18]

As far as the law of the United Kingdom is concerned, this is the most authoritative decision to date on these issues. The House of Lords in this decision reviewed many previous decisions in the United Kingdom, the USA, Australia, New Zealand and South Africa.

It is clear from the decision of the House of Lords that the South African judgment in Ebrahim and the minority judgment in the case of *US v Alvarez Marchain of the USA Supreme Court*, carried considerable weight with the House of Lords.

Lord Griffiths, presiding, put the case as follows:

> *"In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.*
>
> *My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.*

[18] 1993 (3) ALL ER 138 (HL)

> *Let us consider the position in the context of extradition. Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country. Thus sufficient evidence has to be produced to show a prima facie case against the accused and the rule of speciality protects the accused from being tried for any crime other than that for which he was extradited. If a practice developed in which the police or prosecuting authorities of this country ignored extradition procedures and secured the return of an accused by a mere request to police colleagues in another country they would be flouting the extradition procedures and depriving the accused of the safeguards built into the extradition process for his benefit. It is to my mind unthinkable that in such circumstances the court should declare itself to be powerless and stand idly by; I echo the words of Lord Devlin in Connelly v DPP [1964] 2 All ER 401 at 442, [1964] AC 125 1354:*
>
> > *'The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused.'*
>
> *The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.*
>
> *In my view Your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party. If extradition is not available very different considerations will arise on which I express no opinion."*

In the course of his judgment, Lord Griffiths also quoted with approval the following telling passage quoted by Lord Lane CJ, from a judgment by Woodhouse J in a New Zealand decision.[19]

> *"There are explicit statutory directions that surround the extradition procedure. The procedure is widely known. It is frequently used by the police in the performance of their duty. For the protection of the public the statute rightly demand the*

[19] 1978 2 NZLR 199 at 216-217

> *sanction of recognised Court processes before any person who is thought to be a fugitive offender can properly be surrendered from one country to another. And in our opinion there can be no possible question here of the Court turning a blind eye to action of the New Zealand police which has deliberately ignored those imperative requirements of the statute. Some may say that in the present case a New Zealand citizen attempted to avoid a criminal responsibility by leaving the country: that his subsequent conviction has demonstrated the utility of the short cut adopted by the police to have him brought back. But this must never become an area where it will be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society. On the basis of reciprocity for similar favours earlier received are police officers here in New Zealand to feel free, or even obliged, at the request of their counterparts overseas to spirit New Zealand or other citizens out of the country on the basis of mere suspicion, conveyed perhaps by telephone, that some crime has been committed elsewhere? In the High Court of Australia Griffith CJ referred to extradition as a 'great prerogative power, supposed to be an incident of sovereignty" and then rejected any suggestion that "could be put in motion by an constable who thought he knew the law of a foreign country, and thought it desirable that a person whom he suspected of having offended against that law should surrendered to that country to be punished': Brown v Lizars (1905) 2 CLR 837 at 852). The reasons are obvious. We have said that if the issue in the present case is to be considered merely in terms of jurisdiction then Bennett, being in New Zealand, could certainly be brought to trial and dealt with by the Courts of this country. But we are equally satisfied that the means which were adopted to make that trial possible are so much at variance with the statute, and so much in conflict with one of the most important principles of the rule of law, that if application had been made at the trial on this ground, after the facts had been established by the evidence on the voir dire, the judge would probably have been justified in exercising his discretion under s 347 (3) [of the Crimes Act 1961] or under the inherent jurisdiction to direct that the accused be discharged."*

Lord Bridge, who also agreed with the judgment of Lord Griffiths, put the position as follows:

> *"Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots. There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency*

> *responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawless ness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view. Having then taken cognisance of the lawlessness it would again appear to me to be a wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the defendant or in disciplinary or criminal proceedings against the individual officers of the law enforcement agency who were concerned in the illegal action taken. Since the prosecution could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted. If a resident in another country is properly extradited here, the time when the prosecution commences is the time when the authorities here set the extradition process in motion. By parity of reasoning, if the authorities, instead of proceeding by way of extradition, have resorted to abduction, that is the effective commencement of the prosecution process and is the illegal foundation on which it rests. It is apt, in my view, to describe these circumstances, in the language used by Woodhouse, J in* Moevro v Dept of Labour *[1980] 1 NZIR 464 at 476, as an 'abuse of the criminal jurisdiction in general or indeed, in the language of Mansfield J in US v Toscanimo (1974) 500 F 2d 267 at 276, as a 'degradation' of the court's criminal process. To hold that in these circumstances the court may decline to exercise its jurisdiction on the ground that its process has been abused may be an extension of the doctrine of abuse of process but is, in my view, a wholly proper and necessary one."*

Lord Lawry agreed with Lord Griffith and Lord Bridge and affirmed that the Court had a discretion to stay as an abuse of process, criminal proceedings brought against an accused person who has been brought before the Court by abduction in a foreign country participated in or encouraged by British authorities. He cautioned:

> *"And, remembering that it is not jurisdiction which is in issue but an exercise of a discretion to stay proceedings, while speaking of 'unworthy conduct', I would not expect a Court to stay the proceedings of every trial which has been preceded by a venial irregularity....."*

> *"The abuse of process which brings into play the discretion to stay proceedings arises from wrongful conduct by the Executive in an international context."*

Lord Slynn referred to alleged "illegalities" and said:

> *"It does not seem to me to be right in principle that, when a person is brought within the jurisdiction in the way alleged in this case (which for present purposes must be assumed to be true) and charged, the Court should not be competent to investigate the illegality alleged, and if satisfied as to the illegality, to refuse to proceed to trial."*

It should be noted that the House of Lords, and particularly, Lord Griffiths, approved of the dictum of Woodhouse J, where the latter dealt specifically with cases where "explicit statutory directions that surround extradition procedures" and which are "imperative", are deliberately ignored by the police.

The Court in that case held that the Court cannot turn a blind eye to such abuse, and shall, in the exercise of its discretion, refuse to exercise trial jurisdiction. It must be clear from the facts dealt with in the said judgment by Woodhouse J and that of Lord Lane in the aforesaid New Zealand decision, that the facts are similar in many important aspects, to the practice followed in the instant case of the 13 accused. It is therefore directly in point.

7(2) Bennet v H Mr Advocate[20]

This decision was that of the Divisional Court after the House of Lords in *Bennet v Horseferry Road Magistrates Court* had remitted the case to the Divisional Court to apply the law as laid down in Bennet to the facts

[20] 1995 SLT

established after trial, because the judgment of the House of Lords in *Bennet v Horseferry Magistrates Court* was based on assumed facts.

In the remitted case, Lord Justice General (Lord Hope) said in his conclusion:

> "In our opinion it would be unreasonable where there has been no collusion, to insist that the police must refrain from arresting a person who is wanted for offences committed in this country when he arrives here simply because he is in transit to another country from where he could then be extradited. As Lord McLaren pointed out in *Sinclair v HM Advocate* (1890) 17R(J) 38 at 43), we must be careful to apply the rules about the transfer and delivery of persons under arrest in a reasonable way. The flouting of extradition procedures by collusion with the foreign authorities is one thing. To allow a person to escape prosecution and punishment for his alleged offences in this country on the ground of the steps taken to arrest him where there has been no such abuse is quite another. It is of course necessary that the petitioner should receive a fair trial if he is to be brought to trial in Scotland, but we are not concerned with that question at this stage. We are concerned only with the question whether to enforce the warrant would be an abuse of the processes of the Scottish court." (emphasis supplied)

The following should be noted:

> "The flouting of extradition procedures by collusion with foreign authorities", is the "abuse" referred to. The sentence – "to allow a person to escape prosecution and punishment for his alleged offences in this country on the ground of the steps taken to arrest him, where there is no such abuse, is quite another, is not authority for concluding that the Court will have jurisdiction to try the accused, even if there was an abuse as described.

This decision consequently gives no support to the State case, because it is premised on the condition that there is "no such abuse".

8. *R v Staines Magistrates' Courts & Others Ex Parte Westfallen.*

R v Staines Magistrates' Court & Others Ex Parte Soper.

R v Swindon Magistrates' Court & Others Ex Parte Nangle.

The decision in Bennet was followed in 1997 by a decision in the Queen's Bench Division on the aforesaid cases.

Lord Bingham wrote the main judgment of the Court.

> *The decision in Bennett was distinguished on the facts:*
> *The headnote sufficiently summarizes the facts:*
>
> *"In the first and second cases, W and S travelled from London to Oslo and were detained on arrival in Norway, after having been found in possession of forged passports, stolen traveller's cheques, cheque books and cards. In a series of communications between London and Oslo, details of their criminal records were passed to the Norwegian authorities, who then arranged their deportation back to the United Kingdom, relying not on the fact that they had previous convictions but on a belief that they would commit a criminal act in Norway. The Norwegian police advised the Metropolitan Police that W and S were to be deported and that, if met, they would be handed over on arrival. W and S were duly arrested, cautioned, charged and brought before the justices.*
>
> *In the third case, N travelled to Canada whilst he was subject to a warrant for his arrest. In Canada he was convicted of further criminal offences and sentenced to imprisonment. The trial judge recommended him for deportation. N subsequently obtained an Irish passport with a view to being deported on release to the Republic of Ireland. The British police learnt of N's whereabouts and his prospective deportation as a result of communications with the Canadian authorities. The police were later advised that N would travel under escort from Canada to Dublin via Glasgow as there were no direct flights available. On arrival at Glasgow, N was arrested by the police, charged with robbery and later brought before the justices.*
>
> *In each case the examining justices refused to stay the subsequent criminal proceedings. W, S and N each applied for judicial review of the decisions by the police authorities to arrest them on arrival in the United Kingdom and by the justices to continue to hear the*

criminal proceedings. In particular, they contended that the British authorities had improperly procured their presence in the United Kingdom by means other than formal extradition procedures, when the only proper way of procuring their presence would have been to make a formal request for extradition.

Held – When considering whether to exercise its power to stay the prosecution and order the release of an accused following deportation, the question for the court was whether it appeared that the police or the prosecuting authorities had acted illegally or procured or connived at unlawful procedures or violated international law or the domestic law of foreign states or abused their powers in any way. In the instant cases, there was nothing to suggest that the British authorities had influenced or procured the decisions of the Norwegian or Canadian authorities to deport the applicants, even if they did welcome the outcomes. Accordingly, there was no illegality or abuse of power associated with the decisions at issue and no basis on which the subsequent criminal proceedings should be stayed. The applications for judicial review would therefore be dismissed (see p 222 f to p 223 d and p 224 f g, post).
Bennett v Horseferry Road Magistrate's Court [1993] 3 All ER 138 distinguished."

Lord Bingham applied the law as stated in Bennet to the facts and concluded:

"Certain of the cases draw a contrast between official kidnapping and extradition. In R v Governor of Brixton Prison, ex p Soblen [1962] 3 All ER 641 at 661, [1963] 2 QB 243 at 302 Lord Denning MR briefly expressed the difference between extradition and deportation. He said:

> *'So there we have in this case the two principles: on the one hand the principle arising out of the law of extradition under which the officers of the Crown cannot and must not surrender a fugitive criminal to another country at its request except in accordance with the Extradition Acts duly fulfilled; on the other hand the principle arising out of the law of deportation, under which the Secretary of State can deport an alien and put him on board a ship or aircraft bound for his own country if he considers it conducive to the public good that that should be done. How are we to decide between these two principles? It seems to me that it depends on the purpose with which the act is done. If it was done for an authorised purpose, it was lawful. If it was done professedly for an authorised purpose, but in fact for a different purpose with an ulterior object, it was unlawful.'*

Lord Denning MR was, of course, referring to deportation from this country, but the same approach in principle must apply in the case of deportation to this country, and there must be grounds for objection if the British authorities knowingly connive at or procure an authorised deportation from a foreign country for some ulterior or wrongful purpose.

The question in each of these cases is whether it appears that the police or the prosecuting authorities have acted illegally or procured or connived at unlawful procedures or violated international law or the domestic law of foreign states or abused their powers in a way that should lead this court to stay the proceedings against the applicants. In the case of the applicants Westfallen and Soper, the answer to that question is in my judgment plainly in the negative. The Norwegians were entitled under their own law to deport these applicants. The propriety of the deportations is acknowledged and indeed could not be challenged. It is difficult to see why the Kingdom of Norway should be obliged to keep the applicants whilst the British applied for extradition if they wished to deport them. It was indeed a natural step for Norway to send the applicants back to where they had come from. There is in the material before us nothing to suggest that the British authorities procured or influenced that decision. It is true that they did not in any way resist it, and there is no reason why they should have resisted it. It is very probable that they welcomed the decision, but in my judgment they would have been failing in their duty as law enforcement agencies if they had not welcomed it. In my judgment there is nothing to suggest any impropriety such as would attract application of the ratio in Bennett v Horseferry Road Magistrates' Court [1993] 3 All ER 138, [1994] 1 AG 42 in this case.

So far as the applicant Nangle is concerned, it is relevant to remind oneself that the recommendation to deport him was made at the time of conviction, and that the deportation order was made shortly afterwards. The decision was taken to deport him to Ireland, which is where the applicant wished to go, and the Canadian authorities bought him a ticket to that destination. They chose an obvious route in the absence of a direct flight from Canada to Ireland. There were, as is pointed out, other possible ways by which he could have reached Ireland without travelling through the United Kingdom. But it is not suggested, and could not be suggested, that the flight via Glasgow was in any way contrived or sinister or other than an ordinary route to choose in order to reach that destination. There is nothing whatever to suggest that the British authorities influenced the Canadian authorities to deport or procured the choice of route. Again, they did not resist it and probably welcomed the outcome. But again, there is no reason why they should have resisted that decision and no reason why they should not have welcomed it. There was in my judgment no illegality, no violation of international law, no violation

of the domestic law of Canada, and no abuse of power." (My emphasis added)

9. Mackeson v Minister of Information, Immigration & Tourism

In this decision by Gubbay J (as he then was), in the General Division of the High Court of Rhodesia-Zimbabwe (as it then was), the Court took the first faltering steps in Zimbabwe on the issue of "disguised extradition".

The Court held that:

"It was unlawful for the authorities to invoke the power of deportation to achieve an ulterior aim – namely the extradition of Mackeson to Britain to face charges of fraud. On appeal this decision was reversed, Macdonald CJ holding that the immigration authorities were entitled to deport a person declared to be an undesirable inhabitant to his country of origin. 'For obvious reasons,' said the judge, 'this is an appropriate place to send a person who is being deported and it can make no difference that this happens to be the place where he is likely to be charged and tried for an alleged crime. However, in R v Bow Street Magistrates, ex parte Mackeson [21]the receiving state, Britain, refused to exercise jurisdiction over Mackeson on the ground that his deportation was a disguised extradition."

It should be noted that the Rhodesia-Zimbabwe Appeal Court on appeal, ruled that Gubbay J "had been incorrect in looking behind the actual order of deportation and thereby questioning the right of the Zimbabwe/Rhodesia Minister to make the order that he did. Instead the Appellate Division (Rhodesia/Zimbabwe) emphasized the wide powers conferred upon the Minister in this respect, which virtually precluded any questioning of the adequacy of the grounds for any such decision. In other words, the Court approached the problem solely from the point of view of the exercise and

[21] (1982) 75 Crown Appeal R24 11 Quotation taken from article by Dugard: "International Law – a South African perspective 1994."

extent of the ministers powers, as opposed to their effect."[22] But in Namibia, since achieving its independence in 1990, any such "wide powers" would be subject to art. 18 of its constitution, requiring as a fundamental human right that "Administrative bodies and officials, shall act fairly and reasonably…"

This was a case where no extradition treaty or reciprocal legislation for extradition between Rhodesia/Zimbabwe existed at the time. As shown supra, the United Kingdom Court however refused jurisdiction and found that this was a typical case of disguised jurisdiction, justifying it to refuse jurisdiction to try Macheson. The decision of Gubbay J was thus vindicated.

10. S v Beahan[23]

In the decision of S v Beahan, [24] Mtambanengwe, J, first decided the issue of whether he High Court of Zimbabwe had jurisdiction to try Beahan on several criminal charges. The headnote sufficiently summarizes the case for present purposes. It reads as follows:

> *"The accused was charged in the High Court with contravening s 50(1) of the Law and Order (Maintenance) Act Chap 65 (Z) in that he had attempted to release various persons from custody. The accused raised a special plea to the jurisdiction of the Court, contending that the Court lacked jurisdiction as he had been arrested in Botswana by the Botswana Defence Force and had been taken to Zimbabwe where he was arrested. The accused alleged that he had been unlawfully removed from Botswana and taken to Zimbabwe without any extradition proceedings (there being no extradition agreement between the two countries) or deportation proceedings having been instituted. It appeared that the accused had previously been detained for questioning after having entered Zimbabwe illegally but had escaped and swum across the Zambezi River into Botswana. The Court found, on the*

[22] Summary taken from an article by Mr G Cowling, University of Natal.
[23] 1980 (1) SA 747 ZR at 755B
[24] 1990 (2) SACR (ZH)

> *evidence led in respect of the special plea, that after having been brought into Zimbabwe without deportation or extradition formalities the accused was formally arrested on Zimbabwean soil.*
>
> *Held, that in these circumstances the Court did have jurisdiction to try the accused but the Court also had a discretion not to exercise that jurisdiction in the exercise of which it would balance the interests of the State against those of the accused.*
>
> *Held, further, that in the instant case, where the accused had initially entered and left Zimbabwe illegally and had merely been returned, this was not a proper case for the Court to use its discretion to refuse to try the accused. Special plea dismissed."*

After the issue of jurisdiction had been decided, Beahan was tried before another judge of the High Court, convicted and sentenced. Beahan then appealed to the Zimbabwean Supreme Court against the jurisdiction decision as well as against his conviction and sentence. By the time that this appeal was decided, the decision in *S v Ebrahim* had already been given.

Gubbay CJ, who wrote the unanimous judgment of the Zimbabwe Supreme Court, reviewed the decisions in the USA, Great Britain and South Africa. He described the South African judgment in *S v Ebrahim* written by Steyn JA as "the most authoritative and persuasive judgment insofar as the Zimbabwean Court was concerned."

It is not necessary for present purposes to deal in any detail with the merits of the case. Suffice to refer to the summary of the decision of Mtambanengwe in the High Court, supra, from which the relevant criminal charges appear. As to the jurisdiction issue, the following summary of the judgment of the Zimbabwe Supreme Court appears from the heading of the report and suffices for present purposes:

> *"It was contended on behalf of the appellant on appeal that because he had been brought before the Court by illegal means the Court lacked jurisdiction to try him. It was contended in the alternative that, even if the Court did have such jurisdiction, in the circumstances the Court ought to have exercised its discretion and declined to entertain jurisdiction over him.*
>
> *Held, applying the principle set out above, that as the appellant had been recovered from Botswana without any form of force or deception being practised by the Zimbabwean authorities there was no bar to the Zimbabwean courts exercising jurisdiction over him.*
>
> *Held, further, as to the contention that the Court a quo ought, in the exercise of its discretion, to have declined jurisdiction, that as there had been no manipulation or misuse of procedure by Zimbabwean agents and the hands of the prosecution were not soiled there was no basis for interference with the discretion of the Court a quo."*

Gubbay CJ echoed the general approach laid down in *State v Ebrahim* when he stated:

> *"In my opinion it is essential that, in order to promote confidence in and respect for the administration of justice and reserve judicial process from contamination, a court should decline to compel an accused person to undergo a trial in circumstances where his appearance before it shall be facilitated by an act of abduction undertaking by the prosecuting State. there is an inherent objection to such a course both on grounds of public policy pertaining to international ethical norms and because it imperils and corrodes the peaceful coexistence and mutual respect of sovereign nations. For abduction is illegal under international law, provided the abductor was not acting on his own initiative and without the authority or connivance of his government. A contrary view would amount to a declaration that the end justifies the means, thereby encouraging States to become law-breakers in order to secure the conviction of a private individual."*

The Court also overruled the decision in *State v Ndlovu* 1977 (4) SA 125 (RA). In Ndlovu the former Rhodesian Appellate Court had held that "the fact that the appellant had been abducted from Botswana (where he had been resident for several years) by the former Rhodesian security forces in violation of

international law and brought to this country, did not constitute a bar to jurisdiction in a criminal trial."

The Zimbabwean Supreme Court differed from Mtambanengwe J's judgment in that it held that Mtambanengwe J "stated the applicable rule too broadly, excluding as he did the important exception relating to a violation of international law and the sovereign integrity of a foreign state."

It should be noted that according to the Court there was no Extradition Treaty between Zimbabwe and Botswana at the time. The other important distinguishing fact was that there was no reciprocal legislation by Botswana and Zimbabwe laying down mandatory procedures for extradition and deportation.

The contention based on O'Connell, International Law, 2nd ed, Vol 2 at 834 that even where there is an extradition treaty it is still not a violation of international law if there is a voluntary surrender of the fugitive by the host state, since no sovereign is affronted and the offender has no rights other than in municipal law, appears to be in conflict with the decisions in *S v Ebrahim, Bennet v Horseferry Magistrate Court and Another*, S v Wellem, S v Buys & Others, Mohamed v President of the RSA and even State v December, dealt with infra. It also appears to be inconsistent with the principles applied by Gubbay J as he then was, in the Mackeson case, referred to in Section D9 supra.

The Court did not rule on the proposition by Mtambanengwe J in the Court *a quo* that the Court hearing the jurisdiction issue, has a discretion to refuse

jurisdiction, in the exercise of its inherent power, as an expression of its displeasure, when there is an abuse of process in regard to the manner in which a person has been brought before Court.

