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THE DEATH OF CAPITAL PUNISHMENT? *EX PARTE MINISTER OF HOME AFFAIRS AND FOUR OTHERS V TSEBE & PHALE* – A CASE ANALYSIS

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ABSTRACT

The recent South African Constitutional Court decision in Ex Parte Minister of Home Affairs and Four Others v Tsebe & Phale 2012 (5) SA 467 (CC) *confirmed that it is illegal for the South African Government to return any person to a country in which that person faces a charge which is punishable by death. The facts of the case drew on South Africa's sometimes conflicting, international, regional and domestic human rights obligations and required of the Constitutional Court a balancing act to best meet these obligations. This article argues that while the abolition of the death penalty is not yet international custom, cases such as Tsebe play a significant role in encouraging the trend toward abolition, which could in time see an acceptance by the international community of the need to abolish capital punishment.*

I INTRODUCTION

The death penalty functions as a deterrent; it removes the most serious offenders from society, ensuring they will never repeat their heinous crimes. These outmoded concepts no longer resonate with the international community at large. The heyday of the guillotine, the noose and the electric chair has been banished to history's gallows and replaced by concepts such as the right to life. More than two thirds of the world's countries have now abolished the death penalty in law or practice: 97 have abolished it in its entirety, eight for ordinary crimes and 35 in practice. Fifty eight states do, however, actively retain the death penalty; 29.3% of that figure is comprised by African nations.[1] What then of the situation where a state which has abolished capital punishment ("*abolitionist state"*) has been requested to return a non-

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[1] Amnesty International, *Abolish the Death Penalty* (2011) Amnesty International <http://www.amnesty.org/en/death-penalty>. These figures are current as of 28 January 2013.

citizen to a state which has retained the death penalty ("*retentionist state"*) but knows that person is at risk of execution under the death penalty? Does international law permit the return of this person in circumstances where the retentionist state refuses to give an assurance that the death penalty will not be implemented?

Ex Parte Minister of Home Affairs and Four Others v Tsebe & Phale[2] ("*Tsebe"*) was heard by the Constitutional Court of South Africa on 23 February 2012. The decision was handed down on 27 July 2012. The case concerned the extradition of two foreign nationals who had been charged with crimes subject to the death penalty in their home nation. Through the lens of the facts of *Tsebe*, in this paper I will consider the status of the abolition of the death penalty as a rule of customary international law and the extension of the principle of non-refoulement to persons who are not refugees. In analysing the relevant international, regional and domestic law, I will weigh up South Africa's human rights obligations in relation to *Tsebe* at these different levels and consider whether the Constitutional Court's decision meets these obligations. I argue that it is through cases like *Tsebe* that state practice evolves to develop principles of international law, such as the abolition of the death penalty.

II FACTUAL CONTEXT

In *Tsebe*, Emmanuel Tsebe and Jerry Ofense Pitsoe (Phale)[3] were independently charged with murder of Botswana citizens in Botswana. In Botswana, murder is punishable by the death penalty.[4] The Botswana Penal Code provides that '[w]hen any person is sentenced to death, the sentence shall direct that he shall be hanged by the neck until he is dead.'[5] Both men were arrested and detained in South Africa and warrants of arrest were issued by Botswana against them. Botswana also requested their extradition to face the murder charges. Their detention in South Africa was effected pending extradition proceedings. In both cases, the South African Government ("*Government*") requested an assurance from Botswana that the death penalty would not be enforced against the men. In both cases, Botswana refused to provide the assurance, despite negotiations between South African and Botswana officials. Phale was found liable for extradition by a Magistrate. In

[2] *Ex Parte Minister of Home Affairs and Four Others v Tsebe & Phale* 2012 (5) SA 467 (CC) ('*Tsebe'*).
[3] As explained by Zondo AJ in the opening paragraph of *Tsebe*, 'At some stage in Mr Pitsoe's life he used the surname Phale and later used the surname Pitsoe. Phale is the surname of his stepfather and Pitsoe is his mother's cousin's surname which he used from the time when he lived with his mother's cousin in former Bophuthatswana.'
[4] *Penal Code* (Botswana), s 203(1).
[5] Ibid. at s 26(1).

Tsebe's case, a non-extradition order was issued, but ultimately his deportation on the basis of his illegal entry into the country was allowed. Both men brought applications in the High Court to prevent their removal in the absence of the requisite assurance. Tsebe passed away prior to the High Court and Constitutional Court hearings, but remained represented by Lawyers for Human Rights in the public interest. Due to the similar factual circumstances, their cases were joined and heard together.

