

# AFRICAN STUDENT LAW JOURNAL

VOL. 1 2025



FACULTY OF LAW

UNIVERSITY OF THE WESTERN CAPE

DOI: 10.14426/aslj.v1i1.3022

## **International co-operation in criminal matters in South Africa: A comprehensive analysis of mutual legal assistance and extradition**

KUSELO BOOI

*Advocate of the High Court of South Africa  
and member of the Pan African Bar  
Association of South Africa*

<https://orcid.org/0009-0002-3726-8767>

### **Abstract**

*This article examines legal frameworks and mechanisms of international co-operation in criminal matters, focusing on mutual legal assistance (MLA) and extradition, with a particular emphasis on South Africa's role within the global legal community. It explores the effectiveness of South Africa's legislative and judicial systems in facilitating international criminal justice, especially in combatting transnational crimes such as terrorism, drug trafficking, and human trafficking. By analysing the International Co-operation in Criminal Matters Act 75 of 1996 and its regulations, alongside key international treaties such as the United Nations Convention against Corruption, this article assesses the adequacy of existing legal provisions and the challenges faced in implementing MLA and extradition. It highlights the complexities involved in the extra-territorial application of South African law and the potential for legal reform to improve international co-operation. Through a review of case law, legislation, and international agreements, the article proposes recommendations for improving the efficiency and effectiveness of MLA and*

*extradition processes in South Africa to ensure they meet the evolving demands of global criminal justice.*

**Keywords:** mutual legal assistance; extradition; international co-operation; transnational crime; South African law; ICCMA; bilateral agreements; human trafficking; terrorism; human rights

## 1 INTRODUCTION

Terrorism, human and drug trafficking, money laundering, and other serious crimes have evolved into a transnational threat transcending traditional geographical and cultural borders.<sup>1</sup> The increased global mobility of people, information, and goods means both perpetrators and victims operate on a global scale. One nation cannot address these grave crimes alone given the growing challenge facing the international community; rather, international co-operation has become a necessity. Legal remedies at the national, bilateral, and regional levels aid in facilitating and harmonising criminal justice responses to heinous crimes by and among states.<sup>2</sup>

South Africa has taken a variety of steps to work with other nations in the battle against crime. These have included signing bilateral agreements on issues such as mutual legal assistance in criminal matters and extradition; the ratification of multilateral treaties on corruption, organised crime, and extradition; and the enactment of domestic legislation such as laws dealing with the collection of evidence from other countries and those giving South African courts' jurisdiction over offences committed outside of South Africa.<sup>3</sup>

The International Co-operation in Criminal Matters Act (ICCMA)<sup>4</sup> was passed by the South African legislature in 1996. The ICCMA Regulations were issued in 1997 to operationalise the Act. The Act's purpose is to

facilitate the supply of evidence and the execution of punishments in criminal proceedings, as well as the confiscation and transfer of criminal proceeds between the Republic of South Africa and other States; and to provide for issues associated therewith.<sup>5</sup>

---

<sup>1</sup> UNODC "Compendium of bilateral and regional instruments for South Asia international cooperation in criminal matters" (2015) 1 UNODC Regional Office for South Asia, New Delhi and Terrorism Prevention Branch, Vienna at iii.

<sup>2</sup> UNODC (2015) at iii.

<sup>3</sup> Mujuzi JD "The South African International Co-operation in Criminal Matters Act and the issue of evidence" (2015) 48(2) *De Jure Law Journal* 351 at 351–352 (hereafter "Mujuzi (2015a)").

<sup>4</sup> International Co-operation in Criminal Matters Act 75 of 1996.

<sup>5</sup> See long title of the ICCMA.

Several provisions allow South African courts' jurisdiction over crimes committed outside of the country. Some of them deal with foreign offences, while others deal with domestic offences. In the case of the former, courts exercise universal jurisdiction, whereas in the case of the latter, courts invoke the principle of the extraterritorial application of South African law.<sup>6</sup> This article examines the extent to which existing laws, legislation, and mechanisms in South Africa provide for international co-operation between the country and other states in cases of mutual legal assistance and extradition.

It is widely agreed that after a crime has been committed, it should be investigated and the accused tried, and if convicted, punished for his or her unlawful behaviour. The difficulty is determining how to achieve this when the perpetrator is located outside of the borders of the country where the crime was committed or where the impact of the crime was felt.<sup>7</sup> An analysis of South Africa's legal provisions on mutual legal assistance and extradition indicates that its domestic legislation, policy frameworks, and binding international treaties collectively establish sufficient mechanisms to facilitate cross-border legal co-operation in these domains.

Extradition is the typical method by which one state surrenders a person to another based on a treaty, comity, or other bilateral agreement between the two sovereign governments.<sup>8</sup> The Extradition Act governs the extradition procedure in South Africa.<sup>9</sup> A request for extradition by a sovereign state is usually made because the subject sought by that state has been accused of an offence but has not yet been tried, or has been tried and convicted but has evaded the relevant authorities in that state and is located in the jurisdiction of the requested state. The Constitutional Court emphasised in the *Harksen*<sup>10</sup> decision that extradition functions at both an international and domestic level, holding as follows:

An extradition procedure works both on an international and a domestic plane. Although the interplay of the two may not be severable, they are distinct. On the international plane, a request from one foreign State to another for the extradition of

---

<sup>6</sup> Mujuzi JD "The prosecution in South Africa of international offences committed abroad: The need to harmonise jurisdictional requirements and clarify some issues" (2015) 1 *African Yearbook on International Humanitarian Law* 96 at 97 (hereafter "Mujuzi (2015b)").

