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**Review of implementation of the United Nations
Convention against Corruption**

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Note by the Secretariat

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II. Executive summary

Malawi

1. Introduction: Overview of the legal and institutional framework of Malawi in the context of implementation of the United Nations Convention against Corruption

Malawi signed the Convention on 21 September 2004. The instrument of ratification was signed by the President of the Republic on 31 October 2007. Malawi deposited its instrument of ratification with the Secretary-General of the United Nations on 4 December 2007.

Malawi is a constitutional democracy since 1994. Its legal system comprises: statutory law, customary law, and case law (judicial decisions), the Malawi Constitution being the supreme law. The legal system is based on the English common law, largely influenced by Malawi's history as a former British Colony. Malawi follows a presidential system of government comprised of three arms: (a) the executive, including the President, Vice-President, and Cabinet Ministers, (b) the legislature, and (c) the judiciary.

Malawi implements its obligations under the Convention through a variety of laws, principally: the Corrupt Practices Act (CPA), the Penal Code (PC), the Criminal Procedure and Evidence Code (CPC), the Money Laundering, Proceeds of Serious Crimes and Terrorist Financing Act (AMLA), the Extradition Act and the Mutual Legal Assistance in Criminal Matters Act (MLACMA).

The institutions most relevant to the fight against corruption are: the Anti-Corruption Bureau (ACB) the Attorney General, the Director of Public Prosecutions (DPP), the Police and the Financial Intelligence Unit (FIU). Other relevant stakeholders include the judiciary, parliamentarians, civil society, the private sector and the media. Malawi has also created the Office of the Director of Public Officers' Declarations under the Public Officers (Declaration of Assets, Liabilities and Business Interest) Act, 2013.

2. Chapter III: Criminalization and law enforcement

2.1. Observations on the implementation of the articles under review

Bribery and trading in influence (arts. 15, 16, 18 and 21)

The term, "public officer" is defined in the CPA (section 3), while the PC contains a definition of "persons employed in the public service" (section 4); however, not all categories of persons enumerated in the Convention are covered. Most notably, the CPA definition is limited to members of Government and other statutory bodies.

Active and passive bribery of public officials are criminalized principally in sections 24 and 25 of the CPA and section 90 of the PC. However, acts of indirect bribery are not specifically covered in the CPA provisions, as in the case of other corruption offences (e.g., section 25B).

Bribery of foreign public officials and officials of public international organizations is not criminalized.

Trading in influence is not criminalized in accordance with article 18 of the Convention, although relevant provisions are contained in sections 25(2) and 27(4) of the CPA.

Bribery in the private sector is criminalized in sections 26 and 27 of the CPA.

Money-laundering, concealment (arts. 23 and 24)

Money-laundering is criminalized (AMLA, section 35). The money-laundering offence is applied to “serious crimes”, defined as offences punishable by at least 12 months’ imprisonment, which covers all offences established in accordance with the Convention as predicate crimes (AMLA, section 2, definitions of “proceeds of crime” and “serious crime”). Predicate offences include offences committed both inside and outside Malawi, subject to dual criminality (AMLA, section 2, “proceeds of crime”).

Malawi applies self-laundering (Criminal Case No. 14 of 2013, *The Republic vs. Maxwell Namata and Luke Kasamba* (unreported)).

Concealment is criminalized in section 35 of AMLA and sections 328 and 329 of the PC.

Embezzlement, abuse of functions and illicit enrichment (arts. 17, 19, 20 and 22)

Malawi has criminalized the theft of property by public officials (PC, section 283). Certain aspects of misappropriation and diversion of property are also captured by the offence of misuse of public office (CPA, section 25B). Third-party benefits and the indirect commission are not covered under section 283 PC. An evidentiary presumption further provides that, in the absence of a satisfactory explanation by a public official charged with theft of any “sudden or substantial enrichment of that person, or of any member of his family or household”, the court shall take into consideration the absence of such explanation in determining whether the accused is guilty of theft (PC, section 283).

Malawi has partially criminalized the abuse of functions (sections 25A to 25D and 28 CPA, sections 95 and 92 PC). However, omissions to act are not included.

Illicit enrichment is criminalized (CPA, section 32).