In South Africa, *Mohamed and Another v President of the RSA and Others*[6] stands for the proposition that the Government must not surrender people who face capital punishment unless an assurance has been obtained from the requesting country that they will not be executed. In the light of *Mohamed*, the South Gauteng High Court declared Tsebe and Phale's removal to Botswana 'unlawful and unconstitutional…without the written assurance from the Government of Botswana that [Tsebe and Phale] will not face the death penalty'.[7] The Government was prohibited from removing Tsebe and Phale 'until and unless' such assurance is provided.[8]

The decision of the South Gauteng High Court was appealed to the Constitutional Court by the Minister of Justice and Constitutional Development, the Minister of Home Affairs, the Government of the Republic of South Africa, the Director-General of the Department of Home Affairs and various officials of that Department.[9] On appeal, the applicants argued, *inter alia*, that capital punishment is not prohibited under international law and that the alternatives to extradition, namely enactment of legislation to try Tsebe and Phale extraterritorially or release of Tsebe and Phale, would place an undue burden on South Africa and risk to South African people. The applicants also raised concerns of sovereignty and the implications non-removal would have on Botswana's right to exercise jurisdiction over all persons and acts within its territory.

In Zondo AJ's judgment,[10] the Constitutional Court, by a majority, granted leave to appeal and held that the Constitutional Court had jurisdiction over the matter as it concerned the constitutionality of the proposed deportation or extradition.[11] Yacoob ADCJ, however,

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[6] 2001 (3) SA 893 ('*Mohamed*'). *Mohamed* will be discussed in greater depth in Part IV(C) of this paper.
[7] *Tsebe and Another v Minister of Home Affairs and Others, Phale v Minister of Home Affairs and Others* [2012] 1 ALL SA 83 (GSJ) ('*High Court Judgment*'), 130.
[8] Ibid.
[9] For the purposes of this article I will refer to these parties collectively as the applicants and I will couch the arguments in terms of having been argued by the applicants generally, rather than detailing each individual's arguments.
[10] Zondo AJ wrote the majority judgment of the Constitutional Court. Yacoob ADCJ aside, the remaining Justices concurred with Zondo AJ's judgment except for paragraphs 55, 56 and 60–62. I will consider the exclusion of these paragraphs from the majority's decision later in this article.
[11] *Tsebe* supra note 2.

refused leave to appeal. Yacoob ADCJ considered *Mohamed* a conclusive authority on the issues raised by the applicants and held that the High Court was 'undoubtedly right' and that it was 'unnecessary … to cover the terrain so well traversed by the High Court in relation to the legal issues and their resolution all over again'.[12] Yacoob ADCJ finally observed:[13]

> 'To the extent that uncertainty is the pivot for granting leave to appeal, I must point out in conclusion that this judgment leaves the government in no doubt that deportation, extradition or any form of removal under these circumstances is wholly unacceptable.'

After granting condonation and leave to appeal, the majority subsequently dismissed the appeal. In doing so the majority held:

> 'Accordingly, in terms of section 7(2) of the Constitution the Government is under an obligation not to deport or extradite Mr Phale or in any way to transfer him from South Africa to Botswana to stand trial for the alleged murder in the absence of the requisite assurance. Should the Government deport or extradite Mr Phale without the requisite assurance, it would be acting in breach of its obligations in terms of section 7(2), the values of the Constitution and Mr Phale's right to life, right to human dignity and right not to be subjected to treatment or punishment that is cruel, inhuman or degrading. In my view no grounds exist upon which the judgment of the High Court can be faulted.'

The applicants were ordered to pay the costs of Phale and of the *amicus curiae* in the proceedings, the Society for the Abolition of the Death Penalty in South Africa.

I will consider how the majority reached its conclusion by measuring the judgment against an analysis of international, regional and domestic obligations pertaining to capital punishment.

III INTERNATIONAL LAW

International customary law is the equivalent of the common law of the international community. Custom is created by *opinio uris* (an acceptance of an obligation to be bound)

[12] Ibid. 97.
[13] Ibid. 99.

and *usus* (settled practice). Once a principle reaches the stage of *jus cogens*, no derogation is permitted; it is a peremptory norm.

The two main concepts of international law at play in *Tsebe* were the abolition of the death penalty and the principle of non-refoulement. It is important to first ascertain their status at international law to apply them to the facts of *Tsebe*.

(a) Abolition of the death penalty

The abolition of the death penalty finds its legal justification in the right to life and the right not to be subjected to cruel and inhuman punishment. Article 3 of the Universal Declaration of Human Rights ("UDHR")[14] and art 6(1) of the International Covenant on Civil and Political Rights ("ICCPR")[15] declare that everyone has the right to life. South Africa ratified the ICCPR on 10 December 1998. The right to life is a 'supreme right from which no derogation is permitted'.[16] Article 5 of the UDHR and art 7 of the ICCPR state that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Article 1 of the Second Optional Protocol to the ICCPR ("Second Protocol"),[17] to which South Africa acceded on 28 August 2002, provides that '[n]o one within the jurisdiction of a State Party to the present Protocol shall be executed.' South Africa's accession to the Second Protocol renders the removal of a person within its jurisdiction without an assurance a breach of its international obligations.

