SIMON FRANCIS MANN
versus
THE REPUBLIC OF EQUATORIAL GUINEA

HIGH COURT OF ZIMBABWE
MAKARAU JP and PATEL J
Harare 26 July 2007 and 23 January 2008.

EXTRADITION APPEAL

MR J Samkange for appellant.

Mr J Jagada for respondent.

MAKARAU JP: The appellant, a foreign national, was arrested and prosecuted in Zimbabwe for violating the national laws regulating dealings in arms and munitions. He was sentenced to a term of imprisonment. Arising out of the charges and whilst the appellant was still serving his term of imprisonment in Zimbabwe, the respondent made a formal request to Zimbabwe in terms of the Extradition Act [Chapter 9.08] ("the Act"), for the extradition of the appellant. In its request, the respondent alleged that the appellant had illicitly dealt in arms and munitions in Zimbabwe as he was enroute to the respondent where he had conspired to kill the head of that state or to illegally change the government of the respondent through unconstitutional means.

The request was heard by a magistrates' court sitting at Harare. At the end of the hearing, the court a quo granted the request, prompting the appellant to note this appeal before us in terms of section 18 of the Act.

NATURE OF APPEAL

The point was raised and argued *in limine* that an appeal under section 18 of the Extradition Act is an appeal in the wide sense and this court does not first have to find a misdirection on the part of the court a quo to substitute its own decision in the matter. It was further argued that the appeal connotes a re-hearing of the request and the making of an order that the lower court should have made in the circumstances of the matter.

Section 18 of the Act reads:

" (1) Any person, including the government of the designated country concerned, who is aggrieved by an order made in terms of section seventeen may, within seven days thereafter, appeal against the order of the High Court which, may, upon such appeal, make such order in the matter as it thinks the magistrate ought to have made.

(2) In addition to the jurisdiction conferred upon it in terms of subsection (1), in any appeal in terms of that subsection, the High Court may direct the discharge of the person whose extradition has been ordered if the

High Court is of the opinion that, having regard to all the circumstances of the case, it would be unjust or oppressive to extradite such a person-

(a) by reason of the trivial nature of the offence concerned; or
(b) by reason of the lapse of time since the commission of the offence concerned or since the person concerned became unlawfully at large, as the case may be; or
© because the accusation against the person concerned is not made in good faith in the interests of justice; or
(d) by reason of the state of health or other personal circumstances of the person concerned."

The distinction between 'wide' appeals and appeals in the narrow sense as raised in this appeal is not a novel argument in this jurisdiction. It is a distinction that is argued in this court regarding the determination of appeals from the refusal to grant bail by lower courts and in the Supreme Court regarding appeals from labour relations adjudicating bodies set up in terms of the Labour Act.

The position was, in my view, succinctly clarified by McNally J A in *Agricultural Labour Bureau & Anor v Zimbabwe Agro-Industry Workers Union* 1998 (2) ZLR 196 (SC), in the following words:

"Perhaps one can clarify the position by looking at the widely accepted classification of appeals as formulated by TROLLIP J in Tickly & Ors v Johannes NO & Ors 1963 (2) SA 588 (T), and approved by the Appellate Division in South Africa in S v Mohamed 1977 (2) SA 531 (A) at 538 and again in what is now KwaZulu-Natal in a case similar on the facts to the present one, Metal and Allied Workers Union v Min of Manpower 1983 (3) SA 238 (N) at 242B-D.

The three classes of appeals, re-stated in the last of these cases, are:

1. an appeal in the wide sense, ie a complete rehearing of and fresh determination on the merits of the matter with or without additional evidence or information;
2. an appeal in the ordinary strict sense, ie a rehearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong;
3. a review in which the question is not whether the decision was correct or not, but whether those who made it had exercised their powers honestly and properly."

