

6. JURISDICTION

SADC Protocol

6.1.1 In terms of Article 5(1) of the SADC Protocol each State Party must adopt measures necessary to establish its jurisdiction over the offences established in accordance with the SADC Protocol when –

“(a) the offence in question is committed in its territory;

(b) the offence is committed by one of its nationals or by a person who habitually resides in its territory; and

(c) the alleged criminal is present in its territory and it does not extradite such person to another country.”.

6.1.2 Article 5(2) of the Protocol provides that the Protocol does not exclude any criminal jurisdiction exercised by a State Party in accordance with its domestic law, and in terms of Article 5(3) the provisions of the Article are subject to the principle that a person shall not be tried twice for the same offence.

6.1.3 In terms of Article 5(1)(a) above, jurisdiction is established under circumstances where the offence is committed in a State Party’s territory notwithstanding the fact that the accused person is not a national or a person who ordinarily resides in its territory.

6.1.4 In terms of Article 5(1)(b) jurisdiction is established under circumstances where the offence is committed by a national of a State Party or by a person who ordinarily resides in its territory, notwithstanding the fact that the offence was committed in or outside its territory.

6.1.5 In terms of Article 5(1)(c) jurisdiction is established under circumstances where the alleged criminal is present in a State Party’s territory and it does not extradite such person to another country. In other words, if country A does not extradite the alleged criminal to country B, which has jurisdiction to prosecute that criminal, then country A would establish jurisdiction to prosecute that criminal. This provision clearly aims at stopping the possibility of any of the State Parties providing a safe haven for people suspected of committing acts of corruption. Therefore, if a State Party establishes jurisdiction over an alleged criminal in terms of Article 5(1)(c) of the Protocol, there is an obligation on that State Party to

prosecute that criminal. This provision must be read with Article 9(7) of the SADC Protocol, which Article regulates the question of extradition in terms of the SADC Protocol.

- 6.1.6 This type of provision is gaining popularity in other types of international instruments as well. It links with the so-called universal jurisdiction principle that certain crimes are of such a serious nature that all states are obliged to prosecute such crimes, no matter where or by whom they were committed. In this regard Resolution 1373(2001) of the United Nations Security Council provides that “all States shall deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens”.

AU Convention

- 6.2.1 Article 13 of the AU Convention contains a similar provision. In terms of Article 13(1) of the AU Convention each State Party has jurisdiction over acts of corruption and related offences when –

“(a) the breach is committed wholly or partially inside its territory;

(b) the offence is committed by one of its nationals outside its territory or by a person who resides in its territory; and

(c) the alleged criminal is present in its territory and it does not extradite such person to another country;

(d) when the offence, although committed outside its jurisdiction, affects, in the view of the State concerned, its vital interests or the deleterious or harmful consequences or effects of such offences impact on the State Party.

2. This Convention does not exclude any criminal jurisdiction exercised by a State Party in accordance with its domestic law.

3. Notwithstanding the provision of paragraph 1 of this Article, a person shall not be tried twice for the same offence.”.

- 6.3 It is important to note that the SADC Protocol applies to offences “established in accordance with this Protocol”. On the other hand Article 13 is applicable in respect of “acts of corruption **and related offences**”. Furthermore, Article 13(1)(d) of the AU Convention provides for a

broader application of the AU Convention in that it provides for an offence that, although committed outside its jurisdiction, affects, among others, the vital interests the State Party concerned.

UN Convention

6.4 Article 42 of the UN Convention deals comprehensively with this matter. The said Article provides as follows:

“1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

(a) The offence is committed in the territory of that State Party; or

(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State Party; or

(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

(c) The offence is one of those established in accordance with article 23, paragraph 1(b)(ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1(a)(i) or (ii) or (b)(i), of this Convention within its territory; or

(d) The offence is committed against the State Party.

3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.
5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other State Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those State Parties shall, as appropriate, consult one another with a view to coordinating their actions.
6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.”.

6.5 Furthermore, Article 47 of the UN Convention provides that State Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with the UN Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, “in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.”.

6.6 The opinion is held that the provisions in the three instruments providing for jurisdiction matters are very similar and should be adopted by the State Parties concerned.