Public policy considerations arising from the exchange of information about South African taxpayers with countries that sanction the use of the death penalty, with a focus on China

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ABSTRACT

The paper evaluates how South Africa's public policy towards the death penalty is protected amidst increased taxpayer information transparency.

The People's Republic of China (China) may, under article 22(4) of the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters (2010) (Multilateral Convention), use information received from South Africa, for criminal prosecution of a South African taxpayer in a non-tax matter in China, if the South African Revenue Service (the SARS) authorises such use. The Criminal Law of the People's Republic of China 86 of 1997 sanctions the use of the death penalty for various economic crimes and this law has an unlimited territorial scope. China may therefore impose the death penalty on a South African taxpayer at the hands of information supplied by the SARS.

This study will establish what public policy-based remedies are available for a South African taxpayer in this scenario. The SARS is not obliged to exchange information with China's tax authority, as such an action will be contrary to South Africa's public policy. Where the South African taxpayer concerned is in South Africa, including at a sea- or airport, then the SARS has a constitutional obligation not to exchange the information. Further, the South African state has an international obligation not to exchange the information where the method of execution in China is cruel, inhuman or degrading.

The paper concludes that before exchanging the information and authorising its use for non-tax purposes, the SARS must take reasonable steps to evaluate whether it is foreseeable that the exchange of taxpayer information will be against South Africa's public policy. The SARS is under a legal duty not to exchange information with China where the SARS foresees that such an action may lead to the imposition of the death penalty on a South African taxpayer in China. A further recommendation is that the public policy protection must be reinforced by amending the wording of the Multilateral Convention and the bilateral income tax treaty between China and South Africa in line with what other countries have done, in order to clarify that South Africa's public policy specifically prevents the imposition of the death penalty.

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CHAPTER 1: INTRODUCTION

1.1. BACKGROUND TO THE LEGAL STATUS OF SOUTH AFRICAN INTERNATIONAL TAX AGREEMENTS

South Africa's domestic legislation, namely the Tax Administration Act (TAA), permits cross border exchange of taxpayer information under international tax agreements.[1] For purposes of this paper, it is important to establish the process under which international tax agreements are incorporated into South African legislation and in order to do that, the constitutional status of South Africa's international tax agreements must be examined.

According to the Income Tax Act 58 of 1962 (ITA), publication of an international tax agreement in the Government Gazette will be of the same effect as if it is legislated in the ITA.[2] This section was part of the 1962 Income Tax Act and it must be understood against this historical context. Before the Interim Constitution,[3] the executive branch of the government had oversight over the treaty making process and for an international agreement to become law of general application, parliament had to incorporate a treaty through an act.[4] S 108 of the ITA must always be read in line with the Constitution of the Republic of South Africa, 1996 (Constitution). Parliament took over the role of ratifying and acceding to international tax agreements after 1994.

The Constitution enshrines that an international tax agreement becomes law after it has been approved by both houses of parliament,[5] unless it is an international agreement of a 'technical, administrative or executive' nature or if it does not require ratification or accession, then it only needs to be tabled in parliament.[6] State practice indicates that the nature of an international tax agreement is not 'technical, administrative or executive' as it requires parliamentary ratification and accession.[7]

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[1] Tax Administration Act 28 of 2011 s 3(3)*(a)*(i).
[2] Income Tax Act 58 of 1962 s 108(2).
[3] Constitution of the Republic of South Africa Act 200 of 1993.
[4] PJ Hattingh 'Elimination and Avoidance of International Double Taxation' in De Koker & Brincler (eds) *Silke on International Tax* (2010) s 36.14.
[5] The Constitution of the Republic of South Africa, 1996 s 231(2).
[6] Ibid s 231(3).
[7] Hattingh op cit note 4.

Section 231(4) of the Constitution further states that an international agreement becomes law in South Africa when it is enacted into law by national legislation, but a self-executing provision only has to be approved by parliament to become law of general application, unless it is inconsistent with the Constitution or an Act of Parliament. There are different views on whether South Africa's double taxation agreements are self-executing. The term 'self-executing' was defined obiter by the court in *Goodwin v The Director General, Department of Justice and Constitutional Development,* as follows:

> "A treaty can be described as self-executing if its provisions are automatically, without any formal or specific act of incorporation by state authorities, part of the law of the land and enforceable by municipal courts."[8]

One view is that double taxation agreements are not self-executing and must be enacted into national legislation, namely s 108(2) of the ITA, in order to become part of domestic law. S 108(2) of the ITA states that international tax agreements shall be notified by publication in the Government Gazette and it will thereupon have effect as if enacted in the ITA. The following precedents support this view. The court in *CSARS v Van Kets*[9] held that an enabling Act of Parliament, the ITA, gave the executive the power to incorporate the international tax agreement between South Africa and Australia into municipal law, through publication in the Government Gazette. In *CSARS v Tradehold Ltd*[10] the court titled s 108 of the ITA 'enabling legislation' when referring to the international tax agreement between South Africa and Luxembourg. It can possibly be argued that the court indirectly confirmed that s 108 serves as national legislation that is required to incorporate international tax agreements into domestic legislation. In *Krok v CSARS*[11] the court held that the international tax agreement and a later protocol between South Africa and Australia were concluded under s 108(2) of the ITA and s 231(4) of the Constitution. The court stated that the agreement and protocol became South African law when they were approved by the legislature and duly gazetted. By implication, the

[8] *Goodwin v The Director General, Department of Justice and Constitutional Development* (T) unreported case number 21142/08 of 23 June 2008 para. 37.
[9] *Commissioner for the South African Revenue Service v Van Kets* 2012 (3) SA 399 (WCC) para 18.
[10] *Commissioner for the South African Revenue Service v Tradehold* 2012 (3) All SA 15 (SCA) para 15.
[11] *Krok v The Commissioner for the South African Revenue Services* (SCA) unreported case numbers 20230/2014 and 20232/2014 of 15 August 2015 para 24.

court held that international tax agreements are not self-executing as publication in the Government Gazette is required in order to become domestic law.[12]

Another view, supported by the author, is that double tax agreements are self-executing. It is submitted that self-executing provisions are stand-alone provisions that would be enforceable in court[13] and distributive provisions in double taxation agreements are therefore self-executing. South Africa's international tax agreements are published in the Government Gazette after approval by parliament and are not contained in separate legislation passed by parliament. The only possible legislation that can be viewed as enacting international tax agreements is s 108(2) of the ITA, which requires publication in the Government Gazette before an international tax agreement has the effect as if enacted in the ITA. It is however submitted that "this provision is of administrative nature aimed to empower tax administration to carry out treaty obligations in context of the powers granted under the ITA".[14] S 231(4) of the Constitution further requires that self-executing provisions must not be inconsistent with the Constitution or Acts of Parliament. Although the very nature of international tax agreements are in conflict with the ITA as the ITA places an income tax liability on a taxpayer and international tax agreements may provide relief for that liability, they are consistent with the ITA as s 108 envisions international tax agreements. International tax agreements are therefore self-executing and are consistent with the Constitution and Acts of Parliament and they only need to be approved by parliament in order to become law of general application and need not be enacted into legislation.

S 108(2) of the ITA is in conflict with s 231(4) of the Constitution. S108(2) of the ITA states that international tax agreements must be published in the Government Gazette before having the effect as if enacted in the ITA and s 234(4) of the Constitution states that a self-executing provision becomes law of general application once approved by Parliament. The Constitution is the superior law and all South African law is subject to the Constitution. S 108 of the ITA must also be read against its historical context, as stated above. The role of s 108 changed fundamentally under the Interim Constitution and the Constitution took over the role

[12] I du Plessis 'The Incorporation of Double Taxation Agreements into South African Domestic Law' (2015) 18 No 4 *Potchefstroom Electronic Law Journal* 1194.
[13] *Sei Fujii v California* 19 ILR 312 (1952), at 314.
[14] Hattingh op cit note 4.

of the law making process of international tax agreements. Under s 231(4) of the Constitution, tax treaties become law by parliamentary approval alone and separate incorporating legislation is not required.[15] The date of parliamentary approval, and not publication in the Government Gazette, is therefore the date of publication of an international agreement.

A further question is whether international tax agreements therefore have direct effect once approved by parliament.[16] South Africa's double tax treaties require reciprocal notification by each contracting state once their due legal process is completed. The date upon which the last due legal processes is completed in each state is the date of entry into force of South Africa's tax treaties. Parliament will then approve a tax treaty under s 231(4) of the Constitution, which will then be the enforcement date, seeing that the Constitution is the superior law.[17]

It is also important to establish the status of an international tax agreement in relation to domestic legislation. One view is that a double tax agreement ranks higher than domestic legislation, among others the ITA. This view states that the tax treaty has the same force as the Constitution and courts will therefore apply double tax treaties in preference to the ITA.[18] South African courts took the following different views. In *Glenister v President of the RSA,*[19] the Constitutional Court stated that incorporating international agreements only create domestic statutory obligations and does not create constitutional rights and obligations. In *CSARS v Tradehold Ltd,*[20] the Supreme Court of Appeal stated that an international tax agreement modifies domestic law and will be applied over the domestic law to the extent that there is no conflict. In *CSARS v Van Kets,*[21] the court agreed with the minority judgement of *Glenister v President of the RSA* and stated that international tax agreements rank equally with domestic legislation and the provisions of both should be read as a coherent whole.[22] In *A M Moolla*[23] the Supreme Court of Appeal found that double tax agreements form part of the relevant act and where there is conflict between the legislation, domestic law will take preference. The double tax agreement must however be interpreted to avoid any conflict

[15] Hattingh op cit note 4.
[16] Hattingh op cit note 4.
[17] Hattingh op cit note 4.
[18] Hattingh op cit note 4.
[19] *Glenister v President of the RSA* 2011 (3) SA 347 (CC) para 181.
[20] *Commissioner for the South African Revenue Service v Tradehold* 2012 (3) All SA 15 (SCA).
[21] *Commissioner for the South African Revenue Service v Van Kets* 2012 (3) SA 399 (WCC).
[22] I du Plessis 'Some thoughts on the Interpretation of Tax Treaties in South Africa' (2012) *SA Merc LJ* 31 at 40.
[23] *AM Moolla Group Ltd v Commissioner for the South African Revenue Service* (65) SATC 414.

between the legislation. One view is that South African courts will follow *CSARS v Tradehold Ltd* and the author prefers this view and agrees that the Constitution establishes international tax agreements superior to the ITA.[24]

1.2. SARS'S INFORMATION GATHERING POWERS

The South African Revenue Service (the SARS) has information gathering powers under the TAA. It is important to establish what these powers entail as the powers form the basis of everything that the SARS is authorised to do, and it is subject to constitutional circumspection.

A judge may grant an order for an inquiry where there are reasonable grounds to believe that a person failed to comply with a tax act, committed a tax offence or concealed assets.[25] The SARS has the power to authorise any person to conduct an inquiry into a taxpayer's affairs for the purposes of administrating the tax acts.[26] The inquiry is private and confidential and a residing officer, as designated by the court, leads the inquiry.[27]

The SARS may select a person for inspection, verification or audit based on a relevant consideration of a tax act, including on a random or a risk assessment basis.[28] A SARS official may be authorised to conduct a field audit or a criminal investigation and may require a person to make available, at the person's premises, relevant information.[29] If it appears that the taxpayer may have committed a serious tax offence, the investigation must be referred to a senior SARS official responsible for criminal investigations, to decide whether a criminal investigation should be pursued.[30] During an investigation, SARS must apply its gathering powers with due regard for the taxpayer's constitutional rights as a suspect in a criminal investigation.[31] The information obtained may be used in subsequent civil and criminal proceedings.[32] A SARS's official may inspect a premises used for trading, without prior notice, to only determine the identity of the occupant, whether he is registered for tax and is complying

[24] I du Plessis *Incorporation of Double Taxation Agreements* op cit note 12 at 1196.
[25] Tax Administration Act 28 of 2011 s 51(1).
[26] Ibid s 50(3).
[27] Ibid s 56(1), 51(2)(a).
[28] Ibid s 40.
[29] Ibid s 41(1), s48(1).
[30] Ibid s 43(1).
[31] Ibid s 44(1).
[32] Ibid s 44(3).

with record keeping duties.[33] SARS may require a taxpayer, or another person, to submit relevant information within a reasonable time and to attend an interview.[34]

SARS must apply ex parte to the court for a warrant to enter and search premises where relevant information is kept and to seize the information.[35] SARS's search and seizure powers are subject to the overarching normative authority of the Constitution, which includes the right to privacy.[36]

1.3. BACKGROUND TO CROSS-BORDER EXCHANGE OF TAXPAYERS' INFORMATION IN SOUTH AFRICA

South Africa has numerous bilateral and multilateral agreements in place with respect to the exchange of taxpayer information. South Africa's tax authority, namely the SARS, shall exchange South African taxpayers' information with another tax authority in accordance with the provisions of bilateral or multilateral agreements. The receiving state may, depending on the wording of the applicable agreement, use that information to prosecute tax crimes or other economic crimes that a South African taxpayer committed. The criminal law of the receiving state could possibly sanction the death penalty for these crimes. South Africa's Bill of Rights[37] however preserves the right to life to everyone in South Africa and the state must protect, promote and fulfil this right to life.[38] This right may only be limited in terms of the general limitation rule contained in section 36 of the Constitution. Most international tax agreements state that South Africa does not have the obligation to supply information that would be contrary to public policy. In light of this constitutional right to life and South Africa's public policy towards the death penalty, this study will consider the remedies available to South African taxpayers when they can be sentenced to death in another country at the hands of taxpayer information supplied by the SARS. It is an emerging area of research and the question of protection of South African taxpayers' fundamental right to life in the exchange of taxpayer information process has gone unanswered. The purpose of this research is to ensure that the constitutional right to life of a South African taxpayer remains protected amidst increased

[33] Ibid s 45(1).
[34] Ibid s 46(1), 47(1).
[35] Ibid s 59(1)-(2).
[36] AP de Koker & RC Williams *Silke on South African Income Tax* (2018) s 18.113.
[37] Chapter 2 of the Constitution of the Republic of South Africa, 1996.
[38] Supra note 5 at s 11.

taxpayer information transparency. The research will support that South Africa should be an example for practical protection of human rights to other developing and emerging countries. This paper will further make recommendations to the responsible South African fiscal and prosecuting authorities to afford adequate remedies to taxpayers.

1.4. RESEARCH QUESTION

The main research question is; what public policy-based remedies are currently available to South African taxpayers during the exchange of taxpayer information process with a country that sanctions the use of the death penalty, namely the People's Republic of China (China)? The study will examine South Africa's public policy towards the death penalty in light of the remedies afforded to a taxpayer when an international tax agreement includes a clause stating that a contracting state does not have an obligation to disclose information that would be contrary to public policy.

The focus is on exchange of taxpayer information with China and a sub-question of this paper is; what is China's public policy towards the death penalty and what is the actual imposition of the death penalty for economic crimes in China? An additional sub-question is who may be prosecuted in China under the Criminal Law of the People's Republic of China 86 of 1997 (China's Criminal Law) and whether such persons can claim protection under the Constitution. This paper analyses possible scenarios of exchange of South African taxpayers' information with China. A further sub-question is whether the Agreement between the Government of the Republic of South Africa and the Government of the People's Republic of China for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income [China - South Africa Income Tax Treaty (2000)][39] and the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters (2010) (Multilateral Convention) have conflicting treaty norms? This paper finally questions, as a second question in the alternative, whether there are existing treaty provisions that afford more protection to a taxpayer than the China - South Africa Income Tax Treaty (2000) or the Multilateral Convention.

[39] *Agreement between the Government of the Republic of South Africa and the Government of the People's Republic of China for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income* (25 April 2000), Treaties IBFD [hereinafter China – South Africa Income Tax Treaty].

