PREFACE

Member states of the Intergovernmental Authority on Development (IGAD), meeting under the auspices of the IGAD Capacity Building Programme against Terrorism (ICPAT), reached agreement at the political level on the texts of draft Extradition and Mutual Legal Assistance Conventions when IGAD Ministers of Justice met on 1-2 April 2009. Those conventions were adopted by the IGAD Council of Ministers at their 33rd ordinary session in Djibouti on 7 – 8 December 2009.

The following draft IGAD Practitioner Reference Manual for Mutual Legal Assistance and Extradition is designed to provide practitioners with a one-stop reference manual on mutual legal assistance and extradition under those conventions. It has been prepared for a training workshop for IGAD member state representatives in March 2010. It will be finalized after the conclusion of the workshop once the comments and suggestions of the workshop participants have been incorporated.

The reference manual includes descriptions of the provisions of those conventions as well as practical legal issues and difficulties that practitioners (be they prosecutors, government legal advisers, law enforcement officers, or judges) may face – and possible solutions. In addition, the manual also includes the complete text of both conventions and a reference guide to other resources on mutual legal assistance and extradition.

This manual was prepared by Amicus Legal Consultants Limited and Donald Deya, CEO of the Pan African Lawyers Union, with input from ICPAT and the Center on Global Counterterrorism Cooperation, and with the support of the Ministry of Foreign Affairs of Denmark.
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PREAMBLE

We, the Representatives of the Governments of:

The Republic of Djibouti
The State of Eritrea
The Federal Democratic Republic of Ethiopia
The Republic of Kenya
The Somali Republic
The Republic of Sudan
The Republic of Uganda

Being members of the Inter Governmental Authority on Development (IGAD) and

DESIRING to make our co-operation in the prevention and suppression of crime, tracing and confiscating the proceeds of crime more effective by concluding an agreement on Mutual Legal Assistance;

RECOGNIZING that regional and international cooperation is necessary to prevent and combat crime;

MINDFUL of our responsibility to guarantee the security and stability of our peoples in order to minimize the vulnerability of our States;

INSPIRED by the noble purpose of promoting peace, security and stability, and eliminating the sources of conflict as well as preventing and resolving conflicts in the sub-region;

RECALLING the Ministers of Justice statement of 21st of September 2007 in Kampala, Uganda on the vital need for an IGAD wide instrument on Mutual Legal Assistance;

HEREBY AGREE AS FOLLOWS

PART I

DEFINITIONS

“Any other convention” means any universal or regional instruments relating to crime.

Central Authority means an authority designated under Article 2 of this Convention.

Competent Authority means any organization, agency or body of a State Party competent under the domestic law of that State Party to make or receive Mutual Legal Assistance requests.

Communications includes telecommunications and the transmission of an item through the public postal service.

Communications data means any of the following:
a) traffic data;

b) subscriber information;

c) any information not falling within paragraph (a) or (b) that is held or obtained by the provider of a postal service or a telecommunications service and which relates to the provision of that service but does not include content data.

**Confiscation proceedings** means proceedings, whether civil or criminal, for an order whether it is for freezing or confiscating any items that are proceeds of crime or an instrumentality of unlawful activity:

a) Confiscating any property derived or obtained whether directly or indirectly from an offence or used in, or in connection with, the commission of an offence; or

b) imposing a pecuniary penalty calculated by reference to the value of any property derived or obtained whether directly or indirectly from an offence or used in, or in connection with, the commission of an offence.

**Content data** means the subject or purpose of the communication, or the message or information being conveyed by the communication, whether or not any interpretation, process, mechanism or device needs to be applied or used to make the meaning of the communication intelligible.

**Covert surveillance** means surveillance carried out in a manner that is calculated to ensure that the persons who are subject to the surveillance are unaware that it is or may be taking place.

**Covert surveillance by the use of a surveillance device** means covert surveillance carried out by or with an electronic surveillance device which transmits records or otherwise captures audio product or visual images, but does not include either surveillance by a tracking device which only provides of location or position, or the interception of telecommunications.

**Criminal matter** means, comprises and includes every investigation, prosecution or judicial proceeding relating to a criminal offence.

This includes an investigation, prosecution or proceedings relating to:

(a) the forfeiture or confiscation of proceeds of crime;

(b) the imposition or recovery of a pecuniary penalty in respect of a prescribed offence;

(c) the tracing, freezing and restraint of property that may be forfeited or confiscated.

**Dual criminality** means conduct which would constitute an offence under the laws of both the Requesting and Requested State Parties.
Freezing means to prohibit the transfer, conversion, disposition, or movement of funds or other assets on the basis of, and for the duration of the validity of an action initiated by the appropriate authority or a court.

IGAD means Inter Governmental Authority on Development.

IGAD Secretariat means the headquarters of IGAD.

Instrumentality of unlawful activity means any property:

   a) used in, or in connection with, the commission of an offence or unlawful activity; or
   b) intended to be used in, or in connection with, the commission of an offence or unlawful activity;

Interception of communications means the disrupting, destroying, opening, interrupting, suppressing, stopping, seizing, recording, copying, listening to and viewing of communications in the course of its transmission so as to make some or all of the contents of the communication available, while being transmitted, to a person other than the sender or intended recipient of the communication.

Offence means criminal conduct under the laws of a State and in the case of a Federal State or a State having more than one legal system, includes criminal conduct under the laws of that State or any part thereof.

Postal item means any letter, parcel, package, or other thing which is being or will be carried by a public postal service.

Postal service means any service which:

   (a) consists in the following, or in any one or more of them, namely, the collection, sorting, conveyance, distribution and delivery of postal items; and
   (b) is offered or provided as a service the main purpose of which, or one of the main purposes of which, is to make available, or to facilitate, a means of transmission from place to place of postal items containing communications.

Preservation of communications data means the protection of communications data which already exists in a stored form from modification or deletion, or from anything that would cause its current quality or condition to change or deteriorate. Communications data that is stored on a highly transitory basis as an integral function of the technology used in its transmission is not communications data which already exists in a stored form for the purposes of this definition.

Proceeds of crime includes any property, benefit or advantage that is wholly or partly obtained, derived or realised directly or indirectly as a result of the commission of a criminal act or omission.

Property includes any item that is relevant for evidentiary purposes.
Public postal service means any postal service which is offered or provided to the public, or to a substantial section of the public, in any one or more parts of the territory of a State Party.

Requested State Party means a State being requested to provide mutual legal assistance under the terms of this Convention.

Requesting State Party means the State requesting for mutual legal assistance under the terms of this Convention.

State Party means any party to this Convention.

Stored communication means the content data that is no longer in the course of transmission and which has been stored in a form allowing retrieval.

Subscriber information means any information that is held by a provider of a postal service or telecommunications service relating to subscribers to its services and by which subscriber’s identity, affairs or personal particulars can be established, but does not include traffic data.

Surveillance includes:

(a) monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications;

(b) recording anything monitored, observed or listened to in the course of surveillance; and

(c) surveillance by or with the assistance of a surveillance device.

Surveillance device is a device, whether electronic or otherwise, made, designed or adapted for:

(a) monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications;

(b) recording anything monitored, observed or listened to in the course of surveillance

Telecommunication means a communication transmitted or received by means of guided or unguided electromagnetic or other forms of energy.

Telecommunications service means a service provided to any person for transmitting and receiving telecommunications, being a service the use of which enables communications to be transmitted or received over a telecommunications system operated by a service provider.

Telecommunications system means any system (including the apparatus comprised in it) which exists (whether wholly or partly in the territory of a State Party or elsewhere) for the purpose of transmitting and receiving telecommunications.
**Third State** means a State other than the requesting State Party or requested State Party.

**Traffic data** means any information:

(a) that is attached to (whether by the sender or otherwise) or associated with a communication by means of which the communication has been, is being or may be transmitted or received; and

(b) by which can be established the use by any person of any postal service or telecommunications service.

### PART II

**GENERAL PROVISIONS**

**Article 1: Obligation to assist**

1. States Parties shall co-operate with each other, to the widest extent possible for the purposes of criminal matters in accordance with this Convention.

2. This Convention provides for the giving of assistance by the competent authorities of the requested State Party in respect of criminal matters arising in the requesting State Party.

3. The Convention does not affect any existing forms of co-operation, either formal or informal; nor does it preclude the development of any future forms of co-operation.

4. Each State Party shall adopt, if it has not already done so, such legislative and any other measures necessary to give effect to the obligations under this Convention.

5. Mutual Legal Assistance under this Convention includes, but is not limited to, assistance in:

   a) Identifying and locating of persons for evidential purposes;
   b) Examining witnesses;
   c) Effecting service of judicial documents;
   d) Executing searches and seizures;
   e) Examining objects and sites;
   f) Providing (including formal production where necessary) originals or certified copies of relevant documents and records, including but not limited to
government, bank, financial, corporate or business records;
g) Providing information, evidentiary items and expert evaluations;
h) Facilitating the voluntary attendance of witnesses or potential witnesses in the requesting State Party;
i) Facilitating the taking of evidence through video conference;
j) Effecting a temporary transfer of persons in custody to appear as a witness;
k) Intercepting of items during the course of carriage by a public postal service;
l) Identifying, freezing and tracing proceeds of crime;
m) Recovering of assets;
n) Preserving communications data;
o) Intercepting of telecommunications;
p) Conducting covert surveillance by the use of a surveillance device;
q) Any other type of assistance or evidence gathering that is not contrary to the domestic law of the requested State Party.

Article 2: Central Authority

1. Each State Party shall designate a Central Authority to transmit and to receive requests for assistance under this Convention.

2. For the purposes of this Convention, the function of a Central Authority may include:
   a) making and receiving requests for assistance and executing or arranging for the execution of such requests;
   b) where necessary, certifying or authenticating, or arranging for the certification and authentication of any documents or other material supplied in response to a request for assistance;
   c) taking practical measures to facilitate the orderly and rapid disposition of requests for assistance;
   d) negotiating and agreeing on conditions related to requests for assistance, as well as to ensure compliance with those conditions;
   e) making any arrangements deemed necessary in order to transmit the evidentiary material gathered in response to a request for assistance to the competent Authority of the requesting State or to authorize any other authority to do so;
   f) carrying out such other tasks as provided for by this Convention or which may be necessary for effective assistance to be provided or received.
3. Communication between Central Authorities shall take place directly.

4. States Parties shall notify the IGAD Secretariat of their designated Central Authorities.

5. The IGAD Secretariat shall maintain an updated register of Central Authorities as notified by States Parties, and make the register available to Central Authorities of States Parties.

Article 3: Applicable law

1. The law of the requested State Party will govern the procedure for complying with a request under this Convention.

2. Where admissibility of evidence to be gathered requires certain formalities and procedures to be adhered to under the laws of the requesting State Party, it may ask the requested State Party, where possible, to comply with those formalities and procedures.

Article 4: Form of the request

1. Requests shall be in writing, except that in an urgent matter a request may be made orally provided that it is confirmed in writing forthwith.

2. For the purpose of paragraph (1) ‘in writing’ includes e-mail, facsimile or other agreed forms of electronic transmission provided appropriate levels of security and authentication are in place.

Article 5: Contents of the request

1. Except in the case of a request for the preservation of communications data under Article 25, a request under this part of the Convention shall:

   (a) specify the nature of the assistance requested and details of any particular procedure that the Requesting State Party wishes to be followed;

   (b) the purpose for which evidence, information or material is sought;

   (c) contain the information relevant to the assistance sought;
(d) indicate any time limit within which compliance with the request is desired, stating reasons;

(e) contain the following information:

(i) the identity of the agency or authority initiating the request;

(ii) the nature of the criminal matter,

(iii) whether or not criminal proceedings have been instituted.

(f) where criminal proceedings have been instituted, contain the following information:

(i) the court exercising jurisdiction in the proceedings;

(ii) the identity of the accused person;

(iii) the offence(s) of which he stands accused, and a summary of the facts;

(iv) the stage reached in the proceedings; and

(v) any date fixed for further stages in the proceedings.

(g) where criminal proceedings have not been instituted, state the offence which the Competent Authority of the Requesting State Party has reasonable grounds to suspect has been, is being or will be committed with a summary of known facts.

2. Notwithstanding the absence of any of formalities set out above the requested State Party may in its discretion execute the request.

3. A request for assistance and the documents in support thereof, as well as documents or other material supplied in response to such a request, shall not require certification or authentication.
PART III
TRANSMISSION AND EXECUTION OF REQUEST

Article 6: Action in the Requesting State Party

1. A request for assistance under this Convention may be initiated by a competent authority in the requesting State Party.

2. The Central Authority of the requesting State Party shall, if it is satisfied that the request can properly be made under this Convention, transmit the request as soon as practicable to the Central Authority of the requested State Party and shall ensure that the request contains all the information required by the provisions of this Convention.

3. In the event of urgency, or as permitted by domestic law, requests may be sent by direct transmission from a competent authority of the requesting State Party to a competent authority of the requested State Party, for execution in accordance with its domestic law. A copy of the request shall be submitted by the competent authority of the requesting State Party to the Central Authority of the requesting State Party forthwith.

4. Where further information is required before a request under this Convention can be executed, in so far as practicable, such information shall be provided by the appropriate competent authority of the requesting State Party and within any deadlines, where necessary, set by the requested State Party.

Article 7: Action in the Requested State Party

1. The Central Authority of the requested State Party shall, as soon as is reasonably practicable, acknowledge receipt of the request.

2. Subject to the provisions of this Convention, the requested State Party shall grant the assistance requested as expeditiously as practicable.

3. The Central Authority of the requested State Party shall take the necessary steps to ensure that the request is complied with.
4. Requests may be received directly by a competent authority of the requested State Party from a competent authority of the requesting State Party for execution in accordance with the domestic law of the requested State Party.

5. The competent authority of the requested State Party may seek additional information from the competent authority of the requesting State Party.

6. If the Central Authority of the requested State Party considers that:
   a) the request does not comply with the provisions of this Convention; or
   b) in accordance with the provisions of this Convention the request for assistance is to be refused in whole or in part; or
   c) the request cannot be complied with, in whole or in part; or
   d) there are circumstances which are likely to cause a significant delay in complying with the request;

   it shall inform the Central Authority of the requesting State Party promptly, giving reasons.

Article 8: Postponement of the execution of request

The requested State Party may, after consultation with the requesting State Party postpone the execution of the request if its immediate execution would interfere with an ongoing investigation or prosecution in the requested State Party.

Article 9: Defence requests

1. Where criminal proceedings have been instituted against a person, or where a person is joined in such proceedings as a partie civile, a competent authority of a State Party may, on application by either the said person or his or her legal representative, issue a request for assistance to another State Party.

2. The fact that a request originates from a person charged or his or her legal representative shall not be a ground for refusal by the requested State Party.
PART IV
GROUND FOR REFUSAL

Article 10: Grounds for refusal

1. The requested State Party may refuse to comply in whole or in part with a request for assistance under this Convention:
   a) if the requested State Party considers that the criminal matter concerns:
      (i) an offence or proceedings of a political character; or
      (ii) conduct which in the requesting State Party is an offence only under military law or a law relating to military obligations; or
      (iii) an offence the prosecution of which in the requesting State Party would be incompatible with the Requested State Party’s law on double jeopardy (ne bis in idem).
   b) to the extent that it appears to the requested State Party that compliance would be contrary to the constitution of the requested State Party, or would prejudice the security, international relations or other essential public interests of the requested State Party; or
   c) where there are substantial grounds leading the requested State Party to believe that compliance would facilitate the prosecution or punishment of any person on account of race, ethnic origin, gender, religion, nationality or political opinions or would cause prejudice for any of these reasons to any person affected by the request.

2. The requested State Party may refuse to comply in whole or in part with a request for assistance to the extent that the steps required to be taken in order to comply with the request cannot under the law of that State be taken.

3. An offence of a political nature shall not include any offence in respect of which the States Parties have assumed an obligation, pursuant to any multilateral convention, or under international law, 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.

Article 11: Consultation between States Parties

1. Before refusing a request, or postponing its execution, in whole or in part, under any part of this Convention the requested State Party shall consider forthwith whether assistance may be granted subject to certain conditions. If
the requesting State Party accepts assistance subject to these conditions, it shall comply with them.

2. If the requesting State Party refuses to give the undertaking or to comply with the conditions, the requested State Party may refuse to grant the assistance sought in whole or in part.

3. The requested State Party shall give the requesting State Party an opportunity to present its reasons in favour of providing the assistance sought.

PART V
REQUESTS FOR CERTAIN FORMS OF ASSISTANCE

Article 12: Service of documents

1. A request under this Convention may seek assistance in the service of documents relevant to a criminal matter arising in the requesting State Party.

2. The request shall be accompanied by the documents to be served and, where those documents relate to attendance in the requesting State Party, such notice as the requested State Party is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.

3. The requested State Party shall endeavour to have documents served:
   a) by any particular method stated in the request, unless such method is incompatible with the laws of the requested State Party; or
   b) by any method prescribed by its laws for the service of document in criminal proceedings.

4. The requested State Party shall transmit to the Central Authority of the requesting State Party a certificate or other proof as to the service of the document or, if they have not been served, as to the reasons which have prevented service.
Article 13: Provision or production of records

1. A request under this Convention may seek the provision or production of any documents, records or other material relevant to a criminal matter arising in the requesting State Party.

2. The requested State Party may provide copies of documents, records or other material not publicly available, to the same extent and under the same conditions as apply to the provision of such records to its own law enforcement agencies or prosecution or judicial authorities.

Article 14: Examination of witnesses

1. A request under this Convention may seek assistance in the examination of a witness in the requested State Party.

2. The request shall specify, as appropriate and so far as the circumstances of the case permit:
   a) the name and address or the official designation of the witness to be examined;
   b) the question to be put to the witness or the subject matter about which he is to be examined;
   c) whether it is desired that the witness be examined orally or in writing;
   d) whether it is desired that the oath be administered to the witness (or, as the law of the requested State Party allows, that they be required to make a solemn affirmation);
   e) any provisions of the law of the requesting State Party as to privilege or exemption from giving evidence which appear especially relevant to the request; and
   f) any special requirements of the law of the requesting State Party as to the manner of taking evidence relevant to its admissibility in requesting State.

3. The request may seek permission for, so far as the law of the requested State Party permits, the accused person or his legal representative to attend the examination of the witness and ask questions of the witness.
Article 15: Attendance of witnesses in the requesting State Party

1. A request under this Convention may seek assistance in facilitating the personal appearance of a witness before a court exercising jurisdiction in the requesting State Party.

2. The requesting State Party shall inform the requested State Party of the date on which the appearance of the witness is required. The requesting State Party shall inform the requested State Party at least 30 days prior to the date of the attendance. In the event of urgency, the requested State Party may accept a shorter period of notice.

3. The request shall specify:
   a) the subject matter upon which it is desired to examine the witness;
   b) the reasons why the personal appearance of the witness is required; and
   c) details of the travelling, subsistence and other expenses payable by the requesting State Party in respect of the personal appearance of the witnesses.

4. The competent authorities of the requested State Party shall notify a person, in accordance with domestic law, whose appearance as a witness in the requesting State Party is desired; and
   a) ask whether the person agrees to appear;
   b) inform the Central Authority of the requesting State Party of the answer; and
   c) if the person is willing to appear, make appropriate arrangements to facilitate the personal appearance of the witness.

5. A person whose appearance as a witness is the subject of a request may refuse to appear as witness where the law of the requested State Party either permits such a refusal or does not make the witness a compellable witness under its law.

6. A person whose appearance as a witness is the subject of a request and who does not agree to appear shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested State Party.
Article 16: Attendance of witnesses

A person served, in compliance with a request, with a summons to appear as a witness in the requesting State Party and who fails to comply with the summons shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or the requested State Party notwithstanding any contrary statement in the summons.

Article 17: Voluntary attendance of persons in custody

1. A request under this Convention may seek the temporary transfer of a person in custody in the requested State Party for purposes of identification, providing assistance in obtaining evidence for investigations or prosecutions or to appear as a witness before a court exercising jurisdiction in the requesting State Party.

2. The request shall specify:
   a) the subject matter upon which it is desired to examine the witness;
   b) the reasons for which the personal appearance of the witness is required.

3. The consent of the person in custody is a pre-requisite for the transfer. A statement of consent or a copy shall be provided. The requested State Party shall refuse to comply with a request for the transfer of a person in custody if the person concerned does not consent to the transfer.

4. A person in custody whose transfer is the subject of a request and who does not consent to the transfer shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested State Party.

5. Where a person in custody is transferred, the requested State Party shall notify the requesting State Party of:
   a) the dates upon which the person is due under the law of the requested State Party to be released from custody; and
   b) the dates by which the requested State Party requires the return of the person;
   and shall notify the requesting State Party of any variations in such dates.

6. The requesting State Party shall keep the person transferred in custody, and shall return the person to the requested State Party when the presence of
the person as a witness in the requesting State Party is no longer required, and in any case by the earlier of the dates notified under paragraph 5 of this Article.

7. The obligation to return the person transferred shall subsist notwithstanding the fact that the person is a national of the requesting State Party.

8. The requesting State Party to which the person is transferred shall not require the requested State Party from which the person was transferred to initiate extradition proceedings for the return of the person.

9. The period during which the person transferred is in custody in the requesting State Party shall be deemed to be service in the requested State Party of an equivalent period of custody in that State for all purposes.

10. Nothing in this Article shall preclude the release in the requesting State Party without return to the requested State Party of any person transferred where the two States and the person concerned have agreed to such release.

Article 18: Undertaking to witness

1. A witness appearing in the requesting State Party in response to a request shall be given an undertaking by the requesting State Party that he shall not be subject to prosecution, detention or any other restriction of personal liberty in respect of criminal acts, omissions or convictions occurring before the time of the departure of the person from the requested State Party.

2. The undertaking provided for in paragraph 1 above shall cease in the case of a witness appearing in response to a request under Article 17; when the witness having had, for a period of 15 consecutive days from the dates when the person was notified by the competent authority of the requesting State Party that his/her presence was no longer required by the court exercising jurisdiction in the criminal matter, an opportunity of leaving, has nevertheless remained in the requesting State Party, or having left that State has voluntarily returned to it.

Article 19: Privilege

1. In response to a request under this Convention, no person shall, in attendance for examination be compelled to give any evidence in the requested State Party which a witness could not be compelled to give:
a) in criminal proceedings in that State; or
b) in criminal proceedings in the requesting State Party.

2. For the purposes of this Article any reference to giving evidence includes references to answering any question and/or to producing any document, or other thing.

Article 20: Search and seizure

1. A request under this Convention may seek assistance in the search for, and seizure of property in the requested State Party.

2. The request shall specify the property to be searched for and seized and shall contain, so far as reasonably practicable, all information available to the Central Authority of the requesting State Party which may be required to be adduced in an application under the law of the requested State Party for any necessary warrant or authorization to effect the search and seizure.

3. Insofar as permitted by its domestic law, the requested State Party shall provide such certification as may be required by the requesting State Party concerning the result of any search, the place and circumstances of seizure, and the subsequent custody of the property seized.

PART VI
INTERCEPTION OF COMMUNICATIONS, PRESERVATION OF COMMUNICATIONS DATA AND COVERT SURVEILLANCE

Article 21: Requests for interception of telecommunications

1. For the purpose of a criminal investigation, a State Party may, in accordance with the provisions of this Convention and the requirements of its domestic law, make a request to a Central Authority of another State Party for:
   a) the interception and immediate transmission to the requesting State Party of telecommunications; or
   b) the interception, recording and subsequent transmission to the requesting State Party of telecommunications.

2. Without prejudice to the generality of paragraph 1, a request under it may be made in relation to the use of means of telecommunications by the subject of the interception, if this subject is present in:
a) the requesting State Party and the requesting State Party needs the technical assistance of the requested State Party to intercept his communications; or,
b) the requested State Party and his communications are capable of being intercepted in the requesting State Party.

3. A request under this Article shall include:
   a) an indication of the authority making the request;
   b) confirmation that a lawful interception order or warrant has been issued in connection with a criminal investigation, if such an order or warrant is required by the domestic law of the requesting State Party;
   c) information for the purpose of identifying the subject of the requested interception;
   d) details of the criminal conduct under investigation;
   e) the desired duration of the interception; and
   f) if possible, the provision of sufficient technical data, in particular the relevant network connection number, communications address or service identifier to ensure that the request can be met.

4. Where a request has been made under paragraph 1(a) above and immediate transmission of the contents of an intercepted communication is not possible, the requested State Party may undertake to comply with the request as though it were made under paragraph 1(b).

5. The State receiving the information provided under paragraphs 3 and 4 shall keep that information confidential in accordance with its domestic law.