Stealing of property by directors or officers of companies is criminalized in section 287 PC. However, misappropriation and other diversion, as well as the indirect commission and third-party benefits are not covered. Moreover, the offence does not apply to all private sector employees or persons who work “in any capacity, for a private sector entity,” as per article 22 of the Convention.

Obstruction of justice (art. 25)

Inducing false testimony or interfering in the giving of testimony or the production of evidence in a proceeding is criminalized under sections 101, 107, 109 and 113 PC.

Obstruction of law enforcement officers (in particular ACB and the police) is a serious problem in Malawi. Relevant offences are found in sections 13 and 17 CPA (in relation to ACB members), section 109 PC (obstructing justice), section 113 PC (judicial proceedings) and section 119 PC (court officers). However, the penalties for these offences are not considered high enough to be dissuasive and to protect officials and enforcement is lacking.

Liability of legal persons (art. 26)

Only the AMLA contains explicit provisions regarding the criminal liability of legal persons and establishes corresponding penalties (sections 35(3) and 36(3)).

While the General Interpretation Act includes legal persons in the definition of “person”, thus covering the relevant term in the CPA, there is no specific reference in the CPA to penalties for legal persons. A bill to amend the CPA in this regard was submitted by ACB to the Ministry of Justice in 2014.

Malawi has also established the civil liability (under common law principles) and some forms of administrative liability of legal persons, in particular in relation to blacklisting, debarment and revocation of licences. However, no comprehensive regime of liability exists.

The penalties for legal persons (e.g., K10 million (approx. US\$ 13,940) and loss of business for money-laundering) are not considered sufficiently effective, proportionate and dissuasive.

Participation and attempt (art. 27)

Participation and attempt are criminalized (section 35 CPA), the AMLA (sections 35(1)) and 36(2)) and the PC (sections 401 and 404). Mere preparation is not an offence.

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)

Principal and additional penalties generally take into account the gravity of offences. However, the financial penalties for money-laundering for individuals (K2 million (approx. US\$ 2,788) and legal persons (US\$ 13,940) are insufficient. Sentencing guidelines had been under development for more than five years preceding the country visit.

Malawi has established an appropriate balance between immunities and the possibility of investigating, prosecuting and adjudicating offences. Only the President enjoys criminal immunity during his term of office (art. 91, Constitution). A former President was under investigation at the time of review. Functional immunities are established for certain public officials (e.g., art. 60 Constitution in relation to parliamentarians, as well as for ACB and FIU officials in sections 22 CPA and 23 AMLA).

The ACB prosecutes offences under Part IV of the CPA with the consent of the DPP, which may not be unreasonably withheld and is subject to safeguards (section 42 CPA). Section 10 CPA mandates the ACB to prosecute offences under the Act subject to the DPP’s directions. The DPP enjoys broad discretion to institute and withdraw prosecutions (art. 99 Constitution, sections 76-82 CPC). While there are no prosecution guidelines, prosecutors and the DPP are subject to codes of conduct.

The Bail (Guidelines) Act provides bail conditions that take into consideration the need to ensure the presence of the defendant in criminal proceedings.

The Prisons Act provides for the possibility of remission of sentences (section 107). Malawi has further established a Committee on Presidential Pardons which recommends convicted persons for parole to the President.

The Malawi Public Service Regulations provide for interdiction of public officials accused of committing offences (Regulation 3:110). Depending on the offence suspected to be committed, the official can be removed or suspended with full, half or no payment. If the official is found not guilty, he will be reassigned to his duties with compensation.

Section 40 of the CPA provides for the interdiction of persons convicted of corruption offences from holding public office, including in State-owned enterprises.

The Prisons Act promotes the reintegration into society of persons convicted of criminal offences (part XI). The Malawi Prison Service is responsible for implementing the respective provisions and facilitates, inter alia, the provision of employment, education, training and vocational skills.

The DPP has issued Guidelines for plea bargaining in cases of serious or complex fraud, which also govern the prosecutor's role in issuing recommendations regarding sentencing. The Guidelines aim to encourage offenders to cooperate with law enforcement in exchange for the possibility of receiving a reduced sentence. Immunity from prosecution is not established.

