

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

No. 405

25 May 2012

EXTRADITION ACT, 1962**SOUTHERN AFRICAN DEVELOPMENT COMMUNITY PROTOCOL ON
EXTRADITION**

I, Jeffrey Thamsanqa Radebe, Minister of Justice and Constitutional Development, hereby give notice in terms of section 2(3) *ter* of the Extradition Act, 1962 (Act No. 67 of 1962), that the Parliament of the Republic of South Africa has on 14 April 2003 agreed to the ratification of the Southern African Development Community Protocol on Extradition as set out in the schedule. The Protocol entered into force on 1 September 2006.

J.T. Radebe**MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT****SCHEDULE**

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PREAMBLE

We, the Heads of State or Government of:

The Republic of Angola
The Republic of Botswana
The Democratic Republic of the Congo
The Kingdom of Lesotho
The Republic of Malawi
The Republic of Mauritius
The Republic of Mozambique
The Republic of Namibia
The Republic of Seychelles
The Republic of South Africa
The Kingdom of Swaziland
The United Republic of Tanzania
The Republic of Zambia
The Republic of Zimbabwe

NOTING with concern the escalation of crime at both national and transnational levels, and that the increased easy access to free cross border movement enables offenders to escape arrest, prosecution, conviction and punishment;

CONVINCED that the speedy integration amongst State Parties in every area of activity can best be achieved by seeking to create and sustain within the Southern African Development Community, such conditions as shall eliminate any threat to the security of our people;

DESIRING to make our co-operation in the prevention and suppression of crime more effective by concluding an agreement on extradition;

BEARING in mind that the establishment of a multilateral agreement on extradition will greatly enhance the control of crime in the Community;

HEREBY AGREE AS FOLLOWS:

**ARTICLE 1
DEFINITIONS**

1. In this Protocol, terms and expressions defined in Article I of the Treaty shall bear the same meaning unless the context otherwise requires.
2. In this Protocol, unless the context otherwise requires:

“confiscation”	means a permanent deprivation of property by order of a court or other competent authority and includes forfeiture where applicable;
“offence”	means a fact or facts which constitute a crime under the laws of State Parties;

“property”	means assets of any kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible and any document or legal instrument evidencing title to, or interest in such assets;
“Requested State”	means a State being requested to extradite or to provide assistance in terms of this Protocol;
“Requesting State”	means a State making a request for extradition or assistance in terms of this Protocol;
“sentence”	means any penalty or measure imposed or pronounced by a court of competent jurisdiction as a result of a criminal conviction;
“State Party”	means a Member State which has ratified or acceded to this Protocol;
“Third State”	means any State other than the Requested State or Requesting State.

ARTICLE 2 OBLIGATION TO EXTRADITE

Each State Party agrees to extradite to the other, in accordance with the provisions of this Protocol and their respective domestic law, any person within its jurisdiction who is wanted for prosecution or the imposition or enforcement of a sentence in the Requesting State for an extraditable offence.

ARTICLE 3 EXTRADITABLE OFFENCES

1. For the purpose of this Protocol, extraditable offence are offences that are punishable under the laws of both State Parties by imprisonment or other deprivation of liberty for a period of at least one year, or by a more severe penalty. Where the request for extradition relates to a person wanted for the enforcement of a sentence of imprisonment or other deprivation of liberty imposed for such an offence, extradition may be refused if a period of less than six months of such sentence remains to be served.
2. For the purposes of this Article, in determining what constitutes an offence against the laws of the Requested State it shall not matter whether:
 - (a) the laws of the State Parties place the conduct constituting the offence within the same category of offence or describe the offence by the same terminology; and
 - (b) the totality of the conduct alleged against the person whose extradition is sought shall be taken into account and it shall not matter whether, under the laws of the State Party, the constituent elements of the offence differ.
3. Where extradition of a person is sought for an offence against a law relating to taxation, customs duties, exchange control or other revenue matters, extradition may not be refused on the ground that the law of the Requested State does not

impose the same kind of tax or duty or does not contain a tax, customs duty or exchange regulation of the same kind as the law of the Requesting State.