The Human Rights Committee ("HRC") commented on arts 6 and 7 of the ICCPR in General Comments 6 and 20 in 1982 and 1992, respectively.[18] General Comment 6 concedes that under the ICCPR, state parties are not obliged to abolish the death penalty, however it encourages art 6 to be read to understand that 'abolition is desirable'.[19] The HRC also concluded that 'all measures of abolition should be considered as progress in the enjoyment of the right to life' and considered that 'the death penalty should be a quite exceptional

[14] GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
[15] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[16] Ibid arts 6, 4.
[17] *Aiming at the abolition of the death penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).
[18] Human Rights Committee, *CCPR General Comment No. 06: The right to life (art. 6)*, General Comment 6, 16th sess, (30 April 1982); Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, General Comment 20, 44th sess, (10 March 1992) ('*General Comment 20*').
[19] Human Rights Committee, *CCPR General Comment No. 06: The right to life (art. 6)*, General Comment 6, 16th sess, (30 April 1982), 6 ('*General Comment 6*').

measure' and reinforced the need for a fair trial, procedural guarantees and the right to seek pardon or commutation of the sentences in those most exceptional circumstances where the death penalty is retained.[20] General Comment 20 affirms this and provides that art 6 'refers generally to abolition of the death penalty in terms that strongly suggest that abolition is desirable'.[21] In addition, in *Chitat Ng v Canada*,[22] the HRC stated the purpose of art 6(1) is to 'protect life' and that 'States parties that have abolished the death penalty have an obligation under this paragraph to so protect in all circumstances.'[23]

The General Assembly has expressed its views on the use of the death penalty in four resolutions in recent times. In 2008, the General Assembly expressed its 'deep concern about the continued application of the death penalty'.[24] A 2011 resolution advocated for states to 'progressively restrict the use of the death penalty' and to 'establish a moratorium on executions with a view to abolishing the death penalty'.[25] The General Assembly most recently adopted the draft resolution (document A/67/457/Add.2) "Moratorium on the use of the death penalty", calling on states to 'establish a moratorium on executions, with a view to abolishing the practice'.[26] The General Assembly voted 111 in favour to 41 against, with 34 abstentions.[27]

According to the United Nations News Centre, the Secretary-General's spokesperson reported that the Committee's resolution reflects a trend against capital punishment which has grown stronger across regions, legal traditions and customs since the General Assembly resolution on the topic in 2007, which was described as 'landmark'.[28] The spokesperson was further reported as commenting that '[The Secretary-General] said then that the taking of life is too absolute, too irreversible, for one human being to inflict on another, even when backed by legal process.'[29]

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[20] Ibid.
[21] Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, General Comment 20, 44th sess, (10 March 1992), 6.
[22] Human Rights Committee, *Views: Communication No 469/1991*, 49th sess, UN Doc CCPR/C/49/D/469/1991 (7 January 1994) ('*Chitat Ng v Canada*').
[23] Ibid. at 10.4.
[24] *Moratorium on the use of the death penalty*, A/RES/62/149, UN GAOR, C.3, 62nd sess, 75th plen mtg, Agenda item 70(b), UN Doc A/RES/62/149 (26 February 2008), 1.
[25] *Moratorium on the use of the death penalty*, A/RES/65/206, UN GAOR, C.3, 65th sess, 71st plen mtg, Agenda item 68(b), UN Doc A/RES/65/206 (28 March 2011), 3(c)-(d).
[26] *Moratorium on the use of the death penalty*, A/RES/67/176, UN GAOR, C.3, 67th sess, 60th plen mtg, Agenda item 69(b), UN Doc A/RES/67/176 (20 December 2012).
[27] United Nations, *General Assembly Strongly Condemns Widespread, Systematic Human Rights Violations in Syria, as it Adopts 56 Resolutions Recommended by Third Committee* (20 December 2012) United Nations, Department of Public Information, News and Media Division, New York <http://www.un.org/News/Press/docs//2012/ga11331.doc.htm>.
[28] Ibid.
[29] Ibid.

Despite these strong views towards abolition, while qualifications remain, abolition of the death penalty does not appear to have yet reached the status of customary international law, and certainly not *jus cogens*. The trend towards abolition is, however, overwhelming and implementation of the death penalty is demonstrably abhorred by the international community at large.

The Constitutional Court in Zondo AJ's judgment did not expressly consider the above international instruments and views on the abolition of the death penalty, rather it focussed on the regional obligations contained in a Southern African Development Community ("SADC") protocol and also a bilateral agreement between South Africa and Botswana.[30] The Constitutional Court did, however, provide:[31]

> "The allegations against Mr Phale are very serious. He should, indeed, face justice. The question is how to reconcile the need to bring him to justice with the protection the Constitution affords him against the death penalty. *The reconciliation, as I have suggested elsewhere, lies in the sphere of inter-governmental relations because it is clear that, under international law, Botswana is able to give the requisite assurance and South Africa is entitled to decline to surrender Mr Phale until that has happened* (emphasis added)."