<sup>7</sup> Watney M "A South African perspective on mutual legal assistance and extradition in a globalised world" (2012) 15 *PER* 292 at 293.

<sup>8</sup> Masters J "What is extradition?" (8 January 2020) *Council on Foreign Relations* available at <https://www.cfr.org/backgrounder/what-extradition> (accessed 12 December 2024).

<sup>9</sup> Extradition Act 67 of 1962.

<sup>10</sup> *Harksen v President of the Republic of South Africa and Others* 2000 (2) SA 825 (CC) (hereafter "*Harksen* (2000)").

a particular individual and the response to the request will be governed by the rules of public international law.<sup>11</sup>

The literature indicates that South Africa's national extradition legislation specifies that the alleged offence should have been a crime in South Africa at the time of the extradition request or at the time it was allegedly committed.<sup>12</sup> It is argued here that this area of extradition must be addressed more fully by legal scholars so as to assist legislators in improving the law and making it suitable to address the challenges the world faces as a result of transnational crime.

We live in an era of globalisation, one in which certain individuals and groups conduct trade and business through sophisticated means and channels;<sup>13</sup> likewise, most crimes have now become cross-border in nature, and thus the obligation on the part of states to extradite has gained in significance over the years. Mutual legal assistance in criminal matters is a procedure in which states assist each other in gathering evidence for use in criminal cases.<sup>14</sup> Despite globalisation, every jurisdiction has its legal own customs and legal systems, a fact which necessitates procedures and regulations for gathering evidence during an inquiry and utilising it at trial. These procedural and evidentiary norms can be difficult to apply in the context of mutual legal assistance and extradition.

In regard to the admissibility of evidence obtained from abroad, legal scholars have argued that the same principles that have been developed by South African courts on the Law of Evidence Amendment Act could be applied when interpreting the ICCMA.<sup>15</sup> Evidence obtained abroad is not always admissible in South Africa, and the accused could still oppose its admission. This is apparent from sections 5(3) and (4) of the ICCMA,<sup>16</sup> as well as section 35(3)(i) of the Constitution,<sup>17</sup> which states that an accused has the right "to adduce and contest the evidence".

---

<sup>11</sup> *Harksen* (2000) para 4.

<sup>12</sup> Section 2(2) of the Extradition Act 67 of 1962.

<sup>13</sup> Department of Justice and Constitutional Development "High-profile extradition and mutual legal assistance matters" (25 July 2022) *South African Government* available at <https://www.gov.za/news/speeches/minister-ronald-lamola-high-profile-extradition-and-mutual-legal-assistance-matters> (accessed 23 January 2025) at para 8.

<sup>14</sup> Department of Justice and Constitutional Development (25 July 2022) at para 7.

<sup>15</sup> Mujuzi (2015a) at 376.

<sup>16</sup> ICCMA.

<sup>17</sup> Constitution of the Republic of South Africa, 1996.

## 2 MUTUAL LEGAL ASSISTANCE

Given the global scope of crime, mutual legal assistance between governments is essential.<sup>18</sup> The rise in international and transnational crime is one of the many characteristics of the so-called global community in which we live. People, money, and information move throughout the world with relative ease as a result of globalisation, and South Africa is no exception to this phenomenon.<sup>19</sup> Criminal activity in the country is significant both in prevalence and severity, with more than half of reported offences categorised as profit-driven crimes. South Africa has a sizable economy and serves as a major regional financial centre for sub-Saharan Africa, making it particularly vulnerable to the risk of laundering the proceeds of transnational crime.<sup>20</sup>

Moreover, according to a report by the Global Organized Crime Index, South Africa serves as both a destination and a transit point for Afghan heroin, which arrives directly via sea and air routes, as well as indirectly via overland routes originating in East Africa.<sup>21</sup> The country stands out as a significant transit nation because it is simpler for traffickers to transport containers to Europe from South Africa than it is from other nations in the region.<sup>22</sup>

Another challenge South Africa faces is the increase in human trafficking, fuelled by systematic corruption. This corruption enables foreign nationals to cross borders through bribery instead of using genuine passports.<sup>23</sup> According to the South African Police Services, the human smuggling industry in South Africa operates through highly structured professional criminal groups and transactional cash-based networks.

In the South African context, mutual legal assistance requests are facilitated via diplomatic channels to enable direct engagement between the central authorities of the states involved. Each participating state designates a central authority responsible for receiving mutual legal assistance requests; these bodies liaise directly to route requests to the relevant jurisdictional institutions within their territories.

---

<sup>18</sup> Kemp G “Horizontal and vertical international co-operation in criminal matters: An African regional and sub-regional perspective” in Sendze TBK, Adeboyejo A, Morrison H & Ugwu S (eds) *Contemporary international criminal law issues* The Hague: TMC Asser Press (2023) 177.

<sup>19</sup> Kemp (2023).

<sup>20</sup> Financial Action Task Force (FATF) *Anti-money laundering and counter-terrorist financing measures in South Africa mutual evaluation report* (2021) at para 2.

<sup>21</sup> Global Organized Crime Index *Criminality in South Africa* available at [https://ocindex.net/country/south\\_africa](https://ocindex.net/country/south_africa) (accessed 15 July 2024) at 4.

