

PUTTING THE TOOLS TO GOOD USE

AN ANALYSIS OF LEGISLATION THAT
MAY BE USED FOR COMBATTING
WILDLIFE CRIME IN MALAWI



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ABBREVIATIONS AND ACRONYMS

INTERNATIONAL CONVENTIONS AND LEGISLATION

CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMS	Convention on Migratory Species
UNCAC	United Nations Convention Against Corruption
UNTOC	United Nations Convention on Transnational Organised Crime
WFCAT	Wildlife and Forest Crime Analytic Toolkit

INTERNATIONAL ORGANISATIONS

FAO	Food and Agricultural Organisation
ICCWC	International Consortium for Combating Wildlife Crime
ITTO	International Tropical Timber Organisation
IUCN	International Union for the Conservation of Nature
SADC	South African Development Community
UNODC	United Nations Office on Drugs and Crime

NATIONAL LEGISLATION

FCMA	Fisheries Conservation and Management Act
NPWA	National Parks and Wildlife Act

NATIONAL ORGANISATIONS

IACCWC	Inter-Agency Committee on Combating Wildlife Crime
MPS	Malawi Police Service
WCIU	Wildlife Crime Investigation Unit

OTHER

IELP	International Environmental Law Project
LWT	Lilongwe Wildlife Trust
MLA	Mutual Legal Assistance
MOU	Memorandum of Understanding

FOREWORD

It has been well established that wildlife trafficking is a multi-billion dollar illicit industry that is decimating Africa’s animal populations – including iconic species such as the African elephant and less known species such as pangolins. In 2016, Malawi was identified a principal collection, distribution and transit hub for wildlife trafficking in sub-Saharan Africa. At that time, the risk-reward ratio for wildlife criminals was extremely high due to geography and available transit routes, logistics, corruption, and weak legal institutions and limited application of laws.

Since then, the Malawian Government recognized that organized crime syndicates have been exploiting the country as a regional hub for wildlife trade, particularly ivory trafficking. In response, in the past few years, the government, with a number of partners, has worked to reduce the poaching and trafficking of protected animals and their body parts in Malawi. The work has focused on strengthening all parts of the judicial chain – from legislation (with the enactment of the National Parks and Wildlife (Amendment) Act of 2017 with associated regulations; the training and mentoring of all personnel along the judicial chain – from investigators and prosecutors to members of the judiciary.

This publication is part of these efforts and a specific programme that is working to (i) enhance the working knowledge of all key people working to combat wildlife crime in the country of the wider wildlife crime legislative framework and (ii) on the basis of an review and analysis, develop a comprehensive reform package to update Malawi’s legislative and regulatory framework to meet ICCWC recommendations for combatting wildlife trafficking. This will contribute to improve law enforcement and more arrests, convictions and seizures will mean greater perceived risk by criminals.

Brighton Kumchedwa
Director, Department of National Parks and Wildlife



EXECUTIVE SUMMARY

Malawi takes a clear no-tolerance stand in the fight against wildlife trafficking, as reflected in recent amendments to the National Parks and Wildlife Act (NPWA) which tighten the prohibitions in the Act, effectively prohibit hunting, and increase penalties such that wildlife-related offences are now classed as “serious crimes.” This analysis builds on Malawi’s recent success in this regard and looks comprehensively not just at the NPWA but also at forestry and fisheries legislation and how this suite of wildlife legislation taken as a whole works with other relevant pieces of legislation. The analysis draws on international best practices and standards as established by the Wildlife and Forest Crime Analytic Toolkit, the Indicator Framework for Combating Wildlife and Forest Crime, and the National Legislation Project of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). This evaluation builds on these methodologies by creating rubrics that match desired legislative provisions with the various recommendations, desired outcomes, and assessment indicators. The evaluation also draws on consultations with experts in Malawi, a desk study, and a verification workshop in which recommendations were vetted and prioritised.

This evaluation also builds on and supports other work to combat wildlife crime in Malawi. In particular, it contextualises the work in reference to international best practices. Recent developments in Malawi, in addition to revisions of the NPWA, include the development and adoption of wildlife crime sentencing guidelines, the creation of a “Handbook for Law Enforcement Agencies on the Use of Legislation in Wildlife Crime Prosecutions,” and the introduction of trainings for investigators, prosecutors, and magistrates to ensure that the law is used to the full extent of its potential. This evaluation looks more closely at how revisions to existing legislation or new legislation would act to close loopholes and gaps as a buttress for the significant work already taking place in Malawi to scale up efforts to combat wildlife crime.

In general, it was observed that Malawi has a strong legislative basis for combating wildlife trafficking. Although some amendments are necessary to fully implement best practices and standards, the charges currently available to prosecutors are comprehensive. Of perhaps greatest importance, adoption of new CITES regulations must be prioritised and expansion of extradition and mutual legal assistance opportunities must be considered. The table below provides a summary of the priority recommendations.

SUMMARY OF PRIORITY RECOMMENDATIONS

Clarify overlapping jurisdictional scope and authority amongst Forestry Act, NPWA, and Fisheries Act

- Involve Department of National Parks and Wildlife and other experts in wildlife crime in drafting of Forestry Act Amendments.
- Consider development of either a formal or informal policy across DNPW, Department of Forestry, and Department of Fisheries regarding enforcement of wildlife crime.
- Creation of a small task force of the three relevant departments for information exchange and policy implementation; the task force might also include customs and police.

Harmonise export and import requirements with CITES regulations

- Develop and issue policy guidance for the import, export, and re-export of wildlife, forestry, and fisheries products to ensure that the rules and regulations are clear for constituents.
- As legislation is up for review, including upcoming review of Forestry Act, consider eliminating duplicative rules and harmonising import, export, and re-export rules with new CITES regulations.
- Train customs and police officers who staff border posts and roadblocks on import/export rules and investigatory techniques.

Prohibit the violation of permit conditions in Forestry Act and NPWA

- Take into consideration during Forestry Act revisions
- Revisit during any upcoming reviews of the NPWA and, in the short term, consider inclusion of a provision in new CITES regulations.

Criminalise the use and attempted use of forged or fraudulent permits and licences

- Take into consideration during Forestry Act revisions
- Revisit during any upcoming reviews of the NPWA and, in the short term, consider inclusion of a provision in new CITES regulations.

Minor amendment to and expedited adoption of CITES Regulations

- Consider recommendations above as CITES Regulations are finalised and ensure that final versions clearly provide all relevant authorities for making necessary permit findings.

Clarification regarding application of pre-Convention exemption

- Develop clear policy guidance regarding pre-Convention specimens.
- Provide training materials and sessions to local communities where wildlife is culturally significant and worn or collected.
- Include training on the law as it applies to pre-Convention specimens in judicial and prosecutors' trainings.

Make certain Customs & Excise Act violations “serious crimes”

- Consider amendments to the Customs & Excise Act that focus on increasing penalties.

Clarity regarding disposal of confiscated specimens

- Consider amendments to the Customs & Excise Act regarding confiscated specimens or development of a policy or new regulations that harmonises the various approaches to the confiscation and forfeiture of wildlife specimens by all relevant enforcement officers.
- It is important that this policy has legal status, either as a formal policy or by adoption of new regulations, to avoid legal challenges.

Special Investigatory Techniques

- Ensure that the law supports the use of various investigatory techniques.
- Ensure that the results of use of investigatory techniques are admissible in court.

Consider expanding asset forfeiture and recovery provisions

- Consider development of training materials for prosecutors and the judiciary on charging poaching and other wildlife crimes as money laundering in order to trigger asset forfeiture provisions of the Financial Crimes Act so that recovery of proceeds, not just of equipment and specimens, is a possibility.
- Amend relevant wildlife legislation to provide for asset forfeiture.

Criminalise bribery of a foreign public official

- Add, to either the Criminal Code or the Anti-Corruption legislation, a provision that criminalises bribery of a foreign official
- Train relevant prosecutors and others regarding the value of charging offences that trigger UNTOC or UNCAC.

Adoption of whistle-blower protection legislation

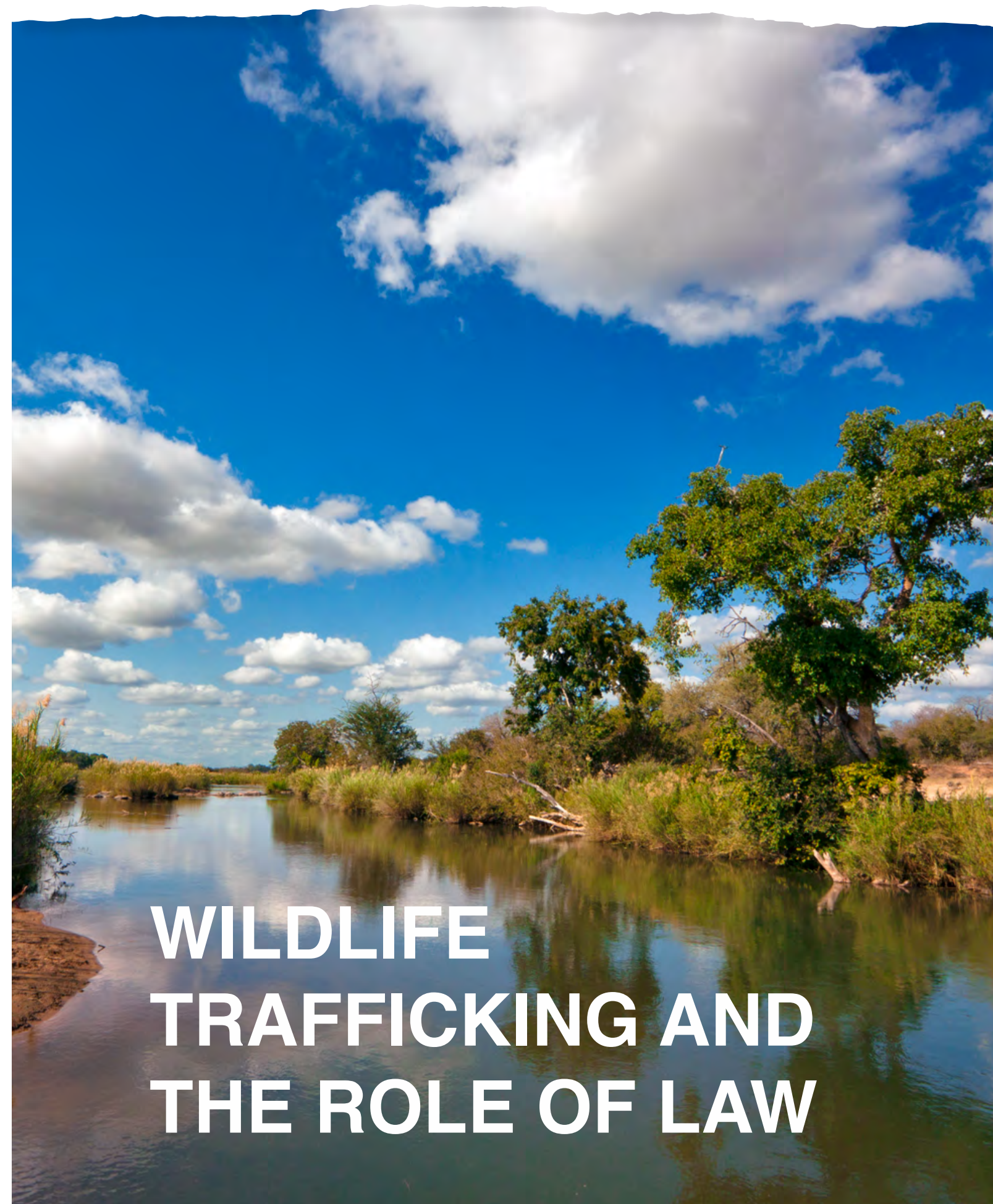
- Build Parliamentary support for prioritising and adopting whistle-blower protection legislation.

Advocate for inclusion of wildlife offences in SADC Protocol on MLA

- Secure ratification of the SADC MLA Protocol by Malawi
- Develop a policy paper outlining importance of wildlife crime and MLA as a SADC priority and clarifying region-wide MLA rules and opportunities
- Build political will for amendments to SADC Protocol on MLA
- Secure adoption of amendments.

Amend Harare Scheme and domestic legislation on extradition to cover wildlife crime

- Draft updated extradition legislation that implements the Harare Scheme but that also clearly expands scope beyond Commonwealth countries
- Build parliamentary support for prioritisation and adoption of updated extradition legislation.



WILDLIFE TRAFFICKING AND THE ROLE OF LAW

As recognised repeatedly by internationally agreed documents, a strong framework for combating illegal wildlife trafficking through the supply, transit, and demand chain requires a robust suite of synergistic laws, policies, and enforcement strategies at domestic, regional, and international levels. For example, the Declaration delivered as the outcome from the London Conference on the Illegal Wildlife Trade comprehensively addresses the relationship between addressing wildlife trafficking and the role of law, calling on signatories to implement their international obligations in national law, adopt or amend domestic legislation, and cooperate fully across borders on enforcement and prosecution of wildlife trafficking offences. It also calls on signatories to tackle the issue of wildlife trafficking through multidisciplinary enforcement and synergistic legal actions, as is often employed in cases of organised crime. Similarly, UN resolutions and other international statements on illegal wildlife trade recognise the importance of assessing wildlife crime laws through as wide a lens as possible so that all potential tools are deployed in an efficient manner to effective ends.

This evaluation also builds on and supports other work which is being done to combat wildlife crime in Malawi. In particular, it contextualises the work in reference to international best practices. In 2017, Malawi began revising and updating regulations, starting with the revision of the National Park and Wildlife Act. These amendments increased penalties for wildlife offences, including possessing, buying, selling, exporting wildlife products, with the aim that these penalties would have a deterrent effect. Between December 2017 and December 2018, 15 regulations implementing the NPWA were introduced or amended, with some previous regulations published in 1994 and 2011 remaining valid. A booklet gathering all laws related to

implementation of the NPWA, including those which have been recently amended as well as older regulations, has been finalised. In May 2018 the “*Sentencing guidelines for wildlife crime in Malawi courts*” were adopted and signed by the Chief Justice. These guidelines have been developed to support the judiciary in determining appropriate sentences for wildlife crime. The guidelines outline the purpose of sentencing and provide a detailed guide to the penalty provisions in the NPWA. The Appendices provide a stepwise sentencing template and a list of potential aggravating and mitigating factors for wildlife offences. The recently created “Handbook for Law Enforcement Agencies on the Use of Legislation in Wildlife Crime Prosecutions” has been used in various training sessions with investigators and prosecutors. Regular case review meetings are organised in collaboration with the judiciary to ensure that the wildlife case law is progressively consistent.

These efforts ensure that the law is used to the full extent of its potential. This evaluation looks more closely at how revisions to existing legislation or new legislation would act to close loopholes and gaps as a buttress for the significant work already taking place in Malawi to scale up efforts to combat wildlife crime.

INTERNATIONAL LAW

Several international treaties are key to addressing wildlife trafficking. Of primary importance is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). CITES establishes a permit system for international trade in listed species, which requires importing and exporting countries to make certain findings before granting a permit; for example, ensuring that a specimen of a species was legally acquired. The permit system functions as a means of distinguishing between legal and illegal international wildlife trade. Given the importance of domestic implementation to achieving the goal of preventing over-exploitation of species due to international trade, the treaty itself presents a number of requirements that must be met by domestic legislation or other administrative measures, such as penalising illegal trade.

The importance of CITES goes beyond its requirements for domestic legislation, however. In order to ensure robust accomplishment of CITES goals, the Parties have begun to focus their policy-making efforts on addressing various drivers and key elements of the illegal wildlife supply and demand chain. Some of these efforts are species-specific and others are more generalised. The Parties have either added to their agenda or are currently developing policies on corruption, demand reduction strategies, illegal internet trade, traceability, ensuring legal acquisition, and many other aspects of enforcement. As a result, CITES is a crucial forum for coordination and

collaboration in the fight against wildlife crime.

Additionally, the Parties have authorised the Secretariat to undertake a range of activities related to wildlife trafficking – most importantly, the CITES Secretariat, along with other essential actors in the international space, have created a platform, the International Consortium for Combating Wildlife Crime (ICWC), for discussing, designing, and promoting criminal justice solutions to the international wildlife trafficking epidemic. Members of ICWC include the CITES Secretariat, INTERPOL, the United Nations Office on Drugs and Crime, the World Bank, and the World Customs Organisation.

The CITES Secretariat, on behalf of CITES Parties, also has MOUs and relationships with the Lusaka Agreement Task Force, which focuses on combating wildlife trafficking in parts of Africa; the Food and Agricultural Organisation (FAO), which is extensively involved in fisheries management; and the International Tropical Timber Organisation (ITTO), which is dedicated to the sustainable management of tropical forests and the promotion of sustainable and legal timber trade. The MOU between CITES and ITTO recognises the importance of addressing illegal timber trade and creates a space through which mutual Parties could take specific, proactive steps to address illegal timber and forest product trade. The MOU with FAO does not mention the significant volumes of illegal fisheries trade, but the language is

sufficiently general for FAO and CITES to collaborate on the issue.

The Convention on Migratory Species (CMS), while not focused specifically on issues of wildlife trafficking, is an important treaty for those species which are placed in Appendix I, because to “take” an Appendix I species is generally prohibited, requiring Range State Parties to implement restrictions on hunting and other forms of harming individuals of such species through domestic legislation. The CMS Parties have recently launched a review of national legislation to ensure that domestic legislation meets the requirements of the treaty.

In addition to these multilateral environmental agreements, a number of treaties that were not designed for the purpose of species conservation have enormous potential to facilitate the fight against wildlife crime. In particular, the United Nations Convention on Transnational Organised Crime (UNTOC) introduces an array of benefits to the wildlife crime-fighting toolbox when wildlife crimes meet its definition of “serious crime,” for example transnational cooperation and collaboration.