Instead of expressly dealing with the international jurisprudence on the death penalty, the Constitutional Court approved, by way of reference, the findings of the High Court in relation to the arguments advanced on international law.[32] The High Court, quoting Chaskalson P in *Makwanyane*[33] confirmed that '[i]t is correct that capital punishment is not outlawed by international law.'[34] The High Court went on to consider brief examples of when the right to life has been recognised and applied in international law and emphasised that international law binds South Africa insofar as it is not in conflict with the Constitution.[35] In considering that the death penalty is not outlawed by international law and, as such, limitations on the right to life in certain countries exist, the High Court observed:[36]

[30] *Tsebe* supra note 2 at 31–34. These agreements are discussed in greater detail in Part V(B) of this article.
[31] Ibid.
[32] Ibid. at 88.
[33] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (Constitutional Court) ('*Makwanyane*').
[34] *High Court Judgment* supra note 7 at 110.
[35] Ibid. at 114, 113.
[36] Ibid. at 120–121

> 'The reason for this is that the right to life is being examined through the prism of the South African Constitution in light of the death penalty and the limitation that such penalty imposes on the right. Because the death penalty is absolutely outlawed in South Africa by the *Makwanyane* decision, any limitations in international law to the right to life are immediately in conflict with our Constitution when applied to this matter, as these limitations can only find application insofar as they form part of the rationale behind the death penalty. As explained in light of *Makwanyane*, this is a rational that finds no place in South Africa's constitutional democracy.
>
> Therefore, any international law principles that may seek to justify the imposition of the death penalty by Botswana are not binding on this court and any attempt to satisfy them would be unconstitutional. Section 233 of the Constitution does not allow for international law to be applied if it is contrary to the Constitution. However, international law that is in accordance with the Constitution is binding on the Republic.'

The High Court also considered the statistics on the death penalty provided by Amnesty International and observed that '[d]espite these rather disheartening statistics, there does appear to be a worldwide decline in death penalty executions, presumably due to consistent activities of various anti-death penalty pressure groups and the effect of various international human rights instruments.'[37] The High Court gave further support to the notion that the international community is pushing for abolition of the death penalty by providing that '[i]t would, however, appear as if Botswana is not swayed by the international trend to abolish the death penalty'.[38]

The Constitutional Court's incorporation by reference of the High Court's observations on the international status of the death penalty in its majority judgment has the effect of discouraging retention and implementation of the death penalty, and adds to the growing body of jurisprudence which advocates the abolition of the death penalty.

(b) Non-refoulement

The principle of non-refoulement derives from international refugee law and provides that an abolitionist state may not remove a person to a retentionist state where there is a real

[37] Ibid. at 55.
[38] Ibid. at 65–66.

risk the person may be subjected to the death penalty; unless the removing state has received an assurance that the death penalty will not be carried out.[39] Neither Tsebe nor Phale entered South Africa as refugees or asylum seekers and so, in this context, the principle did not apply to them. There are, however, expressions of the principle of non-refoulement in other contexts.

Article 3(1) of the Convention Against Torture[40] states that '[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' While non-refoulement applies here to all persons irrespective of their status, the article refers to torture. Torture is a well-recognised norm of customary international law from which no derogation is permitted.[41]

While execution is not strictly torture, views expressed by the HRC suggest that principles of non-refoulement might extend to non-refugees who face capital punishment. In General Comment 20, the HRC expressed that 'State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement'.[42] In *Chitat Ng v Canada*,[43] the HRC found that execution by gas asphyxiation is cruel and inhuman treatment and extradition should not have occurred. In *A.R.J. v Australia*,[44] the HRC opined that if A.R.J. faced a real risk of execution for drug charges upon extradition to Iran, his removal would violate Australia's obligations under art 6 of the ICCPR.[45] In *G.T. v Australia*,[46] the HRC considered the likelihood of the imposition of the death penalty in the event of removal and concluded that if sentencing to death was not a foreseeable and necessary consequence, the removal of the person would not breach the removing state's obligations.

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[39] See *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).
[40] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*CAT*'); South Africa ratified the *CAT* on 10 December 1998.
[41] See, eg, Duffy, Aoife, 'Expulsion to Face Torture - Non-Refoulement in International Law' (2008) 20 *International Journal of Refugee Law* 373, 374.
[42] Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, General Comment 20, 44th sess, (10 March 1992), [9].
[43] Human Rights Committee, *Views: Communication No 469/1991*, 49th sess, UN Doc CCPR/C/49/D/469/1991 (7 January 1994) ('*Chitat Ng v Canada*').
[44] Human Rights Committee, *Views: Communication No 692/1996*, 60th sess, UN Doc CCPR/C/60/D/692/1996 (11 August 1997) ('*A.R.J. v Australia*').
[45] Ibid. at 6.8-6.11.
[46] Human Rights Committee, *Views: Communication No* 706/1996, 61st sess, UN Doc CCPR/C/61/D/706/1996 (4 November 1997) ('*G.T. v Australia*').

Non-refoulement is widely considered international customary law which has attained *jus cogens* status,[47] In the light of the views expressed repeatedly by the HRC and commentators in the field,[48] there is strong argument to suggest that the principle can be extended to all persons who face capital punishment.

