

The background of the image is a photograph of blue concrete steps, viewed from a low angle looking up. Overlaid on the steps is a white, semi-transparent geometric graphic consisting of several overlapping rectangular shapes that create a sense of depth and movement, resembling a staircase or a path. The text is centered within a white rectangular area that is part of this graphic.

TOOLKIT ON MUTUAL LEGAL ASSISTANCE IN SOUTHERN AFRICA

UNITED NATIONS OFFICE ON DRUGS AND CRIME

TOOLKIT ON MUTUAL LEGAL ASSISTANCE IN SOUTHERN AFRICA



UNITED NATIONS
Vienna, 2024

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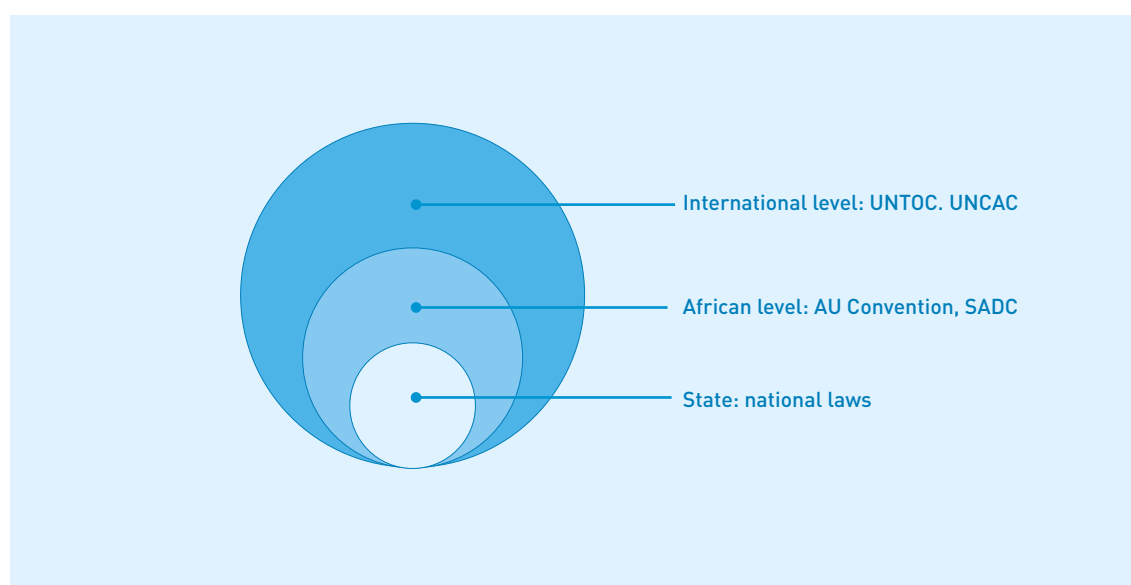
Introduction



The importance of MLA

As crime and criminal conduct increasingly transcend national borders, international cooperation in the global community continues to be one of the most effective tools to counter it. A cornerstone of international cooperation concerns the provision of, and engagement in, mutual legal assistance or MLA. MLA provides States with the mechanisms and procedures needed to tackle transnational crime and criminal conduct, be it at the international or regional levels, or by means of bilateral or multilateral approaches. Adaptable and effective MLA processes are one of the most beneficial instruments that States can use to counter transnational crime.

This holds special relevance for the Southern African region which is struggling with rampant crime, and is plagued by various acts of criminal conduct, including widespread corruption by both public and private entities. Many States in this region have ratified and acceded to international and regional crime-combating instruments to strengthen the region's response to this all-pervasive issue. On an international level, the adoption and entry into force of the United Nations Convention Against Corruption (UNCAC) represents one of the most powerful commitments by States to tackling corruption and related offences. At the regional level, the African Union (AU) has adopted the Convention on Preventing and Combating Corruption (AU Convention) – an instrument dedicated to eliminating the scourge of corruption across Africa. At the sub-regional level, the Southern African Development Community's (SADC) Protocol on Mutual Legal Assistance in Criminal Matters (SADC Protocol) has broadened international cooperation among the SADC members to include the widest possible measure of transnational assistance to tackle a plethora of circumstances and situations.



Content outline

This toolkit examines MLA in the context of the treaties introduced above in relation to eight Southern African States: **Angola, Botswana, Malawi, Mozambique, Namibia, South Africa, Zambia, and Zimbabwe.**

This toolkit consists of four chapters:

- **Chapter one** outlines the legislative context approaches to MLA in Southern Africa. The assessment of the legislative context is undertaken at three levels.
 - First, at an international level, an analysis of the relevant and applicable international treaty law;
 - Second, at a regional level, an analysis of regional treaty law, in the case at hand, that of the applicable AU and SADC treaty law;
 - Third, at a national level, an analysis of domestic legislation and the political systems of the eight States.

This chapter also summarizes the details of each State's accession to, or ratification of, the applicable international and regional treaty law, and assesses the provisions relevant to MLA in their domestic legislation. The analysis of the domestic legislation also considers the constitutional laws of each State and their provisions for the incorporation of international treaty law into domestic law. It also provides an overview of the implementation of the MLA obligations for each of the eight States. It considers UNCAC country review reports of the eight States conducted within the ambit of the Mechanism for the Review of Implementation of the Convention. The chapter outlines key observations relevant to the implementation of MLA obligations under international treaty law. Thereafter, it outlines both policy considerations and practical approaches relevant to the successful engagement in MLA.

- **Chapter two** addresses policy considerations in implementing requests for MLA. It considers the relevant provisions pertaining to the application of each treaty and the voluntary or obligatory nature of their application. In so doing, the chapter details when and to what extent each treaty finds appropriate application and provides guidance on choosing the appropriate treaty under specific circumstances.
- **Chapter three** highlights general implementation principles. Ten key principles are identified – each principle examining a certain facet of MLA. In turn, the discussion of each principle aims to ensure a core understanding of the importance and purpose of that principle in the eventual effective and successful engagement in MLA.
- Finally, **chapter four** examines practical approaches in aiding with, and engaging in, MLA. This chapter is divided into five sub-sections on how MLA is affected in practice, and looks at:
 - Preservation of information or content
 - Outgoing formal requests for MLA
 - Incoming formal requests for MLA
 - Spontaneous transmission of information and evidence
 - Informal requests for information and evidence
- In addition, the following **annexes** are included in this document:

- **Annex A:** a template for a request for data preservation
- **Annex B:** a template for an affidavit for proof of entries in accounting records and bank documentation
- **Annex C:** a template for a subpoena for the attendance of a witness
- **Annex D:** designated central authorities under article 46(13) of UNCAC
- **Annex E:** ratification and accession status by other SADC member States of the legal instruments identified relevant to mutual legal assistance
- **Annex F:** other SADC States' central authorities.
- **Annex G:** a list of resources which includes a bibliography, additional readings, and useful websites.

Purpose of the toolkit

The purpose of this toolkit is to provide national authorities with practical tools to combat criminal activities when considering MLA as one element at their disposal. It consolidates and discusses the measures available and procedures to be followed when requesting assistance from other States in criminal matters, not only within the eight States covered in this toolkit but also with other countries in Southern Africa. Amongst others issues, the toolkit outlines the following:

- The international and regional legislative framework regulating international cooperation and MLA;
- The domestic legislative framework of the respective States which governs matters relating to MLA;
- The treaty law and domestic law requirements which must be complied with when making requests for MLA;
- The processes and procedures of making and executing requests for MLA;
- The content and format to be followed when making requests for MLA;
- General principles of implementation to ensure effective and timely use of resources when engaging in MLA.

Target audience

The toolkit may be of particular interest to:

- Domestic officials of designated central authorities;
- National authorities competent in criminal matters;
- National authorities competent in international cooperation;
- Domestic law enforcement officials and policing and investigative authorities;
- Criminal law practitioners involved in prosecutions and investigations;
- Justice officials involved in judicial proceedings.

Chapter 1

*Legislative context to
MLA in Southern Africa*

International and regional treaty law framework

MLA in the Southern African region is in part regulated by, among others, the following international and regional instruments:

Figure 1: International and regional treaty laws

<p style="text-align: center;">United Nations Convention Against Transnational Organized Crime (UNTOC)</p> <p style="text-align: center;">Adopted: 15 November 2000</p> <p style="text-align: center;">Entered into Force: 29 September 2003</p> <p style="text-align: center;">Scope of Application: Article 3</p> <p style="text-align: center;">Legal Basis for Mutual Legal Assistance: Article 18</p>	<p style="text-align: center;">United Nations Convention Against Corruption (UNCAC)</p> <p style="text-align: center;">Adopted: 31 October 2003</p> <p style="text-align: center;">Entered into Force: 14 December 2005</p> <p style="text-align: center;">Scope of Application: Article 3</p> <p style="text-align: center;">Legal Basis for Mutual Legal Assistance: Article 46</p>
<p style="text-align: center;">African Union Convention on Preventing and Combating Corruption</p> <p style="text-align: center;">Adopted: 11 July 2003</p> <p style="text-align: center;">Entered into Force: 5 August 2006</p> <p style="text-align: center;">Scope of Application: Article 4</p> <p style="text-align: center;">Legal Basis for Mutual Legal Assistance: Article 18(1)</p>	<p style="text-align: center;">SADC Protocol on Mutual Legal Assistance in Criminal Matters</p> <p style="text-align: center;">Adopted: 3 March 2002</p> <p style="text-align: center;">Entered into Force: 1 March 2007</p> <p style="text-align: center;">Scope of Application: Articles 2(5), and 3-22</p> <p style="text-align: center;">Legal Basis for Mutual Legal Assistance: Article 2(1)</p>

United Nations Convention Against Transnational Organized Crime

The United Nations Convention Against Transnational Organized Crime (UNTOC) was adopted on 15 November 2000 by UN General Assembly Resolution A/RES/55/25¹ and entered into force on 29 September 2003. Since its adoption, the UNTOC has been supplemented by four additional protocols, strengthening its reach against further elements of transnational organized crime. These include:

- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (adopted 12 December 2000).
- Protocol Against Smuggling of Migrants by Land, Sea and Air (adopted 12 December 2000).
- Protocol Against the Illicit Manufacturing of and Trafficking in Firearms (adopted 11 July 2001).

The UNTOC defines terms of reference necessary for effective combating of transnational organized crime, including the terms ‘organized criminal group’; ‘serious crime’; ‘structured group’; and ‘controlled delivery’.² Article 3 governs the UNTOC’s scope of application, which includes the prevention, investigation and prosecution of:³

- The offences established in accordance with articles 5, 6, 8 and 23 of this Convention (the criminalization of participation in an organized armed group; the criminalization of the laundering of proceeds of crime; the criminalization of corruption; and the criminalization of obstruction of justice); and
- Serious crime as defined in article 2 of this Convention; where the offence is transnational in nature and involves an organized criminal group.
- In addition, the UNTOC applies to offences which are transnational in nature if:⁴
 - They are committed in more than one State;
 - They are committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
 - They are committed in one State but involve an organized criminal group that engages in criminal activities in more than one State; or
 - They are committed in one State but have substantial effects in another State.

MLA is regulated under article 18 of the UNTOC, in much the same manner that article 46 of UNCAC regulates the same. Article 18(3) provides for the following purposes of MLA:

- taking evidence or statements from persons;
- effecting service of judicial documents;
- executing searches and seizures, and freezing;

1 United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 (UNTOC).

2 Art. 2, UNTOC.

3 Art. 3, UNTOC.

4 Art. 3(2)(a)–(d), UNTOC.

- examining objects and sites;
- providing information, evidentiary items, and expert evaluations;
- providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate, or business records;
- identifying or tracing proceeds of crime, property, instrumentalities, or other things for evidentiary purposes;
- facilitating the voluntary appearance of persons in the requesting State Party; and,
- any other type of assistance that is not contrary to the domestic law of the requested State Party.

States Parties are allowed to, voluntarily and without prior request, transmit information relating to criminal matters should they believe that such information could assist in criminal proceedings or result in a request at a later stage.⁵ Bank secrecy is disallowed as a ground for declining MLA.⁶ In addition, States Parties must designate a central authority that shall have the responsibility and power to receive requests for MLA and either execute them or transmit them to the competent domestic authorities for execution.⁷

All requests for MLA under the UNTOC must contain:⁸

- The identity of the authority making the request;
- The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
- A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
- A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;
- Where possible, the identity, location and nationality of any person concerned; and
- The purpose for which the evidence, information or action is sought.
- MLA may be refused under the UNTOC on the following grounds:⁹
 - If the request is not made in conformity with the provisions of this article;
 - If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, public order or other essential interests;
 - If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;
 - If it would be contrary to the legal system of the requested State Party relating to MLA for the request to be granted.

5 Art. 18(4), UNTOC.

6 Art. 18(8), UNTOC.

7 Art. 18(13), UNTOC.

8 Art. 18(15), UNTOC.

9 Art. 18(21), UNTOC.

United Nations Convention Against Corruption

The United Nations Convention Against Corruption (UNCAC) is the most comprehensive and universally recognized anti-corruption treaty currently in force.¹⁰ It was adopted by the United Nations General Assembly on 31 October 2003,¹¹ and in accordance with article 68 of the treaty, entered into force on 14 December 2005.¹² A total of 188 States have acceded to the treaty, including all eight Southern African States covered in this document.¹³

UNCAC addresses five major areas in combating corruption:¹⁴

- Preventive measures;
- Criminalization and law enforcement;
- International cooperation;
- Asset recovery; and,
- Technical assistance and information exchange.

The treaty is centred around three principal purposes:¹⁵

- to promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including asset recovery;
- and, to promote integrity, accountability and proper management of public affairs and public property.

Article 46 of UNCAC establishes, within the context of international cooperation, the prerogatives of MLA. Article 46(1) reads: “*States Parties shall afford on another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.*”

¹⁰ United Nations, United Nations Convention Against Corruption (31 October 2003, New York) 2349 UNTS 41 (hereafter UNCAC).

¹¹ Para 2, United Nations, United Nations General Assembly, ‘58/4. United Nations Convention against Corruption’ UN Doc. A/RES/58/4 (31 October 2003).

¹² Art. 68(1), UNCAC. Art. 68(1) reads: This Convention shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval, or accession. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

Art 68(2), UNCAC reads: For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Convention after the deposit of the thirtieth instrument of such action, this Convention shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Convention enters into force pursuant to paragraph 1 of this article, whichever is later.

¹³ As of 31 October 2023.

¹⁴ These form part of the chapters respectively as follows: chapters II, III, IV, V and VI. For purposes of this report, primary focus is placed on chapter IV concerning international cooperation.

¹⁵ UNCAC, art 1(a)–(c).

The provision for MLA among States Parties under article 46 explicitly lists eleven purposes for which requests for such assistance may be made. They are:

- taking evidence or statements from persons;
- effecting service of judicial documents;
- executing searches and seizures, and freezing;
- examining objects and sites;
- providing information, evidentiary items, and expert evaluations;
- providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate, or business records;
- identifying or tracing proceeds of crime, property, instrumentalities, or other things for evidentiary purposes;
- facilitating the voluntary appearance of persons in the requesting State Party;
- any other type of assistance that is not contrary to the domestic law of the requested State Party;
- identifying, freezing, and tracing proceeds of crime in accordance with the provisions of chapter V of UNCAC; and,
- the recovery of assets, in accordance with the provisions of chapter V of UNCAC.

In addition, article 46(4) allows the competent authorities of a State Party to transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist in undertaking or successfully concluding inquiries and criminal proceedings (spontaneous transmission). The transmission of such information may take place without the prior request of the State Party to whom the information is being transmitted. Such transmission may also be effected where the transmitting State Party believes a request formulated under the treaty may result from the receiving State Party.

Article 46(5) goes on to stipulate that the transmission of any such information will be without prejudice to inquiries and criminal proceedings in the transmitting State Party. The authorities receiving the information are obliged to comply with a request that the information transmitted remain confidential, even if only for a temporary period. The transmitting State Party may also impose additional restrictions on the use of the information. The receiving State Party is however not prevented from disclosing the information in proceedings where it may prove favourable to the defence of an accused person. In such cases, the receiving State Party is under obligation to notify the transmitting State Party prior to its disclosure. In cases where this is not possible, the receiving State Party must inform the transmitting State Party without delay.

UNCAC recognizes several conditions and specifications which States Parties must adhere to when making requests for MLA. These include the following:

- Requests should be made in writing (or any means that could produce a written record).
- In urgent circumstances and where agreed upon by States Parties, requests may be made orally (but shall be confirmed in writing forthwith).

- Requests should be given in a language acceptable to the requested State.
- Requests for MLA must contain the following:
 - the identity of the authority making the request;
 - the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates;
 - the names and functions of the authority conducting the investigation, prosecution or judicial proceeding;
 - a summary of the relevant facts (except in relation to requests for the purposes of service of judicial documents);
 - a description of the required assistance;
 - any particular procedure that the requesting State Party wishes to follow;
 - if possible, the identity, location and nationality of any person concerned; and, the purpose for which evidence, information or action is sought.

The requested State Party reserves the right to ask for additional information when it may be necessary for it to execute the request. The execution of a request must be taken in accordance with the requested State Party's domestic law and to the extent possible, in compliance with any procedures provided for in the request.

Refusal of requests

UNCAC prohibits the reliance by States Parties on two grounds for the refusal to render MLA. In this respect, UNCAC stipulates that:

- States Parties are prohibited from relying on bank secrecy as a ground to refuse or decline to render mutual legal assistance;
- States Parties are prohibited from refusing a request for MLA on the sole ground that an offence is also considered to involve fiscal matters.

However, it provides five instances where refusal is permissible. These include the following:

- States may refuse to render assistance in the absence of dual criminality. In cases where a State Party is obligated to render assistance not involving coercive action, such assistance may be refused where requests involve matters of *de minimis* or where the request for assistance required is available under other provisions of UNCAC.
- If the request for MLA has not conformed to the requirements of article 46 of UNCAC.
- If the requested State Party considers that the execution of a request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests.

- If the domestic law of the requested State Party prohibits its authorities from carrying out the action requested regarding any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction.
- If it would be contrary to the legal system of the requested State Party for the request to be granted.

In cases where a request for MLA is refused, the requested State Party must, prior to refusal, consult with the requesting State Party to consider whether assistance may be granted subject to terms and conditions it deems necessary. Requesting State Parties which accept the assistance subject to terms and conditions are bound to comply with them.

African Union Convention on Preventing and Combating Corruption

The African Union Convention on Preventing and Combating Corruption (AU Convention) was adopted on 11 July 2003 during the Second Ordinary Session of the AU Assembly held in Maputo, Mozambique.¹⁶ In accordance with article 23(2), the AU Convention entered into force on 5 August 2006. A total of 48 AU Member States have ratified the AU Convention.

The AU Convention aims to consolidate and expand mechanisms for States Parties to combat corruption and related offences continent-wide. To this end, it aims to harmonize policies and legislation between the States Parties, promote, facilitate and regulate cooperation among them, and establish necessary conditions to foster transparency and accountability in the management of public affairs.¹⁷

MLA is regulated under article 18 of the AU Convention, which also forms the legal basis for a request for MLA. Article 18(1) reads: *“In accordance with their domestic laws and applicable treaties, State Parties shall provide each other with the greatest possible technical cooperation and assistance in dealing immediately with requests from authorities that are empowered by virtue of their national laws to prevent, detect, investigate and punish acts of corruption and related offences.”*

The provisions of MLA under the AU Convention do not affect existing obligations among States Parties under other bilateral or multilateral treaties on mutual assistance

¹⁶ Para. 2, African Union, Assembly of the African Union, Second Ordinary Session (10–12 July 2003, Maputo, Mozambique) AU Doc. Assembly/AU/Dec.27(II) available online at <https://au.int/en/decisions-112> at para. 2.

¹⁷ Art. 2(1)–(5), African Union, African Union Convention on Preventing and Combating Corruption (11 July 2003, Maputo, Mozambique) 2860 UNTS (AU Convention).

in criminal matters.¹⁸ They also do not prevent States Parties from according each other more favourable forms of MLA as provided for under their domestic law.¹⁹

Like the provisions of UNCAC, the AU Convention requires States Parties to designate, for purposes of MLA, a national authority or agency in application of offences under its provisions. At the time of signing or depositing their instruments of ratification, States Parties are expected to communicate the details of the designated national authorities to the Chairperson of the Commission of the African Union.²⁰ These national authorities are responsible for making and receiving requests made under the AU Convention²¹ and are obliged to communicate directly with each other and be provided the necessary independence and autonomy to function effectively.²² Additionally, States Parties undertake to ensure that national authorities are specialized in combating corruption, and that their staff are trained and motivated to effectively carry out their obligations.²³

SADC Protocol on MLA in Criminal Matters

The SADC Protocol on Mutual Legal Assistance in Criminal Matters (SADC Protocol) was adopted on 3 October 2002 by the SADC Heads of State and Government.²⁴ The Protocol is the only regional treaty dealing exclusively with mutual legal assistance. It derives its basis under articles 21 and 22 of the SADC founding treaty, which underscores Member States' commitment to cooperation in areas of social welfare, peace and security, and to conclude Protocols as may be necessary in each area of cooperation. In accordance with article 29, the Protocol was entered into force on 1 March 2007.

Assistance under the Protocol is to be provided for:

- locating and identifying persons, property, objects and items;
- serving documents (including documents seeking to ensure the attendance of persons and providing returns of service);
- providing information, documents and records;
- providing objects and temporary transfer of exhibits;
- search and seizure ;
- taking evidence and/or obtaining evidence;

¹⁸ Art. 18(5), AU Convention.

¹⁹ Art. 18(6), AU Convention.

²⁰ Art. 20(1), AU Convention.

²¹ Art. 20(2), AU Convention

²² Arts. 20(3), (4), AU Convention.

²³ Art. 20(5), AU Convention.

²⁴ Preamble, Southern African Development Community, Protocol on Mutual Legal Assistance in Criminal Matters (3 October 2002, Luanda, Angola) UNTS No. 52885 (hereafter SADC Protocol).

- authorizing the presence of persons from a requesting State Party;
- ensuring the availability of detained persons to give evidence or assist in investigations;
- facilitating the appearance of witnesses or the assistance of persons in investigations; and,
- taking possible measures for locating, restraining, seizing, freezing or forfeiting of the proceeds of crime.

States Parties are obliged to designate a central authority to make and receive requests for mutual legal assistance. Designations of such a nature must be communicated to other SADC Member States through the SADC Secretariat.²⁵ Central authorities must, for purposes of the SADC Protocol, communicate directly with one another and such communication may be directed through diplomatic channels or through the International Criminal Police Organization (Interpol).²⁶

Requests for MLA must at all times include the following information:

- The competent authority in the requesting State Party which is conducting the investigation, prosecution or proceeding to which the request relates;
- The nature of the investigation, prosecution or proceeding;
- A summary of the facts and a copy of the applicable laws;
- The degree of confidentiality required as well as reasons for its requirement; and,
- The time limit within which the request for assistance should be executed.