On the assumption that a discretion was vested in the High Court, the Supreme Court again reiterated the principles applicable to enable an Appellate Court to interfere on appeal with a discretion exercised by a lower Court. These were stated as follows:

> *"The principles justifying interference by an appellate Court with the exercise of a discretion are firmly entrenched. It must appear that some error has been made in exercising the discretion. If the court below acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or effect it, if it mistakes the facts, if it does not take into account some material consideration, then its determination should be reviewed and the appellate Court may exercise its own discretion in substitution."*

In regard to the issue of discretion and the reason why the Court did not exercise a discretion to decline jurisdiction, some appropriate comment was made by M G Cowling in his article – "Unmasking Disguised Extradition – some glimmer of hope." He says:

> *"S v Beahan is somewhat confusing in this respect, because although the court accepted the principle that criminal courts have discretion whether or not to exercise jurisdiction in such circumstances, Mtambanengwe J then decided, on the facts of the case, that it was not necessary to exercise such discretion and that the court should indeed assume jurisdiction. The court relied on the absence of an extradition agreement between Botswana and Zimbabwe and also on the accused's illegal entry into and departure from Zimbabwe His Lordship stated the position as follows:*
>
> > *'It seems to me that it would be taking to absurd lengths the concept of personal liberty to insist that a man in these circumstances acquires a right to remain free to complain if apprehended, as the accused here was, after his own*

> *flagrant violation of the immigration laws of both countries, and to insist that he should benefit from such acts and escape being brought to justice'*

This introduces the concept of the conduct of the fugitive offender as a factor in determining whether a criminal court should assume jurisdiction. It is respectfully submitted that this factor cannot in any way be relevant. That a fugitive offender has committed a heinous offence or that he was arrested for being in contravention of a particular state's immigration laws is neither here nor there. What is of relevance in this respect is whether states are evading extradition procedures and failing to comply with accepted international standards. It would appear that Beahan's case is a good example of the latter, for the practical effect of the actions of the Botswana and Zimbabwean authorities was the equivalent of an extradition without the need to follow any procedures.

Beahan's case raises a number of other problems that require closer examination. In the first place, there is strong prima facie evidence that the fugitive offender (Beahan) was wanted by the Zimbabwean authorities for what could be described as a political offence. As pointed out above, political offences are generally not considered to extraditable. This raises the question whether or not disguised extradition can arise in the absence of extradition provisions. Mtambanengwe J specifically referred to the fact that no extradition treaty existed between Zimbabwe and Botswana. In such a case it can be argued that the authorities of both states are not bound by any procedures and hence may act as they please. This is a fundamental distinction, because the court in R v Hartley placed great emphasis on the fact that the New Zealand authorities had evaded existing extradition provisions between that country and Australia. The same reasoning was adopted by the Court of Appeal in Mackeson's case, where it took account of the fact that, as a result of direct rule in Zimbabwe in 1979, extradition provisions had come into operation between that country and the United Kingdom. Does this mean that domestic courts will grant relief only where existing extradition provisions between two states have been violated?

On the other hand, the question of deportation is problematical in Beahan's case, as under normal circumstances an alien cannot be deported to a state with which he has no legal links (such as nationality, citizenship or residence). It is submitted that the applicant in Beahan's case had no such links with Zimbabwe, and it would appear that the only reason why the Zimbabwe authorities were willing to accept him was in order for him to stand trial. This clearly smacks of extradition rather than deportation. At that stage he was a British subject and resident in South Africa. This can be contrasted with Mackeson's case, where the applicant's objection to being deported back to the United Kingdom was based on the desire of the authorities in that country for him to stand trial there. This was notwithstanding that he was a United Kingdom citizen. In Beahan's case the fugitive was simply handed over

without any formalities whatsoever, which means that such action cannot be described as either extradition or deportation. Is it to be assumed that no standards apply in such circumstances and officials can simply do as they please? But, on the other hand, the court was prepared to accept in principle that it would not exercise criminal jurisdiction in certain circumstances. Unfortunately, it did not spell out those circumstances."[25]

11. R v Hartley [26]

M C Cowling [27] comments as follows on this decision:

"A new dimension was added to the problem of extradition in R v Hartley, where the New Zealand Supreme Court accepted that, in accordance with the dictum of Lord Goddard CJ in Ex parte Elliott, it had jurisdiction to try a particular alleged offender notwithstanding irregularities in his apprehension. The applicant had been brought before the court as a result of a request made by New Zealand police to their Australian counterparts to apprehend him, a fugitive whom fled to Australia while being wanted on criminal charges in New Zealand. The Australian police willingly obliged, and the fugitive was picked up in Melbourne (it would not be proper to use the term 'arrest' in this particular context) and placed on the next plane to New Zealand, where he literally had no option but to walk into the waiting arms of the New Zealand police, who had made the initial request and had been alerted to his arrival. The accused challenged the jurisdiction of the court on the ground that the steps taken in this regard by the police (both Australian and New Zealand were illegal.

On the face of it, this contention appeared to be in direct contrast to the dictum in Ex parte Elliott. But Woodhouse J drew a distinction between a criminal court being vested with jurisdiction to try a particular offender (in terms of which the means of bringing such offender within the jurisdiction of the court are irrelevant) and a discretion enjoyed by any criminal court by way of its inherent jurisdiction to prevent abuse of its own process. In other words, even where jurisdiction exists, a criminal court still enjoys the power not to proceed with a particular matter where prior illegalities have the effect of tainting the subsequent trial. This means that any criminal court enjoying jurisdiction to try a particular offender also has a discretion not to exercise that

[25] "Unmasking 'Disguised Extradition' – a glimmer of Hope." Cowley is a senior lecturer in law at the University of Natal", BA (Rhodes) LLB (Natal) LLM. M Phil (Cautab)
[26] 1978 NZLR 199. See also the quotations from this decision in the Bennet v Horseferry Rd Mag.Court and An, (Section D7.1 supra), where the dicta of Woodhause J was approved.
[27] See previous footnote relating to the author of the article.

jurisdiction in certain circumstances. It would appear from the dictum that the court concluded that disguised extradition as revealed by the facts of this case constituted such circumstances..."

12. STATE v Wellem[28]

The decision in *State v Wellem* by Froneman AJ is the first South African decision wherein the role of Extradition Legislation and the failure to comply with it, was held to be decisive. The decision also applied the principles set out in *S v Ebrahim*.

The headnote of the report once again is an adequate summary for present purposes. I repeat:

"The accused were charged in Provisional Division with a number of offences including murder, robbery with aggravating circumstances and theft. The accused entered a plea in terms of s 106(1)(f) of the Criminal Procedure Act 51 of 1977 that the Court had no jurisdiction to try them as they had been apprehended in Ciskei and then brought to South Africa against their will. The evidence showed that accused No. 2 was arrested in Ciskei by members of the Ciskei Defence Force. The fact of his arrest was conveyed to the South African Police who proceeded to Ciskei where they found accused No. 2 at a police station. They informed him that he was a suspect in murder case in South Africa and asked him whether he wished to go with them to South Africa. He was told that if he did not do so he would be kept in custody in Ciskei and a request would be made for his extradition.

[28] 1993 (2) SACR 18E

He was not informed of the nature and content of extradition proceedings in the Ciskei. Accused No. 2 indicated that he was willing to go to South Africa and the Ciskei police released him into the custody of the South African Police. On the following day accused No. 2 was taken back to Ciskei where he pointed out the homes of accused No's 1 and 3 who were arrested by a member of the Ciskei police at their respective homes. The arrests took place with the assistance of the South African Police. Both accused No's 1 and 3 were similarly informed that they were suspects in a murder case in South Africa and were asked whether they wished to return with the South African Police to South Africa, failing which they would be kept in custody in Ciskei pending extradition proceedings. Both elected to go to South Africa.

Held, that the provisions of the Extradition Act 67 of 1962 were exhaustive of the manner in which South African officials may obtain the presence of persons who had committed extraditable offences in South Africa from Ciskei and similarly of the manner in which State officials in Ciskei may hand over such persons to South African officials: to allow State officials to circumvent the Important procedural and substantive safeguards for persons liable for extradition therein would frustrate the very purpose of the Act.

Held, accordingly, that the actions of the Ciskei officials in arresting, detaining and handing over the accused to the South African Police and the actions of the latter in requesting the

accuseds' arrest and detention in Ciskei and handing over in the manner they did was unlawful.

Held, further that in the absence of any evidence that the members of the South African Police had in terms of s 6(6) of the Police Act 7 of 1958 been directed by the Commissioner to perform service outside of South Africa, the conduct of those members of the police in Ciskei was unlawful.

Held, further that the consent of the accused was not sufficient to render their unlawful arrest and removal to South Africa lawful: where a person was unlawfully arrested and detained in a foreign state by officials of that state at the unlawful instance of the requesting states police officials who also participated in that unlawful arrest and detention, considerations of public policy relating to the due process of law outweighed any consent to removal to the requesting state by the individual concerned under those circumstances. This was particularly so in the present case where the accused were not told of the nature and ambit of the extradition proceedings in Ciskei or of the procedural and substantive safeguards provided for in the Act and extradition agreement.

Held, further that an arrest obtained by a stratagem or deceit was invalid.

Held, further that the handing over and removal of the accused amounted to an unlawful kidnapping or abduction and the accuseds' consent thereto was invalid. Accuseds' plea upheld and ordered that they be released from custody."

In regard to jurisdiction – the Court held that this must be decided in accordance with the rules of our law (i.e. Roman Dutch & South Africa) rather than international law. Here Court referred to Ebrahim at 569A-B of report of the decision.

The Court further held:

> *"From the analysis of the old authorities in Ebrahim case supra, it is clear that a person who committed a crime in the area of jurisdiction of one Court could only lawfully be arrested in a foreign area of jurisdiction and brought to trial in the area of jurisdiction where the crime has been committed if the competent authorities of that area or state, requested the competent authorities of the foreign area or state to do so".*

This finding puts in a nutshell an essential requirement of a legal extradition. The Namibian, Botswana and Zambian officials did not qualify as the competent authorities under the laws of their respective countries and acted in total disregard of this requirement. Consequently there was no request by a competent authority and also no delivery by a competent authority.

13. S v Buys & Others[29]

[29] 1994 (1) SACR 539 (O)

The decision by Lichtenberg JP in the Orange Free State Provincial Division in the case of *S v Buys and Others* followed the decisions in *S v Ebrahim* and *S v Wellem*. The headnote summarizes the decision as follows:

> *"The accused were charged in a Provincial Division with murder. The first accused raised a special plea in terms of s 106(1)(f) of the Criminal Procedure Act 51 of 1977 that the Court lacked jurisdiction as the accused had been extradited from Bophuthatswana to South Africa other than in terms of the provisions of the Extradition Act 67 of 1962 and the relevant Convention. It appeared from the evidence that the accused had been arrested in Bophuthatswana by members of the Bophuthatswana police. The arrests were lawful in terms of Bophuthatswana legislation. By agreement between the Bophuthatswana police and the South African police, members of the latter force transferred the accused from custody in Bophuthatswana to custody in South Africa. The accused were later released on their own recognisances by a magistrate's court. It appeared further that the accused were prepared to be transferred because they were being held under appalling conditions in Bophuthatswana. The Court held that there could not be two methods of extradition, viz one in terms of the Extradition Act and the relevant Convention and the other without the provisions of those enactments having been complied with: as the Act and the Convention had not been complied with in the instant case the extradition was unlawful and the Court had no jurisdiction. The Court held further that as the position of the other two accused was the same as that of the first accused, the Court did not have jurisdiction in their cases either."*

14. State v Mahala & Another[30]

The Appellate Division in this decision, written by Joubert JA, distinguished the decision in *State v Ebrahim.* Although *S v Wellem* and *S v Buys* were referred to, the approach in those two decisions were not followed. As a matter of fact, the Appellate Division did not express itself on the question whether or not the Court will have jurisdiction if the accused were removed from the country of their residence, in conflict with available Extradition and Deportation laws and without their consent. The summary in the report of the case adequately

[30] 1994 (1) SACR 510 (AD)

reflect the points of fact and law which were dealt with in the decision. I quote from that summary:

> *"The appellants were convicted in a Provincial Division on a charge of murder and were sentenced to death. When they were called upon to plead in the trial Court they raised a special plea that the Court lacked jurisdiction in that, in breach of international law, they had been unlawfully arrested in the Republic of Ciskei and/or removed from the Ciskei without their consent and brought to South Africa. The trial Court found that the appellants had not been unlawfully arrested by the South African Police in the Ciskei but had been arrested in South Africa. The Court convicted the appellants of murder and sentenced them to death.*
>
> *It appeared that the first appellant was initially arrested by the Ciskeian Police but released from arrest by them and handed to the South African Police. He voluntarily agreed to travel with the South African Police back to East London where he was arrested. As regards the second appellant, it appeared that he had been intercepted by members of the South African Police while he was still in Ciskei and requested to accompany them to South Africa, where he was arrested. The trial Court accordingly held that the appellants had not been unlawfully abducted and that the Court accordingly had jurisdiction to try them. On appeal.*
>
> *Held, that the trial Court had correctly held that the appellants were not unlawfully arrested in the Ciskei and that they had not been unlawfully abducted.*
> *Held, further, that as the appellants had not been unlawfully abducted from the Ciskei in violation of public international law and/or South African law, that there had been no violation of the sovereignty of the Ciskei and there had been no infringement of the appellants' fundamental human rights, there had been no breach of South African law and the trial Court accordingly had jurisdiction to try the appellants. The Court furthermore dismissed the appeal against the imposition of the death sentences for murder."*

The Court appears to have held that where the South African Police remove a suspect from the Ciskei and even handcuff him there, the sovereignty of the state is not impugned, as long as a formal arrest is not done in the Ciskei but only in South Africa once the person is brought across the border into South Africa. This appears to be, with respect, a very artificial approach where the

reality is a prior illegal series of acts executed inside the host country in order to remove him from the Ciskei to South Africa.

The Court also laid down an approach regarding consent by a suspect to be removed, which seems to be completely removed from what the Constitutional Court laid down as reasonable guidelines in *Mohamed v President of the RSA*, 2001 (3) SA 893 (CC).

It must be conceded that the Constitutional Court was also concerned about the fact that the USA could impose the death sentence on Mohamed if tried in the USA Courts. But in the Mahala case the death sentence could also be anticipated if the accused were removed to South Africa for trial.

The Mahala decisions, both that of the Eastern Province Provincial Division and the subsequent decision of the Appellate Division, which upheld the decision of the Provincial Division drew sharp criticism from commentators.

Prof John, Dugard had this to say about the decision of the Provincial Division: [31]

> *"S v Mahala & Another can only be explained in the context of this 'regional practice'. In this case Zietsman JP exercised criminal jurisdiction over two suspects physically arrested by the South African Police in Ciskei with the co-operation of the Ciskei police on the ground that the collusion between the South African and Ciskei police aimed at the avoidance of extradition procedures resulted in Ciskei's territorial sovereignty not being violated. The inevitable conclusion to be drawn from this 'regional practice' is that the strict rules of extradition have no place in the relations between South Africa and the quasi-sovereign TBVC states. S v Mahala therefore should not be seen as a useful or serious precedent on the law of extradition and abduction."*

[31] International Law – A South African Perspective, (1994) at 147.

Neville Botha, a commentator from the University of South Africa, writing in the South African Yearbook of International Law [32] commented as following on the decision of the Appellate Division on appeal:

> *"Apart from the lack of the use of force, the judgment turns on the fact that the accused were not actually physically arrested in Ciskei. However, arrest represents the culmination of a process of investigation, and even from the facts presented by the SAP, there is clear involvement and action by members of the SAP in Ciskei territory. The right of the SAP to act in foreign territory was, however, not examined by the court. Its assessment of Froneman's reasoning in Wellem would have been interesting and instructive. This reasoning was indeed accepted in Mofokeng to which the Appellate Division also failed to refer. In this latter case, reference is made to section 34(g) of the Police Act which creates the possibility of mutual assistance agreements between states (although none existed in that case) which would have rendered the police action valid. The only agreement the appeal court mentions is one between South Africa and Ciskei for the maintenance of the road on which the apprehension took place. It is also noted that he two police forces travel freely on that road. The relevance of this information is also somewhat obscure-a maintenance agreement and unhindered travel are a far cry from apprehension, questioning, clamping an individual in leg irons, and transporting him out of the country.*
>
> *The court also stated that the extradition proceedings need not be explained to the individual faced with the choice of returning to South Africa voluntarily or being extradited (contra: Wellem and Buys). It also found that there had been no violation of the accused's human rights – apparently because the removal had not been forcible. These issues were merely stated without discussion.*
>
> *It is indeed to be regretted that faced with the wealth of case law both in South Africa and internationally, in which the nature, scope, and validity of the male captus bene detentus principle are being incisively debated, the Appellate Division has delivered what is essentially an impoverished judgment. This is all the more distressing when one considers the binding nature of Appellate Division decisions. The logical conclusion to be drawn from the judgment is that provided the individual is not carried across the border in a sack – preferably kicking and screaming – South African courts will enjoy jurisdiction. Not only does this approach cast doubts on the value of the Extradition Act and extradition treaties (which it must be remembered are part of our law enjoying equal*

[32] South African Yearbook of International Law, (1993/1994)

> *status with common law in terms of the constitution), it is out of step with current international sentiment. Although Mahala represents an opportunity lost, it is to be hoped that the Ebrahim tide will not be so easily stemmed."*
> (My emphasis added)

The question is: When a detention and removal is done in conflict with the laws relating to extradition and deportation and without the consent of the person so detained and removed, is anything more required to make such action illegal. And in any event, if it is a requirement that such action must have the characteristic of being done "forcibly", then any pressure or influence emanating from a person in authority, such as a police officer, should suffice. Similarly, any fraud, trick or deceit applied to ensure the persons compliance, would suffice.

15. S v December[33]

In the judgment of the South *African Appellate Division in S v December*, written for the full bench by Nienaber JA, the Court stated that the decision in the Wellem and Buys cases were impliedly overruled in the Mahala decision and was now expressly overruled. I once again make use of the short summary contained in the report of the case and which reads as follows:

> *"The appellant was convicted in a Provincial Division of two counts of murder and was sentenced to death in respect of one count and to 25 years' imprisonment in respect of the other. In an appeal from the convictions and sentence of death, it was contended on behalf of the appellant, inter alia, that the trial Court had lacked jurisdiction to try him as he had been brought from the Republic of Ciskei to South Africa without any extradition proceedings having taken place. It appeared that the appellant had not been forced to leave Ciskei to return to South Africa but that he had willingly accompanied members of the SA Police. It was contended that the appellant had been enticed into South Africa by devious means and that the police contingent had acted unlawfully in entering*

[33] 1995 (1) SACR 438 (AD)

> *Ciskei would provide authority given them pursuant to s 6 of the Police Act 7 of 1958.*
>
> *Held, that on the facts there was no evidence that the appellant had been enticed to enter South Africa.*
>
> *Held, further, that to the extent that it was suggested that the appellant should at the outset have been lectured on the nature and details of extradition, no such duty was cast on the police as a precondition to consent from a person they wished to escort into the country.*
>
> *Held, further, that even though there was no proof that the police had authority in terms of s 6(6) of the Police Act to enter Ciskei, this did not deprive the trial Court of jurisdiction to try the appellant."*

As in Mahala, the main factual issue was decided in favour of the State. It was to the effect that the accused was neither arrested, nor abducted from the Ciskei and had consented, willingly to accompany the South African police officers from Ciskei – where he lived, to South Africa.

On this factual basis the Court held:

> *"Where the appellant was not forcibly abducted and his return to South Africa was voluntary, there was no infraction of South African or Public international Law; consequently the decision in Ebrahim's case did not preclude a South African Court from exercising jurisdiction to try the appellant……."*

It seems that by equating "not forcibly" with "voluntary", the Court accepted that if a removal is "not voluntary", it is "forcibly".

The Court continued:

> *"For the purpose of his alternative argument the appellant accepted that he was not forced to accompany the South African policemen to East London but that he did so willingly.*

Nevertheless, on the authority of S v Wellem (supra), it was submitted in this Court that the rationale of Ebrahim's case supra is to be extended to a situation where an accused person's presence within the jurisdiction is obtained by 'craft or cunning' (Wellem's case supra at 31c-f).

The argument founders as its berth: there is no basis whatsoever on the facts of this case for a finding that the appellant was enticed into South Africa by devious means. And to the extent that it was further suggested that the appellant should at the outset have been lectured on the nature and details of extradition proceedings in place between South Africa and the Ciskei at the time (see too S v Buys en Andere 1994 (1) SACR 539 (O) at 550f-552a), this Court in Mahala's case supra at 516d-e, held that no such duty is cast on the police as a precondition to consent from a person they wish to escort into this country. Failing a duty to speak, there can be no false representation by silence. Consent so obtained is not improperly obtained. Consent properly obtained dispenses with the necessity of seeking formal extradition.

S v Mahala (supra) also provides the answer to a further submission based on S v Wellem (supra at 29e-h), namely that the police contingent acted unlawfully when, without proven authority given to them pursuant to s 6(6) of the Police Act 7 of 1958, they entered the Ciskei in order to investigate a crime committed in South Africa; and that considerations of public policy precluded the appellant's consent from rendering conduct otherwise unlawful, lawful. That very situation also occurred in Mahala's case. Nevertheless this Court, with knowledge of Wellem's case which was cited to it, decided that the trial court had the jurisdiction to try the accused. In Mahala's case Wellem's case and, following it, Buys' case supra, were impliedly overruled. It is now done expressly.

In the absence of unlawful or improper conduct in the sense referred to in Ebrahim's case supra, on the part of any of the organs or functionaries of the South African State, a South African court is not precluded from trying anyone for crimes committed within its borders. Here was no unlawful conduct. The special plea was accordingly rejected."

I must briefly comment on some of the findings:

"(i) The most important perhaps is the finding that:

"Consent <u>properly obtained</u>, dispenses with the <u>necessity</u> of seeking <u>formal extradition</u>." (My emphasis added)

The Court therefore accepted that formal extradition, (of course only where such procedures are available in the form of extradition treaties and/or extradition laws,") is a necessity, unless the party to be extradited, consents and provided such consent was properly obtained.

(ii) The Court in *S v Wellem* held that where consent of the accused is relied on by the State to excuse an unlawful arrest and detention, such consent could not suffice where as in that case, "the accused were not told of the nature and ambit of the extradition proceeding in the Ciskei or of the procedural and substantive safeguards provided for in the Act and extradition agreement."

To this reasonable requirement, the Appellate Division per Nienaber JA, said:

> *"And to the extent that the appellant should at the outset have been lectured on the nature and details of extradition proceedings in place between South Africa and the Transkei at the time .....this Court in Mahala's case supra at 516 d-e held that no such duty is cast on the police as a precondition to consent from a person they wish to escort out of this country. Failing a duty to speak, there can be no false representation by silence. Consent so obtained is not improperly obtained....."*

Nobody suggested that the accused must be "lectured". But surely, it cannot be correct that the police officials, who require a waiver from the accused of his rights provided under the extradition laws, cannot remain silent, without even informing the accused at all of the gist of the implications, if the State wishes to prove consent amounting to a waiver of rights. The said finding by Appellate Division will make it very difficult for the State, if not almost

impossible, to discharge its onus to prove beyond reasonable doubt, the legality of the arrest and removal from one state to the other.

(iii) The issue on which Wellem and Buys was overruled, does not seem to be the requirement of "consent properly obtained," but what would constitute "consent properly obtained". It is in this regard that the Appeal Court in this case struck down not only what was held in the decisions of Wellem and Buys, but laid down an approach which was subsequently discredited by the Constitutional Court in *Mohamed v President of the RSA* in May 2001.

