



## the doj & cd

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Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA

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The Director-General  
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**Attention:** Mr H B van Heerden (Chief Directorate: International Legal Relations)

## DRAFT EXTRADITION TREATY AND TREATY ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS BETWEEN THE REPUBLIC OF SOUTH AFRICA AND THE UNITED ARAB EMIRATES: YOUR 8/8/3/1(GEN) DATED 1 JUNE 2011

### 1. Request

The Department of Justice and Constitutional Development informs us that a delegation comprising of officials from the Department and the National Prosecuting Authority has negotiated a draft Extradition Treaty and a draft Treaty on Mutual Legal Assistance in Criminal Matters with a delegation from the United Arab Emirates and requests us to scrutinise same to determine their compatibility with South African domestic law.

### 2. Discussion

2.1 We have scrutinised the Treaties with reference to-

- (a) the *Manual on Executive Acts of the President of the Republic of South Africa* ["the Manual"];

- (b) the Constitution of the Republic of South Africa, 1996;
  - (c) other relevant legislation;
  - (d) applicable international instruments; and
  - (e) the *Constitutional Handbook for Members of the Executive*, with a view to possible conflict with the domestic law of South Africa.
- We have also considered whether the Treaties are self-executing or non-self-executing agreements or agreements of a technical, administrative or executive nature.

2.2 The Manual requires that all international agreements submitted to the President for approval must have been scrutinised by our office for consistency with domestic law and appropriate and correct legal drafting.<sup>1</sup> The Manual points out that an international agreement includes any written agreement between the Republic of South Africa and another state or states.<sup>2</sup> Paragraph 5.1 of the Manual alludes to two frameworks for concluding international agreements, namely:

- One which applies to international agreements which require *ratification or accession* in order to be brought into effect; and
- another which applies to international agreements which merely require the signature of a duly authorised representative of a contracting state party to come into effect.

2.3 In order to be of assistance, we will *briefly* summarise the provisions of both Treaties. Where necessary, we also commented on the provisions and indicated certain suggested amendments directly on the text thereof.

### 3. The Extradition Treaty

#### The Preamble

The Preamble seeks to recall the friendly relations between the Parties and cooperation in the combating of crime. It also reaffirms the Parties' concern about the magnitude of acts of international terrorism and organized crime.

#### Article 1

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<sup>1</sup> Chapter 5, paragraph 5.20.

<sup>2</sup> See Chapter 5.

This Article creates a reciprocal obligation on the Parties to extradite to the other, in accordance with the Treaty and their respective domestic law, persons wanted for prosecution or execution of a sentence for an extraditable offence. Insofar as the Article purports to provide for the extradition of a person “*for investigation*”, we wish to point out that in international law parlance, the concept of extradition presupposes the surrender of a person to another state for the purpose of trial or the execution of a sentence. This means that the state must already have *prima facie* or sufficient evidence to prosecute the person. Since a person cannot be extradited to assist in “investigations” in another state, we suggest that the reference thereto be omitted.

#### Article 2

This Article specifies the Central Authorities of the respective Parties who shall make and receive requests for extradition.

#### Article 3

The conduct and offences for which extradition may be granted are expounded in this Article.

#### Article 4

The Article deals with offences for which extradition shall be refused, for instance, offences of a political nature and offences under military law which are not offences under other criminal laws of the Parties. Extradition will also not be granted in cases where prosecution of the offence for which extradition is requested will be barred by lapse of time or where the person sought has been finally acquitted or convicted in the Requested Party for the same offence for which extradition is sought (*non bis in idem*).

#### Article 5

Extradition may be refused if-

- the courts of the requested Party have jurisdiction to prosecute the person for the offence for which extradition is requested;
- the offence for which extradition is sought is punishable by death under the law of the requesting Party unless certain assurances are given to the requested Party in this regard;

- the person sought has been finally acquitted or convicted for the same offence for which extradition is sought; and
- extradition will lead to humanitarian hardships for the person sought.