While CITES creates the framework for discerning legal versus illegal wildlife trade, UNTOC provides the framework for international cooperation in the investigation and prosecution of wildlife offences and attendant criminal offences, such as participation in a criminal organisation, money laundering, obstruction of justice, and corruption, when these offences qualify as “serious crime.” A “serious crime” is defined as “conduct constituting an

offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.” Upon the commission of any “serious crime” or participation in a criminal organisation, money laundering, corruption, or obstruction of justice, the cooperative provisions of the Convention may be triggered. These provisions cover confiscations and seizures, extradition, mutual legal assistance, witness protection, law enforcement and investigation, and trainings and technical assistance.

The United Nations Convention Against Corruption (UNCAC) also provides a basis for transnational cooperation and collaboration, as well as a framework for establishing national anti-corruption laws and policies. UNCAC is a useful tool in the fight against wildlife trafficking because often corruption facilitates the illegal movement of wildlife across borders. UNCAC requires that Parties adopt anti-corruption policies and establish a body to implement them. Additionally, it requires Parties to criminalise various forms of corruption, including bribery, various forms of misappropriation, trading in influence, abuse of functions, and obstruction of justice. Similar to UNTOC, the Convention requires Parties to cooperate regarding extradition, mutual legal assistance, and various enforcement operations, including investigations. Furthermore, the Convention provides that Parties should cooperate on asset recovery.

DOMESTIC LEGISLATION

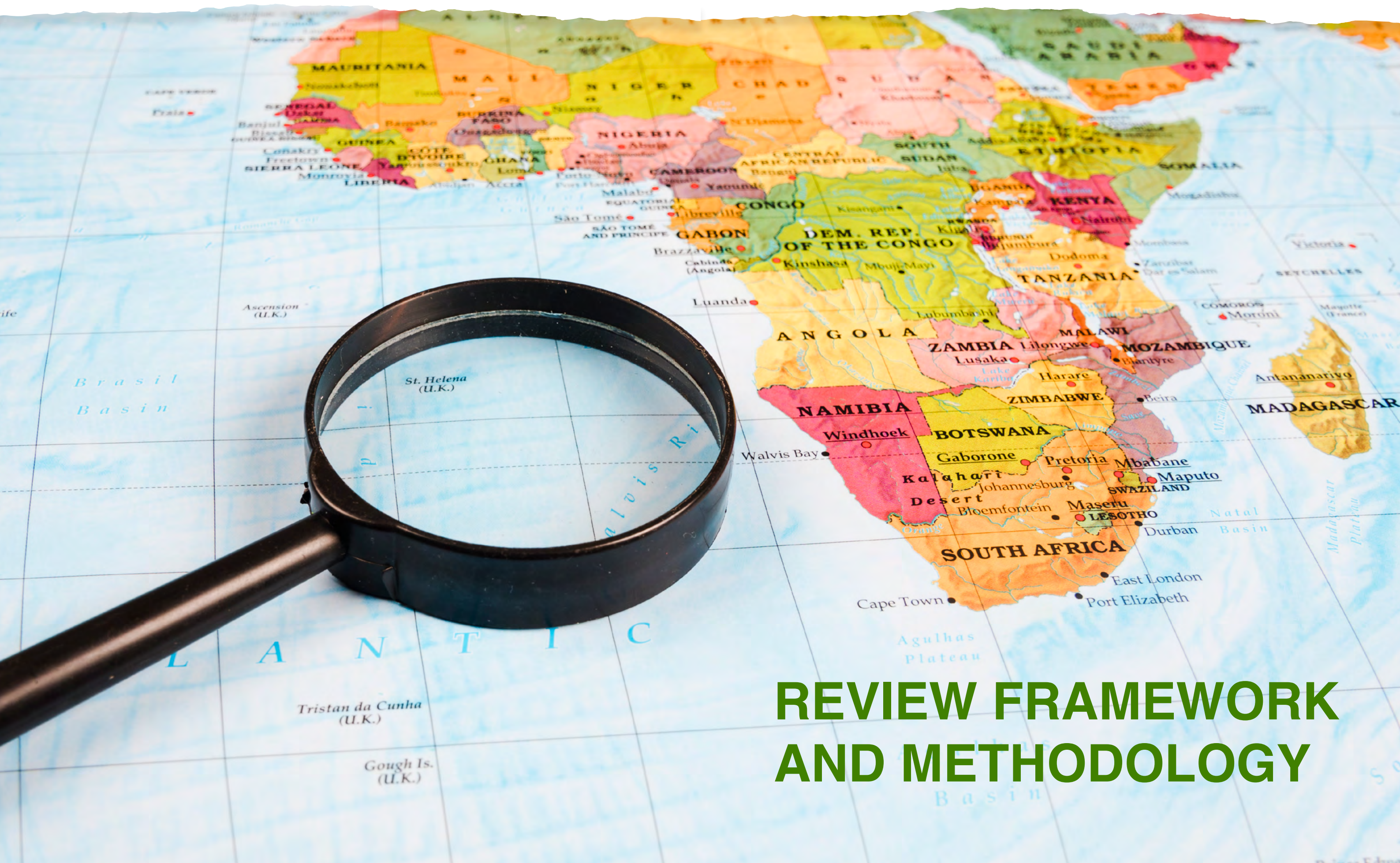
Domestic legislation is often necessary to implement international obligations and it has the potential to provide both an effective offense and an effective defence against wildlife trafficking. Offensively, legislation must provide species listings that are protective of priority species, such as those listed in the CITES or CMS Appendices, those listed as threatened or endangered on the IUCN Red List, and other high-value or targeted species. Any prohibitions or requirements deriving from international obligations must be given meaningful effect in domestic legislation, including “take” restrictions or permit requirements. Penalties must be sufficiently severe to act as a deterrent, and for those offences that warrant such status, penalties should meet the definition of “serious crime” under UNTOC. As described more fully below, “serious crimes” trigger a number of potentially useful avenues for

regional and international collaboration, enhancing enforcement and prosecutorial capacity. From a defensive perspective, adequate domestic legislation must provide comprehensive and synergistic authorities to relevant enforcement officers, including park rangers, customs officers, police, and fisheries officers, amongst others. Violations of relevant legislation should be offences and criminalised as appropriate. Wildlife crimes should serve as predicate offences for corruption, money laundering, and organised criminal activity charges. Conspiracy charges should be applicable to wildlife crime cases, and extradition and mutual legal assistance should be available for wildlife crime prosecutions. Additionally, the *mens rea* requirements of wildlife-related offences should be clear in order to help prosecutors understand the range of charges which may be brought and to discern the most appropriate for a case.

REGIONAL AGREEMENTS

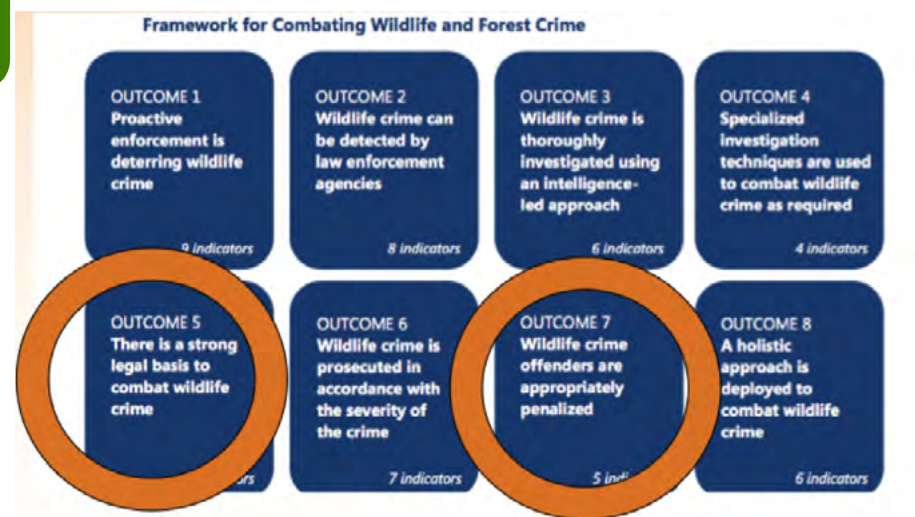
Regional agreements play a critical role in both species protection and enforcement. Regarding species protection, regional agreements provide an opportunity to set conservation standards which apply across international borders but which can be tailored specifically to priority species or priority needs within a defined region. Such agreements might focus on particular species, transboundary protected area networks, or broader environmental goals

that provide a framework for the development of further, more focused agreements. Regional agreements are also helpful in the context of enforcement. Regional agreements may be used to establish regional wildlife enforcement networks, or to agree to region-wide principles on corruption, extradition, mutual legal assistance, and other important enforcement matters.



REVIEW FRAMEWORK AND METHODOLOGY

Figure 1



ICCWC Indicator Framework Outcomes

Figure 2

OUTCOME 5 There is a strong legal basis to combat wildlife crime	28. National wildlife legislation
	The comprehensiveness of national legislative provisions for wildlife conservation, management and use, including international trade in protected species of wildlife.
	29. CITES legislation assessment
	The category in which CITES implementation legislation has been placed under the CITES National Legislation Project.
	30. Legal provisions for international cooperation
	The extent to which national provisions for international cooperation in criminal matters are applied to wildlife crime.
	31. Legal provisions to combat corruption
	The existence of provisions against corruption in national legislation that can be used in the investigation and prosecution of wildlife crime.
	32. Legal provisions to address organized crime
	The existence of national legislation for organized crime that can be used in the investigation and prosecution of wildlife crime.

ICCWC Indicator Framework, Outcome 5 Indicators

Figure 3

OUTCOME 7 Wildlife crime offenders are appropriately penalized	40. Available penalties
	The extent to which national legislation penalizes wildlife crime offences in a manner that reflects the nature and severity of the crime.
	41. Sentencing guidelines
	The existence of national guidelines for the sentencing of offenders convicted with wildlife crime.
	42. Judicial awareness
	The extent of awareness of wildlife crime among the judiciary and the appropriateness of the verdicts handed down.
	43. Legal provisions for asset forfeiture
	The existence of provisions for asset forfeiture and recovery in national legislation that can be applied to wildlife crime.
	44. Use of asset forfeiture legislation
	The use of asset forfeiture and recovery legislation in wildlife crime cases.

ICCWC Indicator Framework, Outcome 7 Indicators

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ANALYSIS

Figure 4



Legislation relevant to wildlife crime

The analysis below uses the aspects of the ICCWC Indicator Framework and the Wildlife and Forest Crime Analytic Toolkit relevant to domestic legislation in order to assess the extent to which Malawi's legislation meets these best practices. Malawi has made significant strides over the last several years to improve its wildlife legislation and regulations. The assessment that follows makes clear that the National Parks and Wildlife Act (NPWA) and the regulations recently promulgated or soon to be promulgated under its authority are germane to combating wildlife trafficking. Equally important and germane to combating wildlife trafficking are the Forestry and Fisheries Acts. Taken together, these three pieces of legislation and relevant regulations form the core components of a legislative package which generally meets best practices. Malawi is currently revising its forestry legislation, and these efforts are intended to ensure that the new forestry legislation is on par with the amended NPWA. The Fisheries Management and Conservation Act and related regulations are also generally strong.

From this “hub” of core legislation, it is important that relevant ancillary legislation serves as effective spokes, so that together, wildlife legislation, criminal legislation, customs legislation, anti-corruption legislation, and all other relevant pieces of legislation work together in functional and effective ways.

As best practices suggest, a holistic perspective on relevant legislation is necessary in order to capture the range of species subject to trafficking, the range of actors who participate in trafficking, and to take into account the different activities that constitute trafficking, as well as the growing complexity of trafficking operations.

When synergies exist between all relevant legislation, prosecutors have the widest range of options for bringing wildlife offenders to justice and enforcement officers have the widest range of authority to inspect, search, arrest, and confiscate wildlife, forestry, and fisheries products.

While CITES requires that illegal trade and possession are penalised, it is also important that all activities related to wildlife trafficking are appropriately criminalised and subject to penalties that serve deterrent purposes. In many cases, violations of wildlife legislation are handled through administrative or civil cases, but a greater deterrent effect may be achieved through criminalisation and thus stronger penalties, including both fines and imprisonment. While caution may be exercised in order to avoid over-criminalisation, it may be especially warranted in cases of repeat offences, when organised networks are involved, or when other aggravating circumstances exist. Several additional factors should be taken into consideration when establishing penalties for wildlife crime, including whether mandatory minimums may be effective in countering corruption, whether penalties are indexed to inflation rates, whether penalties reflect the actual value of wildlife, seizure and asset forfeiture, and the possibility of restitution. Further, provisions establishing the criminalisation of and penalties for certain wildlife offences should meet the criteria for “serious crime” under the United Nations Convention Against Transnational Crime (UNTOC), where appropriate, discussed below.

JURISDICTIONAL SCOPE OF WILDLIFE REGULATORY FRAMEWORK

The National Parks and Wildlife Act 2004 (NPWA) as amended (most recently in 2017), regulates the designation, management, and conservation of protected areas and the conservation and management of wildlife, both in and outside of protected areas. “Protected areas” include national parks, wildlife reserves, and nature sanctuaries. “Wildlife” under the Act is defined narrowly to mean only those wild plants and animals found in Malawi, but the substantive provisions of the Act more often refer to “wild plants” and “wild animals,” both of which are defined according to the plain meaning of the terms and thus include both native and non-native species. The jurisdictional scope of the NPWA is comprehensive and, as such, overlaps with the Forestry Act and the Fisheries Management and Conservation Act, discussed in further detail below.

THE REGULATION OF HUNTING

A number of NPWA provisions provide for the regulation of hunting. Section 35 provides extensive prohibitions within protected areas—hunting, taking, killing, injuring, or disturbing wild plants and wild animals in protected areas are all prohibited unless otherwise authorised by a licence issued under the Act. Section 39 allows the DNPW Director to allow the sustainable harvest of resources in a protected area. These provisions appear to include both forestry and fisheries resources found in

protected areas, as they would be wild plants and animals under Section 35 and “resources” under Section 39.

In addition, Part VII of the NPWA provides a licensing regime for the hunting or taking of several categories of species, including protected species, endangered species, listed species, and game species – these species may be regulated whether they are found inside a protected area or not, depending on how each term is defined. The lists of “protected,” “endangered,” and “listed” species are found in regulations published as the National Parks and Wildlife (Protected, Endangered and Listed Species) Declaration Order. In general, “protected species” are those species found in protected areas which are not otherwise classified as either endangered or listed species. “Endangered species” are species listed as “threatened” by the International Union for the Conservation of Nature (IUCN) and those species on Appendix II of CITES. “Listed species” are those that the IUCN lists as “critically endangered” and those species listed on Appendix I of CITES.

Hunting licences for protected, endangered and listed species outside of protected areas may be issued only in connection with a professional hunter’s licence, and such licences may not authorise the hunting of protected, endangered, or listed species unless “necessary in defence of human life or property...or to prevent the escape of an animal wounded by his client, that client being himself a [lawful] licensee.”

Inside Protected Areas, licences may only be issued when a “Special Licence”¹ has been issued. “Special licences” are only issued for the purposes of scientific research or scientific, educational, or other “proper use” by zoological institutions, botanical gardens, educational institutions, museums, herbaria, and other similar institutions. As a result, the NPWA essentially prohibits hunting of protected, endangered, and listed species in Protected Areas. When licences are issued for the hunting or taking of wildlife, the NPWA contemplates that conditions may be prescribed as appropriate.

THE REGULATION OF RELATED WILDLIFE ACTIVITIES

The NPWA provides a comprehensive regulatory framework regarding commerce and trade in wildlife. The Act prohibits the possession, buying, selling, transfer, and receiving in transfer, as well as attempts thereof, of any specimen of a game species, protected species, endangered species, or listed species, unless an individual holds a valid licence for hunting or taking or has a valid certificate of ownership. The DNPW Director may issue a certificate of ownership to an individual who is in lawful possession of a specimen; an individual who acquires a specimen as a result of hunting or take pursuant to valid licence must obtain a certificate of ownership within fourteen days. Although the Act does not explicitly prohibit the processing or transport of illegally acquired specimens, the prohibition of possession is helpful in this regard. The important question, of course, how “possession” is defined and whether possession must be in fact or may be implied.

In Section 4 of the Penal Code, “possession,” “be in possession of,” and “have in possession” means the following:

Not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person; and if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.

The Penal Code makes it a misdemeanour to “receive or retain any...property whatsoever, knowing or having reason to believe the same to have been unlawfully, taken obtained, converted, or disposed of in a manner which constitutes a misdemeanour.” Any such offender is liable to the same punishment as the offender by whom the property was unlawfully obtained, converted, or disposed of. This provision, in addition to the strong provision in the NPWA, ensures that possession of unlawfully harvested wildlife, forestry, and fishery products is a criminal offence.

¹ Section 53 of NPWA provides for the issuance of “special licences”; however, Section 54(b) regarding hunting licences inside protected areas references a “special permit.” Our assumption is that these are synonymous.

Additionally, the Penal Code allows for the presumption that anyone in possession of property reasonably suspected of being unlawfully obtained is guilty of a misdemeanour unless he can offer an acceptable explanation. The Penal Code allows others accused of employing an individual in possession of suspected unlawfully obtained property to be brought before the court.

Section 330(e) of the Penal Code infers “possession” for employers of carriers, agents, and servants:

The possession of a carrier, agent, or servant shall be deemed to be the possession of the person who shall have employed such carrier, agent, or servant to convey the same.

Section 331 of the Penal Code, also relating to possession, seems to provide some extraterritorial reach to the NPWA, Forestry Act, and the Fisheries Conservation and Management Act.