The Appellate Division of the Supreme Court obviously did not have the benefit of the ruling of the Constitutional Court and the guidelines which it laid down for the obtaining of consent from a person to be extradited or even deported.

(iv) In Wellem's case the Court held, that where a person was unlawfully arrested and detained in a foreign state by the officials of that state at the unlawful instance of the requesting states police officials, who also participated in that unlawful arrest and detention, considerations of public policy, relating to the due process of law outweighed any consent to removal to the requesting state by the individual concerned under these circumstances.

The Court in Wellem did not rule out completely that "consent properly obtained", can be a defence even where Extradition Laws and Agreements were not complied with.

In *S v Buys* it seems that the Court unambiguously held that if the terms of the Extradition Act and Convention are not complied with, the "extradition" was unlawful and the Court had no jurisdiction. The Court said: "There could not be two methods of extradition, viz one in terms of the Extradition Act and the relevant Convention and the other without the provisions of those enactments being complied with."

The decision in S v December clearly struck down any suggestion in *S v Wellem* and *S v Buys* that consent properly obtained, will not suffice to remedy the failure to comply with an available Extradition Act and Convention.

(v) In Wellem's decision detention and/or removal achieved by "craft or cunning", or by "stratagem of deceit, amounts to an unlawful "kidnapping" or "abduction" and was a justified extension of the "abduction" concept as it appeared in *S v Ebrahim*. In *S v December* this approach was not rejected, but the argument based on it was rejected only on the facts:

> *"The argument founders at its berth: there is no basis whatever on the facts of his case that the appellant was enticed into South Africa by devious means."*

To conclude this review of the case law, I must reiterate that the Namibian Supreme Court is not bound to follow decisions of the South African Supreme Court (Appellate Division) or even the South African Constitutional Court.

One must keep in mind that the Appellate Division when considering S v Mahala and S v December was faced with appellants who had already been

found guilty of the most callous, cowardly and heinous crimes of murder. To hold at the appeal stage that the Court *a quo* who had rejected the jurisdiction point and then convicted and sentenced the accused on the merits, had erred in not upholding the objection to the jurisdiction, would have resulted in a grave injustice to the victims of those crimes, their families and friends. To see that justice is done not only to accused persons, but also to the victims of crime is part of the aim of the Rule of Law and the public interest.

Nevertheless, there is no good reason why the State's officials should flout the constitution and laws of their own country and those of neighbouring states. Such abuse of process in countries which subscribe to the Rule of Law, can never be in the public interest.

I have come to the conclusion that the Wellem and Buys decisions were correctly decided, except insofar as these decisions held that consent properly obtained, will not rectify failure to comply with available Extradition Laws and Conventions. In that regard I prefer to follow the two Appellate Division decisions in *S v Mahala* and *State v December*. It also seems to me that the Appellate Division was wrong in sanctioning silence by the officials when confronting the accused and when they are initiating the removal of the suspected fugitive. Such suspected fugitive is at least entitled to know the gist of what is intended for him, such as the intention to put him on trial and the nature of the charges he/she would be expected to face upon his/her return and the gist of extradition procedures and his/her rights under such procedures.

This course may place a burden on the officials, but such burden must be undertaken if the State wishes to take a short cut and avoid a more lengthy and complicated Extradition Procedure, by obtaining a waiver from an accused person.

SECTION E:IS THE ABUSE OF THE LAW AND OF THE RIGHTS OF THE PERSONS DETAINED IN AND REMOVED FROM THE HOST COUNTRY, RELEVANT.

In this regard Mr Gauntlett submitted in his heads of argument:

> *"It is submitted that this Court should not, save in the most extreme cases, embark on a determination, as the Court a quo did, of the lawfulness of functionaries of a foreign state in accordance with the municipal law of that State. This principle is expressed in the "act of state doctrine adopted by courts in the United States. In English courts, a similar approach is explained on the basis of judicial restraint in matters that might affect international relations and the comity between nations. The principle is further based on equality and the sovereignty of nations – as well as the fact that a municipal court has no manageable standards by which to judge issues which occurred in a foreign state.*
>
> *42.The act of state doctrine is not a principle of public international law, but is widely accepted in municipal systems. The doctrine gains particular significance in light of the principle in Article 96 (c) of the constitution of Namibia, that the State endeavours to ensure that in its international relations it creates and maintains just and mutually beneficial relations amongst nations.*
>
> *43.The doctrine is not absolute and notable exceptions have been made in recent times, of which the Pinochet case, discussed above, is a prime example. The doctrine however retains some significance. It is submitted that all of the exceptions to the principle in recent cases indicate that municipal courts will not under this rubric turn away from acknowledging extreme violations of public international law (such as invasions of territorial sovereignty) or egregious violations of international human rights such as torture. This is, however not such a case."*

Mr Gauntlett then goes on to deal with the concept and issues of “disguised extradition” and impliedly accepts that “disguised extradition”, where it is used, is an exception to the “act of state” doctrine. He cites with approval what Lord Denning said in R v Brixton Prison (Governor), Ex Parte Soblen 1962 3 All ER 641 (CA), dealt with in Section D6 supra.

For the sake of brevity I will only repeat the last two paragraphs of the quotation:

> *“It is open to these courts to inquire whether the purpose of the Home Secretary was a lawful or unlawful purpose. Was there a misuse of power or not? The courts can always go behind the face of the deportation order in order to see whether the powers entrusted by Parliament have been exercised lawfully or not”.*

State counsel however continued to equate the action of police and, defence officials with Namibia as a state.

In my respectful view “the State” and “acts of state” cannot be equated with acts of officials who are not authorized by the law of the state to act for and in the name of the State and thus to represent the state. The fact that the host State will be held responsible for wrongs against persons, such as delicts, which are committed by officials of the host State when they are acting in the course of their employment, does not make those wrongs “acts of state” of the host State, which for that reason, falls outside the jurisdiction of a Court of the forum State.

Several of the authorities referred to highlight the uncertainty about the concept of “act of state” and the use of that concept as a bar to a trial court in

a criminal case in the forum state, investigating, or deciding or even expressing itself on wrongs and abuses perpetrated in the host state.

J G Starke deals in his book, "Introduction to International Law," with the proposition that "the Court of one state cannot question the validity or legality of the act of state of another sovereign country or its agents and that such questioning must be done, if at all, through the diplomatic channels" as "a more far reaching proposition" which "cannot as yet be said to be part of international law".[34]

As pointed out before, the aforesaid "far reaching proposition" also finds no support in the decision of R v Brixton Prison (Governor) Ex Parte Soblen, supra, where the argument was about interference with decisions of the Secretary of State, equivalent to a Minister, and as such obviously a representative or agent of the State, authorized by law to take decisions regarding deportation on behalf of the State.

The decision in Attorney General v Nissan, [35], referred to by counsel, dealt with acts of state in a different context. It throws no light on the issue of the aforesaid "far-reaching proposition."

Bradley and Ewing in the 11th edition of the book "Constitutional and Administrative Law" says: "Although it is often applied confusingly in different situations, 'act of state' is often used in this context. One definition of act of state is that is an act of the Executive as a matter of policy performed in the course of its relations with another state, including its relations with subjects of

[34] J.G. Starke, QC, in "Introduction to International Law, 10th edition, 1989, p110.
[35] House of Lords, H.L.(E) 1970

that state, unless they are temporarily within the allegiance of the Crown'. This is not a wholly satisfactory definition and different legal inferences may be drawn from it..."

Brownlee, in "Principles of Public International Law referred to by counsel for the State, states:

> *"One form of Act of State doctrine is the principle (which is not a rule of public international law) that municipal courts will not pass on the validity of acts of foreign government performed in their capacities as sovereigns within their own territories". (My emphasis added).*

The related argument is that a Court such as the Court a quo enquiring inter alia into acts of officials of a host state, done in conjunction with officials of the forum state, affecting the rights of any accused before such Court, who is a citizen of the country of the forum state, will jeopardize or prejudice good relations between the affected states. This argument appears to me to be farfetched.

A number of decisions in civil cases have been brought to our attention several of which have been decided many decades ago, if not centuries ago, and are extremely unhelpful. I will briefly refer to some. Sinclair v H.M Advocate, 17 RJC was decided in 1890. The case is not in point at all because it deals with a situation where there was neither extradition treaty, nor extradition laws with mandatory provisions. The learned judge Lord Mac Laren said: "Generally it (i.e. extradition) is done by treaty, but if a state refuses to bind itself by treaty, and prefers to deal with each case on its merits, we must be content to receive the fugitive on these conditions, and we have neither title nor interest to

inquire as to the regularity under which he is apprehended and given over to the official sent out to receive him into custody".

In Underhill v Hernandez, 168 US 250 1897 at 252, the US Supreme Court, said "Every sovereign State is bound to respect the sovereignty of every other State and the Courts of one State will not sit in judgment on the acts of government of another done within its own territory".

The point is that illegal action by unauthorized officials in a state is certainly not what was meant by "acts of government".

In Banco Nacional de Cuba v Peter L F Sabbatine et al, 376 US 398 (1964) the need for "judicial restraint" was mentioned and it was pointed out that "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches". The above stricture is rather vague and ambiguous with no helpful guidelines.

In Buttes Gas and Oil v Hammer & Another and Occidental Petroleum Corporation & Another v Buttes Gas and Oil Co, 1981 3 All ER, Lord Wilberforce said inter alia:

> *"There exists in English Law a more general principle that Courts will not adjudicate on the transactions of foreign states. Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if existing, not as a variety of 'act of state' but one for judicial restraint and abstention..."*

The question once again is what was meant by "transactions of foreign states". In my respectful view it was never meant to refer to actions of unauthorized officials, committing unauthorized and illegal acts.

The decision in Abassi v Secretary of State for foreign and Commonwealth Affairs, 200 2 EWCA CIV 1598 was decided in a completely different setting and is not in point at all. Decisions such as these above referred to, have been misconstrued and unjustifiably extended to include under the label "act of state" and/or acts where judicial restraint is necessary, the unauthorized and illegal acts of unauthorized officials.

The decision of the House of Lords in R v Bow Street Metropolitan Stipendiary Magistrate and Others, *ex parte* Pinochet Ugarte, was also referred to. This decision was given in 1998 against the background of the State Immunity Act of 1978, enacted by the United Kingdom Parliament, dealing *inter alia* with the Immunity of a foreign state and that of a head of State in courts of the United Kingdom. The House of Lords, by a majority of 3 – 2, found that Pinochet, a former head of State of Chile, had no immunity from proceedings in Courts in the United Kingdom.

The aforesaid Act of 1978, and its impact on the ultimate decision of that Court, is not relevant to the issues before us in the instant case. However, the issue of the doctrine of acts of State, is relevant to the issues in the matter before us. Several of the learned judges of the House of Lords reviewed the decisions of courts of law on the doctrine as well as the writings and opinions of recognized scholars and institutions, including most of the decisions referred to by State counsel before us.

All the decisions reviewed by the House of Lords, once again showed that the Act of State doctrine refers to acts by the sovereign of an independent State, or to acts which can truly be said to be that of officials representing the sovereign, acting in the exercise of the sovereignty of that State.

Lord Slynn of Hadley, who was one of the majority judges in the House of Lords decision in Bennet and one of the minority in the Pinochet decision, said in regard to changes in the rules of Customary International Law:

> *"Rules of customary international law changes however, as Lord Denning, MR said in Trendex Trading Corp. Ltd v Central Bank of Nigeria (1977), ALL ER 881 at 890 (1977) QB 529 at 554, we should give effect to those changes and not be bound by any idea of stare decisis in international law. Thus, e.g. the concept of absolute immunity for a sovereign, has changed to adopt a theory of restricted immunity in so far as it concerns the activities of a state engaging in trade. One must therefore ask - is there sufficient evidence to show that the Rule of International Law has changed?...*
>
> *This principle of immunity has, therefore, to be considered in the light of developments in International Law to what are called International Crimes. Sometimes these developments are through Conventions."*

The learned judge then cited certain conventions relating to International Crimes. The principle stated is obviously also applicable to conventions and treaties relating to fundamental human rights of the individual.

Lord Steyn, one of the majority judges in Pinochet, had this to say in regard to the doctrine of acts of state in criminal cases:

> "Since the act of state doctrine depends on public policy as perceived by Courts in the forum at the time of the suit, the

> developments since 1973 are also relevant and serve to reinforce my view. I would indorse the observation in (1986) 1 Third Restatement of the Foreign Relations Law of the United States 370, published by the American Institute to the effect that:
>
> > 'A claim arising out of an alleged violation of fundamental human rights – <u>for instance</u> a claim on behalf of a victim of torture or genocide – would if otherwise sustainable <u>probably</u> not be defeated by the act of state doctrine, <u>since the accepted international law of human rights is well established and contemplates external scrutening of such acts</u>.'"
> > (My emphasis added.)

The learned judge referred to torture and genocide as examples of the violation of fundamental human rights. He stated a principle, and did not purport to restrict its applicability to torture and genocide. He also stated that in his view the word "generally" should be substituted for the word "probably" in the above quotation.

The above decisions and writings of acknowledged scholars suffice to demonstrate the confusion about the concept of "act of state". The Courts outside the USA, have in the last decade or two moved away from the aforesaid "far reaching proposition" in several authoritative and landmark decisions.

It is clear from the decisions referred to and discussed under Section D supra, that situations where there exist between states extradition treaties and/or 'reciprocal extradition laws, have been distinguished from those where there were not such treaties and legislation. Where mandatory legislature provisions exist, it has been held that such provisions are exhaustive and extradition and/or deportation outside such provisions are illegal. That position was the most clearly spelled out in the *Bennet v Horseferry* decision, the New Zealand

decision in *R v Hartley* and the South African decisions of Wellem and Buys. This aspect was not contradicted in the subsequent decisions of the Appellate Division in Mahala and December.

The majority decision of the United States of America Supreme Court in Alvarez-Marchain can be distinguished as I have shown in Section "D"4, on the ground that in that case there was only an extradition treaty between Mexico and the USA and the provisions therein were very wide and left a discretion to the Executive and even left it open for the executive to decide to use other means to bring a fugitive before the trial Court.

Mr. Gauntlett concluded his written argument in this regard as follows:

> *"57.The critical issue identified by the court a quo thus remains the actions of the Namibian authorities and an assessment of their lawfulness. The unlawfulness of the actions of the Zambian and Botswana authorities alone is neither necessary, relevant or conclusive – at best they gain significance as a prism through which to view the actions of the Namibian authorities. It is submitted that this court should be very reluctant to make such a far-reaching finding against the executive of a foreign State to provide what is at best supporting evidence unless the wrongdoing thus highlighted was of the most serious kind."*

Mr. Gauntlett thus appears to concede that an alternative justification for the Court to look into the "unlawfulness of Zambian and Botswana authorities" is as "a prism through which to view the actions of the Namibian authorities."

In regard to the warning that the Court should be very reluctant to make such a far-reaching finding against the "executive of a foreign state", Mr. Gauntlett in my respectful view, once again confuses investigation into and findings on the

acts of unauthorized officials with that of acts of the Executive of a State as the term is used in regard to the “Act of State” doctrine.

Even though “acts of state” refer to the acts of the sovereign power or senior members of government and the executive, such as ministers, who are in terms of the laws of a sovereign country authorized to act for and on behalf of the State, the State will still be held responsible for the unlawful acts of its officials, when a Court, deciding on whether or not it has jurisdiction to try the accused, considers the acts of those officials in bringing the accused before Court.

As to the qualification that such an enquiry and findings should not be made “unless the wrongdoing thus highlighted is of the most serious kind,” my view is that a total disregard of the laws of the relevant states in regard to extradition and/or deportation and even of international law, is in fact “a wrongdoing of the most serious kind”. Such wrongdoing is also “exceptional” and falls within its own distinct class or category of gross illegality and abuse, which without more, will require a criminal court to decline jurisdiction.

Even if Mr. Gauntlett’s abovequoted restrictive approach was applicable, the Court *a quo* would have been justified in considering the actions of both Namibian, Zambian and Botswana officials and to make findings on it, in so far as it relate to the issue of the abuse of the law in bringing the accused before it. How else could it be determined what the alleged wrongdoing was and whether or not it was of the most serious kind?

The Court *a quo* followed the approach of Wellem and Buys, to the effect that where treaties and or laws provide for the procedures for extradition, such provisions are exhaustive and extradition or deportation outside it would be unlawful.

In my respectful view the approach set out in the cases of Bennet, read with Ebrahim, Mohamed, Wellem, Buys, the Crown Appeals decision in Mackeson, and Hartley, all dealt with in Section D supra, commend itself and should be followed by the Namibian Supreme Court.

SECTION F: THE GROSSNESS OF THE ABUSE BY THE OFFICIALS IN BOTSWANA AND ZAMBIA.

These officials who detained and handed over the accused persons to Namibian police and army personnel, had neither complied with any of the requirements of the laws of their own country nor with the provisions of international law as provided for in the International Covenant of Civil and Political Rights and the Convention and Protocol relating to Refugees. (See Section C4 and C5 *supra*.)

As correctly pointed out by the Court *a quo*, a written request supported by documentation in support thereof is required to set in motion the extradition proceedings.

These officials furthermore completely prevented the accused from exercising their rights provided in the aforesaid legislation. It is necessary to peruse the provisions of those laws as set out in Section C supra to grasp the full ambit of these rights. Those provisions provide *inter alia* for the right to proper arrest in terms of a warrant, the right to legal representation, opportunity to appear at a hearing before a magistrate in the form of a preparatory examination where the charges against them by the requesting country are tabulated and considered, to establish whether they are extraditable, and by which *inter alia* the right to specificity and not to be extradited for crimes of a political nature, are very important forms of protection.

Even in the case of an alleged deportation, there must be a written document to declare the person a prohibited immigrant, a warrant of deportation when that is decided on, the opportunity to make representations to the appropriate senior officials and tribunals established by law, the right to legal representation, the opportunity to leave the country within a reasonable period and an indicated route along which such person should leave the deporting country.

When the provisions of the laws in question are perused, it must be clear that there was a gross abuse not only of the laws of Botswana and Zambia but of the rights of the accused persons in terms of those laws and in terms of international law. Hoff J gave full reasons for finding that the applicable laws were not complied with. I fully agree with his reasons and finding in this regard.

SECTION G: THE INVOLVEMENT OF NAMIBIAN OFFICIALS IN THE ABUSE

1.Although the Court a quo had found that there was “no abduction in the sense used in the Ebrahim case” and also no connivance by South African officials in such abduction, proved by the evidence, it did in effect find that the Namibians were party to the illegalities pertaining to the illegal taking prisoner, detention, removal and handing over of the accused persons. The Court put this aspect as follows:

> *“The ‘deportation’ of 12 of the accused persons was clearly preceded by a request from officers acting on behalf of the Namibian State and it cannot with any conviction be argued that the Zambian authorities acted unilaterally when they deported Namibians.*
>
> *If one accepts, in favour of the State, the accused person had been arrested by the respective neighbouring authorities, a decision had not been taken and they had not been deported until some time after the Namibian authorities had requested their return”.*

The Court further stated:

> *“In my view the protest by the Namibian authorities that they had no part in irregularities which occurred during the deportation procedures in Zambia and Botswana, in itself, cannot come to their rescue since their own initial conduct, by informally requesting the handing over of fugitives and thus bypassing formal extradition proceedings tainted those very deportation proceedings they now want to put at a distance.”*

It is I think useful to look at the dictionary meanings of the words “abduction” “connive” and “collusion” before we proceed. The Oxford Advanced Learners Dictionary of Current English by Hornsby mention the following definitions:

ABDUCTION:“Take or lead … away unlawfully by force, or fraud”.

CONNIVE: "Take no notice of (what is wrong, what ought to be opposed) (suggesting that tacit consent or approval is given).

COLLUSION: "Secret agreement or understanding for a deceitful or fraudulent purpose."

I have compared these definitions with others and am satisfied that it fairly reflects the meaning of these words.

I have already dealt in Section B5 supra with the finding regarding abduction "in the sense of the Ebrahim case" and that it could not find on the facts that "there was indeed a connive or collusion between the authorities to abduct the accused persons". I also pointed out in that section that the learned judge *a quo* there committed a misdirection.

This Court on appeal is entitled to come to a different conclusion.

To the extent that the Namibian police and/or army officials moved to receive, take prisoner, the Namibian accused, without any prior legal extradition request by them, but merely a request from army or police personnel and removed those accused from those countries without any legal warrants or other written authority in terms of Extradition laws or Immigration and/or deportation laws, was *prima facie* evidence of being a party to, or having colluded or connived with the Zambian or Botswana officials' illegal actions.

In such circumstances it should not really be decisive when a Court before which such accused is arraigned has to decide whether or not it has jurisdiction or whether or not it should exercise its discretion to decline jurisdiction,

whether the manner in which the accused was brought before it should be clothed with the label abduction, abduction in essence, disguised extradition, or "voluntary surrender", and whether or not it is in conflict with international law, and/or domestic law, and/or Roman Dutch Law, and/or South African Law.

2. Mr Gauntlett submitted in this regard in his written heads of argument:

> *"In this matter Namibia had asked for no more than the apprehension and delivery of the respondents as fugitives from justice. There is no evidence that Namibia had suggested that this be achieved by illegal means. When such a request is directed, it is presumed that the reference is intended to refer to lawful actions."*

On what logic or law this presumption is based, was not disclosed. There is no basis whatever for such a presumption. The presumption or alternatively, the inference, is rather the opposite.

"Namibia" must be presumed to know its own laws and at least the mandatory procedure laid down in the reciprocal legislation of the neighbouring Commonwealth states, Botswana and Zambia being two of those states. So "Namibia" must know or be presumed to know that the lawful way is to act in terms of the Extradition legislation, the first step of which is a proper written request, supported by documents and in the case of Botswana, directed by the Namibian diplomatic representative or consular officer in Botswana to the Minister in Botswana, who is designated for this purpose by the Botswana Act. In Zambia the law provides:

> *"A request for extradition of any person under this part shall be made in writing to the Attorney-General and shall be communicated by –*
>
> *(a) a diplomatic agent of the requesting country, accredited to the Republic; or*
> *(b) any other means provided in the relevant extradition provisions."*

It must be remembered that Namibia correctly followed this procedure when it requested the extradition of 13 other Namibians, who were also accused of participating in the Caprivi uprising. See in this regard the decision in Kakena Likunga Alfred v The Republic of Namibia heard on August 2002 and decided in December 2002.