4. An offence is extraditable whether or not the conduct on which the Requesting State bases its request occurred in the territory over which it has jurisdiction. However, where the law of the Requested State does not provide for jurisdiction over an offence in similar circumstances, the Requested State may, in its discretion, refuse extradition on this basis.
5. Extradition may be granted pursuant to the provisions of this Protocol in respect of any offence provided that:
 - (a) it was an offence in the Requesting State at the time of the conduct constituting the offence; and
 - (b) the conduct alleged would, if it had taken place in the Requested State at the time of making the request for extradition, have constituted an offence against the law of the Requested State.
6. If the request for extradition relates to several separate offences, each of which is punishable under the laws of both State Parties, but some of which do not meet the other requirements of paragraph 1, the Requested State may grant extradition for such offences provided that the person is to be extradited for at least one extraditable offence.

ARTICLE 4 MANDATORY GROUNDS FOR REFUSAL TO EXTRADITE

Extradition shall be refused in any of the following circumstances:

- (a) if the offence for which extradition is requested is of a political nature. An offence of a political nature shall not include any offence in respect of which the State Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, or any other offence that the State Parties have agreed is not an offence of a political character for the purposes of extradition;
- (b) if the Requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion, sex or status or that the person's position may be prejudiced for any of those reasons;
- (c) if the offence for which extradition is requested constitutes an offence under military law, which is not an offence under ordinary criminal law;
- (d) if there has been a final judgment rendered against the person in the Requested State or a Third State in respect of the offence for which the person's extradition is requested;
- (e) if the person whose extradition is requested has, under the law of either State Party, become immune from prosecution or punishment for any reason including lapse of time or amnesty;
- (f) if the person whose extradition is requested has been, or would be subjected in the Requesting State to torture or cruel, inhuman or degrading treatment or

punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in Article 7 of the African Charter on Human and Peoples Rights; and

- (g) if the judgment of the Requesting State has been rendered *in absentia* and the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he or she has not had or will not have the opportunity to have the case retried in his or her presence.

ARTICLE 5 OPTIONAL GROUNDS FOR REFUSAL

Extradition may be refused in any of the following circumstances:

- (a) if the person whose extradition is requested is a national of the Requested State. Where extradition is refused on this ground, the Requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person in respect of the offence for which extradition had been requested;
- (b) if a prosecution in respect of the offence for which extradition is requested is pending in the Requested State against the person whose extradition is requested;
- (c) if the offence for which extradition is requested carries a death penalty under the law of the Requesting State, unless that State gives such assurance, as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out. Where extradition is refused on this ground, the Requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested;
- (d) if the offence for which extradition is requested has been committed outside the territory of either State Party and the law of the Requested State does not provide for jurisdiction over such an offence committed outside its territory in comparable circumstances;
- (e) if the offence for which extradition is requested is regarded under the laws of the Requested State as having been committed in whole or in part within that State. Where extradition is refused on this ground, the Requested State shall, if the other State Party so requests submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested; and
- (f) if the Requested State, while also taking into account the nature of the offence and the interest of the Requesting State, considers that, in the circumstances of the case, the extradition of that person would be incompatible with humanitarian considerations in view of age, health or other personal circumstances of that person.

ARTICLE 6 CHANNELS OF COMMUNICATION AND REQUIRED DOCUMENTS

1. A request for extradition shall be made in writing. The request, supporting documents and subsequent communications shall be transmitted through the diplomatic channel, directly between the Ministries of Justice or any other authority designated by the State Parties.