<sup>22</sup> Global Organized Crime Index (2024) at 4.

<sup>23</sup> Global Organized Crime Index (2024) at 3.

The primary legislation that governs mutual legal assistance in South Africa is the ICCMA. It provides the legal framework for requesting and providing assistance in criminal matters between South Africa and other countries. The Director-General of the Department of Justice and Constitutional Development is the central authority responsible for coordinating mutual legal assistance requests in South Africa. The procedures on matters of mutual legal aid are provided for in the ICCMA.<sup>24</sup> The Act sets out the requirements for making and executing requests for assistance, including the gathering evidence, exchange of evidence and taking of statements. In addition to the ICCMA, South Africa has signed a number of bilateral and multilateral treaties and agreements that provide for mutual legal assistance.<sup>25</sup> These agreements lay down the procedures for criminal co-operation between South Africa and other states. In regard to the domestic effects of international treaties, South Africa employs a dualist perspective.<sup>26</sup> This means that treaties are negotiated and signed by the executive. Parliament then ratifies them by means of a resolution, only those treaties specifically incorporated by an Act of Parliament become part of South African domestic law.

In this regard, Mohamed DP, as he then was, in *Azapo v President of the Republic of South Africa*<sup>27</sup>, had this to say:

International conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment.<sup>28</sup>

Mutual legal assistance is a critical mechanism in fighting transnational crime. In terms of the ICCM,<sup>29</sup> South Africa may write a letter of request to a foreign state asking for the collection of evidence or information relating to criminal investigations in that state or to criminal proceedings being heard before a court in South Africa; a reciprocal clause allows a foreign state to request South African assistance in gathering evidence in South Africa.<sup>30</sup> Kemp notes, however, that existing criminal justice responses are experiencing challenges in the face of sophisticated international criminal conduct and that the relevant processes are far from expeditious and seamless.<sup>31</sup>

---

<sup>24</sup> ICCMA.

<sup>25</sup> Mujuzi (2015a) at 351.

<sup>26</sup> *Glenister v President of the Republic of South Africa and Others*; 2011 (3) SA 347 (CC)(17 March 2011).

<sup>27</sup> *Azapo and Others v President of the Republic of South Africa* 1996 (4) SA 671 (CC) (hereafter “*Azapo* (1996)”).

<sup>28</sup> *Azapo* (1996) para 26.

<sup>29</sup> ICCMA.

<sup>30</sup> Watney (2012) at 295.

<sup>31</sup> Watney (2012) at 312.

While signing a treaty creates international obligations for South Africa, the dualist system means that in order for the treaty obligations to have domestic legal effect, the treaty must be incorporated in domestic legislation.<sup>32</sup> According to the Constitution,<sup>33</sup> any international agreement becomes law in South Africa when it is enacted into law by national legislation, while a self-executing provision in 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.<sup>34</sup> Through the operation of section 27(2), the ICCMA incorporates the SADC Protocol on Mutual Legal Assistance in Criminal Matters in South African domestic law.<sup>35</sup>

South Africa is a signatory to, and is bound by, the United Nations Convention against Corruption (UNCAC). The purposes of this convention are, *inter alia*, to promote measures to improve the ability to prevent and combat corruption, and to promote, facilitate, and support international co-operation and technical assistance in the prevention of, and fight against, crime and corruption.<sup>36</sup> Article 46 of the UNCAC requires states to provide each other with the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to corruption offences.<sup>37</sup> South Africa's duties under this convention are reflected in domestic legislation such as the Prevention and Combating of Corrupt Activities Act.<sup>38</sup>

In regard to mutual legal assistance, Mujuzi argues that there is a possibility that South Africa, intentionally or unintentionally, could send evidence to a foreign state that could be used to dignify a trial that does not meet the standards set by international law,<sup>39</sup> given that the Director-General and the Minister of Justice are not required to look into whether the evidence sought could be used in an unfair trial.<sup>40</sup> This is important to focus on because while different jurisdictions around the world have different legal norms, the concern seems mainly to be about countries that are known to flout international legal regulations.

South Africa is also a member of the Southern African Development Community (SADC). As such, it is bound by a regional agreement that facilitates co-operation in criminal matters among

---

<sup>32</sup> University of Melbourne Library Guides: Treaties and international Law "International law and South African domestic law" available at <https://unimelb.libguides.com/c.php?g=929734&p=6718239> (accessed 20 March 2025).

<sup>33</sup> Constitution, 1996.

<sup>34</sup> Section 331(4) of the Constitution, 1996.

<sup>35</sup> Kemp (2023) at 177.

<sup>36</sup> See article 1(a) and (b) of the United Nations Convention against Corruption, 2004.

<sup>37</sup> See article 46 of the United Nations Convention against Corruption, 2004.

<sup>38</sup> Prevention and Combating of Corrupt Activities Act 12 of 2004.

<sup>39</sup> Mujuzi (2015a) at 368.

