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MUTUAL LEGAL ASSISTANCE AND EXTRADITION IN SOUTHERN AFRICA





Black rhino (*Diceros bicornis*)

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Contents

Introduction	3
Methodology	4
Executive Summary	5
Main Findings	5
On Extradition.....	5
On Mutual Legal Assistance	7
On Wildlife Crime	7
Recommendations	7
For Extradition and MLA	7
Extradition-specific Recommendations	8
MLA-specific Recommendations	9
Angola	10
General Legal Framework for International Cooperation	10
Domestic Legislation	11
International Agreements on Mutual Legal Assistance and Extradition	11
Relevant Bilateral Treaties in Southern Africa	11
Angola and Southern Africa – Legal Basis for Extradition	11
Process for Extradition Requests:Angola in Comparison to the SADC	
Protocol on Extradition.....	12
Angola: Mandatory Grounds for Refusal of Extradition	13
Angola: Discretionary Grounds for Refusal of Extradition	13
Angola and Southern Africa – Legal Basis for Mutual Legal Assistance	13
Process for Mutual Legal Assistance Requests:Angola	14
Mutual Legal Assistance in Angola: Types of Assistance	15
Grounds for Refusal of Mutual Legal Assistance in Angola	15
Angola: Wildlife Laws and Qualification for Extradition and Mutual Legal	
Assistance with SADC Partners	16
Key Challenges in Execution of Requests for MLA and Extradition	17
Botswana	19
General Legal Framework for International Cooperation	19
Domestic Legislation	20
International Agreements on Mutual Legal Assistance and Extradition	20
Relevant Bilateral Treaties in Southern Africa	20
Botswana and Southern Africa – Legal Basis for Extradition	20
Process for Extradition Requests: Botswana in Comparison to the SADC	
Protocol on Extradition.....	21
Botswana: Mandatory Grounds for Refusal of Extradition	22
Botswana: Discretionary Grounds for Refusal of Extradition	22
Botswana and Southern Africa – Legal Basis for Mutual Legal Assistance	22
Process for Mutual Legal Assistance Requests: Botswana	23
Mutual Legal Assistance in Botswana: Types of Assistance	23

Grounds for Refusal of Mutual Legal Assistance in Botswana	24
Wildlife Crimes in Relation to Protected Species: Qualification for Extradition and Mutual Legal Assistance	24
Botswana: Wildlife Laws and Qualification for Extradition and Mutual Legal Assistance	25
Key Challenges in Execution of Requests for MLA and Extradition	26
Political Nature of Offense	26
Malawi	28
General Legal Framework for International Cooperation	28
Domestic Legislation	28
International Agreements on Mutual Legal Assistance and Extradition	29
Relevant Bilateral Treaties in Southern Africa	29
Malawi and Southern Africa – Legal Basis for Extradition	29
Process for Extradition Requests: Malawi in Comparison to the SADC Protocol on Extradition	30
Malawi: Mandatory Grounds for Refusal of Extradition	31
Malawi: Discretionary Grounds for Refusal of Extradition	31
Malawi and Southern Africa – Legal Basis for Mutual Legal Assistance	32
Process for Mutual Legal Assistance Requests: Malawi	32
Mutual Legal Assistance in Malawi: Types of Assistance	32
Grounds for Refusal of Mutual Legal Assistance in Malawi	33
Wildlife Crimes in Relation to Protected Species: Qualification for Extradition and Mutual Legal Assistance	34
Malawi: Wildlife Laws and Qualification for Extradition and Mutual Legal Assistance	34
Key Challenges in Execution of Requests for MLA and Extradition	35
Mozambique	36
General Legal Framework for International Cooperation	36
Domestic Legislation	37
International Agreements on Mutual Legal Assistance and Extradition	37
Relevant Bilateral Treaties in Southern Africa	37
Mozambique and Southern Africa – Legal Basis for Extradition	37
Process for Extradition Requests: Mozambique in Comparison to the SADC Protocol on Extradition	38
Mozambique: Mandatory Grounds for Refusal of Extradition	39
Mozambique: Discretionary Grounds for Refusal of Extradition	39
Mozambique and Southern Africa – Legal Basis for Mutual Legal Assistance ...	39
Process for Mutual Legal Assistance Requests: Mozambique	40
Mutual Legal Assistance in Mozambique: Types of Assistance	41
Grounds for Refusal of Mutual Legal Assistance in Mozambique	41
Mozambique: Wildlife Laws and Qualification for Extradition and Mutual Legal Assistance	42
Key Challenges in Execution of Requests for MLA and Extradition	43

Namibia	44
General Legal Framework for International Cooperation	44
Domestic Legislation	45
International Agreements on Mutual Legal Assistance and Extradition	45
Bilateral Agreements in Southern Africa	45
Namibia and Southern Africa – Legal Basis for Extradition	45
Process for Extradition Requests: Namibia in Comparison to the SADC	
Protocol on Extradition.....	45
Namibia: Mandatory Grounds for Refusal of Extradition	46
Namibia and Southern Africa – Legal Basis for Mutual Legal Assistance	47
Process for Mutual Legal Assistance Requests: Namibia	47
Mutual Legal Assistance in Namibia: Types of Assistance	48
Grounds for Refusal of Mutual Legal Assistance in Namibia	48
Wildlife Crimes in Relation to Protected Species: Qualification for	
Extradition and Mutual Legal Assistance	48
Namibia: Wildlife Laws and Qualification for Extradition and Mutual Legal	
Assistance	49
Key Challenges in Execution of Requests for MLA and Extradition	50
South Africa	51
General Legal Framework for International Cooperation	51
Domestic Legislation	52
International Agreements on Mutual Legal Assistance and Extradition	52
Bilateral Agreements in Southern Africa	52
South Africa and Southern Africa – Legal Basis for Extradition	52
Process for Extradition Requests: South Africa in Comparison to the	
SADC Protocol on Extradition.....	52
South Africa: Grounds for Refusal of Extradition	53
South Africa and Southern Africa – Legal Basis for Mutual Legal Assistance	53
Process for Mutual Legal Assistance Requests: South Africa	54
Grounds for Refusal of Mutual Legal Assistance in South Africa	54
Mutual Legal Assistance in South Africa : Types of Assistance	55
South Africa: Wildlife Laws and Qualification for Extradition and Mutual	
Legal Assistance	55
Key Challenges in Execution of Requests for MLA and Extradition	56
Zambia	58
General Legal Framework for International Cooperation	58
Domestic Legislation	59
International Agreements on Mutual Legal Assistance and Extradition	59
Zambia and Southern Africa – Legal Basis for Extradition	59
Process for Extradition Requests: Zambia in Comparison to the SADC	
Protocol on Extradition.....	59
Zambia: Mandatory Grounds for Refusal of Extradition	61
Zambia: Discretionary Grounds for Refusal of Extradition	61
Zambia and Southern Africa – Legal Basis for Mutual Legal Assistance	61
Process for Mutual Legal Assistance Requests: Zambia	62
Mutual Legal Assistance in Zambia: Types of Assistance	62

Grounds for Refusal of Mutual Legal Assistance in Zambia	63
Zambia:Wildlife Laws and Qualification for Extradition and Mutual Legal Assistance	64
Key Challenges in Execution of Requests for MLA and Extradition in Zambia	65
Zimbabwe	66
General Legal Framework for International Cooperation	66
Domestic Legislation	67
International Agreements on Mutual Legal Assistance and Extradition	67
Zimbabwe and Southern Africa – Legal Basis for Extradition	67
Process for Extradition Requests: Zimbabwe in Comparison to the SADC Protocol on Extradition.....	67
Zimbabwe: Mandatory Grounds for Refusal of Extradition	68
Zimbabwe: Discretionary Grounds for Refusal of Extradition	68
Zimbabwe and Southern Africa – Legal Basis for Mutual Legal Assistance	69
Process for Mutual Legal Assistance Requests: Zimbabwe	69
Mutual Legal Assistance in Zimbabwe: Types of Assistance	70
Grounds for Refusal of Mutual Legal Assistance in Zimbabwe	70
Zimbabwe:Wildlife Laws and Qualification for Extradition and Mutual Legal Assistance	71
Key Challenges in Execution of Requests for MLA and Extradition in Zimbabwe	72

Introduction

This report comprises a review of existing legislation governing mutual legal assistance and extradition across eight member states of the Southern Africa Development Community (SADC) with a view to examining the effectiveness of these mechanisms in facilitating the investigation and prosecution of wildlife crime in that region. The countries examined were Angola, Botswana, Malawi, Mozambique, Namibia, South Africa, Zambia, and Zimbabwe.

Poaching and illegal wildlife trade are the major forces behind the population decline of many iconic African wildlife species, such as rhinoceros, both the black (*Diceros bicornis*) and white (*Ceratotherium simum*); elephant, both the savanna (*Loxodonta africana*), and the forest (*Loxodonta cyclotis*); pangolin – all four species (*Phataginus tetradactyla*, *P. tricuspis*, *Smutsia gigantea* & *S. temminckii*); lion (*Panthera leo*), and others being targeted by the illegal wildlife traders. Globally, illegal wildlife trade is a multi-billion-dollar illicit business, engaged in by international criminal syndicates – facilitated by an era of global free trade, with easy communication and movement of goods, money, and people. Porous borders across most of the SADC, which comprises 14 states, mean that traffickers are able to move between jurisdictions with ease.

Accordingly, extradition and mutual legal assistance (MLA) provide vital tools in the fight against such international crimes. Within SADC, the need for cooperation was recognized under the SADC Protocol on Wildlife Conservation and Law Enforcement signed by 12 of the 14 members states in 1999, which specifically called upon states to promote the enforcement of wildlife laws within, between and among State parties and to facilitate the exchange of information and the enforcement of wildlife laws (*sic*). This was followed by the signing of two SADC Protocols on Extradition and Mutual Legal Assistance in 2002. The United Nations Convention against Transnational Organized Crime (UNTOC), and the United Nations Convention against Corruption (UNCAC), to which all SADC members are parties, also have provisions for extradition and MLA.

However, whether international agreements such as UNTOC or UNCAC or the SADC Protocols have immediate effect upon a state will depend largely on whether it is monist or dualist in its approach to international agreements. Where dualist, such as Botswana, Malawi, Zambia and Zimbabwe, domestication (legislatively speaking)¹ is required. Some, like Namibia and South Africa, are somewhat mixed in their approach². Where monist in approach, such as Angola and Mozambique, international agreements are generally seen as automatically binding. However, even there, some monist states maintain that any conflict is resolved in favor of domestic laws and further, that where international agreements are not viewed as 'self-executing' (such as UNTOC), then again, some domesticating footwork may be required for full implementation. Much will depend on the wording of the treaty or the convention, the Constitutional provisions, and the interpretation given by the courts. e.g., in Malawi, dualist in its approach, there are two conflicting interpretations regarding the application of international agreements into domestic law, yet to be resolved by the Supreme Court.³

Accordingly, this review was conducted with a view to assessing compliance between domestic laws and international conventions particularly the SADC Protocols, and to identify barriers to cooperation brought about by any inconsistencies in those frameworks, and challenges to implementation.

¹ E.g., see Attorney General vs Dow [1992] B.L.R. 119 page 154 C (Botswana).

² In Namibia, Article 144 of the Constitution states international law is directly applicable unless inconsistent with the Constitution or an Act of Parliament. The amended section 4 of the Extradition Act provides those extraditable countries include those with which multilateral agreements have been signed provided the agreement itself makes clear that it is to be used as such a basis. This in turn depends on whether the agreement is 'self-executing'.

³ See further discussion under chapter on Malawi.

Methodology

A systematic review of the domestic legislation was conducted followed by interviews with key stakeholders in each state, namely, legal officers in the state departments responsible for handling mutual legal assistance and extradition requests, prosecutors with experience in handling requests and in-country legal experts. The COVID-19 pandemic that broke out in 2020, parallel to the launch of this assessment, meant that face-to-face stakeholder engagement was limited to web-based interviews. The author also bases the report on her direct experience with prosecutors and judges in the jurisdictions concerned in relation to the prosecution and adjudication of wildlife crime in those countries, as well as upon legislative assessments conducted by her on behalf of the United Nations Office of Drugs and Crime, and NGOs in Angola, Botswana, Namibia, Zambia, and Zimbabwe.

The SADC Protocols on extradition and mutual legal assistance, and the United Nations Convention against Transnational Organized Crime (UNTOC) and the United Nations Convention against Corruption (UNCAC) were also considered with a view to assessing whether the domestic laws fulfilled the aims and ambitions of those international agreements in this context. For certain countries, the Harare Scheme and London Scheme agreements were also examined as relevant in the context of international cooperation in this region.

Furthermore, a review of relevant wildlife crime legislation across the eight states was examined to assess whether relevant offenses met the threshold required to trigger mechanisms for extradition and/or mutual legal assistance. In considering the qualification of wildlife-related crimes for extradition and MLA between the countries, 'headline' offenses were identified, and their penalties assessed against the SADC Protocol on Extradition and their own domestic law definitions of 'extraditable offenses', and also whether they qualified as 'serious crimes' (i.e., at least four years imprisonment) under UNTOC. Those 'headline offenses' were:

- Hunting a protected species.
- Dealing (sale or purchase) in relation to a protected species.
- Possession of a protected species.
- Import/export of a protected species.

This report addresses each country separately, identifying the different processes for extradition and MLA, the differences between grounds for refusal of requests for international cooperation and types of mutual legal assistance explicitly catered for under each country's laws. Discussions and country-specific recommendations are captured under each country chapter which was then shared with the stakeholders interviewed for comment and feedback before finalization.

Executive Summary

This review found that all of the jurisdictions concerned do try to implement the spirit of both of the SADC Protocols, showing a good awareness of both and a willingness to cooperate with each other. Some jurisdictions described the SADC Protocols as ‘a gentlemen’s agreement’ and even where they were not fully domesticated under national laws, ad hoc arrangements would be made with relative ease. However, whilst this works where requests are uncontested, the lack of full domestication of the SADC Protocols either as a standalone statutory instrument or by amendment of principal domestic law exposes the application of the two Protocols to vulnerability where extradition or MLA is contested in any way.

The UN Conventions, however, are not utilized in and of themselves in the majority of the countries considered herein – whilst they are rarely seen as creating an automatic basis for mutual legal assistance or extradition, they may form a basis for catalyzing a bilateral treaty with other signatories. Conflicts with domestic laws are often resolved in favor of the domestic law and the processes required to execute a request for extradition and mutual legal assistance are very much a domestic concern, not catered for within these international agreements.

Main Findings

On Extradition

Extradition is the formal process by which one jurisdiction asks another for the enforced return of a person who is in the Requested State and who is accused or convicted of one or more criminal offenses in the Requesting State.

The SADC protocol on extradition, signed in 2002 by 14 member states, calls for cooperation in extradition for any crime that carries a term of imprisonment of at least one year or, where extradition is requested to enable an accused person to serve a sentence of imprisonment, where at least six months imprisonment is yet to be served.

In all states examined, the minimum term required to establish an ‘extraditable offense’ differs. For example, in Angola, the offense must carry at least three years to qualify for extradition; in Botswana, it is two years. However, as will be discussed, whether international conventions can override these domestic legislative requirements will depend on the approach taken to such international agreements depending on whether the state is ‘monist’ or ‘dualist’ in its approach. Further, bi-lateral treaties can also override domestic laws where they specifically cater for an issue such as this e.g., the bi-lateral treaty on extradition between South Africa and Botswana, lowers this threshold to one year.

Other key requirements for extradition under the SADC Protocol and UNTOC and UNCAC include:

- **Dual criminality:** the offense in relation to which an extradition is requested must be a criminal offense in both the Requesting and the Requested State. Whilst the terminology used in the law books need not be identical, and the elements of the offense may differ in law, the conduct must be criminalized in both states.
 - All states examined have this requirement within their statutes.
- **The Rule of Specialty:** all parties to an extradition must undertake that any person extradited under the Protocol will only be prosecuted for the offense for which they were extradited (in simple terms, the fugitive’s extradition is protected against prosecution for any other type of crime in the Requesting State unless that criminal conduct occurs after he or she is extradited or where the Requested State consents).
 - All states examined have this requirement within their statutes.
- **Contents of a request:** the SADC Protocol sets out some of the requirements for a ‘letter of request’, unlike UNTOC and UNCAC. Essentially these include providing a full description of the person sought and information relevant to establishing the person’s identity, nationality and location, a text of the relevant law creating the offense, a summary of the conduct concerned, and any other relevant certified copy of any judgment or relevant document. Where an accused has been convicted in his or her absence, a statement confirming the legal means available to the person or to seek a retrial must also be included.
 - All states examined have these requirements in their statutes.
- **Communications:** The SADC Protocol on extradition provides for communication in writing and through diplomatic channels via the relevant Ministry or other appointed authority.
 - All states examined have this requirement within their statutes, appointing a ‘central authority’ as the main receptacle for such requests. This may be a Minister of Justice, or an Attorney General. Communication and requests for further information, if not set out explicitly in the laws,

are implied and in practice, there is no bar. However, as will be discussed in the main recommendations, transmissions of requests and communications (both for extradition and MLA) still rely on hard copy transmission, often via diplomatic missions. Digital transmission is not the norm.

- **Prosecution in the Requested State where extradition is refused:** Under the SADC protocol and the UNTOC/UNCAC, a Requesting State can ask the Requested State to prosecute an offender where extradition is refused. This path is limited to where refusal is based on nationality under all of these agreements and under the SADC Protocol an additional ground for such a request is based on where refusal is grounded in a concern over the death penalty.
 - The only states that provide for prosecution in the event of a refusal to extradite, were Angola, Botswana, Mozambique, and Namibia, and in all four jurisdictions, these requests to prosecute could be made where extradition is refused on any ground.

- **The process by which extradition occurs within a state involves two stages:** First an administrative stage – where the request is received by the central authority who will consider if the basic requirements are met; this is then followed by a judicial stage where a court of law will examine the request, consider any grounds for refusal submitted by the defense, hear submissions, and make a decision. The process for extradition is not catered for within any of the international conventions considered; accordingly, the processes and timelines e.g., for service of documents, do differ from state to state. Trying to align those processes would be a herculean task and is not recommended.

- **Time limits for surrender:** The SADC Protocol provides that once extradition is ordered, the surrender of a fugitive must take place ‘without undue delay’.
 - All states examined have different time limits within which surrender of the fugitive must be made or the case will be discharged, and the fugitive freed.

- **Grounds for refusal:** The SADC Protocol makes provision for mandatory and discretionary grounds for refusal. The UN Conventions are not so prescriptive but do refer to member states having the right to refuse where there is reason to believe that extradition is sought to prosecute or punish someone on grounds of their sex, race, religion, nationality, ethnic origin, or political opinions.
 - All states examined have different grounds for refusal on their statute books. Grounds for refusal that might be listed as mandatory under the SADC protocol, might be discretionary under domestic laws and vice versa. However, across all jurisdictions, the power to seek arrangements with assurances concerning grounds of refusal is afforded to all member states. Accordingly, whilst a ground for refusal might be mandatory e.g., whilst an Angolan national cannot be extradited, in practice, assurances can be sought and mechanisms imposed to meet these objections e.g., observation of the trial in the Requested State, by an Angolan official, with agreement to return the fugitive to serve any sentence upon conviction, can be a means to overcome this ground for refusal.

- **Other key aspects of the SADC Protocol:** these are illustrated below and compared with the domestic laws.

	ANGOLA	BOTSWANA	MALAWI	MOZAMBIQUE	NAMIBIA	SOUTH AFRICA	ZAMBIA	ZIMBABWE
Provisions for ‘fast track’ extradition where accused consents.	✓ Art 41*	✓ s18	✗	✓ Art 36	✗	✗	✗	✓ s6
Provisions for transit of prisoners through the State.	✓ Art 44	✓ s22	✗	✓ Art 38	✓ s24	✗	✓ s58	✓ s23/s10
Provisions to handle concurrent requests.	✓ Art 38	✓ s23	✗	✓ Art 18	✓ s19	✗	✓ s44	✓ Ss9
Provisional arrest provisions (i.e., on the basis of information only).	✓ Art 30	✓ s11	✓ s17	✓ Art 58	✓ s11	✓ s5 & s8	✓ s9	✓ s12

- As the table illustrates, most of the states examined do comply with the majority of the provisions under the SADC Protocol on Extradition with the notable exceptions of Malawi and South Africa in particular.

On Mutual Legal Assistance

Mutual Legal Assistance (MLA) is the formal process by which countries can share information and evidence, and otherwise cooperate in the investigation and prosecution of crimes. The SADC Protocol on Mutual Legal Assistance was signed in 2002 by fourteen member states; UNTOC and UNCAC also call for member states to cooperate. Key requirements for MLA under these international agreements include:

- **Contents of the request:** In essence, a Requesting State must provide as much information as possible in order to help the Requested State do what is necessary to assist; e.g., for obtaining a statement from a witness in the Requested State, providing as much information to enable the identification and location of said witness.
 - Legislation across all member states make provision for contents of request that largely mirror the basic requirements under the SADC Protocol on MLA.
- **Communication of requests:** Under the SADC Protocol this takes place via the central authority who can communicate directly with one another or through other means such as diplomatic channels or through INTERPOL.
 - All states examined make provision in their laws for a central authority to receive and make such requests.
- **Types of assistance:** All international conventions make provision for certain types of MLA such as search warrants, service of documents and so on. This is not an exhaustive list.
 - All states examined make express provision for certain types of MLA within their domestic legislation. These types of MLA do differ from state to state and do differ from those explicitly catered for within UNTOC, UNCAC and the SADC Protocol. However, all states have provisions that allow for any other type of assistance not catered for in the legislation, enabling states to come to an arrangement for such provision. However, the lack of laws, policy and/or guidance on certain investigative measures may limit their ability to actually deliver on certain types of assistance.

On Wildlife Crime

Not all of the states examined have wildlife crimes that qualify as 'serious crimes' (i.e., at least four years imprisonment) under UNTOC. However, all of the states considered have wildlife crime provisions that qualify as 'extraditable offenses' under their domestic laws and/or under the SADC protocols. Accordingly, international cooperation across the states examined is possible in the context of the serious types of wildlife crimes, even if the maximum or minimum sentences upon conviction, differ.

Recommendations

For Extradition and MLA

1. Domestication of the SADC protocols either through amendment of the domestic laws or through gazettment or presidential order (depending on the mechanisms afforded for approval of international agreements) would be the fastest way to overcome some of the obstacles presented by the differences between domestic laws and the SADC protocols; e.g., the minimum terms required for an extraditable offense of 12 months' imprisonment under the SADC Protocol on Extradition would enable countries like Botswana to cooperate with her SADC neighbors; the SADC protocol also makes provision to provide assurances to overcome certain grounds of refusal. This is not afforded under the domestic laws of, for example, Botswana. The option of prosecution within a country where extradition is refused on certain grounds would also then be an option across all member states.

2. Support the digital transmission of requests. Angola and Mozambique provide for digital transmission of requests under their domestic laws governing international cooperation. Zimbabwe has passed a statutory instrument allowing for digital transmission of international requests. However, if their requesting or requested state don't hold this allowance, these provisions can have little effect in practice. The practice of submitting requests in hard copy inevitably entails delay in the transmission and communication between central authorities with requests sometimes languishing in a diplomatic mission for months.⁴ All laws make provision for the ministry concerned to pass regulations concerning extradition. Support to ministries to enable digital transmission with the required security (to be determined) should be advanced.

⁴ Example given during interview with the Head of Asset Recovery, Mutual Legal Assistance and Extradition in the National Prosecution Authority. See section on 'Zimbabwe'.

3. Language and translation issues was also raised as a concern in discussion with stakeholders. There is a limited number of experts within the region who can conduct legal translation and the expense can be prohibitive for some e.g., Zimbabwe. Within SADC as a whole, French and Portuguese may pose difficulty with their English-speaking neighbors, and further afield, Vietnamese, Mandarin, Cantonese, and more pose significant challenges. Identification of a pool of legal translators could be conducted with donor support. Allocation of funding e.g., through dialogue with parliamentarians to assign resources from national treasury or for donor support to the SADC Secretariat to create such a fund would be highly desirable.

4. Political reasons as a ground for refusal. Refusal of MLA and extradition is allowed in relation to offenses seen as politically motivated. Whilst none of the countries examined thought that political interference had hampered their execution of requests, it is recommended that certain categories of offenses be expressly rendered as ineligible for the political offense exclusion, for example, offenses referred to in multi-lateral agreements (such as terrorism, organized crime, or corruption), as well as specified categories of offenses such as murder, sexual assault and offenses concerning CITES protected species.

5. Deployment of liaison officers. Delay in general is a complex issue. The problem with transmission is covered above but differences in legal systems, judicial processes, and a lack of understanding, despite the best efforts of donor-led training events, still give rise to delay. Deployment of liaison officers – as have been used in Europe – can provide an effective measure to minimize delay and smooth the execution of requests through early resolution of disputes or queries. Existing program such as Eurojust can provide a model for such an initiative to be executed under SADC. Cost-benefit analysis for each of the SADC countries would have to be undertaken. If coupled with a SADC Arrest Warrant (akin to the European Arrest Warrant⁵ which simplified surrender as if the parties were one jurisdiction, and instead of being handled by the Executive, they are handled entirely by the prosecution and judicial authorities) the ease of cooperation between SADC countries would be eased significantly.

6. Dialogue with stakeholders is necessary to raise awareness of the law and procedure in both extradition and MLA applications. For example, in Namibia, two magistrates in Windhoek have handled nearly all requests for the last 15 years – but there is no succession plan. Key topics to cover should include:

- Standard of proof required at extradition hearings: many magistrates (according to the interviews conducted) do not always understand the required standard of proof at extradition hearings (balance of probabilities as opposed to ‘beyond reasonable doubt’).
- Bailing of fugitives in extradition hearings is allowed in all jurisdictions. Competent authorities should be made aware of the need to come fully prepared to oppose bail at the earliest opportunity; a practice direction issued by the judicial authorities relating to bail in the context of extradition should be explored with a view to potentially raising a presumption against bail in this narrow context.
- Competent authorities (particularly police and wildlife authorities) should be engaged on the importance of MLA and the types of assistance they can provide. Particular focus should lie on statement writing in line with MLA and extradition legislative requirements.

Extradition-specific Recommendations

7. Further specific compliance with the SADC protocol in Malawi, Namibia, South Africa, and Zambia. From the table above, these states lack provision to cater for fast-track extradition procedures where the accused consents, transit of prisoners through the state, and the handling of concurrent requests. In summary:

- Malawi’s legislation needs a complete overhaul; its legislative framework limits its cooperation to mainly commonwealth states (or designated states) and for extradition, to certain offenses. Although Malawi has shown willingness to work around these limitations (extradition law dates back to 1972) the legislation is vulnerable wherever defense contest proceedings.
- Namibia: Having amended her Extradition Act in 2018, a proposal for a further amendment can be made to the Ministry responsible to include provision for a fast-track mechanism where the accused consents.
- South Africa is currently reviewing its legal framework. Engagement to address the issue of fast-track resolution of extradition requests and handling of transiting prisoners and concurrent requests, should be made as soon as possible.
- Zambia’s extradition act dates back to 1983, although is still largely compliant with the SADC Protocol on extradition. Enabling Zambia to deliver on a mechanism for fast track would enable her to align more fully that protocol.

8. Enabling the provision for a ‘sufficiency of evidence’ certificate from the prosecuting authorities of a member states would further accelerate extradition processes by removing the need for a full evidential hearing. This would require an amendment to the laws of all jurisdictions examined and should be explored with the relevant ministries.

⁵ Introduced in 2002 by the Council of the European Union.

9. Removing the bar on extradition of nationals across SADC would be desirable. Whilst prosecution in a Requested State may be an alternative, it does present difficulties in terms of securing witness attendance and exhibits for the purposes of a trial (and all the uncertainties that may present in terms of adjournments etc.) in the Requested State.