2. A request for extradition shall be accompanied by the following:
- (a) in all cases,
 - (i) as accurate as possible, a description of the person sought, together with any other information that may help to establish that person's identity, nationality and location;
 - (ii) the text of the relevant provision of the law creating the offence and, where necessary, a statement of the law relevant to the offence and a statement of the penalty that can be imposed for the offence;
 - (b) if the person is accused of an offence, by a warrant issued by a court or other competent judicial authority for the arrest of the person or a certified copy of that warrant, a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the alleged offence, including an indication of the time and place of its commission;
 - (c) if the person has been convicted of an offence, by a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the offence and by the original or certified copy of the judgment or any other document setting out the conviction and the sentence imposed, the fact that the sentence is enforceable, and the extent to which the sentence remains to be served;
 - (d) if the person has been convicted of an offence in his or her absence, in addition to the documents set out in paragraph 2(c) of this Article, by a statement as to the legal means available to the person to prepare his or her defence or to have the case retried in his or her presence;
 - (e) if the person has been convicted of an offence but no sentence has been imposed, by a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the offence and by a document setting out the conviction and a statement affirming that there is an intention to impose a sentence; and
 - (f) the documents submitted in support of a request for extradition shall be accompanied by a translation into the language of the Requested State or in another language acceptable to that State.

ARTICLE 7 AUTHENTICATION OF DOCUMENTS

1. Where the laws of the Requested State require authentication, documents shall be authenticated in accordance with the domestic laws of the Requesting State.
2. Authentication procedures of State Parties shall be communicated to the Secretariat.

ARTICLE 8 ADDITIONAL INFORMATION

If the Requested State considers that the information furnished in support of a request for extradition is not sufficient in accordance with this Protocol to enable extradition to be

granted, that State may request that additional information be furnished within such time as it specifies.

ARTICLE 9 SIMPLIFIED EXTRADITION PROCEDURE

The Requested State, if not precluded by its laws, may grant extradition after receipt of a request for provisional arrest, provided that the person sought explicitly consents, before a competent authority, to be extradited.

ARTICLE 10 PROVISIONAL ARREST

1. In all cases, the competent authority of the Requesting State may apply by any means which allows for a written record for the provisional arrest of the person sought.
2. A request for provisional arrest shall be sent to the competent authority of the Requested State either through the diplomatic channel or directly by post or telegraph or through the International Criminal Police Organisation (INTERPOL) or by any other means affording evidence in writing or accepted by the Requested State.
3. An application for provisional arrest shall include the following:
 - (a) such information, as may be available, about the description, identity, location and nationality of the person sought;
 - (b) a statement that a request for extradition will follow;
 - (c) a description of the nature of the offence and applicable penalty, with a brief summary of the facts of the case, including the date and place the offence was committed;
 - (d) a statement attesting to the existence of a warrant of arrest or a statement of the punishment that can be or has been imposed for the offence to which this Protocol applies; and
 - (e) any other information which would justify provisional arrest in the Requested State.
4. The Requested State shall decide on the application in accordance with its laws and communicate its decision to the Requesting State without delay.
5.
 - (a) Provisional arrest shall be terminated if the Requested State has not received the request for extradition and supporting documents through the channel provided for in Article 6 within thirty (30) days after the arrest. The competent authorities of the Requested State, insofar as it is permitted by the law of that State, may extend that delay with regard to the receipt of the documents. However, the person sought may be granted bail at any time subject to the conditions considered necessary to ensure that the person does not leave the country; and

- (b) The provisions of paragraph (a) shall be without prejudice to the right of the person so arrested to be released in accordance with the domestic law of the Requested State.
- 6 The release of the person pursuant to paragraph 5 of this Article shall not prevent re-arrest and institution of proceedings with a view to extraditing the person sought if the request and supporting documents are subsequently received.

ARTICLE 11 CONCURRENT REQUESTS

1. Where requests are received from two or more States for the extradition of the same person either for the same offence or for different offences, the Requested State shall determine to which of those States the person is to be extradited and shall notify those States of its decision.
2. In determining to which State a person is to be extradited, the Requested State shall have regard to all the relevant circumstances, and, in particular, to:
- (a) if the requests relate to different offences, the relative seriousness of those offences;
 - (b) the time and place of commission of each offence;
 - (c) the respective dates of the requests;
 - (d) the nationality of the person to be extradited;
 - (e) the ordinary place of residence of the person to be extradited;
 - (f) whether the requests were made pursuant to this Protocol;
 - (g) the interests of the respective States; and
 - (h) the nationality of the victim.

