

9. EXTRADITION

SADC Protocol

- 9.1.1 Article 9 of the SADC Protocol applies to all the offences established by the State Parties in accordance with the Protocol (Article 9(1)). If an extradition treaty already exists between or among State Parties, each of the offences to which the Article applies, shall be deemed to be included as an extraditable offence in such existing treaty (Article 9(2)).
- 9.1.2 In respect of future extradition treaties, Article 9(3) provides that State Parties undertake to include offences contemplated in the Protocol as extraditable offences in every extradition treaty to be concluded between or among them.
- 9.1.3 Article 9(4) provides that if a State Party makes extradition conditional on the existence of a treaty and it receives a request for extradition from another State Party with which it does not have an extradition treaty, that State Party may consider the Protocol as the legal basis for extradition with respect to any offence to which the Protocol applies. On the other hand, State Parties that do not make extradition conditional on the existence of a treaty, are obliged to recognise offences to which the Article applies, as extraditable offences among themselves (Article 9(5)).
- 9.1.4 In terms of Article 9(6), extradition is subject to the conditions provided for by the law of the Requested State Party or by applicable extradition treaties.
- 9.1.5 Article 9(7) provides that if extradition for any offence to which the Article applies is refused, because the Requested State Party is of the opinion that it has jurisdiction over the offence, the Requested State Party must, within a reasonable time, submit the case to its competent authorities for the purpose of prosecution unless otherwise agreed with the Requesting State Party. The Requested State Party must report the final outcome to the Requesting State Party.
- 9.1.6 In terms of Article 9(8) a Requested State Party may, subject to the provisions of its domestic law and its extradition treaties, upon being satisfied that the circumstances so warrant and are urgent, and at the request of the Requesting State Party, take into custody a person whose extradition is sought and who is present in its territory, or take other appropriate measures to ensure that the person is present at the extradition proceedings.

9.1.7 In the final instance Article 9(9) provides that State Parties must endeavour to conclude bilateral and multilateral agreements to carry out or enhance the effectiveness of extradition.

AU Convention

9.2. Article 15 of the AU Convention deals with extradition. Article 15 contains the following provisions, which are almost identical to those of the SADC Protocol:

- (a) Article 15(1) of the AU Convention is identical to Article 9(1) of the Protocol (see paragraph 9.1.1 above).
- (b) Articles 15(2) of the AU Convention is a combination of the provisions contained in Article 9(2) and (3) of the Protocol (see paragraphs 9.1.1 and 9.1.2 above).
- (c) Article 15(3) and (4) of the AU Convention is identical to Article 9(4) and (5), respectively, of the Protocol (see paragraph 9.1.3 above).
- (d) Article 15(6) of the AU Convention is similar to Article 9(7) of the Protocol (see paragraph 9.1.5 above). However, where the AU Convention requires that the Requested State is obliged to submit the case “without undue delay to its competent authorities for the purpose of prosecution”, Article 9(7) of the Protocol requires that the Requested State Party must “within a reasonable time”, submit the case to its competent authorities for the purpose of prosecution (see paragraph 9.1.5).
- (e) Article 15(7) of the AU Convention is identical to Article 9(8) of the Protocol (see paragraph 9.1.6 above).
- (f) The provisions contained in Article 9(6) and (9) of the SADC Protocol are not contained in the AU Convention.

UN Convention

9.3.1 Article 44 of the UN Convention deals comprehensively with extradition. Most of the provisions contained in Articles 9 and 15 of the SADC Protocol and the AU Convention, respectively, are also contained in the UN Convention. The UN Convention, however, also deals with various other aspects relating to extradition. The provisions of the UN Convention include, among others, the following:

(a) In terms of Article 44(1) the provisions of this Article apply to the offences established in accordance with the Convention provided that –

- the person who is the subject of the request for extradition is present in the territory of the requested State Party; and
- the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

However, Article 44(2) provides that, notwithstanding the provisions of Article 44(1), a State Party whose law so permits, may grant the extradition of a person for any of the offences covered by the Convention that are not punishable under its own domestic law.

(b) Article 44(3) provides that, if a request for extradition includes several separate offences, at least one of which is extraditable under Article 44 and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with the Convention, the requested State Party may apply Article 44 also in respect of those offences.