10. Requests for prosecution where extradition is refused is afforded under the SADC protocols and recommended under UNTOC and UNCAC in certain circumstances. However, jurisdictional issues may arise where this course is pursued – generally speaking, criminal courts will only have jurisdiction over crimes committed within the territory and sometimes, over crimes are committed abroad by their own nationals. Domestic legislation governing jurisdiction over criminal matters should be scoped in order to determine exactly how this approach can be applied in practice in each country e.g., some countries may have laws enabling extra-territorial jurisdiction for certain offenses, akin to the ‘Lacey Act’ provisions in the United States.

MLA-specific Recommendations

11. Development of a framework for controlled delivery across SADC. Agreements and arrangements can be reached between Requesting and Requested States to enable types of assistance not envisaged by the legislative drafters. However, the absence of laws e.g., on cybercrime or intercept, may make execution of such requests very challenging. Certain types of assistance would be particularly useful in the context of wildlife crime and the porous borders within SADC. Controlled delivery as an investigative technique is specifically catered for under the legislation for Angola and Mozambique and is not precluded from any other state examined in this study. However, no guidance exists in any of the states examined regarding how controlled delivery could be executed and how the results might be admissible. It is recommended that a SADC-focused guidance on controlled delivery be explored -with particular input from prosecution authorities) to bring this form of MLA to bear on wildlife trafficking investigations.

12. Identify other priority investigative techniques relevant to cross-border investigations. Consultation with key stakeholders e.g., the Blue Rhino team in Namibia who are tasked with investigating, among others, crimes against protected species should be undertaken.

Angola



Angola

In summary: Angola has a sound legal framework for conducting mutual legal assistance and extradition proceedings. Her challenge is essentially one of capacity and resources to execute requests for mutual legal assistance, and the location and extradition of accused persons, particularly given the time limits set by statute. Angola does have a bar on the extradition of Angolan nationals but will allow a Requesting State to submit a request (and the evidence) for consideration of a prosecution within its borders⁶ and assurances/ agreement may also be explored. Again, the efficacy of this is dependent on Angola's actual capacity that, after so many years of conflict, is still emerging.

In relation to wildlife crime, much of her offenses under statute amount to little more than 'administrative matters' under Angolan law. The new penal code passed in late 2020, however, does appear to elevate all penalties relating to crimes against wildlife that 'create a danger of extinction', now qualifying them for MLA and extradition under her national laws. Challenges may arise, however, in terms of establishing the precise conduct required to establish dual criminality for the purposes of extradition.

General Legal Framework for International Cooperation

1. Angola is party to a number of international agreements directly and indirectly concerned with mutual legal assistance (MLA) and extradition. Angola has a civil law system, and it is widely accepted that such systems are monist in their approach to international agreements. The Angolan Constitution provides in Article 21(1) that 'the fundamental rights provided for in the present (Angolan) Law shall not exclude others stemming from the laws and applicable rules of international law'. In an attempt to resolve any doubt on the application of international agreements to issues of judicial cooperation, the Law on International Judicial Cooperation in Criminal Matters (IJCCM) states at article 4 that

⁶ Article 76 of the IJCCM

judicial cooperation in penal matters will be governed by the norms arising from international treaties which bind the Angolan State, and those norms shall effectively address any insufficiency of this particular law.

2. Accordingly, the SADC Protocols on Extradition and Mutual Legal Assistance and the United Nations Conventions on Organized Crime and Corruption can be applied in determining matters of mutual legal assistance and extradition. However, where there is a conflict between the domestic legislation and international agreements, the domestic law will prevail, particularly in regard to the procedures to be adopted.⁷

3. The following are considered the most relevant agreements regarding MLA and extradition in Angola:

Domestic Legislation

Law on International Judicial Cooperation in Criminal Matters Act 13/15 (IJCCM)⁸.

International Agreements on Mutual Legal Assistance and Extradition

- SADC Protocol on Mutual Legal Assistance in Criminal Matters 2002.
- SADC Protocol on Extradition 2002.
- Convention on Mutual Assistance in Criminal Matters between State Members of the Community of Portuguese-Speaking Countries.
- The United Nations Convention Against Transnational Organized Crime signed in 2000.
- The United Nations Convention Against Corruption signed in 2003.

Relevant Bilateral Treaties in Southern Africa

Angola does not have any bilateral treaties signed with SADC partners.

Angola and Southern Africa – Legal Basis for Extradition

4 For the purposes of extradition with her southern African neighbors, the Law on International Judicial Cooperation in Criminal Matters of 2015⁹ states that an extraditable offense must carry a term of imprisonment of at least three years. It further demands dual criminality based on the alleged conduct of the accused, as well as a guarantee of reciprocity¹⁰. However, at Article 4, it explicitly states:

‘Judicial cooperation...is governed by norms arising from international treaties under the Law on International Treaties, which bind the Angolan State and, in their absence or insufficiency, by the provisions of this law’ (sic).

5 In other words, the SADC protocols can be used as a basis of request for both extradition and mutual legal assistance, as may the UN Conventions. Within SADC, this will apply to: *The Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia, and Zimbabwe*. Only where there are lacunae within the Protocols (or the UN Conventions for example), will the domestic law prevail.

6 Whilst the SADC Protocol on Extradition and the domestic law set out similar requirements relating to the contents of any such request, the domestic law contains strict limits and processes that must then be followed upon receipt. Ultimately, proceedings can be delayed significantly from the point at which a decision to extradite is appealed by an accused person. The time limits on detention are clear (e.g., six months from the date an appeal is lodged) and in practice, an accused may be granted bail whilst extradition proceedings or appeal may continue.

7 The Central Authority may reject requests outright, based on a paper assessment – there is no appeal against this outcome. Therefore, political considerations may need to be considered carefully before making any application and informal discussion had with the authorities to anticipate and address any potential concerns before making the application.

8 Angolan nationals cannot be extradited under Angolan law. There are other grounds of refusal (see below). However, it is possible to seek prosecution of such persons within Angola through submission of the necessary evidence to the Office of the Prosecutor General via the Central Authority under Article 76 of the Act. Furthermore,

⁷ Discussion with Senior Prosecutor in the Office of the Prosecutor General, Andre de Brito; and Senior Attorney in the Office of the Attorney General (Central Authority) April, June, and July 2020.

⁸ The translation used for the purposes of this analysis is an unofficial analysis and so may contain errors.

⁹ Note that an unofficial English translation of the law was used for the purposes of this study.

¹⁰ See sections 5 and 6 of the IJCCM.

assurances and agreement may be obtained to circumvent this objection e.g., by allowing an Angolan official to observe the trial and an agreement to return the accused to Angola to serve any sentence¹¹. However, it is the Central Authority that makes this decision and not the prosecution service.

Process for Extradition Requests: Angola in Comparison to the SADC Protocol on Extradition

SADC PROTOCOL	IJCCM
<p>Contents of a Request for Extradition: Art 6:</p> <ul style="list-style-type: none"> ■ In writing and translated into the language of the Requested State, in this case Portuguese. ■ Accurate description of accused and information on location. ■ Text of the applicable law. ■ Statement of penalty likely to be imposed (or if convicted, either a certified copy of the judgement and sentence imposed or if not sentenced, a statement affirming the sentence likely to be imposed). ■ Statement of facts relating to the commission of the offense, including time and place. ■ Warrant of arrest issued by the competent authority and duly authenticated. ■ If convicted in absence, a statement as to the legal means to defense/have the case re-tried. 	<p>Contents of Request – Chapter III.</p> <p>The same requirements as SADC with an additional element regarding explicit assurances on costs of execution. Requesting States should advisedly enclose a copy of the SADC protocol, also translated into Portuguese, with the relevant sections highlighted. Upon receipt of the request for extradition, there are two processes to be followed:¹²</p> <p>Step 1: Administrative Phase</p> <p>Upon receipt, the Central Authority will check the request for ‘regularity’ before sending to the Ministry responsible within 20 days. Upon receipt by the Ministry, a ‘paper based’ assessment is conducted to determine if there are any grounds for immediate dismissal. If not, the matter is returned to the Central Authority who will notify the State Prosecutors for the Court of Appeal within 10 days.</p> <p>Step 2A: Judicial Phase</p> <p>Upon a receipt, a judge will assess the application and make a decision within 20 days. He will pass this to his assistant judges who have another 10 days to make any observations. After this period, a warrant for arrest will be issued.</p> <p>Step 2B: Judicial Hearing post-arrest</p> <p>Upon arrest, there will be a hearing at the Court of Appeal at which the defendant can be represented and, if he/she so wishes, call up to 10 witnesses. This can significantly delay an extradition. This hearing can be averted if the accused consents to the extradition i.e., there is a fast-track option available.</p> <p>The Court of Appeal must make its decision within 90 days. This can be extended by another 30 days¹³.</p> <p>The accused then has a power to appeal that must be exercised within 10 days of the decision of the Court of Appeal. If an appeal is submitted, the accused can be detained for a further six months from the date the appeal is lodged¹⁴. He may also apply for bail.</p>
<p>Provisional Warrants for Arrest: (i.e., on the basis of information only) can be issued both under the SADC protocol. However; once arrested, the Requesting State MUST follow up with the original warrant of arrest and other information as required for extradition within 30 days, however.</p>	<p>Provisional Warrants for Arrest: can be requested but the full and formal request must be received within 18 days up to a maximum of 40 days. Accordingly, the Requesting State must not delay in putting the papers together. INTERPOL can be used to transmit urgent requests (Art.30).</p>
<p>Time limit for surrender: the SADC protocol on extradition states that surrender must occur without ‘undue delay’. However, the prescriptive nature of the time limits contained within the domestic laws are likely to be observed where there is less clarity contained within international agreements.</p>	<p>Time limit for surrender: if no transfer occurs on the date set for surrender, the accused will be released after 20 days. This can be extended by a further 10 days. Once this limit has expired, no further extradition requests will be entertained in relation to the same matter¹⁵.</p>

¹¹ Discussion with Head of International Cooperation, Office of the Prosecutor General, Angola.

¹² Section 47 IJCCM

¹³ Section 53 IJCCM.

¹⁴ Ibid 4.

¹⁵ Section 62

Angola: Mandatory Grounds for Refusal of Extradition *(Italics highlight differences).*

SADC ARTICLE 4 - <i>Political nature of offense.</i>	ANGOLA CHAPTER II AND ART 33
<ul style="list-style-type: none"> ■ Purpose is based on political opinion, race, religion, ethnicity, sex, or status. ■ The offense is a military law offense. ■ Final judgment has already been rendered in respect of the offense in question. ■ Immunity from prosecution or punishment due to lapse of time or amnesty or any other reason. ■ Risk of torture or inhuman treatment or punishment. ■ Where judgment in the Requesting State has been rendered in absentia with no notice and no opportunity for the accused to have a retrial in his presence. 	<ul style="list-style-type: none"> ■ Political nature of offense. ■ Purpose is based on political opinion, race, religion, ethnicity, sex, nationality, or status. ■ The offense is a military law offense. ■ Final judgment has already been rendered/proceedings are closed in respect of the offense in question. ■ Risk of torture or inhuman treatment or punishment. ■ <i>The accused is an Angolan national.</i> ■ <i>The crime was committed in Angola.</i> ■ <i>The offense may lead to trial by an 'extraordinary court' or the punishment applicable is indefinite.</i> ■ <i>The offense is punishable by death.</i> ■ <i>The request breaches international treaties.</i> ■ <i>Rule of speciality unless guarantees are given or treaty overrides.</i> ■ <i>The absence of a guarantee of reciprocity.</i>

Angola: Discretionary Grounds for Refusal of Extradition

SADC ARTICLE 5	ANGOLA
<ul style="list-style-type: none"> ■ Where the accused is a national of the Requested State. <i>(Mandatory ground for refusal in Angola).</i> ■ Prosecution is already pending in the Requesting State. The offense carries the death penalty unless assurance is given that it shall not be imposed. <i>(Mandatory ground for refusal in Angola).</i> ■ The offense was committed outside of the jurisdiction of either State and the Requested State has no jurisdiction in comparable circumstances. ■ Where the offense was committed in Angola. <i>(Mandatory ground for refusal in Angola).</i> ■ The request is incompatible with humanitarian considerations e.g., health, age of that person. 	<ul style="list-style-type: none"> ■ Trivial nature of the offense such as the offense being punishable with less than imprisonment of less than three years or a fine of less than two million Kwanzas. <i>However, SADC will take precedence (1- year requirement) – see Article 32.</i> ■ Proceedings are already pending, or the case could be prosecuted in Angola for that offense. ■ Where there may be severe consequences for the accused in respect of age, health, or other personal reason. ■ Accused is already serving a sentence or facing prosecution in respect of other offenses (extradition may be delayed rather than refused). ■ Absence of any agreement on re-extradition unless a treaty overrides this requirement.

9. In all cases, where extradition is denied¹⁶, the Requesting State can ask the Angolan authorities to prosecute the case instead¹⁷.

Angola and Southern Africa – Legal Basis for Mutual Legal Assistance

10. The same domestic law applies to requests for mutual legal assistance – and so does the same principle in relation to the application of international agreements. Again, request for MLA may be rejected on the grounds that they are of 'minor importance' i.e., carrying less than three years imprisonment or under the prescribed level of fine, but as described above, where an international convention lowers that requirement, that convention (or protocol or agreement) will prevail.

¹⁶ Where refused on the basis of it being a military offense, special agreements can be reached under Art. 33 IJCCM

¹⁷ Article 76 IJCCM

Process for Mutual Legal Assistance Requests: Angola

SADC PROTOCOL ON MLA ARTICLE 5

IJCCM

Contents of a Letter of Request Article 5

- Name of the authority to which the request relates.
- Description of the investigation, prosecution or proceedings including a summary of the facts and a copy of the applicable law.
- Purpose of the request and the type of assistance sought.
- Degree of confidentiality required and the reasons therefor.
- Details of any particular procedure or requirement to be followed and the reasons therefor.
- Any time limit for execution.
- For requests re: taking of evidence, search and seizure, matters pertaining to proceeds of crime, a statement indicating the basis of belief that the evidence or proceeds are in the Requested State.
- In the case of request for evidence from a person, indication of procedure (e.g., on oath? affirmation?) and the subject matter sought.
- For transfer of exhibits, the location in the Requested State and an indication of where the exhibit will go, in whose custody and what, if any test will be conducted and the date of anticipated return to the Requested State.
- For availability of detained person, the place to which the person will be transferred and date of return.

Contents of a Letter of Request (LOR) Art. 24

The same requirements as SADC with an additional element regarding assurances on costs of execution. Requesting States should advisedly enclose a copy of the SADC protocol, also translated into Portuguese, with the relevant sections highlighted. For requests regarding the taking of evidence, search and seizure, matters pertaining to proceeds of crime etc. the information required in the request is the same as those contained in the SADC Protocol. For transfer of exhibits or voluntary attendance of witnesses abroad, the nexus between the evidence to be given and the offense allegedly committed must be addressed in the LOR.

For Cross Border Controlled Deliveries

(Art. 160), the offense in question must be one that could form the basis of an extradition request. The Requesting State must send copies of its legislation setting out the sanctions available and further guarantees regarding the security of the assets in question. There must be an agreement/assurance that information regarding the operation shall be communicated to the authorities in Angola.

Joint Investigation Teams (Art. 142) can be created for complex investigation that has ‘implications’ for Angola or another State. Such assistance would enable the secondment of an officer from the Requesting State to an Angolan investigative body with the authority of the Minister responsible. The LOR must establish the legal authority for such a venture under the laws of the Requesting State alongside details of the assistance requested and assurances on civil liability for damages caused by any officer in the course of this investigation.

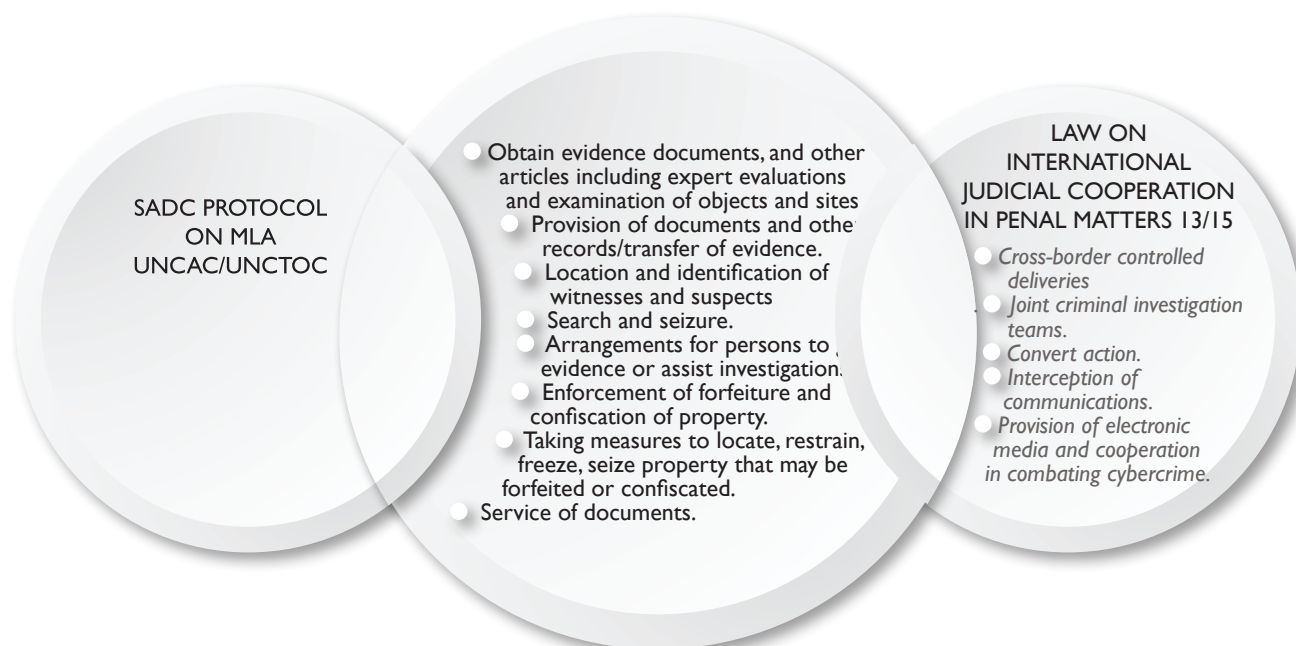
Covert Operations (Art. 161) can be authorized by the Public Prosecutors Office.

Intercept (Art. 162) can be authorized on the basis of a formal agreement or treaty or convention. Again, as much identifying information must be contained within the LOR.

Request for Electronic Media and Cooperation in relation to Cybercrime Art. 167, 169 and 172). Again, as much information must be provided to identify the material in question and the use to which the information will be put. Guarantees for personal data protection must be included.

II Angola’s scope of prescribed forms of mutual legal assistance is wider than her neighbors’, explicitly allowing for assistance such as covert surveillance, joint investigations, and controlled deliveries. Below, the types of assistance are identified under her domestic laws and those of the most relevant international conventions. However, other types of assistance that aren’t catered for explicitly, are not precluded under section 141.

Mutual Legal Assistance in Angola: Types of Assistance



Grounds for Refusal of Mutual Legal Assistance in Angola

12. The SADC Protocol on Mutual Legal Assistance only offers discretionary grounds for refusal. It is likely that where there is a conflict e.g., where Angola is of the view that the request is politically motivated and therefore, she ‘shall’ reject the request vs. the SADC protocol approach that would say that she ‘may’ reject the request, these differences are likely to have little impact in practice given the power to come to agreement and seek assurances on a case-by-case basis.

13. What is of import is to note the additional grounds for refusal in comparison to just four contained in the SADC protocol, and where possible, Requesting States should anticipate those additional grounds and cater for them in any request.

SADC ARTICLE 6 DISCRETIONARY GROUNDS ONLY

- The offense is a political offense or an offense of a political character.
- The offense is an offense under military law, not criminal law.
- That execution of the request would impair its sovereignty, security, public order, public interest or prejudice the safety of any person.
- The request is not made ‘in conformity’ with the Protocol itself.

ANGOLA: MANDATORY GROUNDS

- The request does not satisfy or respect the requirements of international treaties applicable.
- The absence of dual criminality.
- The absence of reciprocity.
- There are grounds to believe that cooperation is requested to punish a person on grounds of nationality, ethnicity, race, sex, language, religion, political, ideological convictions, education, economic or social conditions or by virtue of membership of a specific social group.
- The request is a military offense and not a criminal one.
- The offense is punishable by death, torture, or other inhumane treatment.
- The offense may lead to trial by an ‘extraordinary court’ or the punishment applicable is indefinite.
- The case has been concluded in Angola or another country or the proceedings are closed for any other reason (Requesting State can seek sentence review).

ANGOLA: DISCRETIONARY GROUNDS

- The offense is of ‘minor importance’ i.e., less than three years or where the maximum fine is two million kwanzas (*but SADC protocol will override this*).
- Where the request may imply severe consequences for the person in question due to their age, health status or other personal reasons.

Angola: Wildlife Laws and Qualification for Extradition and Mutual Legal Assistance with SADC Partners

Applicable Domestic Laws:

- Forest and Fauna Base Law 6/17 (FFB).
- Law on Combatting Money Laundering and Financing of Terrorism 34/11 (CMLFT).
- Presidential Decree 311/18, Regulation of Import and Export of Endangered Species of Wild.
- Fauna and Flora (CITES REGS).
- General Tax Code 21/14 (GTC).

The Law on Conservation 20/20 does not prescribe penalties for the relevant offenses. The Penal Code has been approved and appears to 'absorb' all relevant laws and regulations into one penalty-enhancing provision (though lower penalties will apply to 'agents' of up to two years imprisonment and/or a fine). The Law on Environment Crimes is in draft and if passed, its penalties may also qualify the relevant offenses therein for extradition and mutual legal assistance.

OFFENSES IN RELATION TO PROTECTED SPECIES	DOMESTIC LAW OFFENSES	PENALTY	QUALIFICATION UNDER DOMESTIC LAW ON MLA & EXTRADITION	QUALIFICATION UNDER SADC PROTOCOLS	QUALIFICATION UNDER UNCTOC (serious offense = 4 years or more).
HUNTING A PROTECTED SPECIES	FFB s163 (deemed 'administrative', not 'crimes')	Fine	No	No	No
	FFB s14(5)f) & s163 (as above). If without a qualification for hunting as well, see s167 (deemed 'administrative')	3 months or 90 days fine	No	No	No
	Penal Code 2020 s282	1 year to 5 years	Yes	Yes	Yes
	CMLFT s60	2 to 8 years	Yes	Yes	Yes
DEALING (SALE/ PURCHASE)	FFB s163 as read with s29 ('administrative')	Fine	No	No	No
	Penal Code 2020 s28	1 year to 5 years	Yes	Yes	Yes
	CMLFT s60	2 to 8 years	Yes	Yes	Yes
POSSESSION	FFB s163 as read with s29 ('administrative')	Fine	No	No	No
	Penal Code 2020 s282	1 year to 5 years	Yes	Yes	Yes
	CMLFT s60	2 to 8 years	Yes	Yes	Yes
IMPORT/ EXPORT/ RE-EXPORT	FFB s163 as read with s29. (deemed 'administrative')	Fine	No	No	No
	s36(1) CITES Regulations (deemed 'administrative' matters)	Fine	No	No	No
	GTC s186(1)(h) for Appendix I CITES. See s186(2) for elevation of penalty in limited circumstances	6 months to 3 years/fine	Yes	Yes	No
		1 year to 4 years /fine	Yes	Yes	Yes
	Penal Code 2020 s282	1 year to 5 years	Yes	Yes	Yes
CMLFT s60	2 to 8 years	Yes	Yes	Yes	

Key Challenges in Execution of Requests for MLA and Extradition

14. Capacity within the Office of the Attorney General (the Central Authority for the purposes of international cooperation) and the Office of the Prosecutor General (OPG) (the competent authority for execution of such requests) is still being built with a relatively small cohort of lawyers within the OPG and over 500 prosecutors distributed across nine provinces. There are plans to increase this number to over 1,200 in the coming years¹⁸. However, the process, time limits and involvement of the Court of Appeal, based in Luanda and numbering just 11 judges, and the lack of resources available to investigative authorities within Angola, is cited as the main challenge to executing requests for MLA as well location of accused persons for the purposes of extradition¹⁹.

15. Angola's efforts to combat wildlife crime have accelerated in recent times with the approval in 2020 of a new penal code and a new Law on Conservation Areas, also approved in 2020. In assessing Angola's objective to harmonize those international and SADC regional agreements in relation to domestic legislation, the following key points are noted:

- On mutual legal assistance (MLA) and extradition, Angola's new penal code provisions now potentially enable the operation of domestic MLA and extradition legislation in regard to international cooperation by virtue of those offenses carrying up to five years' imprisonment. All other offenses under the regulations and the Forest and Fauna base law would be termed of 'minor importance'²⁰ for the purposes of MLA and extradition. However, the challenge may come in establishing 'dual criminality'. The penal code provision appears to 'absorb' all other laws and regulations without detailed prescription as to prohibited conduct. Leaving aside the legality of suddenly elevating administrative offenses to criminal offenses without the close scrutiny of Parliament, there may lie challenges ahead in terms of MLA extradition as regards identifying what conduct is actually prohibited under the new section 282 of the penal code which talks of 'creating a danger of extinction.....by violation of the precepts of the laws and regulations in force' (*sic*).
- In terms of giving effect to the principles of the United Nations Convention Against Transnational Organized Crime, the Penal Code now appears to qualify wildlife crimes as 'serious crimes' under the four-year penalty requirement under that convention.
- Anti-corruption offenses and their application to wildlife crimes are better aligned with the United Nations Convention Against Corruption, utilizing offenses contained in the proposed Criminal Penal Code and the Government Integrity Act; however, in practice, these are rarely utilized given the complexity of such investigations. For incoming applications framed in terms of corruption matters, Angola would potentially execute the request using UNCAC as a basis wherever the domestic law might fall short.
- In terms of bringing penalties for illegal taking of wildlife and illegal trade in wildlife and wildlife products to 'comparable levels' as required under the SADC Protocol on Wildlife Conservation and Law Enforcement²¹, Angola still lags slightly behind other SADC countries. For example, in comparing three SADC partners with Angola on offenses of export of a trophy of a protected species, namely ivory, the maximum penalty in Angola is still less than her neighbors. However, given the ultimate decision on sentence is made by the courts, the elevation of penalty to up to five years' imprisonment might be regarded as sufficient.

NAMIBIA:	Export of Controlled Wildlife Product e.g., ivory: Max is 25 years imprisonment and/or maximum fine of N\$25,000,000 ²² .
ZAMBIA:	Export of a protected animal or its trophy e.g., ivory 5 to 10 years imprisonment, no option of a fine ²³ .
ZIMBABWE:	Export of specially protected animals e.g., ivory: section 45 and section 128 Parks and Wildlife Act: Minimum 9 years imprisonment.
ANGOLA:	Export of a protected species: Criminalized under the Penal Code at 1 to 5 years and under the Tax Code: 6 months to 36 months and a fine of 2 to 4 times the value ²⁴ .

¹⁸ <https://www.einpresswire.com/article/472203996/attorney-general-announces-creation-of-asset-recovery-office>

¹⁹ *Ibid* 65

²⁰ Section 11 of the Law on International Judicial Cooperation in Criminal Matters 13/15

²¹ Article 6 SADC Protocol on Wildlife Conservation and Law Enforcement.

²² Section 4(1) of the Controlled Wildlife Products and Trade Act as amended in 2017.

²³ Section 130 of Zambia Wildlife Act 2006

²⁴ Article 186(1) (h) General Tax Code 21/14. If the species is of itself a result of smuggling, this may be elevated to up to 4 years and a larger fine under Article 186(2)

RECOMMENDATION 1: To conduct an assessment of Angola's current incoming 'load' on MLA and extradition requests and any obstacles to execution with a view to offering bespoke support and/or liaison opportunities with the Requesting States to alleviate some of the difficulties where possible e.g., meeting cost implications on translations/utilizing joint investigation provisions under the IJCCM.

RECOMMENDATION 2: To support on-going efforts to review and amend the proposed draft Law on Environmental Crimes and deconflict with the new Penal Code. Whilst the penalties may be more severe (anticipated as being up to 12 years), there are concerns regarding the drafting of offenses, the provision of investigative powers, and more that need to be addressed before it is passed. Further, to clarify with the authorities the exact conduct prohibited under the newly drafted section 282 of the Penal Code for the purposes of enabling MLA and extradition requests (incoming and outgoing) to proceed without challenge on the issue of dual criminality.