Where possible, requests for assistance should also include:

- The identity, nationality and location of a person who is the subject of the investigation, prosecution or proceeding; and,
- The details of any procedure or other requirement which the requesting State Party wishes to be followed.

A requested State Party may request additional information should it consider it necessary.²⁷ Requests must be made in writing. In urgent cases, request may be made orally but are to be reiterated in writing promptly thereafter.²⁸

Additional requirements are mandated where the request for assistance is of a particular nature. These include the following:

- Requests for the taking of evidence, search and seizure, or the location, restraint or forfeiture of crime require a statement indicating the basis for belief that the evidence or proceeds may be found in the requested State Party.

²⁵ Art. 3(1), SADC Protocol.

²⁶ Art. 3(2), SADC Protocol.

²⁷ Art. 5(4), SADC Protocol.

²⁸ Art. 5(5), SADC Protocol.

- Requests for taking evidence from a person requires an indication as to whether sworn or affirmed statements are needed and a description of the subject matter of the evidence or statement sought.
- Requests for the temporary transfer of exhibits requires the current location of the exhibits in the requested State Party, an indication of the person or class of persons who will have custody of the exhibits in the requesting State Party, the place to which the exhibits will be moved, any tests to be conducted, and the date by which the exhibits will be returned.
- Requests for ensuring the availability of detained persons requires an indication of the person or class of persons who will have custody during the transfer, the place to which the detained person will be transferred, and the date of that person's return.

A requested State Party may lawfully refuse to render assistance to the requesting State Party if, in its opinion:

- The request relates to political offences or offences of a political character;
- The request relates to an offence under military law which is not an offence under ordinary criminal law;
- The execution of the request would impair its sovereignty, security, public order, public interest or prejudice the safety of any person concerned; and,
- The request is not made in accordance with the provisions of the SADC Protocol.

In all cases, the requested State Party is obliged to provide reasons for refusal to render assistance.²⁹ In cases of securing the proceeds of crime, States Parties are in accordance with their domestic law, prohibited from declining to assist on grounds of bank secrecy.³⁰

29 Art. 6(2), SADC Protocol.

30 Art. 20(3), SADC Protocol.

MLA treaties and the FATF recommendations

Before moving to the domestic legal framework regulating MLA, mention should be made of the Financial Action Task Force (FATF) Recommendations and their position on the same. The FATF is an independent inter-governmental body that develops and promotes policies countering money laundering, terrorist financing and the financing of the proliferation of weapons of mass destruction. The FATF Recommendations, last updated in February 2023, provide a consolidated set of standards for combating international financial crimes.³¹ Recommendations 37 and 38 concern MLA. It is worth noting that a number of the directives under the aforementioned Recommendations are to be found in the numerous provisions contained within UNCAC, the AU Convention and the SADC Protocol. These include, among others, that: States should provide the widest measure of MLA to each other, in the case of the FATF Recommendations, assistance in relation to “money laundering, associated predicative offences and terrorist financing investigations, prosecutions and related proceedings,”³² that States not refuse requests for assistance on the sole ground of fiscal matters, and that states maintain the confidentiality conditions imposed on requests for assistance. In addition, Recommendation 37 also includes, among others, that States should not prohibit or place unreasonable conditions on the provision of assistance, that they have in place clear and efficient processes for the execution of requests, that the investigative powers of their law enforcement and central authorities enable them with a broad range of investigative techniques, including those relating to the production, search and seizure of information, documents, or evidence. Additionally, Recommendation 37, much like UNCAC, encourages States to render assistance even in the absence of dual criminality, so long as the assistance does not involve coercive actions.

Recommendation 38 specifically focuses on freezing and confiscation in relation to MLA. In this regard, Recommendation 38 stipulates that States should ensure that “they have the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered; proceeds from money laundering, predicative offences and terrorist financing; instrumentalities used in, or intended for use in, the commission of these offences, or property of corresponding value.”³³ Recommendation 38 goes on to stipulate that this authority should include being able to respond to requests made on the basis of non-conviction-based confiscation proceedings – unless such a measure is incompatible with a State’s domestic laws.

The overall international legislative framework on MLA among the eight States under review provides for sufficient measures and flexibility to render such assistance. This is evidenced, in particular, by the fact that these States may resort to a number of international and regional treaties which make provision for MLA. Additionally, as elaborated in the following section, these States have also made provision for reciprocal assistance through their domestic legislation.

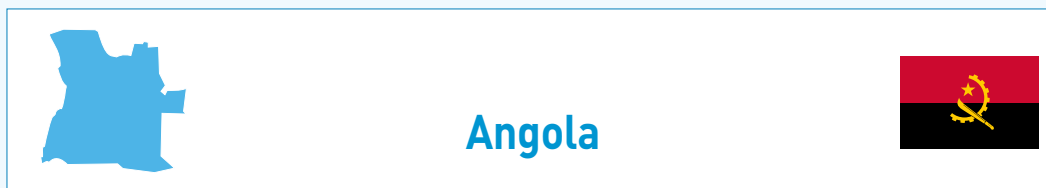
31 Financial Action Task Force (FATF), ‘International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation’ (February 2023) available online at: <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html>.

32 Ibid., p. 27.

33 Ibid., p. 28.

Domestic legal framework

The following section considers the political and legal systems of the domestic States and summarizes the status of each international instrument alongside the domestic legal systems by State. It identifies and discusses two domestic aspects relevant to MLA. The first aspect concerns the constitutional provisions relevant to the incorporation of international treaty law in the domestic law. The second aspect concerns the applicable domestic laws which regulate MLA, and relate to the implementation of the relevant international and regional treaty law.



Political and legal system of Angola

The Republic of Angola is a democratic state based on popular sovereignty, constitutional supremacy and the rule of law. The State is based on the principle of separation of powers. Executive power is vested in the President and auxiliary institutions; legislative power is vested in the National Assembly, and judicial authority is vested in the courts. Legislation is the primary source of Angolan law and the State follows a civil law tradition. Angola does not follow a system of judicial precedent and judicial decisions are therefore not binding.

Status and ratification of treaties

Angola has ratified all four treaties discussed above. The dates of signature and ratification are:

International / regional treaty	Date of signature	Date of ratification
United Nations Convention Against Transnational Organized Crime	13 December 2000	11 April 2013
United Nations Convention Against Corruption	10 December 2003	29 August 2006
African Union Convention on Preventing and Combating Corruption	22 January 2007	20 December 2017
SADC Protocol on Mutual Legal Assistance in Criminal Matters	3 October 2002	17 July 2006

Angola has not entered any reservations against any of the provisions of the above instruments. On 8 September 2011, Angola made notification under article 46(13) of UNCAC relating to its designated central authority.

Domestic legal system of Angola

Constitutional provisions on the incorporation of international treaty law

In accordance with the Constitution of Angola adopted in 2010, international law forms an integral part of Angola's legal system.³⁴ International agreements and treaties duly approved or ratified enter into force in the Angolan legal system only after they have been published and have entered into force in the international legal system.³⁵ Entry into force of international treaties and agreements is also subject to being internationally binding on the Angolan State.³⁶

The President of Angola is responsible for signing and ratifying international agreements, conventions and treaties after they have been passed.³⁷ The National Assembly is in turn responsible for approving international agreements, conventions and treaties for ratification.³⁸ International agreements, conventions and treaties which violate constitutional principles are subject to review of their constitutionality.³⁹ The President may also submit any international convention or treaty submitted for ratification, or any international agreement submitted requiring signature⁴⁰ to the Constitutional Court for review. International agreements, conventions and treaties declared by the Constitutional Court to be unconstitutional must be vetoed by the President and returned to the body which approved them.⁴¹ In such cases, a prohibition exists on signature or ratification of the international agreement, convention or treaty unless the body that approved it has expunged the provisions therein deemed unconstitutional.⁴²

Domestic legislation on MLA

In 2015, Angola adopted the Law on International Judicial Cooperation in Penal Matters (Law No. 13/15). Law 13/15 is the principal legislation which regulates Angola's MLA and gives domestic effect to such assistance under the relevant international and regional treaties. International cooperation in criminal matters is subject to reciprocity and the central authority is mandated to request guarantees of reciprocity from other States.⁴³

³⁴ Art. 13(1), Constitution of Angola (2010) (Angolan Constitution).

³⁵ Art. 13(2), Angolan Constitution.

³⁶ Art. 13(2), Angolan Constitution.

³⁷ Art. 121(c), Angolan Constitution.

³⁸ Art. 161(k), Angolan Constitution.

³⁹ Art. 227, Angolan Constitution.

⁴⁰ Art. 228(1), Angolan Constitution.

⁴¹ Art. 229(2), Angolan Constitution.

⁴² Art. 229(3), Angolan Constitution.

⁴³ Art. 5(1), (2), Law on International Judicial Cooperation in Penal Matters Law 13/15 (2015) (Law 13/15).

Dual criminality is not generally required for cooperation requests so long as non-coercive measures are employed;⁴⁴ it is required when making use of coercive measures.⁴⁵

Law 13/15 provides for several mandatory grounds for refusal of cooperation. These include, among others, where there is reason to believe cooperation is being requested for persecution or punishment of a person based on listed grounds or where the offence for which cooperation is requested is punishable by death, or may result in torture or inhumane treatment.⁴⁶ In addition, a request can be refused where the cooperation process does not respect the requirements of international treaties applicable to Angola.⁴⁷ Since Angola has ratified all three international treaties listed above, this would suggest that any process which does not meet the requirements listed in those treaties, may be refused. Law 13/15 also lists grounds of refusal based on the nature of offences. These, similar to article 6 of the SADC Protocol, provide for refusal of assistance for political or politically related offences.⁴⁸ Unlike UNCAC and the SADC Protocol, Law 13/15 does not stipulate that reasons should be given when a request is refused.⁴⁹

Part IV of Law 13/15 deals extensively and specifically with MLA. Requests for assistance provide for a range of dealings from the communication of information to the recovery of proceeds of crime.⁵⁰ MLA may be afforded where circumstances warrant and the parties agree to the use of real-time telecommunications – much like the provision of article 46(18) of UNCAC.⁵¹

Interestingly, the principle and scope of MLA under article 141 of Law 13/15 explicitly provide that more favourable terms under international provisions would not be affected by that article.⁵² This would suggest that where international provisions provide for additional scope of MLA, Law 13/15 may to some extent be bypassed in favour of such international provisions (provided they do not conflict with any provisions under Law 13/15).

Like UNCAC and the SADC Protocol, Law 13/15 provides for restrictions on the use of information provided through a request. Information cannot be used outside of the requesting State Party. Additionally, confidentiality terms may be imposed by a requesting State and Angola is obliged to comply with such terms. In cases where confidentiality will be breached, there is a duty on Angola to notify the requesting State Party – like article 20 of UNCAC – whereafter the requesting State Party may decide on the continued execution of the request.

44 Art. 6(2), Law 13/15.

45 Art. 145, Law 13/15.

46 Art. 7(1)(a)–(f), Law 13/15.

47 Art. 7(1)(a), Law 13/15.

48 Art. 8(1), Law 13/15; Art. 6(1), SADC Protocol.

49 Art. 46(23), UNCAC; Art. 6(1)(d), SADC Protocol.

50 Art. 141(1), (2)(a)–(f), Law 13/15.

51 Art. 141(3), Law 13/15.

52 Art. 141(11), Law 13/15.

The President of Angola is mandated to designate a central authority for receiving and processing requests.⁵³ Angola has designated the Ministry of Justice and the Attorney General as its central authority (although it has not provided notification to the United Nations Secretary-General of this).⁵⁴ Where the content of a request is of concern, Law 13/15 provides for additional documents to be attached to a request, and differentiates these documents between actions such as notification and search and seizure.⁵⁵ Generally, a request for mutual assistance must be simple and clear, and set out the specifications relating to the offence, persons connected therewith, and processes to be followed.⁵⁶ Requests may, upon agreement, be sent electronically (including via fax), provided such communication can be made authentically and reliably.⁵⁷ Requests must be accompanied with translations into the official languages of the State to which it is directed.⁵⁸ Ancillary documents must also be translated accordingly.⁵⁹ According to the UNODC Country Review Cycle 1 (chapters III and IV), Angola only accepts requests in Portuguese.⁶⁰

53 Art. 22, Law 13/15.

54 UN Doc. CAC/COSP/IRG/I/3/1/Add.31

55 Art. 149(a)–(d), Law 13/15.

56 Art. 22(1), Law 13/15.

57 Art. 23(1), Law 13/15.

58 Art. 21(1), Law 13/15.

59 Art. 21(3), Law 13/15.

60 UN Doc. CAC/COSP/IRG/I/3/1/Add.31, p. 10.



Botswana



Political and legal system of Botswana

The Republic of Botswana is a constitutional democracy based on popular sovereignty, constitutional supremacy and the rule of law. The State is based on the principle of separation of powers. Executive power is vested in the President and auxiliary institutions; legislative power is vested in the National Assembly, and judicial authority is vested in the Botswanan courts. Botswana follows the common law system and its sources of law include a combination of legislation, common law, customary law and judicial precedent.

Status and ratification of treaties

Botswana has acceded to or ratified all four treaties relating to MLA. The dates of signature and ratification or accession are:

International / regional treaty	Date of signature	Date of ratification
United Nations Convention Against Transnational Organized Crime	10 April 2002	29 August 2002
United Nations Convention Against Corruption	–	27 June 2011
African Union Convention on Preventing and Combating Corruption	–	14 May 2014
SADC Protocol on Mutual Legal Assistance in Criminal Matters	3 October 2002	6 August 2004

Botswana has not made any reservations on UNCAC or the SADC Protocol. It has also not made any declarations or notification on its designation of a central authority, in accordance with article 46(13) of UNCAC, to the United Nations Secretary-General.

However, it has made two reservations on the AU Convention. The first reservation pertains to article 10 as Botswana does not have domestic legislation which empowers any entity to require political parties to disclose their donors. Generally, politically party funding is not legislated for. The second reservation concerns article 12 which seeks to address media access to information. At the time of accession, Botswana had no legislation geared towards access to information and could therefore not accede to this provision. Thus, it could not implement article 12 domestically.

Domestic legal system of Botswana

Constitutional provisions on the incorporation of international treaty law

Botswana's Constitution does not explicitly provide for the status or incorporation of international law into the domestic legal system. The prerogative to sign and negotiate international agreements and treaties is accorded to the executive.⁶¹ Botswana follows a strict dualist approach to the domestication of international law – domestic legislation must be enacted to give effect to international treaties.⁶²

Domestic legislation on MLA

Botswana's primary legislation which governs MLA is the Mutual Assistance in Criminal Matters Act of 1990 (MACMA). The Act gives effect to much of the international treaty provisions, and regulates among others, grounds for refusing assistance, specifications surrounding requests made by Botswana, requests directed to Botswana, assistance in relation to evidence, providing testimony, recovery and transfer of proceeds of crime, and custody of persons.

MLA is rendered under the following scope:

- the obtaining of evidence, documents or other articles;
- the provision of documents and other records;
- the location and identification of witnesses or suspects;
- the execution of requests for search and seizure;
- the making of arrangements for persons to give evidence or assist in investigations;
- the confiscation of property in respect of offences;
- the recovery of pecuniary penalties in respect of offences;
- the restraining of dealings in property, or the freezing of assets, that may be confiscated, or that may be needed to satisfy pecuniary penalties imposed, in respect of offences;
- the location of property that may be confiscated, or that may be needed to satisfy pecuniary penalties imposed, in respect of offences; and,
- the service of documents.

⁶¹ Bugalo Maripe, 'Giving Effect to Human Rights Law in the Domestic Context of Botswana: Dissonance and Incongruity in Judicial Interpretation' (2014) 14(2) Oxford University Commonwealth Law Journal 255.

⁶² Maripe (n 54) 258:

Several grounds for refusal to render assistance are also listed, such as where there is belief that the assistance requested is aimed at punishment or persecution of certain individuals.⁶³ Additionally, requests may be refused in the absence of dual criminality.⁶⁴ The MACMA was amended by Act 14 of 2005 and designated the Directorate of Public Prosecutions (DPP) as Botswana's central authority. The DPP is authorized to make requests on behalf of Botswana to another State and may impose certain conditions on incoming requests.⁶⁵ Requests for assistance are in turn directed to the DPP. Requests to Botswana must be made in writing and contain, among others, the name of the authority requesting the assistance, a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws, a description of the purpose of the request and the nature of the assistance being requested, details of the procedure that the foreign country wishes to be followed by Botswana in giving effect to the request, including details of the manner and form in which any information, document or thing is to be supplied to the foreign country pursuant to the request, a statement setting out the wishes of the foreign country concerning the confidentiality of the request and the reasons for those wishes, and (f) details of the period within which the foreign country wishes the request be complied with.⁶⁶ The MACMA was amended more recently in 2018 (Act 14 of 2018), although these amendments have yet to be incorporated.

63 Sec. 5(1), Mutual Assistance in Criminal Matters Act (1990) (MACMA) available online at https://www.unodc.org/res/cld/document/bwa/1990/mutual_assistance_in_criminal_matters_act_1990_html/Botswana_Mutual_Assistance_in_Criminal_Matters_Act.pdf.

64 Sec. 5(2), MACMA.

65 Secs. 6, 7, Act 14 of 2005.

66 Sec. 8(1)(a)–(i), Act 14 of 2005.



Malawi



Political and legal system of Malawi

The Republic of Malawi is a unitary State based on popular sovereignty, constitutional supremacy and the rule of law. The State is based on the principle of separation of powers. Executive power is vested in the President and cabinet; legislative power is vested in the National Assembly, and judicial authority is vested in the Malawian courts. Malawi follows the common law system and its sources of law are a blend of legislation, common law, customary law and judicial precedent.

Status and ratification of treaties

Malawi has signed and ratified the following treaties relevant to MLA:

International / regional treaty	Date of signature	Date of ratification
United Nations Convention Against Transnational Organized Crime	3 December 2000	17 March 2005
United Nations Convention Against Corruption	21 September 2004	4 December 2007
African Union Convention on Preventing and Combating Corruption	–	26 November 2007
SADC Protocol on Mutual Legal Assistance in Criminal Matters	3 October 2002	–

Malawi has not entered any reservations against any of the provisions of the above instruments. It has also not made any declarations or notification on its designation of a central authority, in accordance with article 46(13) of UNCAC, to the United Nations Secretary-General.

Domestic legal system of Malawi

Constitutional provisions on the incorporation of international treaty law

The Constitution of Malawi was adopted in 1994 and most recently amended in 2017. The President as the Head of State is mandated to negotiate, sign, enter into and accede to

international agreements.⁶⁷ International agreements entered into by Malawi form part of the domestic law if provided for by an Act of Parliament.⁶⁸

Domestic legislation on MLA

MLA in the Malawian domestic law is primarily regulated by the Mutual Legal Assistance in Criminal Matters Act 24 of 1991 (MLACMA). However, the MLACMA is limited in application and provides the legal basis for mutual assistance only to Commonwealth States.⁶⁹ The country review of Malawi notes that requests for MLA may be provided by bilateral and multilateral treaties where the MLACMA finds no application.⁷⁰

Like that of UNCAC and the regional treaty framework, the MLACMA stipulates several elements pertaining to MLA. It provides for requests for assistance in obtaining evidence, locating or identifying persons, obtaining articles or items by search or seizure, arranging for the attendance of persons, restrictions on the use of information, grounds for refusal of requests and the form that requests should take.

Requests for assistance must include, among others, the following: specification of the assistance required, identity of the person, agency or authority that initiated the request, and time periods by which the request should be fulfilled.⁷¹ Requests for assistance made for purposes of proceedings are subject to additional requirements.⁷²

⁶⁷ Sec. 89(f), Constitution of Malawi (1994) (Malawian Constitution).

⁶⁸ Sec. 211, Malawian Constitution.

⁶⁹ Sec. 3(1), Mutual Legal Assistance in Criminal Matters Act (24 of 1991) (MLACMA) available online at https://www.imolin.org/doc/amlid/Malawi/Malawi_Mutual_Assistance_Criminal_Matters_Act_no_24_1991.pdf.

⁷⁰ p. 114, United Nations, United Nations Office on Drugs and Crime, 'Country Review Report of Malawi' available online at https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2017_03_09_Malawi_Final_Country_Report.pdf.

⁷¹ See Schedule (Sec.17(1)), MLACMA.

⁷² See Schedule (Sec.17(2)), MLACMA.



Mozambique



Political and legal system of Mozambique

The Republic of Mozambique is a democratic State based on popular sovereignty and constitutional supremacy. The President is the Head of State and of government, and forms part of the executive branch. Parliament is the legislative branch of the State and judicial authority is vested in the Mozambican courts. Mozambique follows the Portuguese civil law tradition, with a blend of Islamic and customary law. Legislation is the primary source of law. Case precedent is not followed and is also not considered a formal source of law.

Status and ratification of treaties

Mozambique has ratified all four treaties relevant to MLA. The dates of signature and ratification are as follows:

International / regional treaty	Date of signature	Date of ratification
United Nations Convention Against Transnational Organized Crime	15 December 2000	20 September 2006
United Nations Convention Against Corruption	25 May 2004	9 April 2003
African Union Convention on Preventing and Combating Corruption	15 December 2003	2 August 2006
SADC Protocol on Mutual Legal Assistance in Criminal Matters	17 August 2004	19 May 2001

Although Mozambique entered reservations against article 66 of UNCAC, no reservations were entered for any provisions relating to MLA. On 4 November 2008, Mozambique entered a notification in accordance with articles 46(13) on the designated central authority and article 46(14) on acceptable language for purposes of MLA. This is as follows: *“Pursuant to the provisions of article 46, paragraphs 13 and 14 of the United Nations Convention against Corruption, the Republic of Mozambique declares that the Attorney’s General Office of the Republic of Mozambique is the central authority designated to receive requests of legal mutual assistance and cooperation in the framework of the Convention, and that the Portuguese and English languages are the acceptable languages...”*

Domestic legal system of Mozambique

Constitutional provisions on the incorporation of international treaty law

The Constitution of Mozambique was adopted in 2004 and most recently amended in 2018. In accordance with article 18, international agreements and treaties validly approved and ratified enter into force in the Mozambican domestic legal system once they have been published and once binding on the international legal system.⁷³ The President is vested with the authority to enter into international agreements and treaties.⁷⁴ Parliament has exclusive authority over the ratification (and termination) of international treaties.⁷⁵

Domestic legislation on MLA

In accordance with its constitutional obligations, Mozambique adopted the Principles and Procedures for International Legal and Judicial Cooperation in Criminal Matters (Law 21/2019) – its principal domestic law governing MLA.⁷⁶ Law 21/2019 provides for six forms of international cooperation, including among others, extradition, enforcement of criminal sentences, transmission of criminal proceedings and MLA.⁷⁷ The scope of application of the law includes legal assistance before administrative authorities as well as judicial cooperation.⁷⁸ Article 4 of the law stipulates the prevalence of international agreements and treaties governing its scope of application. In other words, binding international agreements and treaties, as well as the Vienna Convention on the Law of Treaties, take primary position in the regulation of cooperation under the law.⁷⁹ In the absence of relevant international agreements and treaties, the provisions of Law 21/2019 are subsidiarily applicable.⁸⁰

The Attorney-General is the central authority designated to receive and submit requests for assistance.⁸¹ Requests received through diplomatic channels must also be submitted to the Attorney-General.⁸² The Attorney-General must transmit requests received for assistance to the Minister who oversees justice and they may approve or disapprove requests.⁸³

⁷³ Sec. 18(1), Constitution of Mozambique (2004) (Mozambican Constitution).