On the basis of the above, I am of the view that an appeal brought in terms of section 18 of the Act is an appeal in the wide sense. This is due to the language used in the section that gives the appeal court wide discretion to substitute its own decision on the same facts that were before the lower court in addition to granting power to the court to take into account other factors of a humanitarian nature. Thus, in my further view, in determining an appeal such as the one before us, the appeal court need not first establish any misdirection on the part of the lower court and re-hears the request as argued before, together with any additional considerations of a humanitarian nature that may be placed before it during the appeal hearing. The correctness or otherwise of the approach adopted by the lower court in coming to the conclusion that it did are therefore not issues before this court.

The above is the approach we take in determining this appeal.

GROUNDS OF APPEAL.

The appellant raised three main grounds on appeal why he should not be extradited to the respondent. Firstly, he contended that the lower court erred in holding that the respondent had established a prima facie case. Secondly, he contended that the court did not specifically address its mind as to whether Zimbabwe would be violating any of its international obligations should it extradite the appellant to the respondent. Finally, he urged this court to take into account his failing health and to hold that it would be unjust or oppressive to have him extradited to the respondent.

The first two grounds of appeal are founded on the provisions of section 17 (1) which provides guidelines to lower courts in determining when to grant an order in favour of the requesting state. The section provides as follows:

> "(1) Where a person has been brought before a magistrates court in terms of subsection of section sixteen the court, if satisfied that-
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> (a) the person concerned is the person named in the warrant under which he was arrested; and
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> (b) the extradition is not prohibited in terms of this Act; and
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> (c) either-
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> (i) that a prima facie case is established; or
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> (ii) in case in which a record of the case has been submitted in terms of the proviso to paragraph (b) of subsection(1) of section sixteen, that the record of the case indicates, according to the law of the designated country concerned, that the person concerned has committed the offence to which the extradition relates or that he has been convicted of such offence and is required to be sentenced or to undergo any sentence therefor in the designated country concerned, as the case may be;
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> shall subject to section nineteen, order that such person be extradited to the designated country concerned……"

In *casu,* there is no dispute as to the identity of the appellant and the fact that the warrant of arrest produced by the respondent relates to the appellant. The first two grounds of appeal arise from whether the extradition of the appellant to the respondent is prohibited in terms of the Act and, if not, whether a prima facie case has been established by the evidence submitted by the requesting state.

It appears to me convenient to deal with the appeal on the basis of the above three contentions made on behalf of the appellant in the order in which they appear in the legislation cited above. In other words, the first inquiry will be whether the extradition of the appellant is prohibited in terms of the Act. In my view, once that issue is determined against the extradition of the appellant that will mark the end of the inquiry as the three pre-requisites laid out in section 17 of the Act are cumulative rather than disjunctive.

WHETHER THE EXTRADITION OF THE APPELLANT IS PROHIBITED IN TERMS OF THE ACT.

It is the appellant's contention that his extradition from Zimbabwe is prohibited in terms of the Act in that it will conflict with the obligations of Zimbabwe under various international and regional treaties. In particular, we have been urged to have regard to the International Covenant on Civil and Political Rights and to the African Charter on Human and Peoples Rights, to which Zimbabwe is a state party, as creating those obligations at both international and regional levels. Both instruments do not carry specific non-refouler provisions.

It is correctly submitted on behalf of the appellant that it is in terms of Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment that specific prohibition against expelling, returning or extraditing a person to another state where there are substantial grounds for believing that the person so expelled, returned or extradited would be in danger of being subjected to torture is provided for.

Zimbabwe is not yet a party to the convention and has thus not assumed the obligations imposed by article 3 of the convention.

By not voluntarily assuming the obligations set out in the UN Convention against torture, Zimbabwe may nevertheless have those obligations imposed upon it by the application of international customary law as fully explained in the judgment by PATEL J, the draft of which I have had sight of and agree with.