RECOMMENDATION 3: Given the explicit provision for controlled deliveries, joint investigative teams, covert surveillance etc. to engage with the relevant investigative bodies and the prosecution service to assess any existing protocols and develop, if needed, standard operating procedures to ensure compliance with national laws. This can be used to support the recommendation contained above regarding a SADC-wide framework for controlled deliveries in particular.

= Botswana



Botswana

In summary: Botswana has a sound legal framework for cooperation with her SADC partners. In relation to both MLA and extradition, the DPPs office is flexible and willing to extend assistance even where domestication of the SADC protocols has not taken place. This is partly because the amendments to both domestic laws, and the applicable treaties (see below), have adopted, to a large extent, the principles contained within both SADC protocols.

The grounds for refusal under both extradition and MLA applications are wider in scope under the domestic laws than those envisaged in the SADC protocols. Nevertheless, these are not extraordinary and will be familiar to any competent authority (usually the prosecution services) engaged in drafting outgoing letters of request. It is also clear that wildlife offenses are clearly matters upon which such requests can be made to Botswana; these are, however, few and far between. Where extradition is denied, a request for prosecution within Botswana can be made²⁵.

General Legal Framework for International Cooperation

1. Botswana is party to a number of international agreements directly and indirectly concerned with mutual legal assistance (MLA) and extradition. In addition, Botswana has recently amended her domestic laws on MLA and extradition and has entered into treaties concerning extradition and MLA treaties with some of her SADC neighbors.
2. However, Botswana is a dualist state. International conventions, protocols and treaties are not automatically binding unless passed by Statutory Instrument²⁶. Accordingly, the import of international agreements must be understood in this context.

²⁵ See section 8 as amended by the Extradition (amendment) Act 2018

²⁶ Attorney General vs. Dow [1992] B.L.R. 119-page 154 C

3. The following are considered the most relevant agreements regarding MLA and extradition in Botswana:

Domestic Legislation

- The Mutual Legal Assistance in Criminal Matters Act 1990 as amended in 2018 (MLACMA).
- The Extradition Act 1990 as amended in 2018.

International Agreements on Mutual Legal Assistance and Extradition

- SADC Protocol on Mutual Legal Assistance in Criminal Matters 2002 – *not domesticated*.
- SADC Protocol on Extradition 2002- *not domesticated*.
- The Commonwealth Scheme on Mutual Legal Assistance (the ‘Harare’ Scheme) 1966 – *not domesticated*.
- The Commonwealth Scheme on Extradition (the ‘London Scheme’) - *domesticated under the Extradition (Designated Commonwealth Countries) Order S.I. 93 1997*.
- The United Nations Convention Against Transnational Organized Crime signed in 2007 - *not domesticated*.
- The United Nations Convention Against Corruption signed in 2004 - *not domesticated*.

Relevant Bilateral Treaties in Southern Africa

- Extradition treaty with South Africa 1969, domesticated by Statutory Order 56 of 1969.
- Extradition and MLA treaty with South Africa 2016 – *not domesticated*.
- Extradition and MLA treaty with Zimbabwe 2019 – *not domesticated*.
- Extradition and MLA treaty with Namibia 2018 – *not domesticated*.
- Extradition and MLA treaty with Mozambique – *under negotiation*.

Botswana and Southern Africa – Legal Basis for Extradition

4. For the purposes of extradition with her southern African neighbors, the Extradition Act 1990 demands a two-year minimum term of imprisonment to qualify as an extraditable offense, and requires dual criminality based on the alleged conduct of the accused. Furthermore, there must be either:

- An ‘arrangement’ which includes treaties, protocols, conventions, or schemes²⁷, which would require the Minister to publish an order in the Gazette²⁸ to direct the application of the Extradition Act to that country or countries; or
- That the country is ‘designated’ by statutory order²⁹ (used to domesticate the London Scheme for example).

5. Under both sections 3 and 4 of the Extradition Act, the Minister can prescribe which crimes amount to ‘extraditable offenses’ thereby circumventing the domestic requirement of a minimum term of two years imprisonment to qualify as an ‘extraditable offense’. In practice, there are essentially three existing frameworks, by virtue of the Extradition Act 1990, that can be used to form the basis of such requests within southern Africa.

- The London Scheme on Extradition that has been domesticated³⁰. Here, an extraditable offense is one that carries at least two years imprisonment, and it overlaps with the following signatories to the SADC protocol on extradition:

Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia, and Zimbabwe.

- The SADC Protocol on Extradition. An extraditable offense is one that carries at least one-year imprisonment. Though not domesticated, this is effectively used as a ‘gentlemen’s agreement’ and has in fact guided the drafting of Botswana’s treaties with Namibia, South Africa, Zimbabwe, and Mozambique.
- The treaties with Namibia and Zimbabwe, though not yet formally in force, are used to informally guide extradition and MLA requests with these countries in any event. The treaty with South Africa of 1969 can be used as this is domesticated but the new draft that now includes MLA, is not. Under these treaties, like the SADC protocol, the minimum requirement for an extraditable offense is one of one-year imprisonment.

²⁷ See section 2(1) of the Extradition Act 1990

²⁸ See section 3 of the Extradition Act 1990

²⁹ See section 4 of the Extradition Act 1990

³⁰ S.I.93 of 1997 “Extradition (Designated Commonwealth Countries) Order.

RECOMMENDATION I: To support the authorities in Botswana to domesticate the SADC Protocols on Extradition and Mutual Legal Assistance by way of Statutory Instruments, as suggested by the head of international cooperation within the prosecution service. This is not a matter of complex drafting and given that all but two of the SADC signatories are already party to an 'arrangement' under the domestic laws, this should not pose significant challenges in principle. Angola and DRC being regarded as monist states³¹ would honor SADC as a basis for extradition with Botswana, for example. This should be reciprocated by Botswana through the domestication of the SADC Protocols. There is a parliamentary environmental caucus in Botswana established by the ICCF Group (USA). They should be engaged once agreement to such a move is reached with the Ministry.

Process for Extradition Requests: Botswana in Comparison to the SADC Protocol on Extradition

SADC PROTOCOL ARTICLE 6

Contents of a Request for Extradition: Art 6:

- In writing and translated into the language of the Requested State.
- Accurate description of accused and information on location.
- Text of the applicable law.
- Statement of penalty likely to be imposed (or if convicted, either a certified copy of the judgement and sentence imposed or if not sentenced, a statement affirming the sentence likely to be imposed).
- Statement of facts relating to the commission of the offense, including time and place.
- Warrant of arrest issued by the competent authority and duly authenticated.
- If convicted in absence, a statement as to the legal means to defense/have the case re-tried.

EXTRADITION ACT 1990 - PART III

- In writing and translated into English.
- Accurate description of the accused, identity, nationality.
- Text of the applicable law including powers of sentencing.
- The original or certified copy of any document or process issued in the requesting country e.g., the judgment if convicted, including a certified/authenticated copy of the warrant of arrest.

Normal process s14
Depositions, statement on oath or affirmation and any other 'evidence' that would be admissible in order to justify committal for trial under the laws of Botswana. will be assessed by the i.e., a prima facie case must be established³².

Special process' s16
Summary of facts & 'abstract' of evidence certified copies of exhibits and i) a statement from the person who prepared the record of the case and that the evidence has been preserved for use in court (oath/ affirmation) must be established.

AND

This process can be waived by the accused.

ii) a certificate from the AG or equivalent, that the evidence is 'sufficient' to be tried in his/her courts.

The 'special process' is reserved for countries with which there has been an arrangement e.g., the commonwealth designated countries or where the treaty itself enables this shortened process where admissibility of evidence is not considered by the magistrate. Otherwise, the case effectively requires evidence to be submitted (certified copies are possible) provided the laws of Botswana would consider them admissible for the purposes of preparatory examination under the rules and norms of Botswana criminal law.

Cont.

³¹ Legal reception in the AU against the backdrop of the monist/dualist dichotomy, Michelle Barnard, the Comparative and International Law Journal of Southern Africa vol. 47 No.1 March 2015

³² Republic of Namibia vs. Alfred and Others 2004 BLR 101 (CA) established the need for a prima facie case.

SADC PROTOCOL ARTICLE 6

Provisional Warrants for Arrest (i.e., on the basis of information only) can be issued both under the SADC protocol and the Extradition Act 1990. However, once arrested, the Requesting State MUST follow up with the original warrant of arrest and other information as required for extradition ‘within *such time as the magistrate thinks reasonable in the circumstances*’ – s11 of the Extradition Act 1990. The SADC Protocol gives 30 days, however. In order to avoid a release based on the discretion of the magistrate that may be exercised in less than 30 days, for urgent applications to Botswana, the Requesting State must not delay in assembling the required documents³³.

Time limit for surrender: SADC Protocol states ‘without undue delay’. Extradition Act 1990 Part IV gives 15 days from decision on committal or appeal outcome and a maximum of two months in total.

EXTRADITION ACT 1990 - PART III

Provisional Warrants for Arrest
See column under SADC Protocol Article 6.

Time limit for surrender: Extradition Act 1990 Part IV gives 15 days from decision on committal or appeal outcome and a maximum of two months in total.

Botswana: Mandatory Grounds for Refusal of Extradition (*Italics highlight differences*).

Where extradition is denied, the Requesting State can submit the papers to the DPP to consider prosecution in Botswana. However, jurisdictional issues may arise, discussed in the executive summary.

SADC ARTICLE 4 - *Political nature of offense.*

- Purpose is based on political opinion, race, religion, *ethnicity, sex, or status*.
- The offense is a military law offense.
- Final judgment has already been rendered in respect of the offense in question.
- Immunity from prosecution or punishment due to lapse of time or amnesty or any other reason.
- Risk of torture or inhuman treatment or punishment.
- Where judgment in the Requesting State has been rendered in absentia with no notice and no opportunity for the accused to have a retrial in his presence.

BOTSWANA SECTION 7

- Political nature of offense.
- Risk of prejudice to accused on account of his political opinions.
- The offense is a military law offense.
- Final judgment has already been rendered in respect of the offense in question.
- *Absence of agreement re: rule of specialty.*
- *The fugitive is a Botswana national, not of dual nationality and no assurance of reciprocity is given.*
- *The offense is punishable by death in the Requesting State but not in Botswana unless assurances given.*
- *The accused is facing other proceedings and so shall not be extradited until proceedings are concluded (unless President otherwise directs).*
- *The extradition would breach any other existing international agreement.*

Botswana: Discretionary Grounds for Refusal of Extradition

6. Whereas the SADC protocol also identifies a number of discretionary grounds for refusal under Article 6, under the domestic laws of Botswana, these are essentially confined to:

- Where the magistrates consider the offense as being ‘trivial’; or
- Where the proceedings are considered to not have been made in good faith in the interests of justice or where in all the circumstances of the case, it would be unjust, oppressive or lead to too severe a punishment (s9 Extradition Act 1990).

Botswana and Southern Africa – Legal Basis for Mutual Legal Assistance

7. For the purposes of mutual legal assistance, the Mutual Legal Assistance in Criminal Matters Act 1990 as amended in 2018 is the primary source. MLA must be on the basis of an ‘arrangement’³⁴ and, as with an agreement on extradition, those arrangements must be gazetted under statutory order. The SADC Protocol on MLA has not been domesticated; nor has the Harare Scheme. However, Botswana is relatively flexible in her approach to MLA, giving

³³ Observation from the Head of MLA in interviews June 2020

³⁴ Section 3 of the MLACMA

effect to the SADC protocol in her dealings with SADC partners. Nevertheless, Botswana authorities would prefer to see this domesticated as per Recommendation I above. Requests should be directed to the Director of Public Prosecutions³⁵.

Process for Mutual Legal Assistance Requests: Botswana

SADC PROTOCOL ON MLA ARTICLE 5	MLACMA 1990
<p>Contents of a Letter of Request Article 5</p> <ul style="list-style-type: none"> ■ Name of the authority to which the request relates. ■ Description of the investigation, prosecution or proceedings including a summary of the facts and a copy of the applicable law. ■ Purpose of the request and the type of assistance sought. ■ Degree of confidentiality required and the reasons therefor. ■ Details of any particular procedure or requirement to be followed and the reasons therefor. ■ Any time limit for execution. ■ For requests re: taking of evidence, search and seizure, matters pertaining to proceeds of crime, a statement indicating the basis of belief that the evidence or proceeds are in the Requested State. ■ In the case of request for evidence from a person, indication of procedure (e.g., on oath? Affirmation?) and the subject matter sought. ■ For transfer of exhibits, the location in the Requested State and an indication of where the exhibit will go, in whose custody and what, if any test will be conducted and the date of anticipated return to the Requested State. ■ For availability of detained person, the place to which the person will be transferred and date of return. 	<p>Contents of a Letter of Request Section 8</p> <ul style="list-style-type: none"> ■ Name of the Authority to which the request relates. ■ Description of the nature of the criminal matter and a statement setting out the summary of the facts and laws applicable. ■ Purpose of the request and the type of assistance sought. ■ Degree of confidentiality required and the reasons therefor. ■ Details of the procedure or requirements to be followed including details of the manner or form of any information to be supplied. ■ Any time limit for execution. <p>All documents must be authenticated in accordance with Part VIII.</p> <p>For requests regarding the taking of evidence, search and seizure, matters pertaining to proceeds of crime etc. the principles are the same as SADC save that for registration of orders e.g., restraint orders or enforcement of confiscation orders, the matter must relate <i>to a 'serious crime' i.e., one that carries at least six months imprisonment and/or a fine of at least 500 Pula</i>. Further confirmation that the relevant orders have been issued by a competent authority in the Requesting State is required. For transfer of exhibits or voluntary attendance of witnesses abroad, the nexus between the evidence to be given and the offense allegedly committed must be addressed in the LOR.</p>

8. In all requests for mutual legal assistance, the essence of both the SADC Protocol and the domestic law is that as much information as possible should be submitted to give effect to the Request and the nexus between offense and assistance sought established. The diagram below shows the types of assistance available under the domestic laws of Botswana in relation those supposedly to be availed under international agreements.

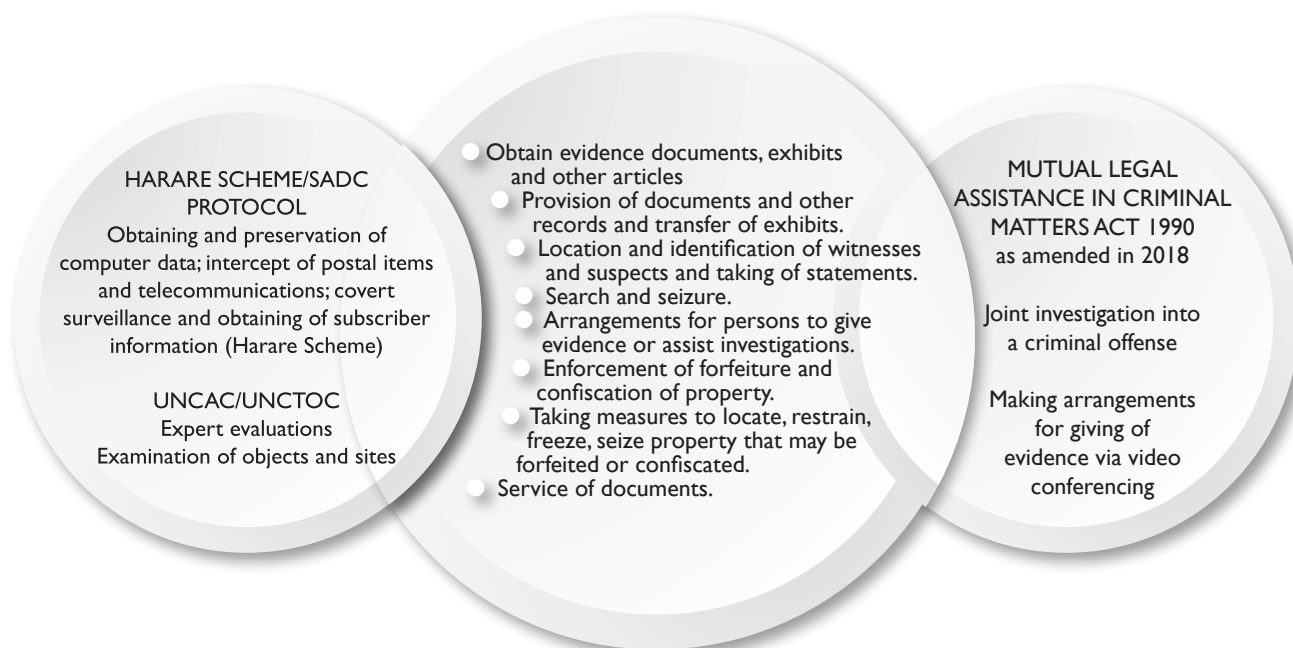
Mutual Legal Assistance in Botswana: Types of Assistance

International, regional, and domestic frameworks address much of the same forms of mutual legal assistance with the SADC protocol playing an integral role in the drafting of treaties with Botswana's southern African neighbors. Though SADC protocols aren't themselves domesticated, in practice, Botswana does try to give effect to requests from SADC partners in line with that protocol.

As for UNCAC and UNCTOC and the Harare Scheme, their role in MLA is limited given the absence of any domesticating legislation.

Additional forms of MLA not explicitly catered for under the domestic legislation, can still be afforded under section 3 of the Act.

³⁵ 2018 Amendment altered the Central Authority from the Attorney General to the DPP for the purpose of MLA



Grounds for Refusal of Mutual Legal Assistance: Botswana

SADC ARTICLE 6 DISCRETIONARY GROUNDS ONLY

- The offense is a political offense or an offense of a political character.
- The offense is an offense under military law, not criminal law.
- That execution of the request would impair its sovereignty, security, public order, public interest or prejudice the safety of any person.
- The request is not made 'in conformity' with the Protocol itself.

BOTSWANA: MANDATORY GROUNDS

Same as SADC above and:

- There are substantial grounds for believing the request is for the purpose of prosecuting, punishing, or prejudicing someone on grounds of race, sex, religion, nationality, or political opinions.
- The person has already been acquitted or pardoned in a foreign country or already been punished for that offense (or another offense constituted by the same conduct).

BOTSWANA: DISCRETIONARY GROUNDS

- The absence of dual criminality, though not a requirement for MLA, can be used as a reason to refuse it.
- Where the person could no longer be prosecuted under the laws of Botswana for reasons of lapse of time or other reason.
- The assistance would prejudice an on-going criminal matter in Botswana.
- The assistance would prejudice the safety of a person in or outside of Botswana.
- The assistance would impose an excessive burden upon the State.
- Where provision would involve pain, injury, or psychological harm in order to enhance the credibility of an existing threat of any kind to a person inside or outside of Botswana.

Wildlife Crimes in Relation to Protected Species: Qualification for Extradition and Mutual Legal Assistance

9. For mutual legal assistance requests (incoming), there are no minimum term requirements in terms of penalty, nor are there strict requirements on dual criminality although absence of this may ultimately be a basis for refusal. However, in relation to extradition, the requirements of the domestic law (minimum of two years) and the requirements of the SADC protocol (one year), do not in themselves present a bar, despite the conflict therein regarding the definition of an 'extraditable crime' given that the penalties in Botswana surpass both minimum terms.

10. The table below highlights four broad categories of wildlife offenses within Botswana in order to identify whether they may amount to extraditable crimes. The application of the United Nations Convention Against Transnational Organized Crime is included for interest though technically it is of little application beyond perhaps guiding the spirit of cooperation and the development of a bilateral treaty with a signatory to that agreement. Customs laws may also have application but are not included here.

Botswana: Wildlife Laws and Qualification for Extradition and Mutual Legal Assistance

11. Applicable domestic laws

- Wildlife Conservation and National Parks Act Cap: 38:01 (WCNPA).
- Proceeds and Instruments of Crime Act Cap 8:03 (PICA) as amended in 2000.

OFFENSES IN RELATION TO PROTECTED SPECIES	DOMESTIC LAW OFFENSES - SPECIFIC CHARGES	PENALTY	QUALIFICATION UNDER DOMESTIC LAW ON MLA & EXTRADITION (latter may be refused if under 2 years)	QUALIFICATION UNDER SADC PROTOCOLS (extradition may be refused if under 1 year)	QUALIFICATION UNDER UNCTOC FOR MLA AND EXTRADITION (serious offense = 4 years or more).
HUNTING	Hunting a protected game animal: WCNPA s27	7 years/fine	Yes	Yes	Yes
	Hunting a rhino s17 WCNPA	15 years/fine	Yes	Yes	Yes
	Hunting elephant s19 WCNPA	10 years/fine	Yes	Yes	Yes
	Hunting a partially protected game animal s199 WCNPA	5 year/fine	Yes	Yes	Yes
DEALING (SALE/ PURCHASE)	Dealing in trophies s64 or s71(3) (for government trophies) WCNPA	5 years/fine	Yes	Yes	Yes
	Dealing in ivory/rhino horn s69 and s70 WCNPA	10 years for elephants; 15 years for horn	Yes	Yes	Yes
	Money laundering s47 PICA	20 years/ fine	Yes	Yes	Yes
POSSESSION	Possession of rhino horn s70 WCNPA	15 years/fine	Yes	Yes	Yes
	Possession of elephant tusks s67(1) and (5) WCNPA	10 years/fine	Yes	Yes	Yes
	Money laundering under s47 PICA	20 years/fine	Yes	Yes	Yes
IMPORT/ EXPORT/ RE-EXPORT	Import/export/re-export s62(5)	7 years/fine	Yes	Yes	Yes
	Import/export of rhino/ rhino trophy	15 years/fine	Yes	Yes	Yes
	Import/export/re-export ivory/elephant	10 years/fine	Yes	Yes	Yes
	Money laundering under s47 PICA	10 years/fine	Yes	Yes	Yes

Key Challenges in Execution of Requests for MLA and Extradition

12. The Central Authority for MLA and extradition is now the Directorate of Public Prosecutions, by virtue of the 2018 amendments. There is a specialist department with the DPP's office that handles requests for MLA and extradition, numbering six lawyers who focus full time on the execution of such requests. At present they are managing the caseload but anticipate that capacity will be stretched once a number of treaties are finalized and domesticated e.g., there is a treaty with China currently under negotiation as is with Mozambique.

13. In interviews with the Head of Mutual Legal Assistance and Extradition Department, Headquarters, Gaborone, Botswana – Ms. Priscilla Musindo – and with Head of Station Maun, Office of the Director of Public Prosecutions, Mr. Tladi Modibedi³⁶, a number of key challenges were identified.

14. The biggest challenge to the execution of extradition and MLA requests lies in the delay in domesticating agreements whether they be international, regional, or bilateral. Had the SADC Protocol on Extradition been implemented, the existing deadlock with South Africa over the issue of the death penalty (for instance) would not have occurred – see paragraph 22 below.

15. In relation to extradition proceedings where the input of a magistrate is required (i.e., the 'normal process' under section 14), the bottleneck of overloaded courts can be a source of delay. Although Botswana has the benefit of procedural rules to accelerate criminal matters, these are rarely implemented and so delay within the court system – and the culture of adjournments – is perhaps one of the biggest challenges to extradition, especially where the process to be followed requires the actual examination of the evidence in question. There is no provision to bypass this process such as through the acceptance of a certification of sufficiency of evidence by the prosecution authority of the Requesting State.

16. Within Botswana, incoming MLA requests are seen as having a relatively quick turnaround time and in discussions with Zimbabwe and Zambia, Botswana is regarded as a country that does cooperate swiftly on requests that are sent to her. However, for outgoing MLA, Botswana views delay as a problem. Frequently there is no acknowledgement of receipt, nor any progress reports sent in relation to such requests. There is a perception that MLA in particular is seen as a low priority for countries where capacity is already stretched in managing day to day caseloads.

17. Also of particular concern is the right to bail that has been applied in cases where suspects have absconded overseas e.g., Dumasani Moyo. Moyo was extradited from Zimbabwe after a lengthy process in 2017, only to be granted bail again. This can undermine the prospects of success of extradition and suggests a failure on the part of the judiciary in Botswana to approach the question of bail in relation to extradition in a coherent way.

18. Of particular concern in relation to extradition requests, there are a number of grounds for refusal of extradition³⁷; the grounds highlighted by prosecutors in Botswana as being particularly problematic are as follows:

Political Nature of Offense

19. The justification of this exception is threefold. To summarize:

- To protect the rights of citizens to object to unjust or oppressive regimes and the right 'to resort to political activism to foster political change' conferring greater legitimacy on such offenses as compared with common crimes³⁸.
- To protect citizens being returned to countries where they might be subject to unfair trial and punishment because of their political opinions; and
- That governments – and particularly their judiciaries – should not interfere in the internal political struggles of other nations.

20. In the case of *Republic of Namibia vs. Alfred and Others*³⁹, the Botswana Court of Appeal refused extradition of 13 members of the Caprivi Liberation Army for offenses including murder, attempted murder, unlawful possession of explosives, and treason, finding that the extradition sought was politically motivated. However, what constitutes a 'political nature of the offense' is sometimes unclear and has given rise to some difficulties in interpretation according to prosecutors in Botswana. Whilst the Act states that an offense is not of a political character if it is an offense (or related offense) in accordance with any international convention to which Botswana and the Requesting State is party or where it is an offense against the Head of State his immediate family, a head of government, Minister, or where it involves a murder 'or related offense', what constitutes a 'related offense' is unclear. Where Ministers of a foreign country, for example, are involved in a corruption-related offense, the issue of 'political nature' has become central to the issue of extradition.

³⁶ Interviews held on 3 June 2020 and the 4 June 2020.

³⁷ See section 7 Extradition Act 1990

³⁸ *United States vs. Pitawanakwat* 120 F.Supp.2d 921

³⁹ 2004 BLR 101 CA
USAID.GOV

Citizenship

21. Botswana will not extradite its citizens to a country that does not extradite its nationals e.g., Zambia. This particular challenge led to Botswana amending her extradition legislation under section 8(i) so that a fugitive criminal who is a citizen of Botswana and is not also a citizen or national of the requesting country shall not be surrendered unless a reciprocal provision is made by the law of that country, or by arrangement.

Death Penalty

22. Botswana will not surrender fugitives where the death penalty may be imposed for an offense that is not punishable by death in Botswana unless an agreement is made that such a penalty will not be imposed by the Requesting State. On the other side of that coin, however, is that Botswana has no domestic legal footing on which to give such an assurance to another jurisdiction. The SADC protocol on extradition does pave the way for such assurances under Article 4(f) but this has not been domesticated. The existing treaty with South Africa expressly excludes extradition for death penalty offenses. This has resulted in a deadlock between South Africa in relation to their bilateral treaty governing extradition. Two particular cases have highlighted the challenge:

- Minister of Justice and Constitutional Development and Another v. Tsebe and Other [2012] ZACC 16, and
- Samotse and Another v. The Minister of Home Affairs and Others [unreported].

23. Both cases involved a murder committed in Botswana before the suspects fled to South Africa. In both cases, Botswana failed to give any assurance or undertaking that the death penalty would not be imposed in respect of the offenses of murder for which a penalty of death is prescribed under statute. The rulings in South Africa concluded with the decision that extradition in such circumstances would violate the constitutional rights of the accused under Article 7 of the Constitution of South Africa. Further, any attempt by officials to use any other law (e.g., deportation) to 'get around' this issue would also constitute a violation of the Constitution⁴⁰. Discussions are still underway to amend the Treaty with South Africa to address this problem.

24. Furthermore, to address the challenges regarding citizenship and the death penalty, the new s8 of the Extradition Act, allows for the Requesting State to submit the case to the Director of Public Prosecutions to assess the evidence and consider a prosecution in Botswana.

25. Finally, there is occasional tension between the Ministry and the judicial sector over the issue of extradition – that the power to designate countries as parties to extradition or MLA arrangements sits with the Executive is viewed as sometimes problematic. The Ministry responsible has little guidance on MLA or extradition and yet are able to exercise a prerogative that can frustrate execution of requests both outgoing and incoming. For example, under the Extradition Act as amended, the Minister can determine what offense is extraditable, even though the Act has offered a definition (minimum 2 years). The potential for political interference and outside interests determining whether such requests can be acted upon is of some concern in cases that may raise diplomatic challenges.