Article 22: Stored communications

1. A State Party may make a request for assistance in accordance with the domestic laws of the requested State Party for provision of stored communications.

2. Each State Party shall consider adopting such provisions as may be necessary to enable it to comply with such a request.

Article 23: Request for the interception of items during the course of carriage by a public postal service

For the purpose of a criminal investigation, a competent authority of the requesting State Party may, in accordance with the requirements of its domestic law, make a request to a competent authority of the requested State Party for the interception of
an item during the course of its carriage by a public postal service and immediate transmission to the requesting State Party of the said item or a copy thereof.

Article 24: Bilateral or multilateral arrangements

Nothing in this Part shall preclude any bilateral or multilateral arrangements between States Parties for the purpose of facilitating the enhanced use of present and future technical possibilities regarding the lawful interception of telecommunications.

Article 25: Requests for the preservation of communications data

1. A request for the preservation of communications data may be made under this Article by an agency or authority competent to make such a request under the laws of the requesting State Party.

2. Such a request may be directly transmitted to an agency or authority competent to receive such a request under the laws of the requested State Party.

3. A request for the preservation of communications data shall:
   a) specify the identity of the agency or authority making the request;
   b) contain a brief description of the conduct under investigation;
   c) contain a description of the communications data to be preserved and its relationship to the investigation or prosecution, and in particular identifying whether the communications data to be preserved includes:
      (i) subscriber information;
      (ii) traffic data;
      (iii) any other information falling within the definition of communications data;
   d) contain a statement that the requesting State Party intends to submit a request for mutual legal assistance to obtain the communications data within the period permitted under this Article.

4. The preservation of communications data pursuant to a request made under this Article shall be for a period of one hundred and twenty (120) days, pending submission by the requesting State Party of a request for assistance to obtain the preserved communications data. Following the receipt of such a request, the data shall continue to be preserved pending the determination of that request and, if the request is granted, until the data is obtained pursuant to the request for assistance.
5. If the requested State Party considers that the preservation of communications data pursuant to a request made under this Article will not ensure the future availability of the communications data, or will threaten the confidentiality of, or otherwise prejudice the investigation in the requesting State Party, it shall promptly inform the requesting State Party, which shall then determine whether the request should nevertheless be executed.

6. Notwithstanding the general grounds for refusal contained in Article 9, a request for the preservation of communications data under this Article may be refused only to the extent that it appears to the requested State Party that compliance would be contrary to the laws or Constitution of that country, or would prejudice the security, international relations, or other essential public interests of that country.

Article 26: Covert surveillance by the use of a surveillance device

1. A request may be made under this Convention for the deployment of covert surveillance by the use of a surveillance device.

2. Covert surveillance by the use of a surveillance device shall take place in accordance with the domestic law and procedures of the requested State Party. The duration of the covert surveillance by the use of a surveillance device, the detailed conditions, and the monitoring and preserving of the product of such surveillance shall be agreed between the requesting and requested State Parties in accordance with their domestic law and procedures.

3. A State Party may make a request for assistance involving surveillance, including the use of a tracking device, other than that provided for in this Article.

PART VII
ASSET RECOVERY, FREEZING AND CONFISCATION

Article 27: General provisions

1. States Parties shall assist each other in proceedings involving the identification, tracing, freezing, and confiscation of the proceeds and instrumentalities of crime in accordance with the domestic law of the requested State Party and shall include:
   a) details of the property in relation to which co-operation is sought;
b) the location of the property;
c) the connection, if any between the property and the offences in respect of which the request is made;
d) where known, details of any third party interests in the property;
e) a certified copy of the freezing decision or final decision of confiscation made by the court.

2. Nothing in this Article shall prejudice the rights of bona fide third parties.

Article 28: Recognition of the claims of a State

Each State Party shall, in accordance with its domestic law, take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognise another State Party’s claim as a legitimate owner of property acquired through the commission of a criminal offence.

Article 29: Mechanisms for asset recovery through international co-operation

1. In accordance with its domestic law, each State Party, in order to provide mutual legal assistance with respect to proceeds and instrumentalities of crime, shall take such measures as may be necessary to:
   a) permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;
   b) permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law; and
   c) allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

2. In accordance with its domestic law, each State Party, in order to provide mutual legal assistance upon a request made pursuant to this Convention, shall, in accordance with its domestic law:
   a) take such measures as may be necessary to permit its competent authorities to freeze property upon a freezing order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this Article;
b) take such measures as may be necessary to permit its competent authorities to freeze property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this Article; and

c) consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

**Article 30: International co-operation for purposes of confiscation**

1. A State Party that has received a request from another State Party, having jurisdiction over a criminal offence for the execution of a confiscation order for the proceeds of crime or instrumentalities of crime in its territory shall, to the greatest extent possible within its domestic legal system:
   a) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party insofar as it relates to proceeds of crime or instrumentalities situated in the territory of the requested State Party; or
   b) Submit the request to its Competent Authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it.

2. Following a request made by another State Party having jurisdiction over a criminal offence, the requested State Party shall take measures to identify, trace and freeze proceeds of crime or instrumentalities for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under sub-paragraph 1(b) of this Article, by the requested State Party.

3. Requests made pursuant to this Article shall contain:
   a) in the case of a request pertaining to paragraph 1 (a) of this Article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting State Party to provide adequate notification to *bona fide*
third parties and to ensure due process and a statement that the confiscation order is final;

b) in the case of a request pertaining to paragraph 1 (b) of this Article, a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;

c) in the case of a request pertaining to paragraph 2 of this Article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based.

3. The decisions or actions provided for in paragraphs 1 and 2 of this Article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party.

4. In addition to the general grounds of refusal as set out under Article 10 above, co-operation under this Article may also be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence within a reasonable period, or if the property is of a de minimis value.

5. Before lifting any provisional measures taken pursuant to this Article, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.

6. The provisions of this Article shall not be construed as prejudicing the rights of bona fide third parties.

Article 31: Return and disposal of assets

1. In accordance with its domestic law and with the provisions of this Convention property confiscated by a State Party shall be disposed of, including by return to its prior legitimate owners, pursuant to paragraph 3 of this Article, by that State.

2. In accordance with its domestic law, each State Party shall take such measures as may be necessary to enable its competent authorities to return
confiscated property, when acting on the request made by another State, in accordance with this Convention, taking into account the rights of bona fide third parties.

3. The requested State Party shall:
   a) in the case of embezzlement of public funds or of laundering of embezzled public funds, when confiscation was executed in accordance with the provisions contained within this Convention and on the basis of a final judgment in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party;
   b) in the case of proceeds of any criminal offence, when the confiscation was executed in accordance with the provisions contained within this Convention and on the basis of a final judgment in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognises damage to the requesting State Party as a basis for returning the confiscated property;
   c) in all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.

4. Where appropriate, unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this Article.

5. Where appropriate, State Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.

**Article 32: Financial Intelligence Unit**

State Parties shall co-operate with one another for the purpose of preventing and combating the transfer of proceeds of criminal offences and of promoting ways and means of recovering such proceeds and, to that end, shall establish a Financial Intelligence Unit to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions.
PART VIII
MISCELLANEOUS PROVISIONS

Article 33: Dual criminality

1. Each State Party is encouraged, where consistent with the basic concepts of its legal system, to render assistance in the absence of dual criminality.

2. Each State Party shall consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance in the absence of dual criminality.

Article 34: Reciprocity

1. Each State Party is encouraged to render assistance in the absence of reciprocal arrangement with the requesting State Party.

2. Each State Party shall consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance in the absence of reciprocity.

Article 35: Rule of specialty

The requesting State Party shall not transmit to another State or use any information or evidence obtained in response to a request for assistance under this Convention in connection with any matter other than the criminal matter specified in the request without the prior consent of the requested State Party.

Article 36: Confidentiality

The Central Authorities and the competent authorities of the requesting and requested States Parties shall use their best efforts to keep confidential a request and its contents and the information and materials supplied in compliance with a request except for disclosure in the criminal matter specified in the request and where otherwise authorised by the requested State Party.

Article 37: Fiscal offences

Assistance shall not be refused solely on the grounds that the offence amounts to an offence of a fiscal nature or on the grounds of bank or other financial institution secrecy rules.

Article 38: Language

1. The documents in support of a request for mutual legal assistance shall be in the language of the requesting or requested State Party. The requested State
Party may require a translation into one of the official languages of IGAD to be chosen by it.

2. The official languages of IGAD are English and French.

**Article 39: Costs**

The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise determined by the Parties. If expenses of a substantial or extraordinary nature are or will be required to execute the request, the Parties shall consult in advance to determine the terms and conditions under which the request shall be executed as well as the manner in which the costs shall be borne.

**Article 40: Transmission and return of material**

1. Where compliance with a request under this Convention would involve the transmission to the requesting State Party of any document, record or property, the requested State Party
   a) may postpone the transmission of the material if it is required in connection with proceedings in that State, and in such a case shall provide certified copies of a document or record pending transmission of the original;
   b) may require the requesting State Party to agree to terms and conditions to protect third party interests in the material to be transmitted and may refuse to effect such transmission pending such agreement.

2. The requested State Party shall as appropriate authenticate material transmitted by that State.

3. Where any document, record or property is transmitted to the requesting State Party in compliance with a request under this Convention, it shall be returned to the requested State Party when it is no longer required in connection with the criminal matter specified in the request unless that State has indicated that its return is not desired.

**Article 41: Special co-operation**

Without prejudice to its domestic law, each State Party shall endeavour to take measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on proceeds of criminal offences to another State Party without prior request, when it considers that the disclosure of such information might assist the receiving State in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State Party under this Convention.
Article 42: Witness protection measures

1. In the event of a request for the attendance of a witness for examination in the requested State Party, to which the witness consents, both the requesting and requested State Parties shall consult one another as to the level of risk, if any, to the witness and shall put in place such measures as are appropriate to address the said risk.

2. The decision as to appropriate measures is a matter for the requesting State Party in accordance with its national laws. The decision shall only be reached after a risk assessment has taken place in both the requesting and requested States and consultation has occurred on those assessments.

Article 43: Consultation in the event of concurrent jurisdiction

1. Where criminal proceedings are contemplated or pending in two or more State Parties against the same person in respect of the same conduct, those State Parties shall consider the appropriate venue for the proceedings to be taken in the interests of the proper administration of justice.

2. In considering the appropriate venue for proceedings, State Parties shall inter alia take into account the following:

   a) location of accused;
   b) location, protection and other interests of witnesses and third parties;
   c) interests of any victim and third parties;
   d) location of documents, exhibits and other relevant material;
   e) availability and nature of sanctions in the event of conviction;
   f) capability to address sensitive or confidential information or material;
   g) delay;
   h) evidential problems;
   i) confiscation and proceeds of crime;
   j) resources and costs;
   k) any other issue of public interest.
Article 44: Depositing of national laws and regulations

Each State Party is urged to furnish copies of its laws and regulations that give effect to this Convention and of any subsequent changes to such laws and regulations or a description thereof to the IGAD Secretariat.

Article 45: Request for Mutual Legal Assistance not to cover arrest or extradition

Nothing in this Convention is to be construed as authorising the extradition, or the arrest or detention with a view to extradition, of any person.

PART IX
FORMALITIES

Article 46: Signature and accession

1. Until its entry into force, this Convention shall be open for signature by IGAD member States.

2. Subsequent to its entry into force, this Convention shall be open to accession by any IGAD member State. For each such non-signatory, this Convention shall enter into force on the 60th day following the date of deposit of its instrument of accession.

Article 47: Reservations

1. Any State Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention.

2. Any State Party which has made a reservation shall withdraw it as soon as circumstances permit. Such withdrawal shall be made by notification to the IGAD Secretariat.

3. A State Party which has made a reservation in respect of a provision of the Convention may not claim application of the said provision by another State Party save in so far as it has itself accepted the provision.

Article 48: Relationship with other treaties

The provisions of any treaty or bilateral agreement governing Mutual Legal Assistance between any two States Parties shall be complementary to the provisions of this Convention and shall be construed and applied in harmony with this
Convention. In the event of any inconsistency, the provisions of this Convention shall prevail.

**Article 49: Ratification, Secretariat and Depositary**

1. This Convention is subject to acceptance, approval or ratification by the signatories, in accordance with their respective domestic laws.

2. Instruments of acceptance, approval, ratification or accession shall be deposited with the IGAD Secretariat which shall serve as Depositary and Secretariat of this Convention.

**Article 50: Entry into force**

1. This Convention shall enter into force on the 60th day following the date upon which three (3) of the IGAD member States have deposited their instruments of acceptance, approval and ratification. For each signatory depositing its instrument after the said entry into force, this Convention shall enter into force on the 60th day after deposit of its instrument.

2. If, after 31 December 2009, this Convention has not entered into force under paragraph 1 of this Article, any signatory which has deposited its instrument of acceptance, approval and ratification may declare in writing to the Executive Secretary of IGAD its readiness to accept entry into force of this Convention under this paragraph. This Convention shall enter into force for any such signatory on the 60th day following the date upon which two (2) such declarations have been deposited by at least two (2) signatories. For any signatory depositing its declaration after such entry into force, this Convention shall enter into force on the 60th day following the date of such deposit.

**Article 51: Amendment**

1. Any State Party to this Convention may propose its amendment. A proposed amendment shall be submitted to the Executive Secretary of IGAD who shall communicate it to the other States Parties at least 90 days before convening a meeting of the States Parties to consider the proposed amendment.

2. An amendment adopted by consensus of the States Parties shall enter into force 60 days after such adoption and ratification by all of the States Parties.
Article 52: Withdrawal

A State Party may withdraw from this Convention by submitting written notification to the Executive Secretary of IGAD. Such withdrawal shall be effective six (6) months after the date of the receipt of the said notification. After such withdrawal, cooperation shall continue between the States Parties and the State Party which has withdrawn in relation to all requests for Mutual Legal Assistance made before the effective date of withdrawal and which remain pending.

Article 53: Registration

In compliance with Article 102 of the United Nations Charter the present convention shall be registered with the United Nations Secretary General in New York by the depository.

Date:_____________________

For the Government of the Republic of Djibouti

For the Government of the State of Eritrea

For the Government of the Federal Democratic Republic of Ethiopia

For the Government of the Republic of Kenya

For the Government of the Somali Republic

For the Government of the Republic of the Sudan

For the Government of the Republic of Uganda
Inter Governmental Authority on Development (IGAD) Convention on Extradition

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PREAMBLE

We, the Representatives of the Governments of:
The Republic of Djibouti
The State of Eritrea
The Federal Democratic Republic of Ethiopia
The Republic of Kenya
The Somali Republic
The Republic of the Sudan
The Republic of Uganda

Being members of the Inter Governmental Authority on Development (IGAD) and

DESIRING to make our co-operation in the prevention and suppression of crime more effective by concluding an agreement on extradition;
RECOGNIZING that regional and international co-operation is necessary to prevent and combat crime;
MINDFUL of our responsibility to guarantee the security and stability of our peoples in order to minimize the vulnerability of our States;
INSPIRED by the noble purpose of promoting peace, security and stability, and eliminating the sources of conflict as well as preventing and resolving conflicts in the sub-region;
RECALLING the Ministers of Justice statement of 21st of September 2007 in Kampala, Uganda on the vital need for an IGAD wide instrument on extradition;

HEREBY AGREE AS FOLLOWS:

PART I

DEFINITIONS

Extradition means the surrender of a person accused or convicted of an extradition offence from a requested State Party to a requesting State Party.
Requested State Party means the State Party that is requested to extradite under the terms of this Convention.
Requesting State Party means the State Party that is requesting extradition under the terms of this Convention.
Third State means a State other than the requesting State Party or requested State Party.
PART II
GENERAL PROVISIONS

Article 1: Obligation to extradite

Each State Party agrees to extradite upon request, in accordance with the provisions of this Convention and its 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 Party for an extradition offence.

Article 2: Extradite or prosecute principle

A State Party in whose territory an alleged offender is found, if it does not extradite a person on the grounds of refusal contained in Article 5, Article 6.1(a), (b), (f) and (g) and Article 6.2(b) and (d), shall, at the request of the requesting State Party be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a similar nature under the domestic law of that State Party.

Article 3: Extradition offence

1. For the purpose of this Convention, an extradition offence is an offence that is punishable under the laws of both the requesting and requested State Party 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 Party it shall not matter whether:
   a) the laws of the requesting and requested State Party each 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, as between the laws of the requesting and requested 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 Party 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 Party.

4. Extradition may be granted pursuant to the provisions of this Convention in respect of any extradition offence provided that:
   a) it was an offence in the requesting State Party at the time of the conduct constituting the offence; and
   b) the conduct alleged would, if it had taken place in the requested State Party at the time of making the request for extradition, have constituted an offence against the law of the requested State Party.

5. If the request for extradition relates to several separate offences, each of which is punishable under the laws of both the requesting and requested State Parties, but some of which do not meet the other requirements of paragraph 1, the requested State Party may grant extradition for such offences provided that the person is to be extradited for at least one extradition offence.

Article 4: Applicable law

The requested State Party shall deal with the request in accordance with its laws.

Article 5: Extradition of nationals

1. a) A State Party shall have the right to refuse extradition of its nationals.
   b) Each State Party may, by a declaration made at the time of signature or of deposit of its instrument of ratification or accession, define as far as it is concerned the term “nationals” within the meaning of this Convention.

2. If the requested State Party does not extradite its national, it shall at the request of the requesting State Party submit the case to its competent authorities in order that proceedings may be taken, if they are considered appropriate.

Article 6: Grounds for refusal to extradite

1. Extradition shall be refused in any one 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 States Parties have assumed an obligation, pursuant to any multilateral convention, or under international law, 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 Party 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 Party 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 the requesting or requested State Party, become immune from prosecution or punishment for any reason, including lapse of time;
f) if the person whose extradition is requested has been, or would be subjected in the requesting State Party 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 Article 14 of the International Covenant on Civil and Political Rights; or,
g) if the judgment of the requesting State Party has been rendered in absentia and the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his defence and he has not had, or will not have, the opportunity to have the case retried in his or her presence.

2. Extradition may be refused in any one of the following circumstances:
a) if a prosecution in respect of the offence for which extradition is requested is pending in the requested State Party against the person whose extradition is requested;
b) if the offence for which extradition is requested carries a death penalty under the law of the requesting State Party, unless that State gives such assurance as the requested State Party considers sufficient, that the death penalty will not be imposed or, if imposed, will not be carried out, or both parties agree that the sentence of the requested State Party will be substituted by another sentence in the requested State Party;
c) 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
Party does not provide for jurisdiction over such an offence committed outside its territory in comparable circumstances;

d) if the offence for which extradition is requested is regarded under the laws of the requested State Party as having been committed in whole or in part within that State; or,
e) if the requested State Party, while also taking into account the nature of the offence and the interest of the Requesting State Party, 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 7: Channels of communication and supporting documents

1. The request shall be in writing and shall be communicated through the diplomatic channel. Other means of communication may be arranged by direct agreement between two or more States Parties.

2. The request shall be supported by:
   a) the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting State Party;
   b) a statement of the offence(s) for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; and
   c) a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality.

3. The request shall indicate the official designation of the official in the requested State Party indicating the contact person and file reference.

Article 8: Authentication of documents

1. Where the laws of the requested State Party require authentication, documents shall be authenticated in accordance with the domestic law of the requesting State Party.

2. The authentication procedure of each State Party shall be communicated to the Secretariat.
**Article 9: Additional information**

If the requested State Party considers that the information furnished in support of a request for extradition is not sufficient in accordance with this part of the Convention to enable extradition to be granted, the requested State Party may request that additional information be furnished within such time as it specifies.

**Article 10: Provisional arrest**

1. In case of urgency the competent authorities of the requesting State Party may request the provisional arrest of the person sought. The competent authorities of the requested State Party shall decide the matter in accordance with its domestic law and communicate its decision to the requesting State Party without delay.

2. The request for provisional arrest shall state that one of the documents mentioned in Article 7, paragraph 2(a) exists, and that it is intended to send a request for extradition.

3. A request for provisional arrest shall be sent to the competent authorities of the requested State Party 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 Party.

4. 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 Convention applies; and
   e) any other information which would justify provisional arrest in the requested State Party.

5. Provisional arrest shall be terminated if the requested State Party has not received the request for extradition and supporting documents through the channel provided for in Article 7, paragraph 1 within thirty (30) days after the arrest. The competent judicial authorities of the requested State Party, 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 territory of the requested State Party.

6. The release of a 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: Waiver of extradition**

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

**Article 12: Concurrent requests**

1. Where requests are received from two or more States Parties for the extradition of the same person, either for the same offence or for different offences, the requested State Party shall determine to which of those States Parties the person is to be extradited and shall notify each of those States Parties of its decision.

2. In determining to which State Party a person is to be extradited, the requested State Party 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 Convention;
   g) the interests of the respective States; and
   h) the nationality of the victim.

**Article 13: Language**

1. The request for extradition and documents in support of a request for extradition shall be in the language of the requesting or requested State Party. The
requested State Party may require a translation into one of the official languages IGAD to be chosen by it.

2. The official languages of IGAD are English and French.

**Article 14: Extradition decision**

1. The requested State Party shall, without delay, inform the requesting State Party by the means mentioned in Article 7, paragraph 1 of its decision with regard to the extradition.

2. Before refusing a request, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with an opportunity to present its reasons or provide information in proceeding with the request.

3. Reasons shall be given for any complete or partial rejection.

**Article 15: Surrender of a person**

1. If the request is agreed to, the requesting State Party shall be informed without undue delay of the place and date of surrender and 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 Party within 15 days of the notification of the extradition decision and shall in any case be released after the expiry of 30 days of that decision. If the person is not removed within the 30 days period, the requested State Party may release the person and may refuse to extradite that person for the same offence.

3. If circumstances beyond its control prevent either the requesting or requested State Party from surrendering or removing the person to be extradited, it shall notify the other State Party. The two State Parties shall then agree a new date of surrender and, for the purposes of paragraph 2, the time limit shall run from the new date agreed by the two States Parties.

**Article 16: Postponed or conditional surrender**

1. The requested State Party 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 Party shall advise the requesting State Party accordingly.
2. The requested State Party may, instead of postponing surrender, temporarily surrender the person sought to the requesting State Party in accordance with conditions to be determined between the two States Parties.

Article 17: Rule of specialty

1. A person extradited under this Convention 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 Party 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 Party consents to. Consent shall be given if the offence for which it is requested is itself subject to extradition in accordance with the present Convention.

2. A request for the consent of the requested State Party under this Article shall be accompanied by the documents mentioned in Article 7 of this Convention 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 Party 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 Party after leaving it.

4. When the description of the offence charged is altered in the course of proceedings, the extradited person shall only be proceeded against or sentenced in so far as the offence under its new description is shown by its constituent elements to be an offence which would allow extradition.

Article 18: Handing over of property

1. To the extent permitted under the laws of the requested State Party, and subject to the rights of third parties, which shall be duly respected, all property found in the requested State Party that has been acquired as a result of the offence and that may be required as evidence shall, if the requesting State Party so requests, be surrendered if extradition is granted.
2. The said property may, if the requesting State Party so requests, be surrendered to the requesting State Party 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 Party, it may retain it or temporarily hand it over.

4. Where the laws of the requested State Party or the protection of the rights of third parties so require, any property so surrendered shall be returned to the requested State Party after the completion of the proceedings, if the requested State Party so requests.

**Article 19: 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 transit State shall deal with this request pursuant to procedures provided by its own laws. The transit State shall grant the request expeditiously unless its essential interest would be prejudiced thereby.

3. The transit State 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 20: Costs**

1. The requested State Party shall make all necessary arrangements for and meet the cost of any proceedings arising out of a request for extradition.

2. The requested State Party shall bear the costs incurred in its territory or jurisdiction in the arrest and detention of the person whose extradition is sought until that person is surrendered to the requesting State Party. The
requested State Party shall also bear the costs incurred in its territory or jurisdiction in connection with the seizure and handing over of property.

3. If during the execution of a request, it becomes apparent that fulfillment of the request will entail costs of an extraordinary nature, the requested State Party and requesting State Party shall consult to determine the terms and conditions under which execution may continue.

4. The requesting State Party shall bear the costs incurred in translation of extradition documents and conveying the person extradited from the territory of the requested State Party.

5. Consultations may be held between the requesting State Party and the requested State Party for the payment by the requesting State Party of extraordinary expenses.

PART III
FORMALITIES

Article 21: Signature and accession

1. Until its entry into force, this Convention shall be open for signature by IGAD member States.

2. Subsequent to its entry into force, this Convention shall be open to accession by any IGAD member State. For each such non signatory, this Convention shall enter into force on the 60th day following the date of deposit of its instrument of accession.