<sup>40</sup> Mujuzi (2015a) at 368.

the member states. The agreement in question is the SADC Protocol on Mutual Legal Assistance in Criminal Matters. Its article 2(2) defines mutual legal assistance as

any assistance given by the Requested State in respect of investigations, prosecutions or proceedings in the Requesting State in a criminal matter, irrespective of whether the assistance is sought or is to be provided by a court or some other competent authority.<sup>41</sup>

Cross-border crimes, including human trafficking, terrorism, drug trafficking, and environmental crimes, have the potential to continue expanding in an increasingly interconnected world, especially in jurisdictions where the legal system does not adequately provide for mutual legal assistance and extradition. Criminals will take advantage of the legal system's flaws for their personal gain. Without protection against such exploitation, nations may become safe havens for fugitive criminals. To prevent offenders from eluding justice, states must put in place laws and legislation that can assist in the effective facilitation of mutual legal assistance agreements and extradition.

According to Kemp, the fundamental goal of mutual legal assistance is to allow the requesting state to obtain evidence from another country for use in domestic criminal proceedings.<sup>42</sup> Yet even in the presence of international obligations stipulated in treaties and agreements, judges and prosecutors must rely on the goodwill of foreign states when gathering any evidence from another jurisdiction. Mutual legal assistance is thus not a concept without challenges. Jean-Bernard made the following observation:

Two problems of a general nature arise regularly. First, neither the requesting nor the requested State masters the other's legal system, such that requests for cooperation are badly formulated, precious time is wasted, and legally flawed means of proof that are of little use to the requesting state are communicated. Second, red tape and appeal procedures can slow any mutual legal assistance request down to a near standstill.<sup>43</sup>

Extradition usually starts with a formal request from the requesting country, which is examined and handled by the requested authorities. The process of extradition is discussed later.

---

<sup>41</sup> See article 2(2) of the SADC Protocol on Mutual Legal Assistance in Criminal Matters.

<sup>42</sup> Kemp G "Mutual legal assistance in criminal matters and the risk of abuse of process: A human rights perspective" (2006) 123(4) *South African Law Journal* 730 at 732.

<sup>43</sup> Schmid JB "Legal problems in mutual legal assistance from a Swiss perspective" in *Denying safe haven to the corrupt and the proceeds of corruption* Philippines: Asian Development Bank (ADB) and Organisation for Economic Co-operation and Development (OECD) (2006) at 45.



## 2.1 Issuing a letter of request from South Africa

Issuing a letter of request for mutual legal assistance allows South Africa to enlist the assistance of foreign nations in order to obtain information and track down witnesses that might not be available within its borders. According to section 2(1) of the ICCMA,

[i]f it appears to a court or to the officer presiding at proceedings that the examination at such proceedings of a person who is in a foreign State, is necessary in the interests of justice and that the attendance of such person cannot be obtained without undue delay, expense or inconvenience, the court or such presiding officer may issue a letter of request in which assistance from that foreign State is sought to obtain such evidence as is stated in the letter of request for use at such proceedings.<sup>44</sup>

Section 2(2) of the ICCMA provides differently, as follows:

A judge in chambers or a magistrate may on application made to him or her issue a letter of request in which assistance from a foreign State is sought to obtain such information as is stated in the letter of request for use in an investigation related to an alleged offence if he or she is satisfied – (a) that there are reasonable grounds for believing that an offence has been committed in the Republic or that it is necessary to determine whether an offence has been committed; (b) that an investigation in respect thereof is being conducted; and (c) that for purposes of the investigation it is necessary in the interests of justice that information be obtained from a person or authority in a foreign State.

In the case of *Thint Holdings (Southern Africa) (Pty) Ltd and Another v NDPP*,<sup>45</sup> the court explained these two sections. It interpreted section 2(1) to mean that the request letter is issued in court rather than by a judge in chambers or a magistrate; the application is made to the court by the investigator during, rather than after, the criminal proceedings. The court also interpreted section 2(2) to mean that it authorises an investigator to bring an application outside of the court process. An application is brought before a judge in chambers or a magistrate, allowing for a request even before the start of criminal proceedings and during investigations.<sup>46</sup>

Mujuzi interprets the distinction between section 2(1) and 2(2) as follows: “If the subject is an accused person, then section 2(1) applies, and section 2(2) of the ICCMA is applicable if the person is a suspect.” An accused person has a right to a fair trial which is guaranteed under section 35(3) of the Constitution. It is therefore under this that an accused has an interest in

---

<sup>44</sup> See section 2(1) of the International Co-Operation in Criminal Matters Act 75 of 1996.

<sup>45</sup> *Thint Holdings (Southern Africa) (Pty) Ltd and Another v NDPP*; *Zuma v NDPP* 2009 (1) SA 1 (CC) (hereafter “*Thint* (2009)”).

<sup>46</sup> *Thint* (2009) para 27.

whether or not a letter of request should be granted in terms of section 2(1), according to Mujuzi. He argues that it is crucial that the legal status of the individual in question be clearly understood.<sup>47</sup>

## **2.2 Letters of request from foreign countries to South Africa**

South Africa has received fair number of requests from other countries for mutual legal assistance, but not all these have seen success. In most failed cases, the failure can be attributed to either procedural shortcomings or the incompetence of the officials concerned.