RECOMMENDATION 2: To scope obstacles to the application of existing Magistrates Court Rules⁴¹ to accelerate the court handling of extradition requests. The culture of adjournments is rife in Botswana⁴².

⁴⁰ For a full discussion see The Botswana -South Africa Extradition Deadlock – Escaping Botswana's Gallows by Gosego Rockfall Lekgowe available online.

⁴¹ See Magistrates Court Rules Statutory Instrument 13 of 2011

⁴² See court handling of wildlife crimes, Botswana, a report by Space for Giants found at www.spaceforgiants.org

Malawi



Malawi

In summary: Malawi's legal framework for extradition dates back to the 1970s; her Mutual Legal Assistance legislation became operational in 1994. There is an urgent need to support Malawi in updating her laws. For wildlife offenses, these are not included as matters to which the domestic law on extradition can apply; accordingly, such requests must be on the basis of specific arrangements made with the Minister responsible. This process delays Malawi's responsiveness to such requests and can cause delay where such arrangements are contested by the defense.

General Legal Framework for International Cooperation

1. Malawi is party to a number of international agreements directly and indirectly concerned with mutual legal assistance (MLA) and extradition. However, like Botswana, Malawi is a dualist state. The High Courts have expounded two schools of thought on the application of international agreements into domestic application – one in favor of a more generous application and the other in favor of a more restrictive approach⁴³. Until the Supreme Court finalizes the issue, the Ministry of Justice does take the approach that where such agreements exist, they can be used as a catalyst for the formation of a bilateral agreement for cooperation. The result is that by and large, the United Nations Conventions Against Transnational Organized Crime or Corruption are rarely used as a basis in and of themselves, but like the SADC protocols, may play an instrumental role in creating bilateral treaties where assistance is requested by signatories to those agreements.

Domestic Legislation

- The Extradition Act Cap 8:03 of 1972.
- The Mutual Assistance in Criminal Matters Act Cap 24 of 1991 Cap: 8:04.

2. The First Schedule of the Extradition Act lists the following SADC countries as 'designated countries': *Botswana, Lesotho, Mauritius, Seychelles, Swaziland, Tanzania, and Zimbabwe.*

⁴³ In the matter of E.M. (a female infant) and S.M. (a female infant; Adoption Cause No. 01 of 2017) and in the matter of D.M. (a male infant) Adoption Cause No. 2 of 2006, High Court of Malawi.

3. Malawi has a separate extradition treaty with South Africa but none with Angola, Namibia, or the DRC. Accordingly, the SADC Protocol may only guide bilateral agreements on extradition that may arise on an ad hoc basis under s3 of the Extradition Act.

4. For mutual legal assistance, all commonwealth countries are designated as qualifying for MLA under the domestic law; within SADC, the only ones excluded from this are Angola and the DRC. However, under section 5 of the Mutual Legal Assistance in Criminal Matters Act, arrangements can still be made on a case-by-case basis.

International Agreements on Mutual Legal Assistance and Extradition

- SADC Protocol on Mutual Legal Assistance in Criminal Matters 2002 – *not domesticated*.
- SADC Protocol on Extradition 2002- *not domesticated*.
- The Commonwealth Scheme on Mutual Legal Assistance (the ‘Harare’ Scheme) 1966 – *crystallized within the domestic law*.
- The Commonwealth Scheme on Extradition (the ‘London Scheme’) – *not domesticated*.
- The United Nations Convention Against Transnational Organized Crime signed in 2000 – *not domesticated*.
- The United Nations Convention Against Corruption signed in 2004 – *not domesticated*.

Relevant Bilateral Treaties in Southern Africa

- Extradition treaty with South Africa.

Malawi and Southern Africa – Legal Basis for Extradition

5. For the purposes of extradition with her southern African neighbors, the Extradition Act states that an extraditable offense must carry at least 12 months’ imprisonment and further demands dual criminality based on the alleged conduct of the accused. Further, there be either:

- An ‘arrangement’ with the government of any country⁴⁴, based on reciprocity; or
- That the country is ‘designated’ under Schedule I⁴⁵ that, in Southern Africa and under SADC, applies to *Botswana, Lesotho, Mauritius, Seychelles, Swaziland, Tanzania, and Zimbabwe*.

6. Extradition in Malawi is limited to offenses contained within the Act as follows:

- Blackmail or extortion.
 - Offenses against bankruptcy/company law.
 - Malicious or willful damage to property.
 - Acts endangering vehicles, vessels/authority.
 - Narcotics/dangerous drug offenses.
 - Piracy.
 - Revolt against shipmaster or aircraft.
 - Import/export re: stones, gold, gems, metals or currency.
 - Specified offenses under the Firearms Act.
- AND

Any other offense agreed by the Minister under an extradition arrangement.

7. It is therefore within the power of the Minister to agree to any other offense as being subject to extradition. Accordingly, offenses relating to wildlife may still be subject to extradition, but this will have to be negotiated in a bilateral agreement with the authorities in Malawi.

RECOMMENDATION 1: Urgent support to the Malawi authorities to draft and approve new legislation on both extradition and mutual legal assistance, removing the limitations regarding types of offenses and enabling both extradition and MLA specifically in relation to SADC countries. There are model laws freely available that can be used to deliver such a draft – it is recommended that representatives from the Ministry and the Directorate of Public Prosecutions are engaged in an exercise to create this. There exists an active parliamentary caucus within that can be engaged⁴⁶ to drive through the legislation as a priority. This will require a further and separate engagement but can potentially ‘piggyback’ the drafting exercise.

⁴⁴ See section 3 of the Extradition Act Cap 8:03

⁴⁵ Ibid 33

⁴⁶ The ICCF Group (US based) has supported the establishment of a Parliamentary Caucus on environmental matters.

Process for Extradition Requests: Malawi in Comparison to the SADC Protocol on Extradition

SADC PROTOCOL	EXTRADITION ACT 1972
<p>Contents of a Request for Extradition: Art 6:</p> <ul style="list-style-type: none">■ In writing and translated into the language of the Requested State.■ Accurate description of accused and information on location.■ Text of the applicable law■ Statement of penalty likely to be imposed (or if convicted, either a certified copy of the judgement and sentence imposed or if not sentenced, a statement affirming the sentence likely to be imposed).■ Statement of facts relating to the commission of the offense, including time and place.■ Warrant of arrest issued by the competent authority and duly authenticated.■ If convicted in absence, a statement as to the legal means to defense/have the case re-tried.	<p>Contents of Request – Section 78.</p> <p>Requests are sent to the Ministry of Foreign Affairs, addressed to the Director of Public Prosecutions that sits under the Ministry of Justice. The same requirements as SADC are set out in the Act regarding contents of requests, with an additional element regarding explicit assurances on costs of execution. Upon receipt of the request for extradition, there are two processes to be followed.⁴⁷</p> <p>Securing the Warrant for Arrest s7, 8, 15, s17:</p> <p>Much depends on whether the country is a designated country or if there is an arrangement under section 3 which prescribes the way in which a warrant for arrest may be issued e.g., upon information only or on reciprocal backing of warrants.</p> <p>The normal route for formal requests is through diplomatic channels whereby the Minister will peruse the application and give ‘authority to proceed’. Thereafter, the magistrate will issue a warrant.</p> <p>Alternatively, where there exists an agreement the warrant for arrest can be sent by the Requesting State to the Minister of Internal Affairs who is responsible for police actions. This will then be passed to the magistrate will endorse it for execution (reciprocal backing of a warrant). A formal request for extradition must follow.</p>
<p>Provisional Warrants for Arrest (i.e., on the basis of information only) can be issued both under the SADC protocol and under the domestic law. However, once arrested, the Requesting State MUST follow up with the original warrant of arrest and other information as required for extradition within 30 days, however.</p>	<p>Provisional Warrants for Arrest s17 for information received from designated countries can also be issued. The original warrant must be produced as soon as possible. This can be sent via INTERPOL.</p>
	<p>Securing the Order for Extradition s9 and s18:</p> <p>Once arrested, the accused is brought before the court that shall conduct an evidential assessment as it would if it were conducting a preliminary inquiry under the laws of Malawi. Accordingly, all evidence must be authenticated i.e., certified by a judge or magistrate AND further authenticated by a witness on oath or the official seal of the Minister, Permanent Secretary, or government official in the Requesting State. After the hearing, the court will order the surrender and the date will be set by the Minister.</p>
<p>Time Limit for Surrender: The SADC protocol on extradition states that surrender must occur without ‘undue delay’. However, the prescriptive nature of the time limits contained within the domestic laws are likely to be observed where there is less clarity contained within international agreements.</p>	<p>Time Limit for Surrender s10 s20: Surrender cannot take place before 15 days have expired from the date of committal for surrender is made or until any appeal is exhausted. Once ordered, the Requesting State has a total of one month from the date of order (or exhaustion of appeal routes).</p>

⁴⁷Section 47 IJCCM

Malawi: Mandatory Grounds for Refusal of Extradition *(Italics highlight differences).*

SADC ARTICLE 4	MALAWI S6 AND S11
<ul style="list-style-type: none"> ■ Political Nature of Offense. ■ Purpose is based on political opinion, race, religion, ethnicity, sex, or status. ■ The offense is a military law offense. ■ Final judgment has already been rendered in respect of the offense in question. ■ Immunity from prosecution or punishment due to lapse of time or amnesty or any other reason. ■ Risk of torture or inhuman treatment or punishment. ■ Where judgment in the Requesting State has been rendered in absentia with no notice and no opportunity for the accused to have a retrial in his presence. 	<ul style="list-style-type: none"> ■ Political nature of offense. ■ Purpose or risk of prejudice based on political opinion, race, religion, nationality. ■ The offense is a military law offense. ■ Final judgment has already been rendered in respect of the offense in question. ■ <i>The accused would be entitled to discharge or acquittal if charged with the same offense in Malawi.</i> ■ <i>Proceedings are currently pending in Malawi.</i> ■ <i>The accused is currently serving a sentence in Malawi (extradition will be delayed).</i> ■ <i>It would be 'unjust or oppressive' to surrender the accused.</i> ■ <i>Absence of agreement re: rule of specialty.</i>

Malawi: Discretionary Grounds for Refusal of Extradition

SADC ARTICLE 5	MALAWI S6 AND S10
<ul style="list-style-type: none"> ■ Where the accused is a national of the Requested State. ■ Prosecution is already pending in the Requesting State. ■ The offense carries the death penalty unless assurance is given that it shall not be imposed. ■ The offense was committed outside of the jurisdiction of either State, and the Requested State has no jurisdiction in comparable circumstances. ■ Where the offense was committed in Malawi. ■ The request is incompatible with humanitarian considerations e.g., health, age of that person. 	<ul style="list-style-type: none"> ■ Where the offense carries the death penalty. ■ <i>The trivial nature of the offense.</i> ■ <i>The lapse of time since the offense was committed.</i> ■ <i>Accusation is not made in 'good faith.'</i> ■ <i>In all the circumstances, extradition would be unjust or oppressive.</i>

8. In relation to the discretionary grounds for refusal, aside from the death penalty matter, all other grounds may be exercised by the High Court on appeal, not the Minister. Accordingly, the judicial process has the potential to frustrate an order for extradition granted by the magistrate at the preliminary stage. High Court judges may not always be experienced or familiar with the issues relating to extradition.

RECOMMENDATION 2: 'Judicial dialogues' particularly targeting the High Court and magistrates' courts on the issues concerning both extradition and mutual legal assistance, with focus on considering how domestic laws should be interpreted in order to achieve the 'spirit' of international agreements such as SADC Protocols and UN Conventions. The Supreme Court should be engaged given that resolution of the two interpretations of this issue has yet to be resolved.

Malawi and Southern Africa – Legal Basis for Mutual Legal Assistance

Process for Mutual Legal Assistance Requests: Malawi

SADC PROTOCOL ON MLA ARTICLE 5

Contents of a Letter of Request Article 5

- Name of the authority to which the request relates.
- Description of the investigation, prosecution or proceedings including a summary of the facts and a copy of the applicable law.
- Purpose of the request and the type of assistance sought.
- Degree of confidentiality required and the reasons therefor.
- Details of any particular procedure or requirement to be followed and the reasons therefor.
- Any time limit for execution.
- For requests re: taking of evidence, search and seizure, matters pertaining to proceeds of crime, a statement indicating the basis of belief that the evidence or proceeds are in the Requested State.
- In the case of request for evidence from a person, indication of procedure (e.g., on oath? Affirmation?) and the subject matter sought.
- For transfer of exhibits, the location in the Requested State and an indication of where the exhibit will go, in whose custody and what, if any test will be conducted and the date of anticipated return to the Requested State.
- For availability of detained person, the place to which the person will be transferred and date of return.

MACMA 1991

Contents of a Letter of Request Schedule I

The Attorney General is the Central Authority. Where the country is not a commonwealth country, a reciprocal arrangement can be made e.g., with Ethiopia and Venezuela, arrangements were made for MLA under section 5.

Schedule I sets out a comprehensive set of requirements that largely mirror those contained in SADC. However, as with all jurisdictions, detail and wherever applicable, certified copies of relevant court orders are required e.g., for securing proceeds of crime.

For proceeds of crime and assistance sought in relation to property e.g., restraint, the matter must be deemed a 'serious offense' – unlike the SADC protocol which does not place a minimum term of imprisonment in relation to an offense for which MLA may be secured, the Malawi law on MLA requires that a serious offense is one that carries at least 12 months imprisonment.

In addition, Malawi requires that where MLA is sought for the purposes of an investigation, the request must be accompanied by a 'certificate in relation to the investigation' confirming the date of commencement of the investigation and its nature. That certificate can be given by the appropriate authority itself (with an official seal for example) or by a legally qualified person. For all other documents/evidence submitted, they should be duly authenticated by a judge or magistrate or authenticated on oath by a witness or public officer or sealed with an official seal from the Ministry or department responsible for such requests.

9. In being limited to commonwealth countries, Malawi's MLA law would apply, in terms of SADC signatories, to the following countries: *Botswana, Lesotho, Mauritius, Mozambique, Namibia, Seychelles, South Africa, the United Republic of Tanzania, and Zambia*⁴⁸. Though Zimbabwe is no longer a member of the commonwealth, in practice it appears that the Act is applied generously in this respect and Zimbabwe has indeed engaged in MLA with Malawi⁴⁹. This has been done by utilizing section 5 of the Act and refusal of MLA in general by Malawi is seen as 'very rare'⁵⁰.

Mutual Legal Assistance in Malawi: Types of Assistance

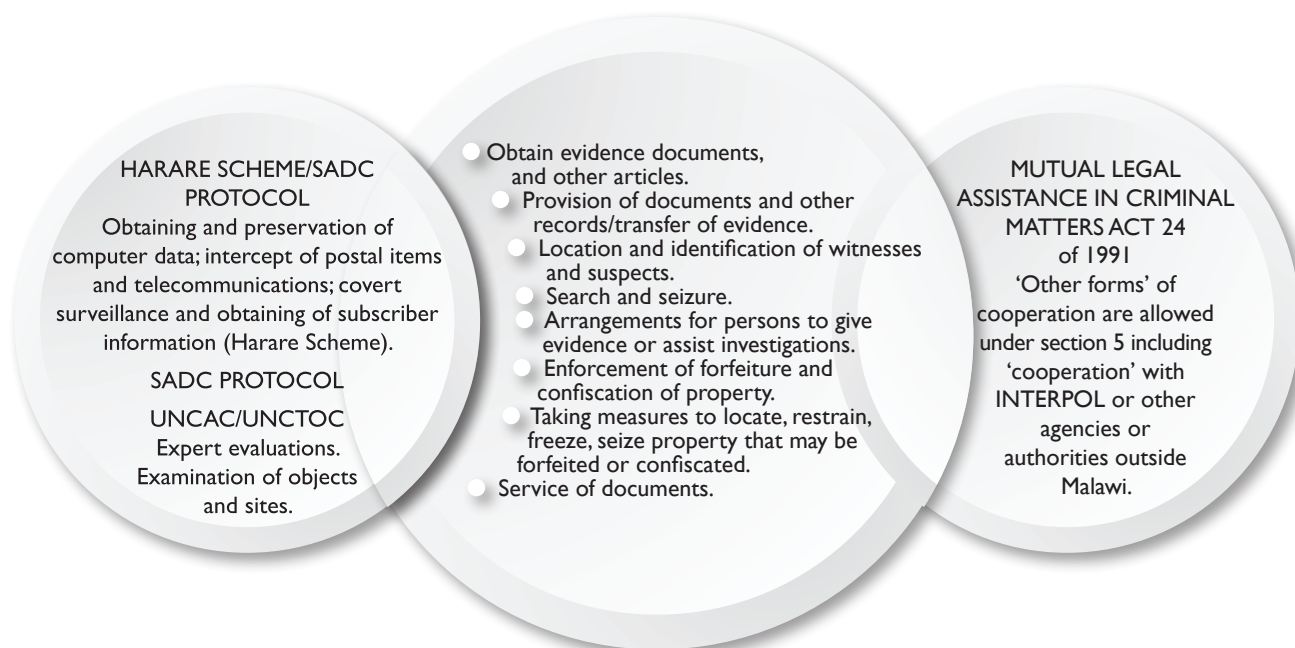
The illustration highlights the forms of cooperation explicitly contained within Malawi's domestic laws and how they compare with those explicitly set out in some international agreements.

However, even forms not explicitly addressed in the legislation can be provided (subject to capacity) under section 5 of Malawi's Mutual Legal Assistance in Criminal Matters Act.

⁴⁸ <https://commonwealthfoundation.com/about-us/where-we-work/>

⁴⁹ Discussion with authorities in Zimbabwe – see below.

⁵⁰ Discussion with Dr Steven Kayuni, Head of International Cooperation, Office of the Director of Public Prosecution



Grounds for Refusal of Mutual Legal Assistance in Malawi

12. The SADC Protocol on Mutual Legal Assistance only offers discretionary grounds for refusal. It is likely that where there is a conflict e.g., where Malawi is of the view that the request is politically motivated and therefore, she 'shall' reject the request vs. the SADC Protocol approach that would say that she 'may' reject the request, these differences are likely to have little impact in practice provided assurances are given and an 'arrangement' can be made.

13. What is of import is to note the additional grounds for refusal in comparison to just four contained in the SADC protocol and where possible, Requesting States should anticipate those additional grounds and cater for them in any request.

SADC ARTICLE 6: DISCRETIONARY GROUNDS ONLY

- That the offense is a political offense or an offense of a political character.
- That the offense is an offense under military law and not criminal law.
- That execution of the request would impair its sovereignty, security, public order, public interest or prejudice the safety of any person.
- The request is not made 'in conformity' with the Protocol itself.

MALAWI: MANDATORY GROUNDS S18 (2)

- The offense is of a political character.
- There are substantial grounds to believe the request is made with a view to prosecuting or punishing or causing prejudice to a person on grounds of race, sex, religion, nationality, place of origin or political opinion.
- The absence of dual criminality.
- The request would prejudice the security, international relations, national security, public policy, or other interest of Malawi.
- The person has already been convicted or acquitted in Malawi for the same conduct.
- For transfer of a prisoner, absence of consent.
- The request cannot be lawfully undertaken under the Act or requires steps that cannot be lawfully implemented.
- Where the implementation would require an individual to do or not to do something that he cannot be legally compelled to do.

MALAWI DISCRETIONARY GROUNDS S18 (3)

- Absence of dual criminality where the conduct occurred outside of Malawi and outside of the Requesting State.
- Prosecution in Malawi for such conduct would be barred by lapse of time or other reason.
- Excessive burden on resources (Malawi will consult with the Requesting State to reach agreement before rejection).
- The request does not comply with the requirements under Schedule I (see above).
- For transfer of prisoners, there are 'reasonable grounds' for refusal.
- The request cannot be accommodated within relevant legal practices in Malawi.

Wildlife Crimes in Relation to Protected Species: Qualification for Extradition and Mutual Legal Assistance

14. For mutual legal assistance requests (incoming), there are, for most forms, no minimum term requirements in terms of penalty, nor is there a strict requirement on dual criminality although absence of this may ultimately be a basis for refusal. For financial orders, the offense must be 'serious' for the purposes of MLA (i.e., carrying at least one year of imprisonment). However, in relation to extradition, the requirement of the domestic law (minimum of one year) mirrors the requirements of the SADC protocol (one year). The table below highlights four broad categories of wildlife offenses within Malawi in order to identify whether they may amount to extraditable crimes and/or qualify for MLA. The application of the United Nations Convention Against Transnational Organized Crime is included for interest though technically it is of little application beyond perhaps guiding the spirit of cooperation and the development of a bilateral treaty with a signatory to that agreement. Customs laws may also have application but are not included here.

Malawi: Wildlife Laws and Qualification for Extradition and Mutual Legal Assistance

15. Applicable domestic laws:

- National Parks and Wildlife Act 1992 as amended in 2017 (NPWA).
- Financial Crimes Act 2017 (FCA)– A predicate offense is 'any offense' which has been committed wholly or partially in Malawi or committed wholly or partially against a Malawian person.

OFFENSES IN RELATION TO PROTECTED SPECIES	DOMESTIC LAW OFFENSES	PENALTY	QUALIFICATION UNDER DOMESTIC LAW FOR EXTRADITION AND MLA (former may be refused if offense carries less than 12 months)	QUALIFICATION UNDER SADC PROTOCOLS (extradition may be refused if under 1 year)	QUALIFICATION UNDER UNCTOC FOR MLA AND EXTRADITION (serious offense = 4 years or more).
HUNTING	Hunting a protected species s110 NPWA	10 years/fine	Yes	Yes	Yes
	Hunting an endangered species s110A NPWA	30 years/fine	Yes	Yes	Yes
	Hunting a listed species s110B NPWA	30 years	Yes	Yes	Yes
DEALING (SALE/PURCHASE)	Dealing in protected species s110 NPWA	10 years/fine	Yes	Yes	Yes
	Dealing in an endangered species s110A NPWA	30 years/fine	Yes	Yes	Yes
	Dealing in a listed species s110B NPWA	30 years	Yes	Yes	Yes
	Using, converting, disposing of proceeds of a predicate offense FCA s42	Life/fine	Yes	Yes	Yes
POSSESSION	Possession of a protected species s110 NPWA	10 years/fine	Yes	Yes	Yes
	Possession of an endangered species s110A NPWA	30 years/fine	Yes	Yes	Yes
	Possession of a listed species s110B NPWA	30 years	Yes	Yes	Yes
	Possession of proceeds of a predicate offense s42 FCA	Life/fine	Yes	Yes	Yes

OFFENSES IN RELATION TO PROTECTED SPECIES	DOMESTIC LAW OFFENSES	PENALTY	QUALIFICATION UNDER DOMESTIC LAW FOR EXTRADITION AND MLA (former may be refused if offense carries less than 12 months)	QUALIFICATION UNDER SADC PROTOCOLS (extradition may be refused if under 1 year)	QUALIFICATION UNDER UNCTOC FOR MLA AND EXTRADITION (serious offense = 4 years or more).
IMPORT/EXPORT/RE-EXPORT	Import/export/re-export of a specimen of a protected, listed, or endangered species s111 NPWA	30 years	Yes	Yes	Yes
	Disposal/concealing / transfers proceeds of a predicate offense s42 FCA	Life/fine	Yes	Yes	Yes

Key Challenges in Execution of Requests for MLA and Extradition

16. In discussions with the Head of International Cooperation within the Directorate of Public Prosecutions (DPP), Dr. Steven Kayuni⁵¹, and Nick Stait, Senior Asset Recovery Specialist, the key challenge lies with the legislation itself. Dating back to the 1970s (extradition) and 1990s, the restriction of cooperation based on commonwealth membership and, for extradition, the limitation of certain offenses, is outdated. Whilst Malawi has shown herself as able to nimbly adapt to emerging crimes and cooperation with non-designated or non-commonwealth countries through ad hoc arrangements, this approach is seen as vulnerable where such proceedings are contested. Although the cases involving the adoption of David Banda⁵² and C.J.⁵³ by Madonna in 2006 saw an articulation of the principle that in signing international agreements (in this case the UN Convention on the Rights of the Child), the courts should enable the spirit of those agreements notwithstanding constraints of domestic laws, Malawi would be better served by a new set of laws governing this complex area.

17. Within the DPP, there are less than fifteen prosecutors for the entire country; police prosecutors handle over 95% of criminal cases. This is a policy decision. However, police prosecutors do not handle any international cooperation matters. The Ministry of Justice and the DPP handle these. Accordingly, most requests for extradition and MLA are handled by a core team of about four lawyers though this is not a dedicated separate unit – given the limited numbers within the ODPP, they also handle day to day criminal matters relating to all types of crime. In terms of the caseload posed by MLA and extradition requests, this is still relatively low and so specialization would be seen as a luxury that the DPP can ill-afford.

18. For wildlife cases, again Malawi has demonstrated willingness to comply e.g., recent extraditions with Kenya and Thailand; but the caseload is still relatively low – only seven or eight requests in the last three years. The challenge, however, sits in the instruction of the competent authorities – primarily the police for most of these requests – an institution that lacks capacity to act quickly. International cooperation is seen within the police as being of relatively low priority; this is not the case of specialized units such as the Anti-Corruption Bureau, where requests are executed quickly⁵⁴. However, with the police, there is a heavy reliance on the INTERPOL.

RECOMMENDATION 3: Deliver targeted training of police and wildlife departments on both the importance of timely responses to international requests and forms of compliance (e.g., statement writing). This should prioritize stations identified by the prosecution authorities in Malawi, possibly based on areas where wildlife crimes near borders are prevalent.

⁵¹ Web-based interviews conducted on 22 and 27th July 2020 with Dr Kayuni; this followed an interview with Nick Stait, Basel Governance Institute and seconded to the DPPs Office between January 2015 and April 2019.

⁵² <https://malawilii.org/node/3751>

⁵³ <https://malawilii.org/node/3557>

⁵⁴ Recent MLA request from South Africa to the ACB was executed without delay.

Mozambique



Mozambique

In summary: Mozambique now has a sound legal framework for conducting mutual legal assistance and extradition proceedings, following the passage of a law in 2019. Her challenge is essentially one of capacity and resources to execute requests for mutual legal assistance, and the location and extradition of accused persons, particularly given the time limits set by statute. Mozambique does have a bar on the extradition of her nationals but will allow a Requesting State to submit a request (and the evidence) for consideration of a prosecution within its borders⁵⁵. Again, the efficacy of this is dependent on Mozambique's actual capacity that is still emerging.

General Legal Framework for International Cooperation

1. Mozambique is party to a number of international agreements directly and indirectly concerned with mutual legal assistance (MLA) and extradition. Mozambique has a civil law system, and it is widely accepted that such systems are monist in their approach to international agreements. Up until 2019, Mozambique had no domestic legislation governing mutual legal assistance or extradition – such requests were executed on an ad hoc basis under specific bilateral agreements. Finally, in November 2019, the necessary legislation was passed, setting a clear framework for execution of requests for both MLA and extradition.

2. Article 4 of the new law provides that cooperation is governed by the Vienna Convention on the Law of Treaties 1964 as well as any bilateral or multi-lateral agreements. Accordingly, the SADC Protocols on Extradition and Mutual Legal Assistance and the United Nations Conventions on Organized Crime and Corruption, can be applied in determining matters of mutual legal assistance and extradition. However, where there is a conflict between the domestic legislation and international agreements, the domestic law will prevail particularly in regard to the procedures to be adopted⁵⁶.

⁵⁵ Article 33 and 83 of the Law to Establish the Principles and Procedures for International Legal and Judicial Cooperation in Criminal Matters.

⁵⁶ Discussion with Senior Prosecutor in the Office of the Prosecutor General, Andre de Brito; and Senior Attorney in the Office of the Attorney General (Central Authority) April, June, and July 2020.

3. The following are considered the most relevant agreements regarding MLA and extradition in Mozambique:

Domestic Legislation

- Law to Establish the Principles and Procedures for International Legal and Judicial Cooperation in Criminal Matters 21/19(IJCCM).The Extradition Act Cap 8:03 of 1972⁵⁷.