Section 331: Receiving or bringing in property dishonestly acquired outside Malawi:

Any person who, without lawful excuse, knowing or having reason to believe the same to have been stolen or obtained in any way whatsoever under such circumstances that if the act had been committed in Malawi the person committing it would have been guilty of felony or misdemeanour, receives or has in his possession any property so stolen or obtained outside Malawi, or having himself so stolen or obtained such property, brings the same into, or has it in his possession within, Malawi, shall be guilty of an offence of the like degree (whether felony or misdemeanour) and shall be liable to imprisonment for seven years.

In addition to regulating the import, export and re-export of CITES-listed species, as discussed in Section IV.D, the NPWA prohibits the import, export, and re-export of all game, protected, endangered, and listed species, unless a permit has been issued. The Act requires that in order to obtain such a permit, an individual must produce a valid certificate of ownership. Additionally, the Act requires that the export, import, or re-export of any such specimen must occur at a customs post or port. The fact that the NPWA goes beyond CITES by also regulating the import, export, and re-export of many non-CITES species is an important step toward combating wildlife trafficking.

PERMIT FORGERY AND FRAUD

The NPWA prohibits and criminalises making false or misleading statements in order to obtain a licence or permit under the Act, as well as alteration or defacement of any licence or permit.

However, forgery of a licence or permit does not seem to be clearly prohibited. Section 15 prohibits “wilfully or recklessly giving to any officer false or misleading information which the officer is entitled to obtain,” which presumably includes information that must be submitted in order to obtain a permit or licence. Importantly, negligently providing false information does not appear to be either an administrative violation or a criminal offence. Section 16 provides that any person who, without lawful authority, “alters or defaces any prescribed document issued under the Act” commits an offence. Because Section 16 seems only to apply when a permit or licence has been issued, it does not appear to apply in circumstances involving forgery. The Penal Code provides additional offences that apply to circumstances of forgery and fraud. The Penal Code makes it a misdemeanour to obtain a licence or permit under NPWA using false pretences. Additionally, the Penal Code makes it an offence to forge any document.

PENALISATION OF OFFENCES

All violations of the NPWA and its attendant regulations are criminal offences. Neither the Act, nor the various regulations, appear to allow flexibility to treat some offences administratively. All offences under NPWA are “serious offences” under UNTOC and trigger the provision of the Convention accordingly. See Annex 3 for further detail on the offences and penalties.

ENFORCEMENT AUTHORITIES

Whether a country has the tools to tackle wildlife trafficking also depends on whether enforcement officers have sufficient authority to fulfil the objectives of the legislation. The NPWA is comprehensive in this regard.

DESIGNATED AUTHORITY

The Act defines “officers” as:

- parks and wildlife officers;
- fisheries officers, forest officers, environmental inspectors, custom officers, members of the Malawi Police Service, members of the Malawi Defence Force and Honorary Parks and Wildlife Officers as the Minister may designate by notice published in the Gazette; and
- such other public officers as the Minister may designate by notice published in the Gazette.

Accordingly, the NPWA creates a strong network of enforcement officers with broad authority to enforce the Act. In practice, a member of the Malawi Police Service (MPS) often accompanies park and wildlife officers when investigating potential criminal acts. This provides authority to make arrests and charge offences such as illegally entering Malawi or other charges that are often incidental to wildlife crime but are not violations of the NPWA.

INSPECTION AND SEARCH AUTHORITY

Officers may, without warrant, enter upon any land, building, tent, motor vehicle, trailer, container, aircraft or boat for the purpose of ensuring that the provisions in the Act are being complied with or for the purpose of preventing or detecting any offence. Officers may similarly without warrant search any of these premises upon reasonable grounds to believe that an offence has been or is being committed, or to verify any document or matter purported to have been issued under the Act.

CONFISCATION, SEIZURE, AND ARREST AUTHORITY

Upon finding any specimen or article that appears to have been obtained, possessed or used, or that appears about to be used, in committing an offence under the Act, officers may seize such specimen or article and arrest any person found committing or reasonably suspected of having or of being about to commit an offence.

FORESTRY

JURISDICTIONAL SCOPE OF FORESTRY REGULATORY FRAMEWORK

The Forestry Act, amended in 2016, regulates the designation and management of forest reserves, protected forest areas, and customary land forests and establishes rules for the utilisation of forest produce in forest reserves and customary land. “Forest produce” is defined broadly and includes trees, timber, firewood, branch wood, bamboos, plants, flowers, seed, fruits, roots, wild animals, among others things.² Because “forest produce” includes “wild animals” and because the Forestry Act also regulates hunting of animals within certain forest areas, the Act overlaps with the NPWA in significant ways. Importantly, the NPWA includes plants and timber species in its scope of coverage. The Forestry Act is currently being revised, so some of the overlap and conflicts may be sorted out in new legislation.

² For the full scope of “forest produce,” see Forestry Act, Art. 2, definition of “forest produce.”

FORFEITURE RULES

Upon conviction of an individual for an offence under the NPWA, a court shall order the forfeiture of any specimen, domestic animal, firearm or vehicle, or any other article used in connection with the commission of the offence.

THE REGULATION OF FORESTRY ACTIVITIES

The Forestry Act regulates forestry and wildlife activities in forest reserves, customary land, public land, and protected forest areas. Section 43 prohibits any person from conveying into, possessing or using within any forest reserve or protected forest area any weapon, trap, explosive, poison, or hunting animal. This is potentially in conflict with Section 46, which allows the “take” of “forest produce” subject to a licence. It is unclear from the legislation whether weapons are allowed in forest reserves or protected forest areas by a valid licence holder, or whether these two provisions read together mean that hunting is generally prohibited in these areas. Additionally, because “forest produce” is defined to include wild animals, this provision applies to hunting in forest reserves, customary land, public land, and protected forest areas, potentially in conflict or overlap with the NPWA, which also regulates or prohibits hunting within some protected areas.

Other than hunting, the Director of Forestry has the authority to grant licences

authorising certain activities within customary land, public land, forest reserves and protected areas. Activities range from the extraction of resources, including timber or minerals, to the construction of structures within these areas. The Director may suspend or cancel any licence upon finding that violations have occurred or that the interest of forest management will be better served by a temporary freeze of forestry activities within an area.

THE REGULATION OF COMMERCE AND TRADE IN FOREST PRODUCTS

The Forestry Act does not explicitly address “buying,” “selling,” or attempting to engage in these activities, but Section 68 makes it an offence to “traffic” in forest produce without a licence. The Forestry Act does not define “trafficking.” Section 68 also provides that any person who knowingly receives forest produce illegally, or is found in possession of such produce without a licence, commits an offence. Again, because “forest produce” includes wild animals, it appears that the Forestry Act overlaps with the NPWA on many provisions. Just as with the NPWA, an important question relates to the scope of what constitutes “possession.” See Section IV.A.3. Additionally, provisions in the Penal Code regarding the receiving of unlawfully obtained property apply to forestry products.

Section 82 prohibits engaging in commercial processing of any wood or forest produce without a permit from the Director. While the Forestry Act does not explicitly regulate the transport of forest produce, Section 6 suggests that a transportation document may be required to engage in such transportation. Additionally, “transporting” may be covered under the prohibition against “removing”

forest produce or “trafficking” without a licence.

The Forestry Act regulates the import, export, re-export or the attempt to do any such activities with regard to forest produce. Export, import, or re-export must be done through a customs post or port and a person must produce a valid licence from the Ministry of Forestry authorising the specific activity. One important question is whether someone wishing to export or import a wild animal removed from a forest regulated under the Forestry Act must obtain a licence under the Forestry Act or under the NPWA, which also regulates import and export of endangered, protected, and listed species, which includes both plants and animals.

PERMIT FORGERY AND FRAUD

The Forestry Act criminalises recklessly or wilfully giving false or misleading information to any officer entitled to obtain such information, but it is unclear whether this provision applies to statements made in connection with a licence application. The Act does not clearly prohibit the violation of licence conditions, although the Director of Forestry does have the authority to suspend or cancel any operation under any licence upon the violation of any condition of the licence. Section 70 makes it an offence to counterfeit or alter any licence, permit or pass; or alter or deface any document issued under the Act. The Penal Code provides additional offences that apply to circumstances of forgery and fraud. The Penal Code makes it a misdemeanour to obtain a licence or permit under Forestry Act using false pretences. Additionally, the Penal Code makes it an offence to forge any document.

PROHIBITIONS AND PENALISATIONS OF VIOLATIONS

All violations of the Forestry Act and its attendant regulations are criminal offences. Neither the Act, nor the various regulations, appear to allow flexibility to treat some offences administratively. Most offences under the Forestry Act are “serious crimes” under UNTOC and trigger the provision of the Convention accordingly.³ See Annex 3 for further detail on the offences and penalties.

ENFORCEMENT AUTHORITIES

The Forestry Act gives forestry officers broad authority to enforce the Act.

DESIGNATED AUTHORITY

Section 4 of the Forestry Act provides for the designation of a Director of Forestry and other officers subordinate to him who shall be responsible for the administration of the Act. In addition, the Act authorises police officers to conduct certain activities within the scope of the Act, described below.

INSPECTION AND SEARCH AUTHORITY

Forestry officers may demand the production by any person of any licence or other documents required for the commission of activities undertaken by such person. Officers may also, without a warrant, stop and inspect any carrier or vehicle which the officer reasonably suspects to be carrying forest produce

³ The only offence that would not qualify as a “serious crime” under the Forestry Act is Section 65(3): “any person who, without reasonable cause, refuses to assist in averting or extinguishing a fire when required to do so...”

obtained in contravention of the Forestry Act or which requires transportation documents. Officers may enter any premises in a forest reserve, any land or premises in which a licensed activity is conducted and inspect such premises, as well as enter any land building, tent, carriages, motor vehicle, trailer, aircraft, boat or locomotive to ensure the Forestry Act is being complied with. Finally, an officer may search a person or property of such person if the officer has reason to believe that an offence has been committed by that person. Forestry officers thus have broad authority to inspect and search under the Act.

CONFISCATION AND SEIZURE AUTHORITY

Both Forestry officers and police officers have authority to seize and detain any forest produce that an officer reasonably believes was obtained illegally. The officer may also seize any article which he or she believes has been used in the commission of the offence. Upon seizure, the officer issues a seizure certificate, and the forest produce or the article is kept safely in the custody of an officer or the village natural resources management committee if the produce was obtained or removed from a village forest area.

ARREST AUTHORITY

An officer may arrest without a warrant any person found committing or reasonably suspected of having committed or about to commit an offence under the Forestry Act.

FORFEITURE RULES

Section 74 provides that upon conviction of a person for any offence under the Forestry Act, a court shall order forfeiture of any forest produce used in the commission of the offence.

FISHERIES

JURISDICTIONAL SCOPE OF FISHERIES REGULATORY FRAMEWORK

Malawi regulates fisheries through the Fisheries Conservation and Management Act (FCMA) and the Regulations implementing the Act. The Act and Regulations apply to “fishing waters,” defined as “all waters within the land borders of Malawi capable of supporting fish” and “those parts of Lake Malawi over which Malawi exercises sovereignty.” “Fish” is defined as “any vertebrate fish or any aquatic crustacean, mollusc or other shellfish or other cold-blooded aquatic animal, whether alive or dead, and their young, fry, eggs or spawn and shells and parts thereof but does not include any reptile.” Accordingly, the Fishing Act is quite broad in scope.

Given the breadth of jurisdictional scope contemplated by the FCMA and the broad coverage of the NPWA of all species found within “protected areas,” jurisdictional overlap may occur when “fishing waters” occur in “protected areas.” Such overlap in scope of authority raises questions regarding the legality of taking fish in protected areas and which officers have enforcement authority over fishing in protected areas. Despite the potentially significant conflicts between the FCMA and the NPWA, the FCMA and the Regulations generally meet the ICCWC indicators.

THE REGULATION OF FISHING ACTIVITIES

The FCMA focuses primarily on commercial fishing. “Commercial fishing” is defined as taking fish for sale; as such, neither subsistence fishing nor sport and recreational fishing are covered under the FCMA. However, the Regulations regulate fishing more broadly, imposing requirements on some sport and subsistence fishing and further defining commercial fishing. In all, the FCMA and Regulations contemplate several categories of fishing as shown here:

Type of Fishing	Requirements	FCMA and Regulations: Applicable Provisions
Large-scale commercial fishing	Registration, licence	FA: Sec. 11, 14, 15 FR: Sec. 18(4), 19, 20
Small-scale commercial fishing	Registration, licence	FA: Sec. 11, 14, 15 FR: Sec. 18(5), 19, 20
Live fish collection commercial fishing	Licence	FA: Sec. 14, 15 FR: Sec. 18(6), 19, 20
Sport fishing	Licence	FR: Sec.17, 21
Subsistence fishing	Licence	FR: Sec. 17, 21
Foreign fishing	Licence, notification to authorities prior of entering or leaving fishing waters	FA: Sec. 12 FR: Sec. 23-27
Research (scientific, experimental, collection for museums, emergency food supply)	Permit	FA: Sec. 19

Each type of fishing is subject to different requirements, but the most thoroughly regulated is commercial fishing. Of primary importance is the registration of “local registerable vessels” with the Director of Fisheries. In order to be a “registerable” vessel, the vessel must meet the requirements provided for in the FCMA with respect to the Inland Waters Shipping Act, markings, and other specifications. “Local vessels” are those vessels that are wholly owned by a Malawian or a Malawian company, society, or organisation. A conflict exists between the FCMA and the Regulations as to whether all “local registerable vessels” must register or whether only those vessels used for commercial fishing must register. The FCMA requires that any such vessel “used...for fishing” must register, whereas the Regulations specify that any such vessel “used for commercial fishing” must register.

Any person who engages in commercial fishing must be licensed according to Section 14 of the FCMA. According to the Regulations, a person may apply for a large-scale commercial fishing licence,⁴ a small-scale commercial fishing licence,⁵ or a live fish collection commercial fishing licence.⁶ The FCMA and Regulations contemplate broad authority to include in any of these fishing licences various conditions regarding the fishing activities that are authorised by the licence, including the type

⁴ Required when a commercial fisherman uses a fishing vessel powered by an engine or engines with a total capacity of not less than 20 horsepower.

⁵ Required for commercial fishermen who use a fishing vessel powered by an engine or engines with a total capacity of less than 20 horsepower or a fishing vessel with no engine power.

⁶ Required when a person who intends to fish for live fish for sale or for the purposes of aquaculture.

of fishing gear and fishing methods that may be used, the species that may be caught, areas and times for fishing, and any other conditions that may be necessary. The Regulations provide very specific rules regarding the type of gear that may be used and the locations in which certain types of fishing or the use of certain fishing methods are restricted. These rules are incorporated into fishing licences as conditions.

Foreign commercial fishing is subject to different requirements. It appears that foreign fishing vessels do not need to be registered. The FCMA provides that the registration requirements “shall apply to foreign fishing vessels if so prescribed,” but the Regulations do not require the registration of foreign fishing vessels. Additionally, it does not appear to be an offence to fish with an unregistered foreign fishing vessel. However, the Regulations clarify that foreign fishing is only contemplated pursuant to bilateral agreement. Foreign fishing licences are non-transferable and are subject to various conditions regarding quantities and species of fish that can be caught, by-catches, fishing gear and methods, areas of fishing, and time of fishing. The master of a foreign vessel must carry and make available for inspection the licence at all times when in the fishing waters. The FCMA requires that the masters of foreign fishing vessels notify fisheries protection officers of the amount and description of fish on board prior to entering into the fishing waters and prior to leaving the fishing waters.

The FCMA contemplates fishing under “special arrangement,” which includes fishing for scientific research or experimental purposes as well as fishing for the “emergency supply of food for human beings.” In order to fish for scientific research or experimental purposes, a person

must apply for a permit from the Director of Fisheries; such a permit may exempt the permit holder from any or all provisions of the FCMA.

Finally, the Regulations also establish sport fishing and subsistence fishing as regulated types of fishing in Malawi. However, individuals engaging in sport fishing or subsistence fishing must obtain a licence only when the species of fish they are fishing is “declared” under the Regulations or designated as a “controlled species of fish” by the Director of Fisheries. The rainbow trout appears to be the only species that has been designated a controlled species. In all other cases, sport and subsistence fishing do not require a licence. The Regulations do make clear, however, that all non-commercial fisherman remain subject to the conservation measures provided in Sections 33-37 of the Regulations, including the gear and fishing method restrictions, as well as fish limits and closed areas, amongst other measures.

THE REGULATION OF ACTIVITIES RELATED TO FISHING

It is unclear whether the FCMA and Regulations comprehensively regulate the sale or purchase of illegally harvested fish. The FCMA and Regulations clearly regulate some aspects of buying and selling. The Act prohibits the sale of fish taken with prohibited fishing methods, which include poison and explosives. The Regulations add that a non-commercial fisherman shall not sell by wholesale or retail fish caught by him. The Fifteenth Schedule, annexed to the Regulations, sets minimum lengths for certain species of fish to be sold or offered for sale. A general prohibition on the sale of fish taken illegally only exists if “deal” under the Act includes sale—the Act prohibits any

master from “deal[ing] with fish caught or transhipped in contravention of the Act.”

The FCMA appears to prohibit the possession of fish taken illegally. Specifically, it provides that no master shall take or allow to remain on board a fishing vessel, within the fishing waters, fish which has not been taken under the authority of and in accordance with a fishing licence or other licence provided for under this Act. The FCMA also gives officers the authority to seize any fishing gear, fish or fish product possessed in contravention of the Act. However, although the Act gives the Minister responsible for fisheries the authority to issue regulations for the licensing of processing establishment, it is unclear whether such regulation has been issued. Officers nevertheless have the authority to seize any fish or fish products processed in contravention of the Act.

Best practices also recommend the regulation of the transport and transhipment of fish. The FCMA provides that any master who tranships, receives on board a fishing vessel, transports or in any other manner deals with fish caught or transhipped in contravention of the Act commits an offence. Under the Act, the Minister has the authority to enact further regulations regarding the transhipment and transport of fish and fish products.