Protection of witnesses and reporting persons (arts. 32 and 33)

Apart from temporary protection measures available during criminal proceedings, Malawi has not established a comprehensive regime for the protection of witnesses and experts. Witness protection is an issue in corruption investigations and prosecutions, which have led to the refusal of witnesses to testify and the loss of evidence.

Basic protections (section 51A CPA) ensure confidentiality of the identity for reporting persons. However, protections against retaliation or unjustified treatment are not established.

Freezing, seizing and confiscation; bank secrecy (arts. 31 and 40)

Malawi has implemented measures to ensure the confiscation of proceeds and instruments of crime (section 30 PC, section 37 CPA, sections 48, 53 and 61 AMLA). Pecuniary penalty orders provide for the possibility of value-based confiscation (sections 48 and 61 AMLA). However, in practice, the restitution of property following an offender's admission of guilt in effect bars the further investigation of the criminal case.

Malawi has implemented measures to trace, freeze and seize goods and properties during investigation proceedings (sections 39, 69, 79, 80, 86 AMLA, sections 23, 23A, 36A CPA). Under the CPA, decisions on the freezing and seizing of assets are taken by the judiciary for a period of up to three months, subject to renewal. In addition, the ACB and FIU have powers to administratively freeze assets/transactions for 90 and 5 working days, respectively. Section 86 AMLA further provides for 6-month freezing, which can be extended under section 88 of the Act.

Malawi has not regulated the administration of frozen, seized or confiscated property. A Bill to amend the CPA would provide for the establishment of a dedicated asset management entity.

Bank secrecy is not an obstacle to the investigation and prosecution of corruption-related offences. The ACB has administrative powers to access and seize bank and financial records (section 11 CPA) and to FIU (sections 11 and 44 AMLA). Such powers have been effectively exercised in corruption investigations. Production orders (sections 94-95 AMLA) and monitoring orders (sections 101-102 AMLA) may be obtained. Relevant measures in relation to the FIU are also found in sections 11 and 28 AMLA.

Insufficient capacity in the relevant institutions to confiscate, trace, freeze and seize assets precludes the effective recovery of criminal proceeds.

Statute of limitations; criminal record (arts. 29 and 41)

There is no prescription period for criminal cases in Malawi. The time limits in the CPC (sections 261 and 302A) of 12 months to start the prosecution once the complaint arises and to complete the case within 12 months from the date the trial commenced are not applicable to most corruption cases as they cover offences punishable by under three years.

Courts can consider previous foreign convictions during sentencing under the general powers of the courts.

Jurisdiction (art. 42)

Malawi exercises territorial jurisdiction, except for offences committed on board vessels and aircraft (Convention art. 42(1)(b)). Jurisdiction is established even if the offence was committed “partly within and partly beyond Malawi” (CPC, section 66).

Malawi has established in personam jurisdiction, except over offences committed against the State or against nationals. Jurisdiction over participatory acts to money-laundering committed wholly outside Malawi is not specified.

The nationality of an alleged offender is not a ground to refuse extradition (section 6, Extradition Act).

Consequences of acts of corruption; compensation for damage (arts. 34 and 35)

The Public Procurement Act provides for the debarment of bidders from government contracts, as well as for the cancellation of contracts in cases where corruption is involved (section 20). Moreover, the cancellation of such contracts is a general principle under the common law.

Victims may initiate legal proceedings to obtain compensation for damages in civil proceedings and may also assume the role of private prosecutor in accordance with the CPC.

Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)

The ACB is mandated to prevent, investigate and prosecute corruption and related activities (CPA, Part III) criminalized under the CPA, the PC and the AMLA. The budget of the Bureau is appropriated from the Consolidated Fund (CPA section 4(2)). The Director is appointed and removed by the President subject to confirmation by the Public Appointments Committee (CPA, sections 5 and 6), and

the Director must also report to the President and the Minister of Justice on the affairs of the Bureau (CPA section 4(4)). A lack of legal and operation independence, human and material resources inhibit the effective functioning of the Bureau. The ability to attract and retain qualified staff is a challenge for the ACB and across agencies.

Other relevant institutions in the fight against corruption could benefit from capacity enhancements, including the DPP, police, Revenue Authority, FIU and the judiciary.