Article 22: Reservations

1. Any State Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention.

2. Any State Party which has made a reservation shall withdraw it as soon as circumstances permit. Such withdrawal shall be made by notification to the IGAD Secretariat.
3. A State Party which has made a reservation in respect of a provision of the Convention may not claim application of the said provision by another Party save insofar as it has itself accepted the provision.

**Article 23: Relationship with other treaties**

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

**Article 24: Ratification, Secretariat and Depositary**

1. This Convention is subject to acceptance, approval or ratification by the signatories, in accordance with their respective domestic laws.

2. Instruments of acceptance, approval, ratification or accession shall be deposited with the IGAD Secretariat which shall serve as Depositary and Secretariat of this Convention.

**Article 25: Entry into force**

1. This Convention shall enter into force on the 60th day following the date upon which 3 of the IGAD member States have deposited their instruments of acceptance, approval and ratification. For each signatory depositing its instrument after the said entry into force, this Convention shall enter into force on the 60th day after deposit of its instrument.

2. If, after 31 December 2009, this Convention has not entered into force under paragraph 1 of this Article, any signatory which has deposited its instrument of acceptance, approval and ratification may declare in writing to the Executive Secretary of IGAD its readiness to accept entry into force of this Convention under this paragraph. This Convention shall enter into force for any such signatory on the 60th day following the date upon which two (2) such declarations have been deposited by at least two (2) signatories. For any signatory depositing its declaration after such entry into force, this Convention shall enter into force on the 60th day following the date of such deposit.

**Article 26: Amendment**

1. Any State Party to this Convention may propose its amendment. A proposed amendment shall be submitted to the Executive Secretary of IGAD who shall communicate it to the other States Parties at least 90 days before convening a meeting of the States Parties to consider the proposed amendment.
2. An amendment adopted by consensus of the States Parties shall enter into force 60 days after such adoption and ratification by all of the States Parties.

Article 27: Withdrawal

A State Party may withdraw from this Convention by submitting written notification to the Executive Secretary of IGAD. Such withdrawal shall be effective six (6) months after the date of the receipt of the said notification. After such withdrawal, cooperation shall continue between the States Parties and the State Party that has withdrawn, in relation to all requests for extradition made before the effective date of withdrawal and which remain pending.

Article 28: Registration

In compliance with Article 102 of the United Nations Charter the present Convention shall be registered with the United Nations Secretary General in New York by the depository.

Date___________________

For the Government of the Republic of Djibouti

For the Government of the State of Eritrea

For the Government of the Federal Democratic Republic of Ethiopia

For the Government of the Republic of Kenya
For the Government of the Somali Republic

For the Government of the Republic of the Sudan

For the Government of the Republic of Uganda
INTRODUCTION

Background

Much criminal activity today, including corruption, organised crime and terrorism, is either transnational in character and/or contains key transnational elements. As such, it requires investigators and prosecutors to gather evidence across borders. Against that background, the framework and procedures within which both formal assistance (referred to as ‘mutual legal assistance’ or MLA) and informal cooperation (referred to as ‘mutual assistance’ or ‘administrative assistance’) are obtained are often bewildering and frequently depend on the attitude and opinions of those ‘on the ground’ to whom the request is made.

With that in mind, the present manual will address not just the provisions contained within the IGAD Convention on Mutual Legal Assistance, but will also examine the real and practical legal issues and difficulties that practitioners (be they prosecutors, government legal advisers, law enforcement officers, or judges) face and will guide the reader to possible solutions and pragmatic approaches.

The IGAD Convention on Mutual Legal Assistance: Its purpose & effect

The Convention, as a formal international instrument, imposes binding obligations on its States Parties (those States that have ratified or acceded to it). To be a State Party, a State must be a member of the IGAD group of States.

The Convention creates a legal basis for the making and executing of MLA requests between IGAD States, assuming that they are parties; however, each IGAD State should also ensure that its domestic law contains MLA provisions which implement and make workable the Convention’s provisions.

Once the Convention comes into force, it will be sensible for a requesting IGAD State to cite it as the legal basis for its request (assuming that the requested State is also an IGAD State and that both States are States Parties to the Convention).

However, even in such an instance, it might also be that both States are also States Parties to another relevant Convention that carries with it the legal basis for an MLA request: for example, if the request concerns a corruption case and both States are parties to the UN Convention Against Corruption (UNCAC) or it is a terrorist financing case and both are parties to the UN Terrorist Financing Convention, it will be
appropriate also to explicitly place reliance on either of those instruments (as the case may be). That will cause no difficulty; it is proper to cite two or even more instruments if each of them provides a relevant legal basis to a given request.

PART 1: GENERAL PRINCIPLES OF MLA

What is ‘mutual legal assistance’?

Mutual legal assistance (MLA) is the principal form of international co-operation in criminal matters and is the mechanism for evidence gathering between States. It is a formal process that involves the issuing of a ‘letter of request’ by a requesting State and the transmission of that letter to the requested State. The MLA process is designed for gathering evidence for use in criminal proceedings.

Informal assistance (sometimes called ‘administrative assistance’) between investigator and investigator, or prosecutor and prosecutor may also be available and is often the appropriate route for the provision of intelligence or information that will not be formally presented in court. However, the caveat is that many States will also provide criminal evidence informally from, for instance, a voluntary witness, without the need for a formal letter of request through the MLA process. If, therefore, a request for evidence does not involve the requested State exercising a coercive power (such as the issuing of a search warrant or other court order) that State may well agree to render assistance on the basis of investigator (or prosecutor) to investigator (or prosecutor) co-operation – without the need for a formal MLA request.

To avoid confusion, it should be borne in mind that mention of ‘formal’ and ‘informal’ is a reference to the manner in which the request is made and transmitted. It is not a reference to the form in which material will be gathered within the requested State. Thus, an informal (so-called ‘administrative’) request for a witness statement from a voluntary witness will (usually) result in that witness being asked to make a formal statement in evidential form or to give a formal deposition before a court. Of course, an informal request for intelligence will, no doubt, mean that material in non-evidential form is provided, but that is because of the voluntary nature of the request not because the request was made (quite properly) outside of the formal MLA framework.

The Legal Bases for Mutual Legal Assistance

If a formal (MLA) request is needed then it must have a legal basis. Such a basis might be:

- A multilateral treaty (such as one of the UN conventions or a regional agreement, such as the OAU Convention on the Prevention and Combating of Terrorism);
- A bilateral treaty;
• A voluntary arrangement between States, such as the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (‘The Harare Scheme’) for Commonwealth States;
• Domestic law alone (in the absence of an international instrument or arrangement relying on the general international law principle of comity), which may, or may not, impose a reciprocity requirement.

In respect of the above, it should be borne in mind that there is no all-encompassing or ‘universal’ MLA convention and that assistance may even be requested and received in the absence of any treaty agreement and, indeed, in the case of some States, in the absence of any domestic MLA law. At the same time, though, one must recognise that the most common building blocks for formal requests are the conventions, bilateral treaties and schemes that States have ratified or acceded to (e.g., the various UN Conventions make specific provision for MLA and the encouraging of international cooperation).

The IGAD Convention on MLA is a multilateral instrument and, therefore, falls within the first of the above legal bases. It does not preclude, however, the ability of IGAD States to rely on the obligations imposed by any bilateral agreements between them for the purposes of an MLA request (Article 1(2)). One of the principal intentions behind the Convention is to encourage IGAD States to afford each other the widest possible assistance in relation to MLA requests (as evinced in Article 1).

Mutual Legal Assistance or Mutual Assistance?

Prosecutors and investigators sometimes have recourse to MLA without exploring whether informal/administrative assistance would, in fact, meet their needs. It is often forgotten that the State receiving the request might welcome an informal approach that can be dealt with efficiently and expeditiously. Prosecutors and other law enforcement officials must thus ask themselves whether they really need to issue a formal letter of request to obtain a particular piece of evidence.

Although no definitive list can be made of the type of enquiries that may be dealt with informally, some general observations might be useful. Variations from State to State, must, however, always be borne in mind.

- If the enquiry is a routine one and does not require the State of whom the request is made to seek coercive powers, then it may well be possible for the request to be made and complied with without a formal letter of request.
- The obtaining of public records, such as land registry documents and papers relating to registration of companies, may often be obtained informally.
- Potential witnesses may be contacted to see if they are willing to assist the authorities of the requesting State voluntarily.
- A witness statement may be taken from a voluntary witness, particularly in circumstances where that witness’s evidence is likely to be non-contentious.
The obtaining of lists of previous convictions and of basic subscriber details from communications and service providers that do not require a court order may also be dealt with in the same, informal, way.

It is often forgotten just how many types of evidence and other material may be obtained not just informally, but from open sources without a request of any sort being made. For example, some States have directories of telephone account holders available on the internet (although consideration will need to be given as to whether it is in a form that may be used evidentially).

The extent to which States are willing to assist with a formal request does, of course, vary greatly. In many cases, it will depend on a particular State’s own domestic laws, on the nature of the relationship between that State and the requesting State and, it has to be said, on the attitude and helpfulness of those on the ground to whom the request is made. Thus, the importance of excellent working relationships being built up and maintained trans-nationally cannot be stressed too greatly.

Confusion can be avoided if prosecutors and investigators have regard for the limits set by those international instruments that relate to, or contain provisions on, MLA. In particular, it should be remembered that the regime of MLA is for the obtaining of evidence; thus, the obtaining of intelligence and the locating of witnesses should only be sought by way of informal mutual assistance to which, of course, agreement may or may not be forthcoming. Neither can MLA requests be made for the arrest of fugitives; that is strictly the domain of extradition requests.

There are certain key considerations for a prosecutor when deciding whether evidence is to be sought by informal means from abroad:

- It must be evidence that it is lawful to request under the requesting State’s law, and there should be no reason to believe that it would be excluded in evidence when sought to be introduced at trial within the requesting State;
- It should be evidence that may be lawfully gathered under the laws of the requested State;
- The requested State should have no objection.

The potential difficulty in failing to heed these elements might be that (in States with an exclusionary principle in relation to evidence) such evidence will be excluded. In addition, but of no less importance, inappropriate actions by way of informal request may well irritate the authorities of the requested State who might, therefore, be less inclined to assist with any future request.

The golden rule must be: Ensure that any informal request is made and executed lawfully.

Sometimes a degree of lateral thinking in making a request is required. For instance, it might be quicker, cheaper and easier for the requesting State’s investigators to arrange and pay for a voluntary witness to travel to the requesting State to make a
witness statement, rather than the investigators themselves travelling to be present when a statement is taken (if a formal MLA route is used) or travelling to take the statement themselves (in the case, often, of an informal request). Similarly, if the consent of the host State in which a State’s embassy is situated is obtained, witness statements may be taken by the requesting State’s investigators at that embassy.

Taking matters one stage further, many States have no objection to an investigator of the requesting State telephoning the witness, obtaining relevant information and sending an appropriately drafted statement by post thereafter for signature and return. Of course, such a method may only be used as long as the witness is willing to assist the requesting authority and in circumstances where no objections arise from the authorities in the other (i.e. requested) State concerned (from whom prior permission must be sought).

Any consideration of such investigator/prosecutor to investigator/prosecutor assistance should not overlook the use to which it can be put in order to pave the way for a later, formal, request. It might, for instance, be possible to narrow down an enquiry in a formal letter of request by first seeking informal assistance. For example, if a statement is to be taken from an employee of a telephone company in a foreign State, informal measures should be taken to identify the company in question, its address and any other details that will assist and expedite the formal process. It is sometimes overlooked, but should not be, that an expectation always exists among those working in the field of MLA that as much preparation work as possible will be undertaken by informal means. Indeed, in the case of, for instance, a request to a financial centre, such as Switzerland, for financial evidence, it will be expected by the requested State that there will be initial informal contact in order that the ambit of the request may be narrowed as much as possible (given both the number of financial institutions within the territory and the amount of requests being received) and the formal letter of request populated with as much information as possible in order to facilitate the execution of the request.

The IGAD Convention seeks to encourage States to build networks in order to facilitate international co-operation in criminal matters and, in particular, to have recourse to informal channels whenever appropriate. Consequently, Article 1(2) specifically preserves the right of States Parties to co-operate on an investigator to investigator/prosecutor to prosecutor basis.

**Formal Requests (Mutual Legal Assistance)**

Where evidence has to be secured through coercive means e.g. search and seizure warrant or the informal mechanism is not otherwise available, a letter of request must be issued. The following are examples of circumstances where such a letter will be required:

- Obtaining testimony from a non-voluntary witness.
- Seeking to interview a suspect under caution.
- Obtaining account information and documentary evidence from banks and financial institutions.
- Requests for search and seizure.
- Obtaining internet records and the contents of emails.
- The transfer of consenting persons into custody in order for testimony to be given.

An authority competent to issue a letter of request, such as a prosecutor or judge (depending on who, in domestic law, is designated as a competent authority to issue a request), who is making a formal request should always assert the international obligation(s) of a requested State to assist, where such an obligation exists by way of international instrument. (The IGAD Convention imposes exactly such an obligation on its States Parties.) Equally, the authority upon which the letter of request is written should also be spelt out; thus, the person signing (and, hence, issuing the letter) needs to say that he or she is a competent authority and the source of that competence (e.g. “I am a Public Prosecutor and am designated by Section 1 of the MLA Law of Ruritania as a competent authority to issue this request”).

The person making a request must take care to ensure that his or her own domestic law allows the request that is actually being made. For instance, a piece of national legislation might, in fact, disallow some requests or type of requests that many conventions, treaties or other international instruments would appear to allow. For many States, the domestic legislation will have primacy (an obvious exception will be those predominantly civil law monist States where ratification of an instrument has the effect, without more, of incorporating the provisions of the instrument into domestic law). To make a request otherwise than in accordance with domestic law in such circumstances will be to invite arguments for exclusion of evidence/unlawfulness in the domestic courts of the requesting State, even if the requested State actually executes the request and provides the evidence.

Prosecutors and prosecuting authorities are urged to make early contact with a counterpart in the State to which the request is to be made. Notwithstanding the existence of a convention or treaty and its broad and permissive approach, the requested State may well have entered into reservations that limit the assistance that can in fact be given. That can best be ascertained by liaison, as can any particular requirements that the requested State might insist on but which might not be immediately apparent to a person making the request. For instance, some States have reserved the right to refuse judicial assistance when the offence that is being investigated is already the subject of a judicial investigation in the requested State. The key principle must be this: An MLA request is executed in accordance with the laws of the requested State (as Article 3 of the Convention makes clear) and regard should therefore always be had to the fact that a requested State will have to comply with its own domestic law, both as regards to whether assistance can be given at all and, if so, how that assistance is, in fact, given.

The Form of the Letter of Request
It must be emphasised that there is no single, prescribed, form that a letter of request must take. There are, however, a number of key features that must appear. For requests made under the Convention, those requirements are set out in Article 5. The guiding principle for a requesting, competent authority is that a letter of request should be a stand-alone document. It must provide the requested State with all the information needed to decide whether assistance should be given and to undertake the requested enquiries. At the same time, though, it should not contain irrelevant facts and should not be any longer than is necessary to set out all those matters that rightfully should be brought to the attention of the requested State. A request under the Convention must be in writing, although that includes email or fax; in an urgent case, the request may be oral and reduced into writing thereafter (see Article 4).

It is worth having in mind that one of the ongoing difficulties, globally, with MLA is that of delay and that the authorities of a requested State will not be assisted by a letter that is of any greater length than is absolutely needed. On the subject of delay, a request may takes weeks, sometimes months, and occasionally and unfortunately, years to execute. As soon as it is realised that a request to another State needs to be made, then the letter should be issued (subject to any appropriate informal contact beforehand, of course). It is important that urgent requests be kept to a minimum and that everyone involved in the process should appreciate that an urgent request is urgent and unavoidably so. If a request is urgent the letter should say so clearly (both at the top of the letter and in a specific paragraph within the body of the text) and in terms that explain the reasons why there is urgency. For these purposes, ‘urgent’ should mean a request that needs to be executed within, say, 14 days. If a request is not urgent in that sense, but needs to be executed within a relatively short time frame (because, for instance, of an impending court date when the evidence is to be adduced), the letter should clearly set out the time frame in such a way that the reader’s attention is drawn to it.

The following material conditions must be satisfied within a letter of request:

- If the requested State requires an undertaking of reciprocity on the part of the requesting State, then this should be given. In that respect, common law States are usually more restrictive than those with a civil code. Equally, even where no undertaking is required, the requesting State should set out in the letter if it is making a request in respect of which it could not reciprocate. The IGAD Convention encourages States to provide assistance even in the absence of reciprocity (Article 34).

- A general prerequisite for some jurisdictions is the crime under investigation is a criminal offence in both the requesting and requested State, the so-called dual criminality rule. This should therefore be addressed within the letter.

- The assistance must relate to criminal proceedings, whether at an investigative stage, or after court proceedings have begun, in the strict and
accepted sense; that is to say, there is a criminal investigation or proceedings against the perpetrators of a criminal offence under ordinary, domestic law. The charges and any future possible charges should be set out.

- In addition, the principle of ‘specialty’ will mean that, if a charge changes after a request has been made, a new request will need to be made, unless the new charge was anticipated in the original letter. It is good practice, therefore, to set out all anticipated charges/offences that are likely to be considered for charge/prosecution.

- The rule of ‘specialty’ also means that, if evidence is to be used in, for instance, confiscation or other ancillary proceedings as well as at the criminal trial, this should also be clearly stated. This is because evidence obtained from the requested State can only be used for the purpose it was requested and in relation to the proceedings which were mentioned in the letter of request. The evidence cannot be relied upon in other proceedings unless the requested State consents.

- Although it need not be specifically asserted within the letter, a prerequisite for formal MLA assistance is the guarantee of a fair trial, and respect of the fundamental rights laid down in the International Covenant on Civil and Political Rights and in relevant regional instruments (such as, for IGAD States, The African (Banjul) Charter) as implemented within the legal system of the requesting State.

- Some requested States may require an assertion that the request does not relate to fiscal, political or military misdemeanours.

- The letter must contain a description of the facts which form the basis of the investigations/proceedings. Such a description must be as detailed as possible and should indicate in what way the evidence being sought is necessary. One of the main reasons, internationally, why a request is refused/its execution delayed is that there is no causal link shown between the facts summarised and the requests being made. The summary of facts need not be voluminous; in many straightforward requests, the summary may occupy two A4 sides or thereabouts. The guide should be: set out all the facts that the requested State will need to make its decision and to get a fair and balanced view of what the case is all about.

- If the requesting and requested States are each a party to a multilateral or bilateral agreements then the international instrument concerned should be cited.

In summary, the following is a proposed checklist for the requesting State on what must be included within the letter of request is as follows:

- An assertion of authority by the sender of the letter;
- Citation of relevant treaties and conventions;
- Assurances (i.e. as to reciprocity, dual criminality, specialty etc);
- If urgent, the reasons and the timescale needed;
- Identification of defendant/suspect;
- Present position re the investigation/proceedings;
- Charges/offences under investigation/prosecution;
- Summary of the elements of those offences under the domestic law of the requesting State, including maximum penalty. [Often, it will assist to include a copy of the relevant law as an annex to the letter.]
- Summary of facts and how those facts relate to the request being made;
- Enquiries to be made;
- Assistance required;
- Signature of the sender

Although a request is executed by a competent judicial authority of the requested State in accordance with its own laws and its own rules and procedures, very often it will be possible for the requesting State’s authority to make an express request that the requested State apply the requesting State’s rules of procedure, insofar as they do not conflict with the law of the requested State. Article 40(2) of the Convention specifically permits such a request to be made. If such a request is available to the requesting authority, advantage should be taken of it. The reason is obvious: A fundamental difficulty, often overlooked, is that different States have different ways of presenting evidence. The whole purpose of a request is to obtain useable, admissible evidence. That evidence must therefore be in a form appropriate for the requesting State, or as near as possible to that form as circumstances allow. It should be made clear, therefore, by the requesting State in what form, for instance, the testimony of a witness should be taken. The requested State cannot be expected to be familiar with the rules of evidence-gathering and evidence-adducing in the requesting State. Indeed, good and useful practice is for the letter to include, as an annex, an example or template of the form of the evidence required. Thus, if the request is that a written witness statement be taken and presented in a particular way (e.g., with the witness’s signature on each page or with a declaration of veracity by the witness, as some States require), then the annex example can usefully illustrate that.

Further to the above, international instruments may contain a provision to the effect that the method of execution specified in the request shall be followed to the extent that it is compatible with the laws and practices of the requested State.

An issue that often arises is whether officers from the requesting State should travel to the requested State when the request is executed. Permission must be sought from the requested State for this, and such permission should only be sought if the presence of those officers will assist in the execution of the request. Remember that it will be law enforcement officers/prosecutors/judges in the requested State who will actually undertake the actions (interviewing witnesses etc) that are requested. The presence of the requesting State’s officers will be to assist the requested State
by providing more details about the investigation, particular issues or questions to be put to witnesses etc.

Taking all that into account, it would be of assistance to have the investigating officers present when the enquiries are made, the requested State should be asked expressly in the letter to grant permission for the officers to be present. Depending upon the nature of those enquiries and the type of case, the requested State may be quite content for officers from the requesting State to travel across and to play a part. On a request that is largely documentation-driven, however, such as telecommunications service provider records, it may be that such travel would not be of any benefit.

The language of the letter of request

It must be borne in mind that the request itself must be in the language of the requesting State and be accompanied by a translation. The letter of request must, therefore, be translated into the language of the requested State if that is different to that of the State making the request. Both the original letter and the translation should be sent to the requested State. Do check with the requested State to ascertain whether there are any certification requirements for the translation. Some States will require a certificate from the translator confirming that they have translated the documents.

Transmission of the letter of request

Letters of request are issued by a competent authority in a State, but are usually transmitted by one Central Authority to another.

A Central Authority transmits and receives requests. States are required to establish a Central Authority in order to facilitate and expedite the making and executing of requests. However, the functions to be performed by the Central Authority are for each State to determine. For example, some States may take the view that the Central Authority should undertake a quality assurance role, whilst others will be content with it carrying out monitoring as to the number and types of letters sent or received. Whatever the approach adopted, the primary function of the Central Authority should be to serve as the transmitting and receiving channel for letters of request (subject, of course, to any provisions in respect to direct transmission). In smaller States, one of the competent authorities for issuing letters of request (for example, the Attorney General’s Chambers) may be regarded as being suitable to be also designated as the Central authority.

For the avoidance of doubt, a competent authority is the organisation(s) that are permitted under the laws of a State to issue a letter of request. Therefore most prosecuting authorities in a State are competent to issue a letter; having done that, they must then transmit it via the Central Authority. Any letter of request writer
beware: Do check that, under your own laws, your organisation is a competent authority before issuing a letter of request.

Article 2 of the Convention provides that transmission of a letter of request should take place from one Central Authority to another (and that each State Party should, therefore, establish a Central Authority if it has not yet done so).

It is important to note, however, that in the domestic law of many States, competent authorities have the power in urgent cases, to transmit a letter of request directly to another competent authority. Some international instruments specifically recognise this, others are silent on it. The IGAD Convention itself makes provision for this in Article 6, and has the effect that, although the Convention presupposes that ordinarily all transmissions will be from/to a Central Authority there will be scope for direct transmission between IGAD States in an urgent case.

It is must be stressed, though, that domestic law will determine the mechanics of direct transmission. Some States, for instance, allow direct transmission, but require a copy of the letter to be sent to their Central Authority by way of notification, whilst other States may have restrictions on whether their competent authorities are able to receive and execute a request that has been directly transmitted. It is, therefore, very important that, in the case of intended direct transmission, the laws of both the requesting and requested State are thoroughly checked. It should go without saying that this is just the kind of instance where informal contact and liaison is vital.

For those States whose domestic law does not address this issue, or whose States are considering their law in this regard, the following considerations may assist:

- Does the Central Authority have the capability to respond very quickly to an urgent request (e.g., re: a witness who is about to leave the jurisdiction and needs to have a statement taken from him immediately, or re: a request for a coercive power to be sought from the court straightaway)? If not, then a provision allowing direct transmission should be considered.
- If direct transmission is to be permitted, will it be in respect of both making and receiving requests?
- In the event of direct transmission, how will quality assurance take place (perhaps, trained points of contact within each competent authority) and how will record keeping and ongoing liaison with the requested State re that request occur (perhaps, the requirement of notifying the Central Authority and providing it with a copy of the letter of request)?
- Internationally, the trend is for direct transmission to be encouraged in appropriate cases. However, that needs to be balanced by each individual State considering whether its own capabilities will support direct transmission and/or direct receipt.
- Whatever is decided, domestic procedures should be clearly set out in explicit and practical domestic legal provisions.