South Africa's obligations to protect the fundamental rights contained in the Bill of Rights where extradition or deportation is concerned, were considered in the matter of *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC), at par [34], where the Court referred to section 7(2) of the Constitution, which provides as follows:

"The state must respect, protect, promote and fulfill the rights in the Bill of Rights."

In terms of section 8(1) of the Constitution, the Bill of Rights binds the legislature, the executive, the judiciary and all organs of state. In this regard, the Court, at par [34], further indicated the following:

"The rights in issue here are the right to human dignity, the right to life and the right not to be treated or punished in a cruel, inhuman or degrading way. According to the argument the Constitution not only enjoins the South African government to promote and protect these rights but precludes it from imposing cruel, inhuman or degrading punishment. The Constitution also forbids it knowingly to participate, directly or indirectly, in any way in imposing or facilitating the imposition of such punishment. In particular, so the argument runs, this strikes at the imposition of a sentence of death. Therefore, even if it were permissible to deport Mohamed to a destination to which he had consented and even if he had given his informed consent to such removal, the government **would have been under a duty** to secure an undertaking from the United States authorities that a sentence of death would not be imposed on him, before permitting his removal to that country." [Our emphasis.]

It is thus evident that the state may refuse to extradite a person not only under the circumstances listed in Article 4 of the Treaty, but under any circumstances that would result in the cruel, inhuman or degrading treatment of the person concerned. If a person therefore would be exposed to treatment in contravention of any of his or her rights contained in the Bill of Rights, refusal to extradite such person would be mandatory. [Also, in *Director of Public Prosecutions, Cape of Good Hope v Robinson* 2005 (4) SA 1 (CC), at par [58], the Constitutional Court remarked as follows:

"*Mohamed's case [supra]* was not concerned with the correct interpretation of the phrase 'liable to be surrendered' in s 10(1) of the Act. An issue in that case was whether Mohamed had been deported or extradited. This Court concluded that it did not matter. In the context of this case, the *ratio* of *Mohamed* means no more than that the Minister ought not to extradite a person sought without seeking an assurance, if relevant, that the death penalty would not be imposed or if imposed, would not be carried out. It is perhaps relevant that the extradition agreement enables a Requested State to refuse extradition 'where the offence carries the death penalty under the law of the Requesting State, unless that State undertakes that the death penalty will not be sought, or if a sentence of death is imposed it will not be carried out'.]

In the (as yet) unreported case of *Jerry Ofense Pitsoe (Phale) v the Minister of Home Affairs and Others* (Case No. 51010/2010) the South Gauteng High Court on 22 September 2011 held that the *Mohamed* case was very clear and that an assurance that the death penalty will not be imposed or carried out must be **obtained and not merely be requested** from the Requesting State.

#### Article 6

The Article provides that "[n]o Party shall extradite its nationals to the other Party, unless it is permitted by its national laws" and where a Party denies extradition of its nationals, it must "submit the case to its competent authority [in the case of South Africa, the National Prosecuting Authority] for conducting the appropriate proceedings [against its nationals]". However, South African domestic law [which includes the common law] currently does not *in general* provide for extra-territorial jurisdiction of a South African court to adjudicate crimes committed outside its area of jurisdiction<sup>3</sup>. However, from a South African perspective, this Article does not pose a problem since there is, in principle, no legal impediment to the extradition of a South African national to a foreign country.

#### Article 7

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<sup>3</sup> Section 43, read with section 44 of the Constitution of the Republic of South Africa, 1996 provides that the legislative authority vested in Parliament gives it the power to make laws for the Republic. Enactments which currently grants jurisdiction to South African courts over offences committed outside the country are, for instance, the Civil Aviation Act, 2009 (Act No. 13 of 2009), the Maritime Zones Act, 1994 (Act No. 15 of 1994), the Merchant Shipping Act, 1951 (Act No. 57 of 1951), the Prevention of Counterfeiting of Currency Act, 1965 (Act No. 16 of 1965), the Prevention of Corrupt Activities Act, 2004 (Act No. 12 of 2004), the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004 and the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998).

Where a person is being prosecuted or is serving a sentence in the territory of the Requested Party, he or she may be temporarily surrendered to the Requesting Party for the purpose of prosecution. Also, the Requested Party may defer extradition proceedings against a person who is being prosecuted or serving a sentence in its territory.