⁷⁴ Sec. 161(b), Mozambican Constitution.

⁷⁵ Sec. 178(t), Mozambican Constitution.

⁷⁶ Law No. 21/2019 Establishing the Principles and Procedures for International Legal and Judicial Cooperation in Criminal Matters (11 November 2019) available online at <https://bit.ly/34gdgsy> (Law 21/2019). The full title of the text in the original Portuguese language is: Lei n.0 21/2019: Estabelece os Princípios e Procedimentos da Cooperação Jurídica e Judiciária Internacional em Matéria Penal. For purposes of this report, an unofficial English translation was used.

⁷⁷ Art. 2(2)(f), Law No. 21/2019.

⁷⁸ Art. 2(3), Law No. 21/2019.

⁷⁹ Art. 4(1), Law No. 21/2019. Article 4 reads as follows: *Article 4: Prevalence of International Treaties and Agreements. 1. The forms of cooperation referred to in article 2 of the present Law are governed by the Vienna Convention on the Law of Treaties, of 22 May 1964, by the bilateral or multilateral international agreements that bind the Mozambican State. 2. In the absence or insufficiency, the provisions of this Law, the Code of Criminal Procedure, and other complementary legislation on the matter are subsidiary. 3. This Law does not confer the right to require any form of international cooperation in criminal matters.*

⁸⁰ Art. 4(2), Law 21/2019.

⁸¹ Art. 5(1), Law 21/2019.

⁸² Art. 5(4), Law 21/2019.

⁸³ Art. 5(2), (3), Law 21/2019.

MLA under Law 21/2019 is based on the principle of reciprocity – although a lack of reciprocity does not prevent execution of requests under certain circumstances.⁸⁴ Law 21/2019 provides six grounds of refusal for MLA. These include, among others, where the request is contrary to the Mozambican constitutional order, does not adhere to the requirements of international and regional human rights treaty regimes that are binding on Mozambique, and where reasons exist to believe that the request is pursuing persecution or punishment based on characteristics of, among others, race, religion, sex, or political affiliation.⁸⁵ Grounds for refusal to execute a request for MLA may however be waived under certain circumstances where the requesting state provides guarantees.⁸⁶

Law 21/2019 also makes provision for requests for cooperation lodged by several States in relation to the same offence. In such cases, it favours the request for assistance, considering the facts of the case, which is best suited to the interests of justice and social reintegration of the accused person.⁸⁷ Although Law 21/2019 does not explicitly indicate the language requests are to be made in, it does stipulate that all requests must be accompanied by a sworn translation into the official language of Mozambique (unless an international agreement or treaty stipulates otherwise).⁸⁸ The same applies to any documents which accompany the actual request for assistance.⁸⁹ According to article 10 of the Constitution of the Republic of Mozambique, the official language of Mozambique is Portuguese.⁹⁰ In accordance with its notification accompanying its instrument of ratification to UNCAC, Mozambique also accepts requests made in English.⁹¹ A decision by Mozambique on whether a request for assistance is accepted or rejected are to be formulated to the requesting State in its respective official language(s).⁹² The relevant documents containing the request for assistance submitted to Mozambique, as well as the decision relating to that request, must be presented in three copies (two of which are archived with the Attorney-General and the Supreme Court).⁹³ Requests for assistance may be submitted electronically provided measures of authenticity and confidentiality are sufficient.⁹⁴

Requests for assistance must include the following details:

- The authority making the request;
- The authority to whom the request is directed;
- The object and reason for the request;
- The legal basis and facts which underpin the criminal procedure for which the request is made;

⁸⁴ Art. 6(1), (3)(a)–(c), Law 21/2019.

⁸⁵ Art. 8(1)(a)–(g), Law 21/2019. See also Arts. 9, 10, 12 and 13 on additional grounds for refusal, as well as Art. 146.

⁸⁶ Art. 8(2), Law 21/2019.

⁸⁷ Art. 18, Law 21/2019.

⁸⁸ Art. 21(1), Law 21/2019.

⁸⁹ Art. 21(5), Law 21/2019.

⁹⁰ Art. 10, Constitution of the Republic of Mozambique.

⁹¹ See above at II. Status and Ratification of International Treaties.

⁹² Art. 21(3), Law 21/2019.

⁹³ Art. 21(4), Law 21/2019.

⁹⁴ Art. 23(1), Law 21/2019.

- The necessary identification of the accused person and any witnesses or experts from whom testimony is requested;
- The facts of the case (including the location and time the alleged offence took place); and,
- The relevant text/provisions of the legislation of the requesting State applicable to the offence for which assistance is requested.

Execution of requests for MLA are generally free of charge (except in certain listed cases such as compensation for costs incurred by witnesses or experts, sending of objects, and costs of transit of persons).⁹⁵ Urgent requests for assistance may be sent directly to the Mozambican judicial authorities or through Interpol.⁹⁶ Such requests may be sent by electronic means, post or fax, followed by written copy.⁹⁷

Chapter VIII details extensively provisions relating to the scope and application of MLA under Law 21/2019. MLA is explicitly provided for the following purposes:

- notification of acts and delivery of documents;
- obtaining evidence;
- searches, confiscations, seizures, examinations, and forensics;
- notification and hearing of suspects, defendants, witnesses, or experts;
- the transit of persons;
- examination of objects and places;
- assistance in making detainees, voluntary witnesses or other judicial authorities in the State of request available to make statements or support investigations;
- identification and location of the proceeds of crime, capital, property and instruments, as well as other objects for the purpose of proof or confiscation;
- provision of documents or certified copies of documents and records;
- information on Mozambican or foreign law and on the criminal record of suspects, defendants and convicted persons; and,
- any other information of MLA that is not contrary to Mozambican laws.

In addition to those requirements laid down in the general provisions of the Law 21/2019, article 144 stipulates that requests for assistance must also include other details, such as specific procedures a requesting State wishes to be followed during the execution of the request.⁹⁸ Chapter VIII also provides procedures and regulations for, among others, joint criminal investigations and their civil liability,⁹⁹ dual criminality,¹⁰⁰ restrictions, limitations and confidentiality on the use of information obtained during the execution of a request for mutual legal assistance,¹⁰¹ the process to be followed for rogatory letters,¹⁰² and temporary transfer of persons in custody.¹⁰³

⁹⁵ Art. 27, Law 21/2019.

⁹⁶ Art. 30(1), Law 21/2019.

⁹⁷ Art. 30(2), Law 21/2019.

⁹⁸ Art. 144, Law 21/2019.

⁹⁹ Arts. 137, 138, Law 21/2019.

¹⁰⁰ Art. 140, Law 21/2019.

¹⁰¹ See Arts. 141 and 142, Law 21/2019.

¹⁰² Art. 145, Law 21/2019.

¹⁰³ Art. 150, Law 21/2019. See also Art. 151 on the safe conduct of persons transferred in custody, and Art. 152 on the transit of persons from a third State.



Political and legal system of Namibia

The Republic of Namibia is a democratic State based on popular sovereignty, constitutional supremacy and the rule of law. The State is based on the principle of separation of powers. Executive power is vested in the President and the cabinet; legislative power is vested in Parliament, and judicial authority is vested in the Namibian courts. Namibia follows the Roman Dutch common law tradition. Legislation, common law and customary law constitute the major sources of the law.

Status and ratification of treaties

Namibia has ratified all four treaties relevant to MLA. The dates of signature and ratification are as follows:

International / regional treaty	Date of signature	Date of ratification
United Nations Convention Against Transnational Organized Crime	13 December 2000	16 August 2002
United Nations Convention Against Corruption	9 December 2003	3 August 2004
African Union Convention on Preventing and Combating Corruption	9 December 2003	3 August 2004
SADC Protocol on Mutual Legal Assistance in Criminal Matters	3 October 2002	1 February 2007

Namibia has not entered any reservations against any of the provisions of the above treaties. It has also not made any declaration or notification on its designation of a central authority, in accordance with article 46(13) of UNCAC, to the United Nations Secretary-General.

Domestic legal system of Namibia

Constitutional provisions on the incorporation of international treaty law

The Constitution of the Republic of Namibia was adopted in 1990 and most recently amended in 2014. General rules of public international law and international agreements

binding upon Namibia form part of its domestic law.¹⁰⁴ The President as the Head of State is empowered to negotiate and sign international agreements.¹⁰⁵ The National Assembly is mandated to agree and ratify international agreements entered into.¹⁰⁶

Domestic legislation on MLA

Namibia's primary legislation dealing with MLA is the International Co-operation in Criminal Matters Act of 2000. The Act designated the Permanent Secretary of Justice as the central authority which may handle all aspects relevant to MLA.¹⁰⁷ It provides for a broad range of measures related to MLA, including confidentiality of requests, admissibility of evidence received from a request, confiscation and transfer of proceeds of crime, and the testimony and custody process of witnesses.

In accordance with section 27 and subject to the section 32(3)(e) of the Constitution of the Republic of Namibia, the Minister of Justice is authorized to enter into agreements with any State for the provision of MLA. Any such agreement only enters into force once it has been ratified by the National Assembly.¹⁰⁸

The Act also explicitly stipulates provision for the admissibility of foreign documents. All such documents (including depositions, affidavits, certificates, records of conviction) may be received in evidence at any proceeding provided that they are: authenticated in the manner in which foreign documents are authenticated to enable them to be produced in any court in Namibia, or authenticated in the manner provided for in any agreement entered into with the foreign State concerned.¹⁰⁹

Schedule 1 of the Act explicitly lists twenty foreign States to which it applies to and includes all other seven States covered by this publication.

¹⁰⁴ Sec. 144, Constitution of Namibia (1990) (Namibian Constitution).

¹⁰⁵ Sec. 32(3)(e), Namibian Constitution.

¹⁰⁶ Sec. 63(2)(e), Namibian constitution.

¹⁰⁷ Sec. 1A, International Cooperation in Criminal Matters Act (2000) (ICCMA).

¹⁰⁸ Sec. 27(2), ICCMA.

¹⁰⁹ Sec. 29(a), (b), ICCMA.



South Africa



Political and legal system of South Africa

The Republic of South Africa is a democratic State founded on constitutional supremacy, popular sovereignty and the rule of law. Executive authority is vested in the President and cabinet, legislative authority is vested in Parliament (National Assembly and National Council of Provinces), and judicial authority is vested in the South African courts. South Africa follows a common law tradition. Sources of law include the Constitution, legislation, common law, customary law and case precedent.

Status and ratification of treaties

South Africa has ratified all four treaties relevant to MLA. The dates of signature and ratification are as follows:

International / regional treaty	Date of signature	Date of ratification
United Nations Convention Against Transnational Organized Crime	13 December 2000	20 February 2004
United Nations Convention Against Corruption	9 December 2003	22 November 2004
African Union Convention on Preventing and Combating Corruption	16 March 2004	11 November 2005
SADC Protocol on Mutual Legal Assistance in Criminal Matters	3 October 2002	16 June 2003

South Africa has not made any reservations on UNCAC. It has made the following notification pertaining to the designation of its central authority for MLA: Notification under article 46(13): “... it is approved that the Director-General of the Department of Justice and Constitutional Development is the designated Central Authority to receive requests for mutual legal assistance in terms of article 46 (13) of the Convention.”

South Africa entered the following designations and reservations applicable to MLA when ratifying the AU Convention:

Designations: Article 20: The Director-General of the Department of Justice and Constitutional Development is designated as the National Authority authorized to make or receive requests for MLA in terms of article 20.

Reservations: Article 25(3): It will not be bound by an amendment to the Convention until it has been approved by the national executive and parliamentary authorities in accordance with the Constitution of South Africa 1996.

Domestic legal system of South Africa

Constitutional provisions on the incorporation of international treaty law

South Africa's Constitution was adopted in 1996 and was last amended in 2012. The national executive is responsible for signing all international agreements.¹¹⁰ International agreements only bind South Africa after they have been approved by resolution in both the National Assembly and National Council of Provinces.¹¹¹ Only agreements of a technical, administrative or executive nature bind the State without prior approval by the National Assembly and National Council of Provinces.¹¹² International agreements are only incorporated into domestic law when enacted into law by national legislation.¹¹³

Domestic legislation on MLA

South Africa's primary legislation regulating MLA is the International Co-operation in Criminal Matters Act of 1996.¹¹⁴ The Act stipulates and regulates the provision and conduct of MLA and includes such assistance as: mutual provision of evidence (chapter 2), mutual execution of sentences and compensatory orders (chapter 3), and the confiscation and transfer of the proceeds of crime (chapter 4). The Act also takes into account issues such as the admissibility of evidence (section 6) and the examination of witnesses (section 8).

The President is authorized to, as they deem fit, enter into any agreement with any foreign State for the provision of mutual assistance in criminal matters.¹¹⁵ Agreements of such a nature must be approved by Parliament, and the Minister of Justice is obliged to give notice of such agreements in the Government Gazette.¹¹⁶

The Act provides no grounds for refusal of requests for assistance. Requests for MLA should be directed to the Director-General of the Department of Justice and Constitutional Development who will then transmit it to the appropriate judicial or

¹¹⁰ Sec. 231(1), Constitution of South Africa (1996) (SA Constitution).

¹¹¹ Sec. 231(2), SA Constitution.

¹¹² Sec. 231(3), SA Constitution.

¹¹³ Sec. 231(4), SA Constitution. The only exception to this provision are self-executing provisions of an international agreement that has been approved by Parliament – but may not be inconsistent with the Constitution or an Act of Parliament.

¹¹⁴ International Co-operation in Criminal Matters Act (75 of 1996) (ICCMA), available online at <https://www.justice.gov.za/legislation/acts/1996-075.pdf>.

¹¹⁵ Sec. 27(1), ICCMA.

¹¹⁶ Sec. 27(2), ICCMA.

government body.¹¹⁷ In urgent cases, requests may be sent directly to the judicial authority exercising jurisdiction in a specific area, or directly to the appropriate government body.¹¹⁸ In such instances, the Director-General must be notified and provided with a copy of the request as soon as is practicable.¹¹⁹

In addition to the International Co-operation in Criminal Matters Act of 1996, on 2 December 2020, the South African Parliament adopted the Cybercrimes Act 19 of 2020 (CCA). The CCA has been sent to the President for assent and a date for when it will come into operation will then be determined. The CCA is a comprehensive piece of legislation establishing cybercrime offences, regulating MLA in relation to these offences, and establishing a designated Point of Contact.¹²⁰ Conduct criminalized under the CCA includes, among others, unlawful access of data or computer systems, unlawful interference and interception of data, software and hardware, unlawful acquisition or possession of passwords and access codes, cyber fraud, cyber forgery, and cyber extortion.

Chapter 5 of the CCA regulates, in a complimentary manner to the International Co-operation in Criminal Matters Act, the provision of MLA and the preservation of information and content related to requests for assistance. More specifically, the provisions of chapter 5 are primarily concerned with the process of MLA related to the preservation of an article or other evidence in electronic format regarding the commission or suspected commission of offences set out in chapter 2, any other offence in terms of the laws of the Republic or other offences which are related to those found in chapter 2 committed in a foreign State.¹²¹ It further confirms that two requests must be prepared – one request for preservation of an article which definition and procedural requirements are set out in section 1(1) of the CCA and a second request for the assistance itself under the provisions of the ICCMA.

The chapter also outlines the process of spontaneous transmission of information subject to limitations or confidentiality requirements,¹²² incoming requests for assistance from a foreign State to South Africa,¹²³ and outgoing requests for assistance to a foreign State.¹²⁴ In addition, provision is made for a designated Point of Contact to ensure immediate assistance for the purposes of proceedings and investigations,¹²⁵ a designated judge to consider and make the appropriate orders in relation to any requests received,¹²⁶ and the process to be followed in cases of urgency.¹²⁷

117 Sec. 2(3), ICCMA.

118 Sec. 2(4)(a), ICCMA.

119 Sec. 2(4)(b), ICCMA.

120 Cybercrimes Act (19 of 2020) (CCA).

121 Sec. 46, CCA.

122 Sec. 47, CCA.

123 Sec. 48, CCA.

124 Sec. 51, CCA.

125 See Sec. 52(3)(a)(b), CCA. See also. Ch. 6 – Designated Point of Contact.

126 Sec. 48(6)(a)–(e), CCA.

127 Sec. 48(9)(a)(b), CCA.



Zambia



Political and legal system of Zambia

Zambia is a democratic State based on popular sovereignty, constitutional supremacy and the rule of law. Executive authority is vested in the President, who is also the Head of State. Legislative authority is vested in the National Assembly and judicial authority is vested in the Zambian courts. Zambia follows a common law tradition; consequently, litigation is based on an adversarial process. Sources of law include the Constitution, common law and case precedent.

Status and ratification of treaties

Zambia has ratified all four treaties relevant to MLA. The dates of signature and ratification are as follows:

International / regional treaty	Date of signature	Date of ratification
United Nations Convention Against Transnational Organized Crime	-	24 April 2005
United Nations Convention Against Corruption	11 December 2003	7 December 2007
African Union Convention on Preventing and Combating Corruption	3 August 2003	30 August 2007
SADC Protocol on Mutual Legal Assistance in Criminal Matters	3 October 2002	2 May 2006

Zambia has not made any reservations to the three treaties above; nor has it made any declarations or designations in relation to MLA.

Domestic legal system of Zambia

Constitutional provisions on the incorporation of international treaty law

The Constitution of Zambia was adopted in 1991 and last amended in 2016.¹²⁸ The National Assembly is responsible for approving international agreements and treaties

¹²⁸ Constitution of Zambia (1991) available online at: <https://bit.ly/37cs3qf> (last accessed 16 October 2020) (Zambian Constitution).

before they are acceded to or ratified.¹²⁹ The President is responsible for negotiating and signing international agreements and treaties, and, subject to their approval by the National Assembly, accede to or ratify such agreements and treaties.¹³⁰ In addition, Cabinet may recommend to the National Assembly the accession to or ratification of international agreements and treaties, and the Attorney General is mandated to advise on agreements and treaties Zambia intends to conclude.¹³¹

Zambia is a dualist State and international law is incorporated into the domestic law by an Act of Parliament. Additionally, the domestication of international law is comprehensively addressed in the Ratification of International Agreements Act of 2016.¹³²

Domestic legislation on MLA

MLA in the Zambian legal framework is regulated under the Mutual Legal Assistance in Criminal Matters Act of 1993.¹³³ Unlike other domestic legislation, the Act specifically addressed MLA by stipulating and designating the details of MLA which is to apply to only those States contained in the Schedule of the Act.¹³⁴ A total of 66 States are listed in the Schedule, including all but one State covered in this publication (Angola).

The Act comprehensively addresses issues of search and seizure, transmitting of evidence, custody of persons, transfer of persons, and the admissibility of evidence, and requires dual criminality.¹³⁵ The Attorney-General may impose specific conditions under which MLA will be granted and is also responsible for requesting assistance on behalf of Zambia.¹³⁶ Requests for MLA by other States may be made to the Attorney-General or anyone authorized by the Attorney-General to receive requests.¹³⁷

Requests for MLA must contain eight substantive elements, including among others, the name of the authority making the request, a description of the matter at hand and a summary of the facts, a description of the purpose of the request, and details of any procedure which the requesting State wishes to be followed by Zambia.¹³⁸ The Act also sets out several grounds for refusal to render assistance – notably for example, where the Act does not apply to the State making the request.¹³⁹

¹²⁹ Sec. 63(2)(e), Zambian Constitution.

¹³⁰ Sec. 92(2)(c), Zambian Constitution.

¹³¹ Sec. 114(1)(d), 177(5)(d), Zambian Constitution.

¹³² The Ratification of International Agreements Act 34 of 2016 (7 June 2016) available online at: <https://bit.ly/3k9AtSU> (last accessed 16 October 2020).

¹³³ Mutual Legal Assistance in Criminal Matters Act (19 of 1993) (30 April 1993) available online at: <https://bit.ly/346dKSi> (last accessed 16 October 2020) (MLACMA).

¹³⁴ Sec. 5(2), MLACMA (Specified States) (Statutory Instrument 95 of 1996).

¹³⁵ Sec. 7(2), MLACMA Zambia.

¹³⁶ Sec. 8, 9, MLACMA Zambia.

¹³⁷ Sec. 10(1), MLACMA Zambia.

¹³⁸ Sec. 10(2)(a)–(j), MLACMA Zambia.

¹³⁹ Sec. 11(1)(a)–(g), (2)(a)–(f), MLACMA Zambia.



Zimbabwe



Political and legal system of Zimbabwe

The Republic of Zimbabwe is a democratic State based on popular sovereignty, constitutional supremacy and the rule of law. The State is based on the principle of separation of powers. Executive power is vested in the President and cabinet; legislative power is vested in Parliament (National Assembly and the Senate), and judicial authority is vested in the Zimbabwean courts. Zimbabwean law remains largely uncoded, although the Criminal Law (Codification and Reform) Act chapter 9:23 has recently codified much of penal matters. Sources of law include legislation, case law (precedent), common law and customary law. Zimbabwe follows a common law tradition.

Status and ratification of treaties

Zimbabwe has ratified all four treaties relevant to MLA. The dates of signature and ratification are as follows:

International / regional treaty	Date of signature	Date of ratification
United Nations Convention Against Transnational Organized Crime	12 December 2000	12 December 2007
United Nations Convention Against Corruption	20 February 2004	8 March 2007
African Union Convention on Preventing and Combating Corruption	18 November 2003	30 March 2007
SADC Protocol on Mutual Legal Assistance in Criminal Matters	3 October 2002	19 June 2011

In April 2019, Zimbabwe designated the Prosecutor General under article 46(13) as its central authority.