Particular problems experienced in MLA requests
**Dual/Double criminality:** Whilst deemed to be an essential safeguard in extradition proceedings, the concept of double criminality has found its way into mutual legal assistance. Given that most evidence is gathered at the investigative stage when proceedings are contemplated, it seems to be an unduly restrictive requirement that has developed. This has made the granting of assistance unnecessarily cumbersome. To that end, most Conventions (including the IGAD Convention) now seek to remedy this ‘defect’ by encouraging States not to apply the principle of double criminality when rendering assistance. (See, below, the discussion of grounds of refusal re: MLA requests.)

**Appeals:** In some States the person in respect of whom the request for mutual legal assistance is made is able to appeal against the sharing of evidence with the requesting country. When such an appeal is available it may well cause lengthy delay. Although this is unlikely to be an issue between IGAD States, it might be encountered when an IGAD State makes a request outside of the region. For instance, in those European States which have traditionally enjoyed favourable tax and banking conditions, for example Liechtenstein and Switzerland, an appeal avenue is available in relation to the disclosure of information on financial position etc. In such States, in addition, institutions such as banks may have similar rights of appeal.

**Search and/or seizure:** Generally, this can be problematic. Essentially, the authority making the request should be careful to provide as much information as possible about the location of the premises etc. But it must be remembered that different jurisdictions set different thresholds. Search and seizure is a powerful weapon for investigators. It must be assumed that the requested State will only be able to execute a request and search/seizure if it has been demonstrated by the request that reasonable grounds exist to suspect that an offence has been committed and that there is evidence on the premises or person concerned which goes to that offence. These “reasonable grounds” should be specifically set out within the letter therefore. Generally, it will not be enough simply to ask for search and seizure without explaining why it is believed the process might produce evidence. Interference with property and privacy is now frequently justified only if there are pressing social reasons such as the need to prosecute criminals for serious offences. Equally, a request for the arrest of person does not give an automatic search and seizure power; it must be followed by a letter of request. Even if all these factors are addressed, it may well be that the searching of the person and taking of fingerprints, DNA other samples will have less chance of success in some jurisdictions.

**Sensitive aspects to an investigation:** It may be that that sensitive information will have to be included in a formal MLA request in order to support the measures/evidence requested to satisfy the requested authority. At the same time, the disclosure of prospective witnesses and other information that could be exploited by, for instance, criminals or their associates needs to be weighed in the balance. In reality, the system for obtaining MLA, globally, is inherently insecure. The risk of unwanted disclosure will be greater or lesser depending on the identity of
the requested State. When considering the matter, those making the request must have regard to duty of care issues which arise for them. Sometimes, difficulties can be avoided by the issuing of a generalised letter which leaves out the most sensitive information but provides enough detail to allow the request to be executed. Exceptionally, consideration can be given to the issuing of a conditional request for MLA; in other words, a request that is only to be executed by the requested authority if it can be executed without requiring sensitive information to be disclosed. Another approach might be to seek an agreement with the requested State that the officer in the case from the requesting State should be allowed to brief the authorities in the requested State in person.

Grounds for refusal

The grounds for refusal of an MLA request are broadly similar to those in relation to extradition (see, in detail, below) save that:

- there is a strong international trend in favour of encouraging MLA to be as permissive as possible, even if that means striking down some of the grounds of refusal that have been relied upon by States; and

- most States in relation to MLA requests, will assert in national law and/or international agreements that there is a general ground for refusal when a State is of the view that its national interests, sovereignty, or security would be threatened thereby. However, it has to be said that, in practice, that general ground is rarely exercised and that, where, in a specific instance, that ground does arise, there should be consultation between requesting and requested State in order that a balance may be struck between, on the one hand, the importance of international cooperation and, on the other, national interests or national security.

Dual criminality: The principle of dual, or double, criminality has been transposed into MLA from the law of extradition. Whilst it is seen as an essential safeguard in extradition law, its applicability in MLA varies greatly. Some States do not insist on dual criminality to provide assistance, whilst others enforce the principle strictly. A third category requires dual criminality only where the request involves a coercive power such as search and seizure. To complicate matters even more, some of those States that have a dual criminality requirement regard its absence as a discretionary ground for refusal, whilst for others it is an essential precondition. However, even where the requirement still exists, proactive provisions and interpretations are reducing its effect as a bar to cooperation. Indeed, Article 43, para 2 of the UN Convention Against Corruption illustrates what is perhaps the prevailing mood, by emphasising a broad approach to the ‘conduct’ test:

“In MLA matters (as in extradition), whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the
conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.”

Following the prevailing trend, the Convention encourages States to render MLA assistance even in the absence of dual criminality (Article 33(1)). That should be of the widest possible scope (Article 33(2)).

Political offence: Denial of assistance in MLA on the basis of the political offence exception has traditionally posed great challenges; however, its importance in relation to terrorism offences has diminished considerably as a result of the express provision found in the UN counter-terrorism instruments preventing reliance on the political offence exception in such cases.

Fiscal offence exception and bank secrecy: Certain international treaties and the domestic law of some States allow refusal of an MLA request on the ground that the offence under investigation is a fiscal one, and conversely, do not allow refusal on the ground of bank secrecy. However, Article 37 of the IGAD Convention provides that: “Assistance shall not be refused solely on the grounds that the offence amounts to an offence of a fiscal nature or on the grounds of bank or other financial institution secrecy rules.”

Death penalty: Many States will deny assistance if the offence under consideration may attract the death penalty in the event of conviction. The determining factor is not that a State retains the death penalty, but rather whether the offence is punishable by death. However, this ground is more difficult for a State to apply in MLA than in extradition, since the investigation may be at an early stage and it may be impossible to say with any certainty whether there is a risk of the death penalty. In the event, though, that this consideration becomes a ‘live’ issue in respect of a letter of request, consultations will need to take place between the requesting and requested State in order to ascertain whether appropriate assurances can be given by those making the request.

Dual jeopardy (non bis in idem): MLA may be refused on the basis of dual jeopardy. However, international treaties, both multilateral and bilateral, vary greatly on how this principle is addressed. Some treaties look at whether the suspect has been convicted or punished for the crime in the requesting or requested State, whilst others extend to consider proceedings in a third State. Similarly, some instruments formulate the test as to whether a person has been acquitted or convicted, whilst others ask whether a person has been ‘punished’. Practitioners must, therefore, examine the language of any relevant treaty closely.

Relevance of the requested enquiries: It should not be forgotten that a request may be refused (or a supplementary letter required) if the enquiries that are sought do not appear to the requested State to be relevant. It is, therefore, important that the relevance to the overall investigation is clearly set out within the summary of facts.
In deciding whether an enquiry is relevant, a court in the requested State should adopt a wide interpretation and should have in mind that admissibility will be a matter for the trial court in the requesting State (as explored in Re Mutual Legal Assistance in Criminal Matters\(^1\), in relation to an MLA request submitted by the Russian Federation to Canada).

**Challenging a Refusal to Execute a Letter of Request**

International co-operation, whether by way of formal MLA or an informal request, depends in very large part on goodwill, a willingness to assist and the recognition that today’s requested State might be the requesting State tomorrow. What then can be done in the event of a refusal to execute a request?

Where reliance is placed on comity alone, then the requested State is not in breach of any obligation to assist as none exists. Rather, the request is, there, being considered as a gesture of goodwill and if it is not possible to execute it under the laws of the requested State or it is refused on any number of grounds for refusal, the requesting State will have no recourse.

If, however, the request is based on any of the applicable treaties to which the States involved are parties, then a failure to comply (other than on the general grounds for refusal contained within the treaty) would put the requested State in breach of its obligations. There are then two options available to the requesting State; first, it might prompt executive or diplomatic pressure to accede to the request, or, alternatively it may bring an action before the International Court of Justice (ICJ)\(^2\). Such an action was recently brought by Djibouti against France.\(^3\)

**Adducing evidence obtained from abroad**

As set out above, it is always advisable for the requesting State to ask the requested State’s authorities to allow the evidence sought to be gathered in the form usually expected by the requesting State’s courts. However, this may not always be possible. Some, but not all States, have enacted provisions allowing the admission into evidence of material not in a form which would be regarded as the prescribed form if the evidence had been gathered domestically, subject, of course, to any other fairness or exclusion arguments which might be mounted. Those States that do not have such a provision already in their law should consider adding it.

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\(^1\) Court of Appeal (Ontario), 13 September 1999.

\(^2\) Principal judicial organ of the United Nations.

\(^3\) Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France),
PART 2: THE IGAD MUTUAL LEGAL ASSISTANCE CONVENTION

As to the general layout:

- **Part I** of the Convention sets out the definitions and interpretation of terms used;
- **Part II (Articles 1-5)** sets out the general provisions. In particular, it encourages States to provide the widest possible assistance to each other for the purpose of criminal investigations or proceedings, details the form a request should take, and addresses transmission and the role of the Central Authority.
- **Part III (Articles 6-9)** focuses on transmission and execution of the request.
- **Part IV (Articles 10-11)** contains grounds for refusal.
- **Part V (Articles 12-20)** addresses requests for certain types of assistance (for instance, the service of documents and the examination of witnesses).
- **Part VI (Articles 21-26)** is the source of express provisions on MLA in relation to the interception of communications, the preservation of communications data, and the deployment of covert surveillance.
- **Part VII (Articles 27-32)** contains provisions on asset recovery, and the freezing and confiscation of assets.
- **Part VIII (Articles 33-45)** has set out within it many of the key principles that arise in MLA applications, including reciprocity, dual criminality, the language of the text of the request, and provisions as to costs.
- **Part XI (Articles 46-53)** address instrument formalities, such as signature, accession, reservation, amendment and withdrawal.

**Article 1** requires States Parties to provide the widest measure of MLA in criminal investigations, prosecutions and judicial proceedings. Thus, each State Party must ensure that its laws enable such assistance to be provided. The use of the word ‘proceedings’ will include parts of the criminal process that in some States may not be part of the actual trial, such as pre-trial proceedings, sentencing hearings and bail applications.

If a State Party’s current MLA laws are not broad enough to enable assistance to be given in accordance with the Convention, then amending legislation may be necessary.

Paragraph 2 preserves the ability to provide assistance, informally or formally outside of the Convention. Thus, investigator to investigator (informal) assistance will continue, as can any formal request predicated on a bilateral treaty, any other international instrument, or, indeed, on the basis of comity.

Paragraph 4 obliges States parties to put in place national laws to give effect to the Convention obligations, if those obligations cannot otherwise be met.
A non-exhaustive list of various categories of assistance under the Convention is set out in paragraph 5. The list serves to underline, however, that MLA is intended to be used for evidence-gathering purposes and that the Convention is seeking to encourage States to co-operate as fully as possible. States Parties should review both their other current MLA treaties and domestic law to ensure that those sources of legal authority are broad enough to cover each form of co-operation listed in paragraph 5.

**Article 2** requires States Parties to designate a Central Authority to transmit and receive requests. States are required to establish a Central Authority in order to facilitate and expedite the making and executing of requests. However, the functions to be performed by the Central Authority are for each State to determine. For example, some States may take the view that the Central Authority should undertake a quality assurance role, whilst others will be content with it carrying out monitoring as to the number and types of letters sent or received. Whatever the approach adopted, the primary function of the Central Authority should be as the transmitting and receiving channel for letters of request (subject, of course, to any provisions in respect to direct transmission).

In smaller States, one of the competent authorities for issuing letters of request (for example, the Attorney General’s Chambers) may be regarded as being suitable to be designated as the Central authority. The reader is referred to the general advice contained in Part 1 of this Manual that explains that direct transmission from competent authority to competent authority is increasingly being encouraged internationally: Indeed, notwithstanding that the ordinary requirement of Convention is transmission from Central Authority to Central Authority, save in an urgent case (see Article 6, below), it would be quite proper for two States Parties to the IGAD Convention to reach a broader agreement between themselves that, in a given case or in certain types of cases, direct transmission between them is acceptable (subject, of course, to the domestic law of each permitting direct transmission/receipt).

**Article 3** confirms one of the key principles of MLA: that the applicable law is that of the requested State. Article 40 paragraph 2 permits the requesting State to ask for evidence to be gathered in line with the requesting State’s domestic law (to the extent that its laws are not inconsistent with the relevant laws of the requested State) if that is required under its laws.

**Article 4** provides that a request for MLA must be in writing (including email or facsimile), except that, in an urgent case, an oral request may be made and confirmed in writing thereafter.

**Article 5** lists those features that must appear in a letter of request. There is, however, no prescribed style to the letter.

Paragraph 2 gives the requested State discretion to execute a request even if one or more of the formal requirements set out in Article 5(1) is not present. However, the
competent authorities of requesting States should have in mind that such an exercise of discretion by the requesting State might invite challenge when evidence so obtained is sought to be adduced.

Paragraph 3 confirms that neither the letter of request, nor supporting documents, require certification or authentication. The letter will, however, need the signature of the issuer.

**Article 6** allows any competent authority to issue a letter of request (paragraph 1), but provides (at paragraph 2) that the Central Authority shall transmit the request without delay (if it is satisfied that the request is Convention-compliant). In an urgent case, or if permitted by the domestic laws of the requesting and requested States, a request may be sent by direct transmission from competent authority to competent authority. A copy letter must, however, be provided to the Central Authority of the requesting State, and it must be submitted from that Authority to the Central Authority in the requested State as soon as possible. That submission is likely, in an urgent case, to be received by the requested State’s Central Authority after the request has been executed; nonetheless it will serve to assist the authorities of the requested State in monitoring and record-keeping.

Where further information is needed by the requested State before a request can be executed, the information is to be provided by the competent authority issuing the letter of request (paragraph 4). That additional information may be transmitted directly, even in circumstances where the initial request was not directly transmitted.

**Articles 7 & 8** are straightforward. Article 7 provides for the required action in the requested State, including acknowledgement of the request, an obligation to act expeditiously in its execution and notification if there is to be a delay in that execution. It also provides, at paragraph 6, that reasons shall be given for a refusal to execute and, for instance, in circumstances where the requested State is of the view that the letter does not comply with the Convention. In that instance, of course, it is expected that there will be dialogue and attempts to remedy the defect identified. Article 8 gives the requested State the discretion to postpone execution where an ongoing investigation or proceedings in the requested State would suffer interference in the event of immediate execution. It should be noted, though, that there should be consultation and dialogue taking place between the requesting competent authorities and the requested competent authorities in circumstances where postponement is being considered.

**Article 9** addresses instances in which the defence (or indeed a *partie civile*) has good grounds for seeking evidence from another State. A *partie civile* is in civil law jurisdictions the alleged victim of a crime who is given locus to be represented in criminal proceedings and who can be awarded compensation in those proceedings.

It may be, for example, that a witness or documents located abroad are necessary if a defendant is to receive a fair trial and be able to put his/her defence fully and
robustly. Given that a letter of request may only be issued by a competent authority, it is important that States Parties have a provision in domestic law to allow either the court or the prosecutor to issue a letter of request on behalf of the defence. It is also important for the rule of law in general that the requested State treat such a request in the same way that it would treat a request coming from a requesting competent authority where evidence is being sought for the purposes of prosecution.

Part IV of the Convention sets out the grounds for refusal in Article 10 and the need for consultation between the States in the event that the requested State is refusing, or is about to refuse, a request for MLA on the basis of Article 10 or any other provision under its own domestic law.

Article 10 sets out a number of grounds on which a request may be refused. Generally speaking the grounds for refusal of MLA largely mirror those under extradition law and practice; however, because there is international recognition that MLA should be as permissive as possible, States are asked, nevertheless, to provide assistance even where such a ground can be relied upon.

The first ground for refusal is that the offence/proceedings in the requesting State are of a political character. By and large this ground for refusal has been whittled away and UN Conventions, in particular, have very largely removed ‘political offence’ as a ground for refusal. Therefore, it is only in rare cases of an obviously political character that a request should be refused on this ground. That is further elaborated in Article 10(3).

The next two grounds, contained in Article 10(1)(a)(ii) and (iii), relate to refusal in respect of offences only under military law and double jeopardy respectively. In the case of military offences, the Convention provides for a basis of refusal if the offence is triable only under military law; however if it is capable of being tried under both general criminal law and military law, then the States concerned must consult, as provided by Article 11, in order to determine if assistance may be provided, subject to any assurances regarding the application of military law.

Where double jeopardy is invoked, it is likely that a request will be refused. However, States must exercise caution as to when double jeopardy is engaged. Often the conduct relied upon may overlap with an offence for which the person has been acquitted or convicted in the requesting State, but the requesting State is seeking assistance in relation to an aspect of the conduct in its investigation or prosecution not itself part of the earlier finding, in which case, double jeopardy will not arise.

Article 10(1)(b) provides for further grounds for refusal which are self-explanatory: that part of the Article refers to, inter alia, ‘essential public interests’ as a ground for refusal. That includes, but is not limited to, sovereignty, security, national interests, ordre publique, the safety of any persons or the placing (by making the request) of an excessive burden on the resources of the requested State.
Article 10(2) confirms the position that it is the law of the requested State that applies and therefore any assistance to provide evidence to the requesting State must be in accordance with its own laws.

Article 11 provides for consultation between the parties in the event that a request is to be refused, in whole or in part. States are urged to consult and attempt to find a way to co-operate, rather than refusing to assist.

Part V of the Convention addresses the various forms of requests for assistance that can be under this Convention. The Convention simply sets out the more common and the minimum level of assistance that a State should provide in the circumstances set out in Part IV. Of course, domestic law of a State may provide for wider assistance than that provided by the Convention.

Article 12 makes provision for the service of documents on an individual who is present in the requested State. Article 12(3) sets out the procedure and provides that the mode of service requested is compatible with the laws of the requested State Party via the Central Authority.

Where, however the attendance of a witness is sought by the requesting State and a request is made, the person is not under an obligation to attend if under similar circumstances he/she would not be a competent or compellable witness under the law of the requested State (Article 16).

Article 16 must also be read in tandem with Article 14 (examination of witnesses) and Article 19 (Privilege). On the face of it Article 19 deals with circumstances where witness attends the proceedings to give evidence, however it is important to note that it is equally applicable to the requirement to attend to give evidence whether such evidence is taken in the requested State or the witness attends in the requesting State.

The difference between informal, mutual or administrative assistance and MLA is set out above (in the discussion on general principles) and it becomes particularly relevant in relation to Article 13: Where the requested State seeks the production of certain documents, records etc, the competent and Central Authority in the requesting State must first ascertain if such material is available through open sources. If that is not the case a request for such documents may be made under Article 13.

Article 14 provides for the examination of witnesses in the requested State following a request. In such circumstances, evidence is usually taken before a judge or magistrate in the requested State. Again this will depend on the domestic law of the requested State. The request will generally set out the scope of the questions to be put to the witness and if the response must be recorded in a manner that would make it admissible in the requesting State, then the request must set it out.
Often the requesting State may ask that an officer or prosecutor be allowed to attend such examination in the event there are other lines of enquiry that emerge etc; it is a matter for the requested State whether such attendance will be permitted. On the whole such requests are permitted with the caveat that the officers from the requesting State play no active part in the examination of the witnesses.

Where it becomes necessary to seek the attendance of a witness in the requesting State, and subject to the consent of the person, Article 15 allows for such a request to be made. The minimum notice period required facilitating such attendance is at least 30 days. In a case of urgency, though, the requested State may agree to a shorter period. The letter of request must set out the reasons for the attendance etc as set out in Article 15(4) (a) – (c).

Article 15(5) and (6) detail the safeguards for the witness in the event of a refusal; these are similar to those contained in Article 16 and 19.

If the witness is in custody in the requested State, but consents to give evidence in the requesting State, Article 17 permits the temporary transfer of the person in custody. The ‘witness’ will then be held in custody in the requesting State until such time as his/her attendance is no longer necessary, after which he/she is transferred back to the requested State in custody. Article 17(8) confirms that, in such instances, the requested State will not need to seek the surrender of the ‘witness’ from the requesting State, but that, as the transfer is temporary and for a specific purpose, namely to attend as a witness, the person is simply handed back.

Article 17, like Article 15, makes it clear that the consent of the person is a prerequisite and that an unwillingness to consent does not prejudice that person. Article 17 contains the same safeguards as set out in Article 15.

It is important to note that the time spent in custody following such transfer must be considered to be part of the sentence and that additional time cannot be added to the sentence in respect of the time spent in the requesting State. If, on the other hand, the sentence has been served whilst waiting to give evidence in the requesting State, then, subject to the agreement of all parties, including the witness, the person may be released in the requesting State. Article 17(10) is worded deliberately widely to cover any other circumstance in which a person may be released.

Article 18: Following the transfer of a person in custody, or the voluntary attendance by a witness, this Article confirms that such a person cannot be made subject to criminal proceedings in the requesting State where he/she is attending to give evidence in relation to any matter that may have occurred before departing the requested State to give evidence. For example, a witness may be under investigation for theft in the requested State but consents to attend as a witness in the requesting State. Article 18 ensures that he/she cannot then be prosecuted for the matter of theft which was committed in the requested State prior to departure. Article 18 is intended as a further safeguard for the witness.
Article 20 addresses requests for search and seizure. As search and seizure are coercive measures, it is important that the requesting State provides as full an account as possible as to why such a measure is necessary; for example, fear of destruction of evidence etc. The authorities in the requested State will inevitably need to obtain such a warrant from a judge or magistrate; therefore, it is vital that the requesting State provide all relevant information [Article 20(2)].

Part VI deals with requests relating to interception of communication, etc.

Article 21 governs those instances where a State Party is requested by another State Party to order an interception operation from its own territory. Paragraph 1 makes a distinction, at (a) and (b), between two types of interception:

(a) addresses the immediate transmission to the State Party requesting the interception of telecommunications. Immediate transmission means forwarding the intercepted telecommunication directly to the requesting State Party, where it can be listened to and/or recorded by the competent authority which ordered it.

(b) addresses the recording and subsequent transmission of telecommunications to the requesting State Party; this is the current practice in judicial assistance between those States already co-operating in respect of interception.

The term "telecommunication", which is not limited to telephone calls, has been defined so as to be construed in its widest sense. It should also be noted that it is necessary that, as far as possible, the requested State also transmits technical data concerning each telecommunication; for instance, the number called, the time and duration of the telecommunication, and, if known, the place from which the telecommunication was made or received. The definition of telecommunication has been arrived at in the expectation that the provisions on the interception of telecommunications may apply to all forms of telecommunication made possible by current and future technologies.

Paragraph 2 sets out, according to the location of the subject, the two instances in which a request for judicial assistance may be made:
(a) Where the subject is on the territory of the requesting State Party.
(b) Where the subject is on the territory of the requested State Party.

Paragraph 3 specifies the form in which the interception request shall be submitted.

Paragraph 4 provides that, when immediate transmission is not possible, the requested State Party may treat the request as though it were made under paragraph 1 (b).

Paragraph 5 reflects that it is in the interests of both an investigation and the persons being investigated that an interception measure remains confidential.
**Article 22** allows for the making of a request for stored communication material (defined as content data no longer in the course of transmission). Such a request will usually be by way of letter of request or, if the laws of the requested State allow, through informal assistance. Paragraph 2 requires States Parties to consider adopting domestic law to allow for such requests to be executed (assuming that such law is not already in force).

**Article 23** allows a request to be made for the interception of postal items. Such items are ‘in the course of transmission’ until delivered to a mail or letter box.

**Article 24** is intended to emphasise to States Parties that they are at liberty to enter into additional agreements (whether bi- or multi-lateral) in respect of interception of telecommunications.

**Article 25** is intended to ensure that a request for communications data is not thwarted because the data in question has already been destroyed. It is also a recognition that automatic preservation periods vary from service provider to service provider. A request under this Article must contain the matters set out in paragraph 3 and may only be refused in the circumstances envisaged by paragraph 6. Thus the general grounds for refusal under Article 10 may not be invoked. Preservation of data under this Article is for a maximum of 120 days.

**Article 26** allows for a request for the deployment of covert surveillance by the use of a surveillance device to be made under the Convention. The authorisation, duration and detailed conditions for such a deployment will be determined by the laws of the requested State, but should also be in compliance with the laws of the requesting State to the extent that the latter’s laws are not inconsistent with the former’s. Any IGAD State likely to make or receive a request in relation to covert deployment should ensure that it has in place:

- Explicit and accessible law governing the use of intrusive measures, such as covert surveillance;
- An authorisation process within that law that provides either for judicial authorisation or, if executive/senior law enforcement, a framework of meaningful judicial oversight of such authorisation;
- Authorisation for a fixed period, and an obligation to conclude the deployment as soon as it is no longer justifiable;
- Authorisation criteria that has regard to the legitimate circumstances in international human rights law (for IGAD States, their respective constitutions, and their international obligations under the African (Banjul) Charter) on Human and Peoples’ Rights, and the International Covenant on Civil & Political Rights (ICCPR) in which a person’s right to a private/personal life may be breached by the State;
- Documentation (recording and retention) of all parts of the process, including full rationale for decisions (including those relating to authorisation).