Malawi law enforcement institutions engage in formal and informal cooperation. ACB has concluded memorandums of understanding with several public agencies (such as the FIU) and private companies. In practice, there is cooperation among the ACB, the fiscal fraud unit in the police, as well as the FIU and Revenue Authority. However, inter-agency coordination could be enhanced, in particular in regard to money-laundering cases.

There is a duty by public officials to report corruption (section 36, CPA) and a duty to cooperate in ACB investigations (sections 12A, 13 and 49A, CPA).

Malawi's national anti-corruption strategy provides for cooperation between public institutions and the private sector in preventing corruption. The role of the FIU in ensuring money-laundering compliance in the private sector is also noted.

ACB operates a hotline (not free of charge) and a website for corruption reporting.

2.2. Successes and good practices

- Section 283 PC (Stealing by public servants) includes an evidentiary presumption conducive to the investigation and prosecution of cases (art. 17).
- ACB has signed a number of memorandums of understanding with public and private entities, which assist the private sector in establishing preventive measures and compliance programmes (art. 39).
- There is no prescription period for criminal cases (art. 29).

2.3. Challenges in implementation

- Continue to strengthen data collection systems to identify and track corruption-related cases that are investigated, prosecuted and adjudicated across agencies; consider publishing this information regularly in annual reports and on the ACB website.
- Adopt a comprehensive definition of public officials in line with article 2 of the Convention.
- Ensure that acts of indirect bribery are covered (art. 15).
- Adopt an offence bribery of foreign public officials and officials of public international organizations and consider criminalizing passive foreign bribery (art. 16).
- Criminalize embezzlement, misappropriation and other diversion of property in line with the Convention (art. 17).
- Consider criminalizing trading in influence (art. 18).

- Consider amending the offence of abuse of office to cover the failure to perform (art. 19).
- Consider amending the offence of “Stealing of property by directors or officers of companies” to cover misappropriation and other diversion, indirect acts and third-party benefits, and to cover all private sector employees, in accordance with the Convention (art. 22).
- Priority should be given to developing systems to prevent obstruction of justice and law enforcement officials, including by enhancing penalties for obstruction of justice and ensuring effective enforcement (art. 25(b)).
- Comprehensively regulate the liability of legal persons (criminal and administrative). Specify the criminal liability of legal persons for Convention offences in the CPA, including the associated penalties. Also ensure that there are no restrictions in the ability to render mutual legal assistance in relation to offences for which legal persons may be held liable (arts. 26, 46(2)).
- Ensure that legal persons are subject to effective, proportionate and dissuasive penalties for corruption and money-laundering offences, which are clearly stipulated in the law (art. 26).
- Enhance financial penalties for individuals and entities for money-laundering. Prioritize the adoption of sentencing guidelines (art. 30(1)).
- Consideration could be given to establishing relevant safeguards in relation to the DPP’s broad discretion to prosecute, for example criteria for withholding prosecutions (art. 30(3)).
- Ensure that the practice of restitution of property does not preclude the further investigation and prosecution of the criminal case (art. 31).
- Establish a dedicated structure for the administration of frozen, seized or confiscated property in accordance with the Convention (art. 31(3)).
- Enhance capacity (including through training and information exchange) of relevant institutions in the confiscation, tracing, freezing and seizure of assets. Consideration could also be given to establishing a framework whereby the recovery of proceeds can be used to finance the operations of relevant law enforcement agencies, based on an equitable distribution of proceeds across institutions (art. 31).
- Establish, as a matter of priority, necessary measures and an institutional framework for the effective protection of witnesses, experts, and victims, as well as offenders who cooperate with law enforcement authorities, which encompass their physical protection and related evidentiary rules. Further, consider adopting measures and systems for the effective protection of reporting persons (arts. 32, 33 and 37(4)).
- Strengthen the legal and operational independence as well as material, human and training resources of the ACB and other law enforcement institutions (DPP, police, Revenue Authority, FIU); political will is needed to enhance the conditions of service across agencies to allow them to attract and retain qualified staff; there is also a need to strengthen capacity in the judiciary (art. 36).

- Enhance coordination among law enforcement agencies in relation to corruption and in particular money-laundering offences (art. 38).
- Continue to invest in outreach, awareness-raising and education on matters of corruption. Consider extending measures to facilitate the reporting of corruption to the national authorities (art. 39(2)).
- Extend jurisdiction to offences committed on board vessels and an aircraft (art. 42(1)(b)) and consider establishing jurisdiction over offences committed against nationals or the State, as well participatory acts to money-laundering committed outside Malawi (art. 42(2)).