Domestic legal system of Zimbabwe

Constitutional provisions on the incorporation of international treaty law

Zimbabwe's Constitution, the Constitution of Zimbabwe Amendment (No. 20) Act 2013, was most recently amended in 2017. Section two recognizes constitutional supremacy and any legislation or conduct inconsistent with the Constitution is considered invalid

to the extent of the inconsistency.¹⁴⁰ In accordance with section 34, the State must ensure that all international agreements, conventions, and treaties which Zimbabwe is party to, are incorporated into the domestic law. The President, as the Head of State, is empowered to conclude or execute international agreements, conventions and treaties with foreign States, governments and international organizations.¹⁴¹

Section 327 of the Constitution regulates the incorporation of international law into the domestic law. An international treaty is defined as a “convention, treaty, protocol or agreement between one or more foreign States or governments or international organizations.”¹⁴² International treaties do not bind Zimbabwe until they are approved by Parliament, and do not form part of the law of Zimbabwe unless they have been incorporated through an Act of Parliament.¹⁴³ In addition, the Constitution also places a positive obligation on the Police Service of Zimbabwe, in exercising its functions, to cooperate with “regional and international bodies formed to combat crime.”¹⁴⁴

In accordance with section 327 of the Constitution, Zimbabwe adopted the Money laundering and Proceeds of Crime Act [chapter 9:23] in 2013.¹⁴⁵ Section 91 of the Money laundering and Proceeds of Crime Act allows the Prosecutor-General, in accordance with the Civil Matters (Mutual Assistance) Act [chapter 8:02], to make an application to a court or tribunal in a country designated under that Act for information or evidence relevant to a civil forfeiture investigation or proceeding.¹⁴⁶ Zimbabwe is also a member of the Asset Recovery Inter-Agency Network for Southern Africa (ARINSA) and information is also shared through this platform.

Domestic legislation on MLA

MLA within the Zimbabwean domestic law is principally regulated by the Criminal Matters (Mutual Assistance) Act of 1991.¹⁴⁷ The purpose of the Act is to provide the Prosecutor-General and appropriate authorities the widest possible measure of cooperation for the purposes of MLA in criminal matters.¹⁴⁸ Zimbabwe’s designated central authority is the Prosecutor General of Zimbabwe.

140 Sec. 3(2), Constitution of Zimbabwe Amendment (No. 20) Act 2013 (Zimbabwean Constitution). See also Sec. 3(1)(a), Zimbabwean Constitution.

141 Sec. 110(4), Zimbabwean Constitution.

142 Sec. 327(1), Zimbabwean Constitution.

143 Sec. 327(2)(a)(b), Zimbabwean Constitution. But see the exceptions provided for in Sec. 327(4)(a) and (b).

144 Sec. 219(2)(c), Zimbabwean Constitution.

145 Money Laundering and Proceeds of Crime Act [chapter 9:23], 2013, available at: <https://zimlil.org/zw/legislation/num-act/2013/4/Money%20Laundering%20and%20Proceeds%20of%20Crime%20Act.pdf>.

146 Sec. 91, [chapter 9:23].

147 Criminal Matters (Mutual Assistance) Act (1 April 1991) available online at: <https://bit.ly/2H5oojl> (CMMA, as amended by SI 33/2014).

148 Sec. 2(A)(1), CMMA.

In applying the Act, the Minister of Justice, Legal and Parliamentary Affairs (or any Minister to whom the President from time to time assigns the administration of the Act) is empowered to decide on when the Act finds application. The Minister, when satisfied that reciprocal provisions have been made by a foreign State to facilitate provision to Zimbabwe of assistance in criminal matters, may by statutory instrument declare the applicability of the Act to relations with any such State.¹⁴⁹ The application of the Act to relations with a foreign State may be subject to conditions or modifications, and are to be specified by statutory instruments.¹⁵⁰ However, the Minister's discretion does not apply to Part II of the Act which governs assistance in relation to search and seizure. The requirement of dual criminality is deemed to be fulfilled in respect of any assistance sought if the conduct underlying the offence is a criminal offence in Zimbabwe and the foreign State requesting assistance (irrespective of whether the laws of the foreign country stipulate the offence within the same class of offences as Zimbabwe).¹⁵¹

Section four of the Act provides an open-ended list of purposes for which mutual assistance in criminal matters may be requested. They include such assistance for:

- obtaining of evidence or other articles;
- the provision of documents or other records;
- the location and identification of witnesses or suspects;
- the execution of requests for search and seizure;
- the making of arrangements for persons to give evidence or assist in investigations;
- the forfeiture or confiscation of property in respect of offences;
- the recovery of pecuniary penalties in respect of offences;
- the interdicting of dealings in property, or the freezing of assets, that may be forfeited or confiscated, or that may be needed to satisfy pecuniary penalties imposed, in respect of offences;
- the location of property that may be forfeited, or that may be needed to satisfy pecuniary penalties imposed, in respect of offences; and,
- the service of documents.

The Act also provides for grounds for refusal to render assistance (sec. 6), assistance in relation to the taking of evidence or the production of objects or items (part II), assistance in relation to search and seizure (part III); transfer of persons for purposes of giving evidence or testimony (sec. 14); custody of persons (secs. 15–16), assistance in relation to giving evidence at hearings in foreign countries (sec. 24) and assistance in relation to investigations in foreign countries (sec. 25).

¹⁴⁹ Sec. 3(1), CMMA.

¹⁵⁰ Sec. 3(2), CMMA.

¹⁵¹ Sec. 3(4), CMMA.

MLA in asset recovery and enforcement of foreign orders

A particular area of focus of MLA includes the process of asset recovery and enforcement of foreign orders. Asset recovery, broadly speaking, pertains to government efforts to return the proceeds of crime which are based in foreign jurisdictions. As such, it involves also an element of enforcing foreign orders in order to recover the proceeds of crime. The following should be noted under the relevant treaties:

UNTOC

Article 12 of UNTOC provides for the confiscation and seizure of the proceeds of crime. States Parties are required to adopt measures necessary to ensure identification, tracing, freezing or seizure of proceeds of crime and property related thereto. Article 13 obliges States Parties to provide, to the greatest extent possible, cooperation among themselves on sending, receiving and executing requests for confiscation.

UNCAC

Chapter V of the UNCAC is dedicated to asset recovery, which is also considered a fundamental principle of the Convention. States Parties, together with their domestic financial institutions, are required to take reasonable steps to detect the transfer of proceeds of crime.¹⁵² In doing so, States Parties must correspond with the relevant financial institutions on enhanced security measures which should apply to specific entities and transactions. In turn, financial institutions are required to maintain adequate records for certain periods of time and which contain specific information relating to the identity of customers and beneficiaries. State authorities may refuse correspondence with exclusively online banks that lack a physical presence in the State.

With regard to the recovery of property, each State is required to establish measures to allow other States Parties to institute civil actions to recover property and to recognize such States' claims as legitimate owners of property.¹⁵³

Each State Party must also provide for mechanisms which allow for domestic authorities to act on confiscation orders issued by courts of another State. Confiscation should be provided for even in cases where criminal conviction is not possible (due to the inability to prosecute because of death, flight or absence).

In addition to the requirements laid out in article 46, which addresses confiscation, the following is also required: description of the property to be confiscated, including its location and value; legally admissible copy of the confiscation order; and, a statement of facts relied upon by the Requesting State.

¹⁵² Art. 52(1), UNCAC.

¹⁵³ Art. 53(a) – (c), UNCAC.

Finally, State Parties are also obliged to provide for measures which allow for freezing or seizure of property based on orders from a court of another State Party.¹⁵⁴

AU Convention

In a similar manner, the AU Convention also provides for confiscation and seizure of the proceeds of corruption. Authorities are legislatively required to be able to search, identify, trace, administer, and freeze or seize proceeds of corruption pending a final judgment of a court. Authorities are also required to repatriate the proceeds of crime. The handing over of the proceeds of corruption may take place in cases even where extradition is refused or cannot take place.

SADC Protocol on MLA in Criminal Matters

Under articles 19 and 20, States Parties are duty-bound to locate potential proceeds of crime within their jurisdiction, trace assets, investigate financial dealings, and obtain information and evidence that may assist in the securing or recovery of the proceeds of crime.

States Parties are required to initiate confiscation proceedings once a request for such confiscation of forfeiture is obtained.

Conclusion

This chapter provided an overview of legislative framework governing MLA in Southern Africa, and more specifically, of the eight States covered by this publication. If adequately enforced, the existing legislative framework provides these States with a wide range of measures applicable to MLA. Relevant international and regional treaty law i.e., the UNTOC, the UNCAC, the AU Convention, and the SADC Protocol, provide a solid framework of reference for the same. States have incorporated many of the provisions of these treaties in their domestic law, and in some cases, entire pieces of domestic legislation are dedicated to MLA.

¹⁵⁴ Art. 54(2), UNCAC.



Chapter 2

*Policy considerations
when implementing
requests for MLA*

Relationship between international and regional treaty law

When considering the relevant provisions relating to MLA, one crucial issue is the choice of laws to be applied. The question which may arise is: which treaty do States rely on when engaging in MLA? Some of the considerations countries can make may include the context under which assistance is sought, the treaty-specific provisions regulating application, as well as those provisions which stipulate a treaty's application as voluntary, obligatory or complimentary. In addition, States may also have to keep the provisions of domestic laws in mind.

Choosing the right legal instrument

When determining which treaty is most suitable for a specific situation, the State may take the following three-step approach:

Step 1

Availability of treaty provisions

Consider whether the provisions of a specific treaty are available to a requesting and requested State, and whether these States have ratified the treaty in question.

Step 2

Scope of applicability

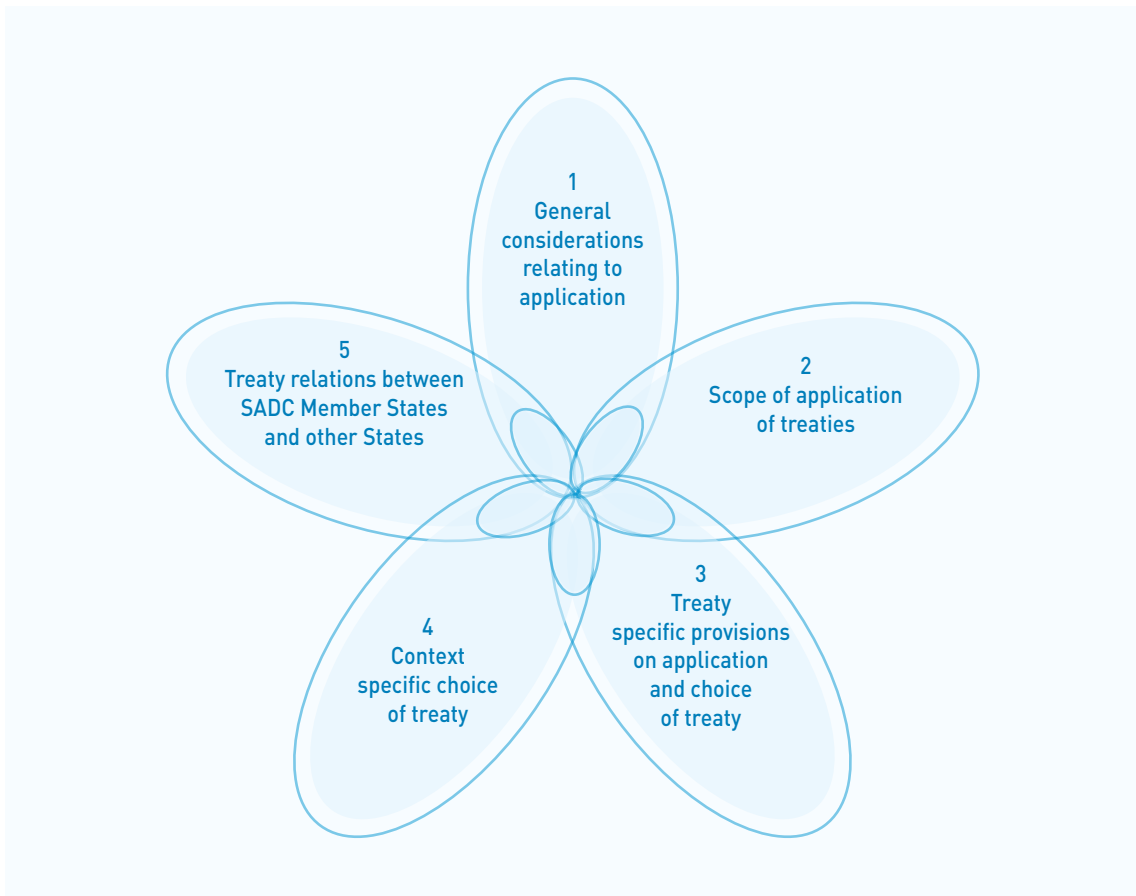
Consider whether the treaty is applicable to the situation under which MLA is being contemplated. Each treaty which could be used as a legal basis will need to be examined to determine its scope of application.

Step 3

Treaty prevalence or hierarchy

Consideration should also be given to the hierarchy of treaties. In other words, whether any specific treaty under consideration takes prevalence over other treaties which may also be applicable. These treaty provisions, which ordinarily regulate the relationship between themselves other treaties, will need to be consulted.

The following categories are critical for implementing policy changes:



General considerations relating to application

While deciding on a particular treaty, the first step should be to consider whether the State has acceded to or ratified the treaty in question, and if the corresponding State it wishes to request assistance from, has also done so. If so, the State may – in principle – resort to applying the treaty.

The second step concerning applicability is to directly examine the provisions relating to scope and application of a treaty. In the case of UNCAC and the AU Convention, both treaties apply specifically to corruption and corruption-related offences (and their inclusion of provisions on MLA is an extension of the provisions of the treaty itself).

Some treaties explicitly provide for application over and above the specific offences they list within their provisions. That would suggest that where States choose, they may apply specific provisions (such as those on MLA), to offences outside of those established under the treaty in question.

One such example is article 4(2) of the AU Convention, which states that: *“This Convention shall also be applicable by mutual agreement between or among two or more States Parties with respect to any other act or practice of corruption and related offences not described in this Convention.”*

In the case of the SADC Protocol, its provisions dealing exclusively with MLA would apply to a much more extensive range of offences than those outlined in either UNCAC or the AU Convention. Article 2, which stipulates the scope of application, is intended to provide the widest possible measure of assistance.

Scope of application of treaties

Another consideration concerns the scope of application of relevant treaties. UNCAC and the AU Convention, for example, specifically provide for MLA in relation to offences created under those treaties (corruption-related offences). In contrast, the SADC Protocol provides avenues of assistance in a broader range of criminal matters, not only those related to corruption. In some cases, treaties outline additional pre-requisites for application. It is therefore important to assess the precise scope of application of each treaty. In this regard, the following points are helpful when considering the scope of application of each of the treaties in question:

UNCAC

While UNCAC is intended to apply as a comprehensive and mutually beneficial instrument among States Parties, its provisions provide for both procedural and substantive pre-requisites for its application. The treaty’s scope of application is detailed in article 3(1) as follows: *“This Convention shall apply, in accordance with its terms, to the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences established in accordance with this Convention.”*

Although UNCAC does not define “corruption”, it comprehensively details “acts of corruption” (where they are corruption-related acts and not corruption acts *per se*). These include, among others, bribery, embezzlement, misappropriation or embezzlement of property, trading in influence, abuse of functions, illicit enrichment, money laundering, concealment, and obstruction of justice. UNCAC also establishes the parameters of involvement, explicitly providing for acts of corruption in the three branches of government (executive, legislative and judicial), as well as acts of corruption within the private or commercial sector. In addition, for the general implementation of the treaty, it is not necessary for the offences set forth in it to result in damage or harm to State property.

Where international cooperation is concerned, specifically MLA, chapter IV provides for additional pre-requisites. Article 43(1) places a positive obligation on States Parties, indicating that they *shall* cooperate in criminal matters in accordance with articles 44 to 50 of the treaty.¹⁵⁵

¹⁵⁵ Art. 43(1), UNCAC.

As a necessary element of international cooperation, article 43(2) addresses the requirement of dual criminality.¹⁵⁶ In cases where required, and in accordance with article 43(2), dual criminality is deemed fulfilled irrespective of whether “the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party”, so long as the conduct underlying the offence for which assistance is sought, is a criminal offence in both States Parties.

Finally, article 46(2) states that MLA shall be rendered in relation to offences for which a legal person may be held liable in accordance with article 26 of the treaty. Article 26 addresses the liability of legal persons. It places an obligation on States Parties to adopt necessary measures to establish the liability of legal persons engaged in offences established under the treaty. Liability may be administrative, civil or criminal; will be without prejudice to the criminal liability of the natural persons who committed the offences; and legal persons may be liable to proportionate sanctions.¹⁵⁷

AU Convention

Article 4 details the treaty’s scope of application. The AU Convention is applicable to acts of corruption under nine explicit conditions, which among others, include: soliciting by public officials in exchange for certain acts or omissions; illicit obtaining of benefits by public officials; soliciting undue advantages by private sector entities in exchange for certain acts or omissions; illicit enrichment; and the use or concealment of proceeds derived from acts of corruption listed under the AU Convention.¹⁵⁸

The AU Convention is also applicable where two or more States Parties agree by mutual agreement that it apply to other acts of corruption not described within its provisions.¹⁵⁹ States Parties are required to adopt legislative and other measures to establish offences within the AU Convention under their domestic law and to, in particular, establish and maintain anti-corruption authorities.¹⁶⁰

Where MLA is concerned, the AU Convention provides that in cases where States Parties have pre-established relations on assistance, they may choose to regulate such assistance without prejudice to the provisions of the AU Convention.¹⁶¹

¹⁵⁶ Art. 43(2), UNCAC.

¹⁵⁷ Art. 26, UNCAC.

¹⁵⁸ Art. 4(1)(a)–(i), AU Convention.

¹⁵⁹ Art. 4(2), AU Convention.

¹⁶⁰ Art. 5(1)–(8), AU Convention.

¹⁶¹ Art. 18(2), AU Convention.

SADC Protocol

MLA under the SADC Protocol is extensively and comprehensively addressed. Further, since the SADC Protocol deals exclusively with MLA, terms and concepts are widely defined as to find application in a range of relations. The term “offence” for example, is defined as the “fact or facts which constitute a crime under the laws of a Member State.” In principle therefore, any offence under any of the laws of the respective Member States may potentially give rise to a request for MLA. The terms “confiscation”, “property”, “proceeds of crime” and “sentence” are equally defined in a manner which allows broad consideration for MLA requests.¹⁶²

States Parties are principally obligated to provide the “widest possible measure of mutual legal assistance in criminal matters.”¹⁶³ Further, MLA is considered “any assistance given by the Requested State in respect of investigations, prosecutions or proceedings in the Requesting State in a criminal matter.”¹⁶⁴ The definition of MLA considers such assistance irrespective of whether it is sought or is to be provided by a court or competent authority.

Criminal matters include investigations, prosecutions or proceedings relating to offences concerning transnational organized crime, corruption, taxation, custom duties, and foreign exchange control.¹⁶⁵ Assistance is provided under the SADC Protocol without regard as to whether the conduct, which is the subject of investigation, prosecution or proceeding in the requesting State Party would constitute an offence in the requested State Party.¹⁶⁶

Treaty specific provisions on application and choice of treaty

International agreements and treaties occasionally include a provision relating to a choice of laws application. All three treaties examined above contain such a provision – commonly referred to as a “relationship with other treaties” provision. The importance in ascertaining these provisions is that they stipulate how one is to interpret the provisions of the current treaty with those of another – and in some cases, these provisions indicate when a treaty takes precedent over another.

UNCAC | Articles 46(6) and (7)

In the case of UNCAC, article 46(6) makes clear that its provisions relating to MLA “shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.”¹⁶⁷ Article 46(6) does not therefore create a preference between

¹⁶² See Art. 2, the Protocol.

¹⁶³ Art. 2(1), the Protocol.

¹⁶⁴ Art. 2(2), the Protocol.

¹⁶⁵ Art. 2(3), the Protocol.

¹⁶⁶ Art. 2(4), the Protocol.

¹⁶⁷ Art. 46(6), UNCAC reads: The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

itself and other treaties on MLA.¹⁶⁸ Therefore, in cases where MLA under UNCAC provides for a greater degree of assistance, then UNCAC would find application;¹⁶⁹ Otherwise, article 46(6) ensures that other treaties that may provide a greater degree of assistance are applied instead.¹⁷⁰

In addition, article 46(7) of UNCAC specifically provides for two other situations.¹⁷¹ The first is where no other treaty regulating MLA exists. In such a case, States Parties would have no other treaty to rely on and would therefore only be able to apply UNCAC – specifically the provisions under articles 46(9)–(29). The second situation article 46(7) foresees is where other treaties on MLA exist, but the States Parties choose to apply the provisions of articles 46(9)–(29). In fact, the final sentence of article 46(7) “strongly encourage[s]” States Parties apply those paragraphs. The resulting outcome is that States Parties are not obligated to follow the provisions of UNCAC if they already have (or in future adopt) treaties regulating MLA. At the same time, UNCAC makes its provisions available to such States – in a manner which would suggest a complimentary relationship.¹⁷²

AU Convention | Articles 18 and 21

In contrast to the provisions of UNCAC, the AU Convention makes its provisions preferentially obligatory. Article 21 states that in cases to those States Parties to which it applies, its provisions supersede the provisions of both other bilateral agreements and treaties. However, article 21 provides that its provisions supersede (only) other agreements that “govern corruption and related offences between any two or more State Parties.” Since only those specific provisions supersede other agreements, it may be reasonable to suggest that the provision of MLA found in articles 18 to 20 do not necessarily supersede other agreements on MLA. In such a case, a harmonious interpretation between the AU Convention and other treaties on MLA should be applied.

When one considers the provisions dealing with MLA, the following may be noted:

- In terms of article 18(2), two or several States which have established relations on the basis of uniform legislation or regimes may resort to those options in their mutual relations.¹⁷³
- In addition, article 18(5) stipulates that the provision of MLA under the AU Convention shall not affect obligations under other agreements.¹⁷⁴

168 Dimosthenis Chrysikos, ‘Article 46: Mutual legal assistance’ in Cecily Rose, Michael Kubiciel and Oliver Landwehr (eds) *The United Nations Convention Against Corruption: A Commentary* (Oxford University Press 2019), p. 447 (hereafter Chrysikos, ‘Commentary on the United Nations Convention Against Corruption (Oxford University Press)’).

169 Ibid.

170 Ibid.

171 Art. 46(7), UNCAC reads: Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.

172 Chrysikos, ‘Commentary on the United Nations Convention Against Corruption’ (Oxford University Press). p. 447.

173 Art. 18(2), AU Convention reads: If two or several State Parties have established relations on the basis of uniform legislation or a particular regime, they may have the option to regulate such mutual relations without prejudice to the provisions of this Convention.

174 Art. 18(5), AU Convention reads: The provisions of this article shall not affect the obligations under any other bilateral or multilateral treaty which governs, in whole or in part, mutual legal assistance in criminal matters.

These provisions therefore provide for States Parties to resort to other treaties when engaging in MLA.