**Part VII** addresses asset recovery, freezing and confiscation.
Article 27 requires States Parties to assist each other in identifying, tracing, freezing and confiscating the proceeds and instrumentalities of crime. There is also an expectation that States will furnish each other with supporting information. The Convention, in its asset recovery provisions, aims to be comprehensive and to encourage co-operation. The extent of the co-operation required mirrors, in key respects, the provisions of UNCAC, to which Djibouti, Ethiopia, Kenya and Uganda are parties, and Sudan a signatory. It is, of course, important that States Parties have in place a domestic framework for asset freezing and confiscation if the provisions of Part VII are to work effectively.

Article 28 provides that States Parties must take necessary measures to permit their courts or competent authorities, when having to decide on confiscation, to recognise another State Party’s claim as a legitimate owner of property acquired through the commission of a criminal offence. Those drafting domestic laws should review existing proceeds of crime legislation to see whether it already allows such a claim by another State.

Article 29 must be read in conjunction with Article 30 (see below). The effect of Article 29 is that each State Party, in order to provide MLA pursuant to Article 30 of the Convention, with respect to proceeds and instrumentalities of crime shall, in accordance with its domestic law:

- Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;
- Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money laundering or such other offence as may be within its jurisdiction, or by other procedures authorised under its domestic law;
- Allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence, or in other appropriate cases.

Each State Party, in order to provide MLA upon a request made pursuant to Article 30 (below) shall, in accordance with its domestic law:

- Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing order issued by a court or competent authority or requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to a confiscation order for the purposes of Article 29(1)(a);
- Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested Party to believe that there are sufficient grounds for taking such action and that the property would eventually be subject to an order of
confiscation for the purposes of giving effect to an order for confiscation order by a court of another State Party;
- Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

**Article 30** itself has the effect that a State Party that has received a request from another State Party having jurisdiction over a criminal offence for the execution of a confiscation order for the proceeds of crime, instrumentalities of crime or property situated in its territory shall:
- Submit to its competent authorities, with a view to giving effect to it to the extent requested, a confiscation order issued by a court in the territory in the requesting State Party, insofar as it relates to proceeds of crime or instrumentalities situated in the territory of the requested State Party.
- Submit the request to its competent authorities for the purpose of obtaining a confiscation order and, if such an order is granted, give effect to it.

Following a request made by another State Party, having jurisdiction over a criminal offence, the requested State Party shall take measures to identify, trace and freeze proceeds of crime, property etc for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request made under 29 (1)(b), by the requested State Party.

It should be noted that a request pursuant to this Article must contain a description of property to be confiscated, a statement of facts, and a legal admissible copy of the confiscation order shall be provided, as appropriate, by the requesting Party (Article 30(3)).

In addition, it should be noted that:
- Co-operation under Article 30 may be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence, or if the property is of a *de minimis* value (Article 30(4)).
- Before lifting any provisional measure taken pursuant to Article 30, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure (Article 30(5)).
- Article 30 shall not be construed as prejudicing rights of bona fide third parties (Article 30(6)).

Articles 29 and 30 set out procedures for international cooperation in confiscation matters. These are important powers, as criminals frequently seek to hide proceeds, instrumentalities and evidence of crime in more than one jurisdiction, in order to thwart law enforcement efforts to locate and seize them.
Article 30 contains obligations in support of international cooperation “to the greatest extent possible” in accordance with domestic law, which require either direct or indirect enforcement by (a) recognising and enforcing a foreign confiscation order, or (b) by bringing an application for a domestic order before the competent authorities on the basis of information provided by another State Party. In either case, once an order is issued or ratified, the requested State Party must take measures to “identify, trace and freeze or seize” proceeds of crime, property, equipment or other instrumentalities for purposes of confiscation [Article 30(2)].

Article 29, for its part, seeks to recognise the challenges that States have faced in international confiscation cases and mirrors UNCAC by encouraging the use of creative measures to overcome some of these obstacles. One of those measures is confiscation on the basis of money laundering as opposed to predicate offence convictions.

States Parties are also obliged to consider allowing the confiscation of property of foreign origin by adjudication of money-laundering or other offences within their jurisdiction or by other procedures under domestic law without a criminal conviction, when the offender cannot be prosecuted [Article 29(1)(b) and (c)].

Finally, Article 29, paragraph 2 offers detailed guidance on measures designed to enhance MLA relative to confiscation as required under Article 29.

The Convention presupposes the establishment of a basic regime for domestic freezing and confiscation of assets, which is a pre-requisite for international cooperation and the return of assets. A domestic infrastructure paves the ground for cooperation in confiscation matters, but it does not cover by itself issues arising from requests for confiscation from another State Party.

Article 29 provides for the establishment of a system which enables a) the enforcement of foreign freezing and confiscation orders, and b) the issuance of freezing/seizure orders for property eventually subject to confiscation, upon a request from another State Party. Paragraphs 1 and 2 of Article 29, thus, provide for the mechanisms that are necessary, so that the options offered in Article 30 [paragraph 1, (a) and (b)] can be exercised in such requests.

Article 31: This is a crucial provision: There can be no effective prevention, confidence in the rule of law and criminal justice processes, proper and efficient governance, official integrity, or widespread sense of justice and faith unless the rewards of the crime are taken away from the perpetrators and returned to the rightful parties.

For this reason there is little discretion left to States Parties about this Article: States are required to implement these provisions and introduce legislation or amend their law as necessary.

Article 31 requires State Parties to:
Dispose of confiscated property in accordance with Article 31(3), including by return to prior legitimate owners (paragraph 1);

Enable their authorities to return confiscated property upon the request of another State party, in accordance with their fundamental legal principles and taking into account *bona fide* third party rights (paragraph 2);

Return confiscated property to a requesting State party, in cases of public fund embezzlement or laundering of embezzled funds when confiscation was properly executed on the basis of final judgment in the requesting State [this judgment may be waived by the requested State, paragraph 3(a)];

Return confiscated property to a requesting State party, in cases of other criminal offences, when confiscation was properly executed, on the basis of final judgment in the requesting State (which may be waived by the requested State) and upon reasonable establishment of prior ownership by the requesting State or recognition of damage by the requested State (paragraph 3(b));

In all other cases, give priority consideration to: return of confiscated property; return such property to its prior legitimate owners; and compensation of victims (paragraph 3(c)).

States parties may also consider the conclusion of agreements or arrangements for the final disposition of assets on a case-by-case basis (Article 31(5)).

**Article 32** has in mind that States Parties must try to give themselves the power to forward information on the proceeds of criminal offences to another State Party without prior request, when such disclosure might assist the receiving State in investigations, prosecutions or judicial proceedings or might lead to a request for asset recovery by that State.

States Parties must cooperate with one another to prevent and combat the transfer of proceeds of corruption offences and to promote the recovery of such proceeds.

To this end, States must establish a financial intelligence unit to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions.

**PART VIII** contains Miscellaneous Provisions (Article 33 – 45):

**Article 33** addresses dual criminality and encourages States to provide the widest possible scope of assistance in the absence of dual criminality. This is in accordance with international practice. The concept was imported from the law of extradition and has acted as an obstacle in relation to MLA. Whereas it is a fundamental safeguard in extradition, it does not serve such a purpose under MLA; recognition of this has led to the growing trend of removing the need for dual criminality at the investigation or proceedings stage.
Article 34 encourages States to provide assistance even if the requesting State may not be able to reciprocate generally or for specific measures of assistance. For example, if the domestic law of State A does not permit interception of communication under its law, it does not mean that it cannot seek assistance from State B (assuming it is permitted under the domestic law of State B) if interception is thought necessary. State A would simply state in its request that in similar circumstances it cannot provide the same assistance. This does not mean that State B should refuse to assist on these grounds.

Article 35 addresses speciality. Evidence obtained from the requested State can only be used for the purpose it was requested and in relation to the proceedings which were mentioned in the letter of request. The evidence cannot be relied upon in other proceedings, for instance, civil or ancillary proceedings, or transmitted to another State, unless the requested State consents. It is therefore important to note that where evidence is sought for the purpose of criminal proceedings and it is likely that forfeiture/confiscation proceedings may follow, the letter of request must make that clear so as not to fall foul of the speciality rule.

Article 36 emphasises the importance of confidentiality in relation to the contents of letters of request. In most instances such requests will be made at the early stages of an investigation and therefore it is important, particularly for sensitive operations, that the contents of such a request are treated in a confidential manner. The reader will be aware (as discussed, above) that letters of request are transmitted through non-secure means and therefore it is important that information contained in such requests is carefully handled. If, however, an investigation is particularly sensitive, it may assist to have the officer in charge of the investigation to travel to the requested State in order to provide the sensitive information in person so as to avoid any danger of compromise. Another alternative is the so-called 'conditional request'.

Article 37 emphasises that a request in relation to fiscal offences should not be refused simply because the offence is of a fiscal nature; nor should there be a refusal on grounds of bank secrecy. Both principles being vital in relation to the effective working of Part VII of the Convention.

Article 38 provides that a request must be translated into the language of the requested State and recognises that the official languages for IGAD are English and French. However, it may well be that, for instance, a request to Sudan requires translation into Arabic. It must be borne in mind that the request itself must be in the language of the requesting State and be accompanied by a translation. If there is any doubt as to which language is required, informal liaison should take place.

Article 39 addresses costs and confirms that all costs in relation to the extradition process in the requested State will be borne by the requested State; unless the costs are exorbitant, and in accordance with Article 39, the State Parties may liaise on how the costs are to be met and, it may well be, that the requesting State has to bear the additional costs.
Article 40 deals with the transmission of the material which was the subject of the request and permits the material to be postponed in its transmission, or the provision of certified copies, rather than originals, to the requesting State in the event that the material is required in proceedings in the requested State. At the conclusion of the proceedings in the requesting State, all material obtained from the requested State pursuant to a letter of request must be returned to the requested State, unless the latter expressly consents to it not being returned. It is important that such arrangements are put in place at the outset so that they are not overlooked.

Article 41 encourages information sharing between the various agencies in the region so as to assist in the investigation and prosecution of serious crime. This becomes of particular use when dealing with criminal activity that may affect one or more States in the region.

Article 42 addresses measures for witness protection where the requesting State is of the opinion that the witness is at risk if sufficient measures are not put in place for his/her attendance in the requested State Party. Such a situation might arise, for example, if the witness is a co-operating defendant in a sensitive case in the requesting State, but is able to give relevant evidence in proceedings in the requested State.

In such circumstances, the requested State will want to ensure that the witness does not come to harm and will require the requesting State to put in place measures to ensure his/her safety. It is important in such instances, as reflected by Article 42, that there is consultation between the parties to determine if there is a risk, and if so, what measures would be appropriate to address the risk whilst the witness is present in the requesting State. In the event that the requested State is not satisfied that appropriate measures are in place, it may, if it so decides, refuse the request.

Most serious crime inevitably touches more than one State, which means that any one of the States affected may claim the right to try the matter in its courts. In order to deal with such circumstances at the outset, Article 43 provides a set of criteria that may be followed to determine the best 'forum' State.

Article 44 encourages member States to deposit with the IGAD Secretariat those of their laws and regulations that are likely to be of relevance to the execution of the Convention.

Article 45 confirms that the Convention only relates to the securing of evidence located in another State and is not to be relied upon for seeking the arrest of a suspect (which must be done in accordance with the IGAD Convention on Extradition).

Part IX of the Convention sets out formalities of the Convention. It might assist to provide an overview of the key defining characteristics of a treaty, including the
various stages: adoption, signature, ratification and accession, along with the making of reservations.

The Vienna Convention on the Law of Treaties 1969, (“the Vienna Convention”)

The rules governing international treaties used to be based on customary international law or the general principles of law. The Vienna Convention, which entered into force on 27 January 1980, codified these rules and clearly set out the criteria for the establishment and operation of international treaties.

For the purposes of this Part, the following provisions of the Vienna Convention are important to note:

Article 2(1)(a) of the Vienna Convention defines “treaty” as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

The terminology that surrounds the treaty-making process can be confusing. It is therefore important to note the distinction between the various procedural terms, as this can determine whether a State has consented to be bound to the terms of the treaty or not.

Adoption
“Adoption” takes place during the treaty-making process, and is the formal act in which participating States consent to the text of a proposed treaty. Article 9 of the Vienna Convention states:

Article 9(1) “The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up...”

Article 9(2) “The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.”

Signature
A State which has signed a treaty subject to ratification, acceptance or approval, does not establish the consent to be bound. Signature is a process of authentication and reflects the willingness of the State to continue in the treaty-making process by qualifying it to proceed to undertake ratification.

A signatory State to a treaty, while not yet bound to its provisions, is nevertheless obligated not to act in any way which would defeat the object and purpose of a treaty prior to its entry into force. Article 18 of the Vienna Convention states:
“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become party to the treaty...”

**Ratification**

Ratification is the act whereby a State establishes its consent to be bound to a treaty. In the case of multilateral treaties, the act of ratification is normally done by the deposit of the instruments of ratification to an international organization or to the Secretary General of the United Nations, as the depositary. Article 16 of the Vienna Convention holds:

*Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:*

  1. (a) their exchange between the contracting States;
  2. (b) their deposit with the depositary; or
  3. (c) their notification to the contracting States or to the depositary is so agreed.

The process of ratification grants States the necessary time frame required to receive domestic approval for the treaty and to enact domestic legislation giving effect to the treaty.

**Accession**

Accession has the same legal effect as ratification, but applies when a State becomes party to a treaty after the treaty has already been negotiated and signed by other States. Article 15 of the Vienna Convention outlines when consent of a State to be bound by a treaty is expressed by accession:

1. (a) the treaty provides that such consent may be expressed by that State by means of accession;
(b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or
(c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

**Reservations to international treaties (Articles 19 – 23 of the Vienna Convention)**

Article 25 provides for a State Party to make a reservation to the provisions of the Convention. A treaty can prohibit reservations entirely, or allow only specific reservations to be made.

A reservation is a declaration made by a State which excludes or alters the legal effect of specified provisions of the treaty to that State. Reflecting the concept of universality, reservations provide a level of flexibility by enabling States to become parties to multilateral treaties whilst permitting the exemption or alteration of certain provisions with which the State may not wish or is unable to comply.
The integrity of the treaty remains intact by virtue of Article 19(c) of the Vienna Convention, which provides that:

*A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: ... (c)... the reservation is incompatible with the object and purpose of the treaty.*
EXAMPLES OF LETTERS OF REQUEST

Possible templates of Letters of Request under the Convention are set out below and may be of assistance to practitioners. Of course, it must be borne in mind that these are provided for guidance only and the format and content of the request must comply with the requirements of the domestic law of the requested State.

Example 1

The Competent Judicial Authorities
of the Republic of Concordia

Dear Sirs,

**Letter of Request: John Smith**

I have the honour to request your assistance under the provisions of the IGAD Convention on Mutual Legal Assistance in obtaining certain information, statements and documents in relation to a criminal investigation being conducted by officers of the Ruretanian Police Service in Capitala, Ruretania.

The Ruretanian Prosecution of Offences Act 2002 states that the Director of Public Prosecutions has the duty to take over the conduct of criminal proceedings (other than certain proceedings relating to relatively minor offences) instituted on behalf of a police force. The Director is head of The Public Prosecution Service of Ruretania. As a Public Prosecutor designated by him I have his powers to conduct proceedings in this case and I am designated as a Judicial Authority for the purposes of Article 6(1) of the Convention. Accordingly, I am empowered to issue this letter.

Criminal proceedings have been instituted against:
Name: ______________
Address: ______________
______________
Ruretania
Date of Birth: 11 February 1964
Nationality: Concordian

He has been charged with murder. His case is listed at ______________ Capitala High Court on 1 April 2010 for a directions hearing. The trial of the issue will take place at a later date. The Court has withheld bail.

Murder is an offence contrary to common law and is committed where a person of sound mind and discretion unlawfully kills another with intent to kill or to cause
grievous bodily harm. Murder carries a penalty on conviction after trial on indictment of imprisonment for life.

Summary of Facts

On 10 April 2008 the ____________ Fire Service attended a house fire at ____________, where they found the partially burnt body of a man, ____________. Post mortem forensic examination revealed the cause of death as multiple blows to the head using a blunt instrument, possibly a bottle. ____________ was an acquaintance of the deceased. He denies being responsible for his murder, but accepts he was in the house with him during the hours before his death.

Extensive forensic scientific investigations have been undertaken. Early results show that Mr Smith was at the house at the time the body and house were set on fire. During the course of their investigations the police spoke to a person who claimed to have seen ____________ buying a bottle of vodka at a shop in Main Street an hour before the deceased is believed to have died. The shop is called ____________.

Police enquiries have established that if ____________ did go to the shop at that time he would have been served by a shop assistant called Miss ____________. She is a Concordian national, who returned home to Concordia on 12 April 2008. Miss ____________ is not suspected of being involved in the murder in any way. The police would like to interview Miss ____________ to establish whether she ____________.

An enquiry through Mr ____________ of the ____________ Department of the Concordia Police have established that she is willing to make a statement and will, if required, travel to Ruretania to see if she can identify ____________ at an identification parade.

Enquiries to be Made

To visit
Miss ____________ of ____________
__________
__________
Concordia

To interview her and take a witness statement in writing concerning:
(a) ___________________________________________________________________
(b) ___________________________________________________________________

Assistance Required
That such other enquiries are made, persons interviewed and exhibits seized as appear to be necessary in the course of the investigation.

It is requested that the above enquiries are made and that Detective Inspector ______________ is permitted to be present when they are made. It is respectfully requested that he attend as he has a full and detailed knowledge of this investigation. His telephone number is +444________. His fax number is +444 __________. His address is Major Incident Room, ___________________ Ruretania. His e-mail address is _______________.

It is requested that the witness statement be taken in writing, dated and headed by the following declaration: “This statement consisting of ____ pages is true to the best of my knowledge and belief.” The number of pages should be filled in the space once the statement has been written and the witness should sign the statement beside the declaration, on every page and at the end. Please date the statement. It is requested that the witness' address, telephone number and date of birth be written on the back of the first page of the statement.

If documentation is obtained from the witness, the witness should produce each document as an exhibit in her statement. In order to do this the statement should describe the document and give it an exhibit number. The exhibit number should consist of the witness' initials and a consecutive number. For example, the first document produced by the witness will have the exhibit number JAS1, the second will be JAS2 and so on.

That an indication be obtained of the preparedness of any witness to travel to Ruretania to give evidence in person.

That the originals of any witness statements made and the originals or certified copies of the documents or other items secured during the course of the enquiry be handed to Detective Inspector ______________ and permission given for their removal to Ruretania for use at the trial.

That any information held on computer in any form be preserved and secured from unauthorised interference and made available in due course to the investigating officers and The Ruretanian Public Prosecution Service for use at any subsequent trial.

I confirm that the enquiries requested to be made in this letter could be made by the Ruretania police under powers currently available to them if the enquiries were made in England rather than the Concordia.

I thank you in advance for your valuable co-operation concerning this case.

Yours faithfully,

______________

Public Prosecutor
EXAMPLE 2

The Competent Judicial Authorities
of the Republic of Concordia

Dear Sirs,

LETTER OF REQUEST:

I have the honour to request your assistance under the provisions of the IGAD Convention on Mutual Legal Assistance and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) in obtaining certain information, statements and documents in relation to a criminal investigation being conducted by officers of the Ruretanian Police Service in Capitala, Ruretania.

The Ruretanian Prosecution of Offences Act 2002 states that the Director of Public Prosecutions has the duty to take over the conduct of criminal proceedings (other than certain proceedings relating to relatively minor offences) instituted on behalf of a police force. The Director is head of The Public Prosecution Service of Ruretania. As a Public Prosecutor designated by him I have his powers to conduct proceedings in this case and I am designated as a Judicial Authority for the purposes of Article 6(1) of the Convention. Accordingly, I am empowered to issue this letter.

A criminal prosecution has been commenced against:-

Name:
Address:
Nationality:
Date and Place of Birth:

The purposes of this request are:

1. To obtain evidence for the Crown Court to take into account when considering the making of a confiscation order under the provisions of the Drug Trafficking Act 1994 against [insert name];
2. To use evidence obtained in (1) in any proceedings in Ruretania ancillary to the criminal proceedings; for example, if the evidence obtained in (1) above reveals any breaches of the restraint order, to utilise the evidence obtained in (1) above to institute proceedings against [Name] in the High Court for contempt of the restraint order;
3. To use evidence obtained in (1) in any proceedings in Ruretania ancillary to the confiscation proceedings, namely for the High Court to take into account when considering an application by the Public Prosecution Service to appoint a receiver to enforce any confiscation order under the provisions of the Ruretanian Drug Trafficking Act 2004 made against [Name]; and
4. To freeze assets in the jurisdiction of the Kingdom of the Netherlands so that they are available to satisfy any confiscation order that may be made under the provisions of the Drug Trafficking Act 1994 against [Name].

The location of the High Court of Ruretania exercising jurisdiction in this case is sitting at Capitala. On the [Date] [Name] was remanded in custody for a trial on indictment of one count of possessing 2 kilograms of cocaine with intent to supply it to another, which is a criminal offence contrary to section 5(3) of the Misuse of Drugs Act 2001.

By section 5(3) of the Misuse of Drugs Act 2001 it is an offence for a person to have in his possession a controlled drug, whether lawfully or not, with intent to supply it to another. Cocaine is a controlled drug by virtue of Schedule 2 of the Misuse of Drugs Act 2001. The maximum sentence upon conviction on indictment is life imprisonment or an unlimited fine or both.

The relevant statutory provisions are annexed to this letter as Annex 'A'.

Possession of cocaine with intent to supply it to another is a drug trafficking offence. Once a defendant is convicted on indictment in the High Court of a drug trafficking offence, a hearing must be held by the High Court to determine:

1. whether or not that defendant has benefited from drug trafficking;
2. if the Crown Court holds that the defendant has so benefited, the Crown Court must assess the amount of the benefit; and
3. the amount of realisable property held by the defendant pursuant to section 2 of the Drug Trafficking Act 2004.

A confiscation order is made in a sum of money up to the value of the property obtained as a result of or in connection with a drug trafficking offence. Its purpose is to recover from the convicted defendant the value of the property obtained as a result of his drug trafficking.

A defendant benefits from drug trafficking if he has at any time received any payment or other reward in connection with drug trafficking carried on by him or another person. It is not confined to the benefit received by the defendant from the offence of which he was convicted. The High Court must assume that:-

1. All property in which the defendant has an interest was received as a payment or reward in connection with drug trafficking; and
2. All transfers to the defendant at any time since the beginning of the period of 6 years ending when the proceedings were commenced against him at any time since the beginning of the period and were received as a payment or reward in connection with drug trafficking; and
3. All expenditure incurred by the defendant over that same period (6 years prior to when the proceedings were commenced against him) was met out of payments or rewards received in connection with drug trafficking.
Once the High Court has decided upon the amount of benefit from drug trafficking (including the making of the assumptions above), it must go on to consider the amount of realisable property held by the defendant which may be available to satisfy the confiscation order.

Realisable property is widely defined. It includes any property in which the defendant holds an interest (interest includes right), and any property that has been given by the defendant to another for little or no consideration. The High Court, in coming to its decision, must take account of any property held by the defendant wherever it is situated in the world.

The amount of realisable property is the total value of the defendant's assets together with the value of any “gifts” (transfers made by the defendant at an undervalue to others or for no consideration). The value of legitimately acquired assets are calculated as part of the amount that might be realised. There is no requirement on the prosecution to prove that the defendant's assets are acquired from drug trafficking. The defendant bears the burden of showing that his realisable property is less than the proceeds of drug trafficking.

If the defendant satisfies the High Court that the amount of his realisable property is less than the amount of the benefit obtained from drug trafficking, the High Court must make a confiscation order in the lower amount. If the defendant is unable to satisfy the Crown Court, the Crown Court must make a confiscation order in the amount of the benefit from drug trafficking.

The High Court (Civil Division) may make a restraint order prohibiting any person from dealing with any realisable property where proceedings have been instituted in Ruretania against a defendant for a drug trafficking offence. The purpose of the restraint order is to prohibit the defendant dealing with realisable property so that the realisable property can be utilised for the satisfaction of a confiscation order. The relevant statutory provisions are annexed to this letter as Annex ‘B’.