ARTICLE 12 DECISION ON A REQUEST

The Requested State shall deal with the request for extradition pursuant to procedures provided by its own laws, and shall promptly communicate its decision to the Requesting State.

ARTICLE 13 SURRENDER OF A PERSON

1. Upon being informed that extradition has been granted, the State Parties shall, without undue delay, arrange for the surrender of the person sought and the Requested State shall inform the Requesting State of the length of time for which the person sought was detained with a view to surrender.
2. The person shall be removed from the territory of the Requested State within such reasonable period as the Requested State specifies and, if the person is not

removed within that period, the Requested State may release the person and may refuse to extradite that person for the same offence.

3. If circumstances beyond its control prevent either State Party from surrendering or removing the person to be extradited, it shall notify the other State Party. The two State Parties shall mutually decide upon a new date of surrender, and the provisions of paragraph 2 of this Article shall apply.

ARTICLE 14 POSTPONED OR CONDITIONAL SURRENDER

1. The Requested State may, after making a decision on the request for extradition, postpone the surrender of a person sought, in order to proceed against that person, or, if that person has already been convicted, in order to enforce a sentence imposed for an offence other than that for which extradition is sought in such a case, the Requested State shall advise the Requesting State accordingly.
2. The Requested State may, instead of postponing surrender, temporarily surrender the person sought to the Requesting State in accordance with conditions to be determined between the State Parties.

ARTICLE 15 SURRENDER OF PROPERTY

1. To the extent permitted under the laws of the Requested State and subject to the rights of third parties, which shall be duly respected, all property found in the Requested State that has been acquired as a result of the offence and that may be required as evidence shall, if the Requesting State so requests, be surrendered if extradition is granted.
2. The said property may, if the Requesting State so requests, be surrendered to the Requesting State even if the extradition agreed to cannot be carried out.
3. When the said property is liable to seizure or confiscation in the Requested State, it may retain it or temporarily hand it over.
4. Where the laws of the Requested State or the protection of the rights of third parties so require, any property so surrendered shall be returned to the Requested State after the completion of the proceedings, if that State so requests.

ARTICLE 16 RULE OF SPECIALTY

1. A person extradited under this Protocol shall not be proceeded against, sentenced, detained, re-extradited to a Third State, or subjected to any other restriction of personal liberty in the territory of the Requesting State for any offence committed before surrender other than:
 - (a) an offence for which extradition was granted;

- (b) any other offence in respect of which the Requested State and the person extradited consents to. Consent shall be given if the offence for which it is requested is itself subject to extradition in accordance with the present Protocol.
2. A request for the consent of the Requested State under this Article shall be accompanied by the documents mentioned in Article 6 of this Protocol and a legal record of any statement made by the extradited person with respect to the offence.
 3. Paragraph 1 of this Article shall not apply if the person has had an opportunity to leave the Requesting State and has not done so within thirty (30) days of final discharge in respect of the offence for which that person was extradited or if the person has voluntarily returned to the territory of the Requesting State after leaving it.

ARTICLE 17 TRANSIT

1. Where a person is to be extradited to a State Party from a Third State through the territory of the other State Party, the State Party to which the person is to be extradited shall request the other State Party to permit the transit of that person through its territory. This does not apply where air transport is used and no landing in the territory of the other State Party is scheduled.
2. Upon receipt of such a request, which shall contain relevant information, the Requested State shall deal with this request pursuant to procedures provided by its own laws. The Requested State shall grant the request expeditiously unless its essential interest would be prejudiced thereby.
3. The State of transit shall ensure that legal provisions exist that would enable the detention of the person in custody during transit.
4. In the event of an unscheduled landing, the State Party to be requested to permit transit may, at the request of the escorting officer, hold the person for such reasonable period as may be permitted by its laws, pending receipt of the transit request to be made in accordance with paragraph 1 of this Article.