(c) Article 44(4) of the UN Convention is partly covered by Article 9(2) of the SADC Protocol. In terms of the first-mentioned Article each of the offences to which Article 44 applies is deemed to be included as an extraditable offence in any extradition treaty existing between State Parties. Furthermore, State Parties must undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. However, a State Party whose laws so permit, in the event of it using this Convention as the basis for extradition, may not consider any of the offences established in accordance with the UN Convention to be a political offence.

(d) Article 44(5) provides that if a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of any offence to which this article applies. This provision is almost identical to the provisions contained in Articles 9(4) and 15(3) of the SADC Protocol and AU Convention, respectively (see paragraph 9.1.4 above).

- (e) Article 44(6) and (7) relates to Article 44(4) above. In the first instance Article 44(6) provides that a State Party that makes extradition conditional on the existence of a treaty, must at the time of deposit of its instrument of ratification, acceptance or approval of or accession to the UN Convention, inform the Secretary-General of the United Nations whether it will take the Convention as the legal basis for cooperation on extradition with other State Parties to this Convention. If it does not take the Convention as the legal basis for cooperation on extradition, it must seek to conclude treaties on extradition with other State Parties to this Convention in order to implement Article 44. Secondly, Article 44(7) provides that State Parties that do not make extradition conditional on the existence of a treaty must recognize the offences to which Article 44 applies, as extraditable offences between themselves. The last-mentioned provision is similar to the provisions of Article 9(5) and 15(4) of the SADC Protocol and AU Convention, respectively.
- (f) Article 44(8) is similar to the provisions of Articles 9(6) and 15(5) of the SADC Protocol and AU Convention, respectively. Article 44(8) provides that extradition is subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, among others, "conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition". The last-mentioned condition does not appear in the SADC Protocol or the AU Convention.
- (g) In terms of Article 44(9) State Parties must, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this Article 44 applies. The SADC Protocol or the AU Convention does not contain a similar provision.
- (h) The provisions of Article 44(10) of the UN Convention deal with the execution of a warrant of arrest by the requested State Party and are almost identical to those of Articles 9(8) and 15(7) of the SADC Protocol and the AU Convention, respectively (see paragraph 9.1.6 above).
- (i) The provisions of Article 44(11) deal with the situation where a State Party does not extradite an alleged offender solely on the ground that he or she is one of its nationals. In such a case that State Party is obliged to submit the case without undue delay to its competent

authorities for the purpose of prosecution. It is further required that the relevant authorities must take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under its domestic law. The State Parties concerned must cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution. The above provisions are similar to Articles 9(7) and 15(6) of the SADC Protocol and AU Convention, respectively (see paragraph 9.1.5 above).

- (j) Article 44(18) of the UN Convention is identical to Article 9(9) of the SADC Protocol. These provisions require that State Parties must seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

9.3.2 It seems that the following provisions relating to extradition only appear in the UN Convention and not the SADC Protocol or the AU Convention:

- (a) Article 44(12) provides that whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that that person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of that person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and any other conditions that they may deem appropriate, such conditional extradition or surrender is sufficient to discharge the obligation set forth in Article 44(11)(see paragraph 9.3.1 (i) above).
- (b) Article 44(13) provides that if extradition, sought for purposes of enforcing a sentence, is refused, because the person sought is a national of the requested State Party, the requested State Party must, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of such sentence under the domestic law of the requesting State Party or the remainder thereof.
- (c) Article 44(14) guarantees a person fair treatment at all stages of extradition proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

- (d) Article 44(15) ensures that the provisions of the UN Convention may not be interpreted as imposing an obligation on a requested State Party to extradite if it has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of his or her sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to his or her position for any one of the above reasons.
- (e) In terms of Article 44(16) State Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.
- (f) Article 44(17) aims at enhancing a consultation process in respect of extradition decisions. In terms of this provision the requested State Party must, before refusing extradition, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its request.

9.4 As indicated above, the provisions of the UN Convention pertaining to extradition are spelled out in much more detail than the provisions of the SADC Protocol and the AU Convention, and it is therefore suggested State Parties should rather implement the provisions of the UN Convention.