It is the position now that certain human rights may be regarded, by their content and universal acceptance, as having entered into the realm of customary law and thus become applicable to nations that may not have assented to the particular instruments protecting these rights by virtue of the superiority of international customary law over all other laws. These rights include the prohibition of slavery, genocide and torture.[1]

Having arrived at the conclusion that Zimbabwe has an obligation not to extradite any person to a country where there are substantial grounds for believing that the person so expelled, returned or extradited would be in danger of being subjected to torture, I will now proceed to deal with the issue of whether the apprehension by the appellant that if extradited to the respondent, he is likely to be tortured is well founded.

[1] See Malcolm N Shaw: International Law 4th Ed at page 204.

WHETHER THERE ARE SUBSTANTIAL GROUNDS FOR BELIEVING THAT THE APPELLANT WILL BE SUBJECTED TO TORTURE, CRUEL, INHUMAN OR DEGRADING TREATMENT IF EXTRADITED

The appellant has sought to rely on the Report presented by Mr Gustavo Gallon, a Special Representative for Equatorial Guinea to the UN commission on Human Rights, a report by the International Bar Association on a fact finding mission conducted in 2003, a report by an observer of the International Bar Association on the trial of du Toit, and a report by Amnesty International on the same trial. All these reports were adduced into evidence before the magistrate conducting the hearing. The appellant also led viva voce evidence from Mr Andrew Chigovera, former Attorney-general of Zimbabwe and Commissioner on the African Commission for Human and Peoples' Rights.

Similar reports to the ones adduced into evidence in this hearing were adduced into evidence before NGOEPE JP in South Africa in the matter of *Kaunda and Others v President of the Republic of South Africa* 2004 (5) SA 191 (T). In addition to the report by the International Bar Association of 2003, the applicants before NGOEPE JP also relied on reports that had been compiled in 2004 by the Human Rights Committee of the General Council of the Bar of South Africa and another report by an Advocate Henning SC, of the office of the National Director of Public Prosecutions in South Africa, who visited Equatorial Guinea after the arrest of certain South Africans in connection with the matter for which the extradition of the appellant is being sought.

In treating the evidence adduced in the from of the reports detailed above, NGOEPE JP was of the view that it did not constitute expert evidence of the efficacy and fairness of the justice delivery systems in both Zimbabwe and Equatorial Guinea and he declined to make declarations based on these reports condemning the justice delivery systems in both countries.

I am compelled to agree with the learned judge.

It is generally accepted that the International Bar Association and Amnesty International are international bodies of standing. It is also generally accepted that they have dealt with matters relating to human rights for a considerable period. Despite the international standing of the international Bar Association, NGOEPE JP was not swayed to accept the report of 2003 as constituting expert evidence on the efficiency and fairness of the justice delivery system in Equatorial Guinea. The same report was adduced into evidence before the trial court without any further basis having been laid as to the authors of the report and their expertise in issues relating to torture and the legal system of Equatorial Guinea. While the report may not be false

or biased as alleged by the Attorney-General of Equatorial Guinea, it does not constitute expert evidence before the court for the purposes of the law.

The same observations apply to the report by Amnesty International.

In passing, I note that the reports point a bleak picture of the justice delivery system in the respondent state and if true, then the apprehension of the appellant that he will not be afforded a fair trail are well founded. It is however my finding that the reports fall short of affording the court expert evidence on the fairness or otherwise of trials in the Equatorial Guinea and of the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the respondent state.

The appellant also adduced into evidence a report by Mr Gustavo Gallon, a Special Representative for Equatorial Guinea to the UN Commission on Human Rights. The expertise of the UN in human rights issues is beyond dispute. The expertise of Mr Gallon on Equatorial Guinea was however not laid out and in any event, the report was produced in 2001, depicting the conditions then. In my view, it can hardly constitute evidence of the state of things in 2007.

As indicated above, the appellant led *viva voce* evidence from the former Attorney-General for Zimbabwe and Commissioner on the African Commission for Human and Peoples' Rights. His evidence was in essence to the effect that when he was Commissioner with the African Union, he would receive reports similar to the ones that were adduced into evidence by the appellant. The contents of these reports did not therefore surprise him.