International Agreements on Mutual Legal Assistance and Extradition

- SADC Protocol on Mutual Legal Assistance in Criminal Matters 2002.
- SADC Protocol on Extradition 2002.
- Convention on Mutual Assistance in Criminal Matters between State Members of the Community of Portuguese-Speaking Countries.
- The United Nations Convention Against Transnational Organized Crime signed in 2000.
- The United Nations Convention Against Corruption signed in 2004.

Relevant Bilateral Treaties in Southern Africa

- South Africa

Mozambique and Southern Africa – Legal Basis for Extradition

4. For the purposes of extradition with her southern African neighbors, the law states that an extraditable offense must carry at least two years imprisonment and that there must be both dual criminality, based on the alleged conduct of the accused, as well as a guarantee of reciprocity⁵⁸. However, the absence of reciprocity is not an automatic bar under Article 6 where the cooperation requested is deemed necessary to combat certain types of crime, or where it contributes to the wellbeing of the accused or his/her social re-integration, or finally, where the cooperation sought clearly serves to clarify facts in relation to a Mozambican citizen.

5. With the operation of Article 4 (application of legal agreements), the SADC protocols can be used as a basis of request for both extradition and mutual legal assistance, as may the UN Conventions. This will cover: *The Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia, and Zimbabwe*. Only where there are lacunae within the Protocols (or the UN Conventions for example), will the domestic law prevail.

6. Whilst the SADC Protocol on Extradition and the domestic law set out similar requirements relating to the contents of any such request, the domestic framework does contain strict limits and processes that must then be followed upon receipt. These processes are not catered for within SADC and so the domestic law will prevail. Ultimately, proceedings can be delayed significantly from the point at which a decision to extradite is made by the Court of Appeal, were an accused person to submit an appeal. The time limits on detention are clear (e.g., 80 days from the date an appeal is lodged).

7. Initial requests may be rejected outright by the Ministry responsible, based on a paper assessment – there is no appeal against this outcome. Therefore, political considerations do need to be considered carefully before making any application with possible objections identified through informal discussions and addressed within the letter of request. Once received and deemed admissible by the Minister of Justice, the request is sent to the Attorney General's Office before transmission to the Prosecution services for action.

8. Mozambican nationals will not be extradited under this law. There are other grounds of refusal (see below). However, it is possible to seek prosecution of such persons within Mozambique through submission of the necessary evidence to the Office of the Prosecutor General via the Central Authority under section 33 of the Act.

⁵⁷The translation used for the purposes of this analysis is an unofficial analysis and so may contain errors.

⁵⁸ See sections 6 of the IJCCM

Process for Extradition Requests: Mozambique in Comparison to the SADC Protocol on Extradition

SADC PROTOCOL	IJCCM
<p>Contents of a Request for Extradition: Art 6:</p> <ul style="list-style-type: none"> ■ In writing and translated into the language of the Requested State. ■ Accurate description of accused and information on location. ■ Text of the applicable law. ■ Statement of penalty likely to be imposed (or if convicted, either a certified copy of the judgement and sentence imposed or if not sentenced, a statement affirming the sentence likely to be imposed). ■ Statement of facts relating to the commission of the offense, including time and place. ■ Warrant of arrest issued by the competent authority and duly authenticated. ■ If convicted in absence, a statement as to the legal means to defense/have the case re-tried. 	<p>Contents of Request – Article 24</p> <p>The new law is largely based on guidance given within the SADC Protocols on both extradition and MLA. Transmission can be through digital means⁵⁹.</p> <p>Upon receipt of the request for extradition, there are two processes to be followed:</p> <p>Step I: Administrative Phase Article 41 to 55</p> <p>Upon receipt, the Central Authority will check the request for ‘regularity’ before sending to the Ministry responsible within 10 days. Upon receipt by the Ministry, a ‘paper based’ assessment is conducted to determine if there are any grounds for immediate dismissal. If not, the matters are returned to the Central Authority who will notify the State Prosecutors within 10 days who will institute proceedings at the Supreme Court within 48 hours.</p> <p>Step 2A: Judicial Phase.</p> <p>Upon a receipt, a judge will assess the application and make a decision within 10 days. He will pass this to his assistant judges who have another five days to make any observations. After this period, a warrant for arrest will be issued.</p> <p>Step 2B: Judicial Hearing.</p> <p>Upon arrest, there will be a hearing at which the defendant can be represented and, if he/she so wishes, call up to 10 witnesses. This can significantly delay an extradition. This hearing can be averted if the accused consents to the extradition. Detention if granted is limited to a maximum of 65 days although this can be extended by 25 days in certain circumstances. Where there is an appeal by either party, the accused may be detained for another 80 days.</p> <p>The accused as a power to appeal to the Supreme Court Plenary which must be exercised within eight days of the decision of the Court. If an appeal is submitted, the accused can be detained for a further six months from the date the appeal is lodged⁶⁰.</p>
<p>Provisional Warrants for Arrest (i.e., on the basis of information only) can be issued both under the SADC protocol. However, once arrested, the Requesting State MUST follow up with the original warrant of arrest and other information as required for extradition within 30 days.</p>	<p>Provisional Warrants for Arrest s17 Art 58 can be requested directly to the judicial authorities. The formal request must be sent through within 18 days of arrest⁶¹. INTERPOL can be used to transmit urgent requests (Art.30).</p>
<p>Time Limit for Surrender: The SADC protocol on extradition states that surrender must occur without ‘undue delay’. However, the prescriptive nature of the time limits contained within the domestic laws are likely to be observed where there is less clarity contained within international agreements.</p>	<p>Time Limit for Surrender Art. 57 a date will be set; if no transfer occurs, the accused will be released after 20 days. Once this limit has expired, no further extradition requests will be entertained in relation to the same matter⁶².</p>

⁵⁹ Article 23 IJCCMA

⁶⁰ Ibid 4.

⁶¹ There is reference to another 40 days, but the translation is difficult to comprehend.

⁶² Section 54 of the IJCCMA

Mozambique: Mandatory Grounds for Refusal of Extradition *(Italics highlight differences)*

SADC ARTICLE 4	MOZAMBIQUE ART 8, 9, 10, 11
<ul style="list-style-type: none"> ■ Political Nature of Offense. ■ Purpose is based on political opinion, race, religion, ethnicity, sex, or status. ■ The offense is a military law offense. ■ Final judgment has already been rendered in respect of the offense in question. ■ Immunity from prosecution or punishment due to lapse of time or amnesty or any other reason. ■ Risk of torture or inhuman treatment or punishment. ■ Where judgment in the Requesting State has been rendered in absentia with no notice and no opportunity for the accused to have a retrial in his presence. 	<ul style="list-style-type: none"> ■ Political nature of offense. ■ Purpose is based on political opinion, race, religion, ethnicity, sex, nationality, or status. ■ The offense is a military law offense. ■ Final judgment has already been rendered/proceedings are closed in respect of the offense in question. ■ Risk of torture or inhuman treatment or punishment. ■ <i>The accused is a Mozambican national.</i> ■ <i>The crime was committed IN Mozambique</i> ■ <i>The offense may lead to trial by an 'extraordinary court' or the punishment applicable is indefinite.</i> ■ <i>The offense is punishable by death.</i> ■ <i>The request breaches international treaties or the Constitutional Order.</i> ■ <i>Rule of speciality unless guarantees are given or treaty overrides Absence of guarantee of reciprocity.</i>

Mozambique: Discretionary Grounds for Refusal of Extradition

SADC ARTICLE 5	MOZAMBIQUE ART 13
<ul style="list-style-type: none"> ■ Where the accused is a national of the Requested State <i>(Mandatory ground for refusal in Mozambique)</i>. ■ Prosecution is already pending. ■ The offense carries the death penalty unless assurance is given that it shall not be imposed <i>(Mandatory ground for refusal in Mozambique)</i>. ■ The offense was committed outside of the jurisdiction of either State and the Requested State has no jurisdiction in comparable circumstances. ■ Where the offense was committed in Mozambique. <i>(Mandatory ground for refusal Mozambique)</i>. ■ The request is incompatible with humanitarian considerations e.g., health, age of that person. 	<ul style="list-style-type: none"> ■ The offense is deemed 'minor' i.e., the offense is punishable with less than two years imprisonment, <i>However, SADC will take precedence (one year requirement) see Article 4.</i> ■ Proceedings are already pending, or the case could be prosecuted in Mozambique for that offense. ■ Where there may be severe consequences for the accused in respect of age, health, or other personal reason. ■ Accused is already serving a sentence or facing prosecution in respect of other offenses (extradition may be delayed rather than refused). ■ Absence of agreement/consent to re-extradition unless treaty overrides.

9. In all cases, where extradition is denied⁶³, the Requesting State can ask the Mozambican authorities to prosecute the case instead. For requests under the United Nations Convention Against Transnational Organized Crime, the matter must entail a 'serious offense' i.e., carry at least four years imprisonment – which includes the vast majority of wildlife matters under Mozambican law (see below). For the United Nations Convention Against Corruption, prescribed offenses therein must be the subject of the request. The majority of these will be found under the Penal Code. Grounds for refusal under both of these conventions largely mirror those captured above.

Mozambique and Southern Africa – Legal Basis for Mutual Legal Assistance

10. The same domestic law applies to requests for mutual legal assistance – and so does the same principle in relation to the application of international agreements. Again, requests for MLA may be rejected on the grounds on that they are of 'minor importance' i.e., carrying less than two years imprisonment, but as described above, where an international convention lowers that requirement, that convention (or protocol or agreement) will prevail.

⁶³ Assurances regarding the application of the death penalty or that an indefinite or 'perpetual' punishment will not be imposed can override this ground of refusal.

Process for Mutual Legal Assistance Requests: Mozambique

SADC PROTOCOL ON MLA ARTICLE 5

Contents of a Letter of Request Article 5

- Name of the authority to which the request relates.
- Description of the investigation, prosecution or proceedings including a summary of the facts and a copy of the applicable law.
- Purpose of the request and the type of assistance sought.
- Degree of confidentiality required and the reasons therefor.
- Details of any particular procedure or requirement to be followed and the reasons therefor.
- Any time limit for execution.
- For requests re: taking of evidence, search and seizure, matters pertaining to proceeds of crime, a statement indicating the basis of belief that the evidence or proceeds are in the Requested State.
- In the case of request for evidence from a person, indication of procedure (e.g., on oath? Affirmation?) and the subject matter sought.
- For transfer of exhibits, the location in the Requested State and an indication of where the exhibit will go, in whose custody and what, if any test will be conducted and the date of anticipated return to the Requested State.
- For availability of detained person, the place to which the person will be transferred and date of return.

ILJCCM

Contents of a Letter of Request Art. 24

The same requirements as SADC with an additional element regarding assurances on costs of execution. Requesting States should advisedly enclose a copy of the SADC protocol, also translated into Portuguese, with the relevant sections highlighted. For requests regarding the taking of evidence, search and seizure, matters pertaining to proceeds of crime etc. the principles are the same as SADC. For transfer of exhibits or voluntary attendance of witnesses abroad, the nexus between the evidence to be given and the offense allegedly committed must be addressed in the LOR.

For Cross Border Controlled Deliveries (Art. 155), the offense in question must be one that could form the basis of an extradition request. The Requesting State must send copies of its legislation setting out the sanctions available and further guarantees regarding the security of the assets in question. There must be an agreement/assurance that information regarding the operation shall be communicated to the authorities in Mozambique.

Joint investigation teams (Art. 137) can be created for 'complex' investigation that has 'implications' for Mozambique or another State. Such assistance would enable the secondment of an officer from the Requesting State to a Mozambican investigative body with the authority of the Minister responsible. The LOR must establish the legal authority for such a venture under the laws of the Requesting State alongside details of the assistance requested and assurances on civil liability for damages caused by any officer in the course of this investigation.

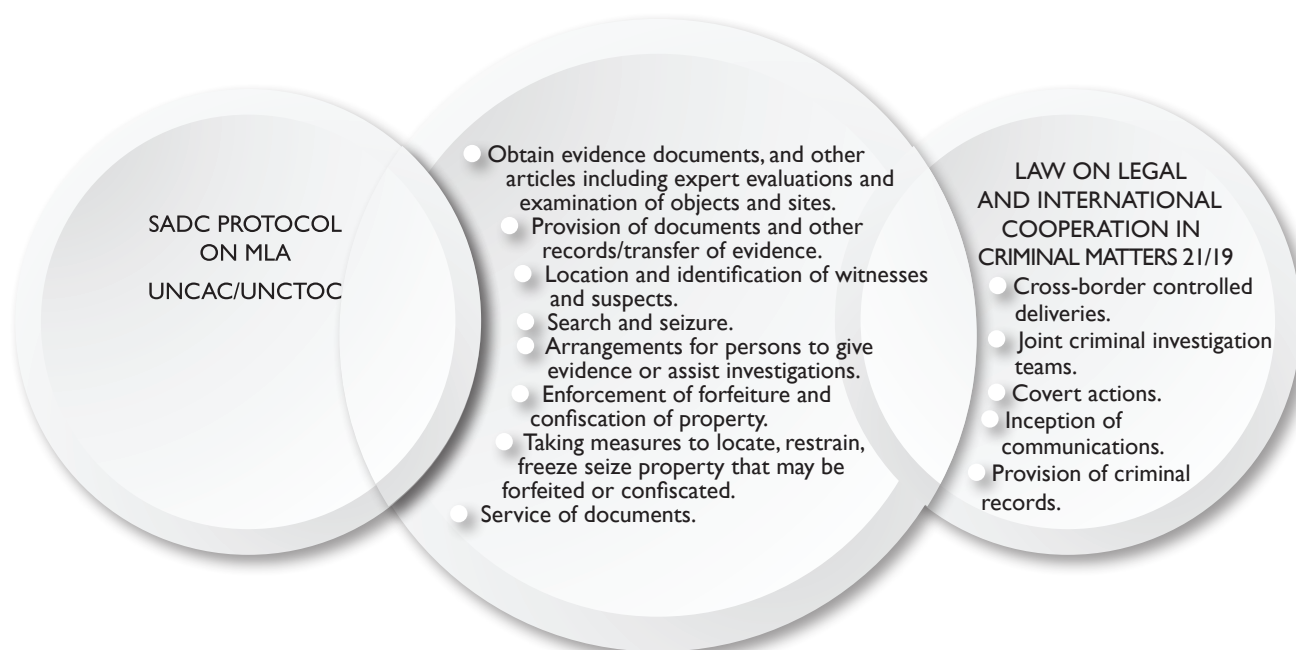
Covert operations (Art. 156) can be authorized by the Public Prosecutors Office. In this case, the request must be based on an international agreement, treaty, or convention or on the observance of the principles of reciprocity.

Intercept (Art. 157) can be authorized on the basis of a formal agreement or treaty or convention. Again, as much identifying information must be contained within the LOR.

Request for Electronic Media and Cooperation in relation to Cybercrime Art. 167, 169 and 172). Again, as much information must be provided to identify the material in question and the use to which the information will be put. Guarantees for personal data protection must be included.

11. Mozambique, like Angola, offers a scope of prescribed forms of mutual legal assistance that is wider than her neighbors, allowing for assistance such as covert surveillance, joint investigations, and controlled deliveries. Below, the types of assistance are identified under her domestic laws and those of the most relevant international conventions. Additional forms of assistance can be provided for under section 136 and 139.

Mutual Legal Assistance in Mozambique: Types of Assistance



Grounds for Refusal of Mutual Legal Assistance: Mozambique

12. The SADC Protocol on Mutual Legal Assistance only offers discretionary grounds for refusal. It is likely that where there is a conflict e.g., where Mozambique is of the view that the request is politically motivated and therefore, she 'shall' reject the request vs. the SADC protocol approach that would say that she 'may' reject the request, these differences are likely to have little impact in practice provided assurances are obtained or an agreement specifically addresses the conflict.

13. What is of import is to note the additional grounds for refusal in comparison to just four contained in the SADC protocol and where possible, Requesting States should anticipate those additional grounds and cater for them in any request.

SADC ARTICLE 6 DISCRETIONARY GROUNDS ONLY

- The offense is a political offense or an offense of a political character.
- The offense is an offense under military law, not criminal law.
- That execution of the request would impair its sovereignty, security, public order, public interest or prejudice the safety of any person.
- The request is not made 'in conformity' with the Protocol itself.

MOZAMBIQUE: MANDATORY GROUNDS

Same as SADC above and:

- The request does not satisfy or respect the requirements of international treaties applicable.
- The absence of dual criminality.
- The absence of reciprocity.
- There are 'ground reasons' to believe that cooperation is requested to punish a person on grounds of nationality, ethnicity, race, sex, language, religion, political, ideological convictions, education, economic or social conditions or by virtue of membership of a specific social group.
- The request is a military offense and not a criminal one.
- The offense is punishable by death or other torture, inhumane treatment.
- The offense may lead to trial by an 'extraordinary court' or the punishment applicable is indefinite.
- The case has been concluded in Mozambique or another country or the proceedings are closed for any other reason (Requesting State can seek sentence review).

MOZAMBIQUE: DISCRETIONARY GROUNDS

- The offense is of 'minor importance' i.e., less than two years (*but SADC protocol will override this*).
- Where the request may imply severe consequences for the person in question due to their age, health status or other personal reasons.

Mozambique: Wildlife Laws and Qualification for Extradition and Mutual Legal Assistance

14. Applicable domestic laws (excluding customs-specific laws).

- Law for the Protection, Conservation and Sustainable Use of Biological Diversity Law 16/2014 as amended by Law 5/2017 (LPCSBD).
- Law on Preventing and Combating Money Laundering and Financing of Terrorism Law No. 14/2013 (PCMLFT). Predicate money laundering offenses under Article 7 include 'environmental crimes.'

OFFENSES IN RELATION TO PROTECTED SPECIES	DOMESTIC LAW OFFENSES-SPECIFIC CHARGES	PENALTY	QUALIFICATION UNDER DOMESTIC LAW ON MLA & EXTRADITION (latter may be refused if under 6 months)	QUALIFICATION UNDER SADC PROTOCOLS (extradition may be refused if under 1 year)	QUALIFICATION UNDER UNCTOC FOR MLA AND EXTRADITION (serious offense = 4 years or more).
HUNTING	Hunting during the months in which hunting is formally prohibited, or hunting in a manner prohibited by the same rules during months when hunting is not prohibited: LPCSBD article 62 (2)	8-12 years/ fine	Yes	Yes	Yes
DEALING (SALE/ PURCHASE)	To sell, distribute, purchase, transfer, receive, provide to another person, transport, import, export, transit or unlawfully hold animals, fauna products or preparations of protected or prohibited species, including the species listed in Annexes I and II to CITES: LPCSBD article 62 (1)	12-16 years/ fine	Yes	Yes	Yes
DEALING (SALE/ PURCHASE)	Conversion, transfer, dispose of proceeds of crime or transfer of proceeds of crime; environmental crimes: PCMLFT article 4 as read with Article 75	8 to 12 years	Yes	Yes	Yes
POSSESSION	To unlawfully hold animals, fauna products or preparations of protected or prohibited species, including the species listed in Annexes I and II to CITES: LPCSBD article 62 (1)	12-16 years/ fine	Yes	Yes	Yes
	Acquire or possess proceeds of crime, article 4 PCMLFT as read with article 7	2 to 8 years	Yes	Yes	Yes
IMPORT/ EXPORT/ RE-EXPORT	To, transport, import, export, transit or unlawfully hold animals, fauna products or preparations of protected or prohibited species, including the species listed in Annexes I and II to CITES: LPCSBD a62 (1)	12-16 years/ fine	Yes	Yes	Yes
	Disposal of proceeds of crime/ conversion, transfer/conceal origin of proceeds of crime Article 4 PCMLFT as read with Article 75	8 to 12 years	Yes	Yes	Yes

Key Challenges in Execution of Requests for MLA and Extradition

15. In discussions with Professor Gildo Espada, lawyer and member of the Mozambican Bar Association⁶⁴, up until the passage of the 2019 Act, Mozambique suffered with many problems with international cooperation. Even though international conventions were applied as a basis for cooperation, the absence of any prescribed procedures on execution meant that international cooperation was often hampered by delay. Accordingly, any requests required a bilateral treaty that would guide the necessary procedure. Whilst MLA was executed – and SADC countries in particular benefited from that relationship in this regard – extradition was very rare.

16. Mozambique has a number of bi-laterals – in southern Africa, this is limited to South Africa. Further afield, Mozambique has agreements including China, Portugal, Vietnam, Timor, Cuba, and Germany.

17. However, with the advent of the new law, there is an urgent need for training on the grounds, procedures, and time limits to be applied to extradition and MLA requests. Furthermore, the prosecution office aims to now establish a new international cooperation unit though the resources to be allocated to this unit are yet to be determined. It has yet to be seen, therefore, how extradition and MLA will be eased with the passage of this new law in November 2019 and the ensuing 2020 pandemic that has obviously impacted upon the execution of even normal prosecutorial services.

RECOMMENDATION 1: Judicial dialogue focusing upon the Supreme Court which holds jurisdiction over extradition matters, to sensitize on the new law and the procedures therein.

RECOMMENDATION 2: Training of lawyers within the Office of the Prosecutor General as well as the Attorney General's Office and the Ministry of Justice, also to sensitize on the new law and identify areas where delay can be anticipated and avoided.

RECOMMENDATION 3: Targeted training of competent authorities i.e., the police and wildlife department regarding the execution of particular requests such as on covert surveillance and controlled deliveries. As with Angola, a framework for these should be developed (if it doesn't exist) and can be used as a basis for a SADC-wide protocol on international controlled deliveries and other operation.

⁶⁴ Interview conducted 9th June 2020 and 5th August 2020. Professor Espada has been instrumental in the drafting of the Mozambican 'Rapid Reference Guide' to wildlife crime aimed at prosecutors, judges and investigators and has been engaged in training of prosecutors and judicial officers in Mozambique on behalf of the United Nations.

Namibia



Namibia

In summary: Namibia has a good legal framework for MLA and extradition and is largely compliant with the SADC Protocols on each. However, some amendments would be required, in particular, provision for a fast-track mechanism for extradition where the accused consents.

General Legal Framework for International Cooperation

1. Namibia, like South Africa and some of her other SADC neighbors has a Roman-Dutch law heritage that for the most part renders it dualist in its approach to international agreements. However, Article 144 of the Constitution states international law is directly applicable unless inconsistent with the Constitution or an Act of Parliament. The amended section 4 of the Extradition Act provides that extraditable countries include those with which multilateral agreements have been signed provided the agreement itself makes clear that it is to be used as such a basis. Similarly, under the International Cooperation in Criminal Matters Act 2000, section 1 also provides for the application of such international agreements. The London Scheme, Harare Scheme and SADC protocols on both extradition and mutual legal assistance are arguably 'self-executing' as providing a basis for cooperation. However, the UN conventions are less clear. Under UNCTOC, for example, it states at article 16 that the convention MAY be used as a legal basis for extradition for the specified offenses referred to therein but goes on to say that extradition shall be subject to the conditions of domestic law and to any applicable extradition treaties. Accordingly, the practice is that the UN Conventions may be used as a basis for triggering a bilateral agreement that would need to be approved by the National Assembly.

2. The country perhaps most engaged with Namibia in terms of extradition and MLA is South Africa, where there exists a good relationship. China and the USA followed in terms of quantity of requests that were being executed at the time of interview⁶⁵.

⁶⁵ Interviews conducted on 15th July and 24th July 2020 with Edios Maronedze, Senior Advocate, HQ Office of the Prosecutor General, Windhoek, Namibia who handles or oversees incoming and outgoing requests.

Domestic Legislation

- International Cooperation in Criminal Matters Act 2000.
- Extradition Act 11 of 1996 as amended in 2018.

International Agreements on Mutual Legal Assistance and Extradition

- SADC Protocol on Mutual Legal Assistance on Criminal Matters 2002.
- SADC Protocol on Extradition 2002.
- The Commonwealth Scheme on Mutual Legal Assistance (Harare Scheme) 1966.
- The Commonwealth Scheme on Extradition (the 'London Scheme').
- The United Nations Convention Against Transnational Organized Crime signed in 2000.

Bilateral Agreements in Southern Africa

- Angola
- South Africa

Namibia and Southern Africa – Legal Basis for Extradition

3. For the purposes of extradition with her southern African neighbors, the Extradition Act of 1996 as amended in 2018 demands dual criminality based on the alleged conduct of the accused, as well as a guarantee of reciprocity⁶⁶. Countries to which extradition may be effected include those with whom an extradition agreement with Namibia has been made, any other country specified by the President of Namibia in the 'Gazette' and, by way of the 2018 amendment, any other country to which a multilateral agreement which provides for extradition, exists and to which Namibia is a party⁶⁷. 'Extraditable offenses' are those that carry at least 12-months imprisonment.

Process for Extradition Requests: Namibia in Comparison to the SADC Protocol on Extradition

SADC PROTOCOL ART.6	EXTRADITION ACT 1996 AS AMENDED.
<p>Contents of a Request for Extradition</p> <ul style="list-style-type: none">■ In writing and translated into the language of the Requested State.■ Accurate description of accused and information on location.■ Text of the applicable law.■ Statement of penalty likely to be imposed (or if convicted, either a certified copy of the judgement and sentence imposed or if not sentenced, a statement affirming the sentence likely to be imposed).■ Statement of facts relating to the commission of the offense, including time and place.■ Warrant of arrest issued by the competent authority and duly authenticated.■ If convicted in absence, a statement as to the legal means to defense/have the case re-tried.	<p>Contents of Request – s7 and s8</p> <p>Section 7 explicitly states that a request can be made in such manner as specified in the extradition agreement so this can be either through diplomatic channels or INTERPOL as per the SADC Protocol. Section 8 goes on to effectively mirror the requirements under the SADC Protocol, but it is crucial to note is that instead of having to provide statements establishing a prima facie case against the accused, the 2018 amendments provide that a certificate issued by the appropriate authority confirming sufficiency of evidence to prosecute, shall suffice.</p> <p>The Minister responsible shall receive the request and, if on the face of it, all information is present, the request is forwarded to a magistrate with 'authority to proceed'. Upon receipt, the magistrate shall, provided the warrant is authenticated i.e., according to the requirements of any applicable extradition agreement or certified by an authorized officer as an original or true copy or translation thereof AND accompanied by a certificate of the format contained in the new Schedule 2⁶⁸, issue the warrant for arrest.</p>
<p>Provisional Warrants for Arrest (i.e., on the basis of information only) can be issued both under the SADC protocol. However, once arrested, the Requesting State MUST follow up with the original warrant of arrest and other information as required for extradition within 30 days, however.</p>	<p>Provisional Warrants for Arrest (i.e., on the basis of information only) can be issued on the basis of information received under section 11 from any diplomatic representative, INTERPOL, or, in the case of a commonwealth country, any government representative. The grounds for urgency must also be established. As with the SADC Protocol, the Requesting State will have 30 days from the date of arrest to provide that further information.</p>

⁶⁶ s1 Extradition Act 1996 definition of 'extradition agreement' includes reciprocity as a basis.

⁶⁷ s1 Extradition Amendment Act 2018.

⁶⁸ See <https://www.lac.org.na/laws/2018/6810.pdf>

Cont.

Executing the Order for Extradition

Namibian prosecution authorities 'shall' be present⁶⁹ at the extradition hearing that takes place before a magistrate, usually in Windhoek. The test is, as with all such inquiries, a 'sufficiency of evidence' test based on evidence presented. Once determined in favor of extradition, the accused does have the power to appeal as does the Requesting State if the request is refused – within 14 days. Thereafter, a final recourse to the Supreme Court is available. The decision is conveyed to the Minister who will then make an order for surrender, setting a date. If no surrender occurs, the Requesting State shall have 15 days before the accused is discharged.

Time limit for surrender

The SADC protocol on extradition states that surrender must occur without 'undue delay'.