In Israel, assets belonging to the suspect Daren Bobroff were frozen due to suspicious transactions. The money was thought to be the proceeds of crimes that Bobroff and his father, Ronald, had allegedly committed in South Africa, according to the Israelis. Israel issued a request for legal assistance to South Africa on 8 May 2017, asking for information regarding the South African probe.<sup>48</sup> It also asked South Africa to send a request for legal assistance so that South Africa could seize the assets for Israel's investigation. It was concluded that the investigative path was not viable because a connection could not be made between the alleged crimes Bobroff was accused of committing in South Africa and the assets in question. Israel was unable to execute South Africa's request for legal assistance. This was because the assets could not be connected to the South African investigation, so the money that had been seized was immediately in danger of being released.<sup>49</sup>

In August 2019, the Forfeiture Unit, in collaboration with South African and Israeli authorities, ordered that the money be transferred to the state's Criminal Assets Recovery Account. The order was issued in accordance with the Prevention of Organized Crime Act (POCA),<sup>50</sup> which states that property used in the commission of a crime may be forfeited to the state.

It is clear from this result that South Africa played a significant legal role in the domestic probe. Arguably, it has put effective processes and procedures in place through domestic legislation; the contribution made to the international community through mutual legal aid can be thus seen in cases like these that South Africa has dealt with in the recent past.

---

<sup>47</sup> Mujuzi J (2015a) at 357.

<sup>48</sup> Department of Justice and Constitutional Development (25 July 2022). See section "Mutual legal assistance requests to and from foreign states".

<sup>49</sup> Department of Justice and Constitutional Development (25 July 2022). See heading: "Mutual legal assistance requests to and from foreign states".

<sup>50</sup> Prevention of Organised Crime Act 121 of 1998.

### 3 EXTRADITION

By virtue of state sovereignty, states exercise authority over all persons and property within their territories.<sup>51</sup> This includes those who are charged with or accused of committing crimes abroad. In general, international law does not require the surrender of someone who is accused or suspected of committing crimes in another country: only when there is a mutual agreement between the states may fugitives be returned.<sup>52</sup>

To combat transnational organised crime effectively, national authorities must be able to collaborate with one another on a variety of levels, including in the provision of international legal assistance. According to international law, every government of a state has power over everything that occurs within its territory and hence has the right to prosecute crimes committed within its jurisdiction. As a result, when people commit a crime in one state and flee to another in an attempt to escape the consequences of their actions, the state where the crime was committed has limited powers it can exercise. The extradition process provides for the lawful return of such people to the state in whose territory the crime was committed.<sup>53</sup> Extradition proceedings work on both the international and domestic planes on an interrelated basis. A request from one state to another to extradite an individual in the requested state is a matter of public international law, which governs relations between states.<sup>54</sup>

Extradition may be defined as the delivery of an accused or convicted person to the state where he is accused of, or has been convicted of, a crime by the state in which he is resident at the time.<sup>55</sup> The objective of extradition is to ensure the return of those accused or convicted of crimes for trial or punishment. Extradition is essentially a process of intergovernmental legal assistance, and typically it relies on treaty, reciprocity, or comity.<sup>56</sup>

The Extradition Act regulates extradition procedures in South Africa. Extradition is permitted only under the terms of a state-to-state agreement, according to the Act.<sup>57</sup> In *President of the*

---

<sup>51</sup> Mokoena UC & Lubaale EC “Extradition in the absence of state agreements” (2019) 67(1) *South African Crime Quarterly* 31.

<sup>52</sup> Mokoena & Lubaale (2019) at 31.

<sup>53</sup> Joubert JJ (ed) *Criminal procedure handbook* 12<sup>th</sup> edition Cape Town: Juta (2016).

<sup>54</sup> *Khama v Director of Public Prosecutions, Gauteng Local Division, Johannesburg and Others* 2023 (2) SACR 588 (GJ) (hereafter “*Khama* (2023)”) para 19.

<sup>55</sup> Mokoena & Lubaale (2019) at 32.

<sup>56</sup> *Patel v National Director of Public Prosecutions: Johannesburg* 2017 (1) SACR 456 (SCA) (hereafter “*Patel* (2017)”) para 7.

<sup>57</sup> Section 2 of the Extradition Act 67 of 1962.

*Republic of South Africa and Others v Nello Quagliani and Others*,<sup>58</sup> the Constitutional Court explained the concept of extradition as follows: “[I]t involves ... acts of sovereignty on the part of two states; a request by one State to another ... and the delivery of the person requested.”<sup>59</sup> It is a process consisting of a series of acts, some of which are judicial, executive, or administrative in character. These acts are usually governed at both an international and local level as a matter of public international and domestic law through treaties that create binding agreements between the governments that are parties to them.<sup>60</sup> Under international law, each state is free to exercise control over events that take place on its soil, including extradition-related events.

According to the ruling in *Khama v Director of Public Prosecutions*,<sup>61</sup> extradition proceedings are not intended to determine whether the individual in question is guilty; rather, they are intended to determine if there is cause to take the subject to a foreign state. The court in *Geuking v President of the Republic of South Africa and Others* held that

extradition is deemed a sovereign act, its legal proceedings are deemed *sui generis*, and its purpose is not to adjudicate guilt or innocence but to determine whether a person should properly stand trial where accused or be returned to serve a sentence properly imposed by another state.<sup>62</sup>

South Africa has witnessed a dramatic increase in cases that involve extradition. This can be attributed to the growing number and variety of crimes that are committed in the country, with offenders attempting to evade the authorities by seeking a safe haven in other countries across the world.<sup>63</sup> However, high-profile failures to extradite fugitives have led the public to believe that South Africa's laws are too weak to successfully bring these individuals back from other countries.<sup>64</sup>

Extradition intends to ensure that accused or convicted persons are transferred from one jurisdiction to another for the purpose of criminal prosecution or for serving the sentence imposed upon conviction.<sup>65</sup> This procedure strengthens co-operation and improves the fight

---

<sup>58</sup> *President of the Republic of South Africa v Quagliani* 2009 (2) SA 466 (CC) (hereafter “*Quagliani* (2009)”).