3.It follows from the above that the request by "Namibia" could only have been conveyed in the form and in the circumstances on the assumption that a "short cut" will be taken not conforming with the law of extradition.

4.It must further be kept in mind that the burden was on the State to prove that the accused were brought before the trial Court by legal procedures.

5.On the evidence before Court, Namibia was, if not the main instigator, at least a "knowing party", in the words of Lord Griffiths in the Bennet decision. Lord Griffiths also made it clear that a situation where "a practice developed where the police or prosecuting authorities in this country ignored extradition procedures by a mere request to police colleagues in another country, they would be flouting the extradition procedures and depriving the accused of the safeguards built into the extradition process for his benefit. It is to my mind

unthinkable that the Court should declare itself to be powerless and stand idly by,…"

The case now under consideration is precisely such a case.

6.The cooperation between Namibian police and army personnel with their colleagues in Botswana and Zambia must be seen against the background of a violent uprising in the Caprivi.

(i) The fact of this uprising was a notorious fact, obviously well-known also to the officials of the neighbouring countries Botswana and Zambia.

(ii) It soon became known that a considerable number of Caprivians moved from the Caprivi to Botswana and Zambia before the actual outbreak and apparently increased after it.

(iii) The first group, the Mamili group had already left before the actual outbreak on 2 August 1999 and were arrested and in detention in Zambia at the time of the actual outbreak, allegedly because they were suspected prohibited immigrants. In Section A3 it was asserted that the arrest of the first group of which Mushwena was a member took place on 18th June. That appears to be incorrect because Mushwena, and Puteho, according to the entry declaration forms which they completed on 23/6/1999, entered on that date.

Stephen Mamili, who died in detention awaiting trial in Namibia before the application of the 13 applicants before the Court *a quo*, also entered Zambia on 23/6/99 and completed a proper immigration form. Mamili stated the purpose of his entry to be "other political". Mushwena stated the purpose as "Political asylum". Puteho stated that his purpose was – "other", i.e. other than those stipulated on the form.

These forms were handed into Court by State witnesses. These forms support the affidavits of Mushwena, and Puteho, who were members of the first group. An important feature of the uncontradicted evidence of Mushwena as contained in his affidavit was the following:

> *"7. Five colleagues and myself left for Zambia due to the fact that even though we were given political asylum by the Botswana government, we were forced to leave because of the living conditions we were subjected to.*
>
> *8. We entered Zambia on 18th June 1999 and reported ourselves to the Zambian Police at Katima Mulilo but due to lack of space there, we were taken to Sesheke where we spent about two days and later transferred to Mongu Prison. Later we were taken to Chilenje Police Station cells in Lusaka and finally to Kamwala Remand Prison, also in Lusaka.*
>
> *9. At Kamwala Remand Prison, a representative of the United Nations High Commission for Refugees (UNHCR) came to see us. We filled in some application forms for refugee status and the representative took photographs of us and told us to wait for the outcome of our applications.*
>
> *10. Before we could get the outcome of our applications, in or about July 1999, a human rights lawyer by the name of Mr Ngulube came to see us at the Remand Prison. We explained our position to him and he told us that he would take out case to court so that we could be removed from prison*
>
> .
>
> *11. However, before Mr Ngulube could take our case to court, we were removed from the Remand Prison and taken back*

to Namibia on 7th August 1999. We stayed at Kamwala Remand Prison for about 53 days.

12. *On the day of our removal from Kamwala Remand Prison, the prison authorities told us that we were being taken to the Central Police Station in Lusaka for interviews but they did not tell us what the interviews were about.*

13. *When we got into their bakkie, we were driven straight to the Airport in Lusaka. At the Airport we asked the officers where we were being taken. The officers told us that we would first be taken to Kampala in Uganda, then to Europe. We were suspicious because the plane we were about to use was a military one. When we got in the plan, the pilot told us that we were flying to Sesheke. That's when we realised that we were being unlawfully conveyed to Namibia.*

14. *We were flown to Sesheke in Zambia, where we found Namibian Police officers who had crossed into Zambia to collect us, waiting. When we arrived on the Namibian side of Katima Mulilo, we were driven straight to Mpacha Military Base.*

15. *Around 01:00 to 02:00 O'clock in the afternoon, we were driven to Katima Mulilo Magistrate's court cells and later in the evening were taken back to Mpacha Military Base where the officers tied our hands behind our backs with wire strings.*

16. *We stayed at Mpacha Military Base from 7th to 10th August 1999. Thereafter, we were transferred to Grootfontein Military Base and subsequently, to Grootfontein Prison where we have been until the present time.*

17. *On 11th August 1999, we were charged with high treason and sedition and as time went by, other counts were added".*

It is clear from the above that there was a total and deliberate refusal or failure to follow the procedure laid down in the legislation of Zambia. The accused were even actively prevented from taking their case to the Zambian Court. The rush to get the accused across the border back into Namibia after the outbreak of hostilities on 2 August 1999, fits in with the background of conferences between Zambia and Namibia military

and police personnel and the specific request of General Shali to urgently hand over the Namibians.[36]

(iv)It was only after the outbreak of hostilities on 2 August 1999 that they were handed over by Zambian officials to Namibia officials. The question is why? The answer appears from the contacts and conferences between Zambian officials and Namibian officials as set out in Section A3(ii) – A3(vii) supra.

At the first meeting Chief Inspector Goraseb "informed the Zambians to heighten their vigilance".

At the second meeting a Zambian delegation led by their criminal investigation officer met with Chief Inspector Goraseb in Katima Mulilo. The purpose was twofold:

Firstly to inform Chief Inspector Goraseb that they ware aware of the attack on Caprivi. Secondly to seek ways in which they could assist in curbing the problem. The next day, the 7th August, Mayor General Nghiishililua, Chief of operations of the Namibian Police Force, instructed Chief Inspector Goraseb to receive the group at Sesheke in Zambia.

This was done by Inspector Theron and Inspector Shishandi of the Namibian police who went to Sesheka in Zambia, where they received and removed this group to Namibia where they were handed to the Namibian Army and where they remained in detention.

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[36] See the 'Bennet v Horseferry Rd Magistrate Court decision Section D7 supra

The evidence of Major-General Shali is significant in this regard. He was asked by the State Prosecutor, Mr January:

> *"As a result of the information from Zambia, what did you do?*
> *Shali replied:*
>
> *"I did exactly what I was supposed to do in my capacity of Army Commander to immediately contact my counterparts on the other side of the border and asked them to immediately contact my counterparts on the other side of the border and asked them to immediately hand over the group of terrorists that I was looking for because I wanted them to be brought to book".*
> *"What happened after that?"*
> *"The Zambians did exactly what we asked them to do and immediately they were handed over."*

Some further passages from Shali's evidence are significant: In his evidence-in-chief he said:

> "It was simple, simple in the sense that Zambian authorities informed us that they have, they are holding people that we are looking for as a result of which the Zambian authorities decided to hand them over to the Namibian authorities." Here it is expressly stated and admitted that the Zambian authorities decided to hand over the "people that the Namibians are looking for" "as a result of which" they were handed over.

Another passage reads:

> *"I was saying that we went there to collect them during the process of deportation, that's why I have mentioned to you to say that these are people who had no choice in any case they had to be returned to Namibian authorities in any case, whether it was*

> *legal, because they were in Zambia illegally and the law does not say that the person has to be deported from point A to Point B of the country it can be anywhere".*

The attitude to legal extradition procedures appears from the following extract:

> *"I said there was no need to ask for extradition because as far as the Zambian authorities are concerned, they were holding illegal immigrants whom they were ready to deport to Namibia. As far as we are concerned this is a group of terrorists which we so badly wanted to apprehend."*

It is clear from the above that the witness, who was instrumental in the handing over and taking prisoner of the Namibians, continuously refer to the "authorities" in Zambia and Namibia, without apparently realizing that the minimum requirement is a request by authorities who are authorized by law to make the request on the one hand, and on the other authorities authorized by law to decide and accede to such a request.

It is clear from the above that there was not the slightest indication of extradition procedure and also no indication whatever of a legal deportation.

The purpose of the handing over of the "terrorists" by army personnel in Zambia to army personnel in Namibia was so that they "could be brought to book in Namibia" and because General Shali asked for their immediate handover for that very purpose. The handover, <u>when it happened</u> was clearly at the initiative of General Shali and other Namibian military and police officials. In this context the purpose and motive was neither legal extradition nor legal deportation. At least General Shali and the other Namibian Defence

Force and police officials influenced the handing over, or knowingly cooperated.

The commentator MG Cowley referred to supra, correctly comments:

> *"And Courts must scrutinize official acts and factual situations very carefully in order to determine whether the expulsion of an alien is a genuine case of deportation or whether it constitutes a form of disguised extradition. Although it is conceded that the distinction is subtle, there are some important differences. The essence of the concept of deportation is the decision by the appropriate authorities in a particular state that the continued presence of an alien in that state is undesirable. So such alien is ordered to leave the territory. The expelling state should not concern itself with the destination of the deportee, nor should deportation be preceded by a request from another state. Thus if the supposed act of deportation was initiated by a request from another state, (state A) to the effect that an alien should be deported to that state with the ultimate objective of his standing trial, this would constitute a clear case of disguised extradition. And in such a case the domestic courts of the receiving state (state A) should grant relief to such an offender on the basis that his presence before the Court is irregular". (My emphasis added)*

It must also be noted that in the instant case there is no indication whatever that a decision to deport was taken by the "appropriate" authorities.

7.The position for the State is aggravated by the fact that Namibian Police and/or military personnel went into Zambian and Botswanan territory in order there to take possession of the accused and from there to remove them to Namibia.

To do so, they were depending on their counterparts in Zambia. Counsel for the defence pointed out that the Namibian Police did not formally arrest the accused in Botswana and/or Zambia but only did so after they had arrived back

in Namibia. That was because they had no legal authority to make an arrest in Zambia and Botswana.

The question then is on what legal authority did they take the accused prisoner, detained them and removed them to Namibia? It follows from the fact that the Namibians could make no legal arrest in Zambia and Botswana, that they also could not legally receive and take possession of the accused, detain them and remove them into Namibia.

The Zambian and Botswanan counterparts obviously also had no legal authority with which they could clothe the Namibians. So what we have is that Namibian officials illegally took of the accused prisoner inside Zambia and Botswana, illegally detained them and illegally removed them across the Namibian border. To do this, the Zambians and the Namibians were dependant on each other and the illegal deed was done by cooperation between them.

Some of the accused, e.g. the members of the second group, were handcuffed by Namibian military personnel in Zambia. This action indisputably contains an element of force. It must also be assumed that some of the military and police personnel, including the Namibian personnel, were armed at the various stages when they dealt with the accused, reinforcing obvious authority and leaving the accused with no alternative but to obey their commands and to submit to the action to remove them from Zambia to Namibia.

Neither State witnesses nor counsel for the State, raised the defence of consent or waiver of rights except in the case of accused. Charles Kalipa Samboma, accused no. 119.

In these circumstances the so-called taking prisoner, detaining and removing of the 12 accused from Zambia and Botswana to Namibia, was in essence an abduction, but not of the kind which occurred in the Ebrahim case. Nevertheless such action without consent can justifiably be described as having been done "forcibly", because it was done without consent and obviously made possible by the apparent authority and power of the police and military officials. An appropriate label for such action is "official abduction".

It also does not matter whether the label of the acts of the said officials is "abduction", "official abduction", "disguised extradition" or "voluntary" or "informal rendition".

Neville Botha in his article in the South African Yearbook on International Law entitled "Aspects of Extradition and Deportation" describes informal rendition as a more subtle form of abduction. While abduction involves the flagrant violation of an extradition treaty and violation of the host states sovereignty, rendition is a less obvious circumvention of extradition formalities. It involves the forcible return of an offender but with the knowledge and generally, although not inevitably, also the sanction and active cooperation of the State in which he has sought refuge....."

The author later describes the said action as a toned down version of abduction in that there is no violation of the sovereignty of the host state and therefore no international delinquency, but the process remains essentially unlawful". Referring to the decisions in Wellem and Ebrahim he comments: "It seems somewhat strained to classify what could well have been *bona fide*

action on behalf of the South Africa Police as 'craft and cunning' simply to force it into the kidnapping mould. It is also unnecessary to do so when invalidity based on rendition is available to the Courts".

9.Another feature of the action or inaction of the Namibian officials involved, was that they specifically refrained from explaining anything to the prisoners, they even refrained from talking to them. This they apparently did because they thought that they cannot execute official acts in Zambia.

This attitude however is not only bizarre, but underlines the gross abuse of the right of the accused to be heard, in accordance with the *audi alterim rule*, which is an internationally accepted right in all democracies and is specifically incorporated in the Namibian Constitution as well as the extradition and deportation laws of Namibia, Botswana and Zambia.

10.The aforesaid action of the officials on both sides cannot be described as innocent cooperation, but as patently illegal conduct. It clearly demonstrates the complicity of both sides in such illegal conduct. The collaboration was not only "indirect" but "direct".

11.The aforesaid illegal activity and background applies to all the groups of accused, except Charles Kalipa Samboma, because he, according to the uncontradicted *viva voce* evidence of the State gave himself up to the authorities and was removed to Namibia with his consent and cooperation.

12.The illegal conduct in the case of the second group continued when the members of that group, were received by the Namibian Security Force on 6th

November 1999 and then kept in military detention for six months before their first appearance in a Court of Law on 2 May 2000.

The uncontradicted evidence of accused Puteho was that he, Misuha, Samati and John Samboma were handcuffed by Zambian officials whilst detained and when they were handed over to Namibian Police and military personnel inside Zambia, the Zambians removed their handcuffs but the Namibia military personnel then handcuffed them. They remained handcuffed from then on, i.e. from 16 November 1999-29th April 2000. Puteho said "…we have been eating, bathing, sleeping with handcuffs on our wrists…."

(There is a discrepancy as to the date of handover of this group as reflected in Section A3(viii) supra and the above evidence of Puteho. However whether it was the 6th November 1999 or the 16th November 1999 does not change the substance and relevance of the evidence in this regard.)

13. Osbert Likanyi said in his affidavit that he left the Caprivi because of political harassment. There he applied for political asylum and was granted political asylum in Botswana by the United Nations Representative for refugees.

From the refugee camp at Dukwe he was however removed to Kasani Prison and from there taken to Kazangula Border post against his will. The accused did not give *viva voce* evidence under oath, but this part of his affidavit was not contradicted by the State.

The State however failed to explain how a person who has been granted political asylum in Botswana could be and was removed from Botswana by Botswana officials and handed over to Namibian officials, in spite of his status as a political refugee who had been granted political asylum. This is an aggravation of the illegality of the actions of the Botswana and Namibian officials. See the provisions of the Convention and Protocol relating to refugees – Section C5 supra.

The general attitude of the Namibian military towards the accused and even those who had been granted asylum was referred to by the Court *a quo* as follows:

> *"During cross-examination the Major-General stated that the 'Namibian view' was that irrespective of whether a 'terrorist' had been given asylum 'somewhere else' it may not necessarily be recognised, so it was 'irrelevant at the time to consider the question of asylum. When asked during cross-examination whether a group of suspects had been informed of their rights to challenge their removal from Zambia, the Major-General replied that the suspects had no choice but to came to Namibia, whether they liked it or not since they had committed crimes here and had to face 'the ruthlessness of the law'".*

This once again underlines the element of force and an attitude of total and deliberate refusal to comply with the laws of Botswana, Zambia and Namibia and the International Law.

Apparently some documents were completed at the handing over on the so-called weighbridge, but it was not explained in terms of which legal provisions these forms were completed. The forms, handed in by witnesses for the State, makes little sense and does not throw any light on the procedures followed.

The first one, purporting to be a document of the Republic of Botswana was dated 6/12/2002 and purported to have been completed at the Ngoma border post within Botswana. It is headed – "Republic of Botswana – ACCEPTANCE WARRANT" and states:

> *"The prospective deportee whose personal particulars are appended below has been given special orders, in accordance with the Immigration Law of the Republic of Botswana to leave Botswana on or before 6 December to Namibia". (My emphasis added)*

A statement that he is a Namibian citizen is then signed by Osbert Likanyi, the accused. A signature purporting to be that of a Botswana official is then appended and also a signature purporting to be that of an official of the Department of Home Affairs in Namibia both dated 6/12/2002. The Namibian official signed under a clause reading:

"Signature of officer accepting deportee".

It is to be noted that there was no sign whatever of any of the documents required by Botswana laws. There was no indication of any reason for the deportation, no period of grace to the deportee to leave, to make representations or to appeal. There was no allegation at all that the deportee was a "prohibited immigrant". If he was a prohibited immigrant in Botswana, this document would have said so if it was not a bogus document.

The document further provides that a "repatriation form is attached to this warrant". But no repatriation form was attached. Particulars required to be

filled in but which were not filled in were: The deportee has a valid travel document/no valid travel document". It must thus be presumed that as far as Botswana was concerned, Likanyi was not a "prohibited immigrant".

Another document purporting to be a document of the "Republic of Namibia, Ministry of Home Affairs, and headed "Warrant of detention", (Section 42), dated 8 December 2002, was handed in. It states that the person "Mr Likanyi has been found in Namibia and is suspected on reasonable grounds to be an immigrant in terms of this Act: (It is to be noted that the words "prohibited/illegal immigrant" have been ruled through. What then remains of the justification is that the deportee "has been found" in Namibia, with no comprehensible reason for his detention other than that he was found in Namibia).

The so-called warrant of detention then continues:

> *"Now therefore, you are under provisions of Section 42 (1)(a)(b) requested to receive and detain such person in the cell/police cell (pending investigations) for a period of 14 days for which this shall be your warrant".*

It is then signed by one purporting to be an immigration officer". It is nowhere stated to what law the stipulated "Section 42" and Section 42(1)(a)(b) refers. Section 42 of the Namibian Immigration Act provides for the "arrest, detention and removal of prohibited immigrants from Namibia". The accused Likanyi was however never a "prohibited immigrant" who could be deported as such from Namibia.

Subsection (1) provides for the powers of arrest of a Namibian immigration officer to arrest a person "who enters, or has entered or who is found within Namibia, on reasonable grounds is suspected of being a prohibited immigrant in terms of any provision of the Act, an immigration officer may arrest such person".

The whole document is patently fraudulent. Likanyi was never "found" in Namibia, but handed over by Botswana officials to Namibian officials inside Botswana. He could never have been "suspected on reasonable grounds" of being a "prohibited immigrant".

The two documents aforesaid also differ as to dates. It seems that both the Botswana and Namibian documents were fraudulent concoctions. The Namibian document also clearly shows that the Namibians knew that the accused was not a prohibited immigrant in Botswana and that the action of Botswana officials were illegal, just as their own actions were fraudulent and illegal. The Namibian officials did not receive any other documents indicating authority to take the accused over the border.

It is noteworthy that the aforesaid speedy, concocted and fraudulent handing over of Likanyi, took place almost immediately after the decision of the Botswana High Court in Kavana Likunga v Republic of Namibia was given on 3 December 2002, setting aside their deportation order and releasing them from custody. The Likanyi "deportation" action was then commenced within days.

The inference is almost unavoidable that the police and military and/or immigration authorities were discouraged by this result and consequently took

the haphazard, concocted and fraudulent steps to prevent a recurrence of the Kavana Likunga case.

Surely this is an instance of gross abuse of both the Botswana and Namibian legislation as well as international law and in addition a grave outrage of the fundamental rights of the accused.

The only reasonable inference from the above is that the Namibian officials were at least "knowing" parties as the concept is used by the House of Lords in the Bennet case.[37] They were in fact directly or indirectly involved in the illegal acts of the Zambian and Botswana officials and so were the Zambian and Botswana officials with the illegal acts of the Namibian officials. The only reasonable inference is that the transfer of the accused to Namibia was done at the request of the Namibians and for the purpose of standing trial in Namibia. The Namibians at least influenced the Zambian officials to do what they did. The prosecution at any event failed to discharge the burden to prove the contrary.

14.There is therefore no substance in the argument of "innocent conduct" as put forward by counsel for the State and that argument was correctly rejected by the Court *a quo* in so far as it relates to all the groups, except Charles Samboma.

15.Mr Gauntlett has also criticised the finding of the Court *a quo* insofar as the Court found that the proceedings were tainted by the conduct of the Namibian officials and that the State did not come to Court with "clean hands".

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[37] See Section D7

The term tainted has been used in several decisions referred to and so the term “with clean hands”. The Prosecution has failed to prove that the officials of the State came to Court “with clean hands” and has followed a process to do so which is “not tainted” by serious illegality.

16.In my respectful view, even where the principle of “judicial restraint” is applied, the forum Court, in the present case the Court *a quo*, had sufficient reason to enquire into the manner in which the State brought the accused before Court. And assuming that the basis of this rule, as well as the “act of state” rule, is the possible breach of international law by interfering with the sovereignty of the host state, based on the influencing of and/or the participation in, directly or indirectly, in the illegal acts of officials of the host state, then the proven acts of officials of the forum state in this case, amount to such influencing, and/or direct or indirect participation in such illegalities of the officials of the host state. Such illegal activity by Namibian officials, in conjunction with their Zambian and Botswana counterparts, some of which was conducted on the territories of these states, amount to a breach of the sovereignty of those states and as such of international law.

For this breach, consent or implied consent, by unauthorized officials from Zambia and Botswana, does not justify or excuse such breach and constitutes another illegality.

SECTION H: THE IMPLICATION OF SECTION 17 OF THE NAMIBIA EXTRADITION ACT

The illegal removal in which Namibian officials participated not only resulted in the destruction of the rights of the accused in Zambia and Botswana, but destroyed their rights specifically provided for in Section 17 of the Namibia Extradition Act No. 11 of 1996, unless the trial Court declines jurisdiction to try them.

Section 17 reads:

> *"A person extradited to Namibia shall not unless such person has first had an opportunity to leave Namibia, be prosecuted or punished in Namibia for any offence other than –*
>
> *(a) the offence in respect of which such other person was returned;*
>
> *(b) any lesser offence proved out the facts on which such person was returned;*
>
> *(c) an offence committed in Namibia after such persons return; or*
>
> *(d) an offence not being an offence contemplated in subparagraph (a), (b) or (c) and in respect of which the country returning such person have consented to the person being tried..."*

This mandatory provision of Namibian statute law makes it abundantly clear that the accused returnees cannot be prosecuted or punished in Namibia for any offence for which they have not been lawfully extradited, unless they returned to Namibia voluntarily.