#### Article 8

This Article iterates the rule of specialty in terms of which a person who has been extradited cannot be prosecuted, sentenced, detained or re-extradited to a third state for any offence committed prior to the surrender other than that for which that person was extradited, except in certain specific cases.

#### Article 9

The content of a request for extradition and the supporting documents which must accompany such a request are addressed in this Article.

#### Article 10

The Requested Party may request additional information if it is of the opinion that the information given in support of a request for extradition is insufficient.

#### Article 11

The Requested Party shall promptly notify the Requesting Party of its decision regarding a request for extradition and furnish reasons for a refusal of a request. The Parties shall agree on the date, venue and manner in which surrender shall take place.

#### Article 12

This Article provides for the arrest and detention of a person whose extradition is sought.

#### Article 13

If the extradition of a person is requested concurrently by one of the Parties and a third state or more, the Requested Party will determine to which state it will extradite, having regard to all the circumstances.

#### Article 14

This Article deals with the contents of an application for the provisional arrest of a person pending the presentation of a formal request for his or her extradition by a Party. It also provides for the procedure to be followed when submitting such a request and matters relating to the discharge of that person from custody if a formal request for extradition is not received by the Requested Party within 60 days from the date of the provisional arrest.

#### Article 15

This Article deals with the seizure and surrender of all property, articles and documents that may be found in the territory of the Requested Party that is connected with the offence for which extradition is sought and the return thereof to the Requested Party if it is liable for seizure and confiscation within the territory of the Requested Party.

#### Article 16

Either Party may authorize the transit through its territory of a person surrendered to the other Party by a third State. A request for transit shall be transmitted through diplomatic channels and shall contain certain information.

#### Article 17

Except where otherwise provided in the Treaty, the procedure with regard to extradition and provisional arrest shall be governed solely by the national laws of the Requested Party.

#### Article 18

This Article deals with the expenses which shall be borne by the respective Parties related to the execution of an extradition request.

#### Article 19

This Article deals with the translation of all requests, supporting documents and other communications made pursuant to the Treaty.

#### Article 20

This Article provides for the authentication of all requests and supporting documents by the Central Authorities of the respective Parties.

## Articles 21 and 22

Assistance and procedures set forth in the Treaty shall not exempt either Party from its obligations arising from other international agreements or its national laws. Any dispute arising from the Treaty shall be resolved between the Parties through diplomatic channels.

## Article 23

This Article deals with the ratification, entry into force, amendment and termination of the Treaty.

## **4. The Treaty on Mutual Legal Assistance in Criminal Matters**

### The Preamble and Article 1

Guided by the friendly relations between them, the Parties recognize the need and obligation to facilitate the widest measures of mutual legal assistance in criminal matters.

### Article 2

This Article specifies the Central Authorities of the respective Parties who shall make and receive requests pursuant to the Treaty.

### Article 3

The Article gives an indication of the scope of assistance the Parties may provide to each other [excluding private parties] in respect of the investigation, prosecution and proceedings relating to criminal matters.

### Article 4

1. The grounds on which either Party may refuse assistance are expounded in this Article. However, before assistance is refused, the Requested Party must consult with the Requesting Party to consider whether assistance can be granted subject to such conditions as it deems necessary. Reasons for a refusal to render assistance under this Article must be communicated to the Requesting Party.



2. We wish to draw the Department's attention to paragraph 1. (e) of Article 4 of the Treaty which provides that the Requested Party may refuse assistance "if the request is related to *an offence of a pure financial nature*". [Our emphasis.] We have considered this paragraph, applying the well-established canons of legal interpretation, and we have little doubt that on a proper reading thereof, that provision will effectively entail that both Parties may refuse legal assistance in the case of offences such as theft, robbery, housebreaking with the intent to commit such an offence, fraud, money-laundering, etc. Given the fact that both Parties undertake to grant each other the "*widest measures*" of mutual legal assistance in criminal matters, we are of the opinion that this provision does not reflect the true intention of the Parties. If it is the intention of the Parties to exclude offences of a fiscal nature from the ambit of the Treaty, it should be clearly reflected in this provision.