Despite the extension of the principle of non-refoulement having been argued by counsel for Tsebe in the Constitutional Court, the majority did not expressly consider its application. As above, however, the Constitutional Court majority affirmed the views of the High Court. The High Court in its judgment confined its discussion of international law principles to the legality of the death penalty and did not consider the principle of non-refoulement.

Arguably, if the Constitutional Court had have found the extradition of Tsebe and Phale without an assurance from Botswana legal, and the Government had have permitted their extradition, South Africa would arguably have been acting in breach of the international norm of non-refoulement. The lack of express discussion is, however, unfortunately a missed opportunity to develop the jurisprudence in this area.

IV REGIONAL LAW

South Africa is a member of the African Union and acceded to the African Charter on Human and Peoples' Rights on 9 July 1996.[49] Article 4 of the African Charter provides that '[e]very human being shall be entitled to respect for his life' and '[n]o one may be arbitrarily deprived of this right'. Article 5 prohibits 'cruel, inhuman or degrading punishment and treatment'. Unlike the ICCPR, however, the African Charter does not have an optional protocol on the abolition of the death penalty; the only regional system with a human rights

[47] Duffy, Aoife, 'Expulsion to Face Torture - Non-Refoulement in International Law' (2008) 20 *International Journal of Refugee Law* 373, 383; Coleman, Nils, 'Non-Refoulement Revised - Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law' (2003) 5 *European Journal of Migration and Law* 23, 23-24; see generally Allain, Jean, 'The jus cogens Nature of Non‐refoulement' (2002) 13 *International Journal of Refugee Law* 533; Skoglund, Lena, 'Diplomatic Assurances against Torture - An Effective Strategy' (2008) 77 *Nordic Journal of International Law* 319, 325; see discussion Messineo, Francesco, 'Non-refoulement Obligations in Public International Law: Towards a New Protection Status?'(2011) *Research Companion to Migration Theory and Policy*, Satvinder Juss, ed., Ashgate, 2012.

[48] Duffy, Aoife, 'Expulsion to Face Torture - Non-Refoulement in International Law' (2008) 20 *International Journal of Refugee Law* 373; Skoglund, Lena, 'Diplomatic Assurances against Torture - An Effective Strategy' (2008) 77 *Nordic Journal of International Law* 319, 325; see discussion Messineo, Francesco, 'Non-refoulement Obligations in Public International Law: Towards a New Protection Status?'(2011) *Research Companion to Migration Theory and Policy*, Satvinder Juss, ed., Ashgate, 2012.

[49] *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force 21 October 1986) ('African Charter').

treaty that does not.[50] The African Charter does not opine on the abolition of the death penalty. The African Commission on Human and Peoples' Rights[51] has released a 'Resolution Urging the State to Envisage a Moratorium on Death Penalty',[52] however its wording is weak and it only goes so far as to 'reflect on the possibility of abolishing death penalty'. Only eight African states have ratified the Second Protocol.[53]

By comparison, the Council of Europe expressly abolished the death penalty in both peace- and wartime in its Protocol No. 13.[54] As a result, the European Court of Human Rights has considerable case law on non-refoulement where persons face the death penalty.[55] Based on Amnesty International's figures, 97.9% of European states are complete abolitionist states. The effect is that there is a greater impetus for seeking guidance on obtaining assurances than there is in Africa, where only 29.6% of states are completely abolitionist.

Due to its youth and the political climate in which it operates,[56] the African system offers little guidance on extradition of foreign nationals facing the death penalty. The Constitutional Court did not expressly refer to South Africa's regional obligations. The High Court, in addition to referring to the cases *Mariette Bosch* and *Kenneth Good v Republic of Botswana* and their consideration of the African Charter, briefly referred to the relevant articles of the African Charter, including article 4 and the protection of the right to life, but did not otherwise discuss in depth South Africa's regional obligations.[57] It is noteworthy that even if it had have been found legal for the Government to extradite Tsebe and Phale without

[50] For a discussion on Africa's lack of a protocol on the abolition of the death penalty, see Lilian Chenwi, 'Breaking New Ground: The Need for a Protocol to the African Charter on the Abolition of the Death Penalty in Africa' (2005) 5 *African Human Rights Law Journal* 89, 89.
[51] Established by art 30 of the *African Charter* in October 1986 ('*African Commission*').
[52] African Commission for Human and Peoples' Rights, *Resolution Urging the State to Envisage a Moratorium on Death Penalty*, ACHPR /Res.42 (XXVI) 99 (15 November 1999).
[53] Cape Verde acceded to the Second Protocol on 19 May 2000; Djibouti acceded to the Second Protocol on 5 Nov 2002; Liberia acceded to the Second Protocol on 16 Sep 2005; Mozambique acceded to the Second Protocol on 21 Jul 1993; Namibia acceded to the Second Protocol on 28 Nov 1994; Rwanda acceded to the Second Protocol on 15 Dec 2008; Seychelles acceded to the Second Protocol on 15 Dec 1994; South Africa acceded to the Second Protocol on 28 Aug 2002.
[54] *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances* [2002] CETS No 5/57.
[55] See eg *Soering v United Kingdom* (14038/83) (1983) 5 Eur. H. R. Rep. 611; *Nivette v France* (44190/98) [2001] ECHR VII; *Said v Netherlands* (2345/02) [2005] ECHR VI; *Öcalan v Turkey* [GC] (46221/99) [2005] ECHR IV; *Boumediene v Bosnia-Herzegovina* (38703/06; 40123/06; 43301/06; 43302/06; 2131/07; 2141/07) [2008] ECHR VI; *Babar Ahmad and Others v the United Kingdom* (24027/07; 11949/08; 36742/08; 66911/09; 67354/09) [2010] ECHR Sect. 4; *Harkins v Edwards* (9146/07; 32650/07) [2012] ECHR Sect. 4.
[56] The African Union is only 13 years old: see The African Union Commission, *AU in a Nutshell* (2012) African Union: a United and Strong Africa <http://www.au.int/en/about/nutshell> cf the European Court which was established in early 1959.
[57] *High Court Judgment* supra note 7 at 114.4.