On the [Date] the High Court (Civil Division) issued a Restraint Order against [Name] prohibiting him from dealing with his assets. The Restraint Order and the statement of [Name of Officer] are annexed to this letter as Annex ‘C’.

**SUMMARY OF FACTS**

On the 26th January 2008, officers of the Ruretanian Police Service monitoring [Name] activities saw his ______ motor vehicle, registration number in the car park of------ .

He was seen to enter a nearby house and shortly afterwards return to his vehicle. As he began to exit the car park, he was approached by officers of the____________, and his vehicle searched. Inside was found a plastic bag containing two packages, each one kilogram in weight, which appeared to be cocaine.

[Name] was arrested and taken to _______ Police Station where he was interviewed by police officers.
He denied the cocaine belonged to him or that he had it in his possession with intent to supply it to another. His explanation was that he had found the carrier bag containing the two packages in the area of a Highway Services Station whilst travelling from Capitala to see a friend in the Ruretanian Highlands. He did not know or suspect what the packages contained, but stated that he would have handed them in to the police.

Subsequent forensic, scientific examination of the packages showed that they contained two kilograms of cocaine.

[Name] stated that he owns the following vehicles in the Republic of Concordia:
1. A ______ motor vehicle, registration number ______
2. A ______ motor vehicle, registration number ______
3. A ______ motor vehicle, registration number ______

[Name] further stated that the above vehicles were purchased by him but registered to, [Name and address] in order to avoid being confiscated in the Republic of Concordia as a result of a drugs trafficking conviction there.

[Name] had in his possession documents relating to vehicle insurance in respect of a ________ motor vehicle, index number _________. The documents show the client number as _____, with the owner being [Name and address].

Enquiries by the police have revealed the following:
1. [Name] has a medical insurance policy with a company known as [Name], the address of which is unknown, account number _____________.
2. [Name] has vehicle insurance with a company known as _____ of ________, in respect of the following vehicles:
   (a) ______ motor vehicle, index number ________, policy number ________.
   (b) ______ motor vehicle, index number ________, policy number ________, and
   (c) ______ motor vehicle, index number ________, policy number ________.
3. The ______ motor vehicle, index number ________ was purchased from a company known as _________________________.
4. [Name] has the following alternative addresses:
   (a) __________
   (b) __________
   (c) __________
5. [Name] is involved in the following companies:
   (a) __________ Company, title number __________
   (b) __________ Import Export Company, title number __________
   (c) __________ Company, title number __________
   (d) __________ Company, title number __________
6. [Name] holds a bank account numbered __________ with the ___________ Bank, Republic of Concordia ____________, in the name of _____________.
7. [Name] holds a ________ account number ________, pass number ________ in the name of ___________________ at _________Bank, Republic of Concordia.
8. [Name] holds or has access to a __________ account number __________
9. [Name] owns a life assurance policy with a company known as _______________, in the name of _______________. Payments to this policy are made via his _______ Bank account number ___________.

ENQUIRIES TO BE MADE

1. To visit the _______ Bank at, ___________________ and take a statement in writing from the manager or other duly authorised officer of the Bank relating to account number _____________ held in the name of _______________.

The written statement is requested to deal with the following matters in respect of that account:-

(1) When the account was opened and by whom together with details of the current signatories;
(2) The amounts of and the dates of all deposits made in to the account and withdrawals made out of the account;
(3) Information about the conduct of the account, including details of inter account transfers, telegraphic transfers, standing orders, direct debits, paid cheques and vouchers (both credit and debit), and manager's notes;
(4) Details of any documents, files, accounts or other records used in ordinary business, including bonds, securities or deeds, held by the bank or on behalf of [Name];
(5) Examination of any safety deposit box or boxes or other material held by the bank on behalf of [Name];
(6) Details of any correspondence relating to the account; and
(7) Exhibit copies of all relevant documents including:-
(a) Bank statements;
(b) Documents attributable to the account; or
(c) Documents held by the bank on behalf of _______ which would be beneficial to the Ruretanian authorities in assessing benefit or establishing assets. Copies of the documents are requested to be supplied in a form in which they can be easily and clearly examined, whether those documents are in written form, kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism.

2. Should the enquiry as set out in paragraph 1 above reveal the details of any joint account holders in the Republic of Concordia, then assistance in the enquiry is sought in respect of each joint account holder as follows:-

(1) to visit that joint account holder;
(2) to interview that joint account holder; and
(3) to take a statement in writing from that joint account holder regarding the conduct of the joint account.

3. To visit the Head Office of the _______ Bank and take a statement in writing from the manager or other duly authorised officer of the Bank relating to account number ________, Pass Number ______ held in the name of _______________. The written statement is requested to deal with the following matters in respect of that account:-
(1) when the account was opened and by whom together with details of the current signatories;
(2) the amounts of and the dates of all deposits made in to the account and withdrawals made out of the account;
(3) information about the conduct of the account, including details of inter account transfers, telegraphic transfers, standing orders, direct debits, paid cheques and vouchers (both credit and debit), and manager’s notes;
(4) details of any documents, files, accounts or other records used in ordinary business, including bonds, securities or deeds, held by the bank or on behalf of [Name];
(5) examination of any safety deposit box or boxes or other material held by the bank on behalf of [Name];
(6) details of any correspondence relating to the account; and
(7) exhibit copies of all relevant documents including:-
(a) bank statements;
(b) documents attributable to the account; or
(c) documents held by the bank on behalf of [Name]
which would be beneficial to the Ruretanian authorities in assessing benefit or establishing assets. Copies of the documents are requested to be supplied in a form in which they can be easily and clearly examined, whether those documents are in written form, kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism.

4. Should the enquiry as set out in paragraph 3 above reveal the details of any joint account holders in the Republic of Concordia, then assistance in the enquiry is sought in respect of each joint account holder as follows:-
(1) to visit that joint account holder;
(2) to interview that joint account holder; and
(3) take a statement in writing from that joint account holder regarding the conduct of the joint account.

5. To visit the Land Registry of the , and take a statement in writing from the Registrar or other duly authorised official as to the ownership of the following properties:
(1)
(2)
(3)
(4)
The written statement is requested to deal with the following matters in respect of the properties:-
(1) the date that the property was registered and by whom the property was registered;
(2) the amount for which the property was purchased;
(3) Any interest [Name] has in the property; and
(4) exhibit copies of all relevant documents.
6. Should the enquiry at the Land Registry of the Republic of Concordia, reveal the
details of any joint owners of the property in the Republic of Concordia then
assistance in the enquiry is sought in respect of each joint owner as follows:-
(1) to visit that joint owner;
(2) to interview that joint owner; and
(3) take a statement in writing from that joint owner regarding:
(a) the purchase of the jointly owned property;
(b) his or her association with [Name]

7. Should the enquiries under paragraphs 5 and 6 above at the Land Registry of the
Republic of Concordia reveal any of the properties in question being owned wholly
by a third party or parties in the Republic of Concordia, then assistance is sought in
respect of each owner as follows:-
(1) to visit that third party or those parties;
(2) to interview that third party or those third parties; and
(3) take a statement in writing from that third party or those third parties regarding:
(a) his or her association with [Name];
(b) the circumstances under which [Name] is, or was, connected with the property or
properties; and
(c) details of any lease or rental agreements in respect of those properties relating to
[Name] or one of the following companies:-
(i)
(ii)
(iii)

8. To ascertain the address of the company known as ________. Once that is done to
visit the company and take a statement in writing from the manager or other duly
authorised officer of the company relating to insurance policy number ___________.
A written statement is requested to deal with the following matters in respect of
that account:-
(1) when the policy was started and by whom together with details of the current
beneficiaries;
(2) the terms and conditions of the insurance policy;
(3) the amounts of and the dates of all deposits made in to the policy;
(4) details of any correspondence relating to the policy; and
(5) exhibit copies of all relevant documents including:-
(a) bank statements; or
(b) documents attributable to the policy.
which would be beneficial to the Ruretanian authorities in assessing benefit or
establishing assets. Copies of the documents are requested to be supplied in a form
in which they can be easily and clearly examined, whether those documents are in
written form, kept on microfilm, magnetic tape or any other form of mechanical or
electronic data retrieval mechanism.

9. To visit _____ of [address] and take a statement in writing from the manager or
other duly authorised officer of the company relating to the life assurance policy
taken out by _____________ in the name of _____________________. A
written statement is requested to deal with the following matters in respect of that policy:-
(1) when the policy was started and by whom together with details of the current beneficiaries;
(2) the terms and conditions of the insurance policy;
(3) the amounts of and the dates of all deposits made into the policy;
(4) details of any correspondence relating to the policy; and
(5) exhibit copies of all relevant documents including:-
(a) bank statements; or
(b) documents attributable to the policy.

which would be beneficial to the Ruretanian authorities in assessing benefit or establishing assets. Copies of the documents are requested to be supplied in a form in which they can be easily and clearly examined, whether those documents are in written form, kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism.

10. To visit the Registrar of Companies in the Republic of Concordia, and take a statement in writing from a duly authorised officer of the Registrar of Companies relating to each of the following companies:
(1) ______________
(2) ______________
(3) etc

The written statement is requested to deal with the following matters in respect of each company:-
(1) when the company was incorporated and by whom;
(2) the shareholders of the companies;
(3) the directors of the company;
(4) the purpose for which the company was formed;
(5) any accounts submitted in respect of the company;
(6) details of any correspondence;
(7) exhibit copies of all relevant documents including:-
(a) the memorandum of association;
(b) articles of association;
(c) accounts submitted by the company; and
(d) documents attributable to the company

which would be beneficial to the Ruretanian authorities in assessing benefit or establishing assets. Copies of the documents are requested to be supplied in a form in which they can be easily and clearly examined, whether those documents are in written form, kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism.

Should the enquiry at the Registrar of Companies in the Republic of Concordia, reveal the details of any shareholders and directors and officers located in the Republic of Concordia then assistance in the enquiry is sought in respect of each shareholder and director and officer of the company as follows:-
(1) to visit that shareholder or director or officer of the company;
(2) to interview that shareholder or director or officer of the company; and
(3) take a statement in writing from that shareholder or director or officer of the company regarding the conduct of the company and their association with ________.

Should the enquiry at the Registrar of Companies in the Netherlands reveal the details of any other bank accounts held in the Republic of Concordia by [Name] or on his behalf then assistance in the enquiry is sought as set out in paragraphs 1 and 2 above respectively in relation to those other accounts.

11. To visit the Vehicle Licensing Authority of the Republic of Concordia and to take a statement in writing from a duly authorised officer of the said Authority relating to the following:
   (1) The ownership of the _____ motor vehicle, index number ______;
   (2) etc
   (3) etc

12. To visit _______________ of _________________, to interview her and to take a statement in writing from her regarding the following:
   (1) The circumstances of the purchase and her ownership of the _____motor vehicle, registration number ______________;
   (2) The circumstances of the purchase and her ownership of the _____motor vehicle, registration number ____________;
   (3) etc.

13. To visit the Taxation Office of the Republic of Concordia and take a statement in writing from the manager or other duly authorised officer of the Taxation Office relating to the tax accounts of the companies mentioned in paragraph ___ above. The written statement is requested to deal with the following matters in respect of those companies for the period 25 th of January 1994 to the 26 th January 2000:
   (1) the declared income and expenditure of the individual companies;
   (2) the declared profits of the individual companies;
   (3) the declared earnings of the directors; and
   (4) to exhibit copies of all relevant documents.
which would be beneficial to the Ruretanian authorities in assessing benefit or establishing assets. Copies of the documents are requested to be supplied in a form in which they can be easily and clearly examined, whether those documents are in written form, kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism.

**DOCUMENTARY EVIDENCE**

There are a number of statutory provisions in the law of Ruretania which govern the admissibility into evidence of business records.
Section 24 of the Criminal Justice Act 2006 provides that a statement (which is defined for these purposes as “any representation of fact”) in a documents shall be admissible as evidence of any fact of which direct oral evidence would be admissible if the conditions specified in that section are satisfied. These conditions relate to the
manner in which the document is created and the sources of information from which it is compiled.

Section 25 of the Criminal Justice Act 2006 preserves a discretion in the trial judge to regulate the admissibility of such evidence. This section specifies the principles to be followed in exercising that discretion. Further, Section 69 and Schedule 3, Part 2 of the Police and Criminal Evidence Act 1997 provide that where a statement which is sought to put in evidence is contained in a document produced by a computer the provisions of Section 69 must be satisfied.

It is requested that the statements referred to above include evidence that will enable the court to consider the applicability of Sections 24 and 25 of the Criminal Justice Act 2006. It is further requested that appropriate evidence is included to deal with the provisions of Section 69 of the Police and Criminal Evidence Act 1997.

Copies of the said provisions and an example of a Section 69 certificate are annexed to this letter as Annex 'D'.

ASSISTANCE REQUIRED.

1. It is requested that any and all money, property and bank accounts held legally and beneficially by [Name] be frozen. If the competent authorities of the Republic of Concordia sought such assistance from the Ruretanian authorities I can confirm that such assistance could be granted provided that proceedings had been instituted in the Republic of Concordia.

2. I confirm that a request will be submitted for registration and enforcement of the confiscation order on behalf of the Government of Ruretania as soon as practicable after the confiscation order has been made. I further confirm that the proceedings in this matter have not concluded.

3. Should any of the enquiries carried out reveal the location and identity of any property in the Republic of Concordia held by or on behalf of [Name], it is requested that such property be searched and that any items or material relevant to the enquiry be secured.

4. That Special Court Orders are obtained in accordance with the laws of the Republic of Concordia in order to carry out the enquiries to be made listed above.

5. That such other enquiries are made, persons interviewed and documents secured as appears to be necessary in the course of the investigation to trace any property held by or on behalf of [Name].

6. That an indication be obtained whether any witness would be prepared to travel to the Ruretania to give evidence in person.

7. It is requested that the above enquiries are made and that Detective Constable __________, a Police Officer and ______________, a Financial Investigator, both of the Ruretanian Police Service, [Address, telephone and fax number] be permitted to travel to the Republic of Concordia to be present when the enquiries mentioned above are made and that Detective Constable ______________ be allowed to take such statements and copies of documents as are relevant to this enquiry.

8. That signed and certified copies of any statements made and any documents or other items secured during the course of the enquiries be handed to
Detective Constable ______________ and permission given for their removal to Ruretania for use at:
(a) at any confiscation hearing for the purpose of seeking confiscation orders against [Name];
(b) at any proceedings in Ruretania ancillary to the criminal proceedings, for example, if the statements and documents reveal a breach of the restraint order, in contempt proceedings to be instituted in the High Court against [Name];
(c) at any proceedings in Ruretania ancillary to the confiscation proceedings, namely for the High Court to take into account when considering an application by The Public Prosecution Service to appoint a receiver to enforce any confiscation order under the provisions of the Drug Trafficking Act 2004 made against [Name].

I thank you in advance for your co-operation concerning this case.

Yours faithfully,

Public Prosecutor
INTRODUCTION
This Part of the manual deals with principles and procedures for extradition under the IGAD Convention on Extradition.

For those practitioners\(^4\), who are not familiar with the extradition process, this manual aims to provide assistance by setting out the broad principles and steps of the extradition process. However, it must be emphasised that the extradition process and procedures are governed by the domestic law of the requested State. The reader is therefore asked to fully acquaint themselves with the domestic law as the principles and steps set out in the next part are only intended to provide a broad understanding; importantly, he or she will need to be familiar with:

1. The domestic law on extradition
2. The treaties/conventions/schemes on extradition that apply to their country, for example, Kenya & Uganda, who are both members of the Commonwealth, have in place the London Scheme\(^5\) that governs extradition between them. When the IGAD Convention on Extradition comes into effect, practitioners will need to know which one of the two applies to them as each sets out different obligations, in particular the removal of the requirement to adduce a prima facie case. It will also be necessary to be aware of any other simplified arrangement that may be in place.
3. Other international instruments that apply, for example, the UN Counter-terrorism Instruments.

What is extradition?
Extradition is the process by which a State seeks the return of a fugitive, accused and/or convicted\(^6\). The practice of extradition has its roots in the idea of state sovereignty – that is, a state could not prosecute or imprison a person who had committed a crime in the territory of another State as the courts of the State where the person resided did not have jurisdiction over his/her conduct – all crime is local. This is particularly true of common law systems [e.g. Kenya and Uganda in the IGAD region]. Civil Law systems [e.g. Angola, DRC, etc], however, generally permit a wider

\(^4\) The manual is aimed at all practitioners in the criminal justice system including law enforcement agencies, judiciary, legal advisers in the justice and foreign ministries, and prosecutors or agencies responsible for drafting extradition requests.

\(^5\) The London Scheme for Extradition within the Commonwealth – last amended in 2002 (previously referred to as the Commonwealth Scheme for the rendition of Fugitive Offenders) governs extradition arrangements between Commonwealth member States; however, it is not a formal treaty but an arrangement that is agreed amongst the members and is given effect through domestic legislation in all member States.

\(^6\) This category also includes those convicted in absence or convicted but absconded prior to sentence or sentenced in absence
assertion of jurisdiction and are therefore competent to assert jurisdiction over their nationals even where they commit an offence abroad.

Thus, in order to secure the surrender of fugitives, States entered into bilateral treaties – this, of course, had a limited effect as only parties to the treaty were bound. As crime became more international in nature, and travel became easier, the international community (acting either through the UN General Assembly or regionally) adopted a number of multi-lateral treaties, of which the IGAD Convention on Extradition is an example. The advantage of such an instrument is that all Member States can be a party and, further, every State Party will be fully aware of the obligations of each State Party and any reservations/declarations they may enter.

**EXTRADITION PROCESS**

The first requisite in any extradition request is that there must be a legal basis for the making of a request. Broadly speaking there are some 5 bases of extradition:

- Bi-lateral arrangements
- Regional extradition treaties e.g. OAU Convention on the Prevention and Combating of Terrorism, The European Convention on Extradition 1957, the European Arrest Warrant, SADC Protocol on Extradition, and the IGAD Convention on Extradition
- Regional arrangements/schemes e.g. The ‘London Scheme’ governing Commonwealth countries,
- International instruments e.g. UN conventions,
- Ad hoc arrangements
- Comity

For the IGAD member States, extradition between them can be governed by one or more of the following treaties or schemes:

- IGAD Convention on Extradition
- Scheme for the rendition of fugitive offenders within the Commonwealth (The ‘London Scheme’) [as amended in 1990]
- OAU Convention on the Prevention and Combating of Terrorism (for terrorism related offences)
- UN Conventions\(^7\)

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\(^7\) A number of UN Conventions purport to provide a basis for extradition in respect of the specific conduct which is the subject matter of the Convention. Hence they are very restrictive – if the request does not fall within the strict parameters of the convention, then no request can be considered.

**Steps to follow:**

- Check whether the Convention creates its own distinct basis for extradition.
- Is the country one with whom your country has a general extradition arrangements, if so you go down the general route.
- If no general arrangement is in place, then check domestic law to see if there are any distinct procedures in respect of requests based on UN Conventions.
• Any bi-lateral arrangement States may have in place.

It is therefore important at the outset to determine under which arrangement a request for extradition has been made as this will govern the process to be followed. Equally important is the relevant domestic law as extradition proceedings are governed by the law of the requested State. Therefore, for example, if Kenya submits a request for extradition to say Uganda then it must be clear under which scheme the application is being made as both the IGAD Convention on Extradition and the London Scheme could apply; in addition if the request relates to an offence under, for example, one of the UN counter terrorism instruments that carries with it the legal basis for extradition, then it is important to decide which convention applies.

The IGAD Convention on Extradition: Its purpose & effect
The Convention, as a formal international instrument, imposes binding obligations on its States Parties (those States that have ratified or acceded to it). To be a State Party, a State must be a member of the IGAD group of States.

The Convention creates a legal basis for the making of extradition requests between IGAD States, assuming that they are parties; however, each IGAD State should also ensure that its domestic law contains provisions which implement and make workable the Convention’s provisions8.

Once the Convention comes into force, it will be sensible for a requesting IGAD State to cite it as the legal basis for its request (assuming that the requested State is also an IGAD State and that both States are States Parties to the Convention) rather than any other treaty or scheme unless there is in place an even more simplified arrangement such as backing of warrants.

Therefore, the first consideration must be: Is the requesting State a member of IGAD and is it a State Party to the IGAD Convention?

If that is the case, the requested State must ensure that its own domestic law has put in place provisions giving effect to the IGAD Convention. Practitioners must also check to see if any other formalities under its domestic law are met; for example, if the IGAD Convention must be announced through the Official Gazette prior to taking effect, then this must also be addressed. In addition, the requested State must make it clear, through its primary or secondary legislation, which convention or agreement must apply in the event the requesting State is an IGAD State Party.

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8 Article 23 of the IGAD Convention on Extradition states: The provisions of any treaty or bilateral agreement governing extradition between any two States Parties shall be complementary to the provisions of this Convention and shall be construed and applied in harmony with this Convention. In the event of any inconsistency, the provisions of this Convention shall prevail.
Before proceeding to the process under the IGAD Convention on Extradition, it might assist to be aware of other terminology that is often used to refer to the handing over of those accused or convicted.

**Rendition and Surrender**

When dealing with extradition the reader will also hear of references being made by Commonwealth States to ‘rendition’ – this just means extradition. The term rendition is used where there is no formal treaty in existence but an ‘arrangement’ is agreed and its terms incorporated in domestic legislation – this is the case with the Commonwealth. The rationale behind this approach is that Commonwealth States share similar legal systems and therefore do not require a formal treaty.

You will also come across the idea of ‘surrender’ rather than extradition and here there is a slight difference – this applies where there is a ‘backing of warrants’, particularly with neighbouring States. The mechanism is very simple and straightforward, whereby the requesting State issues a warrant and it is taken to the other State where the local officers go before a judge or magistrate who “backs” the warrant (endorses it) and the suspect is arrested and surrender is ordered.

The third type of surrender you will come across is from the UN Tribunals – Yugoslavia, Rwanda, Sierra Leone, East Timor (the list has grown and may continue to do). Here the legal basis is very different. Some of the tribunals were set up by the Security Council of the UN under Chapter VII of the UN Charter, whilst others are a mixture of both UN involvement and agreement of the State where the court is located e.g. the Special Court of Sierra Leone In respect of the tribunals established under Chapter VII of the UN Charter, member States are under an obligation to surrender persons indicted by these tribunals and these proceedings take precedence over any domestic proceedings or requests for extradition. Where the tribunal has not been created under Chapter VII, States treat the request for extradition as they would any other request and there is no mandatory obligation to surrender the individual. Of course, one must bear in mind that the crimes the tribunals are dealing with are serious crimes under international law and must be treated accordingly.

The fourth type of surrender is to the International Criminal Court [ICC] and States should have domestic law to give effect to a request from the ICC, unless the Rome Statute is automatically part of the domestic law in monist States, such as Namibia.

**HOW EXTRADITION COMMENCES:**

There are essentially two ways in which the extradition process may be commenced, namely provisional arrest and ‘full’ request. We will examine each of these.

**PROVISIONAL ARREST** is sought where there is a flight risk or any other urgency and it is anticipated that if the person is not arrested, they are likely to leave the
jurisdiction. The provisional arrest procedure is provided by Article 10 of the IGAD Convention and provides as follows:

**Article 10: Provisional arrest**

7. In case of urgency the competent authorities of the requesting State Party may request the provisional arrest of the person sought. The competent authorities of the requested State Party shall decide the matter in accordance with its domestic law and communicate its decision to the requesting State Party without delay.

8. The request for provisional arrest shall state that one of the documents mentioned in Article 7, paragraph 2(a) exists, and that it is intended to send a request for extradition.

9. A request for provisional arrest shall be sent to the competent authorities of the requested State Party 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 Party.

10. An application for provisional arrest shall include the following:
   f) such information, as may be available, about the description, identity, location and nationality of the person sought;
   g) a statement that a request for extradition will follow;
   h) 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;
   i) 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 Convention applies; and
   j) any other information which would justify provisional arrest in the requested State Party.

11. Provisional arrest shall be terminated if the requested State Party has not received the request for extradition and supporting documents through the channel provided for in Article 7, paragraph 1 within thirty (30) days after the arrest. The competent judicial authorities of the requested State Party, 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 territory of the requested State Party.
12. The release of a 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.

The provisional arrest process

Once you have decided that there exists a genuine risk that a person is likely to flee if they are not arrested, then you must seek the provisional arrest of the individual. The provisional request for arrest is submitted, usually, via Interpol, with an accompanying letter which provides an undertaking that an extradition request will follow and the following documents must accompany a request for provisional arrest as set out in Article 10, paragraph 4:

- Warrant of arrest
- List of charges
- Description of conduct
- The relevant law setting out the offence and applicable penalty (this can be incorporated into the letter which provides the undertaking)
- Details of the person sought: name, date of birth, nationality, passport or ID number, any distinguishing features etc and, if available, a photograph of person sought.