1.5. LIMITATIONS OF SCOPE

The analysis is limited to the protection of South African taxpayers' fundamental right to life and the focus is on exchange of taxpayer information on request, automatic exchange of taxpayer information and spontaneous exchange of taxpayer information with China. China's death penalty law status is retentionist, meaning that China retains the death penalty for ordinary crimes. It is reported that China is the world's leading executioner as China executes and sentences thousands of people to death each year, but the exact figure remains classified as a state secret.[40] China further imposes the death penalty for various economic crimes. China is South Africa's main trading partner, as for many other African countries as well.

The definition of a 'South African taxpayer' will be confined to the following three scenarios; a South African citizen and tax resident who is a taxpayer in China, a South African taxpayer who is a citizen and taxpayer in China and a tax resident of a third country, and lastly a Chinese citizen and tax resident who is a taxpayer in South Africa.

1.6. RESEARCH METHOD

A doctrinal, desktop-based research method is used. The main documentary data analysed to answer the research question is primary legislation, specifically the Constitution, China's Criminal Law, the Constitution of the People's Republic of China, 2004 (China's Constitution), the Multilateral Convention, the China – South Africa Income Tax Treaty (2000) and South African and foreign case law. Secondary sources are also analysed, including Organisation for Economic Co-operation and Development (OECD) publications, OECD Models and commentaries, and publications by various researchers.

1.7. STRUCTURE OF THE PAPER

Chapter 2 analyses South Africa's public policy towards the death penalty in light of the fact that South Africa does not have an obligation to supply information that is contrary to public policy. This chapter examines international instruments, domestic legislation and common law principles that afford remedies to the taxpayer and includes a discussion on these legislative frameworks' territorial scope.

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[40] Liu Renwen 'Recent Reforms and Prospects in China' in Hood and Deva (eds) *Confronting Capital Punishment in Asia* (2013) 107-22.

Chapter 3 analyses China's public policy towards the death penalty. This chapter examines the legislation sanctioning the death penalty for economic crimes in China, including a discussion on the territorial scope of China's Criminal Law. This chapter further looks at the actual imposition of the death penalty for economic crimes in China.

The applicable treaty provisions are discussed in chapter 4. A comparison is made between article 26(1) of the China – South Africa Income Tax Treaty (2000) and article 22(4) of the Multilateral Convention, pertaining to the use of information for other purposes, in order to conclude whether these are conflicting treaty norms. A short comparison is made between the protection given to a taxpayer under exchange of taxpayer information on request, automatic exchange of taxpayer information and spontaneous exchange of taxpayer information. This chapter will further consider South Africa's actual performance in exchanging information with treaty partners.

Chapter 5 provides detailed application of the theory discussed in the preceding content chapters to possible scenarios.

The final chapter revisits the research question in light of the content chapters. This chapter provides recommendations on how to reinforce the remedies available to South African taxpayers.

CHAPTER 2: PUBLIC POLICY-BASED REMEDIES IN THE EXCHANGE OF TAXPAYER INFORMATION PROCESS

2.1 INTRODUCTION

South Africa is not obliged, in terms of its bilateral tax treaty with China or the Multilateral Convention, to exchange information that is contrary to public policy. This chapter will establish South Africa's public policy on the death penalty in order to conclude whether South Africa may refuse to exchange information with China, when imposition of the death penalty on a taxpayer in China is foreseeable. The analyses will include an evaluation of the wording of the public policy limitation clause in the applicable tax agreements, South Africa's constitutional right to life and its territorial scope, South Africa's international instruments concerning the death penalty and the common law revenue rule.

2.2 PUBLIC POLICY-BASED REMEDIES IN THE EXCHANGE OF TAXPAYER INFORMATION PROCESS

Article 26(2)(c) of the China – South Africa Income Tax Treaty (2000) and article 21(2)(d) of the Multilateral Convention, include limitations on providing taxpayers' information to a contracting state when the disclosure would be contrary to public policy (*ordre public*). The wording of this public policy limitation in the China – South Africa Income Tax Treaty (2000) and the Multilateral Convention are identical to the wording of article 26(3)(c) of the OECD Model Tax Convention on Income and on Capital [OECD Model (2017)].[41] The Multilateral Convention entered into force in South Africa on 1 March 2014 and in China on 1 February 2016, subject to certain notifications, declarations and reservations of both countries. This limitation on the exchange of taxpayer information concerns the vital interest of a state. Even though the wording of the treaty clause does not require exceptional circumstances for this public policy limitation to apply, various authors see the limitation narrowly and state that it will only apply in extreme cases. OECD commentary state that public policy issues are seldom in information exchanges between treaty partners.[42] Ana Paula Dourado also states that the public policy justification argument must be 'interpreted restrictively as a safeguard clause for

[41] *OECD Model Tax Convention on Income and on Capital* (21 November 2017), Models IBFD.
[42] O*ECD Model Tax Convention on Income and on Capital: Commentary on Article 26* para. 19.5 (21 November 2017), Models IBFD.

extreme and exceptional cases'. Dourado explains that the request for information is against the requested state's public policy if it is against its fundamental constitutional rights. Dourado states that the requested state must therefore do a fundamental evaluation of the purpose for which the information is requested or how the information is going to be handled by the requesting state and whether it is compatible with its fundamental rights (rule of law).[43] The public policy justification can be invoked when the purpose and procedures result in 'an intolerable discrepancy with the rule of law of the requested state'.[44] Examples, given by the OECD commentary, of where this public policy limitation will apply is where an investigation in the requesting state was driven by racial, religious or political persecution.[45] Other instances is where state secret information, namely sensitive data, is held by secret services and the exposure thereof will be opposing the vital interest of the requested state.[46] Similarly, when exchange of taxpayer information is inconsistent with domestic law or it leads to discrimination contrary to human rights, expropriation or political prosecution.[47] Where the assessment is made under the requested state's domestic laws, other arguments under article 26(3) of the OECD Model (2017) can occur and the public policy argument could apply in exceptional circumstances here as well. Where any international fundamental rights are violated, the requested state can invoke the public policy justification if it is subscribed to an international convention, for example the European Convention on Human Rights or it is a member state of an organization, for example the European Union.[48] The author reads this public policy limitation wider than only being applicable to exceptional circumstances and considers it applicable when it violates any part of a requested state's public policy. However, what a contracting state considers to be public policy is an open question and a contracting state that is reluctant to exchange certain information can therefore fall back on this public policy-based remedy to not exchange information. It will be difficult for the requesting state to challenge a

[43] Ana Paula Dourado 'Article 26. Exchange of Information' in Ekkehart Reimer & Alexander Rust (eds) *Klaus Vogel on Double Taxation Conventions* 4ed (2015) 1924.
[44] Engelschalk *V&L* 5ed (2008) 108-109.
[45] OECD *Commentary* op cit note 42.
[46] OECD 'Text of the Revised Explanatory Report to the Convention on Mutual Administrative Assistance in Tax Matters as Amended by Protocol' available at *https://www.oecd.org/ctp/exchange-of-tax-information/Explanatory_Report_ENG_%2015_04_2010.pdf*, accessed on 7 October 2018.
[47] Harald Schaumburg *Internationales Steuerrecht* 2 ed. (2011) note 19.8 p 1333.
[48] Dourado op cit note 43.

refusal based on public policy.[49] This limitation on the obligation to exchange information is worded as a discretionary restriction and therefore a requested state has the freedom to refuse to exchange information where, in their opinion, it is contrary to public policy and the security of the state. This limitation gives the requested state discretionary freedom to protect taxpayers, but it does not contain an obligation to fulfil this duty.[50] Even though the treaty as such imposes no duty, domestic law, constitutional law and international obligations may impose a duty, as is explained in this chapter.

2.3 SOUTH AFRICA'S PUBLIC POLICY TOWARDS THE DEATH PENALTY

A situation can arise where there is a real risk that the information that the SARS will supply to China may lead to the imposition of the death penalty on a South African taxpayer in China. In order to establish whether the SARS is under a legal duty to invoke the public policy-based remedy, as outlined in section 2.2, under such a situation, South Africa's public policy towards the death penalty must be considered.

South Africa had a mandatory death penalty regime from 1917. South Africa then followed the 'doctrine of extenuating circumstances' under the Criminal Procedure and Evidence (Amendment) Act of 1935 in terms of which a judge was required to find a mitigating factor in order to find that the death penalty is not called for. This doctrine was in conflict with the international movement of the time that death penalties must be limited to the most serious crimes by establishing a presumption against death.[51] The Apartheid government of the time used the death penalty to reinforce its oppressive policies and imposed it on political activists. Under the Criminal Procedure Amendment Act of 1990, South Africa replaced this doctrine with a discretionary death penalty regime and finally, in 1995, abolished the death penalty. South Africa is currently an abolitionist country, meaning that South Africa does not impose the death penalty for any crimes.

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[49] Sara K McCracken "Going, going, gone…Global: A Canadian Perspective on International Tax Administration Issues in the 'Exchange of Information Age'" (2002) Vol. 50 no 6 *Canadian Tax Journal* 1869 at 1883.
[50] Roman Seer & Isabel Gabert (eds) 'Mutual Assistance and Information Exchange' (2010) *EATLP Santiago de Compostela 2009 Congress* 107.
[51] Andrew Novak 'Capital sentencing discretion' in Southern Africa: A human rights perspective on the doctrine of extenuating circumstances in death penalty cases' (2014) 14 *African Human Rights LJ* 26.

2.3.a *Right to life*

Section 11 of the Constitution states that everyone has the right to life. The rights to life and dignity have generally been classified as the key sources for all other personal rights of the Bill of Rights. The right to life differs from similar rights in foreign constitutions and international law as it does not have an internal limiter.[52] The right to life includes a negative duty not to kill and a positive duty to protect life in unique circumstances. The right to life is unqualified and may only be limited through the limitation clause in section 36 of the Constitution. Taking a life will not be unconstitutional if it is, in terms of law of general application, reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The requirements of the limitation clause was however not met in *S v Makwanyane* to justify the limitation imposed on the right to life by the death penalty as a sentence for murder, as is explained below.

Article 3 of the Universal Declaration of Human Rights 1948 and section 6 of the International Covenant on Civil and Political Rights entrench every person's right to life. A court can consider international law principles, but it is not bound to follow it.[53]

2.3.a.i *South African precedents on the death penalty*

South Africa had very active death penalty sentencing during Apartheid. The African National Congress set a moratorium on death sentences as a prerequisite for negotiations in 1990. President De Klerk subsequently stated in his speech on 2 February 1990 that the question of the death penalty would be revisited. The last execution in South Africa took place in November 1989, but the Criminal Law Amendment Act 107 of 1990 retained the death penalty, however, it did away with mandatory death penalty, and restricted the application to the most serious crimes. Instead of outlawing the death penalty in the Constitution, the government left the question for the Constitutional Court.[54] Shortly after the certification of the Interim Constitution,[55] in *S v*

[52] D Davis & P Youens 'Life' in MH Cheadle (ed) *South African Constitutional Law: The Bill of Rights* (2017) s 6.1.
[53] *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 39.
[54] Dirk van Zyl Smith 'The Death Penalty in Africa' (2004) 4 *African Human Rights LJ* 1 at 10.
[55] Constitution of the Republic of South Africa Act 200 of 1993.

Makwanyane,[56] the Constitutional Court unanimously declared the death penalty as unconstitutional. The court stated that the rights to life and dignity are the most important human rights and retribution cannot be given the same weight under the Constitution. The prosecutor failed to prove that the death penalty is more effective to discourage or prevent murder than life imprisonment is. In light of these factors, and the arbitrariness and the chance of making a mistake in enforcing the death penalty, the death penalty was no longer justifiable as a punishment for murder. Accordingly, the requirements of the limitation clause, section 33(1) under the Interim Constitution, were not met.[57] Section 277(1)(a) of the Criminal Procedure Act 51 of 1977 set the death penalty for murder and the court held that this section was inconsistent with section 11(2) of the Interim Constitution as it provided for inhuman, cruel and degrading punishment. In the main judgment of the court, Chaskalson P anchored the abolitionist argument in the fundamental values of human dignity and the right to life, making it a very strong precedent used worldwide.[58] Langa J relied more directly on the right to life and emphasized the concept of *ubuntu*, namely communal humanity.[59] Mahomed J also relied on the right to life and stated that even though this right may not be unqualified, when it is breached arbitrarily in a cruel manner, it cannot be justified.[60] Following this decision, the Criminal Law Amendment Act 105 of 1997 formally abolished the death penalty. The wording of the right to life was however not amended in the final Constitution and therefore, the death penalty will remain unconstitutional in South Africa until the Constitution is amended.

The prohibition of the death penalty in South Africa was confirmed in *Mohamed and another v President of the Republic of South Africa and others.*[61] This case concerned the handing over of a suspected terrorist to the authorities of the United States of America ('US') without having the assurance that he

[56] *Makwanyane* supra note 53.
[57] *Makwanyane* supra note 53 para 146.
[58] *Makwanyane* supra note 53 para 144.
[59] *Makwanyane* supra note 53 paras 219 and 225.
[60] Davis et al op cit note 52 s 6.4.
[61] *Mohamed and another v President of the Republic of South Africa and others* (2001) JOL 8498 (CC).

will not receive the death penalty as punishment. The South African Constitutional Court found that the South African immigration authorities did not give value to his right of human dignity, life and his right not to be subjected to inhuman, degrading or cruel punishment.[62] The state has a positive duty to protect his life. The court found that, because of the finding in *S v Makwanyane*, his removal under circumstances where he might face the death penalty was contrary to the Constitution's underlying values. The court also stated that the international community shares the court's view on the death penalty. This rule, however, only applies when the authorities know that the deported suspect could be sentenced to death in the other country.[63] *Minister of Home Affairs and Others v Tsebe and Others*[64] confirmed that it is impermissible to deport or extradite a person to a retentionist state and consequently expose him to a real risk of execution. After *Sibiya and Others v Director of Public Prosecutions and Others,*[65] all the death penalties sentenced before 1995 were replaced with appropriate sentencing.

2.3.b *The relationship between national law and international law*

In order to establish further what South Africa's public policy towards the death penalty is, South Africa's international instruments on the death penalty must be analysed. However, before analysing the international instruments, it is important to establish what the relationship between national law and international law is. A state may not invoke its national law as justification for its failure to perform a treaty, which means that a conversation between national and international law is required.[66] From the perspective of a South African court, the Constitution is the supreme law. South African judges must strive to reconcile national law with international standards, but in the event of conflict, the national law prevails.[67]

[62] *Mohamed* supra note 61 para 59.
[63] *Jeebhai v Minister of Home Affairs* 2007 (10) BCLR 1146 (T) para 37.
[64] *Minister of Home Affairs and Others v Tsebe and Others* 2012 (5) SA 467 (CC) para 43.
[65] *Sibiya and Others v Director of Public Prosecutions and Others* 2005 (5) SA 315 (CC).
[66] Vienna Convention on the Law of Treaties of 1969, art. 27.
[67] Andreas O'Shea *International Law and the Bill of Rights* (2004) s 7A1.

Section 39(1)(b) of the Constitution states that, when the Bill of Rights is interpreted, international law must be considered. It is therefore a mandatory requirement to consider international law, but it does not necessarily have to be applied where there are other overriding considerations arising out of rules of interpretation or out of the Constitution itself. Section 233 of the Constitution states that a court must favour any reasonable interpretation of legislation that is consistent with international law. This rule must also apply to interpretation of the Constitution, as the Constitution was promulgated in the form of a statute.[68] Section 39(1)(a) of the Constitution also states that the Bill of Rights must be interpreted to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom."