2.4. Technical assistance needs identified to improve implementation of the Convention

- Malawi indicated that it would require technical assistance, including capacity-building of the ACB and other law enforcement institutions, including the need for dedicated training of investigators, prosecutors, the judiciary and the FIU, on anti-corruption and related activities.

3. Chapter IV: International cooperation

3.1. Observations on the implementation of the articles under review

Extradition (art. 44)

Extradition is governed by the Extradition Act and 7 bilateral extradition treaties. Malawi can extradite persons to designated countries and territories (currently, 25), subject to such conditions, exceptions, adaptations or modifications as the Minister of Justice may specify (Section 3, Extradition Act). Malawi can also extradite persons in the absence of a treaty on conditions of reciprocity. Malawi recognizes the Convention as a legal basis for extradition.

Extradition is subject to dual criminality and a minimum imprisonment term of one year, subject to the terms of extradition treaties. In addition, the Extradition Act contains a list of extraditable offences, which does not cover all offences under the United Nations Convention against Corruption. Extradition is limited to the extent that not all offences established under the Convention have been criminalized.

Simplified extradition arrangements are available under the London Scheme, but no specific measures are in place to expedite extradition procedures and simplify evidentiary requirements.

Requests are received through diplomatic channels and transmitted to the DPP, through the Attorney General. There have been few completed extradition proceedings, and no extradition cases related to corruption to date.

Political offences are exempted from extradition under Section 6 of the Extradition Act. Only one extradition request has been refused to date (in a homicide case not related to corruption). Malawi recognizes grounds for refusal in line with the Convention. Extradition may not be refused under Section 6 on the grounds of the nationality of the requested person. Malawi has never refused the extradition of a national.

Malawi applies the fair treatment and due process protections of its domestic legislation in extradition proceedings. Issues of fair treatment or discriminatory purpose have not been invoked to date in corruption cases.

Transfer of sentenced persons; transfer of criminal proceedings (arts. 45 and 47)

Malawi has concluded one prisoner transfer agreement with Zambia which is also applicable to corruption. Negotiations for a scheme on prisoner transfer in the Southern African Development Community (SADC) are underway.

There is no law or practice on the transfer of criminal proceedings.

Mutual legal assistance (art. 46)

Malawi's Mutual Legal Assistance in Criminal Matters Act (MLACMA) provides the legal basis for mutual legal assistance but is limited in application to Commonwealth countries. Mutual legal assistance can also be provided on the basis of bilateral and multilateral treaties and on conditions of reciprocity in the absence of a treaty.

Mutual legal assistance is subject to a mandatory requirement of dual criminality (Section 18(2)(d)), which is not alleviated where the request involves non-coercive assistance. Accordingly, mutual legal assistance is limited to the extent that not all offences established under the Convention have been criminalized and subject to the terms of Malawi's treaties. It was noted by Malawian authorities that the strict application of the dual criminality requirement would seem to run counter to Section 18(9) of the MLACMA, according to which assistance may not be refused on the ground that an offence is not within the scope of an international convention imposing an obligation to afford mutual legal assistance relating to such offence.

Malawi may render assistance for a variety of investigative and judicial purposes and bank secrecy is not an obstacle to the provision of assistance. There are no guidelines or provisions governing time frames for executing mutual legal assistance requests.

Malawi subscribes to the Commonwealth (Harare) Scheme on Mutual legal assistance.

Requests are received through diplomatic channels and transmitted to the DPP, through the Attorney General, who is specified as the central authority under subsidiary legislation, the Mutual Assistance in Criminal Matters (Designation of Authority) Order. Once a request is received, the DPP assesses compliance of the request with the Act. Malawi has not notified the United Nations of its central authority and accepted language for mutual legal assistance.

Malawi may refuse mutual legal assistance on the ground that discretionary conditions imposed by the Minister under Section 3(2) are not met or because the provision of assistance would present an excessive burden on its resources (Section 18(3)(c) and (d)). In practice, there have been few completed mutual legal assistance requests, and Malawi has not refused assistance in corruption-related matters to date.