#### Article 5

This Article prescribes that a request for legal assistance must be in writing and must contain certain information. In urgent cases, the Requested Party may accept the request by fax or e-mail, but it must be confirmed within 20 days by a formal written request.

#### Article 6

Requests, supporting documents and other communications must be accompanied, if the Requested Party is South Africa, by a translation into the English language and, if the requested Party is the United Arab Emirates, by a translation into the Arabic language.

#### Article 7

This Article provides for the authentication of documents by the Central Authorities of the respective Parties.

#### Article 8

A request under this Treaty shall be executed by the competent authority of the Requested Party according to that Party's national laws. If so requested by the Requesting Party, the Requested Party shall use its best efforts to keep the request confidential and the Requested Party shall on request keep the Requesting Party informed of the progress in the execution of the request.

### Article 9

This Article deals with the expenses which shall be borne by the respective Parties related to the execution of a request for assistance.

### Article 10

The Requested Party may request the Requesting Party not to use the information obtained under the Treaty for any other purpose other than that described in the request and that it will be kept confidential or be used only subject to the terms and conditions specified by the Requested Party. We wish to draw the Department's attention to paragraph 3 of the Treaty which provides that "[i]nformation or evidence that has been made public in the Requesting Party in a manner consistent with paragraphs 1 or 2 of this Article *may thereafter be used for any purpose.*" In our opinion the meaning of the words "for any purpose" are too wide and should be revisited to reflect the true intention of the Parties.

### Article 11

This Article deals with aspects relating to the taking of evidence and production of items, documents and records in the Requested Party and the authentication thereof.

### Article 12

This Article provides that the Requested Party *shall* provide, on request, the Requesting Party with publicly available records, documents and information that are in the possession of government departments and agencies of the Requested Party. Also, the Requested Party *may* provide such records, documents and information "**which are not publicly available unless those materials or information relate to the national security.**" However, with regard to the latter provision, we wish to point out that there are numerous other "materials or information" which do not relate to "national security" but is protected under South African domestic law<sup>4</sup>. Although the materials and information "*may*" be provided to the relevant authorities of the United Arab Emirates, we suggest that the wording of paragraph 2 of Article 12 be reconsidered. We suggest that the said paragraph be redrafted along the following lines:

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<sup>4</sup> For instance, legal privilege, doctor-patient privilege, banking and fiscal legislation [such as the Income Tax Act, 1962 (Act No. 58 of 1962)] and, in particular, see the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

"2. The Requested Party may provide the Requesting Party with any records in any form, including documents and information that are in the possession of a government department or agency in that Party, which are not publicly available, **to the same extent and under the same conditions as they would be available to its own law enforcement and judicial authorities.**"<sup>5</sup>

### Article 13

The Requested Party may, on request by the Requesting Party, invite a person in its territory to voluntarily testify or assist in the investigations in relation to a criminal matter in the territory of the Requesting Party. The Article also provides for the payment of such a person's expenses and his or her immunity to prosecution or detention in the Requesting Party.

### Article 14

This Article provides for the transfer of persons in custody to give evidence or assist in investigations in the Requesting Party and the terms and conditions under which such transfer and assistance shall take place.

### Article 15

Either Party may authorize the transit through its territory of a person in custody to the Requesting Party whose presence has been requested from a third state by the Requesting Party.

### Article 16

If the Requesting Party seeks a location or identity of a person or articles in the territory of the Requested Party, the latter Party shall use its best efforts to render assistance in this regard.

### Article 17

This Article provides for the service of documents in the territory of the Requested Party.

### Articles 18 and 19

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<sup>5</sup> The words in bold are similar to those used in paragraph 2 of Article 16 of the *Model Treaty on Mutual Assistance in Criminal Matters* adopted by the UN General Assembly Resolution 45/117.

This Article provides for the execution of requests for search, seizure, transfer and return of articles related to the offence which is subject to investigation, as well as the protection of a third party's interests in the article to be transferred to the Requesting Party.