The scope of the term 'international law' includes the general principles of law recognised by international custom, civilised nations, international conventions and teachings and judicial decisions, as supplementary means for determining the rules of law.[69] South Africa has ratified very few human rights treaties. The court should therefore refer to both binding and non-binding international law, namely the complete international framework of international human rights standards, when interpreting the Bill of Rights.[70] Regional treaties concluded outside Africa should also be used as guidance, but the necessary precaution should be applied where regional or national circumstances have their own considerations distinct to another region.[71]

Treaties constitute the clearest form of consent to human rights norms by countries. Where South Africa has signed a treaty, but has not yet ratified the treaty, South Africa has an international obligation to refrain from acts that would defeat the treaty's object and purpose.[72] The period between signature and ratification is there for reviewing all domestic law and policy, to ensure that it will comply with the treaty at ratification.[73] Treaties in force are binding on its parties and must be performed in good faith.[74] A

[68] Ibid s 7A2.
[69] Statute of the International Court of Justice (1946) s 38.
[70] Halton Cheadle 'Interpretation of the Bill of Rights' in MH Cheadle (ed) *South African Constitutional Law: The Bill of Rights* (2017) s 33.1.
[71] O'Shea op cit note 67 s 7A3.
[72] The Vienna Convention on the Law of Treaties of 1969 art 18.
[73] Sandra Liebenberg 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) *SAJHR* 359 at 371.
[74] The Vienna Convention on the Law of Treaties of 1969 art 26.

reasonable interpretation of the Bill of Rights, consistent with the obligation of good faith is preferred.[75]

Section 232 of the Constitution states that customary international law is law in South Africa, except if it is inconsistent with an Act of Parliament or the Constitution. Customary law is formed by general practice and is accepted as law. Customary law will play an important role in South African courts if South Africa does not ratify major international human rights treaties and incorporate it into domestic law. The use of customary law in South African courts has however been very rare.[76]

International and national judicial decisions and writings are subsidiary sources to determine the rules of law, but in practice, it is the most useful source for the South African Constitutional Court and other forums.[77]

2.3.b.i *South Africa's international instruments on the death penalty*

South Africa's international instruments concerning the death penalty must be examined as part of South Africa' public policy towards the death penalty. The right to life ranks highest amongst all other human rights and the death penalty is a big threat to this right. A number of treaties deal with the death penalty. The objective of most of these treaties is to eventually abolish the death penalty globally, but the basic human rights and humanitarian documents regulate rather than abolish the death penalty. South Africa has the following international instruments regarding the death penalty in place:

[75] O'Shea op cit note 67 s 7A4.
[76] O'Shea op cit note 67 s 7A5.
[77] O'Shea op cit note 67 s 7A7.

International Instrument	Ratification / Accession (a) / Adherence (b)	Comment
International Covenant on Civil and Political Rights, 16 December 1966	10 December 1998	This covenant allows the imposition of the death penalty for the 'most serious crimes' by those countries that has not abolished it, but the covenant further provides that 'nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any state party to the present covenant'.[78]
Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, 15 December 1989	28 August 2002 (a)	This protocol requires that state parties introduce necessary measures to abolish the use of the death penalty within their jurisdiction.[79]
African Charter on Human and People's Rights, 27 June 1981	9 July 1996 (b)	Chapter four of the charter states that no person may be arbitrarily deprived of the right to life. It is however questionable whether the charter inspires abolition of the death penalty, as it does not mention the death penalty or the need to abolish it. A protocol to the charter will therefore have to clarify this question. The African Commission on Human and People's Rights adopted a draft Protocol to the African Charter on Human and People's Rights on the Abolition of the

[78] UN General Assembly, *International Covenant on Civil and Political Rights,* 16 Desember 1996, United Nations, Treaty Series, vol. 999, article 6(2)-(6).
[79] O'Shea op cit note 67 s 7A49.

		Death Penalty in Africa. The African Union's Specialised Technical Committee on Justice and Legal Affairs did not consider the first draft in November 2015, referring to lack of legal basis to do so. In the event that the protocol to the charter is adopted, Africa will be the third regional human rights system, after the Americas and Europe, to adopt such a protocol. (Europe has adopted Protocol No 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty of 1989 and the Americas has adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.)
African Charter on the Rights and Welfare of the Child, 11 July 1990	7 January 2000	The charter abolishes the death penalty for children.
Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003	17 December 2004	Article 4(2)(j) entrenches that states may not execute the death sentence on nursing or pregnant women.

The international community's objective that the death penalty must be abolished worldwide is also reflected in that the International Criminal Court has a maximum sentence of life imprisonment.[80] The right to life in the Universal Declaration of Human Rights has reached the status of customary international law. The exact content of the right to life may not find expression in a consistent practice, but a common respect for this right by states out of a

[80] Rome Statute of the International Criminal Court 1998, s 77(1)(b).

sense of legal obligation cannot be denied.[81] Customary law does not forbid the use of the death penalty, as state practices are inconsistent, but there is an emerging rule requiring its abolition.[82] International law does not prohibit the death penalty, as there is no international instrument that absolutely outlaws it. The formulation of the universal human rights provisions, statements and resolutions by the United Nations ('UN') and human rights bodies and some regional human rights systems strongly suggest that the abolition of the death penalty is desirable.[83] It will therefore depend on domestic law whether the death penalty is outlawed or not.

2.3.c *The Revenue Rule*

The revenue rule is an established South African common law rule, which states that South African courts will not, indirectly or directly, enforce the revenue laws of a foreign state. In *Krok v Commissioner for SARS*[84] the Supreme Court of Appeal's view on the rationale for the revenue rule was that the revenue rule does not fundamentally aim to provide taxpayers with protection, but rather justified the revenue rule on the 'embarrassment approach'. In terms of this approach, the enforcement of a foreign tax claim must be preceded by an investigation of the underlying policies of the foreign revenue law in question, which can result in disruption of interstate relations if a negative view is formed about the foreign law because, for example, it offends local public policy.[85] It is unclear whether the court's 'embarrassment approach' justification for the revenue rule is regarded as South African law, a better view might be that the revenue rule aims to secure non-intrusion by the judiciary in the executive's international relations' prerogative.[86] This case found that when contracting states conclude a tax treaty that provides for mutual assistance in tax matters, the reason for

[81] O'Shea op cit note 67 s 7A5.
[82] O'Shea op cit note 67 s 7A50.
[83] The Working Group on the Death Penalty in Africa 'Study on the Question of the Death Penalty in Africa' at 44, available at *http://www.achpr.org/files/news/2012/04/d46/study_question_deathpenalty_africa_2012_eng.pdf,* accessed on 7 October 2018.
[84] *Krok and another v Commissioner for the South African Revenue Services* 2015 (6) SA 317 (SCA).
[85] CF Forsyth *Private International Law* 5th ed (2012) 125.
[86] J. Hattingh, Commentary, Krok and another v Commissioner for the South African Revenue Services (2015) 18 *International Tax Law Reports* 42, 49.

the revenue rule falls away.[87] The court's assumptions are that, under a tax treaty clause concerning mutual assistance in collection of taxes, the contracting states agree to protect each other's fiscal interest as a recognition of sovereignty. Further, that the states were willing to consent, in all circumstances, to the tax claims based on the underlying foreign domestic tax laws.

The decision suggests that where two contracting states conclude a tax treaty that allows for exchange of taxpayer information, considerations for the revenue rule's justifications fall away and are no longer applicable when interpreting the tax treaty. However, where a contracting state imposes a tax covered by the treaty that breaches a fundamental right in the requested state, can the request be denied based on the revenue rule? In South Africa, considering its constitutionally entrenched Bill of Rights, considerations for public policy cannot be repealed in absolute terms in a tax treaty.[88] It is therefore argued that where a South African exchange of information clause does not contain the public policy limitations (which is currently not the case with the treaties concluded with China), public policy must still be considered under the revenue rule.

2.4 SCOPE OF THE CONSTITUTION

Section 11 of the Constitution states that everyone has the right to life. The term 'everyone' means every person within the jurisdiction of the courts, irrespective of their status. All natural persons hold this right and it therefore applies to residents, citizens, visitors and illegal immigrants.[89] Public policy may dictate that this right to life cannot be waived. Rights based on fundamental values of the Constitution may be inalienable.[90] A further question, which will be discussed in the case law below, is whether the Constitution has extra-territorial effect.

In *Mohamed and another v President of the Republic of South Africa and others*, a potential difficulty with the application of the constitutional values to extradition by the South African government arose, namely the territorial scope of the Constitution. This case concerned the

[87] *Krok* supra note 84 para 29.
[88] Hattingh *Krok* op cit note 86 at 50.
[89] Halton Cheadle 'Rights Bearers' in MH Cheadle (ed) *South African Constitutional Law: The Bill of Rights* (2017) s 3.6.
[90] Ibid s 3.7.

handing over of a suspected terrorist to the US authorities to stand trial in the US, without the South African government obtaining a guarantee that he will not face the death penalty. The death or inhuman or degrading treatment would have occurred outside South Africa's territory at the hands of another government. This case involved an illegal immigrant of South Africa, namely a Tanzanian national. Mohamed was hiding in South Africa, because he was wanted by the US for the bombing of their embassies in Nairobi and Dar es Salaam. The question before the court was whether the South African government fulfilled its constitutional duty to obtain assurance that Mohamed will not receive a death sentence.[91] The South African Constitutional Court's decision related to a moot issue as Mohamed was already deported to the US and was standing trial in the Federal Court for the Southern District of New York.[92] The Constitution does not apply to events occurring outside of South Africa's territory. Even though the Bill of Rights makes no express limitation on its territorial application, it only binds organs of the South African state and no other governments.[93] The South African government has the obligation to protect the rights of everyone in South Africa.[94] Any extra-territorial application of South African law must be consistent with international jurisdiction principles. The extraditing state does not have control over the criminal justice system of the requesting state. The court did not address the territorial application directly, but it can be inferred from the court's reasons that the government's actions within South Africa's territory constituted a violation of the Bill of Rights, namely that the person's life and human dignity was threatened.[95] The rights in the Bill of Rights were extended to Mohamed as his physical presence in the country triggered constitutional protection.[96] The South African Constitutional Court found that the South African government officials acted unlawfully by not demanding a guarantee from the US that the death sentence will not be imposed on Mohamed or, if imposed, would not be executed, before handing Mohamed over for trial in the US. The government officials' action was unlawful in that it infringed Mohamed's constitutional right to life, human dignity and to not be treated or punished in a cruel, inhuman or degrading manner. The

[91] Max du Plessis 'The Extra-Territorial Application of the South African Constitution (2003) 120 *SALJ* 797.
[92] Ibid at 805.
[93] O'Shea op cit note 67 s 7A20.
[94] *Mohamed* supra note 61 para 59.
[95] O'Shea op cit note 67 s 7A20.
[96] Max du Plessis *Extra-Territorial Application* op cit note 91 *SALJ* 813.

Constitutional Court ordered further that its judgement must be urgently drawn to the attention of the Federal Court for the Southern District of New York.

In *Kaunda v the Republic of South Africa*,[97] Kaunda and 68 other South African citizens voluntarily left for Zimbabwe, where they were arrested and faced the potential risk of being extradited to Equatorial Guinea for an attempted coup, where they could face the death sentence. The applicants requested that the South African government take the necessary diplomatic action to ensure that their rights under the Constitution were respected by Zimbabwe and Equatorial Guinea. The case raised important questions about the nature and the extent of the right of diplomatic protection of South African citizens abroad.[98] The majority judgment concluded that diplomatic protection is not recognised by international law as a human right and cannot be enforced as such and the applicants could therefore not base their claims on customary international law.[99] In the majority judgment in the Constitutional Court, Chaskalson CJ then turned to the question of whether the South African Constitution places a burden on the South African government under the present circumstances. The Constitutional Court stated that right bearers under the Bill of Rights are people *in* South Africa. The international law principle that the sovereignty of another state may not be obstructed, limits an application of national law in another state. The court stated that the Bill of Rights binds the government, even when it acts outside of South Africa, provided that it does not constitute an infringement on the sovereignty of another state.[100] The majority held that there is no enforceable right to diplomatic protection, but South African citizens are however entitled to request protection from South Africa, under international law, against wrongful acts of foreign states.[101] Chaskalson CJ stated that the applicants had no right to claim that South Africa's government must take action to avert the laws of the foreign state in which they were being held, being applied to them, even though capital punishment is inconsistent with South Africa's Constitution. This was subject to the qualification that the laws of the foreign state were

[97] *Kaunda v President of the Republic of South Africa* 2004 (10) BCLR 1009 (CC).
[98] Stephen Pete & Max du Plessis "South African nationals abroad and their right to diplomatic protection — lessons from the 'mercenaries Case'" (2006) 22 *SAJHR* 439 at 441.
[99] *Kaunda* supra note 97 para 29.
[100] *Kaunda* supra note 97 paras 37, 40, 229.
[101] *Kaunda* supra note 97 para 60.

consistent with international human rights norms and at the time of the case, the death penalty was not per se a violation of international human rights law.[102] Chaskalson CJ stated that:

> "Counsel for the *amicus curiae* submitted that it is cruel treatment to put a person on trial in a foreign country to face a possible death sentence if convicted. However, as long as the proceedings and prescribed punishments are consistent with international law, South Africans who commit offences in foreign countries are liable to be dealt with in accordance with the laws of those countries, and not the requirements of our Constitution, and are subject to the penalties prescribed by such laws."[103]

The author submits that there is presently no universally binding international law that forbids the death penalty. The court would unfortunately likely have come to the same decision if it was decided today, namely that the court would not have directed the South African government to seek assurance from Equatorial Guinea that the death penalty would not be imposed on the applicants.

The court distinguished its earlier judgement in *Mohamed and another v President of the Republic of South Africa and others* in that even though Mohamed was in the US at the time of the trial, his rights were infringed in South Africa by government officials and not in the US where Mohamed found himself as a result of this violation of his rights. This differs to the facts in *Kaunda v the Republic of South Africa* as the applicants voluntarily left South Africa to go to Zimbabwe and their arrest in Zimbabwe and the possibility of their extradition to Equatorial Guinea are not the result of unlawful conduct of the South African government.[104] The South African government's only action in Kaunda's case was that it exchanged information about potential criminal conduct with Zimbabwe and Equatorial Guinea and because of this information, they were arrested upon arrival in Zimbabwe. The court held that the exchange of information did not infringe Kaunda's rights, but rather said that the failure to supply the information of a suspected coup to the other countries might be a breach of South Africa's international law obligations.[105] The court held that South Africa had an obligation to co-operate with Zimbabwe and Equatorial Guinea in the prevention and combating of crime, including the duty to share information of suspected coup attempts or mercenary activity. Chaskalson CJ stated that at best for the applicants, the South African authorities failed to warn

[102] Pete et al op cit note 98 at 447.
[103] *Kaunda* supra note 97 para 100.
[104] *Kaunda* supra note 97 paras 49,50.
[105] Susan D. Franck 'International Decisions' (2005) 99 *Am. J. Int'l L.* 681 at 682.

them of the information that the authorities received or that they would send it to Zimbabwe and Equatorial Guinea, but this was not a breach of duty by the South African government.[106]

One of the reasons that the Constitutional Court, in *Kaunda v the Republic of South Africa* and *Thatcher v Minister of Justice and Constitutional Development,*[107] did not order the South African government to intervene diplomatically, was that the applicants were not yet sentenced and they would intervene only after the death penalty is imposed by the foreign court.[108] Du Plessis and Peté comment that this is not a satisfactory policy as it underestimates the secrecy and speed with which certain foreign states can impose the death penalty. This policy also places unrealistic faith in the commitment by foreign states to protect comity and good relations with others.[109] This policy also does not reflect the international jurisprudence that the imposition of the death penalty after an unfair trial is in itself a violation of the accused's right not to be subject to cruel, degrading or unhuman treatment, even if the sentence is eventually commuted.[110]

In *Soering v the United Kingdom,*[111] the US requested the extradition of a person from the United Kingdom because of a murder charge. Soering would have been sentenced to death in the US and the European Court of Human Rights found that his extradition contravenes section 3 of the European Convention on Human rights, which prohibits degrading, inhuman or cruel treatment. The death row circumstances was cruel as Soering would spend six to eight years on death row, because of his youth and that there was psychiatric evidence that he suffered from an abnormality of mind at the time of the act of murder. The US was not a party to the European Convention on Human rights. The United Kingdom argued that they were not responsible for inhuman or degrading treatment that the person may suffer outside their jurisdiction. The court however held that where extradition holds consequences affecting the enjoyment of a convention right, it might involve a breach of the extraditing state's international obligations, providing that the consequences are not too remote. The United

[106] *Kaunda* supra note 97 para 52.
[107] *Thatcher v Minister of Justice and Constitutional Development* 2005 (4) SA 543 (C) para 104.
[108] Max du Plessis 'The *Thatcher* case and the supposed delicacies of foreign affairs: a plea for a principled (and realistic) approach to the duty of government to ensure that South Africans abroad are not exposed to the death penalty' (2007) 2 *SACJ* 143 at 148.
[109] Pete et al op cit note 98 at 471.
[110] *Ocalan v Turkey* 2004 (15) BHRC (Eur. Ct H.R.) paras 346-347.
[111] *Soering v The United Kingdom* 1989 (11) EHRR (Eur. Ct H.R.) paras 24-26.