With respect, the witness did not testify of any first hand experiences where the respondent state violated human rights as alleged by the appellant. His views that the appellant was unlikely to receive a fair trial were derived from the reports and others that he had received as Commissioner.

Again with respect, while the witness had spent along time dealing with human rights issues, his expertise on the human rights record and history of the respondent state was hardly set out. His knowledge of the alleged record of the respondent state appears to be limited to the reports that he read and ,in my view, that barely places him above the court to which such reports have also been made available.

On the basis of the above, we are therefore unable to hold that we have sufficient evidence before us that the appellant is at risk of being subjected to torture if extradited to Equatorial Guinea.

It appears further that while the appellant may have good grounds for fearing that he stands the risk of being tortured if extradited to the respondent, his apprehension stems from the

reports that I have detailed above. The history depicted by the reports is in my view to be viewed in light of the concessions made by the respondent's attorney General that not only will the respondent appoint a judge from outside the respondent to try the matter, but will open up the trial to international observers and will not seek the death penalty in the event that the appellant is convicted. These may be mere promises but no evidence was placed before us that the respondent will not honour such promises. We therefore have no basis at law for not believing the respondent in this regard. The effect of the concession made by the respondent's Attorney General is to minimize the risk that the appellant will be subjected to torture if extradited to the respondent.

PRIMA FACIE CASE.

The Act provides in section 16 that the request for extradition submitted to the Minister must be accompanied by such evidence as would constitute a prima facie case in a court of law in Zimbabwe. The law further provides in section 17 that the court hearing the request must order the extradition of the person concerned if it is satisfied that the two pre-requisites set out above have been met and in addition, that a prima facie case has been established against the person whose extradition is sought.

It was contended on behalf of the appellant that the respondent had failed to establish a prima facie case against the appellant.

In my view, the concept of a prima facie case is one of those legal concepts that are easier to recognize than to define. The concept eludes definition not only due to the fact that it deals with subjective measures of the cogency of evidence presented before a trier of fact, but also because the term is used loosely in both civil and criminal proceedings without a distinction having been attempted.

It appears to me that in civil cases, our courts have adopted the attitude that for interim protection by the court in the form of an interdict pending the determination of some other suit between the parties, a prima facie case is established once a cause of action is established even where the chances of the applicant to succeed in sustaining the cause of action are open to doubt.[2]

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[2] (See *Bozimo Trade And Development Co (Pvt) Ltd v First Merchant Bank of Zimbabwe Ltd & Ors* 2000 (1) ZLR 1 (HC); *Cooper v Leslie & Ors* 2000 (1) ZLR 14 (HC); *Charuma Blasting & Earthmoving Services (Pvt) Ltd v Njainjai & Ors* 2000 (1) ZLR 85 (SC)

That a prima facie case in civil suits for the obtaining of interim protection is simply the setting out of facts establishing a possible and plausible claim against the respondent without the evidence necessary to prove such a claim appears to me clearly from the following remarks by CHATIKOBO J (as he then was) in *Sultan v Fryfern Enterprises (Pvt) Ltd & Anor* 2000 (1) ZLR 188 (HC):

> "I have deliberately refrained from making definitive findings of fact because it may well be that further affidavits (if any are filed for the return date) or oral evidence may justify a different conclusion. At this stage I am concerned only with the question whether a prima facie case has been shown. I am satisfied it has."

It then appears to me that a different test is used when a prima facie case has been established by a plaintiff in a civil trial to avoid absolution from the instance being granted at the close of his or her case. The test requires the establishment of more than a cause of action. Evidence must be adduced to prove the cause of action and must be so cogent as to enable a court to give judgment on it in favour of the plaintiff unless it is successfully rebutted.

It is my view that the test used to establish a cause of action at the end of the plaintiff's case is the same used to establish a case at the end of the prosecution case to avoid a discharge of the accused person. It is the adducing of evidence upon which a court may convict unless such evidence is rebutted. (See *Kachipare v S* 1998 (2) ZLR 271 (S)). Obviously the different burdens of proof applicable in civil and in criminal proceedings apply in establishing prima facie cases in both proceedings. The test however appears the same to me.