The implication is that the trial Court in the circumstances has no option but to comply with the mandatory provisions of the Namibian law by declining jurisdiction in the trial of the accused for the offences for which they are now

brought before Court and for which they were not lawfully extradited except in the case of those accused who returned to Namibia voluntarily.

It is important to note that the Zambian Extradition law in Section 57 also incorporates the "speciality" provision in Zambian law. The Zambian Section 57 is substantially the same as the Namibian Section 17.

The said Zambian Extradition Act is applicable to all extradition requests from declared Commonwealth countries, which includes Namibia as being such a declared Commonwealth country.

The above contention is strengthened by reference to and consideration of all the other reciprocal provisions in the applicable legislation of Namibia, Botswana and Zambia, wherein each of these countries lay down in mandatory form their requirements for extradition of alleged fugitive offenders from their countries.[38] Botswana Extradition Act 18 of 1990 as amended by Act 9 of 1977, Section 7 the Zambian Extradition Act, Chapter 94 of the Laws of Zambia, Section 31, Section 17, 21, 24.

The implications and consequences of the illegal action described above in relation to section 17 of the Namibian Immigration Act, underlines once again the grossness of the illegalities and irregularities committed in bringing the accused before Court.

It is obvious that if the provisions of the Extradition legislation were used in Zambia and/or Botswana all or some of the accused may already have been

[38] Namibia Extradition Act 11 of 1996, Section 17 read with Section 5.

discharged in Botswana or Zambia as happened in the case of 13 other Namibians in the Botswana case of Likunga v Republic of Namibia, supra.

SECTION I: CONCLUDING REMARKS

1.Whether or not the Court had to exercise a discretion or was compelled to adjudicate as indicated in the Ebrahim decision, according to Roman Dutch and South African common law or in terms of Section 17 of the Namibian Extradition Act as explained in Section H, is not necessary to decide, because the result would be the same. In this regard, in my respectful view, it was not necessary for the presiding judge to expressly state that he was exercising a discretion, although it would have been prudent to do so.

In this regard it must be kept in mind that the discretion referred to in the decisions of Bennet, Beahan, Hartley and other require a discretion to be exercised, but in Ebrahim, the decision to be taken followed from the proof of certain illegalities and did not require the exercise of a discretion in the form and sense set out in the decision of Bennet and others above referred to.

It follows if the Court *a quo* followed Ebrahim, and thus the Namibian common law, he would not have been required to exercise the “discretion” referred to. At any event, if he had to exercise a discretion, this Court sitting as a Court of Appeal, has no ground to set aside the decision of Hoff J in the Court *a quo*, except his finding in regard to Charles, Kalipa Samboma.

In coming to this conclusion, I apply the approach of the Zimbabwean Supreme Court in Beahan in regard to the setting aside of a decision of the lower Court where that Court had to exercise a discretion.

2.There were some misdirections as pointed out in Section B *supra* in regard to the concept of arrest as far as it relates to abduction and connivance therewith. I also questioned whether the Courts label of "disguised extradition" was correct and whether, it was not in fact a case of "voluntary surrender". I inclined to the later. However the result would have been the same.

The misdirections relating to the "arrest", "abduction" and "connivance" however favoured the State and certainly did not prejudice its case. There is consequently no good reason to set aside the Courts final conclusion, except in respect of Charles Kalipa Samboma. In the case of Samboma the initiative to return originated from Samboma himself, and not from officials in authority. Informed consent and waiver of his rights would have been necessary if his return was initiated by persons in authority, but this is not what happened, according to the uncontradicted evidence of the State.

I may mention that Samboma had made very grave allegations of abduction and torture in his written affidavit, but after the State's witnesses had testified, counsel for Samboma did not even cross-examine the State witnesses and Samboma was not called as a witness in rebuttal.

In the circumstances, Samboma must now take responsibility for his own decision.

3.In conclusion I feel constrained to deal briefly with a very important problem relating to the maintenance of the Rule of Law with special reference to this case.

It is a notorious fact that after Hoff J gave his considered judgment in the Court a quo, there was an outburst of emotion and criticism and even hate speech from various influential quarters. Such conduct undermines the integrity of the judicial system, the independence of the Courts and its ability to conduct a fair trial.

It is in this regard that the Botswana High Court decision was a stark but timely reminder of the necessity at all times, to abstain from outside interference – politically or otherwise, in the judicial system and to maintain the integrity of the system.

The Botswana High Court set aside the magistrate's Court extradition decision and ordered the 13 Namibians to be set free. The ratio was that all the alleged offences, except the robbery charges, were offences of a political character, for which extradition was not allowed in the law of Botswana. (It must be noted that the Namibian, Zambian and South African law, also does not allow extradition for such offences).

Furthermore the Court found that there was a likelihood that the accused may be prejudiced at their trial, or <u>being punished</u>, <u>detained</u> or <u>restricted</u> in their personal liberty by reason of their <u>political opinions</u>. In such a case Botswana law required that extradition be refused. The Court took care to point out that

even if the Court at the trial would be impartial, the question is what the effect is of extra judicial punishment.

The Court held:

> *"With regard to the fair trial point, the appellants have wisely, not submitted at the appeal that the evidence shows they will be prejudiced at their trial and no more needs be said about that. With regard to extra judicial punishment however, which they say they fear at the hands of the law enforcement agencies of the respondent (i.e. the Republic of Namibia) and/or members or supporters of the SWAPO government, they argue that there have been many instances recently where people who hold political views such as they do, have indeed been punished by the police and security forces of Namibia by reason of their political opinions and their fear has been fuelled by what they submit is an inadequate response by the respondent to the very serious allegations made by appellants which are relevant to this issue.*

The Court dealt in detail with the evidence of the appellants as well as that by the respondent. The Court then selected a portion of the evidential material and said:

> *"In my view the cherry on the top must be Mr Nghiishililwa's, (the Deputy Director General of the Namibian Police) response to the allegation in par 131 of the 6th respondents affidavit to the effect that when persons charged with Treason etc for their involvement and/or participation in secessionist activities appeared in Court, the SWAPO Youth League issued death threats to them and there were also calls made in the Namibian Parliament by SWAPO MP's one of whom was named, that the prisoners should be killed notwithstanding there being no death sentence available under Namibian Law. In his response, Mr Nghiishililwa does not deny that death threats were made in Parliament by SWAPO MP's and outside it by SWAPO supporters. He said however that the demonstrations (presumably by SWAPO youth) cannot be attributed to the SWAPO government and then goes on to say:*
>
> > *'I wish to state that demonstrations constitute enjoyment of the demonstrator's right to freedom of peaceable assembly and to freedom of expression, guaranteed by the Namibian*

> *constitution and recognised by the International Bill of Rights.'*
>
> *To my mind this is a warped and dangerous assessment of the right of 'peaceable assembly' and freedom of expression which subordinates the constitutional rights of the accused in those cases to what can only be described as 'late speech' by the supporters of the government. It gives one insight, however into the way in which Mr Nghiishiliwa's mind works and also that of the person who prepared his affidavit".*

The Court concluded:

> *In my view, on all the evidence before the magistrate on this issue, there was to use the language of Lord Diplock in Fernando's case a reasonable chance that the appellants might, if surrendered to the respondent, be punished on amount of their political opinions by being ill-treated by the police investigating their cases and/or the prison authorities...*
>
> *In the result the appeal by the 13 succeeded and the magistrates deportation decision overturned and the 13 released.*[39]

The continuation of conduct such as referred to above, will not only reflect negatively on the true values of Namibians, but discredit the Namibian legal system and the ability to ensure a fair trial by an impartial and independent Court. That may eventually imperil the trial – not only of the 13 accused, but of all the accused.

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[39] Compare also the decision of the Namibia High Court in State v Heita and Another, NR 403, reported in 1992 (3) SA 785 NmH. See also art 78 (3) of the Namibian Constitution, relating to the duty of all organs of the State to protect the Courts, their judges and officials which reads as follows:
"no member of the Cabinet or the Legislature or any other person shall interfere with judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall afford such assistance as the Court may require to protect, their independence dignity and effectiveness subject to the terms of the Constitution or any other law"..

4.I have referred in this judgment to some very wise words by eminent judges in landmark decisions on the need for the State, the Government and the Courts to uphold the rule of law and to set an example to the citizen.

I need only mention the decision of the South African Appellate Division of the Supreme Court of South Africa in State v Ebrahim and the decision of the Constitutional Court of South Africa in Mohammed v President of the RSA and the dicta from other distinguished judges in this regard, referred to in these decisions.

I need not repeat these dicta. But as far as Namibian judges are concerned, I can do no better than to quote the oath which the Namibian Constitution requires that judges will honour. It reads:

> *"I .....do hereby swear/solemnly affirm that as a judge I will defend and uphold the Constitution of the Republic of Namibia as the Supreme Law and will fearlessly administer justice to all persons without favour or prejudice and in accordance with the laws of the Republic of Namibia".*

I have also been referred to the following dicta in a judgment written by me in the decision of State v Vries[40] where I said:

> *"However there is no reason whatsoever in my view, why, in accordance with the right to equality before the law, the life of the victim, the dignity of the victim, the right to peace and tranquillity and the security of person or property, should not at all stages of judicial process be given equal emphasis and consideration with that of the offender, even though the consequences of doing so would not always be the same for the offender, and the victim.*
>
> *The Courts must, in particular in the Namibian and South African reality, interpret and apply the Constitution in a way where it will*

[40] 1998 NR 316

> *be able to play its part in combating the emergence of a terror State, where the criminal minority dictates to and holds hostage the law abiding majority and where no one, except the criminals, would have rights and freedoms."*

I still adhere to what was quoted above. But in a later decision, that of State v Monday[41] the other side of the coin was given. I repeat what I said in that decision of the Namibian Supreme Court.

> *"...More specifically, the Court must consider and balance the fundamental rights and interests of the accused with that of the State and the prosecution, but also with the fundamental rights of the victim. The aforesaid balancing action must however, always be carried out subject to the specific constitutional principle that an accused is presumed to be innocent until proved guilty beyond all reasonable doubt, in a fair trial."*

The maintenance of the Rule of Law and more specifically the adherence to the requirements of due process, does not make the State powerless to take effective action against criminals and terrorists and to protect the public interest as well as the rights of the victims. All that is required is to act in terms of Namibia's own constitution and laws as well as those of the international community, particularly those of neighbouring and Commonwealth states with whom Namibia has undertaken reciprocal legal obligations.

I must also point out that the "public interest" is not an interest apart from or in opposition to the Rule of Law, due process and the fundamental rights of the accused. It is in the public interest to uphold the fundamental rights of the accused persons, just as it is in the public interest to protect victims and the law-abiding citizens at large.

[41] Supreme Court of Namibia, Case No. SA 18/2001 not reported

No reason at all and no justification whatever was given why these laws could not be complied with and/or why any arrest, detention and handing over could not be and was not done in accordance with these laws. There was however, a lame attempt on behalf of some witnesses from Zambia called by the State to claim that they had carte blanche to deport any alleged prohibited immigrant, but when the applicable legislation is examined, such claims were shown to be without any foundation.

I need to emphasize: Nothing in this judgment is intended to discourage cooperation between police, military and immigration officials of the Namibian State with their counterparts in neighbouring states. What cannot be allowed however, is cooperation in taking short cuts in conflict with the express provisions of the domestic law of these countries and even of International Law, because such actions will gravely undermine the Rule of Law, entrenched in the Namibian Constitution, which is the Supreme Law of Namibia. Such actions cannot be justified as in the public interest.

It follows from the above that a sovereign state and its authorized representatives and officials, as well as its Courts, often have to take difficult and unpopular decisions, but that unfortunately cannot be avoided in a truly democratic state with civilized values.

I have read the proposed judgment by my brother Mtambanengwe, A.J.A., and feel constrained to make a few comments as to why I am unable to agree with that judgment.

For this purpose I refer to the concluding paragraphs of that judgment wherein my learned brother sets out the crux of his judgment. I have numbered the different passages referring to different points to facilitate a better understanding of my comments.

The passages so renumbered reads:

(i) "In the light of my finding that the evidence did not establish a causal link between the Shali request and the rendition of the respondents, it is not necessary to pursue the discretion issue any further, except to say that the Ebrahim case does not preclude this court from having regard to principles of international law. Article 144 of the Namibian Constitution provides that '---the general rules of public international law and international agreements binding up on Namibia shall form part of the law of Namibia.' As the court *a quo* itself said, 'In the Ebrahim case the Appellate Division based its finding on principles of Roman Dutch law but was not insensitive (to the) principles of public international law.'"

(ii) "It is clear from its Judgment that the court *a quo* laid a lot of store by the fact that respondents were, by "the disguised extradition" or the bypassing of the formal extradition proceedings deprived of the benefits or safeguards embodied in extradition acts or treaties and therefore of their human rights. The answer to any such argument is first that the Zambian or Botswana authorities did not have an obligation to wait for Namibia, or to urge Namibia to initiate extradition proceedings to get rid of undesirable foreigners from their territory. Secondly, the Namibians did not have to refuse to receive the returned fugitives (see the Staines

case (supra) let alone to instruct Zambia or Botswana how they should get rid of their unwanted visitors."

(iii) "Thirdly when one considers the question of human rights care must be taken to balance the rights of accused against these of the victims of their actions. We have in this case antecedent circumstances where some people lost their lives and property was destroyed as a result of the incident at Katima Mulilo on 2 August 1999. The public interest that those responsible must be brought to justice is a very weighty counter in the balance."

(iv) I for one am not much impressed by the quotation from Mohammed v President of the Republic of South Africa and Others 2001 (3) SA 893 (cc) because the present is not such a case."

(a) Ad (i) – (iv)

The full reason why I came to different conclusion on the facts and the law, follows from my detailed judgment on these issues.

(b) Ad (i)

In my respectful view a causal link has been established by the evidence and the inferences to be drawn from those facts. I need not repeat it because the full reasons for my view appear from my judgment and it is not necessary to comment further thereon.

It is not clear from my brother's judgment whether or not he accepts that Roman Dutch Law is part of Namibian law and unless our

Constitution or acts of Parliament provide otherwise, such Roman Dutch Common Law is the law that should be applied.

Obviously, such common law does not exclude International law, because International law by virtue or art. 144, also becomes part of the law of Namibia and shall be binding on Namibia. The common law, again, as it existed before Namibian Independence, by virtue of art. 140 of the Constitution remains in force, until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court. No Act of Parliament has repealed or amended any of the provisions of the common law and no Court has declared it unconstitutional. Furthermore, no Act of Parliament has repealed or amended the common law.

It is therefore debatable whether in case of conflict between Namibian common law and international law, which law will take precedence.

It is not necessary to decide that issue in this judgment, because there is no conflict between Namibian common law and public international law. It is not clear from my brother's judgment, what the conflict is, if any.

As a matter of fact, as I have shown, in Section C4 and 5 of my judgment, that the International Covenant of Civil and Political Rights and the U.N. Covenant and Protocol Relating to Refugees, have become part of Public international law and by virtue of art. 144, has become part of the law of Namibia. The whole process of taking the accused

prisoner and handing them over to Namibian officials, was also in conflict with the aforesaid principles and rules of public international law. An appropriate label for such illegal action is "official abduction".

It is also not clear from my brother's judgment on which part of International Public Law he relies. If it is the Act of State doctrine, I must point out that that doctrine is not a part of Public international law.

(c) Ad (ii):

It is correct that the Zambian or Botswana authorities did not have an obligation to wait for Namibia, or to urge Namibia to initiate extradition proceedings to get rid of undesirable foreigners from their territory. But then they must use the legal procedures at their disposal. The question is why did they wait approximately 5 months after "arresting" and imprisoning the 1st group of 6 Namibians in June 1989 until 5 days after the outbreak of hostilities on the 2 August 1999, to decide to hand over this group to Namibian officials? What prevented them from handing over these accused persons by means of proper deportation proceedings? Surely the only reason for the sudden handing over on 6th August 1989, was because the Namibian officials wanted them to be dealt with in Namibia as alleged terrorists.

Surely one could expect, and the Court should expect, that although officials of Botswana, Zambia as well as Namibia, need not follow a Namibian prescription to "get rid of undesirable foreigners", they at least could be expected to follow the laws enacted in this regard by their

sovereign Legislative authorities and which they have in common with Namibian laws, as well as the provisions of Public international law.

The Namibians did not have to refuse to receive the “returned fugitives”, provided they received them in Namibia or on the border and did not knowingly make use of illegal procedures followed by their counterparts or in any way connived with or directly or indirectly participated in those procedures.

What is completely lost sight of and/or given no weight, is that the Botswana and Zambian officials in conjunction with Namibian counterparts, did not only fail to comply with legal extradition procedures, but also failed to comply with legal deportation proceedings. Furthermore the Namibians did not receive those Namibian prisoners within Namibian borders, but went across the border into Botswana and Zambia to receive them there without warrants or written authority of any sort and without their consent, took them prisoner and then removed them in custody, across the border of Namibia.

My learned brother’s contention that the Namibians did not have to refuse to receive the returned fugitives, let alone instruct Zambia and Botswana how to get rid of their unwanted visitors”, is not a fair and reasonable reflection of the argument of the accused and the judgment of the Court *a quo*.

What was dealt with was not a prescription or instruction by Namibia, but a failure by unauthorized officials to respect and comply with the laws passed by the highest legislative authorities of the aforesaid sovereign countries, as well as the provisions and principles of international law, binding on these countries.

In none of the decisions referred to in which deportation was discussed as an alternative to extradition, was it contemplated or justified, that a deportation not complying with the applicable laws, was a lawful alternative to a lawful extradition.

To continuously label a removal of a fugitive or refugee from the host country to the other, as a "deportation", irrespective of whether or not the removal is in conflict with the laws of the countries in question, is a misconstruction and misapplication of the relevant decisions and laws.

I must also note that the Namibians regard themselves as refugees, and it is my respectful view inappropriate to describe them as "fugitives", because as a result of the illegal procedures, they had no opportunity whatever before removal, to prove that they were in fact political refugees. They must be presumed innocent until proved guilty.

(d) Ad (iii)

The "balancing" would certainly be relevant if the Court was not as in Ebrahim, Wellem and Buys, bound to apply the Roman Dutch Common Law, which requires the Court to refuse jurisdiction, when it is proved that the applicable legal procedures were not followed.

But on the assumption that the Court must weigh up the accused's human rights against that of the victims, and that it is in the public interest that those responsible be brought to justice, the answer cannot be that the State will be entitled to become a lawbreaker, flouting their own laws and that of their neighbours and flouting international law, when no excuse is given why the clear procedures laid down by those laws, were not followed. Not even the Zimbabwean Supreme Court in Beahan, relied on so strongly by counsel for the State, and my learned brother Mtambanengwe, A.J.A., condoned such illegal actions.

Gubbay, C.J., echoing the general approach in Ebrahim, dealing with the illegal process of "abduction" used by a prosecuting State, said:

> "There is an inherent objection to such a course, both on the grounds of public policy pertaining to international ethical norms and because it imperils and corrodes the peaceful co-existence and mutual respect of sovereign nations ..... a contrary view would amount to a declaration that the end justifies the means, thereby encouraging states to become lawbreakers in order to secure the conviction of a private individual."

Although in the instant case, we had no abduction as in Ebrahim, the principle obviously also applies to other forms of serious illegality, such as the imprisonment and removal of persons, by patently illegal

procedures, which amount to a total breach of all the express provisions of the domestic law and the applicable international law, which deprived the Namibians of all their rights under the laws.

(e) Ad (iv)

The abrupt brushing aside of the unanimous and authoritative decision of the 12 judges of the South African Constitutional Court in the case of Mohamed, cannot be justified by the mere reason that "The present is not such a case".

The Court in Mohamed made several findings which are relevant in the case now before us. The following must be noted:

(aa) The Court reiterated the requirements of the Rule of Law and due process and the need for the State to maintain the Rule of Law and due process as well as complying with those principles and procedures required by specific laws relating to extradition and deportation.

(bb) The decision points out the fact that the Aliens Act and the regulations thereunder provide for deportation and the procedure to be followed. It held that those provisions are not merely directory, but mandatory and that a purported deportation, in conflict with those provisions, is unlawful, irrespective of whether the procedure followed is characterized as a "deportation" or "extradition", or an "extradition in substance" or a "disguised extradition".

(cc) The decision reiterated that the essential difference between an extradition and a deportation lies in the purpose with which it is undertaken.

It then proceeds to point out that:

> There is nothing in the South African Constitution which prevented the Government from deporting an undesired alien. If however, what happened was in substance an extradition, then such "deportation" would have been unlawful because the correct procedures were not followed.

(dd) When consent is relied on for a purported deportation, it must be an informed consent complying with certain minimum requirements.

(ee) An intended deportee must have the opportunity to obtain legal advice.

(ff) Where the law provides for a period of grace between a declaration that a person is a "prohibited immigrant" and the actual deportation, the deportation is unlawful if such period of grace is not allowed.

The above finding also clearly indicates, as the Namibian, Botswana and Zambian laws clearly provide, that a whenever action is taken against a

person on the ground that he is a prohibited immigrant, there must be a formal declaration to that effect by an official authorized by law to make such declaration.

Thereupon the person so declared has certain specified rights to contest such declaration in the Courts of law.

The abovestated findings made in the Mohamed decision underlines the fact that according to the laws of Namibia, Botswana and Zambia, the person to be deported also has specific rights. The protection of such rights are therefore not restricted to extradition.

Although the Namibian Courts are no longer bound by any South African decisions, the decision in Mohamed should be regarded as strong persuasive opinion in regard to the points enumerated above.

(f) At the last conference between the judges, my brother Mtambanengwe, A.J.A., brought to our attention a further addendum to his judgment, which unfortunately necessitates some further comment, but I will be as brief as possible.

(aa) I do not find it necessary to reconsider the evidence. However, my learned brother now refers to the supporting allegations to the warrant issued on behalf of the Namibian Government in the Botswana High Court decision in the case of Kakena & Ors. V The Republic of Namibia, dealt with in my judgment, *supra*.

After quoting from a document containing such supporting allegations, my learned brother says: "I hasten to admit that this is not evidence against any of the respondents, but see Hoff, J.'s opening par. In the judgment a quo...".

Clearly the said admission by my brother is appropriate. That being so however, I fail to see why he referred to it as if the allegations were somehow evidence or facts against the 12 accused in the case before us.

(bb) My brother now refers to section 95 of the Defence Act of 1957 as amended by section 29 of the Defence Amendment Act (Act No. 20 of 1990) which provides:

> "(a) Any member of the Defence Force may be required to perform service at any place outside the Republic whenever necessary – to combat, prevent, or suppress any attack or act of aggression in circumstances other then those dated (stated) in art. 26 of the Namibian Constitution.
>
> (b) To prevent the recurrence of any such attack or act of aggression."