SADC Protocol | Article 23

In the case of SADC Member States, the SADC Protocol under article 23 explicitly provides that the provisions of other treaties on MLA “shall be complementary” to the provisions under the SADC Protocol. Those provisions should be construed and applied in harmony with the provisions of the SADC Protocol. However, article 23 also provides that in cases of inconsistency, the provisions of the SADC Protocol apply. Like that of the AU Convention, the provisions under article 23 promote a harmonious interpretation of the SADC Protocol.

Context specific choice of treaty

Beyond the general considerations and treaty-specific provisions on application and choice of laws, a context specific approach merits consideration, in particular, when States choose which treaty to follow. Adopting a context-specific approach entails two main aspects:

- broader elements of international cooperation specifically pertaining to **membership of multilateral organizations**, and
- the **domestic implications** involved in choice of laws.

Membership under multilateral organizations

All eight States under review are SADC Member States. Although they are also all AU Member States, it is worth noting that at the time of writing (August 2024), only SADC had a treaty exclusively dedicated to MLA. The States under review would therefore, first and foremost be able to resort to the SADC Protocol – since it provides for MLA in (all) criminal matters. Resorting to the SADC Protocol would therefore be most appropriate, in accordance with article 2(6), when requests are made among the respective States under review or to any other SADC Member State. Resort to the SADC Protocol would however not necessarily prejudice reliance on the two other treaties.

Where a request for MLA is directed at another African State not a SADC member, but an AU member, the most appropriate choice of law would be the AU Convention. While a request for assistance under the AU Convention would not prejudice reliance on UNCAC, it would not be possible to resort to the SADC Protocol. Additionally, the scope of the AU Convention would potentially restrict reliance thereon.

In cases where a request for assistance is made to a State outside of Africa (that being a State neither a member of SADC nor the AU), then the most appropriate treaty to resort to would be either the UNCAC or the UNTOC. In all cases contemplated, reliance on the appropriate treaty is of course subject to the accession or ratification of such treaty by both the requesting and requested State.

Domestic implications

The second aspect considered under a context-specific approach concerns the provisions of domestic legislation operationalizing the relevant treaties. As is in most cases, the rights, obligations, and regulations concerning MLA, although contained in three different treaties, are on sometimes (but not always) adopted under a single law at the domestic level. The domestic legislation supporting these treaties, which can result in divergent approaches, must be considered in conjunction with the discussions above.

Treaty relations between SADC Member States and other States

A final point to take into account when dealing with choice of laws is the reliance on bilateral agreements. Despite the observations above pertaining to the application of treaties and the choice of laws, States may, as a matter of course, rely on the provisions of their own bilateral agreements with other States. Two of the three treaties discussed above make explicit provision for reliance on bilateral treaties. UNCAC provides for this under articles 46(6) and (7). The corresponding provision under the AU Convention is found in articles 18(2) and (5). Article 18(2) stipulates that States Parties may regulate their MLA under established agreements or regimes without prejudice to the provisions of the AU Convention. Further, article 18(5), much like article 46(6) of UNCAC, provides for reliance on other bilateral or multilateral agreements (particularly where other agreements are more favourable).

In the case of SADC, article 23 of the Protocol provides for a complementary relationship between other (bilateral) treaties and the SADC Protocol. In cases of inconsistency, the provisions of the SADC Protocol apply. Despite this, the provisions of SADC only apply to those Member States of the bloc. In cases where a State requests MLA from a State not a member of SADC, they may resort to bilateral agreements without prejudice to either the AU Convention or UNCAC. In sum, the States under review would in principle, without prejudice to either of the treaties discussed, be able to rely on bilateral treaties, particularly when engaging with States outside of the SADC membership.

Conclusion

The States under review have a variety of options when engaging in international cooperation as they have ratified a number of international and regional treaties all dealing to some extent with MLA, and also have membership of the AU and SADC. Therefore, they can make use of any international or regional treaty they and other States are party to. Ultimately, the decision on which treaty is applied relies on a number of factors, including whether other States are party to a specific treaty, whether the treaty covers a specific situation within its scope of application, and which treaty provides the widest and most beneficial measure of assistance.

Also, membership of international organizations such as the AU and SADC opens the inter-organizational route which may be a preferred approach. States which are SADC members may find mutual benefit in pursuing SADC treaties when engaging in MLA. At a continental level, their accession to the AU places them in a unique position to rely on AU treaty law when engaging with other AU member states. Finally, at an international level, they may of course rely on the relevant and universal treaties of the United Nations.

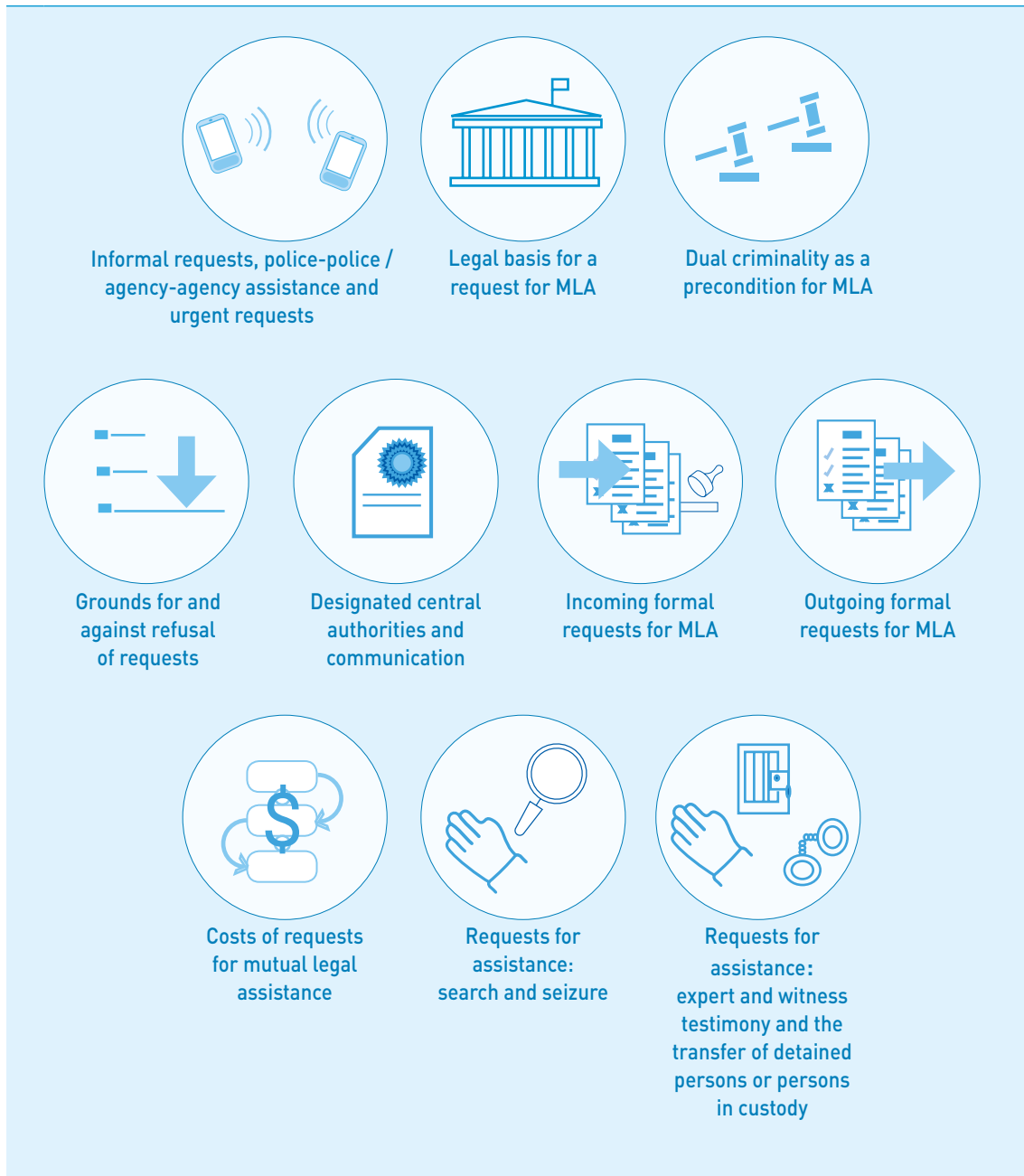
Chapter 3

General implementation principles



This chapter identifies and discusses several general principles that need to be considered in the MLA process. Relevant questions and practical suggestions are offered to optimize the use of these implementation principles. While it may ordinarily be difficult to provide principles that could be applicable to every possible situation owing to different States' processes and legal systems, some general implementation principles remain universal.

Figure: General implementation principles of the MLA process



The principles identified above are elaborated in chapter 4 in outlining how requests should be prepared in practice. The implementation principles identified and discussed here are generally applicable to all three treaties relating to MLA, i.e., UNCAC, the AU Convention and the SADC Protocol.

Implementation principles

Informal requests, police-police / agency-agency assistance and urgent requests

A first consideration before engaging in MLA is to determine whether a formal request is necessary, or whether the issue can be resolved with an informal request.

The following box outlines questions to be considered to help make that decision.

Questions to consider:

- Would a formal request/informal request/ or simply direct communication with a requested State serve the purpose?
- If an urgent case, what procedures should be followed when requesting assistance from a requested State?
- Does the requested State have any additional requirements when providing assistance on an urgent basis?
- What are the procedural and substantive requirements post-urgent assistance being granted (such as that all oral communication be followed up in writing)?
- Would the State from which assistance is sought be able to address requests orally or via electronic means (such as email)?

Informal requests for assistance may be undertaken by communicating directly with the requested State. One example of this is where information from the requested State is required but such information is publicly available. Instead of submitting a formal request to obtain that information, communication with the requested State may point investigators to where that information can be readily obtained. This is particularly relevant for information which may be available online and on databases accessible via the internet. It may simply be a matter of determining where that information is held and how to access it. In such cases, the requested State could give direction on finding the necessary information – and in so doing, avoid the need to submit a formal request. This could by implication save valuable time and resources in urgent matters.

With regard to urgent requests for assistance, different procedures follow. Both treaty law and domestic law provide for avenues under which urgent assistance may be requested. In some cases, urgent requests may be made orally, as opposed to the standard requirement that they be transmitted in writing. The use of instant communication ensures that urgent requests can be conveyed swiftly, to be later followed by a written request from the State. More so, many States have agreed that in urgent cases, requests for assistance may be transmitted through Interpol, and in some cases, direct police to police or agency to agency cooperation is provided for. These options ensure that formal requests can be bypassed in urgent cases, and provide States with an even wider measure of assistance to one another.

The provision of urgent assistance is however conflated by lines of communication. It is therefore advisable that, on a policy considerations basis, communication on urgent cases be meticulously detailed. Guidelines could, for example, stipulate direct lines of communication in such cases, and include also specific means of communication. These may include oral communication, such as by direct telephone conversation, and other electronic means, such as by email. In urgent cases, the underlying focus should be on the ease and manner under which investigating authorities are able to communicate directly between each other.

Legal basis for a request for MLA

At the outset, it is worth noting that before a request for MLA is formulated, a suitable legal basis upon which the request is to be made, should be identified. States usually have the option of relying on multiple legal basis and may wish to explore their options in determining which legal basis is most suitable and provides the most appropriate and effective avenue for seeking assistance. When considering the MLA process, the following questions may arise in determining the appropriate legal basis.

Questions to consider:

- Is a formal legal basis required?
- If not, could the assistance required be provided through informal cooperation and without the need of an MLA request?
- If a formal request for assistance is required, which treaties is the requesting State and requested State party to?
- Has the respective State signed, acceded to, or ratified any these treaties?
- Which of the treaties identified provide the most effective approach or the widest measure of assistance to achieve the objective of the MLA request?
- Has a respective State adapted the relevant provisions of any of the treaties in question into its domestic law?
- What other domestic legislation of the States address support MLA?
- Are there any bilateral agreements concluded between the States on MLA that could be relevant?
- If there are bilateral agreements in place, do they take precedence over any multilateral treaties?
- If there is neither a multilateral treaty nor a bilateral agreement, does the requested State make use of the principle of reciprocity or the principle of international comity?
- What domestic legislation may serve as a legal basis for issuing a request for MLA?

Among the most accessible options to avail MLA is a treaty basis. In such cases, a requesting state may rely on a treaty basis provided it has acceded to or ratified such a treaty, as has the counterpart state. Beyond serving as a legal basis, treaties also create rights and obligations for

States Parties. A treaty basis may therefore be suitable under certain circumstances, particularly where a treaty basis places positive obligations on States to cooperate with each other.

In the current context, States may rely on several international and regional treaties as a suitable basis upon which to make a request for MLA. As discussed above, where a SADC State wishes to make a request to another SADC State, the SADC Protocol may be a suitable legal basis. In cases where a SADC State needs assistance from another African State, the AU Convention is another avenue it could consider. Finally, where a SADC State needs assistance from another State outside of Africa, UNCAC or the UNTOC may be the most appropriate treaty basis. In all three cases, both the requesting and requested State would need to have acceded to or ratified the treaties in question.

Bilateral relations and reciprocity

Another alternative is that a State requesting assistance may consider basing its request on an existing bilateral agreement. Numerous bilateral agreements are currently in force between these eight States. In some cases, and where a bilateral agreement is more extensive or provides a greater measure of assistance than a treaty basis, a State may want to consider relying on it rather than on a treaty.

In contrast to multilateral treaties which sometimes apply a blanket coverage to topical issues, bilateral agreements are often more tailored to accommodate the States in question. They, for example, may take into account the different legal traditions of the States in question, and make provision for cooperation in light of these differences.

While it is not feasible for each State to conclude bilateral agreements with every other State, those States intending to conclude bilateral agreements in relation to MLA may also consider the provisions of the UNODC Model Treaty on Mutual Legal Assistance in Criminal Matters.¹⁷⁵ It is also worth noting that the accession of a State to a multilateral treaty (such as UNCAC) does not affect its existing arrangements under bilateral agreements. States may therefore continue to rely on bilateral agreements even after having acceded to or ratified other multilateral treaties.

A final consideration which arises in cases of bilateral relations concerns the principle of reciprocity. Most States, to some extent, provide for MLA in their domestic legislation based on reciprocity. It is therefore reasonably foreseeable that a State may engage in MLA based solely on that principle. In addition, the principle of reciprocity would, in cases where no treaty basis exists, serve as a possible legal basis for MLA. However, it is more common that reciprocity is included as an element of a State's engagement in MLA and therefore supplements other requirements.

¹⁷⁵ United Nations, United Nations Office on Drugs and Crime, 'Model Treaty on Mutual Assistance in Criminal Matters' (Adopted by the General Assembly in Resolution 45/117, amended by Resolution 53/112) available online at: https://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf.

Domestic legal basis

When considering a legal basis upon which to base a request for MLA, one final consideration to take into account is the relevant domestic laws of both the requesting and requested States. A requesting State may, while relying on a treaty basis, be obliged to consider certain domestic legislation when it receives or transmits a request.

For dualist States which incorporate international treaty law by means of domestication (through legislation), a domestic legal basis may serve to underpin a treaty basis. Even if a State is to request MLA under a treaty (such as article 46 of UNCAC), it may nonetheless need to rely on a domestic legal provision which operationalizes that treaty. In such cases, the domestic provision is the mechanism whereby a request may be initiated under domestic law, and the treaty basis is whereby it is directed and delivered to a requesting State under international law.

In all cases, and as is addressed below, the legal basis should always be clearly articulated within a request for MLA.

It should also be considered that domestic law can specify additional requirements or procedures when dealing with MLA, which are over and above the contents required in a request outlined by a treaty. In other cases, the domestic law of a State may specify certain procedures to be followed when requests are executed. Ultimately, when a State executes a request for MLA, it does so on the basis of its own legal system.

Beyond the domestic law regulating MLA, it may be necessary to consider additional domestic legislation (such as criminal law or law of evidence), particularly where different legal traditions arise. One example concerns the procedure by which a request for assistance is executed – procedure which ensures that any information or evidence received from a request is ultimately admissible in judicial proceedings. For this reason, a range of domestic laws of both the requesting and requested State must be taken into consideration.

Example: MLA request for information

South Africa wishes to make a request for MLA to Botswana for information and needs to consider the most appropriate legal basis. In such a case, South Africa would have multiple legal bases to rely on.

It may rely on UNCAC (for corruption-related assistance) to make the request, because both South Africa and Botswana have ratified the treaty. Additionally, South Africa could rely on the AU Convention and the SADC Protocol since both States have also ratified these treaties.

Reliance on these treaties would of course be subject to whether the offence for which the request is made, is within the scope of the application of the treaties.

In choosing a legal basis, South Africa would have to consider which treaty gives it the widest and most effective MLA measures. It would also have to consider what the Botswana domestic law stipulates in terms of the manner in which requests are to be dealt with – which it may find principally in the Mutual Assistance in Criminal Matters Act, 1990.

Example: MLA request for evidence

Mozambique wants to transmit a request for MLA to Malawi for evidence and needs a sufficient legal basis.

Mozambique may rely on UNCAC or the AU Convention as a legal basis – since both countries have signed and ratified these treaties. Although Mozambique ratified the SADC Protocol on 19 May 2011, it may be unable to rely on that treaty since Malawi, has yet to ratify that treaty (it signed the SADC Protocol on 3 October 2002).

In choosing a legal basis, Mozambique would also have to consider whether UNCAC or the AU Convention would provide for the widest and most effective measures of MLA. In addition, it would also have to consider what Malawi domestic law stipulates regarding requests MLA, which is principally dealt with in Mutual Legal Assistance in Criminal Matters Act 24 of 1991.

Dual criminality as a precondition for MLA

Dual criminality: criminal offences and the underlying conduct of an offence

In order to effect cooperation with other States, domestic legislation often includes the requirement of dual criminality (particularly in extradition proceedings but also with requests for MLA). In principle, dual criminality requires that conduct which is an offence under one State is also considered an offence in another State. The domestic laws of States usually define offences. Owing to different legal systems and their development, offences are on occasion referenced differently – particularly between common law and civil law traditions. However, for purposes of MLA, an offence or criminal conduct need not be defined or categorized identically between States – and dual criminality is usually considered fulfilled where the underlying conduct of an offence is the same. Therefore, in cases where dual criminality is a requirement for requesting MLA – consideration should be given to the actual conduct underlying the offence, rather than the domestic definition of such an offence.¹⁷⁶

Questions to consider:

- Do any of the multilateral treaties or bilateral agreements require dual criminality as a pre-condition to MLA?
- Is dual criminality excluded for specific elements of MLA?
- Does the scope of the relevant treaty or agreement indeed cover the crime in connection with which a request for MLA is made?
- Does the action contemplated in the request amount to non-coercive measures (for which the dual criminality requirement may not be required)?

¹⁷⁶ Chrysikos, 'Commentary on the United Nations Convention Against Corruption' (Oxford University Press). p. 461.

Article 43(2) of UNCAC sets out that in matters of international cooperation, whenever dual criminality is required, it shall be deemed fulfilled when the conduct underlying the offence is a criminal offence under both a requesting and requested State. It states: *“In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.”*

Dual criminality and non-coercive measures

In some instances, the dual criminality requirement is relaxed under certain circumstances. One such case is article 46(9)(c) of UNCAC. While this article provides that States may decline to render assistance in the absence of dual criminality, it indicates that in cases involving non-coercive measures, assistance must be rendered, provided it is consistent with the basic concepts of its legal system.

Dimosthenis Chrysikos, in the Oxford University Press *Commentary on the United Nations Convention Against Corruption*¹⁷⁷ outlines some examples of non-coercive measures under this provision, which, in principle, may be undertaken in the absence of dual criminality. They include:

- Transmission of judicial documents;
- Taking of voluntary witness statements;
- Sharing of intelligence;
- Conducting crime scene analysis;
- Obtaining criminal records or other information publicly available; and,
- Exchange of information regarding the offence of bribery of foreign officials or officials of international organizations.

Example: Refusing request

A situation where dual criminality could prove to be an obstacle in the MLA process is where it serves as a ground for refusing a request. One example includes article 5(2)(b) of Botswana’s Mutual Assistance in Criminal Matters Act, 1990, which states that: “...A request by a foreign country for assistance under this Act may be refused if, in the opinion of the Attorney-General – the request relates to the prosecution or punishment of a person in respect of an act or omission that occurred, or is alleged to have occurred, outside the foreign country and a similar act or omission occurring outside Botswana in similar circumstances would not have constituted an offence against the laws of Botswana;”

¹⁷⁷ Chrysikos, ‘Commentary on the United Nations Convention Against Corruption’ (Oxford University Press), pp. 461–462.

Example: Where requirement is fulfilled

One example where dual criminality is deemed fulfilled in domestic legislation in that assistance sought is based on the underlying conduct of an offence rather than its definition or class, is section 3(4) of Zimbabwe's Criminal Matters (Mutual Assistance) Act of 1991, which states that: *"The requirement of dual criminality upon which the principle of mutual assistance in criminal matters is based shall be deemed to be fulfilled in respect of any offence for which assistance is sought if the conduct underlying the offence is a criminal offence under the laws of Zimbabwe and the foreign country concerned, irrespective of whether the laws of the requesting foreign country place the offence within the same class of offences as Zimbabwe or denominate the offence by the same terminology as in Zimbabwe."*

Grounds for and against refusal of requests

In certain circumstances, or under certain situations, States may have a right to refuse a request for MLA. Grounds for refusal are usually contained in States' domestic legislation but are also listed in several international and regional treaties. In addition, these treaties also stipulate grounds under which assistance may not be refused.¹⁷⁸

Both treaty law and domestic legislation provide for circumstances under which requests should be postponed, rather than refused. One example of such an occurrence is where a request for MLA relates to an ongoing investigation, prosecution or proceeding.

Questions to consider:

- Are there any grounds under which the request for assistance may be refused?
- Are there any exceptions which provide for postponement rather than refusal?
- Are these grounds found in a treaty basis or the domestic legislation of the State concerned?
- If the requested State has refused a request, did the request relate to bank secrecy or fiscal matters which it would ordinarily not be allowed to refuse assistance?

Treaty basis grounds for refusal

When considering a request for MLA, States should note the possible grounds for which assistance may be refused, several of which are listed in treaties. They include that:

¹⁷⁸ See also Recommendation 37(c) which, much like the provisions of UNCAC, stipulates that States should not refuse requests for mutual legal assistance on the sole ground that the offence in question is considered to involve fiscal matters. See Financial Action Task Force (FATF), 'International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation' (October 2020) available online at: <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>

- A request may be refused in the absence of dual criminality.
- A request may be refused if the request does not adhere to the requirements stipulated in a treaty. In other words, a request pursuant to a treaty must, under the terms of that treaty, be made in conformity with its provisions. In such cases, a request may be refused if it does not, for example, contain all the necessary information that it should, or if it is not directed at the appropriate designated central authority.¹⁷⁹
- A request may be refused if its execution may prejudice the sovereignty, security, *ordre public*, or other essential interests of the requested State.
- A request may be refused if the authorities of a requested State would be prohibited by domestic law from taking actions requested in a request. This ground for refusal also stems from the fact that the execution of requests is ultimately conducted in conformity with the domestic law of the requested State.
- A request for assistance may also be refused if it is contrary to the domestic law of a requested State. Again, this ground for refusal stems from the fact that the execution of requests is conducted in conformity with the domestic laws of the requested State.