While it is accepted that extradition proceedings are not criminal proceedings per se, it appears to me that the standard of when a prima facie case has been established as used in civil proceedings is not applicable in extradition proceedings for the main reason that the powers granted to a magistrate conducting a hearing in terms of the Act are similar to the powers of a magistrate conducting a preparatory examination under the Criminal Procedure and Evidence Act [Chapter 9.07],[3] a procedure that is now defunct, having been amended out of the criminal procedure due to non-use.

I would hazard to suggest that by specifically granting to magistrates the powers they enjoyed when conducting the now defunct preparatory examinations, and, by directing them to "receive evidence in the same manner," the legislature intended that the test to be employed under section 17 of the Act as to when a prima facie case has been established must be similar to that which was used at preparatory examinations. I cannot envisage a situation where having granted magistrates powers to conduct extradition hearings as if they were conducting preparatory examination, the legislature intended them to use tests other than the ones used at

[3] See S17 (4) of the Extradition Act.

such proceedings. If this was its intention, it would have used specific language to that effect or would have defined what constitutes a prima facie case for the purposes of the section.

In commenting on the test used at a preparatory examination, the author Reid Rowland in his book: Criminal Procedure in Zimbabwe had this to say under paragraphs 9-16:

> "At the end of a PE, the question which the magistrate has to answer is whether the evidence put before him by the prosecution and the defence raises a prima facie case against the accused. The magistrate does not have to be satisfied that he would convict on that evidence. The standard of proof that the prosecution must satisfy at a PE is thus a very low one."

It thus appears to me that the standard of proof required at the close of a preparatory examination is somewhat lower that that required at the close of a state case during a trial. It is trite that at the close of the prosecution case the trial court must be satisfied that it has before it evidence upon which it may convict the accused of the offence charged. The author Reid Rowland has specifically opined that such evidence is not necessary at the close of a preparatory examination although he has used the term "prima facie case" without attempting to define the term.

I would further hazard that a prima facie case for the purposes of section 17 is established by evidence tending to prove the offence and linking the person whose extradition is sought to the offence. It does not require evidence proving the guilt of the person concerned of the charged offence.

In this regard, I am in agreement with the submissions made by *Mr Samkange* on behalf of the appellant that a magistrate can only order the extradition of a person if such evidence is produced as would justify the committal for trial of the person if the crime had been committed in Zimbabwe.

Thus, the question that a court hearing a request to grant an extradition order has to ask itself at the end of the hearing is whether it has received such evidence as would in its opinion justify putting the person concerned on trial.

At the hearing, Mr Samkange directed most of his challenges against the admissibility of certain documentary evidence that was produced by the respondent. In this regard, he was of the view that such was secondary evidence and was not admissible in terms of section 32 of the Act.

It is in this regard that I do not agree with the submissions made by Mr Samkange. It is trite that at a preparatory examination, the rules relating to the admissibility of evidence are somewhat more relaxed than at trial. Thus, at a preparatory examination, evidence that would constitute hearsay evidence at the trial is admissible as affidavits are generally admissible.

Thus, the admissibility of evidence at an extradition hearing is governed not only in terms of section 32 of the Act but also in terms of the Criminal Procedure and Evidence Act before the amendment.

In particular, *Mr Samkange* for the appellant has sought to challenge the admissibility of the statements from the appellant and from Servaans Nicholas du Toit on the technical grounds that the statement by the appellant was not freely and voluntarily made while that by du Toit was not authenticated in terms of section 32 of the Extradition Act.