Kingdom was held responsible for foreseeable consequences outside its jurisdiction in this case.[112]

In *Ng v Canada,*[113] the Human Rights Committee of the United Nations held that Canada was in breach of article 7 of the International Covenant on Civil and Political Rights, which prohibits cruel, inhuman or degrading treatment or punishment. Canada extradited Ng to the US and Canada could foresee that Ng would be sentenced to death under circumstances that is not in line with article 7, namely that he would be executed by asphyxiation in a gas chamber. The International Covenant on Civil and Political Rights permits the imposition of the death penalty 'for the most serious crimes', but the method of execution in the US was found to be cruel punishment under article 7 of the covenant. Canada therefore breached their international obligation under the covenant. In a similar case, namely *Kindler v Canada*,[114] Kindler was extradited to the US from Canada and it was foreseen that he could face the death penalty in the US. The method of execution in the US in this case was not asphyxiation in a gas chamber, as in *Ng v Canada,* but rather execution by lethal injection. Kindler argued that Canada had breached their obligations under the International Covenant on Civil and Political Rights when Canada authorised the extradition without gaining an assurance from the US that they will not impose the death penalty on Kindler. The United Nations Human Rights Committee held that the method of execution, namely lethal injection, was not a cruel execution method and Canada therefore did not breach its obligation under section 7 of the covenant.

In *Lawyers for Human Rights v Minister of Home Affairs,* the Constitutional Court held that people, who are held at a port of entry in South Africa pending a decision on whether they may formally enter the country, are not beyond the jurisdiction of South African courts for the enforcement of the Bill of Rights. This was stated even though section 7(1) of the Constitution enshrines the rights of people 'in our country'. The court held that the rights to detained persons and their personal freedom and security, in sections 35(2) and 12 of the Constitution, are integral to the fundamental constitutional values of human dignity, freedom and equality. The court further held that the denial of these rights to people, who are physically in South Africa at air- or seaports, only because they have not entered the country formally, would constitute

[112] O'Shea op cit note 67 s 7A20.
[113] Communication no 469/1991, UN Doc CCPR/C/49/D/469/1991 (1994).
[114] Communication no 470/1991 (1993).

a denial of the values underlying the Constitution. The court stated that it could not be suggested that a person who commits murder on a ship in South African waters is not liable to stand trial in South African courts or that people who are unlawfully held on a ship in South African waters cannot turn to South African courts for protection.[115] Further, travellers on an international flight that will land in South Africa are subject to the South African courts' jurisdiction.[116] Similarly, in *Abdi and Another v Minister of Home Affairs and Others*[117] the court held that people who are held in an inadmissible facility in a port of entry into South Africa, were not beyond South African court's jurisdiction. In this case, no guarantee could be given that the appellants, who were refugees, would not be persecuted or tortured, or face inhuman, degrading and cruel treatment if they were sent back to Somalia. It will be against South Africa's fundamental constitutional values when a person is deported to a state and it would result in the implementation of cruel, degrading or unusual punishment.[118]

When South Africa's officials assist foreign governments in the criminal prosecution of South African nationals abroad, without taking the necessary steps to ensure that the accused are ineligible for the death penalty, it may be regarded as, if not active, then passive participation in carrying out the imposition and enforcement of the death penalty.[119] There must be a sufficient close nexus between the action of the authorities in South Africa and the results of these actions in a foreign state, to hold the authorities liable for 'extra-territorial' breaches of the Constitution.[120] This casual approach is evident from *Mohamed and another v President of the Republic of South Africa and others*. The court found that, with regard to the right to life, the South African authorities bore a casual nexus with the risk of Mohamed receiving a death sentence:

> "The fact that Mohamed is now facing the possibility of a death sentence is the direct result of the failure by the South African authorities to secure such an undertaking [against the death penalty][121]. The causal connection is clear between the handing over of Mohamed to the FBI for removal to the United States for trial without securing an assurance against the

[115] *Lawyers for Human Rights v Minister of Home Affairs* 2004 (7) BCLR 775 (CC) para 26.
[116] *Nkondo v Minister of Police and another* 1980 (2) SA 894 (O).
[117] *Abdi v Minister of Home Affairs* 2011 (3) SA 37 (SCA).
[118] *Abdi* supra note 117 paras 19-28.
[119] Max du Plessis *The Thatcher Case* op cit note 108 at 155.
[120] Max du Plessis *Extra-Territorial Application* op cit note 91 at 811.
[121] Words in brackets inserted by author, for clarification.

imposition of the death sentence and the threat of such a sentence now being imposed on Mohamed."[122]

The nexus is whether there are substantial reasons to believe that the official's action will lead to prohibited consequences. If there are such grounds, then the public authority's act may be unlawful as it is incompatible with the Bill of Rights. In this situation, the Constitution is being applied to prohibit acts of officials, subject to its jurisdiction, that causes harm to the individual wherever the result of the harm is occasioned. The nexus between the authorities' act of removal and the eventual harm caused is established by the person's physical presence in South Africa prior to removal. The person's physical presence triggers constitutional protection. Further, the nexus is to be assessed based on 'foreseeability'. There must be a sufficient real risk of danger for the person. The authorities have a positive obligation to take reasonable steps to safeguard the person from foreseeable violation of the person's rights.[123]

In conclusion, the right bearers of the right to life in the Constitution are therefore every person in South Africa's jurisdiction. A taxpayer must therefore be inside South Africa's jurisdiction in order to carry the protection of the right to life. Based on *Mohamed and another v President of the Republic of South Africa and others,* it is argued that if the South African tax authority exchanges information of a South African taxpayer, who was physically present in South Africa, and it is foreseeable that it will lead to this taxpayer being sentenced to death in the requesting state, it constitutes a violation of the Bill of Rights, namely an action of the SARS that threatens a person's life and human dignity. The SARS must therefore obtain a guarantee from China that a taxpayer will not face the death penalty in China before sending the information to China or not send the information at all.

Based on *Kaunda v Republic of South Africa,* a scenario can exist where SARS supplies information to China about a South African taxpayer, who is physically present in China, and at the hands of this information, the taxpayer is arrested and could possibly face the death sentence in China via lethal injection. Without taking the public policy-based remedy in tax treaties into account, SARS will be obliged to co-operate with China in the prevention and combating of crime and would therefore be obliged to exchange the taxpayer's information with China in this circumstances. The South African government would further not be obliged,

[122] *Mohamed* supra note 61 para 54.
[123] Max du Plessis *Extra-Territorial Application* op cit note 91 at 813.

under the South African Constitution or international law, to seek assurance that the death penalty would not be imposed on the South African taxpayer.

The International Covenant on Social and Political Rights tolerates the death penalty 'for the most serious crimes', but the method of execution must not be cruel, inhuman or degrading. Based on *Ng v Canada* and *Kindler v Canada*, the information exchange by the tax authorities will not breach South Africa's international obligation under the International Covenant on Social and Political Rights where it is foreseeable that the information exchange can lead to the sentencing of the death penalty in the requesting state. A requisite to the aforementioned is that the execution must be in accordance with the requirements of the covenant. Therefore, where the method of execution in China is cruel, inhuman or degrading, then South Africa will breach its international obligation. The author submits that South Africa will not always know whether the method of execution will be cruel in China and South Africa therefore has an international obligation not to exchange information where it foresees the imposition of the death penalty on the taxpayer, as there is a risk that the execution method will be cruel.

Further, where Chinese citizens take refuge at our sea- or airports and they face the death penalty in China for some transgression, they are within the jurisdiction of South African courts and are right bearers of South African constitutional rights.

2.5 CONCLUSION

It is clear from South Africa's constitutional right to life and its international instruments on the death penalty, that the country's public policy does not support the death penalty. Under the China – South Africa Income Tax Treaty (2000) and the Multilateral Convention, the South African state is, in certain circumstances, under a constitutional and international law obligation not to exchange information where it is foreseeable that it may lead to imposition of the death penalty on a South African taxpayer in China. Where this is foreseeable, then the South African state has the following obligations in these different circumstances:

- Where the South African taxpayer is in South Africa, then the South African state has a constitutional obligation not to exchange the information.

- Where the South African taxpayer is a Chinese citizen that takes refuge at a South African sea- or airport, then the South African state has a constitutional obligation not to exchange the information.
- Where the South African taxpayer is outside of South Africa, whether the person is ordinarily resident in South Africa or not, then the South African state has no constitutional obligation not to exchange the information.
- However, in all of the aforementioned circumstances, the South African state has an international obligation not to exchange the information where the method of execution in China is cruel, inhuman or degrading.

Further, in all circumstances, the SARS has a discretion to use the public-policy based remedy in the tax treaties with China and refuse to exchange the information as the death penalty is contrary to South Africa's public policy. Otherwise, the South African state can demand, prior to any exchange of taxpayer information, that the Chinese government must give an assurance that death is not an optional sentence in the prosecution of a South African taxpayer.

CHAPTER 3: THE IMPOSITION OF THE DEATH PENALTY FOR ECONOMIC CRIMES IN CHINA

3.1 INTRODUCTION

This chapter considers the history and current imposition of the death penalty in China. The focus is specifically on economic crimes that are punishable by death. Chinese international law and domestic law are set out in this chapter. The territorial jurisdiction of China's Criminal Law is analysed to establish who may be prosecuted in China. Finally, the actual imposition of the death penalty on economic crimes in China is analysed by way of known cases.

3.2 THE HISTORY OF CHINA'S PUBLIC POLICY TOWARDS THE DEATH PENALTY

China is an active retentionist country, meaning that the death penalty remains lawful in China and China still conducts executions. The precise number of annual executions in China is a national secret, but available information indicates that China carries out thousands of executions each year. China has for a number of years accounted for up to 95 per cent of all recorded worldwide judicial executions.[124] Deng Xiaoping, the Chinese Communist Leader, said on 17 January 1986 that:

> "The death penalty cannot be eliminated. Why are we not giving the death penalty for public officials who have committed severe economic crimes in which tens of millions of renminbi (RMB) are lost through corruption? We have to execute more felons to show our determination against crime."[125]

There is however cautious optimism about the death penalty in China as China made the announcement in March 2007, at the UN Human Rights Council, that it was anticipated that the death penalty's scope would be reduced with the final goal of abolishment.[126] China however did not set a timeline to achieve this goal.

In 1997, the death penalty for ordinary theft was abolished in China.[127] In 2004, China's Constitution was amended to read that China protects and has respect for human rights. The term 'human rights' is not defined in China's Constitution, but it pertains to the fundamental

[124] Roger Hood & Carolyn Hoyle *The Death Penalty: A Worldwide Perspective* 5 ed (2015) ch 3 (e).
[125] Guo Zili 'On China's Death Penalty System' (2010) 30 *Peking University Journal of Legal Studies* 30 at 35.
[126] Human Rights Committee 'Human Rights Council Opens Fourth Session' (2007) *UN doc HRC/07/3* 9.
[127] Renwen op cit note 40 at 113.

rights of citizens and can be classified into seven types.[128] The right to life is the basis of the right to freedom of the person as prescribed by China's Constitution, but a person may be sentenced to death.[129] On 1 January 2007, the highest judicial court in China, namely the Supreme People's Court, decided to take over the power to approve and review death penalty cases from the provincial high courts. They did this in order to 'kill fewer, kill cautiously'.[130] This resulted therein that the number of executions reduced significantly, as it limited the implementation of the death penalty by the lower courts.[131] Thereafter, the Chinese government was more willing to discuss the death penalty with European countries. On 25 February 2011, 13 non-violent economic crimes were removed from China's Criminal Law as death-eligible offences, as well as the exclusion of elderly above 75 years of age. China confirmed that crimes concerning bribery and corruption were never on the proposed list of crimes that would have been abolished in the draft eight amendment in 2011, as rumours suggested, but that authorities will continue to punish these offenders harshly. The ninth amendment to China's Criminal Law came into force on 1 November 2015 and it transformed the death penalty system and further abolished the death penalty for nine crimes.[132]

Even though this is a move in the right direction towards abolition, China still uses the death penalty as an instrument of political governance and as a preventative measure to stop anti-socialistic corruption influences. China has a wide variety of offences, namely 46 offences, which are punishable by death. According to article 48(1) of China's Criminal Law, the death penalty only applies to extremely serious crimes and if the immediate implementation of the death penalty is not necessary, a two-year postponement of execution may be awarded. China has however not restricted the death-eligible offences to only a small number of serious crimes and the list still includes economic crimes.[133] 24 out of the 46 death-eligible offences

[128] The right of equality, political rights, freedom of religious beliefs, freedom of the person, social and economic rights, cultural and educational rights and the right of supervision and a right to claim.
[129] Xu Chongde & Niu Wenzhan 'People's Republic of China' in André Alen & David Haljan (eds) *International Encyclopedia for Constitutional Law* (2016) 98, 107.
[130] Renwen op cit note 40 at 112.
[131] Dui Hua Foundation 'Dui Hua Estimates 4,000 Executions in China, Welcomes Open Dialogue' *Newsletter* 12 December 2011, available at *http://duihua.org/wp/?page_id=3874*, accessed on 6 October 2018.
[132] Namely, smuggling of weapons and ammunition; smuggling of nuclear materials; smuggling of counterfeit currency; counterfeiting of currency; fundraising fraud; organizing prostitution; forcing others into prostitution; obstructing the performance of military duties; and spreading rumors during war time.
[133] Hood & Hoyle op cit note 124.

are non-violent crimes.[134] Cases of innocent people receiving the death penalty have also become known.[135]

3.3 THE LEGAL FRAMEWORK IN CHINA

3.3.a *International Treaty Law (whether in force or not)*

China signed the International Covenant on Civil and Political Rights in 1998, but has not ratified the covenant. Article 6 of this covenant states that the death penalty may only be imposed for the most serious crimes and nothing in that article shall be invoked to postpone or stop the abolition of the death penalty. The Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty[136] are the international minimum standards for countries that still impose the death penalty, regardless of whether China is subject to any treaty norms. These safeguards state that death-legible crimes should be limited to 'intentional crimes with lethal or other extremely grave circumstances'.[137] The Human Rights Resolution 30/5 of the United Nations Human Rights Council limited the scope of the crimes punishable by death to not be implemented for non-violent acts as religious practice or expression of conscience, sexual relations between consenting adults and financial crimes, nor as a compulsory sentence.[138] There is therefore pressure on China to include provisions in its criminal law that will improve pre-trial and trial procedures and limit the scope of the death penalty.[139]

3.3.b *Domestic Chinese legislation sanctioning the death penalty for economic crimes in China*

Article 383(3) of China's Criminal Law states that:

> "…if he embezzles in especially huge amount, which causes especially serious loss to the interests of the State and the people, he shall be sentenced to life

[134] G Huang 'Death Penalty in China after the Ninth Amendment: Legislatively Abolishing and Judicially Limiting' (2016) 4 *Journal of Forensic Science & Criminology* 1 at 3.
[135] Rongjie Lan 'A False Promise of Fair Trials: A Case Study of China's Malleable Criminal Procedure Law' (2010) 27 *UCLA Pac. Basin L.J.* 153 at 184.
[136] UN Economic and Social Council 'Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' (1984) *Resolution 1984/50*.
[137] Ibid para 1.
[138] UN Commission on Human Rights 'Human Rights Resolution 2005/59: The Question of the Death Penalty' 20 April 2005 at article 7(f), available at *http://www.refworld.org/docid/45377c730.html*, accessed on 7 October 2018.
[139] Hood & Hoyle op cit note 124.