This is quoted in support of the allegation that I have omitted to say anything about the Defence Acts of Namibia, Zambia and

Botswana, despite the fact that there is some evidence on record that Namibia and Zambia had mutual security Committees.

The point my learned brother wished to make is obscure and can hardly bolster the case for the State in this appeal. If he suggests that Section 95 of the Defence Act nullifies the laws enacted by the Parliaments of the respective countries, then I must differ emphatically. As to the existence of the Security Committees and the cooperation between them, this is another irrelevant fact.

It is irrelevant because it has never been suggested by anyone, and certainly not by me, that such cooperation is wrong or should be discouraged. As I have said in effect repeatedly: There is nothing wrong with cooperation, provided that it is not used as a shortcut to avoid the laws of the land.

The provisions of section 95 of the Defence Act, can never be understood to mean or be interpreted to mean that any member of the Defence Force is thereby authorized to enter another sovereign country to remove suspects from that country, without any authority as required by the Extradition and Deportation Laws. The section obviously is intended to authorise the legal calling up of members of the Defence Force to do service outside Namibia.

I did not deal with the above provision of the Defence Act because it was never raised and it was irrelevant.

To use the omission of those irrelevant facts to suggest that I stretched the evidence “to portray a picture to fit a mould or theory one seeks to vindicate”, is an uncalled for and unjustified suggestion. I will nevertheless not express myself on whether or not the principle applies to the author of the suggestion.

In my respectful view the following order should be made:

1. The appeal is upheld in the case of Charles Kalipa Samboma.
2. The appeal is dismissed in the case of the twelve (12) other accused.
3. The Court a quo must proceed with the trial of Charles Kalipa Samboma.
4. The 12 accused, namely Mushwena, Ziezo, Mulupa, Misuha, Puteha, Samati, John Sikundeko Samboma, Likanyi, Ndala, Tubaundule, Oscar Nyambi Puteho, Mushakwa must be released immediately.
5. The State – appellant must pay the costs of appeal.

_____

O’LINN, A.J.A.

GIBSON, A.J.A.: The facts are as set out in the judgment of my Brother Mtambanengwe, A.J.A.

The stark question before this Court is whether the Court *a quo* was right in its Ruling that it had no jurisdiction to try the Respondents because, as it found, the Government of the Republic of Namibia had breached international law by its failure to seek the extradition of the fugitives from Zambia and Botswana. This Ruling was made notwithstanding its finding – that there had been no abduction "in the sense found in the Ebrahim case", and – that there had been no collusion or conspiracy between Namibia and the foreign States leading to both Zambia and Botswana to break their respective municipal laws. However the Court held that the receipt by Namibia of the Respondents was thus tainted by the request made by the Namibian official who asked that the fugitives be surrendered to stand trial in Namibia.

The Learned Judge rejected the notion of abduction "in the sense used in the Ebrahim case," reported in 1991 2 SA 553 (A). In that case the Court of Appeal (South Africa) said that the action had been unlawful in that it involved the "removal of a person from an area of jurisdiction in which he had been illegally arrested to another area of jurisdiction."

The unlawful removal that the Learned trial Judge in the instant case censured, in my view, is explained later in his judgment when he came to consider the issue of disguised extradition. The trial judge observed, at page 1234.

> *"The deportation of twelve of the accused persons was clearly preceded by a request from officers acting on behalf of the Namibian State and it cannot with any conviction be argued that the Zambian authorities acted unilaterally when they deported the Namibians.*
>
> *In my view the protest by the Namibian authorities that they had no part in irregularities which occurred during deportation procedures in Zambia and Botswana, in itself cannot come to their rescue since their own initial conduct, by informally requesting the handing over of fugitives and thus by – passing formal extradition proceedings <u>tainted those</u> very deportation proceedings they now want to put at a distance."*

The question posed is whether there was thus a “taint” in this action such as to entitle the trial court in the receiving state to refuse jurisdiction. As Mr Gauntlett put it, “is a Namibian Court able to characterise as illegal acts of the executive of other States against persons who were aliens on that State’s territory, – and consequently whether the conduct of one Namibian official in simply asking for

the repatriation of these persons, prior to any such unlawful action, can be characterized as “tainted”.

The applicants have contended that the Court was wrong in fact and law in concluding that the actions of the Namibian authorities in securing the return of the Respondents were “tainted” in the circumstances, given its conclusion that no conspiracy or collusion had been established that, in any event on the facts of this case the court *a quo* further erred because there was no evidence that either Botswana or Zambia surrendered the fugitives as a result of the request.

In coming to the conclusion on whether the Namibian authorities breached international law thereby, the trial Court considered the effect of the request on the Zambians and the Botswana by the

Namibian authorities. In weighing this the learned trial judge scrutinised the actions of those two countries in deporting the Respondents. It also looked at the relevant statutes to see to what extent, if at all, those actions were in compliance with their municipal laws. The Court next considered whether the actions of the Namibian authorities can be characterised as "tainted" and therefore unlawful.

By examining the actions of the Zambian and Botswana authorities within their own countries the Court *a quo* appears to have gone against the long established

position in public international law and custom that the receiving state should not, save in extreme cases, as Mr Gauntlet submitted, consider the lawfulness of the actions of a foreign state as against its own municipal law: the principle more generally known as the "doctrine of act of state". I will look at some examples in a number of jurisdictions.

In the case of *Sinclair v H M Advocate* 1890 17 R (JC) a Scottish National was arrested in Portugal following information received that there was a warrant for his arrest in Scotland; Portugal had no extradition treaty with the former. The complainant was held for

some weeks, thereafter deported to Scotland, tried and convicted for a breach of trust and enbezzlent of funds. The accused applied to have the proceedings quashed on the grounds that his arrest was illegal and oppressive. The application was dismissed. Lord MacLaren, giving one of the judgments, said, at p 43:

> *"With regard to competency of the proceedings in Portugal, I think this is a matter with which we really have nothing to do. The extradition of a fugitive is an act of sovereignty on the part of the state who surrenders him. Each country has its own ideas and its own rules in such matters. Generally, it is done under treaty arrangements, but if a state refuses to bind itself by treaty, and prefers to deal with each case on its merits, we*
>
> *must be content to receive the fugitive on these conditions, and we have neither title nor interest to inquire as to the regularity of proceedings under which he is apprehended and given over to the official sent out to receive him into custody."*

The summary is taken from *S v Beahan* 1992 1 SACR 307 (ZS) AT 318 – 319, a judgment of Gubbay, CJ.

In *Underhill v Hernandez,* (quoted by Appellant) 168 US 250 1897 at 252 the US Supreme Court stated, “Every Sovereign State is bound to respect the independence of every other sovereign State, and the Courts of the one country will not sit in judgment on the acts of the Government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.” See also **Oetjen v Central Leather Co** 246 US 297 (1918) (62 L ed 726) and **Banco Nacional De Cuba v Peter L F Sabbatino et al** 376 US 398 (1964) (11 L ed 2d 804) at 421.

In the latter case the Court, in my view, gave the correct reason why there may be a need for judicial restraint. It said,

> “some aspects of the international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.”

In a more contemporary setting is the British example (before the Bennett decision to which I shall return later,) in *Buttes Gas and Oil v Hammer and Another* (nos 1 and 2); *Occidental Petroleum Corporation and Another v Buttes Gas and Oil Co* 1981 3 All ER 616 (HL). At page 628 g-i.

Lord Wilberforce held,

> "there exists in English Law a more general principle that the Courts will not adjudicate on the transactions of foreign states. Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if existing, not as a variety of 'act of State' but one for judicial restraint or abstention...In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalised in the law of USA, which is effective and compelling in English Courts. This principle is not one of discretion, but is inherent in the very nature of the judicial process.....

> *It would not be difficult to elaborate in these considerations, or to perceive other important interstate issues and/or issues of international law which would face the Court. They have only to be stated to compel the conclusion that these are not issues in which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which it*

> *can be said have not been drawn to the attention of the Court by the Executive), there are, to follow the Fifth Circuit Court of Appeals, no judicial or manageable standards by which to judge these issues, or, to adopt another phrase (from a passage not quoted), the Court would be in a judicial no man's land: the Court would be asked to review transactions in which four foreign States were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law."*

The wide acceptance of this doctrine in municipal systems shows that there is no room anymore for gunboat diplomacy. The appreciation of this doctrine has to be allowed to spread because the use of force and/or diplomacy may not always work, a point well illustrated by the decision I have cited above. See also the number of authorities set out in the Beahan case, pages 315 - 318

In my view, Lord Oliver of Aylmerton, in his dissenting judgment in the Bennett case, put his finger precisely on the impracticability of the proposition that one municipal Court could supervise another

country's system. His Lordship concludes, rightly, as I respectfully accept, at page 159 g, that

> ..."An English (any Court) Criminal Court is not concerned nor is it in a position to investigate the legality under foreign law of acts committed on foreign soil and in any event any complaint of an invasion of the sovereignty of a foreign state as it seems to me, a matter which can only properly be pursued on a diplomatic level..."

In my respectful view, Gubbay, CJ was correct in his observation in the Beahan case, that even if irregularities were found to have been committed in the foreign state these would be irrelevant unless there was a breach of international law or gross invasion of human rights.

In Court proceedings before or during hearings resulting constitutional or other irregularities may occur invarying degrees of magnitude. The question is, should they be allowed invariably to negate the criminal process? This question was answered in the negative in our Court. See *S v Shikunga and Another* 1997 NR 156 (SC). At page 478 9 –479 9 the late Mohamed CJ, said:

“There appears to be a tension between two important considerations of public interest and policy in the resolution of this problem. The first consideration is that accused persons who are manifestly and demonstrably guilty should not be allowed to escape punishment simply because some constitutional irregularity was committed in the course of the proceedings, but in circumstances which showed clearly that the conviction of the accused would inevitably have followed even if the constitutional irregularity relied upon had not been committed. (This is exactly what transpired in the present case. Although the confession was admitted in terms of s 217(1)(b)(ii) the trial court was able to justify correctly the conviction of the second accused without any reliance on the confession.) There is however a competing consideration of public interest involved. It is this: the public interest in the legal system is not confined to the punishment of guilty persons, it extends to the importance of insisting that the procedures adopted in securing such punishments are fair and constitutional and that the public interest is prejudiced when they are not. The courts in various countries have repeatedly addressed themselves to the tensions contained between these two different considerations.”

Lord Oliver's observation, taken from a previous page in the Bennett case, expresses a similar view. At page 158 g, His Lordship said,

> ...*"Experience shows that allegations of abusive use of executive power in the apprehension of those accused of criminal offences are far from rare. They may take the form of allegations of illegal entry on private premises, of damage to property, of the use of excessive force or even of ill-treatment or violence whilst in custody. So far as there is substance in such allegations, such abuses are disgraceful and regrettable and they may, no doubt, be said to reflect very ill on the administration of justice in the broadest sense of that term. But they provide no justification nor, so far as I am aware, is there any authority for the proposition that wrongful treatment of an accused having no bearing upon fairness of the trial process, entitles him to demand that he be not tried for an offence with which he has been properly charged. Indeed, any such general jurisdiction of a criminal court to investigate and adjudicate upon antecedent executive acts would be productive of hopeless uncertainty. It clearly cannot be the case that every excessive use of*

executive power entitles the accused to be exonerated.....”

By virtue of the dicta above (the majority decision in Bennett accepted) as well as the contrary view criticising the acts of intervention by one state on another sovereign state, I view the doctrine of act of state as well in tune with our

Constitution. Article 96 (c) enjoins Namibia to...“create and maintain just and mutually beneficial relations amongst nations:”

It would not be easy, for Namibia to maintain good relations with its neighbours were its courts to take it upon themselves to scrutinise and criticize the actions of the other sovereign states and their institutions in matters within the confines and power of such state.

I agree with Mr Gauntlett, that the doctrine of act of State like most rules is not absolute. Exceptions to it have been made. In R v Bow St Magistrate’s Court, *ex parte* Pinochet Ugarte 1998 4 All ER 897 (HL) the Court ruled that the doctrine could be defeated by evidence of a gross violation of human rights. Thus according to

present day international law and custom courts will not ignore cases of serious violations of public international law, including invasions of territorial sovereignty, by hiding behind the doctrine of act of state. However it is not easy to reconcile this view with the approach that was adopted in the Abassi case, below.

In that case the doctrine of act of state or, in the English approach, "judicial restraint" was allowed to prevail even in the face of a clear breach of fundamental

human rights. See: the case of *Abassi v Secretary of State for foreign and Commonwealth Affairs* (2002) EWCA CIV 1598. I quote from the appellants heads of argument,

> "An application was brought by the mother of a British national who was captured by US forces in Afghanistan, and at the time of the application had been held in Guantanamo Bay for eight months without access to a court or any other form of tribunal, or even a lawyer. The court found was prepared to find that "In apparent contravention of fundamental principles recognised by both jurisdictions [i.e. the USA and the UK] and by international law, Mr Abassi is at present arbitrarily detained in a 'legal black hole'" (at par 64). Having recognized a grave violation of human rights by a foreign state, the court was, however, not prepared

> to grant the relief sought – namely a mandamus that the Foreign Office make representation of Mr. Abassi's behalf to their US counterparts. The court held, at par 107 (ii) that "[o]n no view would it be appropriate to order the Secretary of State to make any specific representations to the United States, even in the face of what appears to be a clear breach of a fundamental human right, as it is obvious that this would have an impact on the conduct of foreign policy, and an impact on such policy at a particularly delicate time."

It is my view that this case must be read in the context of the present day events. The case must be seen as one of those "aspects of international law that touch more sharply on national nerves than do others"...in the interests of comity of nations: the Banco Nacional De Cuba previously cited.

In the instant case, I take the view therefore that the learned trial judge ought not to have investigated the actions of Zambia or Botswana to determine whether the countries had followed their own laws before deporting the fugitives.

The trial Court also held that the Namibian authorities committed serious acts of unlawfulness which amounted to a disguised extradition, a practice which is widely condemned in many jurisdiction. The applicant argued that this finding is not justified

in the circumstances of this case, that even if it did amount to disguised extradition, there was not such a high level of "evil" which would justify an exception to the act of State doctrine. I agree with the appellants submission.

If the Court were right in its finding that there was a disguised extradition, in the unlawful removal of the fugitives, as found by the Court, the effect would be as was found in *S v Ebrahim* 1991 2 SA 553. But this is not such a case. The Ebrahim case was followed shortly afterwards by the case of *S v Beahan* 1992 1 SACR 307, a Zimbabwe Supreme Court decision.

The Ebrahim case, as is made clear in the judgment, rested the decision exclusively on the Roman Dutch municipal law as applied in South Africa. It did not, with respect, advert to the principles of international law though I accept, as my learned brother Hoff observed, that the Ebrahim decision was sensitive to those principles. This is also made clear by Gubbay, CJ in the Beahan judgment, in which the then Chief Justice followed the decision, (Ebrahim) with approval, and, had little difficulty in rationalising his decision on the basis of the principles of international law while quoting from the Ebrahim case. Gubbay, CJ, then examined a

variety of cases from a number of jurisdictions in the international law sphere, and, in commending the judgment, said,

> ***"…not only is it founded on the inherited principles of common law which this country (Zimbabwe) shares with South Africa, it has the added quality of being in accord with justice, fairness and good sense….", at page 315,***
> ***c-d***

His Lordship then gave other instances where the Court of the receiving state need not refuse to exercise jurisdiction, and continued, at page 318 (a),

> *"where agents of the state of refuge, without resort to extradition or deportation proceedings, surrender the fugitive for prosecution to another*
>
> *State, that receiving State, since it has not exercised any force upon the territory of the refuge State and has in no way violated its territorial sovereignty, is not in breach of international law. See Morgenstern 1952 The British Year Book of International Law 262 at 270-1; Oppenheim International Law 8th ed vol 1 at 703. In O'Connell International Law 2nd ed vol 2 at 834, the matter is put thus:*

> 'The case of a voluntary surrender of the offender, but in violation of the municipal law of the State which makes it, is different from that just discussed (ie illegal seizure on foreign territory). Even if the surrender is contrary to an extradition treaty it is still not a violation of international law since no sovereign is affronted, and the offender has no rights other than in municipal law.'

The proposition is well supported by authority. In the Savarkar case (cited fully in Harris Cases and Materials on International Law 3rd ed at 233) an Indian revolutionary who was being returned to India from Great Britain under the Fugitive Offenders Act of 1881, escaped and swam ashore in Marseilles harbour. A French policeman arrested him and handed him over to the British policeman who had come ashore in pursuit. Although the French Police in Marseilles had

been informed of the presence of Savarkar on board, the French policeman who made the arrest thought he was handing back a member of the crew who had committed an offence on board. France alleged a violation of its territorial sovereignty and asked for the return of Savarkar to it as restitution. The Permanent Court of a Arbitration decided in favour of Great Britain for the following reasons:

> '…(I)t is manifest that the case is not one of recourse to fraud or force in order to obtain possession of a person who had taken refuge in foreign territory, and that there was not, in the circumstances of the arrest and delivery of Savarkar to the British authorities and of his removal to India, anything in the nature of a violation of the sovereignty of France, and that all those who took part in the matter certainly acted in good faith and had no thought of doing anything unlawful. While admitting that an irregularity was committed by the arrest of Savarkar and by his being handed over to the British police, there is no rule of international law imposing, in circumstances such as those which have been set out above, any obligation on the Power which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that Power.'

Be that as it may, some criticism has been made of the landmark decision in the Ebrahim case. Suggestions, have been made, respectfully, that there is a slight limitation in this groundbreaking judgment. See The South African Law Journal 1992 Vol 190, an article by M G Cowling, Senior Lecturer in Law University of Natal Pietermaritzburg, published under the title, Unmasking Disguised Extradition, some glimmer of Hope. At page 248, the learned author observes,

> "…But to what extent does this decision have any impact on the issue of disguised extradition? Although the court relied on general Roman-Dutch principles of dealing with fugitive offenders and, as pointed out above, these principles resemble those relating to modern-day extradition proceedings, they do not in any way encompass disguised extradition.
>
> Another problem arises from the foundation of the decision purely on municipal law in the form of the Roman-Dutch common law of South Africa, so that it does not purport to develop the rules and principles of public international law in this sphere."

To say that the law has yet to be developed is to put it too strongly given the dicta by Gubbay, CJ about the common features between Roman Dutch law principles

on this subject and international law principles. Clearly South Africa has not been left behind.

> With regard to disguised extradition, Mr Gauntlet's contention was that … "the existence of unlawfulness in the deportation process by these foreign States is not an indication of a disguised extradition. In fact, as the court

itself notes, a disguised extradition usually occurs in the absence of unlawfulness, when an attempt is made to deport a fugitive "in accordance with deportation procedures." The recognized defining feature of a disguised extradition rather goes to the **motivation** of the officials of the extraditing country. Thus, even in cases where a *prima facie* valid deportation order exists, a court considering the validity of that deportation order will "look behind the form of the order to determine whether the motivation was anything other than to effect a deportation. Mr Gauntlett went on to submit that this principle is most clearly stated in the English case of **Soblen** R v Brixton Prison (Governor) 1962 3 All ER 641 at 661 D-E. Lord Denning MR, in considering how a court was to distinguish between deportation and extradition, concluded as follows:

> *"It seems to me that it depends on the purpose with which the act is done. If it was done for an unauthorized purpose, but in fact for a*
>
> *different purpose with an ulterior object, it was unlawful. If, therefore, the purpose of the Home Secretary in this case was to surrender the applicant as*

> *a fugitive criminal to the United States of America, because they asked for him, then it would be unlawful; but if his purpose was to deport him to his own country because he considered his presence here to be not conducive to the public good, then his action is lawful. It is open to these courts to inquire whether the purpose of the Home Secretary was a lawful or an unlawful purpose. Was there a misuse of power or not? The courts can always go behind the face of the deportation order in order to see whether the powers entrusted by Parliament have been exercised lawfully or not."*

Finally, it was also argued that even if it were held that the Namibian courts can adjudicate on the lawfulness of the actions of Zambia and Botswana, this finding alone wouldn't amount to a disguised extradition and justify refusal to exercise jurisdiction because the crucial question is whether Namibia has violated international law.

I agree that the finding that a foreign state acted unlawfully is irrelevant. In *S v Rosslee* 1994 2 SACR 441 (C), the accused was wanted by the South African

Police. He was arrested and deported by the Namibian Police after a tip off about his whereabouts.

At page 449, the Court held

> "that where there had been no unlawful conduct by any functionaries of the state in which the court is situated, but the presence within its jurisdiction of the person concerned was the consequence of the unlawful conduct on the part of functionaries of the foreign state to which the functionaries of the court's state were not parties, the court will not decline to exercise jurisdiction." *See also:* S v Mahala *1994 1 SACR 510 (A) 616*
>
> S v December *1995 1 SACR 438 (A) 441*

In my conclusion, there was no act of lawlessness committed by either Zambia or Botswana with the knowledge or concurrence of Namibia such as to disentitle Namibia from assuming jurisdiction as a receiving state.

It was also argued that the Court erred in its conclusion because disguised extradition was not canvassed at the hearing. In *Kuesa v The Minister of Home Affairs and Others* 1995 NR 175, Dumbutshena AJA said at page (182 Court), "…Counsel also pointed out that Court a quo raised several aspects in its judgment

which were not advanced by either counsel or canvassed by them. In relation to these counsel said they were not heard. These were .....”. After listing the issues, the then judge of Appeal said, at page 183D,

> *“The above matters are not crucial to the determination of this appeal. They are, however, important because a frequent departure from counsel’s, more correctly the litigant’s case, may be wrongly interpreted by those who seek justice in our courts of law. It is the litigants who must be heard and not the judicial officer. It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. Now and again a Judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such a circumstance to inform counsel on both sides and to invite them to submit arguments either for or against the Judge’s point. It is undesirable for a Court to deliver a judgment with a substantial portion containing issues never canvassed or relied on by counsel.”*

I do not think that this is such a case in that here, unlike the Kuesa case, substantial evidence was led by the Respondents regarding the issue to which the Appellant replied. So there cannot be said to have been any prejudice. In any

event it is well established, that as long as evidence is laid before the Court parties are at liberty to raise such legal argument as can justifiably be raised on the evidence. Mr Kauta invited the Court to reach its conclusion by drawing inferences that could be drawn from the evidence proved. I find it unnecessary to approach it from that angle.