Domestic grounds for refusal

Beyond the general grounds listed in treaties under which a request for assistance may be refused, domestic legislation often includes more specific grounds. These include, but are not limited to:

- The fact that the offence in question is considered a political offence or of a political nature.
- The fact that the offence in question is considered a military offence.
- If the request(s) are considered “minor offences” – and, some States define what is considered as such.
- If the requesting State’s national security or sovereignty may be prejudiced should it agree to the request.
- If the person with which the request relates is to be prosecuted for an offence they have already been acquitted or pardoned of, or where they have already served their sentence.
- If they entail criminal proceedings against a person who would not ordinarily be subject to criminal liability because of their age in the requested State.
- If, in connection with the preservation of data, the requesting State cannot furnish the necessary guarantees that personal data will be protected.
- If the requested State believes that the request was made with the objective of prosecuting or punishing a person based on discriminatory grounds.

What may be deduced from the above is that grounds for refusal of requests may vary greatly depending on domestic legislation of States. It is therefore crucial to consider the relevant domestic legislation of States prior to submitting a request for MLA.

¹⁷⁹ Chrysikos, ‘Commentary on the United Nations Convention Against Corruption’ (Oxford University Press) p.462.

Prohibited grounds for refusal

Both treaty provisions and domestic law usually provide for certain circumstances under which a request for assistance may not be refused. Where a State has domesticated the provisions of international and regional treaties, those prohibited grounds of refusal are accordingly included in its domestic legislation. Nonetheless, States may on occasion include additional grounds under their domestic law.

The most common grounds under which requests may not be refused include that of bank secrecy and the fact that offences are solely of fiscal matters. The prohibition on refusal based on bank secrecy is widely referred to in separate provisions of treaties, as well as domestic legislation. The prohibition on fiscal matters as a ground for refusal usually includes matters relating to, among others, taxes, customs and excise duties.¹⁸⁰

Course of action when a request is refused

Given that provision is made both within treaty law and domestic law for the refusal of requests, it comes as no surprise that such an outcome is of course possible. In cases where a request for assistance is refused, the requesting State should at the least be provided with reasons for the refusal and a treaty or domestic law basis for that refusal. If reasons or the basis for the refusal are not provided by the requested State, the requesting State is within its rights to request such information. The requesting State may, if reasons or the basis for the refusal do not find grounding within the relevant treaty law, query the refusal. In such cases, the requesting State may want to point out the deviation in the reasons or basis. The requested State is in any case obliged to fulfil its obligations under the relevant treaty law it has ratified or acceded to.

Article 11(1)(c) of Zambia's Mutual Legal Assistance in Criminal Matters Act 19 of 1993 lists one ground for refusal of a request, if: *“there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, sex, religion, nationality or political opinions”*

The above ground for refusal is found in several other States' domestic legislation and is a strong example of why the domestic laws of the requested State should be consulted prior to making a request for assistance.

¹⁸⁰ Chrysikos, 'Commentary on the United Nations Convention Against Corruption' (Oxford University Press) p. 463.

Designated central authorities and communication

The cornerstone of any facet of international cooperation concerns communication. It is imperative to ensure that direct lines of communication are established, that communication is transmitted effectively, timeously, and to the appropriate authorities using the appropriate channels. To this end, the effective engagement of MLA requires what has come to be known as designated central authorities.

Questions to consider:

- What is the designated central authority of a specific State from which assistance is required?
- Is there a direct line of communication currently in place with the respective State's designated central authority?
- Does the State in question also accept requests for assistance through diplomatic channels?
- Can the designated central authority be contacted directly on an informal basis to receive information on what requirements (content and format) a request for assistance should include?
- When a request is transmitted to the respective States' designated central authority, should copies of the request be sent to any other authority in that State?
- Is the request and all accompanying documentation sent to the designated central authority in a language acceptable to it?

Designated central authorities

Designated central authorities, sometimes referred to as national authorities, are those government entities responsible for receiving and transmitting requests for MLA. UNCAC, for example, stipulates the following requirement: *“Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution.”*

It goes on to say that: *“Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority.”*

As a pivotal element in international cooperation, and specifically where MLA is concerned, it is necessary to determine what the designated central authority is of the requested State, so that requests for assistance under the relevant treaty provisions can be directed to it.

There are several ways in which the designated central authority can be determined. For example, under the provisions of UNCAC, States Parties should notify the United Nations Secretary-General of their designated central authorities. One way in locating these notifications is by accessing the United Nations Treaty Series Online – in which all depository notifications can be viewed – including those notifications concerning the designated central authorities of States. It may also be possible to contact the depositing secretariat of a specific organisation in relation to other regional or sub-regional treaties. In the case of the AU Convention, the Chairperson of the Commission of the African Union receives communication of the respective States designated national (central) authorities under article 20(1). In the case of the SADC Protocol, the SADC Secretariat is notified of the central authorities.

Another method is directly requesting such information from another State, which may also yield additional information relevant to making MLA requests.

Communication to and from designated central authorities

Ordinarily and in line with most treaty provisions, requests for MLA are directed between States' respective designated central authority. In turn, it is the designated central authority that receives requests for mutual legal assistance. All communication, including the request and all accompanying documentation, is directed at such authority.

In practice however, States resort to several lines of communication. One such line of communication includes transmission of requests by diplomatic channels. In these cases, the request for assistance is then passed on to the central authority once received by diplomatic or consular services.

Communicating MLA requests (Botswana)

While the domestic legislation of Botswana does not explicitly provide for communication of requests through diplomatic channels, Botswana regularly makes use of this method of communication. In the *Country Review Report of the Republic of Botswana*, the following is noted under the summary of information relevant to the implementation of article 46(1) of UNCAC: “633. Regarding the process for MLA in Botswana, officials in the ODPP explained that xxx requests are received through diplomatic channels by the Ministry of Foreign Affairs and transmitted to the ODPP, which assesses compliance of a request with the Act.

Once the requested information is obtained and has been authenticated, it is sent back through diplomatic channels, although transmission by email may be possible in some cases.

The review also notes that: “685. Regarding the transmission of requests, officials explained that the proper transmission is via diplomatic channels...” “685. Regarding the transmission of requests, officials explained that the proper transmission is via diplomatic channels...”

Additionally, it is worth noting that in some States, while the designated central authority receives and makes requests, other entities, such as an Attorney-General or a Minister of Cabinet, must first approve requests before they are issued by the central authority. In all cases, it is the designated central authority which will ultimately be responsible for receiving and transmitting a request. That central authority may also execute the request or direct it to the appropriate authorities for execution.

More so, communication between designated central authorities should – as an effective means of cooperation – not cease once a request is received or transmitted. The following additional examples of communication may ensure an effective process of engagement in MLA:

- Communication or acknowledgement that a request has been received by the requested State.
- Communication that a request has been accepted, postponed, or rejected by the requested State.
- In cases where a request must be postponed, communication between the central authorities on negotiation terms of the postponement.
- In cases where a request is to be rejected and prior to its rejection, communication and consultation on the possibility of negotiating terms so as to avoid rejection.
- In cases of a request being rejected by the requested State, communication on reasons for the rejection.

Additionally, the following kinds of communication are beneficial (and on occasion, mandated by treaty law):

- On whether the requirements of confidentiality in a request are to be accepted by the requested State;
- On whether requirements of confidentiality in a request cannot be accepted by the requested State and why; and prior notification to the requesting State that the confidentiality requirements may be breached.
- On updates during the execution of the request.
- When the execution of the request has been completed.

In principle, a direct line of communication may prove essential in ensuring prompt transmission of requests. Direct communication may also ensure that requests for assistance are attended to timeously, that resources are effectively used during execution of requests, and that updates are provided throughout the process between both States.

Language and translation of documents

Requests for MLA must, in accordance with certain treaty provisions, be made in languages acceptable to a requested State. Acceptable languages are, in line with article 46(14) of UNCAC, communicated to the Secretary-General of the United Nations.

The languages acceptable by States for communication can be accessed through the United Nations Treaty Series Online, under the depository notifications, or directly querying the State

in question. Finally, some States require that all accompanying documentation be translated into that language. Therefore, it is worth noting that both requests and accompanying documentation must be submitted in the acceptable language to avoid delays.

Incoming formal requests for MLA

This section examines the process of when a State receives a request for MLA, and outlines how a request for assistance is to be carried out once received.

Questions to consider:

- What is the nature of the incoming request? What is required of the requested State in providing the assistance sought?
- Are there any grounds under which the request may or must be refused?
- Does the domestic law of the requested State allow for the execution of the request?
- Should the request for assistance be postponed rather than refused?
- Are there any confidentiality requirements imposed on a request for assistance?
- In cases where a confidentiality requirement cannot be maintained, has notification been given to the requesting State?
- In cases where a confidentiality requirement cannot be maintained and notification has been given to the requesting State, should the execution of the request proceed nonetheless? Does the requesting State request for its procession in any case?
- Is there any additional information which is required in order to execute the request?
- Is there any specific procedure required by the requesting State when executing the request?
- Is compliance possible with the specific procedure?
- If compliance with a specific procedure is not possible, has the requesting State been notified?

Assessing, processing, and directing incoming requests

Given the wide range of purposes provided for under treaty law, the nature of a MLA request may vary broadly, ranging from serving of judicial documents, search and seizure, or the transfer of persons for purposes of hearings. Thus, the first step in responding to a request for assistance is to determine what the nature of the request is, and how the requested State may be able to assist. Most likely, the designated central authority would assess the request and determine whether and how the requested State would be able to assist. The decision to grant the request may however be left with another authority (such as a Minister of cabinet).

In essence therefore, even before executing the request, it must be processed and directed. The requested State may have to first ensure that the assistance to be provided is compatible

with its own domestic law and that its domestic authorities would legally be allowed to execute the request. The execution of all requests is, in any case, undertaken in accordance with the domestic law of the requested State. Additionally, an incoming request for assistance may need to be directed to the appropriate domestic authorities which would be legally and practically charged with its execution. This may include forwarding the request for assistance to local or regional authorities in their areas of competence and jurisdiction.

Decisions on granting, postponing, or rejecting assistance

Part of the assessment and processing of an incoming request for assistance also includes the decision on whether to grant assistance for the request which has been sought. The designated central authority of the requested State may be charged with this duty – although it is worth noting that under several States’ domestic laws – other entities such as a Minister of cabinet may legally be designated to have a final say in whether a request for assistance is accepted.

The requested State often has three avenues to follow:

- *Granting assistance:* the requested State may agree to grant assistance in its entirety. Alternatively, it may grant assistance subject to certain conditions – for example, that any information it does provide in line with the request is limited in use or is confidential.
- *Rejecting assistance:* the requested State may decline a request for assistance. Both treaty law and domestic legislation outlines grounds under which requests may be refused. Should such grounds arise, the requested State may legally refuse to provide assistance. One example here is where the request for assistance jeopardises the requested State’s sovereignty or national security. Under the relevant treaty law, States are obliged to at the least consult one another prior to rejecting a request for assistance. The purpose of these consultations is to contemplate the possibility of negotiating terms under which assistance may be provided, rather than being rejected outright.
- *Postponing assistance:* In some cases, a requested State may, rather than rejecting assistance, postpone it. This usually happens when a request for assistance relates to an ongoing investigation, prosecution or proceeding. The relevant treaty law stipulates that States must consider postponing assistance until such a time where they would be in a position to provide it. When doing so, it is useful to consider whether any specific time periods for the postponement may be provided – rather than an indefinite postponement. If applicable, it should also be indicated if the postponement is conditional on the conclusion of a certain procedure. That is to say that rather than indicating a request for assistance is postponed for a specified period of time, it is instead postponed until the conclusion of a domestic prosecution or investigation.

In addition to the above, when considering whether a request for assistance is to be granted, the requested State should take into account:

- Whether there are any grounds under which the assistance may be refused;

- Whether there are any grounds that compel refusal (such as prejudice towards a State's national security, sovereignty, etc);
- Whether there are any obligations under treaty law or its domestic law not to refuse the assistance (such as the explicit exclusion of bank secrecy as a ground for refusal);
- Whether the execution of the request is lawfully allowed under its domestic law.

Adhering to requests for confidentiality

As part of incoming requests for assistance, a request for confidentiality may also be required of the requested State. In other words, the requested State may be required to keep confidential the entirety of the request for assistance or certain aspects of the request for assistance. The requested State should in principle acknowledge the confidentiality requirement even in cases where it presents no problems in execution. This serves to notify the requesting State that the requested State is aware of the confidentiality requirements and, where detailed, acknowledges to abide by such requirements, and notify promptly if unable to do so.

All attempts at giving prior notification to the requesting State should be made. If a confidentiality requirement is breached, notification should also be promptly given to the requesting State.

It is also possible that there is a change in circumstances in the course of a MLA request being executed. The requested State may be unable to maintain its confidentiality commitment or vice versa. Whatever the change in circumstance, the requested State should seek consultation with the requesting State as a matter of priority – and to the extent possible – prior to continued execution of a request.

Providing updates on the execution of requests

During the execution of a request, a requesting State may request updates on the execution. In such cases, timely and full details of the process of execution should be given.

Requesting additional information pursuant to a request

The requested State may, upon receiving a request for assistance, request additional information in order to effectively carry out the task. Requests for additional information should be directed to the authority of the requesting State which transmitted the initial request for assistance.

Adhering to requests to follow specific procedures for purposes of admissibility

Owing to differences in legal traditions across States, requests for assistance may include that a requested State follow a specific procedure when executing a request for assistance. A crucial element of this provision is that once information or evidence is collected and transmitted to

the requesting State under a request for assistance, it is ultimately admissible in a court of law in the requesting State. There may be little value in cases where a request for assistance is sought and once executed, any assistance subsequently provided was unable to be used in judicial proceedings in the requesting State.

Therefore, it is imperative that when a specific procedure is required in the execution of a request, the requested State adheres to it fully. It may also wish to acknowledge the procedure required and indicate its adherence thereto. In cases where a required procedure in the execution of a request is contradictory to the law of the requested State, or in cases where the procedure cannot be followed, prompt notification should be given to the requesting State.

Additionally, in cases where the required procedure cannot be followed, it may be advisable to consult and wait on the requesting State before proceeding with the execution of the request.

Outgoing formal requests for MLA

A second result of the initiation of MLA is the transmission of an outgoing request for assistance to another State. This section outlines key consideration on how a formal outgoing request for assistance should be carried out, including directing requests, procedural and substantive requirements of requests, confidentiality requirements and the provision of specific procedures for purposes of admissibility.

Questions to consider:

- To what authority must the request for assistance be directed? Is it sufficient to direct the request to the designated central authority of the requested State? Or does the requested State accept requests through diplomatic channels?
- Is there an agreement whereby the requested State accepts requests through Interpol, particularly under urgent circumstances?
- Does the request include all the necessary information, including information required under both treaty law and the domestic legislation of the requested State?
- Is the request and supporting documentation in a language that is accepted by the requested State?
- Are there any reasons that a confidentiality requirement should be included in the request?
- Is there any specific procedure the requested State should follow when it cannot adhere to the confidentiality requirement?
- Is there any specific procedure the requested State should follow in the execution of the request and for purposes of admissibility?
- Are there any deadlines or time frames which should be specified in the request and that the requested State should be aware of?

Directing requests

It is important that requests for assistance are channelled appropriately to the correct counterparts. Generally, requests for assistance are directed to the designated central authority of a requested State by the designated central authority of the requesting State. Direct communication between the designated central authorities also ensures swift communication and effective use of resources.

Another option available to States is transmitting requests through diplomatic channels. This manner of communication is often used in practice and both treaty law and domestic legislation make provision for it. Requests directed through diplomatic channels are in most cases transmitted to the designated central authorities thereafter, which, in turn, direct these requests to the appropriate domestic authorities.

A further option when making requests for assistance and particularly under urgent circumstances is to direct requests through Interpol. In most cases, domestic legislation supports treaty provisions which provide for this manner of assistance. It is advisable to consider, prior to directing the request, that the requested State accepts requests transmitted through Interpol.

Format and content of formal requests

A request for assistance to another State must, to be effective and well-functioning, meet several substantive requirements. These requirements are detailed both in treaty law and the domestic legislation of a State concerned. It is prudent to begin with the requirements under treaty law as they are generally more encompassing. Thereafter, consulting the requirements of a specific State in questions is pivotal in ensuring the request is not rejected on grounds of formality.

Treaty law stipulates the inclusion of several pieces of information in a request. They include:

- The identity of the authority making the request;
- The subject matter and nature of the investigation, prosecution, or judicial proceeding to which the request relates;
- The name and function of the authority conducting the investigation, prosecution, or judicial proceeding;
- A summary or description of relevant facts of the investigation, prosecution, or judicial proceeding;
- A description of the assistance being requested;
- Details of any specific procedure which should be followed in the execution of the request; Where possible and where a person is the subject of the request, their identity, location, and nationality;
- The statement on the purpose for which the evidence or information requested is sought.

In principle, the request should be comprehensive and anticipate ahead when it is drafted, to include at a minimum all the necessary and relevant information which a requested State may need to know when it receives and executes the request. The information should be descriptive

and to the point, communicating the request's purpose and objective, yet not overburdened with irrelevant details and superfluous information. A The domestic law of the requested State should also be considered in ascertaining whether additional requirements in terms of content or format are stipulated.

Requests for confidentiality

A clear instruction for confidentiality (partial or full) should be indicated where required, in a request for assistance.. It may also be practically useful to indicate in the request what the requesting State may do, and how to do it, in cases where the confidentiality requirement cannot be upheld. This may save time when circumstances arise in which the confidentiality requirement cannot be met, but the requested State may nonetheless be able to proceed with execution. It would also serve to avoid back and forward communication in time-sensitive matters. In all cases however, it must be emphasised that acknowledgment and communication between the States is a cornerstone in approaching MLA.

Requests to follow specific procedure for purposes of admissibility

When necessary, a request for assistance should include a clear statement on any specific procedure the requesting State wishes the requested State to follow. A crucial element in specifying this procedure is that once information or evidence is collected and transmitted to the requesting State under a request for assistance, that it is ultimately admissible in a court of law in the requesting State.

The request may, for practical purposes, indicate a different procedure to be followed if the requested State is unable to follow the initial procedure set out. It may also wish to indicate an expedited means of communication in cases where the requested State is unable to comply with specific procedures – in order to ensure consultation on the most suitable way forward in executing a request.

Deadlines and time frames

Finally, it is advisable that a request for assistance include clearly any deadlines or timeframes relevant to the execution of the request. This would not only inform the requested State of the relevant time sensitivity or urgent nature of requests but could also provide it with an opportunity to inform the requesting State on the feasibility of executing the request under the specified deadlines or time frames.

Costs of requests for MLA

One final consideration relevant to the successful engagement in MLA concerns the costs of execution. Two principal costs, discussed below, may arise: ordinary and extraordinary costs.

Questions to consider:

- What are the ordinary costs for which the requested State would bear?
- Are there any purposes of the request for assistance which costs may need to be consulted on?
- Are there any extraordinary costs foreseeable or reasonably foreseeable that may arise from the execution of the request?

Ordinary costs and the requested State

In principle, ordinary costs of execution of a request are borne by the requested State. The requirement that the requested State bear ordinary costs is found in treaty law and is also often included in the provisions of domestic legislation of States. It is however worth noting that States reserve the right to negotiate the terms of costs and are free to arrange such terms as they see fit.

Under some treaty law, notably the SADC Protocol, costs of expert witnesses and document translations are treated separately from ordinary costs. Consideration must therefore also be given to costs arising from the different purposes for which MLA is conducted.

Costs which may need to be differentiated and negotiated include those relating to: the transfer of detained persons, costs relating to travel and allowances of witnesses and experts, and the translation, transcription and interpretation of documents.

Extraordinary costs and consultation

Where extraordinary expenses are required to fulfil a request, the requested State and requesting State are required to engage in consultation. As a matter of principle, it would be advisable that should such costs be foreseen, or are reasonably foreseeable, consultation occurs prior to the execution of a request for assistance.

Understanding extraordinary costs

It may sometimes be difficult to ascertain what extraordinary costs of a request are. What may seem ordinary to one State may in fact be considered extraordinary to another State. Consultation and mutual agreement between a requesting and requested State is therefore crucial.

The *Travaux Préparatoires* of UNCAC gives some indication of what extraordinary costs are. Its interpretive note on article 46(18) states that: "Many of the costs arising in connection with compliance with requests made pursuant to article 46, paragraphs 10, 11 and 18, would generally be considered extraordinary in nature. Further, developing countries might encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of this article."

Article 46(10), (11) and (18), of which costs may be considered extraordinary in nature, include assistance for purposes of:

- Transferring of detained persons, persons in custody, or persons serving a sentence, for purposes of providing assistance to the requesting State
- Giving testimony by means of video conference, if in persons appearance is not possible or desirable

See 'Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention Against Corruption' (2010) Part One. Interpretive notes at page 409.

Costs of execution (Mozambique)

Costs of execution may sometimes prove detrimental to the successful engagement in mutual legal assistance. One example of this is section 10 of *Mozambique's Principles and Procedures for International Legal and Judicial Cooperation in Criminal Matters* (Law 21/2019). Article 10(3), under optional refusal of requests, states that: "*Cooperation may be refused, if it could hinder the investigation or efforts in the Republic of Mozambique, compromise the safety of any person or impose high costs on the Mozambican State.*"

A similar provision is found under *Zimbabwe's Criminal Matters (Mutual Assistance) Act* which provides for refusal of requests under certain grounds. Section 6(2)(f) states that: "*(2) A request by a foreign country for assistance under this Act may be refused if in the opinion of the Prosecutor-General — (f) the provision of the assistance would impose an excessive burden on the resources of Zimbabwe.*"

In addition to those principles of implementation addressed above, two other matters relating to requests for assistance can arise. The first of these concerns requests for assistance that involve search and seizure, while the second pertains to expert and witness testimony and the transfer of detained persons or persons in custody. These are discussed in the following text.

Requests for assistance: search and seizure

Search and seizure are explicitly listed as one form of assistance under both UNCAC and the SADC Protocol. While UNCAC does not provide for substantive conditions of this assistance, the SADC Protocol details its circumstances and execution. Article 17 of the SADC Protocol includes in search and seizure the responsibility of the requested State to produce and deliver property, objects or items to a requesting State if the request includes information justifying such action under the laws of the requested State.