> imprisonment or death penalty and concurrently sentenced to confiscation of property."[140]
>
> Article 386 of China's Criminal Law states that:
>
> "Whoever has committed the crime of acceptance of bribes shall, on the basis of the amount of money or property accepted and the seriousness of the circumstances, be punished in accordance with the provisions of Article 383 of this Law. Whoever extorts bribes from another person shall be given a heavier punishment."[141]

People who are given two-year suspended death sentences qualify to have the sentence be commuted to life imprisonment, but no further commutation is possible. Article 385 of China's Criminal Law states that the death sentence for bribery is also applicable to state functionaries.

The term 'especially huge' is not defined in the ninth amendment to China's Criminal Law. In April 2016, the Supreme People's Court and the Supreme People's Procuratorate together issued a clarification stating that offenders found guilty of embezzling or accepting bribes for three million yuan[142] or more is an extremely serious case and will be sentenced to death. They further explained that mitigating factors, such as cooperation during the investigation, might suspend the death sentence.[143]

Further, under crimes of endangering national security, article 125 of China's Criminal Law states that:

> "Whoever illegally manufactures, trades in, transports, mails or stores any guns, ammunition or explosives shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death.
>
> Whoever illegally manufactures, trades in, transports or stores poisonous or radioactive substances, infectious disease pathogens or other substances, thereby endangering public security, shall be punished in accordance with the provisions of the preceding paragraph."[144]

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[140] English translation by the General Office of the Legislative Affairs Commission, the Standing Committee of the National People's Congress on Westlaw China.
[141] Ibid.
[142] Equivalent to 6,190,437.21 ZAR on 12 November 2018.
[143] William Helbling 'China high court confirms death penalty for serious corruption cases' *Jurist: Paper Chase* 18 April 2016, available at *https://www.jurist.org/news/2016/04/china-high-court-confirms-death-penalty-for-serious-corruption-cases/*, accessed on 6 October 2018.
[144] Legislative Affairs Commission op cit note 140.

Under crimes of dereliction of duty, Article 439 of China's Criminal Law states that:

> "Whoever illegally sells or transfers weapons or equipment of the armed forces shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years; if a large amount of weapons or equipment is sold or transferred or if there are other especially serious circumstances involved, he shall be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death."[145]

To summarise, the following types of economic crimes may lead to the death penalty in China:

- Embezzlement of more than three million yuan that causes serious loss to the state and the people of China.
- Acceptance and extortion of bribes of more than three million yuan.
- Illegally manufacturing, trading in, transporting, mailing or storing any guns, ammunition or explosives under serious circumstances.
- Illegally manufacturing, trading in, transporting or storing any poisonous or radioactive substances, infectious disease pythons or other substances.
- Selling or transferring weapons or equipment of the armed forces where it is a large amount or there are especially serious circumstances.

3.3.b.i *Territorial jurisdiction of China's Criminal Law*

The territorial scope of China's Criminal Law is entrenched in these provisions:

> "Article 6 This Law shall be applicable to anyone who commits a crime within the territory and territorial waters and space of the People's Republic of China, except as otherwise specifically provided by law.
>
> This Law shall also be applicable to anyone who commits a crime on board a ship or aircraft of the People's Republic of China.
>
> If a criminal act or its consequence takes place within the territory or territorial waters or space of the People's Republic of China, the crime shall be deemed to have been committed within the territory and territorial waters and space of the People's Republic of China.
>
> Article 7 This Law shall be applicable to any citizen of the People's Republic of China who commits a crime prescribed in this Law outside the territory and territorial waters and space of the People's Republic of China; however, if the maximum punishment to be imposed is fixed-term

[145] Ibid.

> imprisonment of not more than three years as stipulated in this Law, he may be exempted from the investigation for his criminal responsibility.
>
> This Law shall be applicable to any State functionary or serviceman who commits a crime prescribed in this Law outside the territory and territorial waters and space of the People's Republic of China.
>
> Article 8 This Law may be applicable to any foreigner who commits a crime outside the territory and territorial waters and space of the People's Republic of China against the State of the People's Republic of China or against any of its citizens, if for that crime this Law prescribes a minimum punishment of fixed-term imprisonment of not less than three years; however, this does not apply to a crime that is not punishable according to the laws of the place where it is committed.
>
> Article 10 Any person who commits a crime outside the territory and territorial waters and space of the People's Republic of China, for which according to this Law he should bear criminal responsibility, may still be investigated for his criminal responsibility according to this Law, even if he has already been tried in a foreign country. However, if he has already received criminal punishment in the foreign country, he may be exempted from punishment or given a mitigated punishment."[146]

The territorial scope of China's criminal law is therefore unlimited. It applies to everyone within China's territory, including on board a ship or aircraft of China, as well as to Chinese citizens and foreigners outside of China. The only possible constraining element is in article 8 of China's criminal law, which states that when a foreigner commits a crime outside of China, it must be against the state or China's citizens. Article 8 further limits the scope by stating that China's criminal law must prescribe a minimum punishment of imprisonment of more than three years and the crime must be punishable according to the laws of the place where it is committed. To conclude, China's criminal law prescribes the death penalty for various economic crimes and the law's territorial scope is unlimited. The following paragraph examines whether China actually imposes the death penalty for these economic crimes or whether it is only a theoretical matter.

[146] Ibid.

3.4 ACTUAL IMPOSITION OF THE DEATH PENALTY FOR ECONOMIC CRIMES IN CHINA

China is struggling with serious corruption cases, especially by government officials.[147] White collar and financial crimes are a big problem. China's legal system centres on statutory law and administrative power, with the judiciary at the outside edge.[148] The following cases serve as examples of where people were sentenced to death for economic crimes in China as reported by media, as information about most death sentences remain unavailable to the public. The Chinese government however prefers to lower the profile of death penalty cases and the media does therefore not necessarily systematically cover death penalty cases.[149]

3.4.a *Case Law*

3.4.a.i *Cases involving immediate execution of Chinese state officials*

Cheng Kejie, the Chairman of the Guangxi Autonomous Regional Government, was executed in 2000 for taking 41.09 million yuan in bribes.[150] Hu Changqin, the deputy governor of the province of Jiangxi, was executed in 2000 for corruption. Wang Huaizhong, a vice-governor of Anui, was executed in 2003 for corruption.[151] In 2007, Zheng Xiaoyu, the former director of the National Food and Drug Agency, was executed for accepting 6.49 million RMB worth of bribes. He accepted the bribes from pharmaceutical corporations and in return, he approved their unsafe or worthless products. In 2009, Li Peiying, the former chairperson of the Beijing Capital International Airport, was sentenced to death and immediately executed for accepting over 100 million RMB in bribes.[152] In July 2011, two former mayors, namely Xu Maiyong and Jiang Renjie, were executed for accepting bribes of tens of millions of US dollars and

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[147] Vivvienne Bath 'China, International Business, and the Criminal Law' (2011) 13 *Asian-Pacific Law & Policy Journal* 1 at 27.
[148] Nanping Liu 'Legal Precedents with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court' (1991) 5 *Journal of Chinese Law* 107 at 108.
[149] Lin Zhu 'Punishing Corrupt Officials in China' 2015 *The China Quarterly* 595 at 613.
[150] Syamsuddin; M. Syukri Akub; Slamet Sampurno & Suamsuddin Muchtar 'Comparative Study of Perpetrators of Corruption Between Indonesia and China' (2017) 57 *Journal of Law, Policy and Globalization* 82 at 85.
[151] Zhu op cit note 149 at 611.
[152] Zili op cit note 125 at 54.

further embezzlement and abuse of their powers.[153] In July 2013, Zeng Chengji was executed for illegally raising an amount of 3.4 billion yuan and defrauding investors.[154] Xiao Hongbo, a bank official, was also executed for corruption.[155]

3.4.a.ii *Cases involving suspended death penalty sentences of state officials*

In 2003, Li Jiating, secured benefits for others by taking advantage of his position by accepting extremely huge bribes and was sentenced to death. His sentence was suspended for two years as he exposed the criminal activities of others, confessed to his crimes and the illegal money was retrieved.[156] Chen Tonghai, CEO of Sinopec, was convicted of accepting over 200 million RMB worth of bribes. On 15 July 2009, the Beijing Second Intermediate People's Court sentenced him to death, suspended for two years. Mitigating factors in his case were that he surrendered himself, returned all the money and exposed important information regarding other criminals.[157] Two former directors of Construction and Housing within the People's Liberation Army Logistics Department, namely Gu Junshan and Wang Shouye, were convicted of accepting bribes. In respectively 2006 and 2015 both men were sentenced to death for embezzlement, suspended for two years.[158] In 2012, Zheng Niansheng, a development zone official, was convicted of accepting bribes and sentenced to death, as well as being deprived of his political rights for life and confiscation of his personal property. His death sentence was suspended for two years as he confessed to some of the facts and most of the bribery income was seized.[159] In July 2013, Liu Zhijun, the former minister of railways, was sentenced to death with a delay of two years for abuse of power and corruption,

[153] Margaret K. Lewis 'Presuming Innocence, or Corruption, in China' (2012) 50 *Columbia Journal of Transnational Law* 287 at 289.
[154] Mimi Lau 'New cases spur debate on capital punishment; Beijing has made some strides in reforming how death penalty gets meted out, but experts say more transparency is needed in system' *South China Morning Post* 10 October 2013 at 9.
[155] Syamsuddin et al op cit note 150 at 87.
[156] Translation of *The No. 2 Branch of the People's Procuratorate of Beijing Municipality v. Li Jiating* 2003 (Beijing Higher Court) by lawinfochina.com.
[157] Ibid.
[158] He Jiahong 'Assessment and Analysis of Corruption in China' (2015) 3 *China Legal Science* 32.
[159] Translation of *People v. Zheng Niansheng* 2012 (Guangdong Higher People's Court) by lawinfochina.com.

including the acceptance of bribes of over 10 million US dollars.[160] Suspended death sentences are usually commuted to life sentence and therefore public officials receiving this sentence are not expected to face execution. Zhijun's case is an example of the trend where China creates contradictions when it gives mercy for only corrupt state officials or politically connected individuals and not those without political power who would probably have been executed immediately.[161]

3.4.a.iii *Cases involving Chinese citizens*

Hu Xiaohong was sentenced to death in 2001 for the illegal trading of explosive substances and Wang Yushun and Hao Fengqin were sentenced to death for illegally producing and trading explosive substances.[162] In 2009, Yang Yanming, the former senior trader at a Chinese securities company, was executed for embezzlement and misappropriating 94.5 million yuan.[163] In 2012, Song Wendai, former CEO of a state-owned silver and gold refinery, was executed for embezzling 87 million yuan.[164]

3.4.a.iv *The Siemens cases*

In the Siemens cases, bribes were made to foreign government officials to obtain business worldwide, including in China. In these cases, Shi Wanzhong and Zhang Chunjiang, former senior executives of Chinese mobile public enterprises, were sentenced to a postponed death penalty in 2011 for taking bribes. Even though this case concerned Chinese citizens and was decided in a Chinese court, foreign investors, especially multinationals, must note how this

[160] Olha V Shevchenko & Stanislav O. Osyatinskiy 'Is it necessary to Establish Severe Punishments for Corruption (Experience of China and Singapore)?' (2015) 14 *The Journal of Eastern European Law* 198 at 199.
[161] Jessica J. Shen 'Killing a Chicken to Scare the Monkey: The Unequal Administration of Death in China' (2014) 23 *Pacific Rim Law & Policy Journal* 869.
[162] Translation of *The Case of Jin for Intentional Murder and Causing of Explosion, of Wang and Hao Fengqin for Illegal Producing and Trading of Explosive Substances, and of the Defendant Hu Xiaohong for Illegal Trading of Explosive Substances* 2001 (4) SPC Gazette **(**The Higher People's Court of Hebei Province) by lawinfochina.com.
[163] Shen op cit note 161 at 893.
[164] Shen op cit note 161.

case originated.[165] Information on the Chinese staff involved in the Siemens cases were sent to China via diplomatic channels.[166] The US Securities and Exchange Commission and the Department of Justice investigated Siemens AG, a multinational company, for violations of the US Foreign Corrupt Practices Act, involving actions in, amongst others, China. The Securities and Exchange Commission reached a settlement with Siemens AG for the company's contravention of the act. It was a multi-jurisdictional enforcement action as the US and German authorities worked together to investigate the actions of Siemens in various countries under the mutual legal assistance provisions of the 1997 Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[167] The investigation uncovered corrupt activities involving Chinese companies and citizens and the information was sent to Chinese authorities. This information exchange between governments led to the prosecution of the aforementioned Chinese individuals.[168] These trials were not open to the public as it was deemed to involve state secrets. China has however not asserted jurisdiction over Siemens, its subsidiaries or the non-Chinese citizens involved in the cases.[169]

3.4.b *Guiding Cases*

The Supreme People's Court of China introduced the Guiding Cases System in 2010 that provides a beneficial addition to statutory law. According to this system, guiding cases are selected by the Supreme People's Court of China in order to give guidance and reference to judicial personnel at all levels when adjudicating similar cases. Only a small number of cases are however selected, there are currently 92 guiding cases, and implementation thereof comes with many problems.[170] Guiding cases are prepared with

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[165] Stan Abrams 'What The Siemens Bribery Case Says About The Future Of Corruption In China' available at *https://www.businessinsider.com.au/what-the-siemens-bribery-case-says-about-the-future-of-corruption-in-china-2011-6*, accessed on 18 July 2018.
[166] Bath op cit note 147 at 29.
[167] Elizabeth K Spahn 'Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention' (2012) 53 *Virginia Journal of International Law* 1 at 27.
[168] Abrams op cit note 165.
[169] Spahn op cit note 167 at 50.
[170] Jiang Xiaoyi & Shao Ling 'The Guiding Case System in China' (2013) 1 *China Legal Science* 106 at 130.

an emphasis on abstracting guiding principles however there are substantial regional differences in China, therefore the guiding cases are not timely and practical enough to meet the needs of local courts.[171]

Guiding case number 3 relates to article 385(1) of China's criminal law. This case concerns state officials, Pan Yumei and Chen Ying, who exploited the advantages of their offices to seek benefits for others and accepted others' property of particularly enormous amounts, respectively RMB 11.902 million and RMB 5.59 million. The mitigating factors in the case were that both defendants confessed their crimes, they returned part of the illegal money before the hearing and cooperated in recovering the outstanding money after the crime was exposed. On 30 November 2009, the Higher People's Court of Jiangsu Province upheld the Intermediate People's Court of Nanjing Municipality's sentences of them being found guilty of accepting bribes. Pan Yumei received the death penalty with a two-year suspension of execution, was confiscated of all property rights and deprived of all political rights for life. Chen Ning received life imprisonment, was confiscated of all property rights and deprived of all political rights for life.[172]

3.5 ECONOMIC CRIMES COMMITTED BY FOREIGNERS

China has had an increase in crimes committed by foreign companies and individuals since its opening up and internationalisation process. The increase in the number of crimes committed by foreign individuals and companies in China has become a big problem and the punishment and prevention thereof is an urgent issue for China.[173] There are massive crimes committed by foreign companies in China, for instance commercial bribery, smuggling, and fraud.[174] Section 4 of China's Criminal Law states that:

> "Article 30 Any company, enterprise, institution, State organ, or organization that commits an act that endangers society, which is prescribed by law as a crime committed by a unit, shall bear criminal responsibility.

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[171] Chen Kui 'How to Apply the Guiding Cases of the Supreme People's Court in Judicial Practice' available at *https://cgc.law.stanford.edu/commentaries/3-judge-chen,* accessed on 15 July 2018.
[172] Stanford Law School 'PAN Yumei and Chen Ning, A Bribe-Accepting Case' available at *https://cgc.law.stanford.edu/guiding-cases/guiding-case-3,* accessed on 15 July 2018.
[173] Yu Zhigang 'Criminal Offences Committed by Foreign Companies and Individuals in China: Theoretical Analysis and Policy Responses' (2013) 1 *China Legal Science* 73 at 77.
[174] Ibid at 81.