Namibia: Mandatory Grounds for Refusal of Extradition (*Italics highlight differences*)

SADC ARTICLE 4

NAMIBIA S5 AND S14

- | | |
|--|---|
| <ul style="list-style-type: none"> ■ Political Nature of Offense. ■ Purpose is based on political opinion, race, religion, ethnicity, sex, or status. ■ The offense is a military law offense. ■ Final judgment has already been rendered in respect of the offense in question. ■ Immunity from prosecution or punishment due to lapse of time or amnesty or any other reason. ■ Risk of torture or inhuman treatment or punishment. ■ Where judgment in the Requesting State has been rendered in absentia with no notice and no opportunity for the accused to have a retrial in his presence. | <ul style="list-style-type: none"> ■ Political nature of offense. ■ Purpose is based on political opinion, race, religion, nationality. ■ The offense is a military law offense. ■ Final judgment has already been rendered/proceedings are closed/proceedings are pending, in respect of the offense in question. ■ Immunity from prosecution due to lapse of time. ■ Where judgment in the Requesting State was rendered in absentia. ■ <i>Where it is not in the interests of justice to return the accused.</i> ■ <i>Absence of agreement re: re-extradition to a third country.</i> ■ <i>Absence of assurance re: the rule of speciality.</i> ■ <i>Death penalty unless assurance is given.</i> ■ <i>Accused is a Namibian national.*</i> ■ <i>Such extradition would be incompatible with humanitarian considerations in view of age or health of the person.</i> ■ <i>Extradition would conflict with Namibia's international obligations e.g., under another treaty (including risk of torture).</i> ■ <i>The accused would be entitled to acquittal or discharge under the laws of Namibia.</i> ■ <i>Risk of trial in an extraordinary court.</i> |
|--|---|

4. The additional 'mandatory' grounds of refusal encompass the discretionary grounds afforded under SADC. The only additional two grounds under SADC that do not appear in the law concerning extradition – but presumably would apply given the application of section 1 of the Extradition Act as amended - are that the offence was committed in Namibia; or that the offense was committed outside of Namibia and the Requesting State and Namibia would have no jurisdiction in similar circumstances. It is also important to note the following:

5. Post arrest, the magistrate can use any of the mandatory grounds of refusal to terminate an application for extradition. However, upon appeal, the High Court and, if applicable, the Supreme Court, can further find additional grounds to reject a request on the basis of triviality, lapse of time or that the accusation has not been made in good faith or in the interests of justice. This represents a potential for judicial frustration of an extradition at the eleventh hour.

⁶⁹ s12 Extradition Act 1996 as amended by the Extradition Act 2018

6. For Namibian citizens, there is generally a bar on extradition under section 6. However, there are two options available to Requesting States: the first is to request a prosecution within Namibia and leave it in the hands of the Office of the Prosecutor General⁷⁰. This can only be done where an extradition request has been made. Where such a prosecution is instituted, the jurisdictional issue is resolved by deeming the conduct as having occurred in Windhoek.

7. The second option is having made a request for extradition of a Namibian national, to make the argument that the case is 'serious', the costs involved in availing witnesses and evidence to a Namibian court are prohibitive and/or include any other circumstances that would justify the Minister exercising discretion and extraditing the Namibian citizen accordingly.

Namibia and Southern Africa – Legal Basis for Mutual Legal Assistance

8. The International Cooperation in Criminal Matters Act of 2000 imports international conventions as a basis for cooperation provided Namibia is either a signatory to it or to which it has acceded. Under Schedule 1 of the Act, certain states have been designated as states with whom MLA may be provided/exchanged. These are all the state parties to the SADC Protocol on MLA. In addition, the Minister of Justice may enter into any agreement with any state for the purposes of MLA – such an agreement must be agreed to by the National Assembly and published in the Gazette.

Process for Mutual Legal Assistance Requests: Namibia

SADC PROTOCOL ON MLA

Contents of a Letter of Request Article 5

- Name of the authority to which the request relates.
- Description of the investigation, prosecution or proceedings including a summary of the facts and a copy of the applicable law.
- Purpose of the request and the type of assistance sought.
- Degree of confidentiality required and the reasons therefor.
- Details of any particular procedure or requirement to be followed and the reasons therefor.
- Any time limit for execution.
- For requests re: taking of evidence, search and seizure, matters pertaining to proceeds of crime, a statement indicating the basis of belief that the evidence or proceeds are in the Requested State.
- In the case of request for evidence from a person, indication of procedure (e.g., on oath? Affirmation?) and the subject matter sought.
- For transfer of exhibits, the location in the Requested State and an indication of where the exhibit will go, in whose custody and what, if any test will be conducted and the date of anticipated return to the Requested State.
- For availability of detained person, the place to which the person will be transferred and date of return.

ICCMA 2000

Contents of a Letter of Request S7

Requests should be sent to the Permanent Secretary in Namibia or, in the case of urgent requests, directly to the magistrate's court within whose jurisdiction the evidence is required resides or is (in the case of obtaining evidence) or the Permanent Secretary explaining the need for urgency. There are no prescribed general requirements for an incoming LOR; however, as a signatory to the SADC Protocol and in light of s1 of the Act itself, the requirements under SADC should be used to frame any LOR. In terms of authentication of documents e.g., confirmation that an investigation has commenced or the stage of proceedings, a certificate issued by the relevant authority should accompany the LOR⁷¹.

For MLA in relation to obtaining evidence, the magistrate's court must satisfy itself that proceedings have been instituted or an investigation is being conducted and that there are reasonable grounds for believing that the offense has taken place or that it is necessary to determine if an offense has taken place in the Requesting State. The LOR should therefore address these points.

For attendance of witnesses in foreign states, a subpoena issued by the competent authority of the Requesting State must be provided with the LOR.

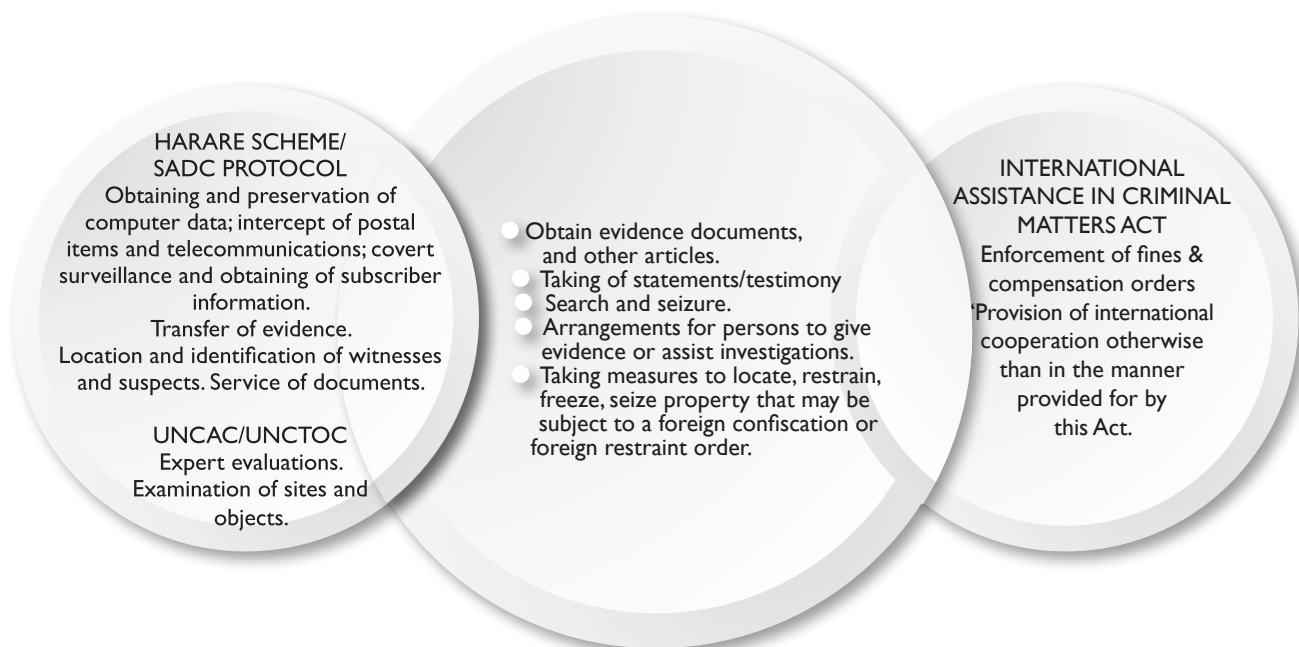
For registration of foreign sentences or compensatory orders, the Executive makes the decision. The LOR – sent to the Permanent Secretary - must confirm the final decision and that no appeal is pending, that the accused had the opportunity to defend the proceedings and that the sentence or order cannot be satisfied in full in the Requesting State – that property is held in Namibia. The order may then be registered in the magistrates' court and the accused will be afforded the opportunity to argue that it be set aside. In relation to proceeds of crime, foreign confiscation orders can also be lodged in Namibia. The same process as above is followed and the Permanent Secretary will consider the same factors (jurisdiction, no appeal etc.) before obtaining Ministerial approval prior to lodging the matter with the court.

⁷⁰ s6 Extradition Act 1996 as amended.

⁷¹ See Government Notice 186 Government Gazette 2614 USAID.GOV

9. Whilst the Act itself is relatively limited in terms of the types of MLA expressly catered for, section 30 enables the provision of other forms of assistance as well. The Requesting State need only clarify the cost and resource implications for the authorities in Namibia and make the necessary arrangements, at the time of, or before, making any such request.

Mutual Legal Assistance in Namibia: Types of Assistance



Grounds for Refusal of Mutual Legal Assistance: Namibia

10. The SADC Protocol on Mutual Legal Assistance only offers discretionary grounds for refusal. As with other jurisdictions considered in this study, conflict may be resolved through the giving of assurances or the making of an arrangement.

11. What is of import is to note the additional grounds for refusal in comparison to just four contained in the SADC protocol and where possible, Requesting States should anticipate those additional grounds and cater for them in any request.

12. Interestingly, the ICCMA does not set out mandatory or discretionary grounds of refusal bar one in relation to the execution of a foreign pecuniary sentence or compensatory order where it appears that such a sentence would not have been ordered under the laws of Namibia relating to extradition. Accordingly, the discretionary grounds afforded under SADC (or indeed, any other international agreement to which Namibia is a signatory or acceded to), would apply.

13. Grounds for setting aside of such orders by the courts in which they are registered, are set out in the Act under sections 18, 22 and 26 based on submissions from the accused.

SADC ARTICLE 6 DISCRETIONARY GROUNDS ONLY

- The offense is a political offense or an offense of a political character.
- The offense is an offense under military law, not criminal law.
- That execution of the request would impair its sovereignty, security, public order, public interest or prejudice the safety of any person.
- The request is not made 'in conformity' with the Protocol itself.

Wildlife Crimes in Relation to Protected Species: Qualification for Extradition and Mutual Legal Assistance

14. For mutual legal assistance requests (incoming), there are, for most forms, no minimum term requirements in terms of penalty, nor is there a strict requirement on dual criminality. However, in relation to extradition, the requirements of the domestic law (minimum of one year) mirror the requirements of the SADC protocol (one year).

The table below highlights four broad categories of wildlife offenses within Namibia in order to identify whether they may amount to extraditable crimes and/or qualify for MLA. The application of the United Nations Convention Against Transnational Organized Crime is also included as many of the offenses with elevated penalties due to recent amendments to the relevant laws, will be of interest. Customs legislation is not specifically included but as with all jurisdictions, may have application as well.

15. The Prevention of Organized Crime Act 29 of 2004 (POCA) provides a framework for the prosecution and investigation of offenses relating to racketeering, human trafficking, gang related offenses and money laundering. The offenses of acquisition, possession or use⁷² of ‘proceeds of unlawful activity’ are not limited to ‘serious offenses’ but rather apply to any unlawful activity that constitutes an offense under any law of Namibia. Accordingly, the POCA has application to wildlife and forestry crime offenses and provides for a penalty of up to N\$100 million and/or up to 30 years imprisonment. In 2015, Namibia was deemed no longer subject to the FATF monitoring process following changes in Namibia’s legal and regulatory framework that were deemed to have met the strategic deficiencies identified by FATF in 2011. As a member of ESAAMLG, as of 2016, Namibia was deemed to have sufficiently addressed a number of ‘Core and Key Recommendations’ in relation to international cooperation and extradition and accordingly it was found that Namibia should exit the follow-up process under the ESAAMLG 1st Round of Mutual Evaluations⁷³.

Namibia: Wildlife Laws and Qualification for Extradition and Mutual Legal Assistance

- 15.** Applicable domestic laws (excluding customs-specific laws and regulations).
- Nature Conservation Ordinance 4 of 1975 as amended in 2017 (NCO).
 - Controlled Wildlife Products Trade Act 2008 as amended in 2017 (CWPTA).
 - Prevention of Organized Crime Act 2004 (POCA) (any unlawful activity can form the basis of a money laundering offense – no minimum requirement on sentence).

OFFENSES IN RELATION TO PROTECTED SPECIES	DOMESTIC LAW OFFENSES-SPECIFIC CHARGES	PENALTY	QUALIFICATION UNDER DOMESTIC LAW ON MLA & EXTRADITION (latter may be refused if offense carries less than 12 months)	QUALIFICATION UNDER SADC PROTOCOLS (extradition may be refused if under 1 year)	QUALIFICATION UNDER UNCTOC FOR MLA AND EXTRADITION (serious offense = 4 years or more).
HUNTING	Hunting elephant/rhino in a protected area s20 NCO	20 years/fine	Yes	Yes	Yes
	Hunting specially protected game in a protected area s20 NCO	5 years/fine	Yes	Yes	Yes
	Hunting in general of elephants/rhino s26 NCO	25 years/fine	Yes	Yes	Yes
	Hunting in general of specially protected game s26 NCO	10 years/fine	Yes	Yes	Yes
	Hunting of protected game s27 NCO	5 years/fine	Yes	Yes	Yes
DEALING (SALE/ PURCHASE)	Dealing in controlled wildlife product s4 CWPTA	25 years/fine	Yes	Yes	Yes
	Money laundering – use of proceeds of an unlawful activity s6 POCA	30 years/fine	Yes	Yes	Yes
POSSESSION	Possession of a controlled wildlife product, s4 CWPTA	15 years/fine	Yes	Yes	Yes
	Possession of proceeds of an unlawful activity s6 POCA	30 years/fine	Yes	Yes	Yes

⁷² Section 6 POCA

⁷³ First Round Mutual Evaluations – Post Evaluations Progress Report, East and Southern Africa Anti-Money Laundering Group 2017

OFFENSES IN RELATION TO PROTECTED SPECIES	DOMESTIC LAW OFFENSES-SPECIFIC CHARGES	PENALTY	QUALIFICATION UNDER DOMESTIC LAW ON MLA & EXTRADITION (latter may be refused if offense carries less than 12 months)	QUALIFICATION UNDER SADC PROTOCOLS (extradition may be refused if under 1 year)	QUALIFICATION UNDER UNCTOC FOR MLA AND EXTRADITION (serious offense = 4 years or more).
IMPORT/EXPORT/RE-EXPORT	s4 Import/export/re-export of CITES I	25 years/fine	Yes	Yes	Yes
	Import/export/re-export of a CITES Appendices I, II or III species s5 CWPTA	20 years/fine	Yes	Yes	Yes
	'Bringing into or taking out of Namibia' s6 POCA	30 years/fine	Yes	Yes	Yes

Key Challenges in Execution of Requests for MLA and Extradition

16. The Office of the Prosecutor General (OPG) does not have a unit specifically dealing with MLA/ extradition cases but each case is treated as and when it comes and will usually be allocated to those familiar with the process. In interviews conducted with one such lawyer headquartered at the main office in Windhoek⁷⁴, the approach taken is that the OPG will prepare or draft the necessary papers in support of the assistance required and forward the same to the Ministry of Justice's International Cooperation Department after which the request will be sent to the Ministry of Foreign Affairs for action. The biggest challenge to international cooperation, according to law enforcement and prosecutors in Namibia is the issue of delay. All requests (including for extradition) must go via the Ministry of Justice and so prosecutors are not able to directly accelerate any response.

17. From a law enforcement point of view, there are good relationships with the police in Angola, Zambia, and Zimbabwe, but obtaining evidence for use at court is a challenge due to delay, often on both sides of the request.

18. Training of law enforcement on fulfilling requests, particularly in relation to the making of statements would be a welcome intervention, as would training of the lawyers within the Ministry of Justice. Judicial dialogue should be separately held, drawing on the particular expertise of the Deputy Chief Magistrate of Windhoek who, with one other, has handled the bulk of incoming requests over the last fifteen years.

19. The lack of a framework in place for controlled deliveries was specifically raised in Namibia by law enforcement engaged in wildlife trafficking investigations⁷⁵.

20. Other recommendations relevant to Namibia are captured in the Executive Summary.

RECOMMENDATION 1: Stakeholder engagement with the Ministry of Justice International Cooperation Department and the Ministry of Foreign Affairs to identify the obstacles to speedy resolution of such requests was specifically raised by the prosecution officers engaged in MLA and extradition.

RECOMMENDATION 2: Training and sensitization of law enforcement, particularly the 'Blue Rhino' team that is engaged on wildlife crimes concerning protected species, is needed. This would focus upon the processes for extradition and MLA and discussion and guidance on the forms of MLA.

RECOMMENDATION 3: Discussion with the Ministry in relation to amending the law to enable a fast-track extradition where the accused consents and to enable evidence 'by certificate of sufficiency' to pass the required evidential test in court.

⁷⁴ Ibid 64.

⁷⁵ ICCWC assessment conducted in July 2019 by the author.

South Africa



South Africa

In summary: South Africa’s legislation on MLA and Extradition needs updating. The MLA explicitly provides for a very limited range of assistance; there is little guidance on processes and requirements for other forms of assistance. The more that can be explicitly stated in statute, the better. With an Extradition Bill currently under consideration, this is an opportune time to engage the relevant ministries to review and make other necessary changes highlighted below. South Africa generally has good relations with her SADC neighbors and, barring issues particular to the death penalty and need for assurances, South Africa is seen as willing and able to cooperate.

General Legal Framework for International Cooperation

1. South Africa, like Namibia, Botswana, Lesotho, Swaziland, and Zimbabwe, has a Roman-Dutch law heritage that for the most part renders it dualist in its approach to international agreements. However, Article 231(4) of the Constitution states ‘any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law unless inconsistent with the Constitution or an Act of Parliament’. What amounts to a ‘self-executing provision’ is not clear, and legal precedent has not yet shed a clear light on this. Accordingly, in determining if SADC or the UN conventions have application, it is necessary to assess the extent to which the domestic law allows for the application of the provisions contained therein.
2. South Africa does have numerous treaties on these issues with jurisdictions across the globe. Closer to home, South Africa has a bilateral treaty with Malawi and Botswana. As a designated country in countries such as Malawi, Zimbabwe, and Zambia, South Africa benefits in terms of having a basis for outgoing letters of request and will give assistance on the basis of reciprocity in the absence of a treaty.

Domestic Legislation

- International Cooperation in Criminal Matters Act 1996 as amended.
- Extradition Act 67 of 1962.

International Agreements on Mutual Legal Assistance and Extradition⁷⁶

- SADC Protocol on Mutual Legal Assistance on Criminal Matters 2002 *not yet in force*.
- SADC Protocol on Extradition 2002 *in force as of 2006*.
- The Commonwealth Scheme on Mutual Legal Assistance (Harare Scheme) 1966 – *not domesticated*.
- The London Scheme on Extradition – *not domesticated*.
- United Nations Convention Against Transnational Organized Crime, signed in 2002 – *not domesticated*.
- United Nations Convention Against Corruption signed in 2003 – *not domesticated*.

Bilateral Agreements in Southern Africa⁷⁷

- Botswana (extradition).
- Lesotho (extradition and MLA).
- Malawi (extradition) Swaziland (extradition).
- Namibia and Zimbabwe (and the UK) are 'designated countries' (see below).

South Africa and Southern Africa – Legal Basis for Extradition

3. For the purposes of extradition with her southern African neighbors, the Extradition Act of 1962 requires dual criminality, and the extraditable offense must be one that carries at least six months imprisonment. There are three routes through which an extradition may be effected:

- By virtue of an agreement, entered into by the President of South Africa, based on reciprocity (s2).
- Through 'designation' of a foreign state (s2).
- Where the President gives written consent to the surrender (s3(2)).

4. All agreements are subject to the rule of specialty and under section 2, any agreement or designation under A or B must be approved by Parliament and then published in the Gazette. For SADC and the UN Conventions, the definition of 'extradition agreement' under s2 explicitly refers to the provisions of section 2 (3) i.e., the need for gazette after Parliamentary approval.

Process for Extradition Requests: South Africa in Comparison to the SADC Protocol on Extradition

SADC PROTOCOL ART.6	EXTRADITION ACT 1962 AS AMENDED.
<p>Contents of a Request for Extradition: Art 6:</p> <ul style="list-style-type: none">■ In writing and translated into the language of the Requested State.■ Accurate description of accused and information on location.■ Text of the applicable law.■ Statement of penalty likely to be imposed (or if convicted, either a certified copy of the judgement and sentence imposed or if not sentenced, a statement affirming the sentence likely to be imposed).■ Statement of facts relating to the commission of the offense, including time and place.■ Warrant of arrest issued by the competent authority and duly authenticated.■ If convicted in absence, a statement as to the legal means to defense/have the case re-tried.	<p>Contents of Request – s4 and s5</p> <p>Requests are sent via diplomatic channels to the Minister of Justice and Correctional Services. Whilst the contents of a request are not explicitly stated within the Act, the requirement outlined under the SADC Protocol would normally be expected. The Minister will then send the matter to the magistrate for a warrant of arrest to be executed. This process may be circumvented by direct transmission of warrant for arrest issued in a country with which there is an extradition agreement providing for reciprocal backing of warrants of arrest for 'associated states' (only applicable to countries in Africa), allowing for a magistrate to simply endorse the warrant directly.</p> <p>Upon arrest, there will follow a judicial enquiry by the magistrate – the test is one of 'sufficiency of evidence' and for the purposes of assessing that, a certificate from the prosecuting authority of the Requesting State, asserting that it has sufficient evidence at its disposal to warrant the prosecution, can be 'conclusive' proof of that question under s10(2). It is interesting to note that during this period, an accused may be granted bail by the magistrates (s9(2)) though in practice this is rare.</p>

⁷⁶ Department of Justice and Constitutional Affairs <https://www.justice.gov.za/ilr/mla.html>

⁷⁷ Ibid 46.

Once the decision is reached, the magistrate will issue the committal order and a copy of the record to the Minister. Ultimately, the Minister will then either or refuse the surrender meaning that the Executive holds the power on the final decision (s10(4) and s11). However, where the matter has come from an 'associated' state, the magistrate also has the power to refuse surrender. In all other cases, however, the only question is one of sufficiency of evidence. See below on 'Grounds of Refusal'.

Provisional Warrants for Arrest

(i.e., on the basis of information only) can be issued both under the SADC protocol. However, once arrested, the Requesting State MUST follow up with the original warrant of arrest and other information as required for extradition within 30 days.

Provisional Warrants for Arrest on the basis of information are provided for under section s 5 and 8. The formal request for extradition, however, must come 'without unreasonable delay' (sic) (s8(2)).

Time limit for surrender

The SADC protocol on extradition states that surrender must occur without 'undue delay'.

Time limit for surrender

No surrender can occur until after the period for exercising the right to appeal has been exhausted (15 days) unless the accused waives his right of appeal; or before such an appeal, once lodged, has been exhausted. Following that, there is a two-month period after which, if not surrendered, the accused can seek discharge.

South Africa: Grounds for Refusal of Extradition

All of South Africa's grounds for refusal are essentially discretionary, exercisable primarily by the Minister but, in the case of reciprocal backing of warrants, some grounds may also be exercised by the magistrates' court. This is indicated by 'mc'.

SADC ARTICLE 4

- Political Nature of Offense.
- Purpose is based on political opinion, race, religion, ethnicity, sex, or status.
- The offense is a military law offense.
- Final judgment has already been rendered in respect of the offense in question.
- Immunity from prosecution or punishment due to lapse of time or amnesty or any other reason.
- Risk of torture or inhuman treatment or punishment.
- Where judgment in the Requesting State has been rendered in absentia with no notice and no opportunity for the accused to have a retrial in his presence.

SOUTH AFRICA S11, S12, S15

- Political character of the offense.
- The accused would be prejudiced, prosecuted, or punished on account of his gender, race, religion, nationality, or political opinion (mc).
- Accused is already serving or is about to serve a sentence of imprisonment (delay extradition) (mc).
- *The punishment would be too severe.*
- *Proceedings are pending (mc).*
- *Trivial nature of offense (mc).*
- *Accusation is not in good faith or in the interests of justice (mc).*
- *Extradition would be unjust or unreasonable (mc).*

5. South Africa, out of all of the SADC countries, has been the most proactive in securing extradition agreements worldwide, holding extradition agreements with Canada, Australia, China, Egypt, and USA, and having acceded in 2003 to the Council of Europe's Convention on Extradition. South Africa is currently negotiating extradition and MLA treaties with Ethiopia, Pakistan, and several South American jurisdictions, and overall, her framework for extradition (and MLA) does render her able to give assistance where required. The role of the Executive in the final decision on extradition has been criticized.

South Africa and Southern Africa – Legal Basis for Mutual Legal Assistance

6. The International Cooperation in Criminal Matters Act of 1996, like the Extradition Act, imports international conventions as a basis for cooperation provided South Africa is either a signatory to it or to which it has acceded and further, that the Parliament approves, and the agreement is gazetted. Accordingly, the SADC Protocol, not yet 'gazetted', or the UN Conventions, cannot themselves form a basis for MLA. However, they can and do guide the principles on which MLA is agreed.

7. Service of letters of request are made to the 'Director General' in the Department of Justice and Constitutional Development. There is no specific provision for contents of an incoming request – rather separate requirements dependent on the type of assistance sought are set out under the various articles. However, MLA is not restricted to those particular forms (see below) and can be extended to other types of assistance under section 31 of the Act.

Process for Mutual Legal Assistance Requests: South Africa

SADC PROTOCOL ON MLA

Contents of a Letter of Request Article 5

- Name of the authority to which the request relates.
- Description of the investigation, prosecution or proceedings including a summary of the facts and a copy of the applicable law.
- Purpose of the request and the type of assistance sought.
- Degree of confidentiality required and the reasons therefor.
- Details of any particular procedure or requirement to be followed and the reasons therefor.
- Any time limit for execution.
- For requests re: taking of evidence, search and seizure, matters pertaining to proceeds of crime, a statement indicating the basis of belief that the evidence or proceeds are in the Requested State.
- In the case of request for evidence from a person, indication of procedure (e.g., on oath? Affirmation?) and the subject matter sought.
- For transfer of exhibits, the location in the Requested State and an indication of where the exhibit will go, in whose custody and what, if any test will be conducted and the date of anticipated return to the Requested State.
- For availability of detained person, the place to which the person will be transferred and date of return.

ICCMA 1996

Contents of a Letter of Request S7 Examination of witnesses s7:

Requests should be sent to the Director General of South Africa. The LOR should follow the guidance under SADC Article 5 including confirmation that proceedings have been instituted or that there are reasonable grounds for believing the offense has been committed in the Requesting State and that an investigation has been commenced. A certificate confirming as such by the competent authority will suffice. That LOR is then sent to the magistrates' court in the relevant jurisdiction that will issue a subpoena to appear or produce such evidence as required. This process can be circumvented for some states - under s11, states specified under Schedule I – namely Lesotho, Swaziland, Botswana, Malawi, Botswana and Zimbabwe, a subpoena issued by the courts in any of those states can be endorsed by a magistrate in South Africa without further enquiry provided he/she is satisfied it was lawfully issued.

For **registration of foreign sentences or compensatory orders**, the Director General will make the decision. The LOR must confirm the final decision and that no appeal is pending, that the court who made the order had the jurisdiction to so do, that the accused had the opportunity to defend the proceedings and that the sentence or order cannot be satisfied in full in the Requesting State and that property is held in South Africa. Once satisfied, this is sent to the Ministerial approval after which the Director General shall have the order lodged with the court. Notice shall then be given to the accused who will be afforded the opportunity to set it aside.