Mr Kauta argued that it is in the interest of the administration of justice and the principles of fair play that the Court should decline jurisdiction over persons who have been removed, collected or arrested from a sovereign state with the intention of having them prosecuted without following extradition procedures. He relied on the case of *Bennett v Horseferry Road Magistrates Court* (1993) 1 All ER 138 (HL) the judgment by Lord Griffiths at p 150 H-J.

> *"Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also*

to protect the rights to those who are accused of crimes by the requesting country. Thus sufficient evidence has to be produced to show a prima facie case against the accused and the rule of speciality protects the accused from being tried for any crime other than that for which he was extradited. If a practice developed in which the police or prosecuting authorities of this country

ignored extradition procedures and secured the return of an accused by a mere request to police colleagues in another country they would be flouting the extradition procedures and depriving the accused of the safeguards built into the extradition process for his benefits. It is to my mind unthinkable that in such circumstance the court should declare itself to be powerless and stand idly by; I echo the words of Lord Develin in Connelly v DPP (1964 2 ALL ER 401 at 442, (1964) AC 1254 at 1354:

"The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused".

Reliance was also placed on the judgment of Gubbay, CJ, in *Beahan*, above, at page 317 D-F. Chief Justice Gubbay said:

> "In my opinion it is essential that, in order to promote confidence in and respect for the administration of justice and preserve the judicial process from contamination, that a court should decline to compel an accused person to undergo a trial in circumstances where his appearance before it
>
> has been facilitated by an act of abduction undertaken by the prosecuting State. There is an inherent objection to such a course both on grounds of public policy pertaining to international ethical norms and because it imperils and corrodes the peaceful coexistence and mutual respect of sovereign nations. For abduction is illegal under international law, provided the abductor was not acting on his own initiative and without the authority or connivance of his government. A contrary view would amount to a declaration that the end justifies the means, thereby encouraging states to become law-breakers in order to secure the conviction of a private individual."

Unfortunately for the Respondents, there is no basis on the facts of this case that these Respondents were removed or arrested by the Namibian authorities in a foreign jurisdiction in contravention of

Namibia's municipal law and international law. The learned trial judge's factual finding herein was:

> "In respect of these accused persons who alleged that they had been abducted, in the absence to the contrary, the evidence presented by the State witnesses stands uncontradicted since they said they had never been arrested by the Namibian authorities on foreign soil, (at page 1224).

Respondent's counsel also argued that the case of R v Staines Magistrates Court *ex parte* Westfallen and Soper and Nangle, 1998 4 All ER 210 are correct but distinguishable on the facts of the present case.

The facts in *R v Staines Magistrate Court ex parte Wasfallen and Others* were these, Westfallen and Soper went to Norway. On arrival in Oslo they were detained after being found in possession of forged documents and stolen travellers cheques. They were refused entry and deported by the Norwegians for fear that they'll commit further crimes. It is to be noted that Norway had an extradition treaty with Britain. But there was no question of holding them to await a British request for extradition.

In Nangle's case he travelled from the United Kingdom to Europe and ended up in Canada, while there was a warrant for his arrest in Britain. In Canada he committed further crimes, was arrested, tried and sentenced. The trial judge made an further order that he be deported to Ireland on release. When he was released the Canadian police notified the British police of his flight arrangements to Ireland via Glasgow. He was met by the British police at Glasgow Airport and was arrested. All three dependants challenged the jurisdiction of the Court and said they were victims of improper and abusive practice by British authorities. They relied on the Bennett case, above, where it considered the question

> "Whether the High Court in the exercise of its supervisory jurisdiction the court has power to enquire into the circumstances by which a person has been brought within the jurisdiction and if so what remedy is available if any to prevent his trial where that person has been lawfully arrested within the jurisdiction for a crime committed within the jurisdiction".

At page 222 f in the Staines case, Lord Bingham CJ observed, ... "The question in each of these cases is whether it appears that the police or prosecution authorities have acted illegally or

connived at unlawful procedures or violated international law or the domestic law of foreign states or abused their powers in a way that should lead this Court to stay the proceedings against the applicants. In the case of Westfallen and Soper the answer is plainly in the negative. The Norwegians were entitled under their own law to deport the applicants. The propriety of the deportation is not challenged. It is difficult to see why the Kingdom of Norway should be obliged to keep the applicant whilst the British applied for extradition if they wished to deport them. It was indeed a natural step for Norway to send the applicants back to where they had come from. There is nothing in the material before us to suggest that the British authorities procured or influenced that decision. It is true that they did not resist it..... It is very probable that they welcomed the decision....."

In the instant case there is no doubt that the Namibians, as in the above case must have welcomed the expulsion when it occurred. The evidence of Mr Matakala was that he got information of a group of illegal immigrants in a village. He travelled to the village and arrested them. Mr Matakala said he prepared warrants for their detention pending deportation in terms of the Zambian law. He explained that in terms of that law he had power as an

immigration officer to deport illegal aliens he said the decision was his whether to invoke a different procedure to go through the courts, but said he elected the first procedure in this case. He was supported in this claim by Mr Mundia, who it seems, must have been the most Senior immigration officer at the time.

This approach is supported by decisions in other jurisdictions that empower the executive to take administrative decisions that are generally shorter in order to expel illegal aliens: See *R v Brixton Prison (Governor)* above, where Lord Denning, lucidly sums the distinction in the powers.

> *"So there we have in this case the two principles: on the one hand the principle arising out of the law of extradition under which the officers of the Crown cannot and must not surrender a fugitive criminal to another country at its request except in accordance with the Extradition Acts duly*
>
> *fulfilled; on the other hand the principle arising out of the law of deportation, under which the Secretary of State can deport an alien and put him on board a ship or aircraft bound*

for his own country if he considers it conducive to the public good that that should be done."

The subsection in the Zambian statute, (S. 26 (4)(c)), was read into the record and appears in line with the witness's understanding. But even if it were not, the Court in Namibia would not be entitled to check the correctness of that answer, i.e. investigate the correctness of the compliance with provisions of a foreign statute, any more than the Court in England would have been expected to in the Westfallen case.

In any event there is highly persuasive authority,

"...that even if the surrender (of the fugitive) is contrary to an extradition treaty it is still not a violation of international law since no sovereign is affronted, and the offender has no rights other than in municipal law," per

Gubbay CJ quoting from an international law publication, for which he found support for the proposition in the Savarkar case.

It seems to me from the above decisions, especially the Staines Magistrates Court decision, that the trial court takes a bold

decision to do justice between the fugitive offender on the one hand and the interests of the public to see that those who commit crimes do not go unpunished.

Dicta to this effect can be found in a number of judgments of this Court, in particular those of my Brother O'Linn, J as he then was, in the cases *S v Andries Gaseb and Others* 2000 NR 135; *The State v Vries* 1998 NR 316.

To quote from Vries, the Learned Judge when discussing a suitable sentence for offenders said, at page 268 G.

> *"However, there is no reason whatsoever in my view, why, in accordance with the right to equality before the law, the life of the victim, the dignity of the victim, the right to peace and tranquillity and the security of person and property, should not at all stages of judicial process be given equal emphasis and consideration with that of the offender, even though the consequences of doing so would not always be the same for the offender and the victim."*

The Learned Judge went on to say,

> "The Courts must, in particular in the Namibian and South African reality, interpret and apply the Constitution in a way where it will be able to play its part in combating the emergence of a terror State, where the criminal minority dictates to and holds hostage the law-abiding majority and where no one, except the criminals, would have rights and freedoms."

The European Court of Human Rights in the international sphere is alive to the need to balance the competing interests when deciding issues of extradition of offenders.

In *Ocalan v Turkey* 15 BHRC page 324, at para 90, the Court observed,

> *..."inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the state obliged to harbour the protected person but*

also tend to undermine the foundations of extradition.' (Soering v UK [1989] ECHR 14038/88 at para 89.)

Though these words were enunciated in the context of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, they are in accord with any citizens understanding and expectations in an organised, orderly society.

In the instant case, the actions of the Namibia officials which were censured by the trial Court as having "tainted" the process of procuring the fugitives from Botswana and Zambia only consist of a request by the officer commanding the Namibian forces to his counterpart in Zambia and nothing further is suggested by this request. There is no hint that the request was accompanied by threats of force or other ultimatum. What is most impressive is that there is no evidence that Matakala (the immigration officer) had been aware of the decisions made in Lusaka when he started the proceedings to expel the fugitives from Zambia. Also, as far as the other groups within Zambia were concerned, the evidence showed that the Zambians initiated the process of deportation

independently of Namibia, that they only advised the Namibian authorities after rounding up the “parcel” of people they wished to expel.

As for Charles Samboma there is no issue that he sought and got a lift to Namibia because he could not endure further hardship from a life as a fugitive. He wanted to return home. He apologised and expressed contrition for his role in the upheavals in the Caprivi.

With regard to the Botswana fugitives, there is not a single piece of evidence that Botswana’s actions were influenced or caused by any action on the part of Namibia. In any event if the surrender of the fugitives was the result of a cooperation between the three foreign States in combating lawlessness within their territories, there is good authority that such eventuality could not avail the Respondents. – see the remarks of Gubbay CJ in the Beahan case page 317 i-j, that

> *“Even if it be assumed that a member of the Zimbabwe Republic Police had interrogated the appellant at the main police station in Gaborone and thereafter requested that he*

be returned, such action does not avail the appellant. It is irrelevant to the issue.

The immutable fact is that the appellant was recovered from Botswana without any form of force or deception being practised by the agents of this country. The decision to convey him to Zimbabwe was made, and could only have been made, by the Botswana Police in whose custody he was."

In concluding I will do no better than echo the words of Gubbay CJ that the fugitives were collected from Zambia and Botswana without any form of collusion or deception by the agents of Namibia but explicitly at the request of the two foreign countries. Even if it were found that Zambia and Botswana in doing so acted in breach of their own municipal laws that was not a matter for the concern of Namibia. Therefore there is no justification for holding that Namibia's hands were not clean on account of the above circumstances. In the result I agree with my brother Mtambanengwe that the appeal be allowed.

It is ordered that the matter be returned to the learned trial judge to continue the trial.

GIBSON, A.J.A.

STRYDOM, ACJ: I have read the judgments of my sister Gibson and my brothers O'Linn, Mtambanengwe and also Chomba. They have written full and well-reasoned judgments and although I agree with much that was stated by them my approach to some of the issues is perhaps different and given the importance of this matter I have decided to make my own contribution. I have reached the same conclusion as my brother O'Linn and in that regard I am of the opinion that the appeal should only succeed in a limited respect. To that extent I respectfully differ from the conclusion reached by my sister Gibson and brother Mtambanengwe. I am in certain respects in agreement with the setting out of the law and the interpretation thereof by my brother O'Linn and will indicate so in this judgment of mine where I accept his reasoning. As my brothers and sister dealt fully with the facts of this matter I do not find it necessary to do so as well except where it is necessary for the purposes of my judgment.

The issue before the Court *a quo* and before us was whether the Court has jurisdiction to try the thirteen appellants who were returned by authorities acting in Zambia and Botswana and brought before the Court to stand trial in what is now known as the Caprivi treason trial. The appellants alleged that they were abducted from the two countries by members of the Namibian Police Force and Defence Force. This is denied by the members of the respective forces and they in turn testified that they, at all times, only received the appellants from officials of Zambia and Botswana. It was also alleged, and found by the Court *a quo*, that no arrests were made by the Namibian forces except when the appellants were on Namibian soil. Various immigration officers and members of the police force of both Zambia and Botswana also testified. According to them the appellants were either illegal or prohibited

immigrants who were arrested by them and deported by them back to Namibia.

The question whether a Court has jurisdiction in circumstances where a fugitive offender, who has committed crimes within the jurisdiction of the Court, crossed into a foreign country and was brought back has undoubtedly undergone some change over the years. As far as our own law is concerned one need not start further back than the case of *Abrahams v Minister of Justice and Others*, 1963 (4) SA 542 (C.P.D.). This was an application made *habeas corpus* and it was alleged that the applicant was abducted from Bechuanaland Protectorate, (now Botswana), and brought back to South West Africa, (now Namibia). The Court accepted these facts and also accepted that members of the South African police were at least parties to the abduction. This notwithstanding the Court found that the applicant was only arrested in South West Africa and found that once there was a lawful detention, the circumstances of the arrest and capture of the applicant were irrelevant. (p.545H). In coming to this conclusion the Court, *inter alia,* relied on an English case, namely *Rex v Officer Commanding Depot Batalion,Colchester: Ex parte Elliot*, 1949 (1) A.E.R. 373.

It seems that, for some time, Courts in England as well as the United States of America applied the principle of *male captus bene detentus* where once the offender is brought within the jurisdiction of the Court the circumstances of his capture and arrest were not obstacles debarring the Court from hearing the case. See *Sinclair v HM Advocate (1890)* 17 R (JC)38 referred to in *R v Plymouth Magistrate's Court and Others:* ex *parte Driver* [1985] All ER 681 (QB) at 692f – 694j; *Kerr v Illinois* 119 US 342 (1888) and *Frisbie v Collins* 342

US 519 (1952). This so it seems to me was also the *ratio* in the *Abrahams* case.

Some fourteen years after the *Abrahams* case the Appeal Court of South Africa was called upon to deal with a more or less similar situation in the case of *Nduli and Another v Minister of Justice and Others,* 1978 (1) SA 893 (A.D.). The applicant and others were abducted from Swaziland and brought to South Africa where they were arrested by the Police. The Court stated that the sole issue for investigation was whether a South African Court could, in terms of international law as applied in South Africa, try an accused that had been apprehended on foreign soil but was arrested within the Republic and charged with criminal acts triable by a South African Court. (p.906H). The Court reviewed various cases in its own jurisdiction as well as Courts of Great Britain and America and concluded as follows, p. 911H – 912A:

> "Having regard to what is stated above and the decisions of some of the Courts of Great Britain and America to which we have been referred, it seems clear that in terms of international law, as it exists (and not perhaps as it should be), the appellants' case would only have merited consideration if their abduction had been authorized by the Republic of South Africa. It is not disputed that appellants were arrested and ordered to be detained by Colonel Dreyer on South African soil. On the assumption that they were abducted by people, including two South African policemen, on Swaziland soil, it must be accepted on the evidence, for the reasons already given, that such apprehension was not authorized by the South African State. In the result it cannot be said that the jurisdiction of the Court *a quo* was ousted according to international law, and that the judgment of the Court *a quo* was wrong."

In regard to the finding of the Court that the South African State was not involved in the abduction the Court accepted the evidence of Colonel Dreyer who had expressly prohibited the police from crossing the Swaziland border

and apprehending the appellants there. Although the Court did not make any finding as to what the position would have been if it was proven that the State was involved in the abduction, the fact that a proper investigation into international law was undertaken by the Court, in my opinion, shows that where there was an abduction from foreign soil the circumstances of the arrest and capture were no longer totally irrelevant.

A further development in this regard came with the case of *S v Ebrahim*, 1991 (2) SA 553 (AA). Again the Court was faced with abduction from Swaziland and although, on the evidence, the Court found that the South African police was not involved the Court, on the evidence, concluded that it was highly probable that the abductors of the appellant were agents of the State. The Court embarked on an exhaustive review of Roman and Roman Dutch law to investigate the common law. As regards the Roman Dutch law the Court found as follows:

> "Uit hoofde van die bogaande is dit duidelik dat 'n Nederlandse hof volgens die Romeins-Hollandse gemenereg geen regsbevoegdheid gehad het om 'n persoon te verhoor wat uit 'n ander jurisdiksie ontvoer is deur werktuie van die Staatsgesag wat bewind voer in die regsgebied van so 'n hof nie."

(From the above it is clear that according to the Roman Dutch common law a Dutch Court had no jurisdiction to try a person who was abducted from another jurisdiction by agents of the State authority exercising power in the area of jurisdiction of such court.) (My translation).

The Court further concluded that these rules of Roman Dutch law were still part of the common law of South Africa. The Court evaluated the principles so involved and stated at page 582C – E as follows:

> "Verskeie fundamentele regsbeginsels is teenwoordig in daardie reels, te wete, die ter behoud en bevordering van menseregte, goeie inter-staatlike betrekkinge en gesonde regspleging. Die individu moet beskerm word teen onwettige aanhouding en teen ontvoering, die grense van regsbevoegdheid moet nie oorskry word nie, staatkundige soewereiniteit moet eerbiedig word, die regsproses moet billik wees teenoor diegene wat daardeur geraak word en die misbruik daarvan moet vermy word om sodoende die waardigheid en integriteit van die regspleging te beskerm en te bevorder. Die staat word ook daardeur getref. Wanneer die Staat self 'n gedingsparty is, soos bevoorbeeld in strafsake, moet die as't ware 'met skoon hande' hof toe kom. Wanneer die Staat dan self betrokke is by 'n ontvoering oor die landsgrense heen, soos in die onderhawige geval, is sy hande nie skoon nie."

> (Several fundamental legal principles are implicit in those rules, namely, those for the preservation and promotion of human rights, good interstate relations and sound administration of justice. The individual must be protected against unlawful detention and against abduction, the limits of jurisdiction must not be exceeded, State sovereignty must be respected, legal process must be fair towards those who are affected thereby and the misuse thereof must be avoided in order to protect and promote the dignity and integrity of the administration of justice. The State is also affected thereby. When the State itself is a litigant, as for instance in criminal matters, it must approach the court so to speak with 'clean hands'. When the State then itself is involved in an abduction over the borders of another country, as is the case in the present instance, its hands are not clean).
> (My translation).

In this instance the appeal succeeded and the conviction and sentence of the appellant were set aside. Although the principles to which the Court referred were Roman Dutch law principles it seems that in so far as these were justified on the basis of respect for the sovereignty of other States and the comity of

nations, such rules do not differ greatly from those applicable in international law, as was also found by the Court by reference to developments also in other countries such as America as reflected in the case of *United States v Toscanino,* 500 2d 267. See also *Ocalan v Turkey* Ect HR APP No. 46221/99 at p 325 par. 92; *S v Beahan* 1992 (1) SA 307 (ZS) and *Prosecutor v Dragon Nicolic* Trial Chamber, I.C.T. case 94-2-T. As the provinces in the Netherlands, to which these Roman Dutch rules applied, were all sovereign states, the similarity with international law may not be accidental.

Whereas the principles involved in the *adagium male captus bene detentus* applied at a stage very much in the United States of America and also Great Britain, as well as South Africa, which brought about that as long as the ultimate detention was legal the courts did not bother to enquire about the circumstances of the arrest and capture of the person abducted, there was in later years a change of attitude and the focus was then directed to possible breaches of international law and more particularly violations by one country of the sovereignty of another. See in this regard the cases referred to in the previous paragraph.

It was common cause between the appellant and the respondents that these rules were applicable and that an abduction over the borders of either Zambia or Botswana by members of the Namibian forces, or other agents of the State, would have constituted a breach of international law and, as I understood Counsel on both sides, such action would have affected the jurisdiction of the Court *a quo*. It was however submitted by Mr. Gauntlet that in each particular instance there was no abduction of any of the respondents by agents of the Namibian State or forces and that in each instance the respondents, with the

exception of Charles Samboma, were handed to the Namibian police or military forces by the co-operation of the authorities in both foreign countries. As this was the case there could not be any question that any of the respondents were abducted in a sense which would constitute a breach of international law. This was also the finding of the Court *a quo* and the learned Judge also found that all arrests were executed on Namibian soil or in the no man's land between Zambia and Namibia. It was further submitted by Mr. Gauntlet that in so far as the handing over of the respondents occurred with the co-operation of Zambia and Botswana these actions constituted 'acts of State' and unless there was proof of some gross violation of human rights, it was not relevant that the two countries, in doing what they did, did not comply with their own municipal laws. In this regard we were *inter alia* referred to the following cases, namely, *S v Beahan, supra; Ocalan, supra; Stocke v Germany* APP No 1175/85 12 October 1989 par 54.

A reading of the above cases supports the submission by Counsel as far as international law is concerned and I therefore also agree with my sister Gibson and my brother Mtambanengwe that the fact that the two countries may have breached provisions of their own laws does not concern this Court. Where one country co-operates in the handing over of an alleged offender of another country there is no suggestion of the latter country violating the sovereignty of the country involved in the handing over. In the instant case there was clear co-operation between the officials and forces of Namibia and Zambia and Botswana and, as was stated in the *Ebrahim* case, the State was bound where action by the lower echelons of power were authorized and executed even though such action was not sanctioned by the highest authority (p. 568C-D). I also agree with what was stated in *S v Wellem,* 1993 (2) SACR 18(E) at p. 32a-

b, namely that where it was clear that all the officials acted within the scope and course of their employment, the State was bound by their actions. In the instant case it was never claimed that the officials did not act within the course and scope of their employment as such. If they had acted as loose cannons then, on the strength of what was decided in *Nduli* and *Ebrahim*, international law did not play any role in this case. I have therefore come to the conclusion that in the present instance there was no breach of international law as far as the handing over of the respondents was concerned. In this regard I am respectfully not in agreement with the finding by my brother O'Linn which is to the effect that the members of the Namibian forces as well as the officials of Zambia and Botswana were "unauthorized" whatever that may mean in the context of this case.

As previously stated, the focus of the Courts was at one stage mainly directed to the question whether actions by the requesting State breached international law or not, with the result that scant attention was given to the fact that there was in existence between two countries an extradition treaty or other legislative acts prescribing how and in what circumstances extradition should be obtained. See in this regard the *Beahan* case, *supra*, p. 318, and the authorities referred therein, and S*tocke v Germany,* supra and *United States v Alvares-Marchain,* (1992) 504 US 655. Although it was submitted in the *Nduli* case that there was an extradition treaty between Swaziland and South Africa this was not even mentioned in the judgment and seemingly did not play any role in the deliberations and conclusion of the Court.

However, since the *Nduli* case, and also the *Ebrahim* case, many countries, more particularly on the African continent, underwent constitutional changes

and can now boast Constitutions containing first and second generation human rights provisions. Transparency and accountability and a government based on the rule of law are now part of the Constitutions of the Republic of Namibia and the Republic of South Africa with which latter country we also share the same common law, namely Roman Dutch law. It is my opinion that where there is an extradition treaty or legislative Act in existence between Namibia and, in the present instance, Zambia and Botswana, which prescribes a particular procedure to be followed and which grants certain rights and safeguards to an accused person, it is at least necessary to also evaluate the role of all agencies involved against the background of the new dispensation.