Questions to consider:

- Are there any treaty basis requirements for search and seizure requests?
- What are the domestic law requirements of search and seizure requests for a requested State?
- Are there any additional requirements that need to be included in a request for assistance concerning search and seizure (such as details of location to be searched, reason for search, etc)?
- What considerations need to be taken into account in relation to the chain of custody over items, objects or property seized?
- Are there any third parties with interests in items, objects or property seized?
- What are the obligations on protecting and returning items, objects or property seized to the requested State?

It is also worth noting that the process of search and seizure is regulated by domestic law. As such, any request for assistance which involves search and seizure will naturally be subject to the laws of a requested State.

Chain of custody

An important element in the process of search and seizure is the chain of custody over evidence acquired by this means. Article 17(2) of the SADC Protocol specifically stipulates that, upon request, every official who has had custody of a seized item must certify the continuity of custody, identity of the item and the integrity of its condition. The chain of custody becomes particularly important when items or property seized must be admitted in a court of law as part of evidence in an investigation, proceeding or prosecution. For purposes of admissibility, the chain of custody should be clearly set out from the time an item or property is seized until its presentation in a court.

Requests for search and seizure

Owing to its nature, a request for search and seizure may require additional details when this process is requested. Requests for search and seizure should therefore include:

- A detailed description of the location to be searched;
- A detailed description of any items, objects or property that is sought;
- In cases of documentation and records, including bank documents, the relevant time periods of documents and records;
- Grounds for which an item, object or property is believed to be present at a specific location;
- Grounds for which the item, object or property is believed to be relevant and sufficiently connected to the offence for which it is being seized and for which a search warrant is being executed;
- Any specific process or procedure that should be followed in executing a search and seizure, for purposes of admissibility in particular; and,
- In cases where a third party has interests in the item, object or property being searched or seized, the details of the third party including the details of any such interests .

Return of seized items, objects or property

In some cases, treaty law and domestic law provide that any items seized in the execution of a request for assistance must be returned after their purpose has been served in the requesting State. One example of such an obligation on the requesting State to return seized items, objects or property is found in article 18 of the SADC Protocol. Article 18 accords the requested State the right to require the requesting State returns any items, objects or property furnished to it in the execution of a request.

Requests for assistance: expert and witness testimony and the transfer of detained persons or persons in custody

The second matter relating to a specific request for assistance concerns the testimony of experts and witnesses, and the transfer of detained persons, or the transfer of persons already in custody. As with requests for search and seizure, requests involving these matters often entails additional requirements and procedures under both treaty and domestic law.

Questions to consider:

- What conditions must be met for the transfer of a person in custody in a requested State?
- Has the person to be transferred agreed to that transfer by way of giving their voluntary and informed consent?
- Have the requesting and requested State's agreed to conditions of the transfer?
- Have the requesting and requested State made arrangement on costs arising from obtaining expert or witness testimony, or costs arising from the transfer of detained persons?

The transfer process and conditions of transfer

Treaty law stipulates several conditions under which a detained person who may assist a requesting State in an investigation, prosecution or proceeding, may be transferred to that State. First and foremost, detained persons are those persons who are either detained, in custody, or are serving a sentence in the territory of the requested State.¹⁸¹ Under UNCAC, transfer is subject to the freely given informed consent of the person in custody, and the competent authorities of both States agree on the transfer subject to conditions they deem appropriate.

Safe custody and return of a transferred person

As with the initial transfer of a detained person, treaty law also regulates their return to the requested State. The requesting State is usually under an obligation to return the person to the requested State as soon as they have assisted it accordingly. The requesting State is also barred from requiring extradition proceedings to return the person and is obliged to provide additional guarantees. These include that the time spent in the requesting State is credited to the person's sentence and that the person should be afforded safe custody such that they are not prosecuted, detained, or punished during the period of their transfer in the requesting State.

Transit of persons from a third state

In some cases, the need to transfer a detained person from a third State through the requested State may become a reality. In such cases, the requested State may authorize the transfer. Should it agree to do so, the requested State may need to adhere to certain requirements. Primarily, the requested State will have to ensure the safe and unimpeded transfer of that person through its territory to the requesting State. Additionally, the requested State would also need to ensure that the transferred person remains in custody during the duration of their transfer.

Testimony from experts or witnesses

A request for assistance may also include the need to obtain testimony from experts or witnesses in an investigation, prosecution or proceeding. For these purposes, a person may be transferred to the requesting State, or they may give testimony or evidence in the requested State which will then be transmitted to the requesting State.

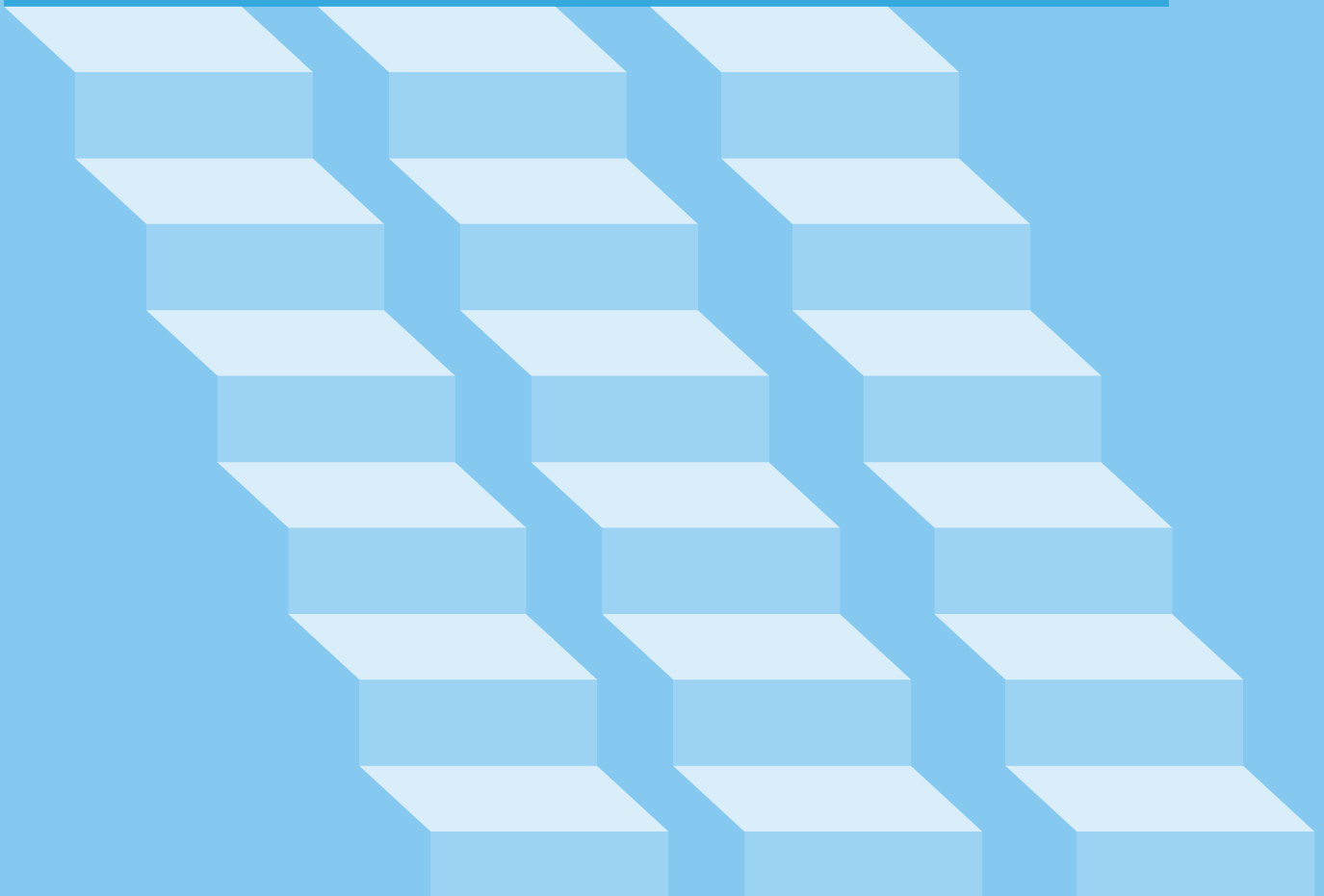
It is worth noting that expenses related to the travel of an expert or witness, allowances and fees, are generally not considered "ordinary costs".¹⁸²

181 On this, see further Chrysikos, 'Commentary on the United Nations Convention Against Corruption' (Oxford University Press) p. 469.

182 See for example art. 10(1), SADC Protocol which states: The Requested State shall pay all costs relating to the execution of the request, except for the fees of expert witnesses, the costs of translation, interpretation, and transcription, and the allowances and expenses related to travel of persons pursuant to articles 12, 13 and 14, which costs, fees, allowances, and expenses, shall be paid by the Requesting State, unless the Parties agree otherwise.

Chapter 4

Practical approaches to MLA



Chapter three has identified some general principles relevant to the successful implementation of requests for MLA. In this chapter, attention is directed at applying those principles in a practical manner. Focus is particularly directed at the practical aspects of the following issues:

- Requests for preservation of information or content
- Outgoing formal requests for MLA
- Incoming formal requests for MLA
- Spontaneous transmission of information and evidence
- Informal requests for information between States

Requests: types, content, formulation, and requirements

Requests for the preservation of information or content

In certain circumstances, before a formal request for assistance can be transmitted to a State, specific information or content must first be preserved. This may in particular relate to information or content that is contained on social media platforms (such as Apple, Google, Facebook, X (formerly Twitter)).

It is essential that the relevant information or content be preserved as soon as possible as servers do not store this information for long periods. Once confirmation is received that the information or content has been preserved, a formal request for MLA can be forwarded to the State where, for example, the main server is situated. In most cases, main servers are located in the United States of America. Thereafter, in executing the request for assistance, the relevant State (in many instances the USA) will approach the company which holds the information or content, to provide it to the requesting State. In many cases the preservation will only be granted for a specific period, and an extension may be required should the original time period lapse.

Information or content that needs to be preserved can be divided into three main categories. It is essential to distinguish between these categories, as there are different legal requirements that must be met before a State will be successful in obtaining that information or content. There are three types of information or content available from service providers that may be of assistance to an ongoing investigation:¹⁸³

Subscriber information (low level of process): The information requested describes who the person is (e.g. the name and address of the subscriber). It can also include information requested about the person's use of an online service on a specific date and time, including the times the person logged into an account and the duration they were logged on for.

¹⁸³ This information is based on practical guidelines issued by the United States Department of Justice.

Transactional / traffic information (medium level of process): The information requested is taken one step further. In this instance, information is requested as to with whom the subscriber communicated, what websites a subscriber visited and further information about the subscriber’s online activity.

Content (highest level of process): The information requested includes content sent in, for example, an email or instant message from the sender to the recipient, which can include written text, embedded photographs or images and attached files.

Execution: In most cases, a letter needs to be drafted to the service provider by the requesting State setting out what the details of the case and requesting preservation of the relevant data or information under the three categories outlined above. The service provider will in most cases reply and provide a reference number under which the data or information has been preserved. It is essential to highlight that it only provides authorization for the preservation of the data or information. A formal request for MLA must still be forwarded to the requested State to obtain that specific information or content under any of the three types set out above.

Legal standard: Where the legal standard pertaining to the preservation of information or content in the types set out above concerns, the following may be noted in addition to what is dealt with below under “outgoing formal requests for MLA.”

In most cases, the legal standard applied would depend upon where the service provider is located. The relevant laws and legislation of that State are therefore applicable and should be considered in preparing any request for assistance following a successful request for preservation. At the same time, most major service providers have their own tailored processes or systems for law enforcement officials to request access to information.

Table: Major service providers and their contact information

Request	Link
Google law enforcement request system	https://lers.google.com/signup_v2/landing
Apple example of request	https://www.apple.com/legal/privacy/gle-inforequest.pdf
Apple guidelines for requests	https://www.apple.com/legal/privacy/law-enforcement-guidelines-outside-us.pdf
Facebook guidelines for requests	https://www.facebook.com/safety/groups/law/guidelines/
Facebook portal for requests	https://www.facebook.com/records/login/
X (formerly Twitter)	https://help.twitter.com/en/rules-and-policies/twitter-law-enforcement-support#5
X (formerly Twitter) example of request	https://legalrequests.twitter.com/forms/landing_disclaimer
X (formerly Twitter) law enforcement form	https://help.twitter.com/forms/lawenforcement

Annex A provides a useful template, based on the Council of Europe's Budapest Convention on Cybercrime, which can be used when a data preservation request is required.

In preparing and submitting requests relating access to subscriber information, transactional information, and content, the United States Department of Justice's Office on International Affairs may be a useful contact, especially since most servers of service providers are located in there.

United States Department of Justice
Criminal Division, Office of International Affairs
1301 New York Avenue, Suite 800
Washington, DC 20530
Phone: 202-514-0000

Outgoing formal requests for MLA

United Nations Convention Against Corruption

The following aspects should be considered in preparing an outgoing request for MLA to another State, including where a request has already been successfully made to preserve information or content from a service provider.

- *The legal basis of the request:* The legal basis should be clearly set out in the request for assistance (i.e. the relevant details of the treaty signed between the requesting and requested States should be provided, including the exact provisions relied upon as a legal basis under the treaty, the fact that both States have ratified the treaty, relevant dates of ratification, and the date of entry into force of the treaty). On the odd occasion that no treaty basis exists, co-operation in terms of the internationally recognized principle of comity (and/or the principle of reciprocity – which generally is often included in domestic legislation of States) could be used. Additionally, domestic law can also be used as a legal basis– particularly that law which supplements a treaty basis – and include the relevant Act/Statute of both the requesting State and requested State.
- *Short introduction:* Provide a short introduction of what the request pertains to. Indicate also whether or not any person has already been arrested and whether any data or information has been preserved. Include relevant dates in cases of arrests and preservations of data or information.
- *Statement of urgency / deadlines / timeframes:* Ideally, the request should include a statement of urgency in cases that are indeed urgent. This sets out to the requested State that the request should possibly be dealt with as a high priority case. In matters that are not urgent, it is advisable to clearly set out relevant deadlines and timeframes for execution. This gives the requested State a good indication of how pressing the execution of the request is and affords it an opportunity to give notification in cases where it may not be able to adhere to certain deadlines.

- *Introduce the person signing the application:* It is important to give notice to the requested State that the request for MLA has been considered by a senior person in the requesting State. Set out the position held by the person, their qualifications, experience and that they are qualified to prepare and sign the application according to the legal system of the requesting State. By doing so, it provides assurances to the requested State that the request has been considered and approved at a high level of authority in the legal system of the requesting State.
- *Provide background facts:* It is of crucial importance to provide a summary of the background facts to the request for MLA. Set out clearly what the request is about and provide a summary of the relevant facts.
- Clearly specify the assistance needed:

General: Remember, the requested State is not involved at all in the investigation, prosecution, or proceeding and from the background facts, it must now follow exactly what assistance is required. Provide as much information as possible to identify, for example, a specific bank account, a required document, and the particulars of a witness. Information or content after a successful application for preservation to a specific service provider. It is essential to clearly set out the relevant facts to meet the appropriate legal standard that must be met under the relevant scenario.

*Legal Test*¹⁸⁴:

Subscriber information (low level of process): indication must be given that the evidence sought is relevant and related to the criminal investigation. It is not enough that a person had an email account – it must be indicated that it had at least some connection with the investigation.

Transactional/Traffic Information (medium level of process): one must provide specific facts detailing how the information/data sought is relevant and material to the investigation.

Content (highest level of process): for obvious reasons this is the highest legal burden to be met in obtaining content information. The request for MLA must at least satisfy two central legal requirements:

Probable cause: Facts must be provided to support the belief that the information or content sought will be among records of the service provider and that the information or content relates to an offence.

The facts: The facts supporting the request must be current or fresh – an indication must be given that the information or content is relatively recent or a likelihood that it will still be located in the place to be searched. It is therefore essential that the

¹⁸⁴ In most cases, the Service Provider will be based in the United States of America. From practical experience, it is therefore best to approach the Department of Justice on these matters.

request to preserve the information or content must be made as soon as possible. Not only will this assist in ensuring the currency of the information or content, but it will also ensure that the records still exist, especially if confirmation is provided that the information or content had already been preserved by the service provider

Correspondence relating to the preservation of information or content: It is advisable to add copies of the letters of preservation forwarded and received between the service provider and the requesting State. These letters may assist the requested State to identify the relevant information or content when it requests the service provider for the actual information or content.

One or two requests? When considering the above, there are two different ways in specifying the assistance needed in a particular case. One request may be made for general information like bank statements, etc. Another request may be made for information or content that has already been preserved by the relevant service provider. In these instances, it is advisable to prepare two separate requests for MLA as the requested State will probably have to forward the content to different institutions or service providers within that State.

- *The law:* Set out the elements of the offence(s) being investigated and the range of sentences to be imposed. In many States, the relevant crimes/elements are dealt with in reputable academic books that are well known in the requested State – the person signing the application can for example declare that by virtue of legal experience they are professionally competent to advise on the elements of the applicable law and then attach relevant pages of the elements of the crime(s) discussed by leading authorities/authors on criminal law in such books. This will also assist the requesting State to satisfy itself that the principle of dual criminality, if required, has been met.
- *The format and admissibility of the evidence to be presented:* States have different ways in preparing statements of witnesses or introducing documentary evidence into court proceedings. The requested State should be informed as to the legal requirements that must be met before such evidence can be introduced into court proceedings before the requesting State. It may also be appropriate to attach such *pro forma* statement that satisfies the legal requirements of the requesting State as an Addendum to the request for MLA.

Once the documentation is obtained by the requested State, the relevant documentation can be attached to the signed *pro forma* statement to satisfy the legal requirements of admissibility of the requesting State. States also have different requirements as to whether a statement can be signed by the maker only or with additional legal and/or religious requirements as to verify/confirm the truth of the contents of the said statement.

An example of such a document is attached to this toolkit marked Annex B (Proof of entries in accounting records and documentation of banks).

- *Requests for search and seizure of documentation:* If requests for search and seizure are also required, provide full particulars of the items to be seized and the reasons thereof. In addition, and if appropriate, provide the names of persons that will be willing and able to assist law enforcement officials from the requested State to execute the search warrant if approved by the courts of the requested State.
- *Reciprocity:* The requesting State should indicate that they will also assist with similar requests in future from the requested State, in accordance with the principle of reciprocity.
- *Reservation of rights:* Build a section into the request to reserve the right to amend and supplement the request later. This may be particularly useful when a change in circumstances arises and serves as a helpful way in which both the requesting and requested State are informed of the possibility of such occurrences, the process which arises following the occurrence, and any expectations connected therewith.
- *Undertaking:* Provide an undertaking that the evidence will only be used for the case/ investigation in the requesting State, in accordance with the principle of specificity. Make it clear to the requested State that the evidence that will be provided will not be shared with other parties or States without prior authorization from the requested State. In doing so, the requesting State is signalling to the requested State that the former can be trusted with the evidence provided, whether it be public or confidential evidence.
- *Assurances:* Provide assurances that the investigation is not of a political nature or on account of a person's race, religion, nationality, or political opinion. Many States' domestic laws provide that political offences and offences of a political nature, as well as requests which seek to punish persons based on certain grounds of discrimination, are lawful grounds to refuse assistance. It is therefore of the utmost importance to assure the requested State that the request relates to a legitimate investigation, prosecution or proceeding and that the principles of a fair trial will be upheld.
- *Contact details:* Provide contact details such as telephone numbers and email addresses of the lawyer and investigating officer working on the case.
- *Translation:* It is essential to establish the working language of the requested State as requests may have to be translated into the working language of that State. The United Nations Treaty Series Online under "depository notifications" may assist in determining what the working or acceptable language of the requested State is. A look at their domestic legislation may also be useful in ascertaining this. Should these methods fail, direct communication with the requested State's designated central authority or even through diplomatic channels are options.

A note on outgoing formal requests for assistance

It may also be prudent, in some instances and because of prior cooperation between the requesting and requested States, to provide drafts of the request for MLA to the requested State for informal evaluation. Since States legal systems and procedures may differ substantially, informal contact by the requesting State to the requested State can assist in preparing the request in the right format and in line with the legal requirements of the requested State. In the long run it will expedite the request for mutual legal assistance.

In many States, a central authority is responsible for finally approving a request for MLA from a law enforcement institution as set out above before it can be forwarded to another State. In some States, the central authority/approving authority is the Department of Justice and in others the Attorney-General /Director of (National) Prosecutions.

African Union Convention on Preventing and Combating Corruption

Generally, the practical approaches laid out above in relation to an outgoing formal request for MLA under UNCAC, may be followed when making requests under the AU Convention.

In addition to those requirements under UNCAC, the following considerations should be taken into account when drafting an outgoing formal request under the AU Convention.

National authorities: In contrast to the designated central authorities referenced in UNCAC, the AU Convention refers to these as “national authorities”. In principle, national authorities serve the same function and purposes as designated central authorities. In addition, the AU Convention stipulates that national authorities must communicate directly between each other. As a matter of compliance, when submitting a request and the legal basis of that request rests with the AU Convention, it is advisable that the request be sent directly by the national authority of the requesting State to the national authority of the requested State.

SADC Protocol on MLA in criminal matters

Generally, the practical approaches laid out above in relation to an outgoing formal request for MLA under UNCAC, may be followed when making requests under the SADC Protocol. While the provisions above relating to UNCAC find application, the SADC Protocol includes additional requirements to be included in requests under certain circumstances:

- *Requests for search and seizure, taking of evidence, location, restraint and forfeiture of proceeds of crime:* The request must, in addition to including all the necessary details ordinarily required, also include a statement clearly indicating the basis upon which the requesting State or its authorities believe that evidence or proceeds of crime may be found in the requested State.

- *Taking of evidence* : Where a request relates to the taking of evidence from a person, the request must indicate whether the statement should be sworn or affirmed. Additionally, the request should include a description of the subject matter of the evidence or statement required.
- *Temporary transfer of exhibits*: Where the request relates to the temporary transfer of exhibits, it must indicate the current location of the exhibits in the requested State as well as the relevant person(s) or class of person(s) who have custody over the exhibits. The request must also indicate the place or location to which the exhibit will be taken, any tests that may need to be conducted on the exhibit, and a date upon which the exhibit will be returned to the requested State.
- *Detained persons and their availability*: Requests concerning detained persons, their availability and transfer, must indicate the person(s) or class of person(s) who will have custody over the detained person during their transfer, the place or location to which the detained person is to be transferred, and a date upon which the detained person will be returned to the requested State. Further information is available under 3.1.10 Requests for Assistance: Expert and witness testimony and transfer of detained persons or persons in custody.