> Article 31 Where a unit commits a crime, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the crime shall be given criminal punishment. Where it is otherwise provided for in the Specific Provisions of this Law or in other laws, those provisions shall prevail."[175]

China therefore has a 'double penalty' as the unit and the person who is held personally liable will be punished.[176] China's judicial department however deals with crimes committed by foreign companies in an overly courteous manner, despite intolerance of corruption.[177] Prosecuted foreign individuals in China usually come from East Asian countries and Africa.[178] On 25 November 2008, the Guangzhou People's Intermediate Court announced eight drug cases involving foreign defendants who committed drug related crimes and that eight offenders were sentenced to death, suspended for two-years, and one to life imprisonment.[179] Since 2014, 2,566 fugitives of corruption crimes, including 410 former officials and 39 on the 100 most-wanted list, have also been deported to China by 72 countries. Most of these offenders took refuge in Canada, Australia and the US and a few in Africa.[180] The authors did not state whether the fugitives were both Chinese citizens and/or Chinese foreigners.

The procedural conduct of trials involving foreigners raises problems. In some cases, witnesses are not available for cross-examination, important evidence is produced at the last minute, suspects are detained for periods longer than prescribed by law, there are no open trials and consular representation is not allowed.[181]

3.6 CONCLUSION

Even though China is moving in the direction of abolition of the death penalty, it still imposes the death penalty for economic crimes on a significant scale. Corruption, by Chinese citizens and foreigners, is a serious problem in China and it is important for China to eradicate it. The territorial scope of China's Criminal Law is unlimited. It is applicable to anyone who commits a crime in China, to a citizen who commits a crime outside of China's territory and to a

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[175] Legislative Affairs Commission op cit note 140.
[176] Zhigang op cit note 173 at 76.
[177] Zhigang op cit note 173 at 92.
[178] Zhigang op cit note 173 at 85.
[179] Pan Xianglong & Qin Zonggen 'On the Prevention and Control Mechanism of Crimes Committed by Foreigners in Guangzhou' (2011) 5 *Journal of Political Science and Law* 84 at 86.
[180] Alexey Kurakin & Alexander Sukharenki 'Anti-Corruption in the BRICS Countries' (2018) 5 *BRICKS Law Journal* 56 at 59.
[181] Bath op cit note 147 at 32.

foreigner who commits a crime outside of China, against the state of China or its citizens, except for deminis exemptions. Available cases confirm that China imposes the death penalty for embezzlement and bribery and it is therefore not only a theoretical matter but also a serious reality.

CHAPTER 4: LEGAL MECHANISMS FOR THE EXCHANGE OF TAXPAYER INFORMATION

4.1 INTRODUCTION

Tax crimes often have an international facet, for example, where the proceeds from illicit transactions are kept out of the country or where a foreign jurisdiction is used to hide income or assets.[182] In order to fight tax crimes, it is important for countries to have a comprehensive and working international co-operation network. This may include exchange of information assistance between governments and internal exchange of information with all relevant national law enforcement and intelligent agencies, where appropriate.[183] Information sharing between government agencies can reveal new approaches to ongoing investigations, for example, where an investigation into a tax crime reveals money laundering or other criminal activity.[184] This chapter examines the possible ways in which China may use information received from South Africa, under a tax exchange of information mechanism, for criminal prosecution in non-tax matters.

Two of the exchange of taxpayer information mechanisms in place between South Africa and China are the China - South Africa Income Tax Treaty (2000) and the Multilateral Convention. Both these treaties are analysed in this chapter, as well as the question as to which agreement governs when conflicting treaty norms arise between the treaties. This chapter will further consider South Africa's actual performance in exchanging taxpayer information with treaty partners.

4.2 LEGAL STATUS OF OECD MATERIALS

Before interpreting the tax treaties between South Africa and China, it is necessary to study the applicability of the OECD model and commentaries, to non-OECD member countries. States negotiate treaties on various different model agreements of which the OECD model is the most prominent.[185] Official commentary accompanies and interprets the OECD model. South Africa and China is not OECD member countries, but they were awarded observer status

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[182] OECD 'Fighting Tax Crime: The Ten Global Principles' *OECD Publishing, Paris* 2017 para 124, available at *http://www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles.htm*, accessed on 31 July 2018.
[183] Ibid para 127.
[184] Ibid para 112.
[185] Alwyn de Koker 'Tax Treaties' in Alwyn de Koker & E Brincker (eds.) *Silke on International Tax* (2010).

in the Committee on Fiscal Affairs in 2004.[186] South Africa and China have generally adopted the OECD model as the basis for its tax treaties and has only made minor adjustments to it. The OECD commentary has persuasive force when interpreting non-OECD member treaties, which are based on the OECD model and where the contracting parties took no specific position.[187] The commentary is not legally binding on China or South Africa, but it is a highly influential tool for interpreting treaties.[188] South African courts have not explicitly pronounced the status of the OECD commentary, as they refer to the commentary without providing reasons for doing so.[189] The following chapter will establish that article 26 of the China – South Africa Income Tax Treaty (2000) largely follow the OECD Model (2000) and it can therefore be assumed that South Africa and China accept the OECD commentary as an interpretation aid.

A further question is what version of the OECD commentary must be used as it is updated regularly. Scholars follow the following two approaches, but there is not a consensus as to which approach must prevail. The ambulatory approach is that the law at the time when the treaty is applied must be followed and not the law at the time when the treaty was entered into.[190] The static approach is that the treaty should be interpreted based on the intentions of the parties at the time the treaty was entered into. The OECD's view is that existing treaties should be interpreted in the spirit of the revised commentary, but where the revision in the model or the commentary differ in substance from those used in previously concluded treaties, the revised commentary is irrelevant.[191] The updates to the commentaries has persuasive effect, but caution must be exercised when applying it to treaties that pre-date the specific set of commentary.[192] The following paragraphs will interpret the China – South Africa Income Tax

[186] OECD 'China, South Africa to participate in work of OECD's Committee on Fiscal Affairs' available at *http://www.oecd.org/newsroom/chinasouthafricatoparticipateinworkofoecdscommitteeonfiscalaffairs.htm*, accessed on 13 November 2018.
[187] De Koker op cit note 185.
[188] Lee-Ann Steenkamp 'The use of the OECD Model Tax Convention as an Interpretive Aid: the Static v Ambulatory Approach Debate considered from a South African Perspective' (2017) 10(2) *Journal of Economic and Financial Sciences* 195 at 198.
[189] Steenkamp op cit note 188 at 197.
[190] Steenkamp op cit note 188 at 198.
[191] Steenkamp op cit note 188 at 200.
[192] Steenkamp op cit note 188 at 202.

Treaty (2000) in the spirit of the revised OECD commentary, but not where it differs in substance from the OECD Model (2000).

4.3 EXCHANGE OF TAXPAYER INFORMATION INSTRUMENTS IN PLACE BETWEEN CHINA AND SOUTH AFRICA

4.3.a *Article 26(1) of the China-South Africa Income Tax Treaty (2000)*

Article 26(1) of the China – South Africa Income Tax Treaty (2000) states that:

> "The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Agreement or of the domestic laws of the Contracting States concerning taxes covered by the Agreement insofar as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Article 1. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Agreement. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions."[193]

Articles 26(1) of the OECD Model (2000) states that:

> "The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in the first sentence. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions." [194]

The following paragraphs explain the meaning of article 26(1) of the China – South Africa Income Tax Treaty (2000). This article provides for exchange of taxpayer information that is 'necessary' for carrying out the provisions of the treaty or the

[193] Art.26(1) *China - South Africa Income Tax Treaty.*
[194] *OECD Income and Capital Model Convention* art. 26(1) (29 April 2000), Models IBFD.

domestic laws of the contracting states concerning taxes covered by the treaty. The SARS states that they interpret the word 'necessary' as equivalent to the words 'foreseeably relevant' as used in the OECD Model (2017).[195] States must therefore meet a certain threshold of specificity when making an information request in order to prevent fishing expeditions.[196] The requested information is not restricted to information concerning residents of the contracting states and it therefore provides for exchange of information in respect of all persons.[197] Exchange of information is restricted to taxes covered by the treaty.

The commentary to the OECD Model (2017) and the Multilateral Convention indicate that exchange of information in criminal tax matters may also be based on multilateral or bilateral treaties on mutual legal assistance in place between countries, insofar as the treaties also apply to tax crimes. The Mutual Legal Assistance in Criminal Matters Treaty between the Republic of South Africa and the People's Republic of China, 2004 (China – South Africa Mutual Legal Assistance in Criminal Matters Treaty (2004)) as well as the Extradition Treaty between the Republic of South Africa and the People's Republic of China, 2004 are both in force. A restriction is set in the exchange of information provision in order to keep it within the context of the treaty, namely the wording that information should only be given insofar as the taxation under the domestic taxation laws concerned is not contrary to the treaty.[198]

The requesting state must protect the information exchanged as secret in the same manner as information received under the requesting state's domestic law.[199] The exchanged information may only be disclosed to authorities or persons, including administrative bodies and courts, involved in the collection or assessment of taxes, the enforcement of the obligation to pay tax or prosecution or appeals regarding the payment of tax. The information may only be disclosed to these persons, regardless of

[195] OECD 'Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: South Africa 2013: Combined: Phase 1 + Phase 2, incorporating Phase 2 ratings' *OECD Publishing* 2013 at para 195, available at *https://read.oecd-ilibrary.org/taxation/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-peer-reviews-south-africa-2013_9789264205901-en#page1*, accessed on 29 July 2018.
[196] OECD *Model Commentary* op cit note 42 para 5.
[197] D.M. Ring, *Article 26: Exchange of Information - Global Tax Treaty Commentaries s 2.1.1.*, Global Tax Treaty Commentaries IBFD (accessed 24 July 2018).
[198] OECD *Model Commentary* op cit note 42 para 5.3.
[199] Ring op cit note 197 s 2.2.1.

whether there are national disclosure laws that permit better access to governmental documents.[200] The information received may also not be exchanged with a third state, unless the treaty contains an express provision otherwise, which is not the case here.[201] The Commentary on the OECD Models (2000 & 2017) state that information may also be disclosed to taxpayers, their proxies or to witnesses.[202] Information may not be disclosed to authorities that supervise the general administration of a government of a contracting state, but who are not involved in tax matters specifically.[203] The authorised parties may use the information solely for tax purposes, namely the assessment of and collection of taxes, the enforcement and prosecution under the tax law and determination of appeals. Exchange of information may therefore be requested for both criminal and civil tax matters.

The third sentence of article 26(2) of the OECD Model (2017) further allows information received to be used 'for other purposes', but the China – South Africa Income Tax Treaty (2000), like the OECD Model (2000) on which it is based, does not authorise non-tax use of exchanged information.[204] The receiving state must resort to means specifically designed for those purposes when the information appears to be of value to the receiving state for non-tax purposes (e.g. in case of a non-fiscal crime, to a judicial assistance treaty).[205] Under the bilateral tax treaty, China can therefore not share information received from South Africa with the department of public prosecution in 'high priority matters' such as a corruption case. China must resort to other mechanisms specifically intended for those purposes.[206]

The information received may further be shared in public court proceedings or in judicial decisions, meaning cases dealt with by tax courts or in administrative or penal proceedings for tax offences.[207] Once the information is used in public court

[200] OECD *Model Commentary* op cit note 42 para 12.
[201] OECD *Model Commentary* op cit note 42 para 12.2.
[202] *OECD Model Tax Convention on Income and on Capital: Commentary on Article 26* para. 12 (29 April 2000), Models IBFD para 12.
[203] OECD *Model Commentary (2000)* op cit note 202 para. 12.1.
[204] Ring op cit note 197 s 2.2.3.
[205] OECD *Model Commentary (2000)* op cit note 202 para. 12.
[206] OECD 'International Co-operation against Tax Crimes and Other Financial Crimes: a catalogue of the main instruments' available at *http://www.oecd.org/tax/crime/50559531.pdf*, accessed on 30 July 2018.
[207] Dourado op cit note 43 para 277.

proceedings or court decisions that is rendered public and becomes common knowledge, then the information can be cited from the decisions or court files for other purposes, even as possible evidence.[208] This is in line with section 75 of the ITA. The authorised persons may however not provide, on request, additional information received.[209] Contracting parties must state expressly in the treaty if one or both of them demand that the information may not be made public by courts and consequently be used for other purposes, as it is not the usual procedure under the party's national law.[210] This was however not stated in the China – South Africa Income Tax Treaty (2000) and the author recommends that the treaty be amended to include this statement.

Article 26(4) of the OECD Model (2017) states that:

> "If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information."[211]

The China – South Africa tax treaty (2000) does not have a paragraph identical to this preceding article, but there is no difference in the interpretation of the treaty whether or not this paragraph is included or not.[212] Nonetheless, no domestic tax interest restrictions exist in South Africa's laws and therefore no information requests have been declined on the basis that South Africa must have a domestic tax interest in the information in order to obtain it.[213]

Article 26(5) of the OECD Model (2017) states that:

> "In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person."[214]

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[208] OECD *Model Commentary* op cit note 42 para 13.
[209] Ibid.
[210] OECD *Model Commentary* op cit note 42 para 13.
[211] Art. 26(4) *OECD Model* (2017).
[212] Ana Paula Dourado & Johannes Becker 'Article 26. Exchange of Information' in Ekkehart Reimer & Alexander Rust (eds) *Klaus Vogel on Double Taxation Conventions* 4ed (2015) para 326.
[213] OECD *Global Forum* op cit note 195 para 206.
[214] Art. 26(5) *OECD Model* (2017).

The China – South Africa tax treaty (2000) does not have a paragraph identical to the preceding paragraph. Without this rule, there are no obligations on a contracting state to supply banking information to the other contracting state. Nonetheless, South Africa permits exchange of banking information in the absence of this paragraph.[215]

4.3.a.i *Methods of exchange of taxpayer information*

Under the treaty, information can be exchanged upon request, automatically or spontaneously, or these forms can be combined.[216] The exchanging states may further use other mechanisms where the information may be important to both contracting states, for example a tax examination abroad, a simultaneous examination or an industry-wide exchange of taxpayer information.[217] This paper will however not focus on these additional forms.

Exchange of taxpayer information upon request is where one state's competent authority requests information from another state's competent authority, concerning a certain case. The requested competent authority will then secure and transmit the requested information to the requesting competent authority, unless the requested state finds a ground upon which to refuse the information exchange.[218] The competent authority of the requested state therefore has the responsibility to determine whether the requested information is appropriate under the treaty.[219]

Contracting states may draft article 26 of a tax treaty to label certain information to be shared automatically, without a request or a link to a specific tax matter, with the other contracting state. The China – South Africa Income Tax Treaty (2000) does not have an automatic exchange of taxpayer information provision in place.[220]

[215] OECD *Global Forum* op cit note 195 para 203.
[216] OECD *Model Commentary* op cit note 42 para 9.
[217] OECD *Model Commentary* op cit note 42 para 9.1.
[218] Ring op cit note 197 s 2.5.2.
[219] Ring op cit note 197 s 2.5.1.
[220] Ring op cit note 197 s 2.5.2.3.

Contracting states may spontaneously exchange information when they discover information that may be useful and relevant to the other contracting state. The China – South Africa Income Tax Treaty (2000) does not explicitly provide for spontaneous exchange of taxpayer information.