In two recent decisions in South Africa the Courts found that the fact that there were extradition treaties and an extradition Act between South Africa and the two countries from which the applicants were handed over, were unlawful where the request, which was made for such handing over, and the handing over itself, was executed by police officers of the two countries who, in terms of the provisions of these instruments, were not competent to take such actions. In the first case, namely *S v Wellem*, supra, one of the accused persons was arrested by members of the Ciskei Defence force who informed the S.A. police of his arrest. Two other accused persons were arrested by the Ciskei police by request of an officer of the S.A. police. All the accused persons were given the choice to remain in custody in the Ciskei until extradition proceedings could be started or to accompany the S.A. police to South Africa. They all opted to go to South Africa and some of them signed written consents to that effect. The Court discussed the extradition legislation between the two countries and the extradition treaty in existence and came to the conclusion that the provisions were exhaustive and that extradition could

only take place in terms thereof. The Court concluded that neither the Act nor the treaty sanctioned extradition by request of a police officer and handing over by the forces of the returning country. The Court consequently found that the actions of the S.A. Police and the Ciskeian Police were unlawful and that this action amounted to an unlawful abduction of the accused. In the course of his judgment the learned Judge stated as follows, at p. 27h - i:

> " In my view the provisions of the Act and agreement are exhaustive of the manner in which South African officials, including the police, may obtain the presence of persons who committed extraditable offences in South Africa from Ciskei, and, similarly, of the manner in which officials in Ciskei, including the police, may hand over such persons to South African officials. The Act and agreement is comprehensive, even to the point of making provision for cases of urgency. To hold that the provisions of the Act and agreement are not exhaustive and thus to allow State officials to circumvent the important procedural and substantive safeguards for persons liable for extradition therein would frustrate the very purpose of the Act and agreement and make its provisions superfluous."

The conclusion reached by the Court in *S v Willem,* to the effect that the provisions of the Extradition Act and agreement were exhaustive, was followed in the case of *S v Buys en Andere,* 1994 (1) SACR 539(O). Because of the circumstances of the case the Court found that there was no unlawful abduction by the S.A. police involved in the transfer of the accused persons from Bophutatswana to South Africa however, the Court found that as a result of non compliance with the provisions of the Extradition Act, the extradition was irregular and therefore unlawful.

Although there are no extradition treaties between Namibia and Zambia and Namibia and Botswana, extradition between these countries is regulated by reciprocal Extradition Acts. In Namibia Act 11 of 1996 contains provisions

prescribing the procedure to be followed when a request is made by another country for the return of persons and the Act grants certain rights to persons returned to Namibia by request of the competent authority. Section 2 of the Act provides that in such a case the return shall be in accordance with the provisions of the Act. The Act further provides for the type of offences that are extraditable (sec. 3) and prescribe the circumstances and crimes, such as of a political nature, where the State shall not comply with a request to return a person to another country (sec. 5). Sections 7, 8, 9 and 10 prescribe the procedure and by whom and to whom the request should be addressed. It further puts in place enquiry proceedings for committal (sec. 12) and provides for a right of appeal to the High Court of Namibia for the person so committed as well as the requesting Country (sec. 14).

In sec. 15 the person whose return has been requested is given the power to waive his or her right to an enquiry provided that the magistrate is satisfied that such waiver was voluntary and the person understands the significance and all the implications of such waiver. Even then the Minister must still be satisfied that the return of such person is not prohibited by the Act. In the case of an extradition to Namibia the person so returned shall only be charged in respect of the offence for which such person was returned or a lesser offence proved on the facts. (sec. 17) unless he or she is given an opportunity to leave Namibia. Another important provision is sec. 20 which provides for legal representation for a person arrested for purposes of being returned to a requesting country. Sub sec. (2) instructs the Director of Legal Aid, notwithstanding the provisions of the Legal Aid Act, Act 29 of 1990, to appoint a legal representative for such a person where the latter has not himself

instructed a legal representative. Furthermore the Act also provides for a procedure to be followed where grounds of urgency are present. (sec. 11).

The Zambian Extradition and Deportation Act, Chapter 94 of the Laws of Zambia, and the Botswana Extradition Act, Act 18 of 1990, as well as relevant provisions of the immigration laws of these countries, were handed in to Court by agreement between the parties. A reading of these Acts makes it clear that they contain very similar provisions of procedure and safeguards in respect of accused persons to that of the Namibian Act and to that extent they also provide for the procedures to be followed when a request for the handing over of a person is made, the circumstances when extradition is prohibited, such as crimes of a political nature, enquiries to be held and the right granted to such person to appeal against his or her committal. (See further the discussion by my brother O'Linn of the specific Deportation Acts and Extradition Acts of the two Countries and his interpretation thereof, with which I agree).

In the present instance various immigration officers of Zambia and Botswana testified in the Court *a quo*. According to them 12 of the respondents were arrested because they were illegal or prohibited immigrants. These officers testified that as a result of that the persons were deported in terms of their immigration Laws. The Court *a quo* rejected this claim and in my opinion rightly so. I agree with the Court *a quo* that if that was so one could surely expect to see some documentation supporting that claim. There is none and neither is there any claim or indication that any of the steps, prescribed by the respective Acts, were followed, and the warrants that were produced in regard

to Osbert Likanyi, respondent no. 8, are no more than an attempt to give some semblance of legality to the handing over of this respondent. (See the discussion in this regard by my brother O'Linn).

The dearth of documentation to support the claims by the immigration officials, and the inference to be drawn there from, is further substantiated by the circumstances under which the respondents, or some of them, were handed over to the Namibian authorities.

The handing over of the respondents was divided by the Court *a quo* into five groups. It was common cause that at no stage was any formal request for the extradition of any of the respondents made by any competent authority on behalf of the Government of Namibia. For purposes of this case it is therefore necessary to determine how and under what circumstances each of the groups were handed over to the police or defence force of Namibia and the role played by these forces in such handing over. In this regard the following is relevant.

The first group, consisting of respondents numbers 1, 9, 10, 11 and 12 were arrested by

Zambian immigration officials on 18th or 23rd .June 1999. As this happened before the alleged attack on various installations at Katima Mulilo, which occurred on the 2nd August 1999, I am of the opinion that at least at this stage there was a genuine intention to deal with this group in terms of the Immigration laws of Zambia. This is further substantiated by the evidence of Major-General Shali who testified that he became aware that the respondents were in Zambia when he saw their names on a list which was provided by the

Zambian authorities. There is a suggestion in his evidence that before people are deported to their country of origin it is customary to send a list of the names to such country. All this lends support to the evidence of immigration officer Matakala that he intended to set in motion proceedings for the deportation of these people.

However, the matter does not end there. Shali further testified that there were still many other names on that list but when he saw the names of the "terrorists" on the list he requested that they be handed over to the Namibian forces. It is common cause that the only persons who were handed over on this occasion were the respondents. Seemingly in regard to the other names on the list the normal procedure of deportation continued. This differentiation can in my opinion only be explained on the basis of an extradition as against a deportation. This is further substantiated by the evidence of Shali who sought their handing over to come and face the "ruthlessness of the law". It is in my opinion clear that the general wanted these men, and this was more than once said by him, for one purpose only and that was to prosecute them. These respondents were handed over to Inspector Theron who collected them inside Zambia.

The second group was arrested at a much later stage and after the attack on Katima Mulilo. This group consisted of respondents numbers 4, 5, 6 and 7. This was the group that was handed over in no man's land to members of the Namibian police or defence force. Here again members of the Namibian Police force entered Zambia seemingly to identify the respondents. What happened to this group, and the way that they were dealt with, shows no resemblance to a deportation.

According to the evidence of the Namibian police officers the third group, consisting of respondents 2 and 3, was brought to the police station at Katima Mulilo and handed to one of the officers. The impression was created that they arrived at Katima Mulilo unexpectedly and without any involvement by the Namibian officials. This is contradicted by the evidence of respondent No 2 as well as Colonel Kaleji.

The fourth group consists of Charles Samboma, respondent no. 13. He was seen at the police station at Sesheke. He informed the police that he wanted to return to Namibia and he expressed his regret at what had happened on the 2nd of August. He willingly accompanied Inspector Simasiku to Namibia and was then arrested on Namibian soil.

The last group consisted of three persons which included Osbert Likanyi, respondent no. 8. They were handed over to Namibian police officers in Botswana at a defunct weighbridge close to the Border post with Namibia. That happened notwithstanding the fact that political asylum was granted to this respondent.

In the *Ebrahim* case the Court of Appeal of South Africa pointed out that in cases where the State is a party, such as criminal prosecutions, the State must come to Court with clean hands. This conclusion was reached in terms of the rules applicable and according to Roman Dutch law. I agreed that as far as international law was concerned the Court of the requesting country is not interested in any breaches by the returning country of their own municipal law.

Where, in the return of a person there is co-operation by the returning country there is no violation of the sovereignty of that country and consequently breaches by them of their own law does not fall within the realm of international law.

However where this Court must decide on the lawfulness, or otherwise, of the process whereby the respondents were brought within the jurisdiction of our Courts I can find no reason why the Court shall not look at all the evidence, including that of the involvement of officials and members of the returning country, to decide whether the State, in this instance, approached the Court with clean hands. Or as it was put by Counsel for the appellants, namely that the unlawfulness of the actions of the Zambian and Botswana authorities alone is neither necessary, relevant or conclusive but that it at best gain significance as a prism through which to view the actions of the Namibian authorities. The *caveat* added by Counsel that a Court should only do so in the event of gross human rights violations cannot apply in this instance. In doing this the Court is no longer dealing with international law but with the lawfulness or otherwise of the whole process in terms of its own laws and Constitution and the role played by the State, or its representatives, in that process. No finding of illegality or otherwise is made in regard to the other countries involved. That this is permissible and necessary where the Court's jurisdiction was challenged was, in my opinion, decided in various present day cases in South Africa as well as in other jurisdictions.

So far as South African law is concerned reference can be made to *S v Wellem* and *S v Buys and others.* In regard to other jurisdictions see *Bennett v Horseferry Road Magistrate's Court* and *Another,* (1993) All ER 138 (HL)*;* its

follow up namely, *Bennett v HM Advocate* 1995 SLT 510 at 518; *R v Bow Street Magistrate's Court, ex parte Mackeson*, (1981) 75CT APP R 24; *R v Staines Magistrate's Court and Others, ex parte Westfalen R v Staines Magistrate's Court and Others, ex parte Soper R v Swindon Magistrate's Court and Others, ex parte Nangle,* (1998) 4 ALL ER 216(QBD); *R v Hartley,* (1978) 2 NZLR 199; *Bozano v France,* 9 E.H.R.R.. 1986 Series A, No. 111 and *Prosecutor* v *Dragon Nicolic,* Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violation of International Humanitarian Law, Case No 94-2-T par. 111;

The above cases are in my opinion authority that, apart from possible breaches of international law, Courts must also examine the conduct of the parties responsible for bringing the fugitive offender before the jurisdiction of the requesting State, even more so where the requesting country is a Government based on the rule of law. This was aptly stated by Lord Bridge in the House of Lords in the *Bennett* case as follows:

> "Whatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots. There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view. Having then taken cognisance of the lawlessness it would again appear to me to be wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the defendant or in disciplinary or criminal proceedings against the individual officers of the law enforcement agency who were concerned in the illegal

> action taken. Since the prosecution could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted. If a resident in another country is properly extradited here, the time when the prosecution commences is the time when the authorities here set the extradition process in motion. By parity of reasoning, if the authorities, instead of proceeding by way of extradition, have resorted to abduction, that is the effective commencement of the prosecution process and is the illegal foundation on which it rests."

As far as the first two groups are concerned there can be no doubt that agents of the State were actively organizing and involved in bringing those respondents out of Zambia. I have already pointed out that in regard to both these groups I agree with the finding of the Court that there was no deportation. The request by Major-General Shali brought about that those people he wanted were excluded from the others on the list and handed over to the Namibian authorities. This resulted therein that any rights they may have had in terms of the Namibian laws or the Zambian laws were, as far as they were concerned, completely negated. I am satisfied that the request by Shali triggered the actions by the Zambian authorities and the way in which the groups were received, in some cases after officers of the Namibian Police first visited the stations in Zambia, is evidence of an orchestrated and organized involvement in order to obtain the handing over of the respondents. From the evidence I am satisfied that the Namibian officials and officers were not mere passive recipients of the respondents but that they took an active part in bringing about the handing over and in receiving the respondents which, as it turned out, was in breach of their own laws. In my opinion the actions by the Namibian authorities were irregular which resulted in the unlawfulness of their action.

In regard to the third group Inspector Goraseb as well as Commissioner Maasdorp testified that this group was simply brought by Colonel Kaleji to Katima Mulilo without any prompting from the Namibian side and without them knowing that this would happen. There is also uncertainty amongst the policemen as to whom this group were handed over. In his evidence Colonel Kaleji however sketched a different scenario. According to him he was instructed by his army headquarters to hand the group over to his Namibian colleagues. He then contacted the Namibians and a date was arranged for the handing over of this group. This happened in December 1999. The 2nd respondent also testified and according to him he was handed to the Namibian police in Zambia and escorted by them to Katima Mulilo.

In regard to the fourth group, namely Charles Samboma, I do not agree with the finding of the Court *a quo.* The Court dealt with the matter as if Samboma was persuaded by someone to return to Namibia and although he consented he was not apprised of what was in store for him once he returned to Namibia. This was clearly not the case. Samboma surrendered himself, first to the Zambian authorities to whom he expressed his wish to return to Namibia, and thereafter to Sgt. Simasiku whom he willingly accompanied to Namibia because that was his wish. He even expressed his regret to the police for what had happened on the 2nd August, that being the day of the attack on Katima Mulilo. Under the circumstances there was in my opinion no duty on the police officer to explain anything further to him. The cases of *S v Mahala and Another,* 1994 (1) SACR 510 (AD), *S v December,* 1995 (1) SACR 438 (AD) and *Mohamed v President of the RSA,* 2001 (3) SA 893(CC) are authority that a consent properly given suffices under the circumstances and non compliance with the relevant legislation is not a bar to subsequent prosecution. This would

be even more so, in my opinion, where a person willingly surrenders himself to the authorities.

The last group consisted of three persons. of which Osbert Likanyi was one, which was brought from Botswana and handed to the Namibian authorities still inside Botswana. This happened despite the fact that political asylum was granted to Osbert. The involvement of the Namibian authorities in bringing Osbert to Namibia was not denied. Again this resulted in a complete negation of any rights the respondent had in terms of the Namibian and Botswana laws and, what is more, he was handed over shortly after the High Court of Botswana refused to extradite other Namibians in regard to which a formal request for extradition was made. In my opinion the appeal in regard to this respondent must also be dismissed.

Because of the involvement of the Namibian police and/or members of the defence force, the respondents were denied any rights they may have had in terms of the deportation laws and extradition laws of Zambia and Botswana and also Namibia. These rights, which were contained in legislative Acts by the parliaments of three sovereign countries, were ignored by minor functionaries and, taken to its logical consequences, can open the door to the handing over also of Namibian citizens who had allegedly committed crimes in foreign countries despite the rights and safeguards provided for in the Extradition Act. Any action which has the effect of suspending or circumventing the provisions of an Act, in this case Act 11 of 1996, undermines the rule of law which is the basis of our Constitution. The unlawful action of the Namibian police and defence force members therefore consists in there active participation in the handing over of the 12 respondents despite and

contrary to reciprocal legislation providing for a procedure and safeguards in such handing over and thereby causing the circumventing of those procedures and rights which the respondents had in terms of that legislation.

I would therefore propose the following order:

1. The appeal against the release from prosecution of respondents 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 is dismissed.
2. The appeal against the release from prosecution of respondent no. 13, Charles Samboma, succeeds .
3. In the latter instance the matter is referred back to the Court *a quo* and respondent No. 13 must plead to the charges and stand trial.

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STRYDOM, A.C.J.

CHOMBA, A.J.A.

I have had the opportunity of perusing the draft judgments of my learned brethren Mtambanengwe AJA, Gibson AJA, O'linn AJA and Strydom ACJ and note that the first two have arrived at a verdict of allowing this appeal while the other duo have resolved to dismiss it. I must state at the out set that for reasons stated by them, I concur with my learned brother Mtambanengwe and learned sister Gibson. I shall state briefly why I feel that I should add my voice to allowing this appeal.

My brother Mtambanengwe has comprehensively reviewed the facts of this case as it was presented in the court a quo. Therefore, there is no need for me to recapitulate them. It suffices to mention that in the wake of the tumultuous upheaval of 2nd August, 1999 in the Caprivi Region, a number of alleged perpetrators of the criminal activities of that day were apprehended in Namibia. Others are said to have decamped and taken refuge in neighbouring countries. The 13 respondents to the present appeal are alleged to be among those that decamped. Indeed that is why when the 13 were brought back home to Namibia they were, together with those who were arrested internally, charged with offences emanating from the mayhem, destruction and security threatening events of 2nd August. The respondents have, by invoking the provisions of S. 106 (1) (f) of the Criminal Procedure Act, No. 51 of 1977, purported to thwart the attempt to prosecute them by pleading that the trial court in Namibia had no jurisdiction over them because they were returned home to Namibia unlawfully since they were not legally deported or extradited from Botswana or Zambia their respective countries of refuge.

I readily concede that there are many celebrated decided cases in many countries including South Africa and the United Kingdom in which the plea of lack of jurisdiction by courts of trial has succeeded

grounded on the principle that the accused's rendition to the country of trial was unlawful in as much as the laws of deportation or extradition had not been complied with by the surrendering countries. However, in the situation which presents itself in the appeal before us, to use that rationale would not, in my considered opinion, meet the tenets of justice. In this day and age when the world has been and continues to be ravaged by terrorist activity it is otiose to apply that rationale.

In my view the rationale on which those celebrated cases are predicated sends wrong signals to potential terrorists. All you have to do is terrorize a state and when you are about to be apprehended by the authorities you cross territorial borders if you have the means to do so and you will be safe unless and until the country of refuge catches up with you and either deports or extradites you under the law. Meanwhile any of your collaborators who were unable to make a cross border escape can face the consequences of the law alone. Furthermore, I think that the human rights of fugitives from the law should not be considered by courts to be of prior concern over those of victims of terrorism whose security remains endangered as long as the fugitives remain at large.

In stating the above, I am far from stating that breaches of international law in the removal of fugitive criminals from one country to another should be condoned. However, my understanding of breach of international law in the present context is typified by the case of S v Ebrahim 1991 (2) SA 553. The headnote in that case

states that Ebrahim had escaped from South Africa where he was being sought in connection with treasonable offences. He was sojourning in Swaziland as a refugee. Agents of the South African state abducted him from his home and conveyed him to South Africa where he was tried and convicted. Swazi state authorities did not only not collaborate in the abduction but were also unaware of the abduction at the time it took place. Quite clearly in my opinion that was a case in which the state sovereignty of Swaziland was breached. The action of the South African Agents who abducted Ebrahim was an infraction of international law.

To the contrary, in casu the respondents who were apprehended in Zambia were illegal immigrants, although I must agree with the view taken by my brother O'linn that they had not been so declared under Zambian law. Their not being declared illegal immigrants notwithstanding, the men were illegal immigrants no more no less as they had not entered Zambia by first reporting themselves to immigration officers. Some of them claimed that they had entered Zambia to seek refuge, but they made this claim only after they were apprehended. The Zambian state witnesses who gave evidence were quite clear on the fact that they intended to deport them, but of course we know that in the end the law of deportation was circumvented. It is clear, too, that for the purpose of maintaining public security in the border area between Namibia and Zambia the relevant security authorities in both countries were collaborating. It was in the advancement of that collaboration that the respondents were surrendered to Namibia.

The same in my view can be said about Osbert Mwenyi Likanyi, as to how he was surrendered by Botswana to Namibia.

Collaboration in the surrender of a fugitive offender was among the issues that fell to be considered in the case of <u>Ocalan vs. Turkey App. No. 46221/99.</u> That was a case in which Ocalan was on the run from Turkey where he was alleged to have been concerned in the committing of acts of terrorism endangering state security. He

eventually, clandestinely and illegally, entered Kenya. When the Kenyan state authorities came to know about his presence in their country they collaborated with Turkish state agents who had travelled to Nairobi in search of Ocalan. Ocalan was surrendered to the latter without deportation or extradition statutory procedures being followed. Having been flown back to Turkey, he was tried by the State Security Court, was convicted of terrorism-related offences and was sentenced to death. When his case went before the European Court of Human Rights the issue of competence of the Turkish trial court was raised. It was argued on Ocalan's behalf, inter alia, that his forced expulsion from Kenya and removal to Turkey had amounted to disguised extradition and that he was deprived of procedural and substantive protection under the law – the very kind of plea made by the respondents in the present case.

The following are some excerpts of the judgment of the European Court of Human Rights:

> **"The court accepts that an arrest made by the authorities of one state on the territory of another, without the consent of the latter affects the person's individual rights." para 88.**

However, the Court went on-

> **"The fact that a fugitive has been handed over as a result of co-operation between states does not in itself make the arrest unlawful." para 90.**
>
> **"It (i.e. the Court) considers that subject to its being the result of co-operation between the states concerned and provided that the legal basis for the order of the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's state of origin, even an extradition in disguise cannot be regarded as being contrary to the Convention." (i.e. the International Convention for the Protection of Human Rights and Fundamental Freedoms of 1950). para 92.**

I would identify myself fully with the view contained in these excerpts.

Consequently, it is my considered opinion that the rendition of all the respondents was not tainted with breach of international law. Indeed there was no evidence before the trial court that either the Zambian or Botswana state authorities complained of any violation of their territorial integrity by Namibian authorities concerned in the removal of the respondents to Namibia. I am well alive to the strong language of Gen. Shali whose evidence purported to suggest that while seeking the fugitives he made demands to his counterparts in Botswana and Zambia for the return of the fugitives and that the authorities of the requested states obligingly abided with the request. However, Gen. Shali testified that he was not directly involved in the removal of the fugitives back to Namibia. On the other hand the witnesses who were so concerned, particularly those from Botswana and Zambia, did not lend credence to the picture portrayed by Gen. Shali that the authorities of these two countries pandered to the demands of Gen. Shali.

As for Charles Kalipa Samboma, my brother Mtambanengwe has chronicled the events that transpired leading to Samboma's travel from Zambia to Namibia. It is abundantly evident from that chronicle that Samboma visited Katima Mulilo Police Station on the Zambian side for the sole purpose of finding a way to return home to Namibia. He could endure no more the hardships he was experiencing in Zambia, was missing his family and, above all, he expressed regret for the part he had played in the riotous pandemonium of 2nd August, 1999 in Katima Mulilo in Namibia.

For the foregoing reasons, and concurring with what Mtambanengwe and Gibson AJJA have stated in their more explicative judgments, I would also uphold this appeal.

CHOMBA, A.J.A.

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