In my view, even if the challenges against these two statements are sustained, there is still enough evidence establishing a prima facie case against the appellant. The oral evidence of Detective Chief Superintendent Madzingo that he recorded a statement from du Toit in which the appellant was directly implicated cannot be challenged. The evidence of the Attorney _ General of the respondent that his country is in possession of information regarding the alleged offence and implicating the appellant cannot be challenged. Further, the statements of agreed facts in the trials of Mark Thatcher and Jacob Hermanus Albertus Carlse in South Africa did not require authentication in terms of section 32 of the Act as they were not originating from the respondent but from South Africa. Such statements implicate the appellant in the alleged offence and are admissible as they would have been admissible at a preparatory examination in this country.

It has been argued that Jacob Hermanis Albert Carlse may not be available to testify on behalf of the respondent in that country. That in my view is beside the point. At this stage of the inquiry, the guilt or otherwise of the appellant is not in issue. We do not in this hearing have to be satisfied that there will be evidence upon which the appellant will be convicted of the offence. The evidence adduced by the respondent may not be forthcoming or may not be sufficient to sustain the charges but, in my view, it does establish a *prima facie* case for the purposes of having the appellant committed for trial if the offence had been committed in Zimbabwe. As discussed above, the standard of proof required at this stage is not such as to put the appellant to his defence during a trial or evidence upon which a court may convict, but evidence tending to link the appellant to the alleged offence and to which he has to proffer an answer when charged.

On the basis of the above, we are of the view that a prima facie case has been established against the appellant.

ADDITIONAL CONSIDERATIONS

As an appeal court, we are enjoined by section 18 (2) of the Act to determine whether there are any additional considerations upon which we may bar the extradition of the appellant. At the time of the hearing of the inquiry before the court a quo, the appellant had developed a life threatening hernia that then required immediate surgery. That was six months ago. It is hoped that in the time it has taken us to make a determination in this appeal the condition has been suitably attended to and has consequently reduced in its threat to the appellant's life.

Additionally, in this regard, we note and take into account the contents of an affidavit dated 23 July 2007 and filed before this court. The affidavit is sworn to by a Doctor Motu who is based at the Malabo Prison Hospital in Equatorial Guinea. In essence, Dr Motu certifies that the medical staff at Malabo Prison Hospital and staff at other hospitals in Malabo are fully competent to carry out hernia operations.

Without in any way attempting to downplay the appellant's medical condition, it is our view that his state of health is not such that, having regard to all the circumstances of the matter, it would be unjust or oppressive to extradite him to the respondent.

In the result, the appeal is dismissed.

PATEL J: One of the grounds of appeal in this matter raises an issue not previously canvassed by our courts. This pertains to the status of the United Nations Convention against Torture of 1985 at international law and its impact on the law of extradition in Zimbabwe.

Article 3 of the Convention provides as follows:

> "1. No 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.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

Also relevant for present purposes are the provisions of the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples Rights. Article 7 of the International Covenant prohibits the subjection of any person "to torture or to cruel, inhuman or degrading treatment or punishment". In similar vein, Article 5 of the African Charter enjoins respect for "the dignity inherent in a human being" and proscribes, *inter alia*, "torture, cruel, inhuman or degrading punishment and treatment". While both instruments are

explicit in their rejection and condemnation of torture *per se*, they are silent as to the non-refoulement principle expressly embodied in Article 3 of the Convention against Torture.

Turning to our domestic law, Part III of the Extradition Act [*chapter 9:08*] deals with the rendition of persons to and from designated countries, including the respondent State. Section 15 of the Act, in its relevant portion, stipulates that:

> "No extradition to a designated country shall take place in terms of this Part—
> (*a*) if the grant of the request for extradition would conflict with the obligations of Zimbabwe in terms of any international convention, treaty or agreement;
> ……".

It is common cause that Zimbabwe is a party to the International Covenant and the African Charter and that it is consequently obligated to adhere to the provisions of these two august instruments. It is also not in dispute, despite *Mr. Jagada's* erroneous concession to the contrary, that Zimbabwe has neither signed and ratified nor acceded to the Convention against Torture. Zimbabwe is not alone in its non-adhesion to the Convention. There are many other States that have not as yet subscribed to the Convention or that have done so with reservations.