While CITES legislation regulates the export or import of some species of fish listed under the Convention, many other species are not subject to CITES regulations, and thus fisheries legislation must regulate export and import for those species. The FCMA gives the Minister the authority to issue regulations with regard to the export or import of fish, but it is unclear whether such regulations have been issued. However, the FCMA gives fisheries officers

the authority to seize any fish or fish products reasonably believed to have been traded, imported or exported in contravention of the Act. This provision could provide a basis for the prohibition of fish traded illegally.

PERMIT FORGERY AND FRAUD

With regard to conditions imposed on a licence, the FCMA makes clear that violations of any of the conditions attached to a licence are offences and that the Director of Fisheries may upon such violation suspend or cancel any registration, licence, or permit made or granted under the Act. The Director can also suspend or cancel a licence or permit if he is satisfied that the licence or permit was granted in error or on the basis of false or misleading information. A person giving false or misleading information for the purposes of obtaining any licence, permit, or registration also exposes himself or herself to a fine and imprisonment if the information was known to be false or recklessly provided. Finally, any person who alters or defaces any registration, certificate, permit, licence, or any other document issued under the Act commits an offence. However, neither the Act nor Regulations penalise the forgery or possession of a fraudulent permit, although the general provisions of the Penal Code analysed in the CITES and wildlife context could provide a basis for prosecution.

PENALISATION OF OFFENCES

All violations of either the FCMA or the Regulations are offences. All violations of the FCMA are offences, and the Regulations also state this plainly in Section 49:

Any person who fails to comply with any requirement of these

Regulations, any condition of any permit . . . or any order, requisition, or direction lawfully issued by any fisheries protection officer under these Regulations shall be guilty of an offence.

Most offences provided in the FCMA and Regulations are criminal offences. However, unlike the National Parks and Wildlife Act and the Forestry Act, the FCMA provides that some offences may be treated as administrative offences. An offence may be treated as an administrative offence when the Director of Fisheries has reasonable grounds to believe that the offence committed was minor in nature and has considered the prior conduct of the person and any relevant vessel involved. If the person decides to admit the offence, explicitly or implicitly, according to Section 50(6)(b), the Director has the authority to impose a penalty of no more than one half of the maximum penalty to which the person would otherwise be liable.

Several offences under the FCMA qualify as “serious crimes” under UNTOC, including commercial fishing without a licence, commercial fishing using an unregistered vessel, fishing in contravention of a commercial fishing licence, and unlicensed commercial fishing with a foreign fishing vessel. However, it is noteworthy that the use of an unregistered local vessel to fish commercially is subject to a much higher penalty than someone who is fishing without a licence using a registered vessel. Offences under the Fisheries Regulations do not qualify as “serious crimes” as they are punishable by a fine of K5,000 and imprisonment for one year. See Annex 3 for a complete list of offences and penalties under the FCMA and Regulations.

ENFORCEMENT AUTHORITIES

DESIGNATED AUTHORITIES

The FCMA mandates the appointment of a Director of Fisheries and fisheries protection officers responsible for the administration, monitoring, and enforcement of the Act and Regulations. The FCMA also provides that members of the Malawi Police Force, forest officers, wildlife officers, environmental officers, persons responsible for vessels or armed forces of Malawi, and fisheries officers of the Department of Fisheries may all act as fisheries protection officers, thus making enforcement possible by many different officers. Fisheries protection officers enjoy broad enforcement authority, particularly with regard to inspection, search, seizure, and arrest.

INSPECTION AND SEARCH AUTHORITY

The FCMA and Regulations both address authority to inspect and search. Under the Act fisheries inspection officers can require any fishing vessel in the fishing waters to stop and facilitate the boarding of the vessel. Inspection officers can also require the master or crew of the fishing vessel to produce any certificate of registration, licence, log book, official paper, record of fish caught and any other document relating to the vessel. Once on board the officers can make any search, examination or enquiry which they consider necessary to determine whether any provision of the Act has been contravened. Additionally, inspection officers can stop, board and search outside the fishing waters any foreign fishing vessel upon reasonable belief that the vessel has been used in the commission of an offence.

Additionally, upon seeing a person doing any act which requires a licence or permit under the Act, a fisheries inspection officer may require any person to produce for inspection such licence or permit, and may also inspect any fishing gear, fish, fish product, explosive, poison or article in such person’s possession. Finally, officers may, for the purpose of the enforcement of this Act, stop and inspect any vehicle, aircraft or other means of conveyance. Upon reasonable belief that an offence is being or has been committed, officers may enter and search any land, building, camp, tent or other premises or vehicle, aircraft, vessel or other means of conveyance; and open and search any baggage, pack or other thing.

The Fisheries Regulations add that fisheries inspection officers may inspect any store holding fish; any fish when landed; any fish prior to export, whether in store, on land or on board a ship; and any imported fish when landed or, prior to landing on board a ship.

CONFISCATION AND SEIZURE AUTHORITY

When upon inspection or search of a vessel, an officer finds that an offence has been committed in violation of Sections 11, 12, or 14 of the Act (fishing without a licence or without registration) or Regulations enacted pursuant to the Act, the officer may seize the vessel and its equipment, fishing gear, fish or fish product, stores and cargo upon belief that they have been used in the commission of the offence.

Additionally, when an officer searches premises or means of conveyance, or other things, he may seize any fishing gear, explosive, poison, chemical, machinery, equipment, vehicle, vessel, pack animal, aircraft or other things he has reasonable

grounds to believe has been used or is being used in the commission of an offence. He may also seize any fish or fish product which he has reasonable grounds to believe has been, or had been attempted to be, caught, processed, traded, imported, exported, or possessed in contravention of the Act.

Finally, when exercising his inspection authority under the Fisheries Regulations, an officer may seize fish which in his opinion does not conform with the Regulations or is not fit for human consumption.

ARREST AUTHORITY

Fisheries inspection officers may take, or require the master to take the vessel to any place, port or harbour in Malawi in order to carry out any search, examination or enquiry. They have the authority to arrest any person reasonably believed to be

committing or to have committed an offence under the Act.

FORFEITURE RULES

The FCMA provides that courts shall, upon conviction of any person of an offence under the Act, order the forfeiture of any licence, permit or registration granted or made under this Act, and any fees paid for such licence or permit. Additionally, failure to pay a fine may lead to the forfeiture of the fishing vessel used in contravention of an offence. With regard to fish or other perishable products seized by the fishing inspection officers, the Director may order the sale of the fish and pay the proceeds into Court pending an order by the Court with regard to the guilt of the person arrested. Accordingly, while the FCMA and Regulations do provide for some forfeiture provisions, the authority appears limited with regard to fish, fish products, or fishing gear and equipment.

CITES: NATIONAL LEGISLATION REQUIREMENTS

According to Article VIII, all Parties must take appropriate measures to enforce the provisions of the Convention and to prohibit trade in specimens in violation thereof, including measures to penalise trade in, or possession of, such specimens, and to provide for the confiscation or return to the State of export of such specimens. Additionally, Article IX requires that all Parties designate at least one Management Authority and one Scientific Authority. Together these requirements form the basis of the CITES National Legislation Project, which the Parties devised to assess the adequacy of Parties’ domestic implementing

legislation.⁷ In order to have “adopted all appropriate measures for implementation of the Convention,” a Party must have domestic measures that provide the authority to:

- i) designate at least one Management Authority and one Scientific Authority
- ii) prohibit trade in specimens in violation of the Convention
- iii) penalise such trade; and

⁷ Resolution Conf. 8.4 (Rev. CoP15).

- iv) confiscate specimens illegally traded or possessed.

Malawi is currently designated as Category 2 under the National Legislation Project, which means that its legislation meets some of the requirements for the implementation of CITES. However, the recent adoption of amendments to the National Parks and Wildlife Act in February of 2017 means that Malawi’s legislation is currently under review by the CITES Secretariat and may be re-classified.

Additionally, new regulations which support CITES implementation have been drafted; some of these regulations, such as the List of Protected, Endangered, and Listed Species regulations, have been gazetted and are in force. However, some remain to be approved and gazetted. This analysis considers the draft regulations under the assumption that they will be gazetted in due course. The analysis below suggests that, taken together, Malawi’s legislation and regulations, assuming they will be adopted and gazetted, meet all four criteria identified in Resolution Conf. 8.4 and that, as such, it will likely soon qualify as Category 1 legislation.⁸

DESIGNATION OF MANAGEMENT AND SCIENTIFIC AUTHORITIES

CITES Article IX requires each Party to CITES to designate “one or more Management Authorities competent to grant permits or certificates on behalf of that Party and one or more Scientific Authorities.” Unlike other CITES requirements, this designation need not be

⁸ As of CoP18, Malawi’s legislation will be reclassified as Category 1 legislation, according to the Secretariat.

specifically executed via “domestic measures,” meaning that the designation, as long as official, need not be specifically contained in a Party’s legislation or other formal legislative or regulatory measure. Instead, the designation may be by decree or some other form of administrative declaration. The requirements for the National Legislation Project deviate slightly, suggesting that the Parties must include in their “domestic measures” the *authority* to designate at least one Management Authority and one Scientific Authority.

In a draft regulation, National Parks and Wildlife Act (Control of Trade in Protected, Endangered and Listed Species) Regulations 2017, the Minister of Natural Resources, Energy and Mining, designates the Office of the Deputy Director of National Parks and Wildlife as the Management Authority and Scientific Authority. Although best practices suggest the separation of the Management and Scientific Authorities in order to facilitate some independence from each other; however, many governments, including the United States, designate one agency to serve as both Management and Scientific Authorities. In the case of the United States, the Fish and Wildlife Service acts as both.

ASSIGNATION OF SPECIFIC AUTHORITIES

In addition to the designation of a Management and Scientific Authority, each entity must be authorised to perform the tasks assigned in the Convention. For the Management Authority, this means issuing necessary permits and certificates as well as making specific findings, including that the specimen has been legally acquired and that it will be humanely prepared and shipped if alive for export permits and that a specimen will not be used for primarily commercial

purposes in the case of import permits. The regulations that designate the Management and Scientific Authorities do not provide the full scope of authority required under CITES. Instead, the Management Authority is charged with authority to issue import, export, and re-export permits but only for “endangered species.” Under the regulations that define “endangered species” this includes only species listed on Appendix II of CITES. Although Malawi intends not to issue export permits for CITES Appendix I species, cases may arise in situations of scientific exchange, or other non-commercial exports, as well as re-exports, where authority is necessary and desirable.

Other than authority to issue permits for trade in endangered species, the regulations do not provide authority to make specific findings. However, the NPWA provides that an applicant for an import, export, or re-export permit must provide evidence of compliance with CITES. This at least implies that the requisite findings must be made prior to issuance of CITES permits, but the authority to do so is not explicitly designated to the Management Authority, as appropriate. On the other hand, the Scientific Authority, according to the National Parks and Wildlife Act (Control of Trade in Protected, Endangered and Listed Species) Regulations 2017, has authority to “provide scientific advice on issuance of permits for international trade”; this is sufficient authority to make the findings assigned to the Scientific Authority, such as the finding that neither an export or import will be detrimental to the survival of the species and that in the case of imports, a recipient is “suitably equipped to house and care for” a live specimen.

PROHIBITION OF TRADE IN VIOLATION OF THE CONVENTION

Article VIII, paragraph 1 requires Parties to prohibit trade in CITES-listed specimens. Meeting the terms of this means that a Party must provide a means through which all CITES-listed species are covered by all domestic CITES legislation and regulations. Furthermore, a Party must ensure that its legislation and regulations cover “specimens” as defined by CITES. Similarly, legislation or regulations must define international trade as defined under CITES. Finally, the legislation or regulations must identify the prerequisites required by CITES prior to the issuance of any permit or certificate. The legislation or regulations may be stricter than CITES requires, but in order to meet the obligations of the treaty, they may not be any less strict as regards any CITES-listed species or aspect of the CITES permit regime.

COVERAGE OF CITES-LISTED SPECIES

Through newly adopted regulations, the NPWA comprehensively covers all CITES-listed species. Species listed in CITES Appendix I are listed as “listed species” according to the National Parks and Wildlife (Protected, Endangered and Listed Species) Declaration Order 2017, and all CITES Appendix II species are “endangered” species. The permit regime in the NPWA applies equally to endangered and listed species, so coverage is comprehensive. The caveat is as noted above: the Management Authority only has explicit authority to issue permits for “endangered species.”

COVERAGE OF “SPECIMENS” AS DEFINED BY CITES

The term “specimen” is one of the most important in CITES as it defines the exact scope of CITES coverage since trade is regulated in “specimens of species” under the Convention. Article I of CITES provides that “specimen” means any whole plant or animal, whether dead or alive, plus “any readily recognisable parts or derivatives.” The Parties further defined this term in Resolution Conf. 9.6 (Rev. CoP16), indicating that “readily recognisable part or derivative” includes “any specimen which appears from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be a part or derivative of an animal or plant of a species included in the Appendices.” As such, for a Party’s legislation or regulations to simply include CITES-listed species is insufficient; a Party must also clarify that “specimens” of CITES-listed species are covered by domestic legislation and regulations.

According to the NPWA, permits are required for trade in wildlife “specimens,” and a “specimen” is defined as “any wild plant or animal, alive or dead, whether or not native to Malawi, and any readily recognised part or derivative of such plant or animal.” This language is similar to the Convention text, ensuring that the scope of coverage is in line with the scope of coverage contemplated under CITES.

DEFINITION OF “TRADE”

CITES provides that “trade” means import, export, re-export, and introduction from the sea. The term “introduction from the sea” is further defined as “transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State.” The

NPWA and draft regulations regulate “trade” as defined by CITES, except that the NPWA does not provide for “introduction from the sea.” Since Malawi is land-locked, it will never be in a position of issuing introduction from the sea certificates and exclusion should not be a barrier to having adequate implementing legislation.

IDENTIFICATION OF PERMIT CONDITIONS

At the heart of the CITES permit regime are the preconditions set out by the treaty for the issuance of each permit. These conditions establish the terms under which trade in specimens of CITES-listed species is legal. As such, in order to properly prohibit trade in violation of the Convention, legislation or regulations must make clear that permits may only be issued by the proper authority when the necessary prerequisite findings have been made and preconditions have been met. The preconditions for each permit as provided by CITES are listed in the tables in the relevant sections below.

The listing of a species in a particular Appendix determines the permit rules that apply to trade in that species. Trade in specimens of Appendix I species requires issuance of both an export permit and an import permit. Trade in Appendix II specimens requires issuance of an export permit only. Trade in Appendix III specimens requires issuance of CITES documents by the exporting country.

The requirement to issue an import permit is the most critical aspect of trade in specimens of Appendix I species. CITES authorities of the State of import must make three findings before an import permit may be issued. First, before an import permit may be issued, the CITES Management

Authority of the State of import must determine that the trade is not for primarily commercial purposes. Because much trade is for primarily commercial purposes, such as for pets or luxury goods, this permit requirement will have the effect of prohibiting most trade in specimens of Appendix I species. Additionally, the Scientific Authority of the State of import must determine that the purpose of the import is not detrimental to the survival of the species for which the permit is sought and that the proposed recipient of a living specimen is suitably equipped to house and care for it.

The CITES authorities of the State of export must determine that an import permit has been issued by the State of import prior to the issuance of an export permit for an Appendix I specimen. As a consequence, any trader must ensure that he has permission to import the Appendix I specimen before the shipment leaves the State of export. Additionally, the State of export must make three other permit findings that apply to exports of both Appendix I and Appendix II specimens, as shown in the Table 1.

Table 1: Import and Export Permit Findings

Import Permit Findings (Appendix I Species only)	Export Permit Findings (Appendix I and II Species)
The <i>Scientific Authority</i> must advise that the import will be for purposes that are not detrimental to the survival of the species involved;	The <i>Scientific Authority</i> must advise that the export will not be detrimental to the survival of the species involved;
The <i>Scientific Authority</i> must be satisfied that the recipient of a live specimen is suitably equipped to house and care for it; and	The <i>Management Authority</i> must be satisfied that the specimen was not obtained in contravention of domestic law; and
The <i>Management Authority</i> must be satisfied that the specimen is not to be used for primarily commercial purposes.	The <i>Management Authority</i> must be satisfied that living specimens will be prepared and shipped in a manner that minimises the risk of injury, damage to health, or cruel treatment.

CITES also requires that Parties implement a permit scheme for the re-export of specimens as defined by Table 2.

Table 2: Re-export Certificate Findings

Re-export Certificate Findings (Appendix I species only)	Re-export Certificate Findings (Appendix II Species)
The <i>Management Authority</i> of the State of re-export is satisfied that the specimen was imported into that State in accordance with the provisions of the present Convention;	The <i>Management Authority</i> of the State of re-export is satisfied that the specimen was imported into that State in accordance with the provisions of the present Convention; and
The <i>Management Authority</i> of the State of re-export is satisfied that any living specimen will be so prepared and shipped as to minimise the risk of injury, damage to health or cruel treatment; and	
The <i>Management Authority</i> of the State of re-export is satisfied that an import permit has been granted for any living specimen.	

Although the Convention contemplates the issuance of “introduction from the sea” certificates any time a specimen of a species listed in Appendix I or II is caught in the high seas, the Parties have limited the issuance of “introduction from the sea” certificates to those circumstances in which a vessel flagged by one State takes a

specimen of a CITES-listed species in the marine environment beyond the jurisdiction of any State and transports that specimen into that same State. In these circumstances, this State is called the “State of introduction.” Articles III and IV requires the State of introduction to make the findings described in Table 3.