In relation to proceeds of crime, **foreign confiscation orders** can also be lodged in South Africa. The same process as above is followed and the Director General will consider the same factors (jurisdiction, no appeal etc.) before obtaining Ministerial approval prior to lodging the matter with the court. For **foreign restraint orders**, the only consideration is that the order is not subject to appeal or review.

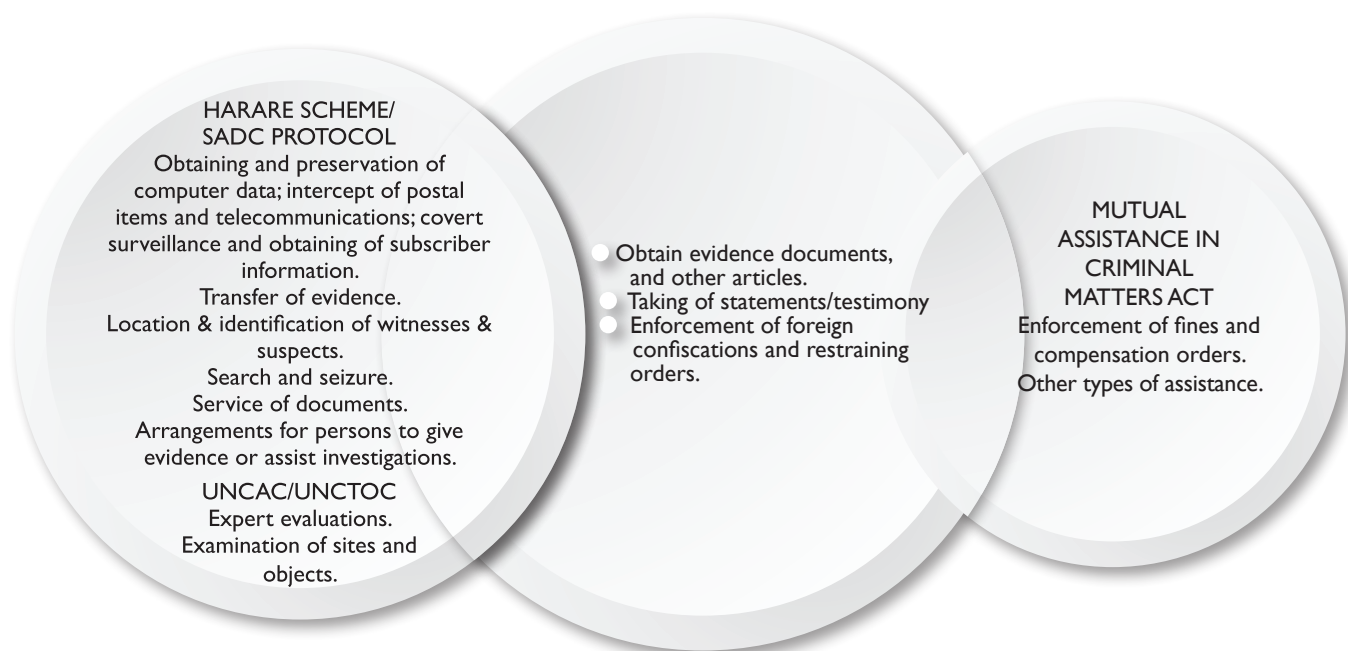
Grounds for Refusal of Mutual Legal Assistance: South Africa

8. By virtue of section 16, a Minister can refuse a request to enforce a foreign sentence on the same grounds as he might use to refuse extradition had that been requested. However, for all other forms of assistance, it is implied that refusal may be on the grounds reference in any relevant agreement with the Requesting State. There are no explicit grounds set out in the Act but in practice, the principles contained in SADC are applied⁷⁸.

RECOMMENDATION 1: To support the authorities in South Africa to accelerate their approval and gazettment of the SADC Protocol on Mutual Legal Assistance.

⁷⁸ Discussion with the Deputy Director of Public Prosecutions, South Africa 15/08/2020

Mutual Legal Assistance in South Africa: Types of Assistance



UNCAC and UNCTOC the Harare Scheme and the SADC Protocol are limited in their role given the absence of any gazetted notice. Nevertheless, the additional forms of MLA that these three agreements provide for are likely catered for under the domestic legislation that can allow for ‘other forms’ of assistance under section 31 of the Act.

Hence, even though the domestic legislation for South Africa is limited in the types of assistance expressly provided for, South Africa can address requests that do not quite fall within the categories prescribed in the Act under section 31.

For wildlife offenses, as can be seen in the table below, the majority of offenses most likely to be subject to requests for MLA and extradition would qualify under South Africa’s legal framework for assistance.

South Africa: Wildlife Laws and Qualification for Extradition and Mutual Legal Assistance

9. Applicable domestic laws (excluding customs-specific laws and regulations).
 - National Environment and Biodiversity Act 10 of 2004 (NEMBA).
 - National Environment and Biodiversity Act: Threatened or Protected Species Regulations 2015 (TOPS).
 - Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Regulations 2010 as amended in 2014.
 - Prevention of Organized Crime Act 1998 (POCA).

Note: South Africa’s laws on hunting/dealing/possession are highly nuanced and scattered throughout not only the national laws mentioned above but also provincial laws. Wherever there is a conflict, national laws shall prevail according to Article 146 of the Constitution and NEMBA section 8. For the purposes of this exercise, the ‘headline’ offenses have been captured.

OFFENSES IN RELATION TO PROTECTED SPECIES	DOMESTIC LAW OFFENSES-SPECIFIC CHARGES	PENALTY	QUALIFICATION UNDER DOMESTIC LAW ON MLA & EXTRADITION (latter may be refused if offense carries less than 6 months)	QUALIFICATION UNDER SADC PROTOCOLS (extradition may be refused if under 1 year)	QUALIFICATION UNDER UNCTOC FOR MLA AND EXTRADITION (serious offense = 4 years or more).
HUNTING	Restricted activities involving listed threatened or protected species s57 as read with s102 NEMBA	10 years/ fine	Yes	Yes	Yes
	Hunting generally of listed, threatened, or protected species in breach of provincial laws s79 TOPS as read with s123	5 years/fine	Yes	Yes	Yes
DEALING (SALE/ PURCHASE)	Restricted activity involving a listed threatened or protected activity includes selling, trading in, buying, acquisition or disposal of such species s57 as read with s102 NEMBA	10 years/ fine	Yes	Yes	Yes
	Sale of a CITES I species s74 TOPS	5 years/fine	Yes	Yes	Yes
	Money laundering – use of proceeds of an unlawful activity s4 POCA	30 years/ fine	Yes	Yes	Yes
POSSESSION	Possession of a listed threatened or protected species s57 as read with s102 NEMBA	10 years/ fine	Yes	Yes	Yes
	Possession of an imported CITES I species s74 TOPS	5 years/fine	Yes	Yes	Yes
	Performing any act in relation to proceeds of unlawful activities s4 POCA	30 years/ fine	Yes	Yes	Yes
IMPORT/ EXPORT/ RE-EXPORT	Import or exporting a listed, threatened, or protected species into or out of South Africa s57 as read with s102 NEMBA	10 years/ fine	Yes	Yes	Yes
	Import/export in breach of TOPS Regulations or CITES regulations – s73 TOPS	5 years/fine	Yes	Yes	Yes
	Performing any act in relation to proceeds of unlawful activities s4 POCA	30 years/ fine	Yes	Yes	Yes

Key Challenges in Execution of Requests for MLA and Extradition

10. Following discussion with the Deputy Director of Public Prosecutions, South Africa, Adv. Luckson Mbiga and Mr. Herman Van Heerden, Head of International Cooperation, Ministry of Justice, South Africa, the following challenges were identified:

11. Delays: this is particularly acute in relation to obtaining the Minister's approval under section 7(1) of the International Co-operation in Criminal Matters Act for MLA and the issuance of notification by Minister in terms of section 5(1) of the Extradition Act (for the issue of a warrant for arrest by a magistrate) with regard to extradition. While it is understandable that the Executive should be involved in extradition matters, the same should not be for MLA. Dispensing with the need for the Minister's approval for execution of MLA requests can speed up the process. However, to achieve this, it may be necessary to amend the legislation.

12. Further, since extradition hearings are heard in the magistrates' court, court caseload (other criminal matters) presents a significant delay. Coupled with the appeal process that can take the matter through the High Court, the Supreme Court of Appeal and then the Constitutional Court, extradition requests can be all too easily frustrated.

13. Another challenge identified relates to the failure or refusal by some states to give assurance regarding the death penalty. Authorities in Botswana also raised this as a problem (see section on Botswana). In the absence of 'Lacey Act' provisions for offenses other than terrorism matters, South Africa does not have jurisdiction to prosecute offenses committed in foreign states. A Requesting State will face a challenge in asking South Africa for a domestic prosecution where an extradition fails. This issue of jurisdiction and the right to prosecute a foreign offense is discussed in the executive summary.

RECOMMENDATION 2: There exists an Extradition Bill that is under consideration. This may be an opportune time to convene the prosecution service alongside the Ministry to consider other amendments. For example, were extradition matters to be heard directly in the High Court (by passing the need for a magistrates' court hearing), there would be less delay according to those interviewed. The insertion of a fast-track mechanism for notification by the Minister relating to warrants for arrest should be considered as should the removal of any requirement for Ministerial approval in relation to MLA requests. The current Extradition Bill does provide the option of seeking a prosecution in South Africa where extradition is refused. Additional provisions to ensure compliance with SADC on issues like concurrent requests, transit, and fast track extraditions where consent is given, should be explored.



Zambia

In summary: Despite resource difficulties, Zambia does not regard herself as having a particular challenge with the majority of her SADC neighbors in terms of handling requests. For wildlife matters, provided the penalty involves holds at least 12 months, dual criminality can be established through conduct rather than a prescriptive requirement on the wording of the statutory offense. Zambia have made video links available on MLA requests – though not catered for by way of statute, this shows a degree of flexibility to make things work. However, statutes governing extradition and MLA are limiting in terms of the types of offenses and the countries to which cooperation is extended. Although Zambia does work around these limitations through ad hoc arrangements, it would be better to revise the legal framework entirely to properly domesticate the SADC Protocols and wider application of those principles to all international partners.

General Legal Framework for International Cooperation

1. Zambia is a dualist State – treaties and agreements do not have the force of law unless passed by an Act of Parliament⁷⁹. This hasn't happened in relation to the United Nations Conventions and so these are not relied upon for MLA or extradition. For extradition requests, the President must issue a statutory order based on reciprocity, even where that foreign country and Zambia are parties to an international convention or arrangement; likewise, for mutual legal assistance, a statutory order must be issued, although for MLA, this is undertaken by the Minister, not the President.
2. Therefore, domestic legislation takes precedence alongside treaties that have been gazetted as is the case with South Africa, Zimbabwe, and Namibia. Further afield, extradition agreements exist with Portugal and UAE. For SADC countries, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, and Zimbabwe are all included in statutory orders regarding MLA and extradition. Angola and DRC are not.

⁷⁹ Section 3 of the Extradition Act and section 5 of the Mutual Legal Assistance in Criminal Matters Act. Agreements with foreign countries must be captured within a statutory instrument.

3. SADC Protocols are regarded as a ‘gentlemen’s’ agreement’ but are not yet fully implemented into domestic law. This should be a priority as the SADC Protocols do address lacunae that exist in the domestic law e.g., the giving of assurances⁸⁰ in relation to the death penalty for example, a problem that has also been highlighted by authorities in Botswana.

Domestic Legislation

- The Extradition Act Cap 94.
- The Extradition (Declared Commonwealth Countries) Order.
- The Mutual Legal Assistance in Criminal Matters Act Cap 98.
- Mutual Legal Assistance in Criminal Matters (Specified States) Order SI 95 of 1996.

International Agreements on Mutual Legal Assistance and Extradition

- SADC Protocol on Mutual Legal Assistance on Criminal Matters 2002 – *not domesticated*.
- SADC Protocol on Extradition 2002 – *not domesticated*.
- The Commonwealth Scheme on Mutual Legal Assistance (Harare Scheme) 1966 – *not domesticated*.
- The Commonwealth Scheme on Extradition (the ‘London Scheme’) – *not domesticated*.
- United Nations Convention Against Transnational Organized Crime, signed in 2005 – *not domesticated*.

Zambia and Southern Africa – Legal Basis for Extradition

4. For the purposes of extradition, the Extradition Act Cap 64 requires dual criminality, reciprocity and an extraditable offense must be one that carries at least twelve months imprisonment. The rule of speciality applies to all such agreements. Extradition is effected by way of an arrangement that can be:

- By virtue of an international agreement or convention to which the Republic is a part (s3(1) or where the President is satisfied that reciprocal facilities will be afforded by a foreign country, then by statutory order.
- Designated commonwealth countries under Part III of the Act subject to a limited number of offenses set out under Schedule I of the Act – these offenses do not extend to wildlife offenses. ALL commonwealth countries qualify under this Part.

Process for Extradition Requests: Zambia in Comparison to the SADC Protocol on Extradition

SADC PROTOCOL ART.6	EXTRADITION ACT CAP 64
<p>Contents of a Request for Extradition: Art 6:</p> <ul style="list-style-type: none"> ■ In writing and translated into the language of the Requested State. ■ Accurate description of accused and information on location. ■ Text of the applicable law. ■ Statement of penalty likely to be imposed (or if convicted, either a certified copy of the judgement and sentence imposed or if not sentenced, a statement affirming the sentence likely to be imposed). ■ Statement of facts relating to the commission of the offense, including time and place. ■ Warrant of arrest issued by the competent authority and duly authenticated. ■ If convicted in absence, a statement as to the legal means to defense/have the case re-tried. 	<p>Contents of Request s6, s18, s46</p> <p>Requests are sent via diplomatic channels to the Attorney General (AG) and must contain, as per the SADC protocol, an original or authenticated copy of the conviction or sentence or warrant or other order as the case may be, a statement of the offense with an accurate description of the alleged facts of the offense along with the text of the relevant law plus an accurate description of the accused. Upon receipt, the AG will issue a notice to a magistrate to issue a warrant of arrest.</p> <p>For commonwealth countries designated under Part III of the Act, any request is simply made in writing to the AG with authenticated statement confirming the external warrant for arrest. This is then effectively ‘backed’ by the magistrate upon instruction from the AG.</p> <p>There are also provisions for reciprocal backing of warrants whereby the President can, by statutory order, declare the Extradition Act part V has having application. Here an external warrant can be sent direct to the magistrates who, if satisfied that it has been duly executed, endorse that warrant for arrest.</p>

Cont.

⁸⁰ See discussion on death penalty below.

Upon arrest, there will follow a judicial enquiry by the magistrate – the test is one of ‘sufficiency of evidence’ under section 10. Once the magistrates deem there is sufficient evidence, notice is given to the Attorney General who will issue a warrant for the surrender of the accused unless there are grounds for refusal.

Provisional Warrants for Arrest

(i.e., on the basis of information only) can be issued both under the SADC protocol. However, once arrested, the Requesting State MUST follow up with the original warrant of arrest and other information as required for extradition within 30 days, however.

Provisional Warrants for Arrest *(i.e., on the basis of information only)*

can be issued under the domestic law as well - however, once arrested, the Requesting State MUST follow up with the original warrant of arrest and other information as required for extradition within 18 days, however. (s9). Failure to do so will lead to the accused being discharged.

Time limit for surrender

The SADC protocol on extradition states that surrender must occur without ‘undue delay’.

Time limit for surrender

No surrender can occur until after the period for exercising the right to appeal has been exhausted (15 days unless the accused waives his right of appeal); or before such an appeal, once lodged, has been exhausted. Following that, there is a two-month period after which, if not surrendered, the accused can seek discharge.

5. As a party to the London Scheme on Extradition regarding commonwealth countries, Zambia has effectively operationalized this through her domestic law and in particular the Extradition (Declared Commonwealth Countries) Order issued under the Act itself. Therefore, whilst the London Scheme limits extradition to offenses that carry at least two years’ imprisonment, the Extradition Act of Zambia lowers this threshold to just one year. Furthermore, the SADC Protocols also have effect and are used to guide requests from countries that are party to it⁸¹. Accordingly, Schedule I of the Act which sets out extraditable offenses to commonwealth countries, should not be read as self-limiting given the operation of SADC and other international agreements.

6. Schedule I offers the following range of offenses in relation to requests from commonwealth countries:

- | | |
|---|--|
| ■ Murder/manslaughter | ■ Actual bodily harm |
| ■ Wounding or grievous bodily harm | ■ Unlawful sexual intercourse with a female |
| ■ Rape | ■ Human trafficking |
| ■ Indecent assault | ■ Kidnapping, abduction, false imprisonment |
| ■ Bigamy | ■ Stealing/abandoning/exposure of a child |
| ■ Slavery | ■ Perjury/perverting the course of justice |
| ■ Bribery | ■ Offense involving counterfeit currency |
| ■ Arson | ■ Theft/embezzlement/fraudulent conversion |
| ■ Forgery offenses | ■ Obtaining property/credit by deception |
| ■ False accounting, property fraud | ■ Robbery |
| ■ Burglary/housebreaking | ■ Offenses against bankruptcy/company law |
| ■ Blackmail or extortion | ■ Acts endangering vehicles, vessels/authority |
| ■ Malicious or willful damage to property | ■ Piracy |
| ■ Narcotics/dangerous drug offenses | ■ Import/export re: stones, gold, gems, metals or currency |
| ■ Revolt against ship master or aircraft | |
| ■ Specified offenses under the Firearms Act | |
| ■ Offenses relating to abortion | |

Aiding, abetting, counselling, procuring, being an accessory to, attempting or conspiring any of the above are also included.

7. In practice, where a request is received that falls outside of this range of offenses, the general principles will be applied in relation to dual criminality, a minimum of twelve months imprisonment, reciprocity, and requirements regarding assurance regarding specialty and re-extradition.

⁸¹ Discussions with Eddie Kwasa, Ministry of Justice International Cooperation Unit, 14 July 2020

Zambia: Mandatory Grounds for Refusal of Extradition *(Italics highlight differences)*

SADC ARTICLE 4	ZAMBIA S8, 12, 19,31. S32-S36, S38 TO 41
<ul style="list-style-type: none"> ■ Political Nature of Offense. ■ Purpose is based on political opinion, race, religion, ethnicity, sex, or status. ■ The offense is a military law offense. ■ Final judgment has already been rendered in respect of the offense in question. ■ Immunity from prosecution or punishment due to lapse of time or amnesty or any other reason. ■ Risk of torture or inhuman treatment or punishment. ■ Where judgment in the Requesting State has been rendered in absentia with no notice and no opportunity for the accused to have a retrial in his presence. 	<ul style="list-style-type: none"> ■ Political Nature of Offense. ■ Purpose is based on race, political opinion, religion, or nationality <i>or where extradition would involve transit through a country that would pose risk to life or freedom.</i> ■ The offense is a military law offense. ■ Final judgment has already been rendered in respect of the offense in question. ■ Immunity from prosecution due to lapse of time. ■ <i>The trivial nature of the offense.</i> ■ <i>The accusation is not in 'good faith'.</i> ■ <i>Offense was committed in Zambia.</i> ■ <i>Prosecution for the same offense is already pending in Zambia.</i> ■ <i>Accused is a Zambian national unless agreement says otherwise.</i> ■ <i>Where the accused may face the death penalty (and absence of assurances).</i> ■ <i>Absence of agreement on re-extradition to a third party.</i>

Zambia: Discretionary Grounds for Refusal of Extradition

SADC ARTICLE 5	ZAMBIA S19, S23
<ul style="list-style-type: none"> ■ Where the accused is a national of the Requested State <i>(Mandatory ground for refusal in Mozambique).</i> ■ Prosecution is already pending. ■ The offense carries the death penalty unless assurance is given that it shall not be imposed <i>(Mandatory ground for refusal in Mozambique).</i> ■ The offense was committed outside of the jurisdiction of either State and the Requested State has no jurisdiction in comparable circumstances. ■ Where the offense was committed in Mozambique. <i>(Mandatory ground for refusal Mozambique).</i> ■ The request is incompatible with humanitarian considerations e.g., health, age of that person. 	<ul style="list-style-type: none"> ■ The accused is already in bail or in custody for any other offense committed in Zambia <i>(may postpone).</i> ■ Where the offense is also an offense under the laws of Zambia and the Director of Public Prosecutions has decided either not to institute or to terminate proceedings in respect of that offense. ■ Note: <i>The Magistrate MAY also refuse on the grounds of triviality, that the accusation was not in good faith or that it would not be in the interests of justice or that the passage of time is too great; further that to extradite would be unjust, oppressive, or too severe. In such a finding, the accused can be discharged, or the final decision may be left to the AG (s23).</i>

8. Where extradition is refused, Zambia does not offer the option of a domestic prosecution. In practice, the authorities would be open to the possibility subject to legal requirements being met. Within a redraft, this option should be catered for explicitly. However, as discussed in the executive summary, issues of jurisdiction must be clarified at the outset, perhaps through involvement of the SADC Secretariat.

Zambia and Southern Africa – Legal Basis for Mutual Legal Assistance

9. The Mutual Legal Assistance in Criminal Matters Act regulates assistance to foreign states specified by the Minister by statutory order under s5. Where there is no treaty between Zambia and another State, the Minister for Home Affairs may enter into administrative arrangement with that other State providing for assistance in an investigation for a matter that would amount to an 'indictable offense' under the Laws of Zambia. Similarly, where a treaty exists that does not cater for the specific criminality alleged, the Minister may also, by administrative arrangement, extend the operation of that treaty to cover the criminality alleged provided it would constitute a violation under an Act of Parliament in Zambia. This does provide for swift arrangements to be made for MLA with

Zambia given the absence of any requirement for gazette. However, such administrative arrangements may only be in place for six months⁸².

10. Under the Mutual Legal Assistance in Criminal Matters (Specified States) Order, issued under the Act itself, the following SADC States are specifically catered for in terms of MLA:

Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, and Zimbabwe.

Process for Mutual Legal Assistance Requests: Zambia

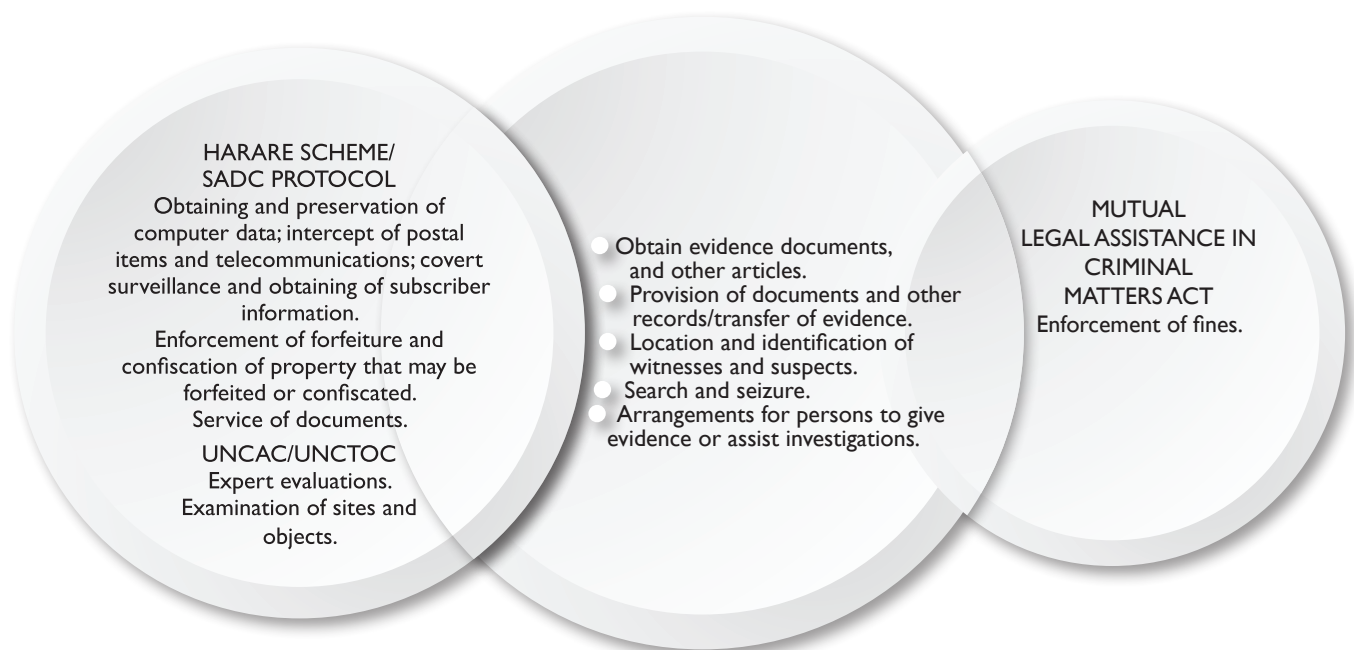
SADC PROTOCOL ON MLA ARTICLE 5	MLACMA
<p>Contents of a Letter of Request Article 5</p> <ul style="list-style-type: none"> ■ Name of the authority to which the request relates. ■ Description of the investigation, prosecution or proceedings including a summary of the facts and a copy of the applicable law. ■ Purpose of the request and the type of assistance sought. ■ Degree of confidentiality required and the reasons therefor. ■ Details of any particular procedure or requirement to be followed and the reasons therefor. ■ Any time limit for execution. ■ For requests re: taking of evidence, search and seizure, matters pertaining to proceeds of crime, a statement indicating the basis of belief that the evidence or proceeds are in the Requested State. ■ In the case of request for evidence from a person, indication of procedure (e.g., on oath? Affirmation?) and the subject matter sought. ■ For transfer of exhibits, the location in the Requested State and an indication of where the exhibit will go, in whose custody and what, if any test will be conducted and the date of anticipated return to the Requested State. ■ For availability of detained person, the place to which the person will be transferred and date of return. 	<p>Contents of a Letter of Request s10</p> <p>Requests should be sent to the Attorney General – the content requirements under section 10 mirror those contained in the SADC Protocol with additional mention of allowances and accommodation to be specified where the request relates to travel of a witness.</p> <p>Enforcement of a foreign fine s12 the order imposing the fine must not be older than five years.</p> <p>For ‘Evidence Gathering Orders’s20, the request must set out reasonable grounds to believe that an offense has been committed in respect of which the foreign state has jurisdiction and reasonable grounds to suppose that evidence or information relating to that offense will be found in Zambia.</p> <p>The transfer of exhibits is done through the issue of a ‘loan order’ under s32. The Attorney General must apply to the court for the order and so, as per the SADC Protocol, details as to the description of the exhibit, reasons for request, identification of custodian, place of storage, any tests to be performed and time period required should all be included.</p>

Mutual Legal Assistance in Zambia: Types of Assistance

On the face of it, the domestic legislative framework offers a limited range of assistance in terms of MLA. However, under section 4, additional forms of MLA can be afforded in furtherance of any agreement reached.

According to the Ministry of Justice in Zambia, assistance of the kind envisaged under SADC rarely poses a difficulty in principle. However, in the absence of statutory guidance on the matter, the lack of guidance within the Act e.g., on registration of a foreign confiscation order, may frustrate some requests where the judiciary are unfamiliar with international best practice on MLA.

⁸² See sections 6 and 7 of the Mutual Legal Assistance in Criminal Matters Act Cap 98.



Grounds for Refusal of Mutual Legal Assistance: Zambia

11. The SADC Protocol on Mutual Legal Assistance only offers discretionary grounds for refusal. It is likely that where there is a conflict e.g., where Zambia is of the view that the request is politically motivated and therefore, she 'shall' reject the request vs. the SADC protocol approach that would say that she 'may' reject the request, these differences are likely to have little impact in practice.

12. What is of import is to note the additional grounds for refusal under domestic law in comparison with just four discretionary grounds contained in the SADC protocol and where possible, Requesting States should anticipate those additional grounds and cater for them in any request.

13. The decision on refusal is made by the Attorney General who sits within the Ministry of Justice.

SADC ARTICLE 6 DISCRETIONARY GROUNDS ONLY

- The offense is a political offense or an offense of a political character.
- The offense is an offense under military law, not criminal law.
- That execution of the request would impair its sovereignty, security, public order, public interest or prejudice the safety of any person.
- The request is not made 'in conformity' with the Protocol itself.