<sup>59</sup> *Quagliani* (2009) para 1.

<sup>60</sup> *Tucker v Additional Magistrate, Cape Town and Others; Tucker v S* 2019 (2) SACR 166 (WCC) para 33.

<sup>61</sup> *Khama* (2023) para 20.

<sup>62</sup> *Geuking v President of the Republic of South Africa and Others* 2003 (3) SA 34 (CC) para 27.

<sup>63</sup> Watney (2012) at 312.

<sup>64</sup> This view, prevalent in public discourse, posits that notable extradition failures have eroded public confidence, leading to the perception that the South African legal framework on extradition is insufficient to secure the return of fugitives from abroad.

<sup>65</sup> Extradition Act 67 of 1962.

against transnational crime. Watney argues that it is important that extradition be seen as a function not only of the executive branch of government but also of the judiciary.<sup>66</sup> This is a correct position to take: the South African courts play a fundamental role in the development of international law, and it is hence important that the concepts of extradition and mutual legal assistance be seen from a wider perspective that recognises the judiciary as a key role-player in their development.

Under South Africa's extradition law, a person will not be extradited if doing so would result in that person's being killed<sup>67</sup> or the person's trial in the requesting state being unfair based on his or her gender, race, religion, and so on etc. The matter of *S v Dewani*,<sup>68</sup> an unreported case, is noteworthy in this regard. In November 2010, a British national, and his wife were in Cape Town for their honeymoon when Mrs Dewani was shot and killed during a hijacking. With the approval of South African law enforcement, Mr Dewani left the country shortly afterwards. Later, during the sentencing of one of the hijackers, it was claimed that Mr Dewani had orchestrated the murder of his wife. Dewani was arrested in the United Kingdom and released on bail pending an extradition application.

In his bid to avoid extradition, he argued that extradition to South Africa would infringe his human rights as he would be in danger of gang-related sexual violence in prison. Dewani's attempt to challenge the extradition directive in the High Court was rejected. Nevertheless, the High Court temporarily postponed his extradition to South Africa due to concerns that it would impair his mental well-being and complicate the process of preparing him to stand trial.<sup>69</sup> This shows that courts in different jurisdictions take their states' international obligations seriously and are able to apply their minds to allegations by implicated persons and make competent orders in that regard.

In July 2022, the National Director of Public Prosecutions submitted a request to extradite the Gupta brothers from the United Arab Emirates (UAE) to South Africa to face trial for alleged fraud, money laundering, and corruption under the Prevention of Organised Crime Act and the Prevention and Combating of Corrupt Activities Act.<sup>70</sup> The extradition request aligned with the

---

<sup>66</sup> Watney (2012) at 313.

<sup>67</sup> *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC) (hereafter "*Mohamed* (2001)") para 54.

<sup>68</sup> *S v Dewani* (CC15/2014) [2014] ZAWCHC 188.

<sup>69</sup> *The Government of the Republic of South Africa v Shrien Dewani* [2012] EWHC 842.

<sup>70</sup> Department of Justice and Constitutional Development (25 July 2022). See heading: "Update extradition requests from South Africa to foreign states" at para 2.

bilateral extradition treaty between South Africa and the UAE as well as with the UNCAC, a multilateral treaty ratified by both countries.<sup>71</sup>

Atul and Rajesh Gupta stood as accused persons in criminal cases in South Africa, where they had already been charged and had had warrants issued against them. When South Africa began seeking their extradition, one of the matters was before the High Court of South Africa, Free State Division, but collapsed. This attempt to extradite the brothers from the UAE failed under questionable circumstances, considering that South African authorities stated that the request to the UAE was made correctly and within the prescripts of the law. The National Director of Public Prosecutions said the extradition request was denied on the basis of a technicality regarding a cancelled warrant of arrest.<sup>72</sup> This case is a typical example of why people lose faith in the South African criminal justice system and its dealings with perpetrators of crime, especially influential and powerful individuals like the Gupta brothers.

### **3.1 Double criminality**

According to the principle of double criminality, conduct claimed to be an extraditable crime must be a crime in both the requesting and the requested state.<sup>73</sup> The notion of double (or dual) criminality is universally acknowledged as essential to extradition law.<sup>74</sup> Shearer argues that with the double-criminality rule, it is not necessary for the offence to have the same name in both states but it must be substantially comparable. According to Oppenheim, no individual may be extradited whose deed is not a crime under the laws of both the state being requested to extradite and the state requesting extradition.<sup>75</sup> The court in *Patel v S*<sup>76</sup> held that the principle is satisfied only if the alleged offence was an offence in the requested state at the time that it was allegedly committed in the requesting state.<sup>77</sup>

The current approach is that parties provide for extradition for crimes that are punishable in both the seeking and requested states with a penalty of more than a certain severity, without identifying the offence. The principle of double criminality safeguards the sovereignty of nations by preventing individuals from being extradited or subject to legal processes for acts

---

<sup>71</sup> Department of Justice and Constitutional Development (25 July 2022). See heading: “Update extradition requests from South Africa to foreign states” at para 3.