Confidentiality restrictions are established, but a limitation on the use of information received through mutual legal assistance has not been adopted.

Malawi may consult with requesting States before refusing mutual legal assistance (Section 18(8) MLACMA) and is required under Section 18(6) to provide reasons for refusing assistance, unless the request involves the temporary transfer of prisoners for purposes of mutual legal assistance (Section 18(7)).

The safe conduct of transferred persons is only addressed in the case of outgoing requests made by Malawi (Section 22 MLACMA).

The possibility of conducting hearings via videoconference for purposes of mutual legal assistance is not regulated.

The MLACMA and subsidiary legislation do not regulate the ordinary expenses of executing requests.

Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49 and 50)

Malawi's law enforcement authorities cooperate through the Southern African Regional Police Chiefs Cooperation Organization (SARPCCO) and INTERPOL. Malawi is also a member of the Southern African Development Community (SADC), the Eastern and South African Anti Money Laundering Group (ESAAMLG) and the Asset Recovery Inter-Agency Network of Southern Africa (ARINSA).

The ACB is a member of the SADC Anti-Corruption Committee (SACC) and the African Association of Anti-Corruption Authorities (AAACA).

Joint Permanent Consultative Commissions provide a platform for law enforcement cooperation among SADC countries. Some memoranda of understanding are in place (e.g. FIU and the police), and the FIU also cooperates through the Egmont Group. Malawi considers the Convention as a basis for law enforcement cooperation.

Malawi participates in joint investigations on a case-by-case basis in the absence of formal legal or administrative measures. The use of special investigative techniques is regulated in subsidiary legislation (standing orders) and presents legal and practical challenges.

3.2. Successes and good practices

- The exchange of personnel for investigative and training purposes, in particular with neighbouring countries, helps to strengthen law enforcement cooperation at the international level.

3.3. Challenges in implementation

The following steps could further strengthen existing anti-corruption measures:

- Continue to invest in the development of statistics and capacity of authorities for international cooperation (arts. 44, 46 of the Convention).
- Revise the Extradition Act, including the list of extraditable offences, and treaties to ensure all offences under the Convention against Corruption are extraditable (art. 44(4)).

- Specify the conditions on which extradition may be granted, and consider adopting extradition guidelines to provide greater legal certainty to requesting States (art. 44(8)).
- Adopt measures to expedite extradition procedures and simplify evidentiary requirements (art. 44(9)).
- Provide that consultations be held before extradition is refused, and before mutual legal assistance is postponed or refused, including through the adoption of guidelines or regulations, as appropriate (arts. 44(17) and 46(26)).
- Extend the application of MLACMA to non-Commonwealth countries (art. 46).
- Alleviate the strict dual criminality requirement, in particular to ensure that non-coercive mutual legal assistance is provided in the absence of dual criminality, and harmonize the applicable provisions with Section 18(9) of MLACMA (art. 46(9)).
- Revisit the grounds for refusal provided in Section 18(3)(c) and (d) of the MLACMA (art. 46(21)).
- Adopt a provision on the limitation of use of information received through mutual legal assistance, for greater legal certainty (art. 46(19)).
- Ensure that requesting States are notified of any reasons for refusal, also in cases involving requests for the temporary transfer of prisoners for purposes of mutual legal assistance (Section 18(7) of MLACMA) (art. 46(23)).
- Consider adopting mutual legal assistance guidelines and provisions governing timeframes for executing mutual legal assistance requests (art. 46(24)).
- Specify the safe conduct of persons transferred pursuant to an incoming mutual legal assistance request received by Malawi (Section 22 of MLACMA) (art. 46(27)).
- Specify in MLACMA that ordinary expenses of executing requests are borne by the requested State (art. 46(28)).
- Provide the notifications under paragraphs 13 and 14 of article 46.
- Consider regulating the transfer of criminal proceedings (art. 47).
- Continue to strengthen law enforcement cooperation at the international level (art. 48).
- Regulate the use and admissibility of evidence derived from special investigative techniques (art. 50).

3.4. Technical assistance needs identified to improve implementation of the Convention

- Malawi indicated that it would require technical assistance, including legal advice and capacity-building, on extradition, mutual legal assistance and special investigative techniques.