Table 3: IFS Certificate Findings

IFS Certificate Findings (Appendix-I species only)	IFS Certificate Findings (Appendix-II species)
The <i>Scientific Authority</i> of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved;	The <i>Scientific Authority</i> of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved; and
The <i>Management Authority</i> of the State of introduction is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and	The <i>Management Authority</i> of the State of introduction is satisfied that any living specimen will be so handled as to minimise the risk of injury, damage to health or cruel treatment.
The <i>Management Authority</i> of the State of introduction is satisfied that the specimen is not to be used for primarily commercial purposes.	

The NPWA does not specify that specific permit findings are required, except to provide that permits must be issued in compliance with “any international, regional, or bilateral agreement relevant to such species,” which clearly includes CITES. However, draft regulations entitled “National Parks and Wildlife Act (Import, Export and Re-export) Regulations 2017” provide that import, export, and re-export permits may only be issued after the Management and Scientific Authorities have made the requisite findings in line with CITES recommendations. As noted above, Malawi does not have provisions relating to introduction from the sea.

PENALISATION OF TRADE AND POSSESSION OF SPECIMENS IN VIOLATION OF CITES

The CITES National Legislation Project requires that Parties’ domestic legislation penalise trade in contravention of the Convention; the Convention itself requires Parties to “penalise trade in, or possession of . . . specimens [traded in violation of the Convention], or both.” The NPWA penalises trade in violation of the Convention. The NPWA also criminalises possession of specimens, unless a person lawfully acquired the specimen by means of a valid licence to hunt that species and the person is in possession of a valid certificate of ownership. However, this provision does not directly apply to specimens *traded* in violation of the Act or the Convention.

AUTHORITY TO CONFISCATE SPECIMENS ILLEGALLY TRADED OR POSSESSED

CITES Article VIII and the National Legislation Project require that national legislation or regulations grant the authority to confiscate specimens illegally traded or possessed. “Officers” under the NPWA have broad authority to confiscate specimens: an officer shall seize any specimen or article “which appears to have been obtained, possessed, used or about to be used in committing an offence” under the NPWA. Upon conviction, such specimens are forfeited to the government.

ADDITIONAL PROVISIONS HELPFUL TO CITES IMPLEMENTATION

The Convention requires that Parties include in domestic legislation or regulations the basic, necessary elements for implementation of CITES; however, full implementation requires additional provisions, such as any that might provide for implementation of the exceptions provided in Article VII of CITES and provisions that indicate the characteristics of a valid, legally authorised CITES permit.

CITES EXCEPTIONS

Critical to implementation of CITES are provisions in legislation or other domestic measures that provide any exceptions to the permit regime provided by CITES that a Party may wish to implement. Without explicit authorisation of these exceptions in domestic legislation, it should be assumed that no such exceptions exist in a particular country—in other words, that the Party is instead wishing to implement “stricter domestic measures.” However, more often, not explicitly outlining the exceptions that a

Party wishes to implement causes confusion and in some cases prosecutorial challenges.

The NPWA does not recognise any of the CITES exceptions; however, the model permit included in draft regulations appears to recognise two exceptions for Appendix I specimens: specimens bred in captivity for commercial purposes and “pre-Convention specimens.” In the first case, the Convention allows Parties to treat such specimens as Appendix II, allowing for commercial trade, even though the species is Appendix I. According to Resolution Conf. 12.10, facilities that breed such specimens must be registered with the Secretariat. Pre-Convention specimens are those that were acquired before the Convention applied to that species; in these cases, permits are not necessary for trade. Resolution Conf. 13.6 outlines the rules for implementation of this exception. According to the DNPW, pre-Convention specimens require a CITES export permit and a certificate of ownership. Further work and trainings are being done by DNPW to ensure that Chiefs and elders, who might possess pre-Convention ivory, furs, and other wildlife specimens are aware of the import and export rules. This is important because there is regular cross-border movement between Zambia and Malawi.

PERMIT FORM AND VALIDITY

Article VI of CITES requires that Parties take certain steps to ensure the proper form and validity of permits. The steps Parties are to take include ensuring that permits contain all of the information contained in the model permit annexed to the Convention; permit expiry after six months; and indications of authenticity, such as official stamps, the Convention name, and control numbers. While the National Legislation Project does not demand that

these be officially integrated as requirements in domestic legislation, some indication of what an official, authentic permit looks like and the information it must contain is important for preventing fraud and forgery.

The National Parks and Wildlife Act (Import, Export, and Re-export) Regulations 2017, which remain in draft form, include a model permit. The model permit requires a passport or national identity card number, a signature, seal, and security stamp.

ANCILLARY LEGISLATION

Ancillary legislation represents the “spokes” to the hub of core wildlife, forestry, and fisheries legislation. Ancillary legislation enables the fight against wildlife crime by ensuring that prosecutors have as many additional tools as are required to tackle wildlife trafficking from the widest possible lens. Effective and adequate ancillary legislation works cohesively with wildlife, forestry, and fisheries legislation and complements such legislation by offering additional investigatory and legal tools as well as additional or alternative charges.

CUSTOMS

A cohesive relationship between customs and wildlife and forest legislation is paramount. Customs legislation must, in a complementary manner with wildlife, fisheries, and forestry legislation, provide authority for customs officials to search, as well as to seize, suspected illegal wildlife and forest products and examine any required permits. As seen in the wildlife, forestry, and fisheries legislations, officers

FORGERY AND PERMIT FRAUD

The NPWA does not explicitly prohibit violations of permit conditions. With regard to forgery and permit fraud, the provisions identified in Section IV.A.4 relating to forgery and permit fraud in the context of wildlife apply to CITES permits. Notably, the use or possession of a forged or fraudulent permit does not appear to be prohibited or criminalised.

charged with enforcement of these laws generally have the authority to inspect permits, search vehicles or premises, and seize species or products that were acquired illegally. According to Section 7 of the Customs & Excise Act, any public officer or “class of public officers” may be conferred power under the Act; as such, if designated as such, wildlife, forestry, and fishery enforcement officers may be “officers” under the Customs & Excise Act, just as Customs officers are authorised as enforcement officers under the NPWA.

The Customs & Excise Act confers broad authority to question individuals and to stop and search. Individuals may be questioned if they are entering or leaving Malawi or if an officer has reasonable ground to believe that the individual is in possession or “harbouring” any goods subject to customs control. The definition of “goods” under the Act is broad enough to include any specimen of wildlife or forest products, and good under customs control include all imported and exported goods, as well as

goods waiting for export. Officers may search any person whom they have reasonable grounds to suspect of having in his possession any goods subject to customs control, and may require such person to open any package for inspection. Authority to search extends to any aircraft of vehicle arriving from or being about to depart to a foreign port, or any aircraft or vehicle within Malawi which officers reasonably suspect may be carrying imported goods to be exported.

Additionally, customs officers have the authority to require an individual to produce any document “which is required under the customs laws to be kept or exhibited.” Although the Customs & Excise Act does not speak specifically to the need to have import and export permits for wildlife specimens, it does provide that goods shall not be imported or exported contrary to the provisions of “any written law prohibiting or restricting the importation [or exportation] of such goods.” This provision can be read as “requiring” import and export permits for wildlife subject to the provisions of the NPWA.

Customs officers must also have the authority to confiscate suspected illegal wildlife, fish, and forest products. Section 145 of the Customs & Excise Act provides that any goods in respect of which an offence has been committed under the Customs & Excise Act shall be liable to forfeiture, and customs officers or police officers may seize any goods or conveyance which are reasonably suspected to be liable to forfeiture. Finally, customs officers and police officers may arrest any person upon reasonable grounds to believe that this person is committing, has committed, or is connected with the commission of, any offence under the Customs & Excise Act.

The Customs & Excise Act enumerates several offences that could be useful in prosecuting wildlife crimes. These include giving customs officers untrue or incomplete information, failing to comply with the Customs Act provisions, conspiring with others to commit an offence under the Act, or failing to stop at a customs port, and importing or exporting any goods in violation of the Act. Any person guilty of an offence under the Customs & Excise Act with the intent to evade any restriction or prohibition on the importation or exportation of any goods shall be liable to:

- In the case of dutiable goods that are not prohibited, a fine of between not less than three times the amount of the duty or K2,000, whichever is the lesser, and not more than ten times the amount of the duty of K2,000, whichever is the greater, and imprisonment for three years;
- In the case of prohibited goods, a fine of between not less than three times the amount of the duty or K2,000, whichever is the lesser, and not more than ten times the amount of the duty of K2,000, whichever is the greater, and imprisonment for three years.

The Customs & Excise Act also provides a general penalty for other offences under the Act: a fine of K10,000 or three times the value of the goods in respect of which the offence was committed, whichever is greater, and imprisonment for three years.⁹ Offences under the Customs & Excise Act thus do not qualify as serious crimes.

⁹ Note that for all fine provisions the Conversion Act applies.

One important aspect that is often missing from customs laws is giving direction to customs officials about how to dispose of live plants and animals subject to seizure. Under the Customs & Excise Act, upon seizure of such goods, the Controller may direct the goods to be sold in such manner as he may deem fit and then retain the proceeds as seized goods. In general, the sale of confiscated wildlife specimens is discouraged and destruction may be favoured, especially for high-value specimens, such as elephant ivory and rhino horn. For live specimens, best practices could include identifying the live species that are most subject to trafficking at the borders of Malawi and publish guidelines on how to care for those live specimens once they are seized. Malawi's recently adopted Captive Care Guidelines serve this purpose. Additionally, the provisions of the Customs & Excise Act regarding disposal of animals might conflict with CITES and the NPWA. Article VIII of CITES provides that confiscated specimens shall be entrusted to the Management Authority of the State of confiscation. Part XIV of the NPWA deals with disposal of confiscated specimens. It appears important to clarify whether customs officers should follow the mandate of the Customs & Excise Act or of the NPWA when dealing with confiscated wildlife specimens.

QUARANTINE, TRANSPORT, AND WELFARE LAWS

Quarantine, transport, and welfare laws can be useful in the fight against wildlife trafficking because they offer avenues through which to add additional charges against suspected criminals and criminal networks and because they create an additional hurdle that criminal activity must evade. Because offences are often strict liability offences, when there is insufficient

evidence to prosecute an illegal wildlife trader it is sometimes possible to bring administrative charges under these statutes and to levy fines and confiscate specimens. The Control and Diseases of Animals Act provides rules regarding the quarantine and importation of animals. The Act provides various offences, and Section 15 notably provides that any person obstructing or impeding an inspector or police officer in the execution of his duty under the Act shall be guilty of an offence. The Act gives the Minister the authority to prohibit or regulate the importation into Malawi of all animals, carcasses, hides, skins, horns, hoofs, hair, wool, semen, litter, dung or fodder, from all places outside Malawi from any specified country, territory or port, or the exportation thereof from Malawi.

PENAL CODE

Many issues related to the prosecution of wildlife and forest crime are found not in a country's wildlife, forestry, or fisheries legislation but rather in the penal code or its body of criminal law. Topics that stand out in particular for the prosecution of wildlife crime are issues related to *mens rea* and the factual circumstances necessary to prove or infer a mental state. Although wildlife legislation might make violations an offence, it may be unclear as to what mental state is required for successful prosecution of the violation—intentionally, knowingly, recklessly, or negligently committing a violation, for example. Each of these standards is subjective and may require that various evidentiary standards be met. Additionally, wildlife, forestry, and fisheries legislation may sometimes be written to suggest that strict liability applies to a violation or an offence; in these cases, it is critical to ensure that strict liability is acceptable under criminal law in that particular country. Furthermore, ensuring

that conspiracy liability may apply to wildlife crimes is important when criminal networks are active in wildlife trafficking—this is a question often answered by criminal law as opposed to wildlife and forest-specific legislation.

CRIMINAL RESPONSIBILITY

The Malawian Penal Code provides general rules with regard to mental state and criminal liability. For example, ignorance of the law is not an excuse, and the intention to cause a particular result by an act or omission is immaterial, unless specifically provided for by the applicable law. This means that unless a provision requires a specific intent, the default rule for criminal liability is strict liability.

SCOPE OF CRIMINAL LIABILITY AND CONSPIRACY

Section 21 deals with the parties to an offence and provides that each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence:

- every person who actually does the act or makes the omission which constitutes the offence;
- every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- every person who aids or abets another person in committing the offence; and
- any person who counsels or procures any other person to commit the offence.

Accordingly, the Penal Code allows prosecutors to cast a large net over persons

involved in the commission of wildlife crimes.

Conspiracy is generally the instance in which two or more people engage in the planning or commission of a crime. The ability for wildlife crime prosecutors to charge conspiracy offences related to wildlife crimes is essential to the fight against organised wildlife crime and wildlife trafficking. For example, a person might be arrested in the commission of a wildlife crime, but often that person will have been hired by criminal organisations to commit the crime. While this person is getting some of the proceeds of the crime committed, the real beneficiaries are often criminals higher up in the chain of command in the organisation.

The Penal Code addresses conspiracy to commit a felony and conspiracy to commit a misdemeanour. These provisions reach beyond Malawi as a person who conspires with another to commit any felony or misdemeanour in Malawi, or do any act in any part of the world which if done in Malawi would be a felony or a misdemeanour, and which is an offence under the laws of the country where the act is done, shall be guilty of a felony or a misdemeanour. Felony is defined in the Penal Code as an offence punishable by at least three years in prison, while misdemeanour is defined as “any offence which is not a felony.” Accordingly, in general all wildlife offences are covered under “conspiracy to commit felony or misdemeanour.” Offences under the NPWA are felonies and conspiracy to commit a felony may be charged if relevant. The conspiracy provisions and the definition of “parties to an offence” provide a good framework to address organised wildlife crime.

SENTENCING GUIDELINES

Wildlife crime sentencing guidelines have been approved by the Chief Justice and are now being used in trainings of the judiciary and prosecutors.

SPECIAL INVESTIGATORY TECHNIQUES

Because combating wildlife trafficking involves a multitude of domestic legislation and requires cooperation across borders, traditional investigatory techniques may fall short of what is needed to efficiently tackle this issue. Whether a country's domestic legislation authorises enforcement officers to use 'special investigatory techniques' can be essential to the fight against wildlife trafficking. These special techniques may take the form of relaxed procedural requirements leading to arrest or requests for foreign assistance, as well as the constitution of specific enforcement divisions that receive training specific to fight against wildlife trafficking.

Malawi has taken steps to ensure that these best practices are met. A number of specialist units now exist to tackle wildlife crime. This includes a unit formed especially for wildlife crime intelligence gathering and investigations, which has had special investigation techniques training. Following recommendations made in the Illegal Wildlife Trade Review¹⁰ in 2015, the Department of National Parks and Wildlife established a specialist Wildlife Crime Investigation Unit in 2016. The WCIU includes specially trained wildlife

investigators who are also DNPW officers and who have enforcement authority under the NPWA.¹¹ WCIU has made over 200 arrests of traffickers and traders across the country since its inception.

Additionally, in 2014, Malawi also established an Inter-Agency Committee on Combating Wildlife Crime (IACCWC). The goal of the Committee is to share information, resources, and developments regarding wildlife crime investigation and prosecution. When used effectively, the Committee should result in robust prosecutions that explore all aspects of a particular wildlife crime, including corruption and financial crime charges. The following departments and agencies are members:

- Department of National Parks and Wildlife
- Judiciary (Senior Resident Magistrates)
- Anti-Corruption Bureau Financial
- Intelligence Authority Immigration (Regional Office Centre)
- National Intelligence Bureau
- Malawi Revenue Authority (Enforcement Department)
- Malawi Defence Force
- Ministry of Justice
- Association of Environmental Journalists
- Wildlife & Environmental Society of Malawi

ASSET FORFEITURE

In order to increase the deterrent effect of wildlife and criminal laws, it is important to provide for the forfeiture of assets obtained in connection with the commission of a wildlife crime. Malawi law does not provide for asset forfeiture in the case of wildlife crime generally. The Financial Crimes Act provides that any offence under the Act is subject to asset forfeiture, meaning that when a wildlife offence is a predicate offence to a violation of the Act or may be charged as an offence under the Act, asset forfeiture proceedings may ensue. The most likely scenario is when a wildlife criminal is charged as or along with money laundering. The Penal Code provides for forfeiture of property passed in connection with the commission of a corruption offence under the Code.

ANTI-MONEY LAUNDERING LAWS

The use of money laundering statutes to divest criminals of the proceeds of wildlife crime and to bring charges against a wider network of criminals has recently gained traction as a productive prosecutorial approach. In order to pursue money laundering charges to combat wildlife crimes, these crimes must be predicate offences.

Money laundering is principally covered in the Financial Crimes Act. The provisions of the Act are broad and consistent with the United Nations Convention against Corruption (UNCAC). Under the Act, a person who: knowingly or with reasonable grounds to believe that any property directly or indirectly represents proceeds of a predicate offence; converts or transfers property with the aim of concealing or disguising the illicit origin of that property, or of aiding any person, including himself,

involved in the commission of the offence to evade the legal consequences thereof; commits the offence of money-laundering. The Act also covers the concealment or disguise of the true nature, origin, location, disposition, movement or ownership of that property which is the proceeds of a predicate offence. "Predicate offence" is defined to mean any offence, thus money-laundering applies to proceeds of wildlife crimes and serious crimes. However, to constitute money laundering, a person must know or have reasonable grounds to believe that the property involved is the proceeds of a predicate offence.