an assurance, South Africa would not appear to have been acting directly in breach of any regional obligations, unless article 5 applies.

V DOMESTIC LAW

(a) South African Constitution

South Africa is a constitutional democracy founded on the values of human dignity, equality, human rights and freedoms.[58] Chapter Two of the Constitution is a Bill of Rights entrenching rights which the state 'must respect, protect, promote and fulfil'.[59] The Bill of Rights 'applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'.[60] The Constitution enshrines equality before the law and the right to have human dignity 'respected and protected'.[61] In South Africa, the right to life belongs to '[e]veryone', as does the right 'not to be treated or punished in a cruel, inhuman or degrading way'.[62]

Constitutional rights may be limited but only to the extent that is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[63] International law binds South African insofar as it is not in conflict with the Constitution and must be considered when interpreting the Bill of Rights.[64] Foreign law may also be considered and courts must promote values of human dignity.[65] When interpreting legislation, courts must 'promote the spirit, purport and objects of the Bill of Rights.[66]

The Constitutional Court, through Zondo AJ's majority judgment, considered the relevant constitutional provisions and concluded that sections 2, 7(1) and (2), 10, 11 and 12 of the Constitution were directly raised for consideration.[67] The Constitutional Court approached the interpretation of these provisions through a consideration of *Makwanyane* and *Mohamed*, which I will consider in greater depth below.

(b) Legislation and Agreements

[58] *Constitution of the Republic of South Africa, 1996* ('*Constitution*'), s 1.
[59] Ibid. s 7(2).
[60] Ibid. s 8(1).
[61] Ibid. ss 9, 10.
[62] Ibid. ss 11, 12(1)(e).
[63] Ibid. s 36(1).
[64] See Ibid. ss 232, 233.
[65] Ibid. s 39(1).
[66] Ibid. s 39(2).
[67] *Tsebe* supra note 2 at 27–30.

The *Extradition Act 1962* (South Africa) ("*Extradition Ac"*) empowers the South African Government to extradite persons accused of the commission of an extraditable offence specified in an extradition agreement with another state.[68] There has been an Extradition Treaty in place between Botswana and South Africa since 1969. Article 6 of the Extradition Treaty provides for refusal of extradition if 'under the law of the requesting Party the offence for which extradition is requested is punishable by death and if the death penalty is not provided for such offence by the law of the requested Party'.[69] As considered in the High Court Judgment,[70] the Extradition Treaty is considered complimentary to the Southern African Development Community's *Protocol on Extradition*.[71] Article 5(c) provides that extradition may be refused 'if the offence for which extradition is requested carries a death penalty' unless an assurance 'that the death penalty will not be imposed' is provided.[72]

As earlier mentioned, the Constitutional Court in its majority judgment considered the Extradition Treaty and SADC Extradition Protocol in reasonable depth in a section entitled "International law".[73] The Constitutional Court referred to article 6 of the Extradition Treaty and article 5(c) of the SADC Extradition Protocol and concluded:[74]

> 'This is the second instrument, to which both South Africa and Botswana are parties, that allows one of them to refuse extradition of a suspect charged with a capital offence in the absence of the requisite assurance. From this it is clear that South Africa has acted in accordance with the Extradition Treaty between itself and Botswana and in accordance with the SADC Extradition Protocol in insisting on the requisite assurance before it could extradite Mr Tsebe.'

(c) Case Law

The two significant Constitutional Court precedents which were instrumental in determining the ultimate outcome of *Tsebe* were *Makwanyane* and *Mohamed*. *Makwanyane* saw the abolition of the death penalty in South Africa. In *Makwanyane*, the Constitutional

[68] *Extradition Act 1962* (South Africa), s 2.
[69] Extradition Treaty, 6.
[70] *High Court Judgment* supra note 7 at 74.
[71] *Protocol on Extradition* [2002] SADC ('*SADC Extradition Protocol*').
[72] Ibid art 5(c).
[73] *Tsebe* supra note 2 at 31–34.
[74] Ibid. at 33.