<sup>72</sup> Department of Justice and Constitutional Development (25 July 2022).

<sup>73</sup> *Patel* (2017) para 8.

<sup>74</sup> *Patel* (2017) para 8.

<sup>75</sup> Oppenheim L *International Law* 8<sup>th</sup> ed London: Longmans, Green & Co (1955) at 701.

<sup>76</sup> *Patel v S* 2016 (2) SACR 141 (GJ) (hereafter “*Patel* (2016)”).

<sup>77</sup> *Patel* (2016) para 23.

not deemed criminal in their jurisdiction. However, its rigid application can impede co-operation in combatting transnational crimes, especially where legal definitions diverge across jurisdictions. A balanced approach that respects legal diversity is critical for enhancing the efficacy of collaboration.

### 3.2 Application of human rights to extradition

In South Africa, the application of human rights to extradition is based on the Constitution and international treaties. The Constitution places a strong emphasis on safeguarding fundamental human rights. These rights are set out in the Bill of Rights, which contains clauses that could have an impact on the extradition procedure. The right to life,<sup>78</sup> the prohibition of torture and cruel, inhuman, or humiliating treatment or punishment, and the right to a fair trial<sup>79</sup> are all pertinent in this regard.

The Constitutional Court in *Mohamed and Another v President of the RSA*<sup>80</sup> established the precedent that the South African government has no authority to extradite, deport, or transfer a person in any other way from South Africa to a state that imposes the death penalty. The Court held that Mohamed's surrender violated the Constitution of South Africa and concluded that it was unlawful.<sup>81</sup> The constitutional violation centred on the South African government's failure to obtain prior assurance from the United States' government that the death penalty would not be enforced upon conviction.<sup>82</sup> In essence, this decision meant that if any South African official, without the requisite assurance, handed over anyone from within the Republic to another country to stand trial knowing that such person ran the real risk of a violation of his or her right to life, to human dignity, and not to be treated or punished in a cruel, inhuman or degrading way in that country, such official would be acting in breach of the duty provided for in section 7(2) of the Constitution.<sup>83</sup>

Many other decisions that followed have relied on the *Mohamed* decision. In *Tsebe and others v Minister of Home Affairs and others*,<sup>84</sup> the High Court issued an order stating that it was unlawful and unconstitutional to deport, extradite, or remove two individuals to Botswana

---

<sup>78</sup> Section 11 of the Constitution of Republic of South Africa.

<sup>79</sup> Section 35(3) of the Constitution of Republic of South Africa.

<sup>80</sup> *Mohamed* (2001) para 43.

<sup>81</sup> *Mohamed* (2001) para 68.

<sup>82</sup> Watney (2012) at 303.

<sup>83</sup> *Mohamed* (2001) para 38.

<sup>84</sup> *Tsebe and another v Minister of Home Affairs and others; Pitsoe v Minister of Home Affairs and others* 2012 (1) BCLR 77 (GSJ).

without receiving a guarantee in writing from that country's government stating they would not be subject to the death penalty there in any situation. The Minister of Home Affairs and the Minister of Justice and Constitutional Development sought leave to appeal directly to the apex court against this decision. The Constitutional Court by a majority granted leave to appeal but upheld the order by the High Court and dismissed the appeal.<sup>85</sup> It held that "this judgment leaves the government in no doubt that deportation, extradition or any form of removal under these circumstances is wholly unacceptable".<sup>86</sup>

These cases underscore the critical role that human rights principles play in shaping South Africa's extradition practices. The integration of human rights considerations in extradition law demonstrates a commitment to upholding constitutional values even in the context of international co-operation. Yet while the statutory framework, as well as the growing South African jurisprudence on international co-operation, has improved significantly, due attention must be paid to the ever-changing operations of criminal enterprises so that the laws that the legislature enacts are appropriate.

## 4 CONCLUSION

While South Africa has made progress in establishing legal mechanisms to facilitate international co-operation in criminal matters, significant challenges hinder the operation of these frameworks. Collaboration in matters of mutual legal assistance and extradition necessitates that participants be aware of and appreciate differences in legal traditions and systems and adopt the flexibility of approach that is the hallmark of effective international collaboration.<sup>87</sup> South Africa should develop a robust and effective legal framework that meets global standards and guarantees the swift and fair administration of justice by implementing comprehensive reforms, providing adequate resources to the institutions that deal with these requests, and fostering healthy international relations with other states.

By fostering a deeper understanding of diverse legal traditions and systems, South Africa can enhance its capacity to engage effectively in international co-operation. The ongoing development of comprehensive legislation, such as the Extradition Bill of 2022, highlights the importance of codifying clear principles and processes for handling mutual legal assistance and

---

<sup>85</sup>*Minister of Home Affairs and others v Tsebe and others (Amnesty International as amicus curiae); Minister of Justice and Constitutional Development and another v Tsebe and others (Amnesty International as amicus curiae)* 2012 (10) BCLR 1017 (CC) (hereafter "*Tsebe 2 (2012)*") para 97.

<sup>86</sup>*Tsebe 2 (2012)* para 99.

<sup>87</sup> United Nations Office on Drugs and Crime *Manual on mutual legal assistance and extradition* (2012).



extradition requests. South Africa's future efforts should focus on strengthening institutional resources, ensuring transparency, and minimising legal ambiguities to promote the fair administration of justice and foster healthy international relations.