ANTI-CORRUPTION AND WHISTLE-BLOWER LAWS

Laws that criminalise corruption and bribery are critical in the fight against wildlife trafficking, since government officials at all levels may be complicit in the commission of wildlife crime. In these scenarios, the taking of bribes or merely "looking the other way" is seen as a low-risk, high-profit endeavour. Ending government collusion must be a priority in any plan to combat wildlife trafficking. Relatedly, whistle-blowers must enjoy the full protection of the law to encourage information-sharing regarding suspected corruption. If whistle-blower protection legislation is issue- or legislation-specific, it should be amended to include disclosure of activities related to the commission of wildlife crime. Section 51 of the Corrupt Practices Act provides limited protection to whistle-blowers. It protects information about whistle-blowers from being presented in court and requires redaction of names and information from evidence put before the court. The protections seem to apply to a broad category of whistle-blowers and informants and thus would protect those who blow the whistle regarding complicity and corruption related to wildlife crime;

¹⁰ By Waterland, S., Vaughan, J., Lyman, E., & Jursic, I. (2015). Illegal Wildlife Trade Review: Malawi, 19: <http://www.lilonggewildlife.org/wp-content/uploads/IWT-Review-Malawi.pdf>

¹¹ Also trained by USFWS.

however, the protections offered are not extensive. Comprehensive whistle-blower protection legislation is currently under review in Malawi.

Corruption is covered in the Corrupt Practices Act and the Penal Code in Malawi, which comply for the most part with the provisions of UNCAC. The Corrupt Practices Act criminalises bribery, trading in influence, illicit enrichment, and abuse of functions by public officers and also addresses corrupt transactions by private bodies. Corrupt practice is defined as “the offering, giving, receiving, obtaining or soliciting of any advantage to influence the action of any public officer or any official or any other person in the discharge of the duties of that public officer, official or other person.” Corrupt practices also include influence peddling and the extortion of any advantage. Public officer includes any person who is member of, holds, or is employed by a public body. Accordingly, corruption offences include, for example, bribery of customs officers or of any officer charged with enforcing wildlife, forestry, or fisheries legislation, which is essential to combat wildlife trafficking. Under the Corrupt Practices Act, offences relating to corruption are punishable by imprisonment for twelve years, constituting “serious crime.”

REGIONAL AND INTERNATIONAL COOPERATION

RELEVANT INTERNATIONAL TREATIES

Both UNTOC and UNCAC are relevant to the fight against transnational wildlife crime. Whether countries are Parties to these treaties is an important element in a comprehensive legislative analysis. While a country may or may not have legislation

The Penal Code criminalises corruption of officials and abuse of office. Obstruction of justice is also criminalised, specifically the giving of false testimony and tampering with witness or evidence. Such offences are misdemeanours and punishable with a fine and imprisonment for a term not exceeding two years.

One significant gap in Malawi’s anti-corruption legislation is that it does not appear to cover the bribery of foreign public officials. This can hinder the fight against wildlife trafficking as this is a regional issue that can often involve officials in different countries, such as countries of import. Another issue which may arise in prosecuting corruption-related offences is that the Penal Code and the Corrupt Practices Act appear to address some of the same offences, but with different penalties associated. Penalties are generally stronger in the Corrupt Practices Act, but it is unclear how the laws interact and whether the Penal Code supersedes the Corrupt Practices Act or the other way around or whether it is up to a prosecutor’s discretion to choose an appropriate charge. For example, section 90 of the Penal Code and 24 of the Corrupt Practices Act both criminalise bribery of public officials. The Penal Code provides a prison sentence between 5 and 12 years, while the Corrupt Practices Act provides for a prison sentence of 12 years.

specifically implementing these treaties, if a country is Party to these treaties then the requirements and recommendations should be implemented throughout all relevant legislation. Malawi is a party to both Conventions. Malawi’s Constitution provides that any international agreement ratified by an Act of Parliament shall form part of the law of Malawi “if so provided for

in the Act of Parliament ratifying the agreement.”

With regard to UNTOC, one of the key provisions of the Convention is the concept of “serious crimes.” UNTOC defines “serious crime” as “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.” Accordingly, depending on the penalty, an offence may be considered a serious crime in one State and not in others. As the Conference of the Parties to UNTOC explained in 2012, “[t]he determination as to whether certain offences fall under the definition of serious crime is of direct relevance in establishing the offences of criminalisation of participation in an organised criminal group, laundering of proceeds of crime and obstruction of justice, . . . and the scope of international cooperation in criminal matters, including extradition and mutual legal assistance.” Whether wildlife offences and related crimes meet the definition of “serious crime” is thus important to international cooperation with regard to wildlife trafficking. Malawi’s National Parks and Wildlife Act is a useful tool as all offences are punishable by imprisonment of at least four years or more, thus meeting the definition of serious crime. Some fisheries and most forestry offences, but not all, also meet that definition. Money-laundering offences and most corruption offences also qualify as “serious crimes.” Accordingly, many wildlife-related offences do meet the serious crime definition in Malawi, allowing for potential international cooperation.

With regard to UNCAC, UNODC has compiled a comprehensive country report analysing Malawi’s implementation of the

Convention.¹² Malawi meets most of the standards of the Convention, although as flagged above, bribery of foreign officials is not criminalised. The report also notes that the definition of public officials is narrower than the definition provided by the Convention and recommends amending the definition according to Article 2 of the Convention. Another issue the report flags is the fact that although some provisions address trading in influence and embezzlement, they do not meet the standards of the Convention.

EXTRADITION LAWS

Each country may differ slightly in how it provides for the legality of extradition, but in the fight against wildlife crime, a country’s extradition legislation should be examined as to whether it allows extradition for certain wildlife crimes. If treaties are additionally required for extradition, an important question is whether any new treaties should be negotiated with countries that are relevant to the fight against wildlife crime.

Malawi’s law offers several avenues for extradition. In general, the Extradition Act provides that Malawi is able to extradite to designated countries and territories (currently 26), subject to such conditions, exceptions, adaptations or modifications as the Minister of Justice may specify (Section 3 of the Extradition Act). Extradition is subject to dual criminality and a minimum imprisonment term of one year, plus the Act limits extradition to designated countries and designated offences. Wildlife crimes are

¹² UNODC, Country Review Report of Malawi, available at [unodc.org/documents/treaties/UNCAC/CountryVisit/FinalReports/2017_03_09_Malawi_Final_Country_Report.pdf](https://www.unodc.org/documents/treaties/UNCAC/CountryVisit/FinalReports/2017_03_09_Malawi_Final_Country_Report.pdf)



not listed under extraditable offences. In practice, Malawi has cooperated with neighbouring countries in order to prosecute individuals who have fled Malawi, according to government officials consulted for this report.

In addition, Malawi is a Party to the Southern African Development (SADC) Protocol on Extradition. Under the Protocol, all 15 Member States agree to authorise extradition for offences that are punishable under the laws of both State Parties by imprisonment or other deprivation of liberty for a period of at least one year or by a more severe penalty. Wildlife offences would be a valid basis for extradition if the offence in question is punishable in both the requesting State and the requested State by imprisonment of at least one year. As wildlife trafficking is a regional, transnational issue, the fact that Malawi and other SADC countries have the ability to extradite wildlife criminals subject to the terms of the SADC Protocol is essential.

Malawi also recognises UNCAC, UNTOC, and seven bilateral extradition treaties as a legal basis for extradition; however, we have not analysed the provisions of the bilateral treaties.

MUTUAL LEGAL ASSISTANCE

Mutual legal assistance legislation and policies allow countries to cooperate during investigations and prosecutions. UNTOC and UNCAC both include provisions outlining the types of mutual legal assistance that Parties may request. At a minimum, if a country is a Party to one or both of these treaties, such mutual legal assistance should be available. Malawi is a Party to both, so MLA under either treaty is possible if triggered by a particular wildlife-related offence. However, whether a country

has specific legislation or policies on the provision of mutual legal assistance is also an important element of a wildlife crime legislative analysis.

The “Harare Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth” (Harare Scheme) is a governing document for MLA among Commonwealth countries and Malawi’s MLA legislation largely follows the framework of this “scheme.” The Mutual Legal Assistance in Criminal Matters Act (MLA Act) applies to all Commonwealth countries and implements the Harare Scheme. Under the Harare Scheme, each Commonwealth country designates a Central Authority (in Malawi, this is done by the MLA Act) to transmit and receive requests for assistance. The Scheme provides that a criminal matter arises in a country “if the Central Authority of that country certifies that criminal or forfeiture proceedings have been instituted in a court exercising jurisdiction in that country or that there is reasonable cause to believe that an offence has been committed in respect of which such criminal proceedings could be so instituted.” Under the Scheme, “offence” includes an offence under the law of the country or any part thereof. Accordingly, the definition of “criminal matters” is broad enough to cover wildlife crimes and wildlife offences in Malawi. However, dual criminality is required for a request to proceed, which potentially limits the assistance in wildlife trafficking cases.

Although a Party to many SADC Protocols, Malawi has not yet ratified the SADC Protocol on MLA. It could be helpful for regional efforts to combat wildlife trafficking if this Protocol entered into force in Malawi, especially if the Protocol could be amended to specifically address wildlife offences. Under the SADC Protocol on MLA,

Figure 5

Extradition Act	<ul style="list-style-type: none">• Minimum 1-year imprisonment• Designated country• Dual criminality• Offence described in schedule 2
SADC Protocol	<ul style="list-style-type: none">• Minimum 1-year imprisonment in both countries
UNTOC	<ul style="list-style-type: none">• “serious crime”• Organized criminal group• Dual criminality
UNCAC	<ul style="list-style-type: none">• Offence under the Convention• Dual criminality

Summary of extradition requirements


a request for mutual legal assistance should be granted “without regard to whether the conduct subject of a criminal investigation would be an offence in the requested State.” However, the SADC protocol applies only to “criminal matters,” which is limited to “investigation, prosecutions or proceedings relating to offences concerning transnational organised crime, corruption, taxation, custom duties and foreign

exchange control.” It thus appears that wildlife offences may not be the subject of mutual legal assistance requests, unless they involve corruption or transnational organised crime. That the SADC Protocol cannot be used for mutual legal assistance regarding wildlife crime could be a significant barrier to combating wildlife trafficking in Southern Africa.

Figure 6

MLA Act	<ul style="list-style-type: none">• Commonwealth country• “any criminal matter”: evidence, search or seizure, witness procurement, serving documents• Minimum 1-year imprisonment: tracing property, orders regarding property, confiscations
SADC Protocol	<ul style="list-style-type: none">• Criminal matter• Specific offences: transnational organized crime, corruption, tax, customs duties, foreign exchange control
UNTOC	<ul style="list-style-type: none">• “Serious crime”• Transnational in nature• Organized criminal group
UNCAC	<ul style="list-style-type: none">• An offence under the Convention

Summary of Mutual Legal Assistance provisions

A close-up photograph of a person's hand holding two long, curved, yellowish-brown objects, possibly ancient bone or ivory. The objects have a smooth, polished appearance with some darker, possibly charred or stained, sections near the base. The hand is positioned in the center-left of the frame, with the fingers gently gripping the objects. The background is a dark, textured surface, possibly a piece of fabric or a wall, which provides a strong contrast to the lighter-colored objects.

CONCLUSIONS AND RECOMMENDATIONS

Table 4

Consideration	ICCWC Outcomes and Indicators	Legislative Provisions	Fulfilled by Malawi?		
			Wildlife	Forestry	Fisheries
Regulating and prohibiting activities related to wildlife trafficking	Outcome 5, Indicator 28	Regulation or prohibition of hunting, take, or harvest	✓		
		Regulation of buying, selling, and attempting to buy and sell wildlife	✓		
		Prohibition against possession of illegally hunted, taken, or traded wildlife	✓		
		Prohibition against processing wildlife hunted, taken, or traded in violation of the legislation		✓	
		Prohibition against transport of wildlife hunted, taken, or traded in violation of the legislation			✓
Forgery and permit fraud	Outcome 5, Indicators 28, 31	Prohibition of violation of permit conditions	*		
		Prohibition of false or misleading statements	✓		
		Criminalisation of possession, use, or attempted use of forged/fraudulent permit			
		Prohibition against alteration of permits/criminalisation	✓		
Penalisation of offences	Outcome 5, Indicators 28, 29	Are violations offences? Are they administrative, civil, or criminal?	✓		
	Outcome 7, Indicator 40	Are these offences penalised?	✓		
		Do the penalties meet the UNTOC definition of “serious crime”?	✓		
Enforcement Authorities	Outcome 5, Indicators 28, 29	Designated Authority	✓		
	Outcome 7, Indicator 43	Authority to Inspect and Search	✓		
		Authority to Confiscate and Seize	✓		
		Authority to Arrest	✓		
		Forfeiture Authority	✓		

Summary of Legislative Provisions: Wildlife, Forestry, Fisheries

★ = partial progress

CORE WILDLIFE LEGISLATION: WILDLIFE, FORESTRY, FISHERIES

Overall, Malawi has strong wildlife, forestry, and fisheries legislation. Nearly all legislative provisions necessary to meet relevant legislative indicators are present as demonstrated in the analysis above and summarised in the tables, below. From a wide-lens perspective, one of the most important issues to address are those relating to overlapping scope and authority. For example, while the NPWA and the Fisheries Act cast a wide net in terms of enforcement authority, the Forestry Act only allows forestry officers to enforce the provisions of the Act. In addition, the scope of the three Acts overlap in the context of certain species and certain areas. For example, the NPWA covers all wildlife, wherever found, including fish species, which the Fisheries Act also regulates, and the Forestry Act covers certain wildlife species when found in forest areas. In most cases, Malawian Authorities appear to work this out, but

clarifying jurisdictional scope with a coordinated national policy might be useful. Relatedly, the Forestry and Fisheries Acts provide some rules with respect to export and import requirements; it is important that these provisions are harmonised with the new CITES regulations so that the requirements are clear and are not contradictory.

Specific legislative recommendations are not many but are important. First, the violation of permit conditions should be an offence in both the Forestry Act and NPWA. While permits and licences may be revoked if conditions are violated, the violation of permit or licence conditions is not an offence under either Act. Second, neither the NPWA, Forestry Act, nor the Fisheries Act criminalises the use or attempted use of forged or fraudulent permits – this should be remedied.

Priority recommendations Wildlife, Forestry, & Fisheries Legislation

- 1 Clarify overlapping jurisdictional scope and authority
- 2 Harmonise export and import requirements with CITES regulations
- 3 Prohibit the violation of permit conditions in Forestry Act and NPWA
- 4 Criminalise the use and attempted use of forged or fraudulent permits and licences

Table 5

Summary of Legislative Provisions: CITES

★ = partial progress

NLP Criteria	ICCWC Outcomes and Indicators	Legislative Provisions	Fulfilled in Malawi?
Designate at least one Management Authority and one Scientific Authority	Outcome 5, Indicators 28, 29	An express delegation or an authorisation to delegate	✓
		Assignment of authority to make necessary findings	★
Prohibit trade in specimens in violation of the Convention	Outcome 5, Indicators 28, 29	Clear prohibition of trade in specimens in violation of the Convention	✓
		Definition of “trade” includes import, export, re-export and introduction from the sea	✓
		Definition of “specimen” includes all readily recognisable parts and derivatives per Art. I(b)	✓
		Scope of coverage includes all CITES-listed species	✓
		Specification of permit conditions	✓
Penalises such trade	Outcome 5, Indicators 28, 29	Clearly specified penalties for violating prohibition of illegal trade	✓
	Outcome 7, Indicator 40		
Confiscate specimens illegally traded or possessed	Outcome 5, Indicators 28, 29	Legal authority to confiscate	✓
	Outcome 7, Indicator 43	Authority is designated to all relevant enforcement officers	✓

Table 6

Summary of Legislative Provisions: Ancillary Legislation

★ = partial progress

Consideration	ICCWC Outcomes and Indicators	Legislative Provisions	Fulfilled by Malawi?
Customs		Do customs officers have the authority to inspect CITES permits?	✓
		Do customs officers have the authority to confiscate wildlife specimens?	✓
		Do relevant violations exist?	✓
		Are offences serious crimes?	
Quarantine, Transport, and Welfare Laws		Are violations of any such legislation offences that could be used in the fight against wildlife trafficking?	✓
Penal Code	Outcome 5, Indicator 31, 32	Is conspiracy criminalised?	✓
		Are wildlife crimes predicate offences?	✓
	Outcome 7, Indicator 41, 43	Do sentencing guidelines exist? Do they apply to wildlife crime?	✓
Anti-Money Laundering Legislation	Outcome 5, Indicator 32, 33	Does the law cover the conversion, transfer, or concealment of property?	✓
		Does the law cover disguising the nature, source, location, etc. of any property that is the proceeds of a crime?	✓
		Do the offences apply to the proceeds of wildlife crime?	✓
		Are violations serious crimes?	✓
Asset Forfeiture and Recovery	Outcome 7, Indicator 44	Do asset forfeiture provisions apply to wildlife crimes	★

CITES LEGISLATIVE ASSESSMENT

Once adopted, Malawi’s suite of CITES regulations bring the country into nearly full compliance with CITES’ national legislation requirements. Minor tweaking should bring Malawi into full compliance. In particular, the regulations should specifically designate the authority to make requisite findings to the Management Authority.

Although this is implied when the NPWA and CITES Regulations are read together, clarity is an important factor in the CITES National Legislation Project assessment. In addition to the core criteria evaluated under the National Legislation Project, Malawi should continue to clarify its laws and policy with respect to pre-Convention specimens.

Priority recommendations CITES legislation

1

Minor amendment of and expedited adoption of CITES Regulations

2

Clarification regarding application of pre-Convention exemption

ANCILLARY LEGISLATION

While the wildlife, forestry, and fisheries legislation in Malawi is strong, the addition of strong ancillary legislation further enables the nation’s fight against wildlife trafficking. In all, Malawi’s customs legislation as well as the Penal Code provide additional helpful charging options for prosecutors and are drafted in such a way that they work mostly synergistically with wildlife, forestry, and fisheries legislation. The greatest need for clarity arises in the case of confiscated specimens. The Customs & Excise Act appears to allow the sale of confiscated goods, whereas under the NPWA, the Minister has discretion regarding disposal of confiscated specimens. In addition, CITES Parties have adopted a policy regarding the disposal of confiscated specimens. A national policy regarding disposal of confiscated wildlife that reflects CITES rules may be useful. Also important to note is that none of the violations

provided for in the Customs & Excise Act qualify as “serious crimes.”