#### Article 20

This Article deals with mutual assistance relating to the forfeiture of the proceeds and instrumentalities of offences, restitution and compensation to victims of crime.

#### Articles 21 and 22

Assistance and procedures set forth in the Treaty shall not exempt either Party from its obligations arising from other international agreements or its national laws. Any dispute arising from the Treaty shall be resolved between the Parties through diplomatic channels.

#### Article 23

This Article deals with the ratification, entry into force, amendment and termination of the Treaty.

### 5. Public Finance Management Act, 1999 (Act No.1 of 1999) and Manual

5.1 The Department's attention is drawn to Article 18 of the Extradition Treaty and Article 9 of the Treaty on Mutual Legal Assistance in Criminal Matters which may have financial implications for South Africa. The provisions of the Public Finance Management Act, 1999 and paragraph 5.16 of the Manual must be complied with. Paragraph 5.16 of the Manual stipulates as follows:

"Accordingly, international agreements dealing with routine departmental matters would be covered by this convention. In this regard, as with all other matters, line function Ministers must determine whether the international agreement in fact deals with routine departmental matters or may have contentious, **including financial, consequences. If it does then it must go to the Cabinet.** If not, the line function Minister may then seek to have the agreement approved by the President and, if the President is not personally able to sign the agreement, to have a person authorized to sign the agreement on behalf of the National Executive, without first referring the agreement to the Cabinet." [Our emphasis.]

5.2 It is therefore our view that both Treaties must be referred to Cabinet for approval before it can be signed by the Minister.

## 6. Status of the two Treaties

6.1 In determining the status of the two Treaties, it is necessary to consider section 231 of the Constitution which provides as follows:

“(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.”

6.2 We now turn to the relevant provisions of section 231 of the Constitution which we have quoted in full above. The Department’s attention is drawn to section 231(3) which deals with international agreements of technical, administrative or executive nature. According to Chapter 56 (par 5 on page 44) of the *Constitutional Handbook for Members of the Executive*, technical, administrative and executive agreements are agreements which—

- (a) are departmental specific;
- (b) are of no major political or other significance;
- (c) have no financial consequences; and
- (d) do not affect domestic law.

These agreements flow from the everyday activities of government departments and are often drafted in a simplified form.

6.3 The draft Treaties appear to be of neither a technical, administrative nor executive nature as they have major political or other significance, or financial

consequences. The Treaties also affect our domestic law directly, as they concentrate around cooperation between the Parties in relation to the laws of extradition and mutual legal assistance in criminal matters. In terms of section 2(3)(a) of the Extradition Act, 1962, which deals with extradition agreements, such agreements must be “ratified” [approved] by Parliament, as required by section 231(2) of the Constitution, but it does not provide for the incorporation of the agreement into domestic law by ‘national legislation’, as required by section 231(4) of the Constitution. [See *President of the Republic of South Africa and Others v Quagliani, and Two Similar Cases 2009 (2) SA 466 (CC)*] It merely provides that the Minister of Justice and Constitutional Development shall give notice of Parliament’s approval of the agreement in the *Government Gazette*, which does not qualify as ‘national legislation’. Similarly, section 27(2) of the International Co-Operation in Criminal Matters Act, 1996, provides that the Minister “shall as soon as practical after Parliament has “agreed” [approved] to the ratification” of an agreement on mutual legal assistance in criminal matters, give notice thereof in the *Gazette*. Therefore, these Treaties will, in our opinion, fall within the scope of section 231(2) of the Constitution, which requires approval by resolution of both the National Assembly and National Council of Provinces. The Department’s attention is, however, drawn to paragraph 5.21 of the Manual which obliges the Department of International Relations and Cooperation to confirm that the that the two Treaties do indeed fall within the ambit of section 231(1) of the Constitution.

## 7. Conclusion

Subject to our foregoing remarks and our suggested amendments on the texts of the two Treaties, there is no provision thereof, as far as we could ascertain, that is in conflict with the domestic law of South Africa.

Yours sincerely



**P PIENAAR/ H MEKWA/ S MASAPU**

**For the CHIEF STATE LAW ADVISER**