Incoming formal requests for MLA

Compliance with domestic laws

When a request for MLA is received by the requested State, the following should be considered:

- *Approval of requests*: Before a request for MLA may be executed, it must first be approved by a central authority (or in some cases, the Attorney-General or Ministry of Justice). It is therefore advisable to first ensure, prior to executing a request, that it has been approved.
- *Legal system of the requesting State*: Respect the legal system and procedural requirements of the requesting State especially if it is different to that of the requested State. If there is a request that the information be provided in a certain format, or that a specific procedure be followed during execution, try to adhere thereto even if it differs from the legal requirements of admissibility in the courts of the requested State.
- *Requests for search and seizure*: If requests for search and seizure are received, ensure that it is prepared and executed in accordance with the relevant law of the requested State. It may also be required to identify the names of the persons from the requesting State in the application for the search warrant that will accompany members of, for example, the law enforcement officers of the requested State during the operation. It is always extremely helpful for law enforcement officers from the requesting State to join law enforcement officers from the requested State in the execution of a search warrant. It is sometimes essential to consult with them when decisions are to be taken before seizing material or

evidence. It is however also imperative that law enforcement officers from the requested State executing the warrant, oversee the search and seizure operations with help only, if required, from members present of the requesting State.

It can also do no harm, in appropriate cases, to provide the requesting State with informal copies of the documentation or evidence seized by the requested State. However, it is essential to ensure that the documentation or evidence be forwarded later through proper formal official or diplomatic channels by the requested State to the requesting State.

- *Requesting the information:* Some States requires the information to be subpoenaed through a Magistrate or Judge. In such cases, as with any execution, the proper legal channels must be followed, and all requests must be executed in accordance with the domestic law of the requested State. An example of such a document is attached to this toolkit marked Annexure C (Issuing of Subpoena – attendance of witness)
- *The interview process and taking statements from a witness or suspect:* In some instances, a Requesting State may also request the Requested State that a statement be taken from a relevant witness or suspect. In most cases, the Requesting State will also attach relevant questions that may need to be asked during the interview process. In some civil law jurisdictions, these questions will be asked by the Magistrate or Presiding officer in a court of law. In common law jurisdictions however, a statement can be taken outside of court and provided later to a Magistrate or Presiding Officer. In the latter case, the procedure specified below is recommended as it is customary that law enforcement officers from the Requesting State would accompany or be present during the interview alongside law enforcement officers of the Requested State. While reasons for this vary; it often the case that law enforcement officers from the Requesting State are well acquainted with the details of each case and may be in a better position to request additional or follow up questions to those already provided. The following procedure is therefore recommended in such cases:
 - The Magistrate or Presiding Officer should be informed of the process to be followed. They should also be informed that law enforcement officers from the Requesting State will be present together with officers from the Requested State during the interview of the witness or suspect. The presence of law enforcement officers from the Requested State should preferably be in conjunction with the presence of a lawyer or legal representative appearing on behalf of the witness or suspect.
 - Law enforcement officers from the Requested State will lead the interview process, but additional and further follow up questions may also be added by law enforcement officers from the Requesting State.
 - It goes without saying that before the interview of any suspect can commence, they should be informed fully of their rights, including their right to remain silent. As the suspect or witness will normally be accompanied by their lawyer or legal representative, the issue of whether testimony or a statement will be given would

ordinarily be dealt with prior to the commencement of the interview (as the lawyer or legal representative would already have informed law enforcement officers whether their client is prepared to answer questions as a suspect).

- Once the statement is finalized, the witness or suspect should sign it. The statement should also indicate the relevant details of the person responsible for taking the statement (interviewer) as well provide the details of anyone else who was also present during the interview (such as law enforcement officers from the Requesting State and the lawyer or legal representative appearing on behalf of the witness/suspect).
- The signed statement should then be presented to the Magistrate or Presiding Officer at the next court appearance with an indication from the witness or suspect that they have made the statement voluntary and that no undue influence had been exerted on them when making the statement. The fact that their statement was given voluntarily and without undue influence may then be confirmed by the lawyer or legal representative. This should provide sufficient safeguard for the Magistrate or Presiding officer to admit the statement as part of evidence that will be provided later to the Requesting State.
- The Magistrate or Presiding Officer will thereafter forward the statement to the relevant central authority of the Requested State for onward transmission through diplomatic channels to the Requesting State. There should also in principle be no issue with providing an unofficial copy of the statement to law enforcement officers from the Requesting State while they await the original statement through official diplomatic channels.

Spontaneous transmission of information and evidence

Both treaty law and domestic law often make provision for the spontaneous and voluntary transmission of information or evidence.¹⁸⁵ In essence, spontaneous transmission entails that a State, when it has come across information or evidence which may be useful to another State, transmits such information or evidence to that State. Spontaneous transmission is not mandatory; therefore, a State acts within its discretion on whether to transmit any information or evidence it comes across. The State to which the information or evidence is transmitted may not be aware of the existence of that information or evidence. That transmission may therefore prompt the receiving State to open an investigation, prosecution or proceeding once it receives such information or evidence. Alternatively, receiving the information or evidence may assist it in ongoing investigations, prosecutions, or proceedings.

¹⁸⁵ See for example, Arts. 46(4) and 56, UNCAC.

A spontaneous transmission of information or evidence may subsequently lead to a formal request for assistance. As Chrysikos notes, spontaneous transmission of information or evidence is not intended to bypass formal requests, but rather, may serve to clarify and narrow a subsequent formal request for assistance.¹⁸⁶ Additionally, it is worth noting that when a spontaneous transmission is received, it may be subject to confidentiality requirements as with ordinary formal requests for assistance. In these cases, the receiving State should acknowledge those confidentiality requirements and indicate timeously if it is unable to comply with them.

Spontaneous transmission of information or evidence may be beneficial for the following reasons:

- It may assist a State which may previously have been entirely unaware of the commission of a specific offence, the existence of certain circumstances, or of persons involved in the commission of an offence.
- It may, where a receiving State is aware and an investigation, prosecution or proceeding is ongoing in that State, assist it with such investigation, prosecution, or proceeding.
- Generally speaking, spontaneous transmission may emphasise cooperation between States, indicating a State's willingness to act in good faith.
- It may also re-affirm a State's commitment to good neighbourliness and cooperation, and signal that State's positive attitude towards MLA. On occasion, this may in turn signal that State's willingness to positively assist in possible future requests for assistance, both related and unrelated to the spontaneous transmission.

Informal requests for information between States

In today's times, it is important to make allowance for necessary informal cooperation between States without always relying on or going through the formal procedure for requests for MLA set out above.

A primary consideration before engaging in formal requests is therefore to ascertain whether any cooperation can occur informally, or prior to a formal request that may be sent at a later stage. The following can, *inter alia*, be considered:

- There can be no problem with providing lead and other information about a person's whereabouts or assistance in tracing and locating a bank or specific person(s). Once that information is obtained, notification of this should be included in a subsequent formal request for MLA to the relevant State.
- Sometimes, States will provide statements, documents etc., on an informal basis to each other due to urgency. It is, however, good practice to later forward a formal request for MLA indicating what information has been provided on an informal basis already and request the information be provided on a formal basis through a formal request for assistance through proper approved channels according to the legal requirements of the relevant State.

¹⁸⁶ Chrysikos, 'Commentary on the United Nations Convention Against Corruption' (Oxford University Press) 454.

Annexes

Annex A: Request for data preservation

Insert Logo or Letterhead of the
requesting authority

Request¹⁸⁷

Date: _____ / _____ / _____

Case Number/Reference Number: _____

Status of Request:

<input type="checkbox"/>	New Request
<input type="checkbox"/>	Extension of Previous Request Reference Number of Previous Request: _____

Requesting Authority:

Organisation/Institution:	
Person making the request within the organisation/institution, or person in charge of the request:	
Contact details of person making or in charge of request	Tel: Cell: Email:
Organization/Institution Address:	
Organization/Institution Telephone::	
Organization/Institution Email address:	
Organization/Institution Fax:	
Organization/Institution Hours:	
Organization/Institution Time zone:	

¹⁸⁷ Based on the Council of Europe's Budapest Convention on Cybercrime, 'Data Preservation Request under Article 29 and 30 Budapest Convention on Cybercrime' available online at <https://rm.coe.int/t-cy-2018-11-template-article29-request-v26-final/16808c4956>.

Requested Authority:

(Insert full details of the authority to which the request is directed. Include its name, office location or headquarters, any relevant contact details, or its contact policy details.)
--

Urgency / Timeframe:

<input type="checkbox"/>	Urgent. Please respond by: ____ / ____ / _____ Reason for urgency: _____
<input type="checkbox"/>	Non-Urgent Matter: Please respond by: ____ / ____ / _____

Preferred Response:

<input type="checkbox"/>	Expedited Response (by email or other means)
<input type="checkbox"/>	Response by other means (please, specify): _____ _____

Investigating Authority (If different from Requesting Authority):

Investigating Authority:	
Person in charge at investigating authority and their capacity at investigating authority:	
Contact details of person making or in charge of request	Tel: Cell: Email:
Investigating Authority Address:	
Investigating Authority Telephone:	
Investigating Authority Email address:	
Investigating Authority Fax:	

Prosecuting Authority or Judicial Authority over the Case (if applicable):

Prosecution Office: Case Number/Reference:	
Judicial Authority (court):	
Case Number/Reference:	
Judicial Decision relating to request: Case Number/Reference:	

Formal Request for MLA to follow:

<input type="checkbox"/>	A formal request for mutual legal assistance will be submitted following this request.
<input type="checkbox"/>	A formal request for mutual legal assistance is attached to this request.

Offences subject to Investigation, Prosecution or Proceeding:

<input type="checkbox"/>	Treaty-offence: Offence under a specific treaty. Specify details of offence under treaty law.
<input type="checkbox"/>	Offence under law of the requesting State. Specify details of offence under domestic law of requesting State.

Summary of the Facts / Background Information:

<p>(Provide a brief description of the facts of the case or investigation, offences alleged including conduct underlying the offence, how the data or information requested in this requested is related to the offence or underlying conduct being investigated, the purpose of the data requested and the reasons for which it must be preserved.)</p>
--

Data or Information to be Preserved:

	Type	Period / Duration of Focus	Details/Information Relating to Category of Information
<input type="checkbox"/>	Subscriber Information	Start date: (Time Zone): End date: (Time Zone):	Specify details of subscriber information required for preservation.
<input type="checkbox"/>	Transactional/ Traffic Information	Start date: (Time Zone): End date: (Time Zone):	Specify details of subscriber information required for preservation.
<input type="checkbox"/>	Content Information	Start date: (Time Zone): End date: (Time Zone):	Specify details of subscriber information required for preservation.

Details of Possession/Control/Location of Data or Information:

	Type	Detail
<input type="checkbox"/>	Possession by Individual	Specify details of individual, their address and the location of computer system on which data or information is stored.
<input type="checkbox"/>	Possession by Organisation or Institution	Specify details of individual, their address and the location of computer system on which data or information is stored.

Confidentiality:

<input type="checkbox"/>	Please treat this request and its content confidential.
--------------------------	---

Communications Required from this Request:

<input type="checkbox"/>	Please confirm receipt of this request.
<input type="checkbox"/>	Please confirm whether this request and its content will be kept confidential.
<input type="checkbox"/>	Please indicate if this request cannot be kept confidential and provide reasons therefor.
<input type="checkbox"/>	Please confirm preservation of data or information under this request once it is preserved, including period for which it will be preserved and whether data or information is erased/destroyed/removed after period of preservation.

Annex B: Affidavit – proof of entries in accounting and documentation of banks

IN TERMS OF

[Insert relevant section of domestic law]

(Proof of entries in accounting records and documentation of banks)

1.

I, the undersigned, do hereby state that I am

[Full names of deponent]

in the service of the branch/office

(Name of BRANCH OR OFFICE of bank)

of

(Insert here NAME OF BANK)

(hereinafter referred to as “this bank”) being a bank as defined in [Insert relevant provision of domestic law].

2.

I have examined the entries in the accounting records and the documents of this bank, as set out in the annexure hereto.

3.

The attached copies of the aforesaid entries in the accounting records and/or of the aforesaid documents are correct copies of the entries in the accounting records and/or of the documents of this bank.

4.

The aforesaid accounting records and/or documents are or have been the ordinary records and documents of this bank. The entries in the aforesaid accounting records have been made and the aforesaid documents have been compiled, printed, or obtained in the usual and ordinary course of the business of this bank. The aforesaid accounting records and/or documents are in the custody or under the control of this bank.

..... /

SIGNATURE OF DEPONENT

SIGNATURE OF COMMISSIONER

OF OATHS

5.

Do you know and understand the contents of this declaration?

Do you have any objection to taking the prescribed oath?

Do you consider the prescribed oath to be binding on your conscience?

.....

SIGNATURE OF DEPONENT

I certify that deponent has acknowledged that *he/she knows and understands the contents of this declaration. This declaration was sworn to before me and the deponent's

signature was placed thereon in my presence at

on this the day of 20.....

.....

COMMISSIONER OF OATHS: [Requesting State Name]

FULL NAMES:

DESIGNATION: EX OFFICIO:

BUSINESS ADDRESS:

.....

.....

.....

ANNEX to affidavit in terms of [Insert relevant provision of domestic law] (to be read together with Annex B above)

(Exposition of attached accounting records and documents)

1. Copies of the
account

(Nature of account, e.g. savings/current/loan)

of

.....

.....,

(Insert the name of account holder)

being account number for the period

from to

2. Copies of the following documentation pertaining to the above-mentioned account:

2.1.
.....
.....
.....
.....
.....

(To be continued on additional pages if necessary)

..... /

SIGNATURE OF DEONENT

SIGNATURE OF COMMISSIONER
OF OATHS

Annex C: Subpoena – attendance of witness

IN TERMS OF

[Insert provisions of domestic law relevant to the making of a subpoena]

In the [Insert Full Name of Court and District or Region of its Jurisdiction]

1. To any police service official or other person authorised to serve process:

1.1. You are hereby commanded in the name of the State to serve a true copy of this subpoena on the person whose particulars appear hereunder so as to summon him/her to appear in person before a [place: Full Name of Court and date of appearance], as well as to remain in attendance at the ensuing proceedings to testify and declare all he/she knows concerning the subject matter of a request by [insert requesting State] (requesting authority in the foreign state) in terms of [Insert relevant section of the domestic law relied upon for the request for mutual legal assistance], for assistance in obtaining evidence in the Republic of [Insert State name requesting assistance] pertaining to a *criminal investigation/*criminal proceedings being conducted in the requesting State.

1.2. The said *criminal investigation relates/*criminal proceedings relate to (an) offence(s)

Name of witness	Gender	Age

1.3. Report to the appointed Magistrate what you have done thereon.

2. To the person who is hereby summoned as a witness:

2.1. You are hereby summoned to appear in person before the appointed Magistrate, in the above-mentioned Court at [insert time] on the above-mentioned date and place as well as to remain in attendance to testify and declare all you know concerning the evidence required by the requesting State, the nature of which is set out in more detail in annexure “A” hereto.

* Delete words not applicable

2.2. If you appear and attend as directed above, you are entitled to witness fees.

Name of the Magistrate – [Insert Full Name]

[Insert contact details]

3. WARNING:

3.1 Should any change in the above-mentioned address take place before the proceedings are finally disposed of, or before you are officially advised that you are no longer required as a witness, you are compelled to inform the official who served this subpoena upon you thereof.

3.2 Failure to comply with either the above-mentioned warning or this subpoena renders you liable to a fine or a term of imprisonment not exceeding three months.

.....

CLERK OF THE COURT:
MAGISTERIAL DISTRICT OF

[Insert region or district]

RETURN OF SERVICE OF THIS SUBPOENA

I, the undersigned, certify that I have served this subpoena upon the within-named person by -

- (a) *delivering a true copy to him/her PERSONALLY; **or**
- (b) *delivering as he/she could not be found, a true copy to

.....
.....

a person apparently over the age of 16 years and apparently residing or employed at the witness's place of

*RESIDENCE/EMPLOYMENT/BUSINESS; at

.....
.....

The nature and exigency of this subpoena was explained to the recipient thereof.

* Delete words not applicable

Time Day..... Month Year

Place

.....

Signature of empowered official

.....

Full name

.....

Capacity

.....

Signature of recipient

.....

Full name

Annex D: Designated central authorities under article 46(13) of UNCAC

Angola	Botswana
<p>Ministry of Justice and Human Rights Rua 17 de Setembro Cidade Alta Luanda</p> <p>Focal Point: Sebastiao Rocha Consultant to the Minister of Justice and Human Rights Sebastiao.rocha65@hotmail.com Sebastiao.rocha@minjusdh.gov.ao www.minjusdh.gov.ao</p>	<p>Directorate of Public Prosecutions Plot Number 54388 Central Business District Private Bag 00356 Gaborone Botswana</p> <p>Tel: (+267) 364 0599 (+267) 364 0300 (+267) 364 0304 Fax: (+267) 390 0363</p>
Malawi	Mozambique
<p>The Attorney General, Ministry of Justice Headquarters Capital Hill Private Bag 333 Lilongwe 3 Malawi</p> <p>Tel: +265 1 788 411 Fax: +265 1 788 332 Email: sg-justice@sdpn.org.mw</p>	<p>Attorney-General's Office, Av. Vladimir Lenine, no 121 Republic of Mozambique</p> <p>Tel: 21 304 303 21 304 304 Ph: 84 390 0769 Email: denuncias@pgr.gov.mz</p>
Namibia	South Africa
<p>Permanent Secretary: Ministry of Justice Justitia Building Independence Avenue Windhoek Private Bag 13302</p> <p>Tel: 061 280 5335 Email: pssecretary@moj.gov.na</p>	<p>Director-General: Department of Justice and Constitutional Development Salu Building, 316 cnr Thabo Sehume and Francis Baard Street Pretoria Private Bag X81, Pretoria, 0001</p> <p>Tel: 012 515 1111/ 012 315 1730 Fax: 012 315 8130/ 012 315 8131 Email: webmaster@justice.gov.za</p>
Zambia	Zimbabwe
<p>Office of the Attorney General Ministry of Justice PO Box 50106 Fairley Road Ridgeway Lusaka Zambia</p> <p>Tel: +260 21 125 0438 Email: mumbamalila@yahoo.com</p>	<p>Attorney-General's Office No. 5 Golda Avenue Strathaven Harare Zimbabwe</p> <p>Tel: 263-4-307066/307079 Ph: 263-4-11 880 059</p>

Annex E: Other SADC States' ratification / accession to international and regional treaty law

United Nations Convention Against Corruption		
Country	Date of signature	Date of ratification / accession
The Comoros	10 December 2003	11 October 2012
Democratic Republic of the Congo	-	23 September 2010
Eswatini	15 September 2005	24 September 2012
Lesotho	16 September 2005	16 September 2005
Madagascar	10 December 2003	22 September 2004
Mauritius	9 December 2003	15 December 2004
Seychelles	27 February 2004	16 March 2006
Tanzania	9 December 2003	25 May 2005

African Union Convention on Preventing and Combating Corruption		
Country	Date of signature	Date of ratification / accession
The Comoros	16 April 2004	5 August 2006
Democratic Republic of the Congo	24 April 2006	5 August 2006
Eswatini	-	-
Lesotho	5 November 2004	5 August 2006
Madagascar	9 February 2005	5 August 2006
Mauritius	-	-
Seychelles	17 June 2008	17 July 2008
Tanzania	12 April 2005	5 August 2006

SADC Protocol on MLA in Criminal Matters		
Country	Date of signature	Date of ratification / accession
The Comoros	-	-
Democratic Republic of the Congo	-	-
Eswatini	1 August 2006	1 March 2007
Lesotho	17 September 2004	1 March 2007
Madagascar	-	-
Mauritius	20 August 2004	1 March 2007
Seychelles	-	-
Tanzania	20 August 2003	1 March 2007

Annex F: Other SADC States central authorities

Eswatini	Lesotho
<p>Director of Public Prosecutions Inter-Ministerial Office Block Mbabane P. O. Box 1055, Mbabane Eswatini</p> <p>Tel: (268) 404 4293/6010 Fax: (268) 404 5617 Email: malazalazini@gmail.com</p>	<p>Office of the Attorney-General P. O. Box 402 Maseru 100</p> <p>Tel: +266 223 2268 3 Fax: +266 223 1036 5 Email: denuncias@pgr.gov.mz</p>
Madagascar	Mauritius
<p>Directorate for Administration of the Judiciary Ministry of Justice 43 Rue Joël Rakotomalala Faravohitra Antananarivo Madagascar</p>	<p>Attorney-General's Office Renganaden Seeneevassen Building Port Louis Mauritius</p> <p>Tel: (230) 203 4740 Fax: (230) 212 6742 Email: ago@govmu.org</p>
Seychelles	Tanzania
<p>Ministry of Foreign Affairs P. O. Box Maison Quéau de Quinssy Mont Fleuri Mahé Seychelles</p> <p>Tel: (248) 428 3500 Fax: (248) 422 4845/5852 Email: ps@mfa.gov.sc</p>	<p>Office of the Attorney General P. O. Box 630 Dodoma Tanzania</p> <p>Tel: +255 26 233 2161 Fax: +255 26 3231 8661 Email: info@agctz.go.tz</p>

Annex G: Resources

Selected bibliography and additional readings

Cecily Rose, Michal Kubiciel and Oliver Landwehr, *The United Nations Convention Against Corruption: A Commentary* (2019, Oxford University Press), see p. 440–473.

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the 1990s, the number of people in the world who are illiterate has increased from 500 million to 700 million.

It is not only illiterates who are excluded from the benefits of modernization. The vast majority of the world's population, especially in the developing countries, are excluded from the benefits of modernization.

The world's population is growing rapidly. In 1990, the world population was 5.3 billion. By 2000, it is expected to reach 6 billion. By 2025, it is expected to reach 8 billion.

The world's population is becoming more diverse. There are now over 200 different ethnic groups in the world. The number of people who speak different languages is also increasing.

The world's population is becoming more mobile. More and more people are moving from rural areas to cities. This is especially true in the developing countries.

The world's population is becoming more educated. The number of people who are literate is increasing. This is especially true in the developed countries.

The world's population is becoming more affluent. The number of people who are living in poverty is decreasing. This is especially true in the developed countries.

The world's population is becoming more democratic. The number of people who are living in authoritarian regimes is decreasing. This is especially true in the developing countries.

The world's population is becoming more environmentally conscious. The number of people who are concerned about the environment is increasing. This is especially true in the developed countries.

The world's population is becoming more technologically advanced. The number of people who are using computers and other modern technologies is increasing. This is especially true in the developed countries.

The world's population is becoming more interconnected. The number of people who are using the Internet and other modern communication technologies is increasing. This is especially true in the developed countries.

The world's population is becoming more globalized. The number of people who are living in a globalized world is increasing. This is especially true in the developed countries.

It is not only the world's population that is changing. The world's economy is also changing.

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