Malawi’s Financial Crimes Act appears to be adequate to meet international best practice standards for combating wildlife crime. In fact, its utility may be significant given asset forfeiture is allowed under the Act. When wildlife crimes may be charged as money laundering or money laundering charges may be brought, asset forfeiture may be triggered, enabling prosecutors and law enforcement to truly dispossess criminals of the proceeds of wildlife crime. Asset forfeiture may also be applied for corruption offences charged under the Penal Code. Importantly, however, asset forfeiture and recovery mechanisms do not apply in general to wildlife crime and do not apply to conspiracy to commit an offence under the NPWA, Forestry Act, or Fisheries Act.

Priority recommendations Ancillary legislation

1

Make certain Customs & Excise Act violations “serious crimes”

2

Clarity regarding disposal of confiscated specimens

3

Consider expanding asset forfeiture and recovery provisions

Table 7

Summary of Legislative Provisions:
anti-corruption & whistle-blower protection

* = partial progress

Consideration	ICCWC Outcomes and Indicators	Legislative Provisions	Fulfilled by Malawi?
Anti-Corruption legislation	Outcome 5, Indicators 30 - 32	Is bribery an offence?	✓
		Is bribery of a foreign public official an offence?	
		Is trading in influence an offence?	✓
		Is abuse of function or duty an offence?	✓
		Is illicit enrichment an offence?	✓
		Is obstruction of justice an offence?	✓
		Are violations serious crimes?	✓
Whistle-blower Protection Legislation			*

LEGAL PROVISIONS TO COMBAT CORRUPTION AND PROTECT WHISTLE-BLOWERS

Malawi's anti-corruption legislation was assessed by UNODC during the UNCAC 2010-2015 review cycle, and while several recommendations were made, Malawi's anti-corruption legislation mostly meets UNCAC standards and is mostly adequate in the context of combating wildlife

crime. The most glaring omission in the context of wildlife crime is that bribery of a foreign public official is not an offence under the Act. Given the transboundary nature of wildlife crime, bribery of foreign public officials is an important offence and charge. Section 51 of the Anti-Corruption Act provides some protection to whistle-blowers, and comprehensive whistle-blower protection legislation is currently under review.

Priority recommendations Anti-corruption & whistle-blower protection

1

Criminalise bribery of a foreign public official

2

Adoption of whistle-blower protection legislation

LEGAL PROVISIONS FOR INTERNATIONAL COOPERATION

Regarding international cooperation, the opportunities in Malawi fall short of what is considered useful according to international best practices and standards. While UNCAC and UNTOC may provide opportunities for either extradition or MLA, domestic legislation is limiting and regional agreements may be

challenging to use as well. A full summary of the opportunities for extradition and MLA is presented above. Priority recommendations consider filling in gaps to ensure that options exist to fully employ international cooperation in the fight against wildlife trafficking. Most important amongst these may be amendment of the SADC Protocol on MLA to provide that wildlife offences trigger cooperation.

Table 8

Summary of Legislative Provisions: International Cooperation

* = partial progress

Consideration	ICCWC Outcome and Indicators	Legislative Provisions	Fulfilled in Malawi?
Extradition	Outcome 5, Indicator 30	Does legislation cover wildlife offences?	
		Do regional agreements cover wildlife offences?	*
		Are UNTOC and UNCAC bases for extradition?	✓
Mutual Legal Assistance	Outcome 5, Indicator 30	Is there national legislation in place and does it cover wildlife offences?	*
		Do regional treaties cover wildlife offences?	
		Are UNTOC and UNCAC bases for MLA?	✓

Priority recommendations International Cooperation

1

Advocate for inclusion of wildlife offences in SADC Protocol on MLA

2

Amend Harare Scheme and domestic legislation on extradition to cover wildlife crime

3

Consider making certain offences under Customs & Excise Act "serious crimes" so that they trigger UNTOC

ANNEXES



ANNEX I: CONSULTATIONS

Institution	Name and Position	Consultation date
Department of National Parks and Wildlife	Mr. Brighton Kumchedwa: Director	31.01.18
Department of National Parks and Wildlife	Mr. Chiza Manda: Deputy Director	31.01.18
Wildlife Crime Investigation Unit of the Department of National Parks and Wildlife	Mr. Miles Zidana: Head	30.01.18
Wildlife and Environmental Society of Malawi	Mr. Vincent Kaitano: Director	26.01.18
Forestry Department	Mr. Teddy Kamoto: Deputy Director	25.01.18
Department of Environmental Affairs	Ms. Victoria Kachamere: Principle Legal Officer	01.02.18
Anti-Corruption Bureau	Mr. Ipyana Musopole: Chief Corruption Prevention Officer	25.01.18
Malawi Police Service	Mr. Saddrey Sambo: Assistant Superintendent	25.01.18
Malawi Police Service	Mr. Happy Mkandawire: Deputy Commissioner	25.01.18
Malawi Police Service and INTERPOL	Mrs. Katy Msoya: Assistant Superintendent and INTERPOL Desk Officer	25.01.18
GIZ	Dr. Ivana Jurisic: Head of Programme, GIZ Elephant and Rhino Conservation	26.01.18
US Embassy	Gregoire Delhayre: Political and Judicial Analyst	26.01.18
Department of National Parks and Wildlife	Mr. Francis Phiri: Officer	26.01.18
International Centre for Asset Recovery, seconded to Ministry of Justice, DPP Office	Mr. Nick Staite: Barrister	30.01.18
Wildlife Action Group	Ms. Lynn Clifford: Director	02.02.18
Ministry of Agriculture, Irrigation and Water Development	Mr Maurice Makuwila: Chief Fisheries Officer (Planning and Development)	16.02.18
Financial Intelligence Authority	Mr. John Minofu: Manager, Operations Anaylist	06.03.18
Financial Intelligence Authority	Mr. Edwin Mtonga: Head of Legal	06.03.18
Malawi Communications Authority	Mr. Christopher Banda: Head of Cyber Crime and Cyber Security, CERT Manager	16.03.18

ANNEX II: ASSESSMENT RUBRIC

CITES: Convention Requirements

<i>NLP Criteria</i>	<i>ICCWC Outcomes and Indicators</i>	<i>Legislative Provisions</i>	
Designate at least one MA and one SA	Outcome 5, Indicators 28, 29	An express delegation or an authorisation to delegate	NPW CITES Regulations, Sec. 2: The Office of the Director of National Parks and Wildlife is designated as the CITES Management Authority in Malawi NWP CITES Regulations, Sec. 4: The Office of the Deputy Director of National Parks and Wildlife is designated as the CITES Scientific Authority in Malawi
		Assignment of authority to make necessary findings	NWP CITES Regulations, Sec. 3(g): “Perform such tasks as is required” by CITES While the NPWA provides that an applicant for an import, export, or re-export permit must provide evidence of compliance with CITES, neither the NPWA nor the CITES Regulations explicit designate to the MA the appropriate authority. NWP CITES Regulations, Sec.5: gives the SA the authority to “provide scientific advice on issuance of permits for international trade,” which should be sufficient to comply with CITES.
Prohibit trade in specimens in violation of the Convention	Outcome 5, Indicators 28, 29	Clear prohibition of trade in specimens in violation of the Convention	NWPA, Sec. 98: Any person who imports, exports or re-exports or attempts to import or export or re-export any specimen of a protected species, endangered species or a listed species, except through a customs post or port or without producing to a customs officer a valid permit to import, to export or to re-export, commits an offence
		Definition of “trade” includes import, export, re-export and introduction from the sea	The NPWA does not clearly define “trade,” but the NPWA and draft regulations regulate “trade” as defined by CITES, except that it does not provide for “introduction from the sea.” Because Malawi is a land-locked country, this should not be a barrier to having adequate implementing legislation.
		Definition of “specimen” includes all readily recognisable parts and derivatives per Art. I(b)	NWPA, Sec. 1: specimen means “any wild plant or animal, alive of [sic] dead, whether of not native to Malawi, and any readily recognisable part of derivative of such plant or animal”
		Scope of coverage includes all CITES-listed species	Yes, The NPWA and the NPW (Protected, Endangered and Listed Species) Declaration Order cover all CITES-listed species
		Specification of permit conditions	NPWA, sec. 97(b) provides that the Director may issue an import, export, or re-export permit for endangered or listed species when the person produces evidence of compliance with the requirements of any international, regional or bilateral agreement relevant to such species to which Malawi is party to, which includes CITES. Draft regulations for permit conditions are being developed to make this clearer.

Penalises such trade	Outcome 5, Indicators 28, 29	Clearly specified penalties for violating prohibition of illegal trade	NPWA, Sec. 111: any person who is convicted of an offence under Section 98 (regulating trade of listed species) or under regulations made pursuant to section 99 shall be liable to imprisonment for a term of thirty years.
	Outcome 7, Indicator 40		
Confiscate specimens illegally traded or possessed	Outcome 5, Indicators 28, 29	Legal authority to confiscate	NPWA, Sec 9(1): When conducting a search or inspecting a document, if an officer finds any specimen or article which appears to have been obtained, possessed, used or about to be used in committing an offence under this Act, he shall seize such specimen or article.
	Outcome 7, Indicator 43		
		Authority is designated to all relevant enforcement officers	NPWA, Sec. 6(3): “officers” include parks and wildlife officers; fisheries officers, forest officers, environmental inspectors, customs officers, members of the Malawi Police Service, members of the Malawi Defence Force and Honorary Parks and Wildlife Officers as the Minister may designate by notice published in the Gazette; and such other public officers as the Minister may designate by notice published in the Gazette

CITES: Additional Helpful Provisions for Implementation			
<i>Convention Elements</i>	<i>ICCWC Outcomes and Indicators</i>	<i>Legislative Provisions</i>	
CITES exceptions	Outcome 5, Indicators 28, 29	Pre-convention specimens	No exception (pending enactment of final regulations)
	Outcome 5, Indicators 28, 29	Transit and Transshipment	No exception (pending enactment of final regulations)
	Outcome 5, Indicators 28, 29	Personal and Household Effects	No exception (pending enactment of final regulations)
	Outcome 5, Indicators 28, 29	Captive Breeding	Animal Captivity licences are mentioned in NPWA Sec. 54A, but does not provide exceptions from permit requirements in relation to trading wildlife
	Outcome 5, Indicators 28, 29	Scientific Loan or Donation of museum specimens	No exception (pending enactment of final regulations)
	Outcome 5, Indicators 28, 29	Travelling Exhibition	No exception (pending enactment of final regulations)
Form and Validity of Permit	Outcome 5, Indicators 28, 29	Example of permit	NPW Import/Export Regulations contain sample permit
	Outcome 5, Indicators 28, 29	Requirement of seal, signature, stamp	NPW Import/Export Regulations: model includes space for seal, signature, and stamp
Forgery and permit fraud	Outcome 5, Indicators 28, 31	Prohibition of violation of permit conditions	The NPWA does not explicitly prohibit violation of permit conditions.
	Outcome 5, Indicators 28, 31	Prohibition of false or misleading statements	NPWA, Sec. 15(c) only prohibit a person from “willfully or recklessly giving to any officer false or misleading information which the officer is entitled to obtain.” liable to a fine of K2,000,000 and to imprisonment for a term of

			four years. Could conflict with: Penal Code, Sec 326: Any person who wilfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence, is guilty of a misdemeanour, and is liable to imprisonment for twelve months.
	Outcome 5, Indicators 28, 31	Prohibition of forgery and alteration of permits	NPWA, Sec. 16: Any person who, without lawful authority, alters, defaces or removes any official record maintained in pursuance of this Act or any regulation or order made under this Act, or alters or defaces any prescribed document issued under this Act commits an offence (see penalties table). Penal Code, sec. 356, criminalises forgery of “any document” with imprisonment for three years.
	Outcome 5, Indicators 28, 31	Criminalisation of possession, use, or attempted use of forged/fraudulent permit	The NPWA does not criminalise possession or use of a forged or fraudulent permit.

Provisions for Combatting Wildlife Trafficking: Wildlife, Forestry, Fisheries			
Consideration	ICCWC Outcomes and Indicators	Legislative Provisions	
Regulating and prohibiting activities related to wildlife trafficking	Outcome 5, Indicator 28	Regulation or prohibition of hunting and take	NPWA, Sec. 35: no taking, disturbing, or injuring any wild plant or animal in protected areas unless have a permit to harvest resources (sec. 39/40) or a valid hunting licence. Sec. 47: no hunting or taking protected, endangered, or listed species unless have a licence. Sections 50 - 54 detail requirements for various licences Sec. 64-72: regulate methods of hunting. Forestry Act, Sec. 46: no harvesting “forest produce,” including wildlife, except under a licence.
	Outcome 5, Indicator 28	Regulation of timber harvest	Forestry Act, Part VIII, Sec. 46: No person shall cut, take, fell, destroy, uproot, collect, and remove forest produce from a forest reserve, customary land, public land and protected forest area “unless under a licence”
	Outcome 5, Indicator 28	Regulation of marine species harvest	Fisheries Act, Sec. 10: fishing vessels must be registered Sec. 11: an offence if not registered and individuals are fishing without a licence Sec. 14: prohibition of commercial fishing without a licence Fisheries Act, Sec. 12: No foreign fishing vessel shall be used for commercial fishing unless authorised by a licence Sec. 42: prohibition on certain fishing methods Sec. 61: regulations may establish closed areas, seasons, quotas: the Minister did issue regulations regarding Lake Chilwa and Mpoto Lagoon, prohibiting fishing between December 1st and March 31st, and prohibiting fishing in Domasi River, Likangala River, Mnombo River, and Sombani River between May 1st and December 31st.

			Sec. 15: licensees are subject to these conditions, and every fishing licence shall specify the gear that is permitted in the exercise of the fishing right granted Fishing regulations: requires licences for commercial fishing, sport fishing, and subsistence fishing, including live fish collection for sale or aquaculture; violation is an offence. Sec. 31–34 of the Fisheries Regulations establish restrictions and rules regarding fishing gear
Outcome 5, Indicator 28	Regulation of buying, selling, and attempting to buy and sell wildlife	Wildlife	NPWA, Sec. 86: Prohibits buying, selling and attempting to buy or sell any specimen of a game species, protected species, endangered species or listed species without a valid licence for hunting or take or a certificate of ownership
		Forestry	Forestry Act, Sec. 68(1)(c): any person who trafficks in forest produce without a licence commits an offence
		Fisheries	Fisheries Act, Sec. 42(3)(b) prohibits the sale of fish taken with prohibited fishing methods Fisheries Regulations, Sec. 50: A non-commercial fisherman shall not sell by wholesale or retail fish caught by him Fisheries Regulations, Sec. 36: No person shall sell or offer to expose for sale any fish listed in the First Column of the fifteenth schedule of less than the lengths set out in the second column measured
Outcome 5, Indicator 28	Prohibition against possession of illegally hunted, taken, or traded wildlife	Wildlife	NPWA, Sec. 86: prohibits the possession or attempts to possess any specimen of a game species, protected species, endangered species or listed species without a valid licence for hunting or take or a certificate of ownership
		Forestry	Forestry Act, Sec. 68(1)(a)-(b): any person who knowingly receives forest produce illegally, or is found in possession of forest produce without a permit commits an offence
		Fisheries	Fisheries Act, Sec. 16(1): no master shall take or allow to remain on board a fishing vessel, within the fishing waters, fish which has not been taken under the authority of and in accordance with a fishing licence or other licence provided for under this Act. Fisheries Act, Sec. 32(1)(d) gives fisheries protection officer the authority to seize any fishing gear, of fish or fish product possessed in contravention of this Act Sec. 42(3)(b) also prohibits the possession of fish knowing or having reasonable cause to believe it to have been taken with prohibited fishing methods such as explosives or poison
Outcome 5, Indicator 28	Prohibition against processing wildlife hunted, taken, or traded in violation of the legislation	Wildlife	No explicit prohibition; see “possession” above

			Forestry	Forestry Act, Sec. 82: No person shall engage in commercial processing of any wood or forest produce without a permit from the Director of Forestry
			Fisheries	Fisheries Act, Sec. 61: Although the Minister has the authority to issue regulations for the licensing of processing establishment, it is unclear whether such regulation has been issued
	Outcome 5, Indicator 28	Prohibition against transport of wildlife hunted, taken, or traded in violation of the legislation	Wildlife	No explicit prohibition; see “possession” above
			Forestry	Could be covered under the prohibition against “removing” forest produce without a licence or against “trafficking” without a licence. Forestry Act, Sec. 6(b)(i) suggests that a transportation document may be required to transport forest produce
Fisheries			Fisheries Act, Sec. 45(7): Any master who tranships, receives on board a fishing vessel, transports or in any other manner deals with fish caught or transhipped in contravention of this Act shall be guilty of an offence (see penalties table)	
	Regulation of import, export, re-export, introduction from the sea (See also CITES section of rubric).	Wildlife	NPWA, Sec. 97: import, export, and re-export of game species, protected species, endangered species, and listed species requires a permit	
		Forestry	Forestry Act, Sec. 73: Any person who imports, exports, or re-exports or attempts to import, export or re-export any forest produce through any place other than a custom’s post or port; or without producing to a customs officer a valid licence to import or export or re-export (see penalties table)	
		Fisheries	Fisheries Act, Sec. 61(j), (n): Minister has authority to regulate import/export of live fish, eggs, spawn and fry, as well as “fish and fish products”	
Forgery and fraud – hunting, harvest, fishing licences	Outcome 5, Indicators 28, 31	Prohibition of violation of licence conditions	Wildlife	The NPWA does not explicitly prohibit violation of licence conditions, but Sec. 55-57: The Chief Parks and Wildlife Officer may refuse to grant a licence or revoke a licence if the applicant fails to comply with any prescribed conditions
			Forestry	No direct prohibition but Forestry Act, Sec. 51 provides that the Director of Forestry may suspend any operation under any licence upon the violation of any condition of the licence