4.3.b *The Joint Council of Europe / OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters as amended by the 2010 Protocol (Multilateral Convention)*

Both China and South Africa have signed and ratified the Multilateral Convention and included the China- South Africa Income Tax Treaty (2000) in their list of covered tax agreements under article 2(1)(a)(ii). According to article 1(3) of the Multilateral Convention, the Multilateral Convention aims to secure assistance in information exchange for both residents and non-residents. The taxes applicable to information exchanged under the Multilateral Convention are very broad and include taxes imposed at both the national and local levels, but both China and South Africa made reservations under article 30(1)(a) of the Multilateral Convention against providing assistance concerning certain kind of taxes.[221] China further limits the geographical reach of the Multilateral Convention to not apply to Hong Kong or Macau.[222] The Multilateral Convention will however apply to the Hong Kong Special Administrative Region and the Macao Special Administrative Region of China from 1 September 2018, subject to certain reservations.[223] Under articles four to ten of the Multilateral Convention, foreseeably relevant information can be exchanged on request, automatically, spontaneously or under simultaneous examinations and tax examination aboard.[224]

[221] Namely, taxes on income, profits, capital gains or net wealth which are imposed on behalf of political subdivisions or local authorities of a party; compulsory social security contributions payable to general government or to social security institutions established under public law; taxes on the use or ownership of movable property other than motor vehicles; taxes in categories referred to in sub-paragraph 2(1)(b)(iii) which are imposed on behalf of political subdivisions or local authorities of a party. China made a further reservation for estate, inheritance or gift taxes. South Africa further made a further reservation for taxes on the use of motor vehicles.
[222] Ring op cit note 197 s 4.2.
[223] Council of Europe 'Reservations and Declarations for Treaty No.127 - Convention on Mutual Administrative Assistance in Tax Matters' available at *https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/127/declarations,* accessed on 10 August 2018.
[224] Ring op cit note 197 s 4.2.

Further, the Model Competent Authority Agreement for automatic information exchange is also executed under article 6 of the Multilateral Convention.[225] Both South Africa and China signed the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information. South Africa's anticipated first information exchange date was September 2017 and China's date was September 2018.[226] The Standard for Automatic Exchange of Financial Account Information in Tax Matters contains the Common Reporting Standard, namely due diligence rules that financial institutions must follow when reporting information. South Africa has made the necessary domestic law amendments in order to implement the OECD's plan for automatic information exchange. Section 26 of the TAA was amended to require that South African financial institutions must collect certain information, with an associated obligation on the financial institutions to register with the SARS. This amendment was necessary to allow for the SARS to implement agreements under international tax standards, as the OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters. South Africa's domestic law stipulates that financial institutions must report on all foreign account holders and all foreign controlling persons of entity account holders, irrespective of whether there is a treaty in place between South Africa and their residence jurisdiction or whether that country is a Common Reporting Standard partaking member.[227]

The Multilateral Convention differs from the China – South Africa Income Tax Treaty (2000) in that article 22(4) of the Multilateral Convention allows contracting states to use the information that they received from the other state, for non-tax purposes. The prerequisite is that the information may be used for such other purposes under the laws of the supplying state (for example in cases of a treaty concerning judicial assistance or a non-fiscal crime) and that their competent authority authorises

[225] Ring op cit note 197 s 1.2.5.4.
[226] OECD 'Signatories of the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information and intended first information exchange date' available at *http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/MCAA-Signatories.pdf*, accessed on 30 July 2018.
[227] SARS 'Exchange of Information Conventions / Agreements' available at *http://www.sars.gov.za/Legal/International-Treaties-Agreements/Pages/Exchange-of-Information-Agreements-(Bilateral).aspx*, accessed on 30 July 2018.

such use.[228] If it is not for this article, contracting states must exchange the information under a mechanism specifically intended for such other purposes, for example a treaty concerning mutual assistance in judicial matters.[229] Article 22(4) therefore provides for information sharing with judicial and law enforcement authorities in important cases, for example to fight money laundering, terrorism financing or corruption.[230] The receiving state must specify the non-taxation purpose for which it wants to use the information in their request to the supplying state.[231] The supplying state is expected to authorise a non-tax use where it has concluded an international agreement or made other arrangements with the requesting state on mutual assistance between judicial authorities and other law enforcement agencies.[232] The China – South Africa Mutual Legal Assistance in Criminal Matters Treaty (2004) is an example of such a treaty and South Africa will therefore be expected to authorise such non-tax use when China requests it, subject thereto that it meets the secrecy requirements set out in article 22 of the Multilateral Convention. The law enforcement agencies and judicial authorities of the receiving state must further treat the information as confidential.

Article 22(4) of the Multilateral Convention facilitates the multilateral sharing of information with third parties, if the competent authority of the requested state authorises such use.[233]

4.3.b.i *Information sharing with governmental agencies under South African domestic law*

Article 22(4) of the Multilateral Convention states that China may use exchanged information for non-tax purposes, if the information may be used for such purposes under South Africa's laws and South Africa authorises such use. This paragraph therefore considers whether South Africa's laws allow exchanged information to be used for non-tax purposes.

[228] Dourado op cit note 43 para 266.
[229] OECD *Explanatory Report* op cit note 46 para. 225.
[230] Ibid.
[231] Dourado op cit note 43 para 267.
[232] Dourado op cit note 43 para 267.
[233] Ring op cit note 197 s 4.3.1.

The SARS may share information with agencies investigating tax offences. The South African Police Service (SAPS) can acquire information relating to a non-tax investigation from the SARS under an *ex parte* court application or where a particular request is made under specific legislation relating to the investigation and prevention of serious organised crime. The SARS is further obliged to report information relating to possible terrorist financing or money laundering to the Financial Intelligence Centre (FIC) under section 36(1) of FIC Act,[234] which is not limited by the SARS's statutory duty of confidentiality. For the purpose of ongoing criminal investigations and prosecutions, the SARS is allowed to share information with financial regulatory agencies such as FIC, the National Credit Regulator, the South African Reserve Bank and the Financial Services Board.[235] In the event that alleged criminal offences include both non-tax and tax offences, the SARS will co-operate with other law enforcement agencies, but the SARS will run its own parallel investigation and share information with the joint investigation team.[236]

The first provision of the Multilateral Convention, i.e. that China may use information from South Africa for non-tax purposes, provided that the information may be used for such other purposes under South African law and the SARS authorises such use, is met as the SARS may share information with SAPS for use in a non-tax investigation, under an *ex-parte* court application.[237]

4.4 POSITION WITH MORE THAN ONE EXCHANGE OF TAXPAYER INFORMATION INSTRUMENT IN PLACE

China and South Africa have several agreements with exchange of taxpayer information mechanisms in place between them, including a bilateral treaty and both countries are signatories to the Multilateral Convention. Pertaining to the use of exchanged information for other purposes, the Multilateral Convention and the China – South Africa Income Tax Treaty (2000) have conflicting treaty norms. The Multilateral Convention allows the exchanged

[234] Financial Intelligence Centre Act 38 of 2001.
[235] OECD *Effective Inter-Agency Co-operation in Fighting Tax Crimes and Other Financial Crimes* 3 ed (2017) 441.
[236] Ibid para 316.
[237] Supra note 1 s 71.

information to be used for non-taxation purposes, but the bilateral treaty does not. The only way in which exchanged information may be used for non-tax purposes under the bilateral treaty is when it is made public in court proceedings. The question therefore arises as to which agreement governs.

Where there are two or more exchange of taxpayer information instruments in place between South Africa and another state, the parties may choose the most appropriate instrument under which to exchange information.[238] Article 27 of the Multilateral Convention, as well as the commentary to the OECD Model (2017),[239] state that the assistance granted under it does not limit, nor is it limited by, other exchange of information agreements between the countries.[240] The commentary of the OECD Model (2017) states that the provisions of more specialised instruments shall generally prevail over the bilateral tax treaty and uses the example of the exchange of information for custom duties, which has a legal basis in other instruments.[241] The commentary to the Multilateral Convention further states that countries may use the most effective and least restrictive available instrument. The less restrictive provisions in instruments will prevail. In practice, when a country is a party to the Multilateral Convention and a bilateral tax treaty, the competent authority of the requesting state will request assistance under the instrument that will be the most effective.[242] Contracting states may therefore choose to apply the most appropriate instrument for a specific case, but they may not concurrently implement more than one mechanism.[243] The reference to 'other international agreements' in article 27 of the Multilateral Convention is very wide and includes bilateral agreements. The most appropriate instrument for circumstances where a requesting state wants to use exchanged information for non-tax purposes is the Multilateral Convention. Article 22(4) of the Multilateral Convention will prevail over article 26 of the China - South Africa Income Tax Treaty (2000) as it is the most effective and least restrictive instrument, as it provides for the use of the information for non-tax purposes. However, as stated in 4.2 above, the legal status of the OECD materials for non-OECD members is problematic. A further legal doctrine of international law that may help address the overlap is the doctrine of *lex specialis*,

[238] OECD *Global Forum* op cit note 195 at 86.
[239] OECD *Model Commentary* op cit note 42 para 5.5.
[240] Ring op cit note 197 s 4.3.2.
[241] OECD *Model Commentary* op cit note 42 para 5.5.
[242] OECD *Explanatory Report* op cit note 46 para 267.
[243] Ibid.

namely that special legislation overrides general legislation. Where two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. Under this doctrine, the Multilateral Convention, which specifically deals with assistance in tax matters in detail, will prevail over the bilateral treaty. Further, South Africa and China is bound to the Vienna Convention on the Law of Treaties (VCLT). Article 30 deals with the application of successive treaties relating to the same subject matter and article 30(3) of the VCLT states that:

> "When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."[244]

Both China and South Africa are parties to the earlier bilateral treaty and the later Multilateral Convention, and the bilateral treaty is not compatible with the Multilateral Convention concerning the use of information for other purposes. The author therefore concludes that the *lex specialis* doctrine and article 30(3) of the VCLT support the view that the provisions of the Multilateral Convention will override article 26 of the bilateral tax treaty, with regards to the use of exchanged information for non-tax purposes.

The OECD published the Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions in 2009. One of the recommendations is that member countries and parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) must consider including in their respective tax treaties wording that allows tax authorities to share tax information with judicial authorities and other law enforcement agencies on certain important cases.[245] Neither China, nor South Africa are OECD member countries, but South Africa ratified the OECD Anti-Bribery Convention on 19 June 2007.

The OECD's first forum on tax and crime, namely the Oslo Dialogue, encourages government agencies to work together both domestically and internationally to fight economic

[244] Vienna Convention on the Law of Treaties of 1969, art 30(3).
[245] OECD 'Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions' available at *http://www.oecd.org/ctp/crime/2009-recommendation.pdf*, accessed on 30 July 2018.

crimes.[246] This forum is supported by the G20[247], therefore China and South Africa also support the forum. The G20 also supports international cooperation to prevent, investigate and prosecute corruption and to return stolen assets. The G20 further promotes co-operation between law enforcement and other relevant authorities within and between countries.[248]

Both the OECD Anti-Bribery Convention and the G20 support co-operation between governmental agencies in order to combat economic crimes. South Africa and China's support hereto therefore further illustrates their approval of article 22(4) of the Multilateral Convention. South Africa and China's demonstrated their 'approval' when they ratified the Multilateral Convention under the Constitution in South Africa and under China's Constitution and the Law of the People's Republic of China on the Procedure of the Conclusion of Treaties.[249]

4.5 SOUTH AFRICA'S EXCHANGE OF TAXPAYER INFORMATION PERFORMANCE

The Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: South Africa 2013, states that South Africa is able to respond to information requests quickly and with high quality.[250] In the period accessed, South Africa exchanged information within 90 days in 80% of the cases, within 180 days for 10% more cases and sent updates where information was delayed. South Africa's peers consider South Africa a cooperative and reliable partner. [251] South Africa's overall rating is 'compliant' for its legal and regulatory framework and the effectiveness of its exchange of taxpayer information in practice.[252]

The Enforcement Risk Planning Division of the SARS is responsible for the daily administration of exchange of taxpayer information requests. This division has direct access to a database containing general information on taxpayers and their income as received by filed tax returns, as well as various external databases, for example the property register and the Companies and Intellectual Properties Commission's register. The SARS has the power to

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[246] Ring op cit note 197 s 1.2.5.12.
[247] The G20 (Group of Twenty) is an international forum for the finance ministers and central bank governors from the European Union and 19 countries, including China and South Africa.
[248] G20 'G20 Anti-Corruption Action Plan 2017-2018' available at *https://www.mofa.go.jp/files/000185882.pdf*, accessed on 5 August 2018.
[249] XUE Hanqin & JIN Qian 'International Treaties in the Chinese Domestic Legal System' (2009) 8(2) *Chinese Journal of International Law* 299 at 301.
[250] OECD *Global Forum* op cit note 195 at 8.
[251] OECD *Fighting Tax Crime* op cit note 182 para 10.
[252] OECD *Fighting Tax Crime* op cit note 182 para 10.

request information, search businesses, make formal inquiries and seize documents from anyone within their jurisdiction. If a person fails to provide the requested information, that person will receive a penalty.[253] These access powers can be used even though South Africa does not have a domestic interest in the information, because South Africa's information exchange agreements are implemented in South Africa's domestic law.[254] SAPS and the public prosecutor have discretions to provide information spontaneously to the SARS. Further, South Africa has no secrecy provisions that can obstruct access to information and no safeguards and rights, for example appeal or notification rights, which may stop or postpone effective information exchange.[255]

4.6 CONCLUSION

The arguments in 4.4 above support the view that article 22(4) of the Multilateral Convention will prevail over article 26 of the China - South Africa Income Tax Treaty (2000). Under the Multilateral Convention, information received from the other contracting state, may be used for other, non-tax purposes, provided that certain prerequisites are met. Where China receives information from South Africa under the Multilateral Convention, China may use it in a criminal case that may lead to a South African taxpayer being sentenced to death. The SARS has the responsibility to determine whether the requested information is appropriate under the treaty before authorisation of the use of the information for non-tax purposes under article 22(4) of the Multilateral Convention. Whether it is information exchanged on request, spontaneously or automatically, the SARS has a legal duty to determine whether exchanging the information will be against South Africa's public policy or not. This is particularly important in light thereof that South Africa is a reliable exchange of taxpayer information partner and that the SARS has access to several databases and has investigative powers. The SARS must therefore ensure that they use their powers correctly by determining whether the exchange of taxpayer information may be against South Africa's public policy.

[253] OECD *Fighting Tax Crime* op cit note 182 para 6.
[254] OECD *Fighting Tax Crime* op cit note 182 para 147.
[255] OECD *Fighting Tax Crime* op cit note 182 para 148.

CHAPTER 5: THREE CASE STUDIES

5.1 INTRODUCTION

This chapter analyses possible scenarios of exchange of South African taxpayers' (as defined in 1.5) information with China. It provides detailed application of the theory discussed in the preceding content chapters to possible scenarios.

5.2 APPLICATION TO PROBABLE SCENARIOS

5.2.a *The fraudulent South African lawyer*

5.2.a.i *Facts*

A South African lawyer renders professional services in both South Africa and China. She is a citizen of South Africa and a tax resident in South Africa, as well as a taxpayer in China. She embezzled 90 Million RMB of her Chinese clients', who are state owned companies, trust account money for her personal benefit in bank accounts in South Africa. She has not been tried or received criminal punishment in South Africa for this crime. The Chinese state conducts a tax investigation into the affairs of the lawyer and based on the investigation the Chinese tax authorities believe that she holds several undeclared bank accounts with South African banks.[256] China therefore requests, under article 5(1) of the Multilateral Convention, information from South Africa on all her accounts with South African banks.

5.2.a.ii *Application of China's Criminal Law*

Article 383(3) of China's Criminal Law states that if an individual embezzles an especially huge amount, which causes especially serious loss to the interests of the State and the people, that person shall be sentenced to life imprisonment or death and concurrently sentenced to confiscation of property.

Article 8 of China's Criminal Law, as outlined in 3.3.b.i above, applies, as the lawyer is a Chinese foreigner who commits a crime in South Africa against Chinese citizens and the state of China, as the clients are state owned

[256] OECD *Model Commentary* op cit note 42 para 5. para 8(e).

companies. Further, article 8 requires that China's Criminal Law must prescribe a minimum punishment of a fixed-term imprisonment of three years and the crime must be punishable according to the laws of the place where it is committed. China's Criminal Law prescribes a minimum punishment of life imprisonment or death penalty and the crime of embezzlement is punishable according to South African law. China's Criminal Law will therefore apply in this scenario.