In any event, the question that arises in the present context is this: Does the fact that Zimbabwe is not a party to the Convention against Torture entitle it to disregard the requirements of Article 3 and extradite an alleged offender to a State where he would be in danger of being subjected to torture. In my view, the answer to this question must be predicated on an analysis of the principle against torture in the international sphere.

It is axiomatic that every treaty or convention must be interpreted and applied in a wider international context. It is also incontrovertible that torture is universally prohibited at the international level. This prohibition is encapsulated not only in instruments of global application, viz. the Universal Declaration of Human Rights of 1948 and the International Covenant of 1966, but also in regional human rights instruments applicable in Europe, Latin America and Africa. It was further restated by the United Nations General Assembly in its Resolution 3452 (XXX) of 1975 and eventually culminated in Article 2 of the Convention against Torture. See *A & Others v Secretary of State for the Home Department (No. 2)* [2006] 2 AC 221, at 254-259 (a decision of the House of Lords).

The first corollary of the universal proscription of torture is that it imposes upon every State obligations which are applicable *erga omnes*, that is to say, towards all other States, which are then endowed with correlative rights. The second corollary is that the principle against torture has evolved into a peremptory norm or *jus cogens*, viz. a principle endowed with primacy in the hierarchy of rules that constitute the international normative order. As such, it

cannot be derogated or deviated from by any State or group of States. See the judgement of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Furundzija* (unreported) Case No. IT 95-17/I 10 (1998), paras. 147-157, cited in the case of *A & Others*, *supra*, at 259-262.

The overarching nature of the principle against torture imposes certain additional duties on States. It requires States to do more than simply eschew the practice of torture and to give more positive and wider effect to the principle in the fulfilment of their international obligations. In this respect, the decision of the European Court of Human Rights in *Soering v The United Kingdom* 11 EHRR 439, at paras. 80-91, is particularly instructive and highly persuasive. In interpreting Article 3 of the European Convention on Human Rights vis-à-vis Article 3 of the Convention against Torture, the Court held as follows, at para. 88:

> "The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention …….. were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article ……..".

I fully concur with and respectfully adopt this holistic approach to the obligations of States with respect to the principle against torture. In my view, the principle entails the duty of States to interpret and implement the requirements of human rights treaties that they have subscribed to in a manner that affirms and advances rather than one that negatives or dilutes the principle. Accordingly, the general prohibition against torture contained in Article 7 of the International Covenant and in Article 5 of the African Charter must be construed to incorporate, by necessary intendment, the principle of non-refoulement embodied in Article 3 of the Convention against Torture. It follows that in order to comply with its general obligations against torture under the International Covenant and the African Charter, Zimbabwe is required to abide by and take into account the specific prohibition against extradition to a State where there exists the danger of the person extradited being subjected to torture. This is so notwithstanding that Zimbabwe is not a party to the Convention against Torture. To construe the general prohibition against torture otherwise would inevitably operate to render the prohibition nugatory and illusory on the international plane.

To conclude, I take the view that the extradition of any person to a designated country where he or she would be placed in danger of being subjected to torture would conflict with the obligations of Zimbabwe in terms of the International Covenant and the African Charter. It would therefore be contrary to and prohibited by section 15(a) as read with section 17(1)(b) of the Extradition Act.

In any event, insofar as concerns the appellant *in casu*, I am inclined to agree with the Judge President, albeit tentatively, that the appellant has failed to adduce the evidence necessary to sustain his appeal on the ground that he would be subjected to torture in the respondent State. In addition, I fully agree that the respondent State has established the requisite *prima facie* case against the appellant in terms of section 17(1)(c)(i) of the Extradition Act. I am also satisfied that there are no additional considerations under section 18(2)(d) of the Act precluding the appellant's extradition to the respondent State.

In the result, the appeal must be dismissed.

Byron Venturas & Partmers; appellants' legal practioners
Attorney- Generals Office, respondent's legal practitioners