The documents are then transmitted to the requested State, usually through Interpol; however, please check with the requested State to see if they have any additional or alternative requirements under their domestic law.

The provisional arrest process is governed under the Convention by Article 10 where a person who is the subject of the request may be a flight risk, or transiting through the requested State or any other reason which satisfies the requested State that the person should be arrested pending the submission of the request.

Article 10, paragraph 5 sets the time limit of 30 days in which the request must be submitted to the requested State through the formal channels provided by Article 7, paragraph 1. In the event that the request is not transmitted by 30 days, the requested State may, if its domestic law permits, extend the time period for the submission of the documents. In the event an extension is not granted and the documents have not been submitted within 30 days, the provisional arrest comes to an end and the fugitive is discharged. The reason for discharging in the absence of the receipt of the request is quite straightforward – the person has been arrested at the behest of the requesting State and based on an assurance by the requesting State that it intends to submit the necessary documents in support of the extradition [see Article 10(2)]. Therefore, if the request is not submitted in the relevant period, the requested State does not have the power to continue to hold a person in detention particularly as they are not subject to any criminal proceedings in the

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9 An undertaking by the requesting State at this stage is essential as both Interpol and the requested State need to be satisfied that the request is genuine and they are not likely to be subject to any civil proceedings relating to the arrest.
requested State apart from the extradition proceedings. However, it does not prevent a subsequent arrest when the request is received (see paragraph 6).

Once the person has been arrested in the requested State, you should be notified of the arrest so that the extradition request can be prepared and submitted within 30 days under Article 10, paragraph 5. Make sure the request is transmitted through the appropriate channels within the time period. If the request needs to be translated, this must accompany the request. Check with the requested State if there are any certification requirements for the translation. Some States will require a certificate from the translator confirming that they have translated the documents.

If the request is not submitted within that time period, the person may be discharged. There is discretion, however, under paragraph 5 to extend the time period for the submission of the request, but this must be confirmed by the requested State.

Check the treaty to ensure you meet the time limits.
- Article 10(5) of the Convention – 30 days;
- Article 12 of the OAU Convention on the Prevention and Combating of Terrorism, which does not provide a time period but simply states that the provisional arrest will be for a ‘for a reasonable period’, so check with the requested State the position under their domestic law
- The London Scheme is also silent on the time period and must be dictated by national law – again check with the requested State.

‘FULL’ REQUEST is submitted where there is no urgency and is usually processed through diplomatic channels (Article 7(1) of the Convention). Arrest takes place after consideration of the request by the relevant authorities of the requested State where they are satisfied that it contains all the necessary documents which are authenticated in the manner provided by the law of the requested State. Again, if the request needs to be translated, this must accompany the request. Check with the requested State if there are any certification requirements for the translation. Some States will require a certificate from the translator confirming that they have translated the documents.

Summary of the extradition process

The procedure for the commencement of the extradition process is governed by the domestic law of the requested State.

Step 1
The requesting State submits a request through one of the above routes. In cases where the provisional arrest of a person is sought, the requested State will usually submit the foreign warrant and accompanying documents to its courts for
consideration and if satisfied that the warrant discloses an extradition offence and that there is a flight risk, it issues a ‘local’ warrant which is then executed and the person is usually brought before a court for the first hearing.

**Step 2**
The court will then adjourn the case accordingly for the receipt of the formal request within the time period permitted under the convention (30 days).

If it is a ‘full’ request the court will usually fix a date for the extradition hearing.

The request documents to be included are set out in Article 7, paragraph 2 which provides as follows (discussed in detail below, see Request Documents):

2. **The request shall be supported by:**
   
   d) the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting State Party;
   
   e) a statement of the offence(s) for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; and
   
   f) a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality.

The request must then be ‘sewn’ together and if required, sealed (check with the requested State on the formalities for seal/certification)

**Step 3**
Once the formal request is received from the requesting State, the law of the requested State will govern the process (Article 4 of the Convention). In some jurisdictions the request is first considered by the executive prior to the judicial hearing, particularly in common law States. By contrast, in most civil law jurisdictions the request is submitted directly to the judiciary for proceedings to commence. The extradition law of each member State will determine this.

For those States that engage both the executive and judicial process, it is important to determine what the initial executive stage involves. Is the executive simply confirming the receipt of the request or does it need to consider it further. Most States which involve the executive at this stage will require the Minister to consider the request to determine if it should proceed to the next stage. The decision is usually recorded in an ‘authority to proceed’ or equivalent document. Practitioners should note that defence may challenge the issue of such an order through the judicial review process. Please also check if the domestic law permits someone other than the Minister to consider the request, for example if the Minister is out of the
country. If there is nothing in the Extradition Act, then check other relevant laws (e.g. administrative law) which may provide for a person other than a Minister, by delegated authority, to consider the request.

**Step 4**
The matter is then heard at the first instance court to determine whether or not the fugitive should be surrendered to the requesting State. The court may, if domestic law so provides, also be invited by the defence to hear evidence as to why the fugitive should not be committed. Upon conclusion of these proceedings the fugitive may be entitled to lodge application for appeal or a **writ of habeas corpus**.

At this stage, depending on domestic law the defence may challenge the request on a number of grounds provided by the legislation or under Article 6 of the Convention, which may not be confined to the contents of the request. Article 6 of the Convention sets out mandatory (Article 6, paragraph 1) and discretionary (Article 6, paragraph 2) grounds for refusal (discussed in detail below, **Grounds for Refusal**)

You may need to contact the prosecutor in the requesting State to get all the information. It is important, at the outset, to establish contact with the prosecutor in the requesting State as issues may arise which may go well beyond the information contained in the request for example, if the defence argue that the person if returned is likely to be persecuted for any one of a number of reasons. This challenge must be met and evidence adduced, if appropriate.

**Step 5**
Once all the judicial proceedings are concluded, the matter may then be referred once again to the executive, depending on domestic law to decide on the final surrender of the fugitive to the requesting State.

At the appeal stage, the defence may be entitled to rehearse the same arguments that were raised before the first instance court and may also introduce fresh grounds. Further affidavits may be required from the requesting State to meet the challenges raised. This can cause difficulties as States may take the view that the challenges are ‘disrespectful’ particularly where a State is attacked on the grounds of human rights violations. In order to deal with this, it is advisable to establish early contact with your counterpart and inform them of the challenges that could arise.

**THE CONVENTION PROVISIONS**

We will now turn to consider the Convention, Article by Article:

**Article 1: Obligation to extradite**

*Each State Party agrees to extradite upon request, in accordance with the provisions of this Convention and its 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 Party for an extradition offence.

Article 1 sets out the obligation to extradite anyone who is present in the requested State and is sought for criminal proceedings in the requesting State or for the purposes of sentencing following conviction or the enforcement of a sentence of imprisonment for an extradition offence. In cases sentence after conviction, the obligation to extradite is usually to serve a sentence of imprisonment and not for the purposes of enforcing any non-custodial measures such as fines, probation orders etc. It therefore covers any person accused or convicted (this includes conviction in absence). A request for extradition can only be considered in respect of conduct that amounts to an extradition offence. The definition of what amounts to an extradition offence is contained in Article 3.

Whilst the Article is headed ‘obligation to extradite’, it is subject to the grounds for refusal as provided by Article 5 and 6, or a determination by the requested State that the conduct does not amount to an extradition offence or any other ground provided for under its own domestic law or other international obligation, for example where the person may be the subject of a request for surrender emanating from any ad hoc tribunal or the International Criminal Court. The obligation is therefore an obligation to consider a request for extradition.

Article 2: Extradite or prosecute principle

A State Party in whose territory an alleged offender is found, if it does not extradite a person on the grounds of refusal contained in Article 5, Article 6.1(a), (b), (f) and (g) and Article 6.2(b) and (d), shall, at the request of the requesting State Party be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a similar nature under the domestic law of that State Party.

Article 2 sets out the aut dedere aut judicare principle, i.e. the obligation on a State Party to submit a case against the person who is the subject of the extradition request where that State decides not to return the person. The circumstances in which a referral will arise is where the requested State, for example, refuses to extradite on the basis of the nationality of the offender or applies one of the grounds for refusal set out in the mandatory part of Article 6. In such circumstances there is an obligation to submit the request to its own prosecution authorities to consider prosecution in the requested State, where the requesting State so requires. Of course, the evidence that would have been relied upon by the requesting State must be sought and the matter reviewed for sufficiency of evidence in accordance with its own domestic law.
However, it is important to note that where international instruments provide for the *aut dedere aut judicare* principle as mandatory, such as the UN counter terrorism instruments, UNCAC (UN Convention against Corruption) etc the referral to the prosecuting authorities of the requested State would be automatic. Practitioners will need to ensure that they check the relevant international instrument when dealing with this principle.

**Article 3: Extradition offence**

6. *For the purpose of this Convention, an extradition offence is an offence that is punishable under the laws of both the requesting and requested State Party 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.*

7. *For the purposes of this Article, in determining what constitutes an offence against the laws of the Requested State Party it shall not matter whether:*
   
   c) the laws of the requesting and requested State Party each place the conduct constituting the offence within the same category of offence or describe the offence by the same terminology; and
   
   d) the totality of the conduct alleged against the person whose extradition is sought shall be taken into account and it shall not matter whether, as between the laws of the requesting and requested State Party, the constituent elements of the offence differ.

8. *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 Party 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 Party.*

9. *Extradition may be granted pursuant to the provisions of this Convention in respect of any extradition offence provided that:*
   
   c) it was an offence in the requesting State Party at the time of the conduct constituting the offence; and
d) the conduct alleged would, if it had taken place in the requested State Party at the time of making the request for extradition, have constituted an offence against the law of the requested State Party.

10. If the request for extradition relates to several separate offences, each of which is punishable under the laws of both the requesting and requested State Parties, but some of which do not meet the other requirements of paragraph 1, the requested State Party may grant extradition for such offences provided that the person is to be extradited for at least one extradition offence.

Article 3 defines what amounts to an extradition offence and goes to the heart of the rule of double criminality. It has long been regarded as one of the key safeguards in extradition, in that, if conduct did not amount to an extradition crime, then no extradition could lie.

Given the critical importance of the rule of double criminality, it may assist to have a closer examination of what is involved when determining ‘extradition offence’. What amounts to an extradition crime/offence varies between instruments. The IGAD Convention on Extradition adopts the more flexible and permissible approach, the conduct test.

Let us examine both approaches briefly. Broadly speaking, there are two different approaches to determining what amounts to an extradition offence/crime:

- The conduct test
- The ‘list’ test

The conduct test: most recent extradition treaties adopt this approach, as it avoids the complexities usually associated with trying to fit the conduct in a general list. The main criteria under this test is that the offence is punishable under the laws of both the requesting and requested State with twelve months or more\(^{10}\) imprisonment; in some cases the sentence threshold is set at 2 years or more\(^ {11}\).

Therefore, when determining an extradition offence/crime under the conduct test, the requested State transposes the conduct from the requesting State as if it has occurred within the requested State. If the conduct amounts to a crime, then the next stage is to look at the sentence threshold to ensure it satisfies the requirement. If the conduct does not amount either to a crime or does not satisfy the sentence threshold, it fails the double criminality rule and the extradition request cannot proceed. This approach has been found to be a more flexible and one that encompasses both statutory and common law offences.

\(^{10}\) Article 3, paragraph 1 of the IGAD Convention;

\(^{11}\) The London Scheme for Extradition within the Commonwealth (Nov 2000)
The list test, in contrast, has proven to be more difficult as the requested State must look at the allegation and then see if the criminality falls within the list of offences. This is a more onerous approach as the requested State must look at the offence alleged and then see if the offence fits into one of the offences in the list. This approach has been particularly difficult in relation to common law offences, for example ‘conspiracy to defraud’ does not fall neatly within a list of statutory offences.

Apart from the transposition of conduct, consideration must also be given to the following matters, all of which must be satisfied for the purposes of the double criminality:

(i) Date of the offence: as the offence has to be a crime under the law of both the requesting and requested State and must not fall foul of the retrospectivity rule, which will ‘bite’ when the offence is criminalised at a date later than when it occurred in the requesting State. For example, the extradition request submitted by Spain in respect of Pinochet related to offences allegedly committed between 1973 and 1990, while he was head of State of Chile. The crimes included genocide, torture, taking of hostages and the murder of Spanish citizens. The proposed English charges included conspiracy to torture between:

- January 1972 and September 1973;
- August 1973 and January 1990
- January 1972 and January 1990; and
- Torture in June 1989

One of the grounds for challenge was whether the rule of double criminality was satisfied, given that the conduct alleged had occurred prior to torture being an offence under UK law. As torture was criminalised by the Criminal Justice Act of 1988, and hostage-taking made an offence after 1982, the conduct did not amount to an extradition crime. For an offence to amount to an extradition crime, the conduct must be an offence at the date it took place and not merely the date of the request for extradition. Therefore, only those parts of the conspiracy to torture and torture relating to the period after 29 September 1988 were extradition crimes.

However, Article 3, paragraph 4 provides for extradition where the conduct is criminalised in the requesting State but at the time it was committed in the requesting State, it did not amount to an offence under the laws of the requested State. However, it would suffice if at the time it received the request for extradition the conduct had been criminalised Paragraph 5 permits extradition in such circumstances. For example, the offence of maritime piracy may be an offence in requesting State and the offence occurred, let’s say in 2004. In 2004 maritime piracy was not an offence under the laws of the requested State, but in 2007 it criminalises such conduct. The requesting State, in 2008, submits a request for extradition for maritime piracy committed in 2004 (when it was not an offence in the requested State). For the purposes of double criminality Article 3, paragraph 4 states that it is the date when the request is received, i.e. 2008 and not when the offence is
committed [in 2004] that is determining date and not when the offence was committed.

Practitioners are reminded to confirm the approach in the requested State prior to submitting the request as domestic law may differ from the provisions of the Convention.

(ii) Are there any extra-territorial elements to the conduct? Where the conduct spreads over a number of States the transposition exercise still remains the same in order to determine if there is an extradition crime. Generally speaking treaties and domestic law refer to conduct which occurs within the ‘territory’ of the State Party. However, courts have always read ‘territory’ to mean ‘jurisdiction’ in order to capture conduct in both the Requesting State and elsewhere; this is now of particular relevance given that crime is no longer local in commission or effect. For example, in the US extradition request of Al-Fawwaz & others\(^{12}\), Al-Fawwaz, Abdel Bary and Eidarous were accused of a conspiracy to murder US nationals, American diplomats and American personnel as part of the conspiracy by members of Al Qaeda. The USA sought their extradition in respect of the embassy bombings in East Africa in 1998 from the UK. Following the committal hearing, the defence lodged an application for habeas corpus and submitted that in order to amount to an ‘extradition crime’ the conduct should have occurred within the territory of the USA, but in the present case the conduct was largely extraterritorial, and so it could not amount to an extradition crime as it had not occurred in the territory of the US. This was rejected and the word ‘territory’ in the treaty had to be given a broader interpretation, in line with paragraph 15 of Schedule 1 of the 1989 Extradition Act and the case of Minervini, to mean ‘jurisdiction’.

The House of Lords (UK) stated that there was no requirement for the conduct to have occurred in the USA and reliance could be placed on extra-territorial conduct in order for the offences to be justiciable in the USA, particularly as serious crimes were committed globally, and “an ordinary meaning of the term ‘the jurisdiction of the state’, is the power of that state to try an offence and includes extra-territorial jurisdiction”.\(^{13}\)

Thus, to amount to an ‘extradition offence’ under the Article 3, the conduct has to satisfy the following criteria:

- Double criminality
- Sentence

\(^{12}\) [2001] UKHL 69

\(^{13}\) the manual gives examples of cases from other jurisdictions, which although not binding in the IGAD member States, they are still of persuasive value. Practitioners in the region are urged to keep each other informed of relevant cases from their national courts as reliance can be placed on them as way of illustrating the interpretation of the Convention. Equally, practitioners can place reliance on decisions from outside the region.
- Occurring within the ‘jurisdiction’ of the requesting State, which includes both territorial and extraterritorial offences

It does not mean however, that if part of the conduct does not satisfy the double criminality rule, it would lead to a refusal of extradition on the entire conduct. As illustrated in *Pinochet* and other cases, the requested State can find that part of the conduct satisfies the test and return a fugitive for that part of the conduct. Such a finding would be binding on the requesting State under the speciality rule.

As stated above, the approach of the Convention is to look at the conduct alleged rather than the ‘list of offences’ approach. When determining whether the conduct amounts to an extradition offence the requested State will need to be satisfied, in line with the principles set out above, that the conduct for which the return of the person is sought also amounts to an offence under its own laws.

Article 3, paragraph 1 sets out the criteria for determining extradition offence for both accusation and conviction cases:

*Accusation cases*: the conduct must be an offence under the laws of both the requesting and requested States and must attract a sentence of imprisonment of at least 12 months, or a more severe penalty. Therefore, any conduct that does not attract at least 12 months would not amount to an extradition offence and the request must be refused. For example, if an offence in the requesting State is punishable by 12 months, but in the requested State similar conduct is only punishable by 6 months, then Article 3 is not satisfied and the request must be refused.

*Conviction cases*: the underlying conduct for which the person was convicted must satisfy the sentence threshold above; if that is satisfied, then the sentence to be served upon return must be at least 6 months.

It is a matter for each State to decide if the sentence threshold complies with its domestic law. Where that is not the case, the State Party may include that in the reservations/declarations appended to the Convention so that all other States Parties are aware of the position.

Article 3, paragraph 2 confirms that it is the conduct that is being considered and not the elements of an offence. Therefore, in practice the requested State would transpose the conduct from the requesting State to it and see what offence, if any, would be committed in the requested State had the conduct occurred there. It does not matter how the offence is described in either State as long as it is conduct that amounts to an offence in both States. For example, State A may describe a particular fraudulent activity as theft but State B may describe is as ‘obtaining by deception’; for the purposes of Article 3, paragraph 2 it does not matter that the conduct is labelled differently in both States or that the constituent elements of the offences differ; what is required is that both States criminalise such conduct.
Article 3, paragraph 3 aims at dealing with fiscal offences and provides that State Parties should not refuse to consider a request on the basis of different taxes or duties or fiscal offences. This is in line with current international practice.

Where an extradition request relates to a number of offences, some of which are extradition offences and some which are not, then under Article 3, paragraph 5 the requested State can reject those offences that are not extradition offences and return on the offences that satisfy Article 3. Of course, the rule of speciality contained in Article 17 prohibits the requesting State from reinstating those offences that have been included in the surrender.

Article 4 confirms that the law of the requested State governs extradition proceedings.

Article 5: Extradition of nationals

1. a) A State Party shall have the right to refuse extradition of its nationals.

   b) Each State Party may, by a declaration made at the time of signature or of deposit of its instrument of ratification or accession, define as far as it is concerned the term “nationals” within the meaning of this Convention.

2. If the requested State Party does not extradite its national, it shall at the request of the requesting State Party submit the case to its competent authorities in order that proceedings may be taken, if they are considered appropriate.

Most civil law States assert criminal jurisdiction over their nationals for all offences, wherever those nationals may have committed the offence(s), i.e. the active personality principle. The corollary is that they will not extradite their own nationals. This is in direct contrast to common law practice where the assertion of active personality criminal jurisdiction must be specifically provided for. In order to accommodate this difference between the legal systems, Article 5 paragraph 1(a) preserves the right not to extradite nationals where such surrender is prohibited under a State Party’s constitution or domestic law.

As the definition of ‘nationals’ may vary amongst the States Parties, Article 5 paragraph 1(b) requires States to declare who falls within the category of ‘national’ under either the constitution or domestic law. Practitioners are advised to check with their counterparts in the requested State should a case involving the national of the requested State arise and if it is known that they do not extradite their own national. In the event that a request is refused on the grounds of nationality, then
under Article 2 the requested State must submit the matter for consideration of prosecution to its authorities. This obligation is also set out in paragraph 2.

Article 5, paragraph 2 reflects the agreed international practice that where the requested State refuses to extradite its own nationals solely on the grounds of nationality, it must then submit the case to its competent authorities to consider criminal proceedings in the requested State. In the context of extradition, competent authorities mean the authority that conducts prosecutions in the requested State. In order to consider such cases, the competent authorities in the requested State will clearly need all the evidence relied upon by the requesting State and this paragraph provides for such material to be submitted without reliance upon the mechanisms of mutual legal assistance certainly at the stage where the matter is being considered, but it may well be that the evidence may subsequently have to be submitted through the MLA channels.

**Article 6: Grounds for refusal**

The decision on extradition always remains one for the requested State as the person is found within its territory and it is for that State to determine if the person should be removed. However, given that the objective of extradition is to deny safe haven to those accused of crimes, States must try as far as their domestic law and policy dictate to permit extradition. The requested State can, and should, engage with the requesting State in making the decision so as to allow any further information to be made available to it.

Having said that, extradition law and practice recognises that in certain instances, extradition is not desirable, particularly where the offence is, for example, an offence of a political nature etc, and a refusal will follow. In order to reflect the international best practices, Article 6 addresses both mandatory and discretionary grounds.

The Article is divided into two parts and paragraph 1 sets out the mandatory grounds for refusal. If the request is deemed to fall within any of the grounds contained in 1(a) – (g) the request for surrender will generally be refused; however, before such a refusal, the requested State is encouraged to liaise with the requesting State to ascertain if the concerns of the requested State can be met in anyway. The mandatory grounds for refusal include the political offence exception. Whilst the other grounds are self-explanatory and therefore require little or no explanation, that is not the case with the political offence exception which is the subject of treatment by the international instruments, specifically the counter terrorism instruments (both regional and international).

Given the importance of the political offence exception, a brief explanation of the underlying principles may be of assistance.
The political offence exception has received renewed attention in international instruments, more particularly the counter terrorism conventions and protocols. It must be remarked at the outset that, in practice, there have been cases, few and far between, where the requested State has refused to extradite the fugitive on the grounds of the political offence exception.

Despite its common usage both in extradition and refugee law, there is no definition or an agreed meaning of this phrase. Treaties, whether bilateral, regional or international have all remained silent. It has been largely left to national courts to interpret the term, assisted to some extent from the general comments and interpretation guidance issued by human rights committees and commissions.

Historically the political offence exception has constituted a ground for refusal for extradition in many States. That exception was based upon an understanding amongst States not to assist in punishing political activity directed against the government of another State, such as treason, sedition, or attempts to force a ruling group to change or adopt certain policies, otherwise referred to as ‘pure’ offences. This approach is fairly straightforward and clear, however the difficulty arises in respect of ‘relative’ offence, that is, conduct that alleges criminality but is also linked with political activity. It is this latter range of offences that national courts and international bodies have sought to grapple with.

The starting point must, therefore, be a determination by the court as to whether the offence falls within the exception, if so, is it a ‘pure’ offence or a ‘relative’ offence. Once that is determined, it then becomes a matter for the court to decide if the particular facts lend themselves to the application of the exception.

Article 6, paragraph 1(a) makes provision to disallow the political offence exception from being engaged where it is specifically prohibited by any other Convention, apart from this convention. This in turn ensures that this Convention is aligned to all other international agreements, particularly the counter terrorism instruments.

Another critical provision under the mandatory grounds is that contained in Article 6(1)(f) and provides as follows:

if the person whose extradition is requested has been, or would be, subjected in the requesting State Party 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 Article 14 of the International Covenant on Civil and Political Rights;

The provision sets out the absolute prohibition on the surrender of individuals where there is a fear that the person would be subject to torture or cruel, inhuman or degrading treatment or punishment. The paragraph also includes denial of fair trial as a mandatory ground.
This is in accordance with international best practice under international human rights law and refugee law. Recent jurisprudence from the European Court of Human Rights has emphasised the absolute bar on surrender where there is a real risk of torture etc, and reflects international practice.

Article 6, paragraph 2 provides five discretionary grounds for refusal and as stated, States Parties are encouraged to liaise before refusing a request on any of the grounds set out in paragraph 2(a) – (e). The discretionary grounds for refusal are not an exhaustive list, and in the final analysis it remains a matter for the requested State whether extradition should be granted. Most of the grounds for refusal under paragraph 2 are relatively straightforward, and it would remain a matter for the authorities (judicial and/or executive) under domestic law as to whether the request should be granted or refused.