5.2.a.iii *Remedy afforded to a taxpayer*

Under article 22(4) of the Multilateral Convention, as outlined in 4.3.b above, the information received by China may be used for non-tax criminal matters, as it may also be used for such purposes under South African domestic law. As described in 4.6 above, if the SARS authorises the use of the information for other purposes, China may use the received information in a criminal case against the lawyer, that may lead to her being sentenced to death.

Under article 21(2)(d) of the Multilateral Convention, as outlined in 2.2 above, South Africa is not obliged to carry out measures that would be contrary to South Africa's public policy. Before exchanging the information and authorising its use for non-tax purposes, the SARS must take reasonable steps to evaluate whether it is foreseeable that the exchange of taxpayer information will be against South Africa's public policy. As stated by Dourado in 2.2 above, the SARS must do a fundamental evaluation of the purpose for which the information is requested or how the information is going to be handled by China and whether it is compatible with South Africa's constitutional right to life and its international obligations. The SARS will know if China wants to use information for non-tax purposes as it is a prerequisite of article 22(4) of the Multilateral Convention that the SARS must authorise this use. As stated in 4.3.b, China must specify to the SARS the non-tax purpose for which they want to use the information. The author recommends that the SARS must consult with a Chinese legal expert and the Chinese tax authorities to establish whether the information could, foreseeably, result in the death penalty and what the

execution method might be. As stated in 4.3.a, the SARS may disclose the information to the taxpayer. Further, based on *Kaunda v the Republic of South Africa* in 2.4 above, the author recommends that the SARS must warn the taxpayer that the SARS will send the information to China, even though the SARS does not have a duty to warn the taxpayer. It is currently not the SARS' practice to notify the relevant taxpayer upon receiving an information exchange request from another state and taxpayers are not afforded the opportunity to make any representations during the exchange process, nor are they informed of the exchange after the fact.[257] A taxpayer does not have a right to be notified of an exchange of information request, nor does the taxpayer have a right to appeal or object to the request. The author however recommends that it is best practice for the SARS to give the taxpayer concerned notice of the impending exchange, with an opportunity to make representations, to check the accuracy of the information and to alert the taxpayer to the potential non-tax use and sanctions. A taxpayer's right to be informed of a taxpayer information exchange and to challenge the accuracy of the information ought to be afforded to the taxpayer under South Africa's domestic tax laws.[258]

South Africa's public policy does not support the death penalty, as established in 2.5 above. The SARS will therefore not be obliged to exchange information where it is foreseeable that it may lead to imposition of the death penalty on the lawyer in China. Further, as stated in 2.5, an information exchange under these circumstances will be contrary to the lawyer's constitutional right to life in South Africa and, in the event that the method of execution in China is cruel, inhuman or degrading, it will be against South Africa's international obligations. The lawyer is within the jurisdiction of the

[257] Louise Möller *An analysis of the current framework for the exchange of taxpayer information, with special reference to the taxpayer in South Africa's constitutional rights to privacy and just administrative action* (unpublished LLM thesis, University of Cape Town, 2016) para. 2.2.
[258] Andy Mazz, Irma Mosquera Vulderrama & Jennifer Roeleveld et al 'The rule of law and the effective protection of taxpayers´ rights in developing countries' (2017) *10 WU International Taxation Research Paper Series* 1 at para 3.2.2.

Constitution as she is a natural person in South Africa. The SARS therefore has a duty not to exchange the information.

5.2.b *The smuggling Chinese flight attendant*

5.2.b.i *Facts*

A flight attendant of Cathay Pacific regularly works on flights between Beijing, China and Johannesburg, South Africa. The flight attendant is a taxpayer in South Africa, as he owns an apartment in South Africa from which he earns rental income. He is a citizen and tax resident of China. He illegally transported explosive substances on the flights from China and illegally traded the explosives in Johannesburg. Upon arrival at OR Tambo International Airport, the flight attendant was caught in possession of explosives when he passed through customs control and was held at the airport. Further, the SARS had information on the flight attendant's income from illegal trading that they wanted to spontaneously exchange with China. Under article 7(1)(a) of the Multilateral Convention, South Africa shall, without prior request, forward to China information of which it has knowledge where South Africa has grounds for supposing that there may be a loss of tax in China.

5.2.b.ii *Application of China's Criminal Law*

Article 125 of China's Criminal Law states that whoever illegally transports or trades in explosives and where the circumstances are serious, shall be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death.

According to article 6 of China's Criminal Law, as outlined in 3.3.b.i above, this law shall be applicable as the flight attended committed a crime on board an aircraft of China by transporting explosives on the aircraft. Further, according to article 7 of China's Criminal Law, also outlined in 3.3.b.i, this law is applicable as the flight attendant is a citizen of China who committed the crime of trading in explosives in South Africa.

5.2.b.iii *Remedy afforded to a taxpayer*

Under article 22(4) of the Multilateral Convention, and as outlined in 4.3.b above, the information received by China, may also be used in non-tax criminal matters, if the SARS authorises this use. South Africa's information can therefore possibly result in the flight attendant being sentenced to death in China. Before exchanging the information and authorising its use for non-tax purposes, the SARS must take reasonable steps to evaluate whether it is foreseeable that the exchange of taxpayer information will lead to the imposition of the death penalty on the flight attendant in China. The content of the SARS's duty is explained in 5.2.a.iii.

People held at airports in South Africa, pending a decision on whether they may formally enter South Africa, are within the jurisdiction of South Africa for the enforcement of the Bill of Rights, as established in 2.4. The flight attendant therefore carries the protection of the right to life under section 11 of the Constitution. If the SARS exchanges information of the flight attendant with China, where it is foreseeable that it will lead to him being sentenced to death in China, it constitutes a violation of his right to life. Further, as outlined in 2.5, the information exchange will also breach South Africa's international obligations if the method of execution in China is cruel, inhuman or degrading.

South Africa's public policy is against the death penalty. Under article 21(2)(d) of the Multilateral Convention, and as outlined in 2.2 above, the SARS has a duty not to exchange information or approve its use for non-tax purposes, where it is foreseeable that it may lead to the imposition of the death penalty in China.

5.2.c *The corrupt Chinese executive*

5.2.c.i *Facts*

A senior executive of a Chinese public enterprise accepted large bribes in China from a multinational company to obtain business worldwide. The executive is in China and the proceeds from the illicit transactions are kept in South Africa.

The executive is a tax resident of Singapore, a citizen and taxpayer in China and a taxpayer in South Africa. Under article 6 of the Multilateral Convention, the SARS wants to automatically exchange the information regarding the proceeds from the bribery with China, as it is foreseeable that it is relevant for the enforcement of China's domestic laws, concerning the taxes covered by the Multilateral Convention.

5.2.c.ii *Application of China's Criminal Law*

Article 386 of China's Criminal Law, as stated in 3.3.b above, establishes that the executive shall be sentenced to life imprisonment or receive the death penalty and concurrently be sentenced to confiscation of property, for accepting the bribes.

According to article 6 of China's Criminal Law, as stated in 3.3.b.i above, this law is applicable as the executive committed a crime within China's territory.

5.2.c.iii *Remedy afforded to a taxpayer*

As outlined in 4.3.b above, if the SARS authorises the use of the information for other purposes under article 22(4) of the Multilateral Convention, China may use the received information in a criminal case against the executive that may lead to him being sentenced to death.

Under article 21(2)(d) of the Multilateral Convention, as outlined in 2.2 above, the SARS is not obliged to exchange the information or authorise its use for non-taxation purposes, as it is foreseeable that it may lead to imposition of the death penalty on the executive in China, which is against South Africa's public policy. The SARS must take reasonable steps to evaluate whether the information could, foreseeably, result in the death penalty of the executive and what the execution method might be. The SARS's duty is further explained in 5.2.a.iii above.

As stated in 2.5, an information exchange that may lead to the imposition of the death penalty will be contrary to South Africa's international obligations if the method of execution in China is cruel, inhuman or degrading.

Everyone, namely every person within the jurisdiction of the South African courts, has the right to life. The executive is not physically present in South Africa and constitutional protection is therefore not triggered, as established in 2.4 above. This however does not affect the public policy-based remedy provided under the Multilateral Convention. According to article 21(2)(d) of the Multilateral Convention, the SARS does not have an obligation to exchange information where the disclosure will be contrary to public policy. Therefore, even where the SARS does not have a constitutional obligation not to exchange the information, it is not obliged to do so as the death penalty is contrary to South Africa's public policy, as established in 2.3.

5.3 CONCLUSION

The possible scenarios of exchange of South African taxpayers' information with China illustrate that information exchanged under the Multilateral Convention may lead to the imposition of the death penalty on a South African taxpayer in China under China's Criminal Law. The SARS must take reasonable steps to evaluate whether the information could, foreseeably, result in the death penalty of a South African taxpayer in China. The SARS must not exchange the information or authorise its use for non-tax criminal matters where it is foreseeable that it may lead to a taxpayer being sentenced to death, because it is against South Africa's public policy, a taxpayer's right to life (where the taxpayer is within South Africa's jurisdiction) and South Africa's international obligations (where the imposition of the death penalty in China is cruel, inhuman or degrading).

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 INTRODUCTION

This chapter revisits the research question in light of the content chapters and thereafter, summary remarks and a conclusion are provided. The chapter then reviews the possibility of amending the wording of the treaties in order to clarify and reinforce the protection afforded to a South African taxpayer.

6.2 CONCLUSION

In summary, South Africa can exchange a South African taxpayer's information with China under the China – South Africa Income Tax Treaty (2000) or the Multilateral Convention. Pertaining to the use of this information in China for non-tax purposes, article 22(4) of the Multilateral Convention and article 26 of the China – South Africa Income Tax Treaty (2000) are conflicting treaty norms and article 22(4) of the Multilateral Convention will prevail. China may therefore use information received from South Africa, under the Multilateral Convention, for criminal prosecution of a South African taxpayer in non-tax matters in China, provided that the SARS authorises the use.

This paper established that China imposes the death penalty for economic crimes and the territorial scope of China's criminal law is unlimited. Available cases establish that China imposes the death penalty for embezzlement and bribery and it is therefore not only a theoretical matter. Where China therefore receives information from South Africa under the Multilateral Convention with authorisation that China may use the information for non-tax purposes, China may use it in a criminal case that may lead to a South African taxpayer being sentenced to death.

This paper further established that the SARS has discretion to use the public-policy based remedy in the tax treaties with China and refuse to exchange information as the death penalty is contrary to South Africa's public policy. The public policy-based remedy can also be enforced under the revenue rule. Where the South African taxpayer concerned is in South Africa, including at a sea- or airport, then the SARS has a constitutional obligation not to exchange the information. Further, the South African state has an international obligation not

to exchange the information where the method of execution in China is cruel, inhuman or degrading.

6.3 RECOMMENDATIONS FOR AMENDING SOUTH AFRICA'S TAX TREATIES

A further option, to reinforce the public policy-based remedies provided to a South African taxpayer under the China – South Africa Income Tax Treaty (2000) and the Multilateral Convention, is to amend the wording of these treaties to reinforce that South Africa's public policy prevents the imposition and enforcement of the death penalty.

Just like South Africa, Germany will not exchange information where it is in conflict with Germany's public policy. Germany reportedly envisioned making a reservation to the Multilateral Convention and an observation to the commentary to the Multilateral Convention in the 2014 update to state that Germany's public policy specifically prevents the imposition of the death penalty. The reservation and observation were however not included, presumably because it would have only clarified the meaning of public policy and all the states must have made the observation and reservation for it to be practical.[259] Germany's tax treaties usually state that exchanged information may be used in all tax proceedings, including criminal proceedings related to tax offences, but the Protocol to the China – Germany Income and Capital Tax Treaty (2014)[260] states that exchanged information may only be used in criminal matters with the prior consent of the supplying state. This reservation ensures that information cannot be used where it may lead to the imposition of the death penalty on a taxpayer.[261]

Further, article 26(3)(c) of the Germany - Tunisia Income and Capital Tax Treaty (unofficial translation) (2018), which is not yet in force, states that:

> "In the case of the Federal Republic of Germany, public policy (ordre public) includes in particular the prevention of the imposition and enforcement of death penalty. Where information is disclosed in a public trial or in a court decision, the Contracting States shall ensure that such information is not used for a procedure in which the death penalty is likely to be imposed and enforced." [262]

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[259] Daniel Dürrschmidt & Karin Kopp 'The practical protection of taxpayers' fundamental rights – Germany' (2015) 100B *IFA Cahiers* 423.

[260] *Agreement between the Federal Republic of Germany and the People's Republic of China for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on Capital* protocol no. 6(b)(2) (28 March 2014), Treaties IBFD.

[261] Dürrschmidt et al op cit note 259 at 424.

[262] *Convention between the Federal Republic of Germany and the Republic of Tunisia for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital* art. 26(3)(c) (8 February 2018), Treaties IBFD.

Further, the Italy – Panama Competent Authority Agreement on Automatic Exchange of Information (2017), which is not yet in force, states that:

> "Information exchanged may not be used or disclosed in proceedings that could result in the imposition and execution of the death penalty or torture or other severe violations of human rights (including tax investigations motivated by political, racial, or religious prosecution)."[263]

Amendments to the China – South Africa Income Tax Treaty (2000) and the Multilateral Convention in accordance with the wording of the examples above, will only clarify the meaning of South Africa's public policy. Further, the Multilateral Convention already affords the protection that the SARS must authorise the use of exchanged information in criminal matters in China. The author however recommends amendments of the treaties in accordance with the above examples as the wording reinforces what South Africa's public policy towards the death penalty is and therefore strengthens taxpayers' protection to prevent their information from being used in proceedings that may lead to the imposition of the death penalty. The current wording of the public policy-based remedy in the treaties are too technical and requires much reading in, based on OECD guidance. The amendments must give express recognition to limits imposed by the Constitution, namely the duty on SARS to take active steps to protect the right to life. Specific recommendations pertaining to the wording of the amendments are provided below.

6.4 FINAL RECOMMENDATIONS

The paper therefore found that a South African taxpayer has public policy-based remedies, but the following recommendations are proposed on how to reinforce the protection available to South African taxpayers:

- The SARS must protect a South African taxpayer's fundamental right to life by doing an evaluation, prior to the information exchange, of the purpose for which the information is requested or how the information is going to be handled by China and whether it is compatible with South Africa's public policy. Where the SARS foresees that there is a sufficient real risk that the SARS's action will lead to a taxpayer being sentenced to death

[263] *Agreement between the Competent Authorities of the Italian Republic and the Republic of Panama on the Automatic Exchange of Financial Account Information to Improve International Tax Compliance* s 5(2) (21 June 2017), Treaties IBFD.

in China, the SARS has a legal duty not to exchange the information with China. The SARS must further notify the taxpayer concerned of the impeding information exchange. This process must be followed in exchange of taxpayer information on request, automatic exchange of taxpayer information and spontaneous exchange of taxpayer information.

- South Africa must make a reservation to the Multilateral Convention and an observation to the commentary to the Multilateral Convention to state that South Africa's public policy specifically prevents the imposition and the enforcement of the death penalty.
- South Africa should seek an amendment of Article 26(1) of the China – South Africa Income Tax Treaty (2000) to state that information may not be made public by courts and consequently be used for a procedure in which the death penalty is likely to be imposed or enforced. In the alternative, that exchanged information may only be used in criminal matters with the prior consent of the supplying state.
- In the event that China does not agree to such amendments, another remedy must be found to ensure that the SARS does not inadvertently exchange information. An option is a memorandum of understanding with China, but this would only bind China's tax authority and not the rest of the government. A better option would be to use a unilateral instrument that binds the SARS, namely to obtain a binding general ruling under section 89 of the TAA. This ruling will clarify the SARS' interpretation of protecting a taxpayer's right to life in the exchange of taxpayer information process.

South Africa must be an example of practical protection of human rights to other developing and emerging countries. This paper concludes that legislation/treaties must be amended and the SARS's conduct in practice must be reformed to ensure that the constitutional right to life of a South African taxpayer remains protected amidst increased taxpayer information transparency.

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