Court, in Chaskalson P's judgment, found the death penalty to be cruel, inhuman and degrading treatment both in the ordinary meaning of the words and within the meaning of the Constitution.[75] The Court considered other jurisdictions' case law on the death penalty and the implications of the Interim Constitution's 'unqualified right to life vested in every person'.[76] Chaskalson P considered the 'supreme' nature of the right to life and that the Interim Constitution only allowed limitations on the essential content of fundamental rights.[77] It was held that the right to life was protected in the Interim Constitution without reservation and as South Africa is a society committing itself to the recognition of human rights, particular value must be given to the rights to life and dignity and 'be demonstrated by the State in everything that it does'.[78]

The Court in *Mohamed* also considered *Makwanyane* and the fact that no exception to the right to life was made in the final Constitution and there was no evidence to suggest that the decision had ceased to be applicable;[79] in fact, 'the values and provisions of the interim Constitution relied upon by this Court in holding that the death sentence was unconstitutional are repeated in the 1996 Constitution'.[80] Furthermore, the importance of human dignity, which was given great weight in *Makwanyane*, was reinforced by its inclusion as one of the values on which the state is founded.

The Constitutional Court in *Tsebe* considered both *Makwanyane* and *Mohamed* in reasonable depth.[81] Zondo AJ expressed the principle that was established by *Mohamed* as follows:[82]

> '… The principle is that the Government has no power to extradite or deport or in any way remove from South Africa to a retentionist State any person who, to its knowledge, if deported or extradited to such a State, will face the real risk of the imposition and execution of the death penalty.[83] This Court's decision in *Mohamed* means that if any

[75] *Makwanyane* supra note 33 at 26, 95.
[76] Which carried over to the *Constitution*, s 11.
[77] Ibid. at 82; now s 36 of the *Constitution*.
[78] Ibid. at 44.
[79] *Mohamed* supra note 6 at 39.
[80] Ibid. at 39.
[81] See *Tsebe* supra note 2 at 37.
[82] Ibid. at 43.
[83] The proposition that the test is a real risk is supported by the fact that, after quoting from *Soering v United Kingdom* (1989) 11 EHRR 439 (*Soering*); *Hilal v United Kingdom* (2001) 33 EHRR 31 (*Hilal*); and *Chahal v United Kingdom* (1996) 23 EHRR 413 (*Chahal*), all of which referred to "a real risk", this Court in Mohamed went on to say at para 58:

> "These cases are consistent with the weight that our Constitution gives to the spirit, purport and objects of the Bill of Rights and the positive obligation that it imposes on the State to 'protect, promote and fulfil the rights in the Bill of Rights'." (Footnotes omitted.)

See *Mohamed* supra note 6 at 55-59.

> official in the employ of the State, without the requisite assurance, hands over anyone from within South Africa, or under the control of South African officials, to another country to stand trial knowing that such person runs the real risk of a violation of his right to life, right to human dignity and right not to be treated or punished in a cruel, inhuman or degrading way in that country, he or she acts in breach of the duty provided for in section 7(2) of the Constitution.'

The majority pointed out that it was not submitted in the Constitutional Court that the correctness of the Court's decision in *Mohamed* be reconsidered and so clarified that 'unless the present case is distinguishable from *Mohamed* [the Constitutional Court is] bound to decide it in accordance with the principle established in that case'.[84] Zondo AJ, with the majority concurring, then proceeded to dismiss the points of argument on which the applicants sought to distinguish the present case from *Mohamed*.

The majority dismissed the applicants' argument that *Tsebe* could be distinguished on the basis that in the immediate proceedings, Phale would be freed from detention following non-return, whereas in *Mohamed* there was no possibility of Mohamed being freed.[85] It further dismissed the argument that provisions of the *Extradition Act* had not applied in *Mohamed* by reiterating the application of the constitutional obligation on the 'particular facts of the particular case and the provisions of the Constitution', rather than 'on the provisions of the empowering legislation or extradition treaty under which the deportation or extradition is carried out'.[86] The majority dismissed arguments of the performance of statutory extradition duties being an act of state,[87] and with reference to the applicants' sovereignty arguments, concluded that giving an assurance that the death penalty will not be imposed 'does not in any way affect the independence of the courts of Botswana or the prosecutorial independence of the Director of Public Prosecutions in Botswana'.[88]

In *Tsebe*, the applicants sought to distinguish the facts of *Mohamed* on the basis that in *Tsebe* an assurance was sought but denied, whereas in *Mohamed* no such assurance was sought. It is to be noted, however, that nowhere in the HRC views or European case law has a mere request for an assurance been equated to its actual attainment.[89]

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[84] *Tsebe* supra note 2 at 44.
[85] Ibid. at 48.
[86] Ibid. at 49.
[87] Ibid. at 50.
[88] Ibid. at 51.
[89] See *High Court Judgment* supra note 7 at 118.