Article 6, paragraph 2(b) provides for a refusal to extradite if the person is likely to face the death penalty for the extradition offence. It is irrelevant for the purposes of extradition that a State retains the death penalty, the critical deciding factor is whether the extradition offence attracts the death penalty. If it does, then the discretionary ground under paragraph 2(b) may apply. At a practical level, and as provided by paragraph 2(b) the requested State may seek assurances from the requesting State that the death penalty will not be imposed. The giving of such assurances has come under some judicial scrutiny in other jurisdictions and practitioners are reminded to take into account international developments in this regard.

Article 6, paragraph 2(c) deals with requests based on extra-territoriality. If the domestic law of the requesting State permits a wide criminal jurisdiction over conduct where such conduct does not occur on its territory, it may still submit a request for extradition; but whether such a request would satisfy the double criminality rule under this Article would depend on whether the law of the requested State would permit the assertion of jurisdiction in similar circumstances. If it does, then double criminality is satisfied. However, if its law does not provide for the offence to be justiciable under its laws, the request may be refused.

Article 6, paragraph 2(d) permits the requested State to refuse the extradition request if the conduct, or any part of it, was committed in its territory. However, as crime gets increasingly transnational such issues are more likely to be resolved at the outset between the States capable of asserting jurisdiction; but where no such consultation occurs, the requested State may refuse the request as it too would be competent to assert jurisdiction.

Article 6, paragraph 2(e) sets out additional grounds for refusal which take into account the personal circumstances of the person sought such as age, health etc

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14 Case of Saadi v Italy [Application no 37201/06] 28 February 2008
Practitioners are reminded that the grounds of refusal can be rehearsed before both the executive decisions and judicial proceedings. Clearly where they are put before the executive, the decision may still be subject to judicial review proceedings. Practitioners must bear in mind the appeal provisions contained not only within the domestic law on extradition, but any other remedies that are available for example habeas corpus, judicial review etc.

**Article 7: Channels of communication and supporting documents**

The channels for submitting a request are provided by Article 7, paragraph 1 and include the possibility of alternative arrangements between States if diplomatic channels are considered inappropriate for any reason.

Article 7, paragraph 2 sets out the documents that must be submitted in support of a request for extradition and these include:

**Accusation cases must include:**

- Warrant of arrest (check if the requested State requires any authentication if you are sending a copy of a warrant). A warrant of arrest is the warrant used in the requesting State. There is no such thing as an ‘international warrant of arrest’. Please ensure that the warrant sets out all the offences for which extradition is sought and if there is insufficient space on the warrant, attach a list but make sure the warrant refers to the list and the magistrate/judge signs both the warrant and the accompanying list (so it becomes part of the warrant). Make sure any bail provisions are crossed out so that when the person is arrested, it is clear that they are to be detained. Of course the judge in the requested State may then release the person on bail for the extradition proceedings in accordance with the laws of the requested State.
- The statement of facts in support of the request (unsworn)
- Relevant law setting out the offence and the sentence threshold; where the offence has extra-territorial elements the statement of law must specify that the conduct is triable in the requesting State and set out the relevant provisions confirming that. If reliance is being placed on case law, then that too should be explained.(unsworn)
- Particulars of identity of the person sought (usually a photograph and/or fingerprints). The photograph need not be an official police photo but any photo of the person sought would suffice provided someone has identified it as the person mentioned in the warrant of arrest.

**Conviction cases:**

- Certificate of conviction setting out the offences for which the person was convicted and the sentence imposed
- The statement in support of the request setting out the conduct of which the person was convicted, which is required to satisfy the dual criminality. The
statement must also confirm the time remaining to be served (after parole etc, if applicable). Where a person has been convicted but not sentenced, then the statement must confirm if the conviction is final and the maximum penalty available. The statement must also confirm that the person sought is ‘unlawfully at large’

- Relevant law
- Particulars of identity of the person sought (usually a photograph and/or fingerprints). The photograph need not be an official police photo but any photo of the person sought would suffice provided someone has identified it as the person mentioned in the warrant of arrest. If a country requires a prima facie case then it may assist if the witnesses who provide the statements can identify the person in the photograph
- Conviction in absence: The requesting State must set out if the person is deemed to be a person accused or convicted – this will largely depend on if the conviction is final or if there is the possibility of a re-trial or appeal.

One of the key changes that Article 7 seeks to introduce is the removal of the need for the requesting State to produce a prima facie case. Article 7, paragraph 2 provides as follows:

2. The request shall be supported by:
   (a) the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting State Party;
   (b) a statement of the offence(s) for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; and
   (c) a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality.

Article 7, paragraph 2(b) has, in essence, removed the need for a prima facie case to be submitted by the requesting State. This is a shift away from the practice in most common law countries which usually require the requesting State to submit a prima facie case. The intention is to accommodate the legal systems of all IGAD member States as well as provide a more simplified approach in order to expedite the process. The statement need not be a sworn statement, but it must provide all the essential information such as the conduct alleged, time and place of the offence etc – this should be as detailed as possible as the requested State needs to establish whether or not the conduct amounts to an offence under its laws and this can only be achieved if a fairly full summary of facts is provided. The narrative must establish a nexus between the offence and the person who is being sought.

The request must also include the relevant laws; this means the offence creating provisions as well as any other relevant texts which set out the penalty, statute of
limitations, basis for extra-territorial jurisdiction where that is relevant. The relevant laws can either be copied or set out in full in the statement of an officer from the relevant competent authority in the requesting State. As set out in Article 7, paragraph 3 the official designation of the officer completing the request together with contact details. It is particularly helpful to provide the contact details in the event further information is required by the requested State or any matters need clarification. It also helps to expedite matters of enquiry rather than submitting all correspondence through the diplomatic channels.

However, as stated previously you must check the domestic law of the requested State to ensure that the simplified request documents have been adopted or whether the State still requires a prima facie case.

**Article 8: Authentication of documents**
The authentication of the request will be in accordance with the laws of the requesting State, of which the requested State may be required to take judicial notice.

Clearly, the type of authentication may vary from State to State and so a clear understanding is required when a request is being prepared. A practical approach might be for all the extradition practitioners in the IGAD member States to provide to each other a copy of their legislation and a short guide on how the request must be prepared, including authentication and submission.

**Article 9** is self-explanatory and provides for further information to be submitted by the requesting State in the event the information provided in any of the documents set out in Article 7 is either incomplete or requires clarification.

**Article 10** deals with the request for provisional arrest and has been addressed above.

**Article 11** provides for a fugitive to waive the extradition proceedings, provided domestic law of the requested State allows for such waivers. This means that the person arrested can choose, if he so wishes, to return to the requesting State without the requirement of extradition proceedings. The waiver of proceedings can occur at the first appearance before a judge/magistrate or at a later stage in the proceedings. Under most domestic laws, a waiver is usually conducted before a judge or magistrate and requires the explicit consent of the person sought. Domestic law usually sets out the procedure in this regard and would require a written consent from the person sought. In such circumstances, the requesting State is not caught by the speciality rule – this means the requesting State is not confined to the offences contained in the request and may, if necessary, prosecute for any other offence.

**Article 12** deals with concurrent requests and the factors that the requested State may take into account when determining which request will take precedence. The factors outlined in paragraph 2 are a guide and a State may have other, additional,
criteria. Article 12, paragraph 2 provides for the following factors to be taken into account:

2. In determining to which State Party a person is to be extradited, the requested State Party shall have regard to all the relevant circumstances, and, in particular, to:
   i) if the requests relate to different offences, the relative seriousness of those offences;
   j) the time and place of commission of each offence;
   k) the respective dates of the requests;
   l) the nationality of the person to be extradited;
   m) the ordinary place of residence of the person to be extradited;
   n) whether the requests were made pursuant to this Convention;
   o) the interests of the respective States; and
   p) the nationality of the victim.

Once again, it is a matter for domestic law as to who will decide on concurrent requests, the appropriate Minister or the court.

**Article 13** provides that a request must be translated into the language of the requested State and recognises that the official languages for IGAD are English and French; however, it may well be that a request to Sudan for example may require the request to be translated into Arabic. It must be borne in mind that the request itself must be in the language of the requesting State and be accompanied by a translation. The accompanying translation is not the request and should not be treated as such. Whether the translation requires certification under the law of the requested State must be made clear to the requesting State.

**Article 14** requires the requested State to notify the requesting State of its decision once all proceedings have concluded and if there is a refusal or partial refusal, apart from the ongoing liaison, the reasons should be set out.

Following a decision to surrender has been made, **Article 15**, paragraph 2 states that the person should be removed from the requested State within 15 days. This is to allow for arrangements to be made by the requesting State. If however, the person has not been removed after 30 days, the person must be discharged. The rationale behind this is to avoid a person being held in the requested State for an unnecessary lengthy period or indefinitely. Further, it violates the rights of the person not to be arbitrarily detained. Article 15, paragraph 3 recognises that there may well be circumstances when it may not be possible for arrangements for removal to be made within the 15 or 30 days and permits for an extended period for removal. It is worth noting that such an extension should be consistent with human rights jurisprudence and not amount to ‘arbitrary detention’.

Where the requested State has or had commenced criminal proceedings against the person sought which are still continuing at the time the extradition decision is made
or has been/will be sentenced, the requested State may either postpone the surrender of the person under paragraph 1 of Article 16 or arrange a temporary surrender of the person to the requesting State such that at the end of the proceedings in the requesting State the person is returned to the requested State as provided by paragraph 2.

The rule of speciality as provided by Article 17 acts as a safeguard to ensure that a fugitive is not tried or sentenced for an offence other than that upon which his return is based and forbids the re-extradition or the handing over of a person by the requesting State once the person has been surrendered to it, unless the requested State is notified and consents to such re-extradition. This provision is aimed at protecting the individual from being the subject to prosecution of offences that were not disclosed in the request, a disguised extradition or rendition to another State. When considering a request for re-extradition or hand over, the requested State must be provided with the documents that would usually accompany a request for extradition.

If however, following surrender, other earlier offences come to light and the requesting State wishes to proceed on those matters as well, it must seek the consent of the requested State and the person surrendered, save for those circumstances where a lesser charge is being proceeded with and the elements of the offence are similar to those for which he was surrendered (see Article 17, paragraph 4). For example, a person is surrendered by the requested State for an offence of robbery but on return the prosecuting authorities take the view that a lesser offence of theft is more appropriate, in such circumstances as the elements of the offence are similar and theft is a lower offence, the requesting State does not need to seek the consent of the requested State. By contrast, if the original request was in relation to a robbery and when the person is surrendered the requesting State find that he was also wanted for an allegation of rape, they must then seek the consent of the requested State and will need to send an extradition-style bundle of documents for consideration. Therefore, apart from the situation where a lesser offence is being considered, in every other situation, consent is required and the offence for which such permission is sought must also be an extradition offence as defined by Article 3 of the Convention.

The mechanism by which such consent is procured from the requested State is set out in Article 17, paragraph 2 and requires the requesting State to submit the documents in support of a request for extradition (see Article 7, paragraph 2, discussed above).

This rule will not apply in circumstances where the matter for which the person was surrendered has been dealt with and following release, remains in the requested State for a period of more than 30 days. In such circumstances, if other matters come to light, the person can be proceeded against without the need to seek the consent of the requested State.

**Article 18: Handing over of property**
It often happens that when officers arrest a person on an extradition warrant, evidence relating to the offence may be found with him or at his premises. As mutual legal assistance and extradition are different measures and a request for one cannot be used to secure the other, it is important that any evidence seized is retained and handed over to the requesting State if it so requests (under mutual legal assistance request).

Thus, where property has been acquired by the person in furtherance of the commission of an offence and may be required as evidence, Article 18 preserves the position of mutual legal assistance requests and the requesting State must submit such a request if the evidence is to be relied upon. However, upon arrest it may be possible for the officers in the requested State to seize any property in the vicinity of the arrest, pending a request for mutual legal assistance, but the extent to which any seizure can take place depends on the domestic law. Equally Article 18 does not permit the use of coercive measures such as search and seizure that must be carried out in accordance with the Mutual Legal Assistance Convention.

**Article 19: Transit**

5. 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.

6. Upon receipt of such a request, which shall contain relevant information, the transit State shall deal with this request pursuant to procedures provided by its own laws. The transit State shall grant the request expeditiously unless its essential interest would be prejudiced thereby.

7. The transit State shall ensure that legal provisions exist that would enable the detention of the person in custody during transit.

8. 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 19 deals with transit arrangements where a person is being extradited and seeks to address two (2) different situations. The first, under Article 19 paragraph 1, is where a person is being extradited from a third State to one of the IGAD Member States through another IGAD Member State. For example, if a person is being surrendered to Sudan but the airline is transiting through Ethiopia, and the person is likely to be in Ethiopia for a short duration (it could be as short as a few hours), then the authorities in Ethiopia need to be informed of this arrangement to ensure that any detention of the suspect during transit is consistent with its own laws, and more importantly they are aware that a person subject to an extradition order is transiting...
through their territory. Another reason to inform the authorities would be to ensure that the person subject to the extradition order does not use the transit country as a place to lodge a claim for asylum etc; for all these reasons it is important that a transit State is kept informed and the obligation to do so is set out in Article 19.

The second situation arises where no transit is planned, but due to unforeseen circumstances such transit becomes necessary, a request can be made at the time of landing and the person can continue to be detained (see paragraph 4) by the escorting officer for a short duration. Any detention period will be in accordance with the laws of the transit State, which must have in place laws to permit the detention of individuals in such circumstances. Of course, the individual remains in the custody of the escorting officer but as they would be in the territory of the transit State, it is important that laws are put in place to permit such detention.

Article 20: Costs
6. The requested State Party shall make all necessary arrangements for and meet the cost of any proceedings arising out of a request for extradition.

7. The requested State Party shall bear the costs incurred in its territory or jurisdiction in the arrest and detention of the person whose extradition is sought until that person is surrendered to the requesting State Party. The requested State Party shall also bear the costs incurred in its territory or jurisdiction in connection with the seizure and handing over of property.

8. If during the execution of a request, it becomes apparent that fulfillment of the request will entail costs of an extraordinary nature, the requested State Party and requesting State Party shall consult to determine the terms and conditions under which execution may continue.

9. The requesting State Party shall bear the costs incurred in translation of extradition documents and conveying the person extradited from the territory of the requested State Party.

10. Consultations may be held between the requesting State Party and the requested State Party for the payment by the requesting State Party of extraordinary expenses.

Article 20 addresses costs and paragraph 1 confirms the practice in all extradition cases that costs in relation to the extradition process in the requested State will be borne by the requested State. The requesting State bears the request of preparing the request and any translations that may be required. Equally the requesting State will bear the costs of any additional information that may arise and require action in the requesting State (paragraph 4) and all the costs of transport (by any means) for conveying the individual at the end of the process in the requested State.
However, circumstances may arise whereby an extradition request raises complexities that involve additional or extraordinary expenses in the requested State. In that case, Article 20, paragraph 3 and 5 allows the State Parties to liaise on how the costs are to be met and it may well mean that the requesting State may have to bear the additional costs. Article 20, paragraph 5 also encourages the States involved in the extradition request to consult with each other where it may be expected, at the outset, that the request is likely to lead to exorbitant costs.

**Part III** of the Convention sets out formalities of the Convention. It might assist to provide an overview of the key defining characteristics of a treaty, including the various stages: adoption, signature, ratification and accession, along with the making of reservations.

**The Vienna Convention on the Law of Treaties 1969, (“the Vienna Convention”)**

The rules governing international treaties used to be based on customary international law or the general principles of law. The Vienna Convention, which entered into force on 27 January 1980, codified these rules and clearly set out the criteria for the establishment and operation of international treaties.

For the purposes of this Part, the following provisions of the Vienna Convention are important to note:

Article 2(1)(a) of the Vienna Convention defines “treaty” as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

The terminology that surrounds the treaty-making process can be confusing. It is therefore important to note the distinction between the various procedural terms, as this can determine whether a State has consented to be bound to the terms of the treaty or not.

**Adoption**

“Adoption” takes place during the treaty-making process, and is the formal act in which participating States consent to the text of a proposed treaty. Article 9 of the Vienna Convention states:

Article 9(1) “The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up...”

Article 9(2) “The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.”

**Signature**
A State which has signed a treaty subject to ratification, acceptance or approval, does not establish the consent to be bound. Signature is a process of authentication and reflects the willingness of the State to continue in the treaty-making process by qualifying it to proceed to undertake ratification.

A signatory State to a treaty, while not yet bound to its provisions, is nevertheless obligated not to act in any way which would defeat the object and purpose of a treaty prior to its entry into force. Article 18 of the Vienna Convention states:

“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become party to the treaty...”

**Ratification**

Ratification is the act whereby a State establishes its consent to be bound to a treaty. In the case of multilateral treaties, the act of ratification is normally done by the deposit of the instruments of ratification to an international organization or to the Secretary General of the United Nations, as the depositary. Article 16 of the Vienna Convention holds:

> Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:
> 1. (a) their exchange between the contracting States;
> 2. (b) their deposit with the depositary; or
> 3. (c) their notification to the contracting States or to the depositary is so agreed.

The process of ratification grants States the necessary time frame required to receive domestic approval for the treaty and to enact domestic legislation giving effect to the treaty.

**Accession**

Accession has the same legal effect as ratification, but applies when a State becomes party to a treaty after the treaty has already been negotiated and signed by other States. Article 15 of the Vienna Convention outlines when consent of a State to be bound by a treaty is expressed by accession:

1. (a) the treaty provides that such consent may be expressed by that State by means of accession;
   (b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or
   (c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

Reservations to international treaties (Articles 19 – 23 of the Vienna Convention)
Article 25 provides for a State Party to make a reservation to the provisions of the Convention. A treaty can prohibit reservations entirely, or allow only specific reservations to be made.

A reservation is a declaration made by a State which excludes or alters the legal effect of specified provisions of the treaty to that State. Reflecting the concept of universality, reservations provide a level of flexibility by enabling States to become parties to multilateral treaties whilst permitting the exemption or alteration of certain provisions with which the State may not wish or is unable to comply.

The integrity of the treaty remains intact by virtue of Article 19(c) of the Vienna Convention, which provides that:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: ... (c)... the reservation is incompatible with the object and purpose of the treaty.

PRACTICAL CONSIDERATIONS

In order to improve regional co-operation, practitioners in the region should consider setting up an informal network or building on the ICPAT network of judicial and legal experts to exchange ideas, cases and decisions so as to build a better understanding of the domestic laws and procedures of each member State.

The group can agree to set up a virtual network as well as organise meetings to discuss the challenges they face in international co-operation (both mutual legal assistance and extradition). Such a network would help to facilitate better co-operation in criminal cases and provide legal and practical information necessary to the authorities in their own country and the other member States wishing to invoke cooperation. Practice in other regions has demonstrated that direct and regular contact helps to ease regional co-operation and create a pool of specialists in the region.

Practitioners should consider uploading their domestic law and relevant decisions on the IGAD website and ensuring that they distribute any changes in legislation or procedure introduced within their jurisdiction. As the Convention applies to the region, each national court will approach the application of the Convention in the jurisdiction in slightly different ways and by exchanging relevant decisions, practitioners can quite properly use the decisions in their own courts. Of course, the decisions are not binding on the national courts of other States within the region, but they are persuasive.

Practitioners should also consider building a ‘library’ of decisions in extradition cases from other States for the reasons set out above. For example, should one of the national courts in the region need to consider a ground for refusal, say, the political offence exception and if there are no readily available cases on the application of the
exception either in the State or in the region, reliance can then be placed on the
approach of the courts in other jurisdictions as most extradition treaties/conventions
contain the same principles. Such an approach would also assist to ensure that the
courts in the region are made aware of international and regional jurisprudence and
of best practice.

Possible templates of the documents in support of an extradition request under the
Convention are set out in the Annexes below and may be of assistance to
practitioners. Of course, it must be borne in mind that these are provided for
guidance only and the format of the request must comply with the domestic law of
the requested State.

Annexes:

Annex 1 Draft letter for provisional arrest
Annex 2: Draft statement of facts
Annex 3: Draft statement of law
Annex 4: Draft particulars of identity

ANNEXES: FOR GUIDANCE ONLY.

Annex 1: Draft letter for provisional arrest

Your contact details & case reference details (if any)

The Officer in Charge
Interpol
(full address for Interpol in the region)

Date

BY E-MAIL/ POST/FAX

Dear Sir,

Re. The Proposed Extradition of X from (insert country)

I write to confirm that it is the intention of the [name of your organisation] to seek
MR X’s extradition from (insert country) for the offences set out in the attached copy
warrant dated 19th January 2005 and issued by (Y) Magistrates Court.

The case has been reviewed by a [Prosecutor], who confirms that there is sufficient
evidence against Mr X and it is in the public interest to proceed with the prosecution.
I also enclose

- a copy of the case summary which summarises the facts of the matters. It also sets out details where Mr X is believed to reside and particulars of his identity.
- a copy of his driving licence
- a copy of his fingerprints
- a copy of his passport.

If needed: Please note that [country] police have worked in close liaison with the police in (insert country). This request for provisional arrest is being made with the full knowledge and co-operation of the (....) Department.

I request that the provisional arrest of Mr X be co-ordinated with the co-operation of the (insert country) police as set out above, pending the submission of the full extradition documentation. The investigating officer is [name and rank of officer]. I would be grateful if you would let me know as soon as Mr X is arrested pursuant to this request.

The investigating officer is:

- Name of officer
- Tel:
- Fax:
- Mobile telephone number: (available 24 hours)

Please let me know if there is any further information that you require

Yours faithfully,

Annex 2: Draft statement of facts

NAME OF OFFICER states [or on oath states]:

Introduction

I am a (insert rank) with the [name of organisation] based in [town, country]. From the enquiries conducted I can state the following:

Summary of facts

Please ensure all the conduct alleged against the defendant/any conspiracies etc is set out

The facts must conclude by saying: Mr X is accused of all the offences set out above.

Last paragraph
I produce as Exhibit XY/1 a photograph of (name of defendant) which I certify is a true likeness of him/her

I produce as Exhibit XY/2 a certified copy of (name of defendant) fingerprints

NB: Every page must have Officer’s name and signature (twice on the last page)

Annex 3: Draft statement of law

NAME OF LAWYER states [or on oath states] :-

I am a [Barrister/Solicitor/State Prosecutor] and with the [name of organization] of [name of country]. I am well acquainted with the criminal law of [name of country].

The offences for which extradition is requested under the terms of the [the treaty/convention etc being relied upon] are [list all the offences for which extradition is sought and these should be identical to the offences set out in the warrant].

I set out below the relevant law.

[set out the provisions of law including the sentence and where relevant any extra-territorial provisions. If reliance is being placed on the common law then it would assist to have that explained in detail as countries that do not have the common law tradition normally find this quite difficult]

Signature of lawyer [preferably on every page]

Annex 4: Draft particulars of identity

(photograph of person sought, if available)
I certify that the above is a true likeness of (name of defendant, including all aliases) and any other particulars that may be known.

Signed: ......................
   (Full name & rank of officer)

Date:
RESOURCE MATERIALS

CAERT:
http://www.caert.org.dz

Center on Global Counterterrorism Cooperation
www.globalct.org

Commonwealth Network of Contact Persons:
http://www.thecommonwealth.org/subhomepage/165671/

Eurojust:
http://www.eurojust.europa.eu

IGAD Network of Judicial Experts:
http://www.issafrica.org/cdterro/index.htm

Interpol:
http://www.interpol.int/Public/Icpo/intliaison/default.asp

InterGovernmental Authority on Development (IGAD)
http://www.igad.org

UNODC MLA Tool Writer (password required):
http://www.unodc.org/mla/index.html

UNODC: UN Counter-Terrorism Conventions:

UNODC: UN Convention Against Corruption (UNCAC):

UNODC: UN Convention Against Organised Crime (UNTOC):

AU CT Convention:

AU Anti-Corruption Convention:
EU MLA Convention:

Commonwealth Harare Scheme on International Co-operation in Criminal Matters:

Institute for Security Studies (ISS):
http://www.iss.co.za
## GLOSSARY

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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</thead>
<tbody>
<tr>
<td>aut dedere aut judicare</td>
<td>extradite or prosecute</td>
</tr>
<tr>
<td>IGAD</td>
<td>Inter Governmental Authority on Development</td>
</tr>
<tr>
<td>MLA</td>
<td>Mutual legal assistance</td>
</tr>
<tr>
<td>OAU</td>
<td>Organisation of African Unity</td>
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<tr>
<td>Requesting State</td>
<td>State making the request for assistance under either IGAD Convention</td>
</tr>
<tr>
<td>Requested State</td>
<td>State receiving the request for assistance under either IGAD Convention</td>
</tr>
<tr>
<td>SADC</td>
<td>Southern African Development Community</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNODC</td>
<td>United Nations Office on Drugs &amp; Crime</td>
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</tbody>
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