## **BIBLIOGRAPHY**

### ***Books***

Joubert JJ (ed) *Criminal procedure handbook* 12 ed Cape Town: Juta (2016)

Oppenheim L *International law* 8<sup>th</sup> ed London: Longmans, Green & Co (1955)

### ***Chapters in books***

Kemp G "Horizontal and vertical international co-operation in criminal matters: An African regional and sub-regional perspective" in Sendze TBK, Adeboyejo A, Morrison H & Ugwu S (eds) *Contemporary international criminal law issues* The Hague: TMC Asser Press (2023)

Schmid JB "Legal problems in mutual legal assistance from a Swiss perspective" in *Denying safe haven to the corrupt and the proceeds of corruption* Philippines: Asian Development Bank (ADB) and Organisation for Economic Co-operation and Development (OECD) (2006)

### ***Journal articles***

Dandurand Y "Strategies and practical measures to strengthen the capacity of prosecution services in dealing with transnational organised crime, terrorism, and corruption" (2007) 47 *Crime, Law and Social Change* 225–246

Kemp G "Mutual legal assistance in criminal matters and the risk of abuse of process: A human rights perspective" (2006) 123(4) *South African Law Journal* 730–743

Mokoena UC & Lubaale EC "Extradition in the absence of state agreements" (2019) 67(1) *South African Crime Quarterly* 31–42

Mujuzi JD "The prosecution in South Africa of international offences committed abroad: The need to harmonise jurisdictional requirements and clarify some issues" (2015b) 1 *African Yearbook on International Humanitarian Law* 96–117

Mujuzi JD "The South African International Co-operation in Criminal Matters Act and the issue of evidence" (2015a) 48(2) *De Jure Law Journal* 351–387

Watney M "A South African perspective on mutual legal assistance and extradition in a globalized world" (2012) 15 *PER* 292–318

## ***Legislation***

Constitution of the Republic of South Africa, 1996

Extradition Act 67 of 1962

International Co-operation in Criminal Matters Act 75 of 1996

Prevention and Combating of Trafficking in Persons Act 7 of 2013

Prevention of Organised Crime Act 121 of 1998

## ***Case law***

*Azapo and Others v President of the Republic of South Africa* 1996 (4) SA 671 (CC)

*Geuking v President of the Republic of South Africa and Others* 2003 (3) SA 34 (CC)

*Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC)

*Harksen v President of the Republic of South Africa and Others* 2000 (2) SA 825 (CC)

*Khama v Director of Public Prosecutions, Gauteng Local Division, Johannesburg and Others* 2023 (2) SACR 588 (GJ)

*Minister of Home Affairs and Others v Tsebe and Others; Minister of Justice and Constitutional Development and Another v Tsebe and Others* 2012 (10) BCLR 1017 (CC)

*Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC)

*Patel v National Director of Public Prosecutions: Johannesburg* 2017 (1) SACR 456 (SCA)

*Patel v S* 2016 (2) SACR 141 (GJ)

*President of the Republic of South Africa v Quagliani* 2009 (2) SA 466 (CC)

*S v Dewani* (CC15/2014) [2014] ZAWCHC 188

*The Government of the Republic of South Africa v Shrien Dewani* [2012] EWHC 842

*Thint Holdings (Southern Africa) (Pty) Ltd and Another v NDPP; Zuma v NDPP* 2009 (1) SA 1 (CC)

*Tsebe and Another v Minister of Home Affairs and Others; Pitsoe v Minister of Home Affairs and Others* 2012 (1) BCLR 77 (GSJ)

*Tucker v Additional Magistrate, Cape Town and Others; Tucker v S* 2019 (2) SACR 166 (WCC)

### ***Internet sources***

Department of Justice and Constitutional Development “High-profile extradition and mutual legal assistance matters” (25 July 2022) *South African Government* available at <https://www.gov.za/news/speeches/minister-ronald-lamola-high-profile-extradition-and-mutual-legal-assistance-matters> (accessed 23 January 2025)

Global Organized Crime Index *Criminality in South Africa* available at [https://ocindex.net/country/south\\_africa](https://ocindex.net/country/south_africa) (accessed 15 July 2024)

Masters J “What is extradition?” (8 January 2020) *Council on Foreign Relations* available at <https://www.cfr.org/background/what-extradition> (accessed 12 December 2024)

University of Melbourne Library Guides: Treaties and international Law “International law and South African domestic law” available at <https://unimelb.libguides.com/c.php?g=929734&p=6718239> (accessed 20 March 2025)

UNODC “Compendium of bilateral and regional instruments for South Asia international cooperation in criminal matters” UNODC Regional Office for South Asia, New Delhi and Terrorism Prevention Branch, Vienna, Volume II, (2015) available at [https://css.unodc.org/documents/terrorism/Publications/SAARC%20compendium/SA\\_Compendium\\_Volume-1.pdf](https://css.unodc.org/documents/terrorism/Publications/SAARC%20compendium/SA_Compendium_Volume-1.pdf) (accessed 26 August 2025)

### ***Reports***

Financial Action Task Force (FATF) “Anti-money laundering and counter-terrorist financing measures in South Africa Mutual Evaluation Report” (2021)

United Nations Office on Drugs and Crime *Manual on mutual legal assistance and extradition* (2012)

### ***International and regional instruments***

United Nations Convention against Corruption, 2004

SADC Protocol on Mutual Legal Assistance in Criminal Matters