The applicants contended that non-extradition could result in South Africa becoming a safe haven for 'murderers' as the country is bordered by retentionist countries.[90] On this point, Zondo AJ was alone in considering the application of the fundamental principle of a presumption of innocence until proven guilty,[91] with the remaining majority either simply exempting the matter from their concurrence or expressly providing that those findings 'are not necessary for the decision'.[92] The applicants also argued that not extraditing Tsebe and Phale would place significant financial burden on South Africa if required to enact extra-territorial legislation to try them and, conversely, would threaten citizens' safety if they were released into the general community without being tried. Similarly, while Zondo AJ made a point of dismissing this argument,[93] the remainder of the majority did not consider it necessary for the decision.

Zondo AJ, with the support of the majority, in relation to the argument on the need for South Africa to be seen to be fighting crime, made the point that the Constitution is the supreme law of the country and that being a party to the SADC Extradition Protocol would mean that 'among the SADC countries South Africa's conduct will not be perceived negatively because the SADC Extradition Protocol contemplates South Africa's conduct'.[94] On the topic of the application of the principle decided in *Tsebe* to illegal entrants to South Africa, the majority in powerful terms concluded the following:

> 'The human rights provided for in sections 10, 11 and 12 of our Constitution are not reserved for only the citizens of South Africa. Every foreigner who enters our country – whether legally or illegally – enjoys these rights and the State's obligations contained in section 7(2) are not qualified in any way. Therefore, it cannot be said that they do not extend to a person who enters our country illegally.'

The effect of the decision in this context will be to put pressure on retentionist countries to either consider abolishing their death penalty, or to at least provide an assurance as to its non-implementation. Without so providing, in the light of *Tsebe*, retentionist countries will otherwise face impunity of their charged citizens. Botswana has itself ratified

[90] Eg, Botswana, Zimbabwe and Lesotho.
[91] *Tsebe* supra note 2 at 55–56.
[92] Ibid. at 77 per Cameron J (Froneman J, Skweyiya J and Van der Westhuizen J concurring).
[93] Ibid. at 60-62.
[94] Ibid. at 64.

the Second Protocol and agreed to the Extradition Treaty; a diplomatic assurance seems a small price to pay in the light of these obligations.[95]

While abolition of the death penalty is not yet custom at an international level, the Constitutional Court's interpretation of the right to life in both *Makwanyane* and *Mohamed* is emphatic in its condemnation of the death penalty.[96] *Tsebe* now reinforces that view, making clear that extradition to face a charge with a punishment of capital punishment without the requisite assurance poses a threat to a person's right to life so as to be contrary to South Africa's domestic law.

VI ALTERNATIVE REMEDIES

Fortunately for Phale, the Constitutional Court's decision prohibits his removal from South Africa without an assurance from Botswana. If the Constitutional Court had found Phale and Tsebe liable to extradition to Botswana, Phale's only remaining recourse would have been to petition the HRC as an individual victim of a violation of the *ICCPR* by South Africa, which acceded to the *First Optional Protocol to the ICCPR*[97] on 28 August 2002. Phale would have exhausted all domestic remedies by appealing to South Africa's highest court. Phale would have needed to provide written submissions to the HRC, the result of which would have been the formulation of non-legally binding 'views' by the HRC which would be forwarded to them and the Government.[98] Alternatively, Phale could have submitted a written communication to the African Commission alleging a violation of the right to life, however due to the lack of jurisprudence in the African regional system, it is debatable this would have yielded a satisfactory result.

The non-binding nature of HRC views renders a binding decision of the Constitutional Court, such as was provided, the preferred result in the case of the individuals affected. From an international law perspective, the Constitutional Court decision is also beneficial, even though it is not an HRC view, due to the practical impact the effects of the decision will have geopolitically. It carries significant weight for the development of international principles pertaining to complete abolition of the death penalty. It is particularly important in the regional sphere of Africa, where the death penalty remains strikingly

[95] For a discussion see *High Court Judgment* supra note 7 at 108.
[96] Ibid at 120.
[97] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[98] For a discussion on the views of the HRC, see Dugard, John, *International Law: A South African Perspective* (Juta and Company Ltd, 2010), 319.

prevalent. In finding the proposed removal of Tsebe and Phale unconstitutional, the Constitutional Court has reinforced South Africa's position as a world leader in the protection and advancement of human rights.

VII CONCLUSION

The Constitutional Court's decision in *Tsebe* that non-removal of Tsebe and Phale was essential for compliance with the Constitution was a demonstration of *opinio uris* on behalf of South Africa. In not extraditing the Botswana nationals, it implemented the concept of *usus* in terms of the broader application of the principle of non-refoulement. The inability of the Government to now legally extradite Tsebe and Phale to Botswana without an assurance from Botswana will have the effect of South Africa taking a political stand to discourage the enforcement of the death penalty.

While abolition of the death penalty cannot yet be considered custom, it is precisely the sort of political pressure which, as a result of the Constitutional Court's decision in *Tsebe*, will now be placed on Botswana to either abolish the death penalty or warrant as to its non-implementation which aids the development of principles heralded by the international community and which could, in time, lead to international prohibition of the death penalty entirely.

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