ARTICLE 18 EXPENSES

1. The Requested State shall make all necessary arrangements for and meet the cost of any proceedings arising out of a request for extradition.
2. The Requested State shall bear the expenses incurred in its territory or jurisdiction in the arrest and detention of the person whose extradition is sought, and the maintenance in custody of the person until that person is surrendered to the Requesting State.
3. If during the execution of a request, it becomes apparent that fulfillment of the request will entail expenses of an extraordinary nature, the Requested State and Requesting State shall consult to determine the terms and conditions under which execution may continue.

4. The Requesting State shall bear the expenses incurred in translation of extradition documents and conveying the person extradited from the territory of the Requested State.
5. Consultations may be held between the Requesting State and the Requested State for the payment by the Requesting State of extraordinary expenses.

ARTICLE 19 RELATIONSHIP WITH OTHER TREATIES

The provisions of any treaty or bilateral agreement governing extradition between any two State Parties shall be complementary to the provisions of this Protocol and shall be construed and applied in harmony with this Protocol. In the event of any inconsistency, the provisions of this Protocol shall prevail.

ARTICLE 20 SETTLEMENT OF DISPUTES

Any dispute arising from the interpretation or application of this Protocol which cannot be settled amicably shall be referred to the Tribunal for determination.

ARTICLE 21 WITHDRAWAL

1. Any State Party may withdraw from this Protocol upon the expiry of twelve (12) months from the date of giving the Executive Secretary a written notice to that effect.
2. Any State Party that has withdrawn pursuant to paragraph 1 of this Article shall cease to enjoy all rights and benefits under this Protocol upon the withdrawal becoming effective but shall remain bound by the obligations under this Protocol for a period of twelve (12) months, from the date of giving notice to the date the withdrawal becomes effective.

ARTICLE 22 AMENDMENT

1. Any State Party may propose amendments to this Protocol.
2. Proposals for amendments to this Protocol may be made to the Executive Secretary who shall duly notify all Member States of the proposed amendments at least thirty (30) days in advance of consideration of the amendments by State Parties. Such period of notice may be waived by the Member States.
3. Amendments to this Protocol shall be adopted by a decision of three quarters of all the State Parties, and shall become effective thirty (30) days after such adoption.

**ARTICLE 23
SIGNATURE**

This Protocol shall be signed by the duly authorised representatives of the Member States.

**ARTICLE 24
RATIFICATION**

This Protocol shall be subject to ratification by the signatory States in accordance with their respective constitutional procedures.

**ARTICLE 25
ENTRY INTO FORCE**

This Protocol shall enter into force thirty (30) days after the deposit of instruments of ratification by two-thirds of the Member States.

**ARTICLE 26
ACCESSION**

This Protocol shall remain open for accession by any Member State.

**ARTICLE 27
DEPOSITARY**

1. The original texts of this Protocol and all instruments of ratification and accession shall be deposited with the Executive Secretary who shall transmit certified copies to all Member States.
2. The Executive Secretary shall register this Protocol with the Secretariat of the United Nations and the Commission of the African Union (AU).

IN WITNESS WHEREOF, WE, the Heads of State or Government or our duly authorised Representatives, have signed this Protocol.

DONE at Luanda this 3rd day of **October, 2002** in three (3) original texts in the English, French and Portuguese languages, all being equally authentic.

Republic of Angola
Republic of Botswana
Democratic Republic of Congo
Kingdom of Lesotho
Republic of Malawi
Republic of Mauritius
Republic of Mozambique

Republic of Namibia
Republic of Seychelles
Republic of South Africa
Kingdom of Swaziland
United Republic of Tanzania
Republic of Zambia
Republic of Zimbabwe