ZAMBIA: MANDATORY GROUNDS S11 (1)

- Political Nature of Offense.
- Purpose is based on race, sex, political opinion, religion, or nationality.
- The offense is a military law offense.
- The granting of the request would prejudice the sovereignty, security, or national interest of Zambia.
- Final judgment has already been rendered in respect of the offense in question in a foreign state or the accused has already served any punishment provided for by the law of that country for the same act or omission as the offense alleged.
- Absence of an agreement under the Act.

ZAMBIA: DISCRETIONARY GROUNDS S11 (2)

- Absence of dual criminality whether the conduct occurred inside Zambia or where the conduct occurred outside of Zambia and outside of the Requesting State.
- Prosecution in Zambia for such conduct would be barred by lapse of time or other reason.
- Provision of assistance would prejudice an investigation or proceedings in a criminal matter in Zambia.
- The assistance required would likely prejudice the safety of any person inside or outside of Zambia.
- Excessive burden on resources.

Zambia: Wildlife Laws and Qualification for Extradition and Mutual Legal Assistance

14. Applicable domestic laws:

- Zambia Wildlife Act No. 14 of 2015 (ZWA) as read with the Zambia Wildlife (Protected Animals) Order No. 42 of 2016 and the National Parks and Wildlife (Prescribed Trophies) Regulations No. 61 of 1993.
- Prohibition and Prevention of Money Laundering Act as amended by Act No. 44 of 2010 (PPMLA) – applies to ‘any crime’ that qualifies as an offense under the laws of Zambia or any other country.

OFFENSES IN RELATION TO PROTECTED SPECIES	DOMESTIC LAW OFFENSES-SPECIFIC CHARGES	PENALTY	QUALIFICATION UNDER DOMESTIC LAW ON MLA & EXTRADITION (latter may be refused if offense carries less than 12 months)	QUALIFICATION UNDER SADC PROTOCOLS (extradition may be refused if under 1 year)	QUALIFICATION UNDER UNCTOC FOR MLA AND EXTRADITION (serious offense = 4 years or more).
HUNTING	Unlawful hunting of a protected animal s36(4) ZWA as read with SI No. 42 of 2016	7 years/ fine	Yes	Yes	Yes
	Unlawful hunting of game or protected animals s37 as read with s136 ZWA	7 years/ fine	Yes	Yes	Yes
	Unlawful hunting of elephants or rhino s127(1) ZWA	5 to 20 years	Yes	Yes	Yes
DEALING (SALE/ PURCHASE)	Sale or purchase of a protected animal, its meat or trophy s130(1) ZWA	5 to 10 years	Yes	Yes	Yes
	Illegal sale or purchase of a prescribed trophy s130(2) ZWA	5 to 10 years	Yes	Yes	Yes
	Unlawful dealing in government trophies s97 as read with s136 ZWA	7 years/fine	Yes	Yes	Yes
	Money laundering – engaging in a ‘transaction’ in relation to proceeds of crime s7 PPMLA	10 years/ fine	Yes	Yes	Yes
POSSESSION	Possession of a protected animal, its meat or trophy s130 (1) ZWA	5 to 10 years	Yes	Yes	Yes
	Possession of a prescribed trophy s130 (2) ZWA	5 to 10 years	Yes	Yes	Yes
	Possession of a government trophy s97 as read with s136 ZWA	7 years/fine	Yes	Yes	Yes
	Possession of proceeds of crime s7 PPLMA	10 years/ fine	Yes	Yes	Yes
IMPORT/ EXPORT/ RE-EXPORT	Import/export/re-export of wild animals or trophies s105 as read with s136 ZWA. Also see s102 (import only) and s103 (export)	7 years/fine	Yes	Yes	Yes
	Where possession/hunting is related to trafficking of ivory or rhino horn s127(2) ZWA	5 to 20 years	Yes	Yes	Yes
	Engages in a transaction/ removes or brings into Zambia proceeds of crime s7 PPMLA	10 years/ fine	Yes	Yes	Yes

Key Challenges in Execution of Requests for MLA and Extradition in Zambia

15. In a discussion with the head of the MLA and Extradition Unit in the Ministry of Justice (the central authority for such requests), Mr. Martin Lukwasa⁸³ and Eddie Kwasa, State Counsel, the following challenges were identified:

16. The biggest challenge was retention of staff. With only four lawyers in the MLA and Extradition Unit within the Ministry of Justice, delay was inevitable in terms of making and receiving requests. This is an institutional problem that touches on issues of terms and conditions of employment, salary scales and the like.

17. Delay is also an issue where execution of MLA requests by competent authorities is problematic e.g., execution of search and seizure and execution of arrest warrants for fugitives. Again, this is largely due to capacity issues within the competent authorities in question and the low priority that is often given to international cooperation by some agencies.

18. Another problem cited for both types of requests related to the issue of translations. This poses a particular challenge in dealing with countries where English is not a first language. Sourcing legal interpreters is difficult in Zambia – and expensive.

19. For requests to countries where their own nationals cannot be extradited, this has posed a problem e.g., with Botswana. Much depends on the other states' domestic legislation and whether ad hoc agreements can be made on a case-by-case basis e.g., through the giving of assurances and reciprocity.

20. Zambia still holds the death penalty on its statute books for offenses of murder, aggravated robbery, and treason⁸⁴ and within its Constitution under Article 12, a position that was upheld by the Supreme Court in 2000⁸⁵. However, Zambia's last executions were held in 1997 and though willing to give assurances to Requested States, the presence of the death penalty does occasion difficulties in some cases. For example, a request for extradition made to South Africa for an offense of murder has not been answered despite Zambia offering assurances to the South African authorities. For wildlife offenses, the death penalty is not applicable, however, although if linked with an offense of murder e.g., the killing of a ranger, then difficulties may well arise.

RECOMMENDATION 1: A review of the domestic framework and the very limited forms of MLA specifically catered for is required. There should be a broadening of Zambia's framework for cooperation within the statute.

RECOMMENDATION 2: Detailed needs assessment of the Ministry department to ascertain caseload and specific needs.

⁸³ Discussion with Martin Lukwasa, Ministry of Justice, 19 June 2020, 17 June; discussions with Eddie Kwasa on 13 July 2020

⁸⁴ Murder (Section 201 of the Penal Code); aggravated robbery (Section 294 of the Penal Code); and treason (Section 43 of the Penal Code)

⁸⁵ <https://www.hrw.org/reports/1997/zambia/Zambia-04.htm>

Zimbabwe



Zimbabwe

In summary: Despite resource difficulties, Zimbabwe does not regard herself as having a particular challenge with the majority of her SADC neighbors in terms of handling requests for extradition or MLA. For wildlife matters, provided the penalty involved holds at least 12 months' imprisonment, dual criminality can be established through conduct rather than a prescriptive requirement on the wording of the statutory offense. Zimbabwe has made video links available on MLA, having passed legislation to this effect. However, where her SADC neighbors do not allow for this, this facility is rather one-sided at present. Her laws could be updated to remove the restrictions as regards 'designated countries' and enable domestic prosecution where extradition is refused.

General Legal Framework for International Cooperation

- 1.** Zimbabwe is a dualist State – treaties and agreements do not have the force of law unless passed by an Act of Parliament, usually by way of statutory instrument. This hasn't happened in relation to the United Nations Conventions and therefore these conventions are not relied upon at all by prosecutors in handling requests for MLA or Extradition.
- 2.** The Harare Scheme on MLA and SADC Protocols are regarded as a 'gentleman's agreement' and so though not technically implemented into domestic law, they do guide the application of the principles contained within the domestic laws. Accordingly, the primary law that competent authorities will rely upon is the domestic legislation concerning mutual legal assistance and extradition. In addition, the list of 'designated countries' issued by the Ministry of Justice is relied upon in terms of executing requests and short-cutting otherwise lengthy judicial processes.
- 3.** Zimbabwe has no restriction regarding the extradition of Zimbabwean nationals to jurisdictions that are designated under Part III of the Extradition Act or where agreements are made by the Minister under Part II of the Extradition Act.

4. Insofar as the designated commonwealth countries list applies to SADC signatories, Botswana, Lesotho, Seychelles, Zambia, Malawi, Mauritius, Tanzania, Namibia, Swaziland, and South Africa are all included. Angola and Mozambique are not, and so requests would require a separate statutory order. Zimbabwe has no bi-lateral treaties with her SADC neighbors.

Domestic Legislation

- The Criminal Matters (Mutual Legal Assistance) Act [Chapter 9:06] 1990 (as amended in 2001).
- The Extradition Act [Chapter 9:08] 1990 (as amended).
- Statutory Instrument 133 of 1990 Extradition (Designated Countries) Order (SIs 133/1990, 37/1991, 141/1998, 101/2004). Insofar as SADC countries are concerned, this lists the following as designated countries for the purposes of extradition:
Botswana, Lesotho, Malawi, Mauritius, Namibia, Seychelles, Tanzania, and Zambia.
Angola, DRC, and Mozambique are not included in this list.

International Agreements on Mutual Legal Assistance and Extradition

- SADC Protocol on Mutual Legal Assistance on Criminal Matters 2002 – *not domesticated.*
- SADC Protocol on Extradition 2002 – *not domesticated.*
- The Commonwealth Scheme on Mutual Legal Assistance (Harare Scheme) 1966 – *not domesticated.*
- United Nations Convention Against Transnational Organized Crime, signed in 2007 – *not domesticated.*
- United Nations Convention Against Corruption signed in 2004 – *not domesticated.*

Zimbabwe and Southern Africa – Legal Basis for Extradition

5. For the purposes of extradition, the Extradition Act 1990 as amended requires dual criminality, reciprocity and an extraditable offense must be one that carries at least twelve months’ imprisonment. The rule of speciality applies to all such agreements. Extradition is effected by way of an arrangement that can be:

- By virtue of an agreement, entered into by the Minister and published by statutory order under s3.
- By virtue of being a ‘designated country’ under Part III of the Act.

Process for Extradition Requests: Zimbabwe in Comparison to the SADC Protocol on Extradition

SADC PROTOCOL ART.6	EXTRADITION ACT CAP 64.
<p>Contents of a Request for Extradition:</p> <ul style="list-style-type: none"> ■ In writing and translated into the language of the Requested State. ■ Accurate description of accused and information on location. ■ Text of the applicable law. ■ Statement of penalty likely to be imposed (or if convicted, either a certified copy of the judgement and sentence imposed or if not sentenced, a statement affirming the sentence likely to be imposed). ■ Statement of facts relating to the commission of the offense, including time and place. ■ Warrant of arrest issued by the competent authority and duly authenticated. ■ If convicted in absence, a statement as to the legal means to defense/have the case re-tried. 	<p>Contents of Request s4, s16</p> <p>Requests are sent via diplomatic channels to the National Prosecution Authority (NPA) and must contain, as per the SADC protocol, an original or authenticated copy of the conviction or sentence or warrant or other order as the case may be, a statement of the offense with an accurate description of the alleged facts of the offense along with the text of the relevant law plus an accurate description of the accused.</p> <p>Upon receipt, the NPA will request the Minister to issue a notice to a magistrate to issue a warrant of arrest. For designated countries designated under Part III of the Act, the process is essentially the same with the contents of the letter of request requiring the same elements save two additional requirements namely that an affidavit or sworn statement from an investigating officer from the Requesting State confirming that evidence has been preserved for use; and a certificate confirming that the sufficiency of evidence test has been passed, issued by the prosecuting authority, may be accepted as evidence by the magistrate without any further enquiry once arrest is executed.</p> <p>There are also provisions for reciprocal backing of warrants under s11 provided the extradition agreement warrants it. Here an external warrant can be sent direct to the magistrates who, if satisfied that it has been duly executed, endorse that warrant for arrest.</p>

Cont.

SADC PROTOCOL ART.6	EXTRADITION ACT CAP 64.
	Upon arrest, there will follow a judicial enquiry by the magistrate – the test is one of ‘sufficiency of evidence’ Once the magistrates deem there is sufficient evidence, notice is given to the Minister who will issue a warrant for the surrender of the accused unless there are grounds for refusal.
Provisional Warrants for Arrest <i>(i.e., on the basis of information only)</i> can be issued both under the SADC protocol. However, once arrested, the Requesting State MUST follow up with the original warrant of arrest and other information as required for extradition within 30 days, however.	Provisional Warrants for Arrest s12 <i>(i.e., on the basis of information only)</i> can be issued again providing the extradition agreement provides for it. The Requesting State MUST follow up with the original warrant of arrest and other information as required for extradition within 28 days, however. (s12(7)). Failure to do so will lead to the accused being discharged.
Time limit for surrender The SADC protocol on extradition states that surrender must occur without ‘undue delay’.	Time limit for surrender No surrender can occur any appeal has been exhausted unless the accused waives his right of appeal); or before such an appeal, once lodged, has been exhausted. Following that, there is a 2-month period after which, if not surrendered, the accused can seek discharge.

Zimbabwe: Mandatory Grounds for Refusal of Extradition *(Italics highlight differences)*

SADC ARTICLE 4	ZIMBABWE S15
<ul style="list-style-type: none"> ■ Political Nature of Offense. ■ Purpose is based on political opinion, race, religion, ethnicity, sex, or status. ■ The offense is a military law offense. ■ Final judgment has already been rendered in respect of the offense in question. ■ Immunity from prosecution or punishment due to lapse of time or amnesty or any other reason. ■ Risk of torture or inhuman treatment or punishment. ■ Where judgment in the Requesting State has been rendered in absentia with no notice and no opportunity for the accused to have a retrial in his presence. 	<ul style="list-style-type: none"> ■ Political nature of offense. ■ Purpose is based on political opinion, race, religion, nationality or color. ■ The offense is a military law offense. ■ Final judgment has already been rendered/proceedings are closed in respect of the offense in question. ■ Risk of torture or inhuman treatment or punishment. ■ <i>Absence of agreement re: rule of specialty.</i> ■ <i>For any other reason which the Minister considers sufficient in national interests of Zimbabwe.</i> ■ <i>If the extradition would contravene and existing international agreement.</i>

Zimbabwe: Discretionary Grounds for Refusal of Extradition

SADC ARTICLE 5
<ul style="list-style-type: none"> ■ Where the accused is a national of the Requested State <i>(Mandatory ground for refusal in Mozambique)</i>. ■ Prosecution is already pending. ■ The offense carries the death penalty unless assurance is given that it shall not be imposed <i>(Mandatory ground for refusal in Mozambique)</i>. ■ The offense was committed outside of the jurisdiction of either State and the Requested State has no jurisdiction in comparable circumstances. ■ Where the offense was committed IN Mozambique <i>(Mandatory ground for refusal Mozambique)</i>. ■ The request is incompatible with humanitarian considerations e.g., health, age of that person.

6. Like Namibia, much of the discretionary grounds for refusal under Article 5 of the SADC protocol are captured under the mandatory grounds for refusal under Zimbabwean law.

7. The ground of refusal regarding ‘any other ground’ which the Minister considers ‘sufficient in the national interests’, would encompass much of SADC’s discretionary grounds for refusal under Article 5 of the Protocol. Note that Zimbabwe has not used Zimbabwean nationality as a ground for refusal though it is discretionary under SADC, extraditing 13 nationals in the last seven years⁸⁶.

Zimbabwe and Southern Africa – Legal Basis for Mutual Legal Assistance

8. The Criminal Matters (Mutual Assistance) Act 1990 as amended regulates assistance to foreign states specified by the Minister by statutory order under s3. The basis of such arrangements is reciprocity.

9. The Central Authority for such requests is the Office of the Attorney General that sits under the Ministry of Justice. In the execution of requests for mutual legal assistance, the limits on capacity and resources may slow execution but, on the whole, Zimbabwe regards herself as able to meet most requests that are submitted – see discussion below.

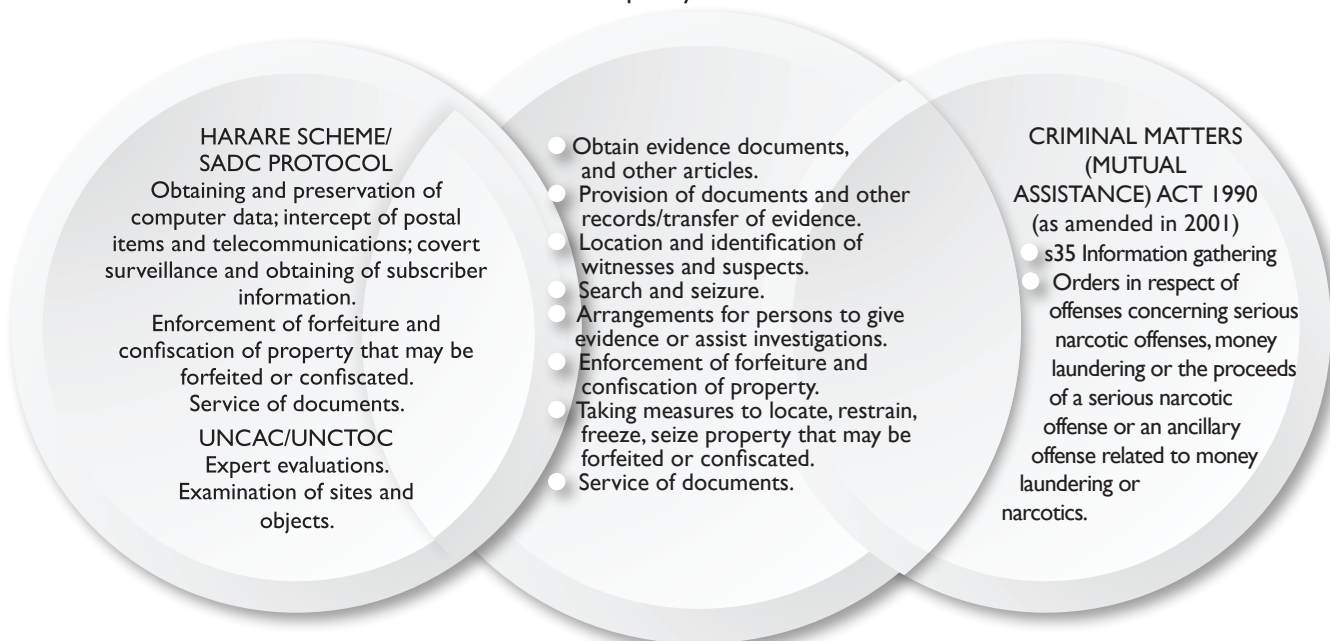
Process for Mutual Legal Assistance Requests: Zimbabwe

SADC PROTOCOL ON MLA	MLACMA
<p>Contents of a Letter of Request Article 5</p> <ul style="list-style-type: none"> ■ Name of the authority to which the request relates. ■ Description of the investigation, prosecution or proceedings including a summary of the facts and a copy of the applicable law. ■ Purpose of the request and the type of assistance sought. ■ Degree of confidentiality required and the reasons therefor. ■ Details of any particular procedure or requirement to be followed and the reasons therefor. ■ Any time limit for execution. ■ For requests re: taking of evidence, search and seizure, matters pertaining to proceeds of crime, a statement indicating the basis of belief that the evidence or proceeds are in the Requested State. ■ In the case of request for evidence from a person, indication of procedure (e.g., on oath? Affirmation?) and the subject matter sought. ■ For transfer of exhibits, the location in the Requested State and an indication of where the exhibit will go, in whose custody and what, if any test will be conducted and the date of anticipated return to the Requested State. ■ For availability of detained person, the place to which the person will be transferred and date of return. 	<p>Contents of a Letter of Request s9</p> <p>Requests should be sent to the Attorney General – the content requirements under section 10 mirror those contained in the SADC Protocol with additional mention of allowances and accommodation to be specified where the request relates to travel of a witness to a foreign country.</p> <p>Registration of foreign forfeiture orders and foreign pecuniary orders s32: must be made in relation to a ‘foreign specified offense’ as defined under the laws of the Requesting State – accordingly, a copy of the text of the law specifying the offense as such is helpful. Proof of conviction and absence of any appeal are required.</p> <p>For ‘Information Gathering Orders’ 35, i.e. a property tracking document is believed to be in Zimbabwe, a request can be made to request the AG to obtain a production order or a search warrant under the Serious Offenses (Confiscation of Profits) Act 9:17. In addition, monitoring orders relating to tracking transactions within Zimbabwe can also be obtained though this is limited to serious narcotic offenses, a money laundering offense in respect of the proceeds of a serious narcotic offense and ancillary offense thereto (i.e. conspiracy, aiding, abetting and other inchoate offenses).</p>

RECOMMENDATION 1: To support Zimbabwe in updating her law on MLA to include wildlife trafficking offenses to the requirements for transaction monitoring orders (see illustration below). Though this is not a matter included in the SADC Protocol, advantage should be taken where it exists under domestic laws.

Mutual Legal Assistance in Zimbabwe: Types of Assistance

s5 of the Act allows for other forms of assistance not explicitly laid out in the Act.



Grounds for Refusal of Mutual Legal Assistance: Zimbabwe

10. The SADC Protocol on Mutual Legal Assistance only offers discretionary grounds for refusal. It is likely that where there is a conflict, this can be resolved through negotiation, and the giving of assurances or through agreement on a case-by-case basis.

11. The decision to refuse is made by the Attorney General who sits within the Ministry of Justice.

SADC ARTICLE 6 DISCRETIONARY GROUNDS ONLY

- The offense is a political offense or an offense of a political character.
- The offense is an offense under military law, not criminal law.
- That execution of the request would impair its sovereignty, security, public order, public interest or prejudice the safety of any person.
- The request is not made 'in conformity' with the Protocol itself.

CM (MA) A S6 MANDATORY GROUNDS

- That the offense is a political offense or an offense of a political character.
- That the offense is an offense under military law and not criminal law.
- Reasonable grounds to believe the request is made for the purposes of prosecuting, punishing, or prejudicing another by virtue of their race, sex, religion, nationality, or political opinions.
- That the offense is a military offense and not a criminal offense under the laws of Zimbabwe.
- That execution of the request would prejudice Zimbabwe's public safety, public order, defense, or economic interests.
- Where the person has already been acquitted or pardoned or punished in accordance with the laws of the foreign country.
- The foreign country is not a country to which the Act applies.

CM (MA) A S6 DISCRETIONARY GROUNDS

- Absence of dual criminality were the offense committed in Zimbabwe or even outside of its jurisdiction.
- That the offense would not be prosecuted in Zimbabwe for the same conduct due to lapse of time or some other reason.
- The provision of assistance could prejudice an investigation or proceedings in relation to criminal proceedings in Zimbabwe.
- The provision of assistance would, or would be likely to, prejudice the safety of any person whether in or outside of Zimbabwe.
- The provision of assistance would impose an excessive burden on the resources of Zimbabwe.

Zimbabwe: Wildlife Laws and Qualification for Extradition and Mutual Legal Assistance

- 12.** Applicable domestic laws (excluding customs-specific laws and regulations).
- Parks and Wildlife Act Cap 20:14 (PWA).
 - Parks and Wildlife (General) Regulations issued under Statutory Instrument 362 of 1990 ('the Regs').
 - Proceeds of Crime Act Cap 9:24 (POCA) – 'any' economic advantage derived from committing a serious crime that must carry at least 4 years imprisonment.
 - Parks and Wildlife (Import and Export) Wildlife Regulations 1998 SI 76 of 1998 ('Import/export Regs').
- 13.** UNCTOC had been included in order to assess the issue of compliance with 'serious offense' requirements.

OFFENSES IN RELATION TO PROTECTED SPECIES	DOMESTIC LAW OFFENSES-SPECIFIC CHARGES	PENALTY	QUALIFICATION UNDER DOMESTIC LAW ON MLA & EXTRADITION (latter may be refused if offense carries less than 12 months)	QUALIFICATION UNDER SADC PROTOCOLS (extradition may be refused if under 1 year)	QUALIFICATION UNDER UNCTOC FOR MLA AND EXTRADITION (serious offense = 4 years or more).
HUNTING	Hunting of specially protected animals under 6th Schedule of the Act – s45 of PWA as read with section 128 of the same	9 years/fine	Yes	Yes	Yes
	Note: elephants are not specially protected. Hunting in general in a national park s24 (PWA)	2 years/fine	Yes	Yes	Yes
	Hunting outside of a national park s59 PWA	1 year/fine	Yes	Yes	Yes
DEALING (SALE/PURCHASE)	Sale/dealing of specially protected animals, their trophies or meat, including horn and ivory – s45 as read with s128 PWA; also see s82 of the Regs as read with s128 PWA	9 years/fine	Yes	Yes	Yes
	Converting/transferring proceeds of crime s8 POCA	25 years/fine	Yes	Yes	Yes
POSSESSION	Possession of a specially protected animal, their trophies or meat, including horn or ivory – s45 as read with s128 of PWA. See also s82 of the Regs as read with s128 PWA.	9 years/fine	Yes	Yes	Yes
	Possession of proceeds of crime s8 POCA	25 years/fine	Yes	Yes	Yes
IMPORT/EXPORT/RE-EXPORT	If interpreted as 'disposal' of a specially protected animal, trophy, or meat of the same, see s45 as read with s128 of PWA	9 years/fine	Yes	Yes	Yes
	s3 and s15(1) Import/Export Regs.	1 year/fine	No	Yes	Yes
	Transferring/concealing etc. proceeds of crime s8 POCA	25 years/fine	Yes	Yes	Yes

Key Challenges in Execution of Requests for MLA and Extradition

14. In interviews⁸⁷ with the Head of Asset Recovery, Mutual Legal Assistance and Extradition in the National Prosecution Authority, Zimbabwe, Mr. Chris Mutangadura together with Chief Public Prosecutor, Mr. Tapiwa Kasema, Principal Public Prosecutor and Mr. Kelvin Mufute, Principal Public Prosecutor and PA to the Prosecutor General, the following issues were identified:

15. In terms of capacity, 10 lawyers have been assigned full time to the Unit at Headquarters in Harare; each province has an additional lawyer acting as a focal point in relation to mutual legal assistance and extradition. The Central Authority is the National Prosecution Authority and the majority of extradition and mutual legal assistance requests come straight to their Office. It is only where no treaty or agreement exists and where the country is not a 'designated country' under the Extradition Act that matters must be first addressed by the Minister and orders given by the court which, as outlined above, contributes significantly to delay. However, for the most part, Zimbabwe has been able to execute extradition requests without too much difficulty; this includes the extradition of Zimbabwean nationals – a total of 13 over the last seven years. For mutual legal assistance requests, Zimbabwean prosecutors are helped in meeting incoming requests by the fact that for them, dual criminality is conduct-based as opposed to 'offense based'. The Unit reported 'good' relations with their counterparts in South Africa, Namibia, Zambia, and Botswana in particular.

16. The main challenges identified are threefold:

- Legal translators. This has proved particularly problematic when dealing with partners in Mozambique and Angola and identifying legal translators within Zimbabwe to translate requests to countries where English is not the first language poses a significant challenge. Without any budget allocated to the prosecution authority to address this, it is clear that some letters of request are not properly addressed or completed, leading to delays in response or even outright refusal.
- Delays and poor communication between central and competent authorities. With no acknowledgement of receipt and the continuing reliance by a lot of countries on 'the diplomatic bag' for service, this can significantly delay the transmission of such requests. Even though digital services are allowed in Zimbabwe⁸⁸, that service must be 'mutually agreed'. If the requesting or requested State does not have provision for this, then the diplomatic bag will be the only means of communication. This has resulted, in some cases, request languishing in a diplomatic mission for months before being transmitted to the appropriate authority.
- Lack of legal precedent in the courts means that sometimes MLA requests are refused because of a failure by the magistrates to correctly interpret the requirements for MLA or extradition (depending on the nature of the request).

RECOMMENDATION 1: A review of Zimbabwe's extradition and MLA laws overall would be welcome in order to remove restrictions regarding 'designated countries', and to provide for a prosecution option within Zimbabwe where extradition is refused. However, as discussed in the executive summary, issues of jurisdiction must be clarified at the outset, perhaps through involvement of the SADC Secretariat.

⁸⁷ Interviews conducted on 4 June 2020

⁸⁸ s2(4) the Criminal Matters (Mutual Assistance) Act 9:06 provided such service is mutually agreed.