		Fisheries	Fisheries Act, Sec. 15(c): violation of licence conditions is an offence (see penalties table) Fisheries Act, Sec. 57(1)(c): authorises suspension or cancellation of any registration, licence or permit if he has proof to believe that holder conditions have been violated
Outcome 5, Indicators 28, 31	Prohibition of false or misleading statements	Wildlife	NPWA, Sec. 15(c): prohibits “wilfully or recklessly giving to any officer false or misleading information which the officer is entitled to obtain” Penal Code, Sec 326: Any person who wilfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence, is guilty of a misdemeanour
		Forestry	Forestry Act, Sec. 69: Any person who wilfully or recklessly gives to any officer false or misleading information which the officer is entitled to obtain is guilty of an offence (see penalties table)). Unclear whether this applies to statements made in connection with a licence application, but this gap could be filled by Penal Code, Sec. 326 (see above)
		Fisheries	Sec. 44(2): Any person who, for the purposes of obtaining any licence, permit or registration; or in purported compliance with any requirement to provide any information under this Act, provides information which he knows to be false in a material particular or recklessly provides information which is false in a material particular shall be guilty of an offence
Outcome 5, Indicators 28, 31	Prohibition of alteration of licences or forgery	Wildlife	NPWA, Sec. 16: Any person who alters or defaces any prescribed document issued under this Act commits an offence Penal Code, sec. 356: Any person who forges any document shall be guilty of an offence
		Forestry	Forestry Act, Sec. 70(a)(b): any person who without lawful authority: counterfeits or alters any licence, permit or pass required under this Act; alters or defaces any prescribed document issued under this Act, is guilty of an offence (see penalties table) Penal Code, sec. 356
		Fisheries	Fisheries Act, Sec. 44(3): any person who, without lawful authority, alters or defaces any registration certificate, licence, permit, return, or other document issued under this Act commits an offence (see penalties table) Penal Code, sec. 356
Outcome 5, Indicators	Criminalisation of possession, use, or attempted use of	Wildlife	licences for hunting and take, certificates of ownership, and import, export, re-export permits must be “valid” or individual

	28, 31	forged/fraudulent licence		commits an offence
			Forestry	Could be covered under Forestry Act, Sec. 70
			Fisheries	No
Penalisation of offences	Outcome 5, Indicators 28, 29	Are violations offences? Are they administrative, civil, or criminal?	Most violations are offences. Fisheries Act, Sec. 50: provides for the charging of an administrative offence under certain conditions; penalty cannot exceed half of maximum penalty that could be imposed by a Court.	
	Outcome 7, Indicator 40			
	Outcome 5, Indicators 28, 29	Are these offences penalised?	Yes	
	Outcome 7, Indicator 40			
	Outcome 5, Indicators 28, 29	Do the penalties meet the UNTOC definition of “serious crime”?	Many but not all do; see offences and penalties table.	
Enforcement Authorities	Outcome 5, Indicators 28, 29	Designated authority	Wildlife	NPWA, Sec. 6: Wildlife Officers
	Outcome 7, Indicator 43		Forestry	Forestry Act, Sec. 4: The Director of Forestry and officers subordinate to him are responsible for the administration of this Act
			Fisheries	Fisheries Act, Sec.30(1): Fisheries Protection Officers
		Inspect and Search	Wildlife	NPWA Sec. 8 and 9: Officers may, without warrant, enter upon and search any land, building, tent, motor vehicle, trailer, container, aircraft or boat for the purpose of ensuring that the provisions in this Act are being complied with or for the purpose of preventing or detecting a ny offence under this Act. They also have authority to inspect relevant documents
			Forestry	Forestry Act, Sec. 6 and 8:: Officers may inspect documents, search vehicles and persons, and enter premises in a forest reserve or any building to conduct inspections and ensure the Act is being complied with,

			Fisheries	<p>Fisheries protection officers have broad authority, including to stop and board vessels (sec. 30(1)(a),(d)); examine and take copies of any certificate of registration, licence, log book, record of fish (sec. 30(1)(e)); question the master of the vessel (sec. 30(1)(f)); make any search, examination or enquiry necessary to determine whether any provision of the Act has been contravened (sec. 30(1)(g).</p> <p>Authority to stop, board and search outside the fishing waters any foreign fishing vessel if reasonable belief that the vessel has been used in the commission of an offence (sec. 30(1)(2))</p> <p>Officers may require any person to produce for inspection any licence or permit required under the Act (sec. 31(1)(a)); inspect any fishing gear, fish, fish product, explosive, poison or article in such person’s possession (sec. 31(1)(b))</p> <p>Officers may stop, enter, and inspect any vehicle, aircraft, vessel or other means of conveyance, and question the person in charge of the vehicle, boat, aircraft or other conveyance (sec. 31(2)(a-c)</p> <p>Upon reasonable belief that an offence is being or has been committed, an officer may enter and search any land, building, camp, tent or other premises or any vehicle, aircraft, vessel or other means of conveyance and open and search any baggage, pack or other thing (sec. 32(1)(a))</p> <p>However, officers may not enter a dwelling without a warrant or consent of the occupier (sec. 33(1)).</p> <p>Fisheries Regulations, Sec. 46: Fisheries protection officers may inspect any store holding fish; any fish prior to export, any imported fish</p>
	Confiscate/Seize		Wildlife	NPWA, Sec. 9: if an officer finds any specimen or article which appears to have been obtained, possessed, used or about to be used in committing an offence under this Act, he shall seize such specimen or article
			Fisheries	<p>Fisheries Act Sec. 30(1)(k): authority to seize vessels, stores and cargo;</p> <p>(l): a fisheries protection officer may seize any fishing gear, instrument, or appliance used in commission of an offence; (m) any fish or fish product believed to have been taken in commission of an offence; and (n) any documents which he believes to be relevant to such offences</p> <p>Sec. 32(1)(c): a fisheries protection officer may seize any fishing gear, explosive, poison, chemical, machinery, equipment, vehicle, vessel, pack animal, aircraft or other thing that he has reasonable grounds to believe has been or is being used or possessed in the commission of an offence</p> <p>32(1)(d): Fisheries protection officers can seize any fish or fish product they have reasonable grounds to believe has been or has been attempted to be caught, processed, traded, imported, or exported or is possessed in contravention of this act</p>
			Forestry	Forestry Act, Sec. 9: Any officer or police officer may seize and detain any forest produce which the officer or police officer reasonably suspects has been obtained or removed in contravention of this Act, any article which the officer or police officer reasonably suspects has been used in committing the offence,

	Arrest	Wildlife	NPWA, Sec. 12: where any person is found committing or is reasonably suspected of having committed or of being about to commit an offence under this Act, any officer may without warrant arrest such person
		Forestry	Forestry Act, Sec. 13: where any person is found committing or is reasonably suspected of having or of being about to commit an offence under this Act, any officer may, without warrant, arrest such person
		Fisheries	<p>Fisheries Act, Sec. 30(1)(i): An fisheries protection officer may without summons or warrant, in the case of any person whom he has reasonable grounds to believe is committing or has committed an offence against this Act, arrest the suspected offender and take or require the master of the vessel to take the vessel, together with the crew to a port or harbour in malawi to bring them before a competent court</p> <p>Fisheries Act, Sec 32(1)(f): power to arrest without a warrant any person with reasonable grounds to believe is committing or has committed an offence under this Act.</p>
Forfeiture	Wildlife		NPWA, Sec. 113: Upon the conviction of any person of an offence under this Act where it considers forfeiture to be necessary, the court shall, notwithstanding any other written law and subject to the provisions of section 108 and in addition to any other penalty imposed, declare any specimen, domestic animal or any firearm or other weapon, trap, net, poison, material or any motor vehicle, aircraft, boat, or any other article taken by or used in connexion with the commission of the offence to be forfeited to the Government.
		Forestry	Forestry Act, Sec. 74(1)(a): upon conviction of any person of an offence under this Act, the court may order that any forest produce which has been used in the commission of the offence shall be forfeited to the government
		Fisheries	<p>Fisheries Act, Sec. 49: upon conviction of any person of an offence under this Act, the Court shall forfeit any licence, permit, or registration granted under this Act</p> <p>Fisheries Act, Sec. 40(3): Where a person who has been charged with an offence under this Act fails to appear to answer the charge within ninety days, the Director may apply to the Court for the vessel, article or other thing detained or seized in accordance with section 30 or 32 to be forfeited to the Government and the Court shall make such order as it shall consider just.</p> <p>Sec. 51(1): if any fine or costs is adjudged to the owner, master, or charterer of a vessel in respect to a contravention under the Act, the Court may, if no security or insufficient security given to the Government, order in default of payment the detention of the fishing vessel used in contravention of an Act</p> <p>Sec. 51(2): if after thirty days of such order the fine is still not paid, the Court may order, in the case of an offence committed under section 11, 12, or 13, order the forfeiture of any vessel and equipment used in commission of the offence</p>

Ancillary Legislation Used to Combat Wildlife Trafficking			
Customs		Do customs officers have the authority to inspect CITES permits?	<p>Customs Act, Sec. 13: An officer may in the course of his duty stop and search or cause to be searched any person, including any person within or upon any conveyance, whom the officer has reasonable grounds to suspect of having in his possession or secreted about him any goods subject to customs control:</p> <p>Sec. 14: Any officer may in the course of his duty require the owner of any package containing or reasonably suspected of containing respect of any goods subject to customs control to open such package and such officer may examine, weigh, measure, mark or seal the the package or any of the goods contained therein and such owner shall not in any manner dispose of or remove any such package or goods until they have been released by the proper officer.</p> <p>Sec. 16: stop, enter and search any aircraft or vehicle arriving from or being about to depart to a foreign port, or any aircraft of vehicle within Malawi which he reasonably suspects may be carrying imported goods to be exported;</p> <p>Sec. 145: Any goods in respect of which an offence has been committed under the customs laws shall be liable to forfeiture.</p> <p>Sec. 146: An officer or police officer may seize any goods or conveyance which he reasonably suspects may be liable to forfeiture.</p>
		Do customs officers have the authority to confiscate wildlife specimens?	
Quarantine, Transport, and Welfare Laws		Are violations of any such legislation offences that could be used in the fight against wildlife trafficking?	The Control and Diseases of Animals Act provides rules regarding the quarantine of animals and importation of animals. The Act provides various offences, and Section 15 notably provides that any person obstructing or impeding an inspector or police officer in the execution of his duty under the Act shall be guilty of an offence.
Penal Code	Outcome 5, Indicator 31, 32 Outcome 7, Indicator 41, 43	Is conspiracy criminalised?	The Penal Code criminalises conspiracy in various places, including Sec. 323 (conspiracy to defraud), Sec. 227 (conspiracy to murder), Sec. 404 (conspiracy to commit felony), sec. 405 (conspiracy to commit misdemeanour). Conspiracy to commit wildlife crimes would likely be covered under conspiracy to commit a felony or a misdemeanour
		Do sentencing guidelines exist? Do they apply to wildlife crime?	<p>Sentencing guidelines have been under development for the last 4-5 years</p> <p>It appears the draft sentencing guidelines have been completed and will be published in the Gazette in the near future</p>
		Do provisions on asset forfeiture and recovery apply to wildlife crime?	Although the Penal Code and Criminal Procedure Code provide for the forfeiture of property used in connection of an offence, there does not seem to be provisions relating to the forfeiture of assets obtained as a result of wildlife offences.
Anti-money laundering	Outcome 5, Indicators	Does the law cover the conversion, transfer, or	Financial Crimes Act, Sec. 42(1): A person who, knowingly or who has reasonable grounds to believe that any property, including his own property, in whole or in part, directly or indirectly, represents proceeds of

	“investigations, prosecutions or proceedings relating to offences concerning transnational organised crime, corruption, taxation, custom duties and foreign exchange control. Accordingly, wildlife offences would only be covered if they are intertwined with the listed offences.
Are there international or regional treaties? If so, do they cover wildlife offences or serious crimes?	<p>MLA can also be provided on the basis of bilateral and multilateral treaties and on conditions of reciprocity in the absence of a treaty.</p> <p>Malawi is a party to the SADC Protocol on Mutual Legal Assistance in Criminal Matters</p> <p>Malawi is also a party to the Harare Scheme on MLA.</p>

ANNEX III: OFFENCES AND PENALTIES TABLE

As suggested, penalties are a crucial component of adequate legislation to combat wildlife trafficking. Criminalising activities attendant to wildlife trafficking is key, and penalties should include options for either or both fines and imprisonment. Several additional factors should be taken into consideration when establishing penalties for wildlife crime, including whether mandatory minimums may be effective in countering corruption, whether penalties are indexed to inflation rates, whether penalties reflect the actual value of wildlife, seizure and asset forfeiture, and the possibility of restitution. Further, provisions establishing the criminalisation and penalties for various wildlife crimes should meet the criteria for “serious crime” under the United Nations Convention Against Transnational Crime (UNTOC), discussed below.

Malawi’s wildlife legislation provides for strong penalties against violators. For example, many of the NPWA and Forestry Act offences are punishable by fines of more than K2,000,000 and imprisonment between 10 and 30 years. The Fisheries Act also has strong prison sentences associated with violations, many between 2 and 4 years, although fines are quite lower than for the NPWA and Forestry Act. This could be explained by the fact that penalties for the NPWA and Forestry Act were recently updated while the Fisheries Act is a bit older. Nevertheless, many wildlife offences analysed in this report would qualify as “serious crimes” under UNTOC, thus facilitating international cooperation in the prosecution of those offences.

Many penalty provisions throughout legislation in Malawi, including the penalties provided for in the NPWA, are drafted such that a fine *and* imprisonment are indicated as the proper penalty. However, despite the use of the conjunctive “and,” these provisions have been interpreted by the Courts in Malawi as disjunctive—in other words, that “and” may be interpreted as “or” when used in penalty provisions. This was first pronounced in the case of the case of *Republic v Pitason* (Confirmation Case No. 1143 of 2001, MW HC 58). In that case, the High Court ruled that “where the words “fine and imprisonment” appear in such a penal provision, the Court should read the words disjunctively.”

Justice Ivy Kamanga followed this decision in open court in the case of *Monika Mattaka, Ibrahim Rafick and Hope Kapalamula against the State*, Appeal No 23/2017, appeal from the Chief Resident Magistrates’ Court for the Central Region Magistrate’s Court, case number 921/16. One of the appellants’ grounds of appeal was that the lower court erred in law by not considering a financial penalty. Justice Ivy Kamanga dismissed all the grounds of appeal and confirmed that the Chief Resident Magistrate had not erred in law in passing a custodial sentence and was not required to pass a financial penalty at the same time given the High Court ruling that penalty provisions may be read disjunctively.

NATIONAL PARKS AND WILDLIFE ACT			
Offence	Penalty or penalties	Authority	Serious Crime
Importing, exporting, re-exporting or attempting any of these activities except through a customs port or post or without a valid permit	Imprisonment for 30 years and forfeiture if necessary	NPWA, Sec. 98, 111, 113	Yes
Contravening regulations made to restrict imports, exports or re-exports	Imprisonment for 30 years, and forfeiture if necessary	NPWA, Sec. 99, 111, 113	Yes
Any person who possesses, buys, sells, transfer or receive in transfer or who attempts to possess, buy, sell, transfers or receives in transfer, any specimen of a game species without a licence	Fine of K2,000,000 and imprisonment for a term of four years, and forfeiture as necessary	NPWA, Sec. 86(1), 109(b), 113	Yes
Conviction of an offence including “taking, hunting, molesting or reducing into possession any game species”	Same as above	NPWA, Sec. 109(a), 113	Yes
Any person who hunts or take any protected species, endangered species or listed species except in accordance with the conditions of a licence and, where so required under this Act, a permit issued pursuant to this Part	<ul style="list-style-type: none"> • Fine of K5,000,000 and imprisonment for a term of ten years for a protected species • Fine of K15,000,000 and imprisonment for 30 years for an endangered species • Imprisonment for 30 years for a listed species • Forfeiture as necessary 	NPWA, Sec. 47, 110(a), 110A(a), 110B(a), 113	Yes
Buying, selling and attempting to buy or sell any specimen of a game species, protected species, endangered species or listed species without a valid licence	Same as above	NPWA, Sec. 86(1), 110(b), 110A(b), 110B(b), 113	Yes
Any person who possesses or attempts to possess any specimen of a game species, protected species,	Same as above	NPWA, Sec. 86(1), 110(b), 110A(b),	Yes

endangered species or listed species without a valid licence		110B(b), 113	
Any person who transfers or receives in transfer or attempts to do so for any specimen of a game species, protected species, endangered species or listed species without a valid licence	Same as above	NPWA, Sec. 86(1), 110(b), 110A(b), 110B(b), 113	Yes
Wilfully or recklessly giving to any officer false or misleading information which the officer is entitled to obtain	Fine of K2,000,000 and imprisonment for a term of four years, and forfeiture as necessary	NPWA, Sec. 15(c), 108, 113	Yes
Any person who, without lawful authority, alters, defaces or removes any official record maintained in pursuance of this Act or any regulation or order made under this Act, or alters or defaces any prescribed document issued under this Act	Same as above	NPWA Sec. 16, 108, 113	Yes
Obstruction of any officer in the performance of his functions under this Act	Same as above	NPWA Sec. 15(a), 108, 113	Yes
Any person who fails to comply with any directive or instruction of the Chief Parks and Wildlife Officer or of any officer duly acting on behalf of the Chief Parks and Wildlife Officer in the management of an area under this section	Same as above	NPWA, Sec. 30(3), 108, 113	Yes
A person who is convicted of an offence under this Act for which no other penalty is provided	Fine of K2,000,000 and imprisonment for a term of four years	NPWA, Sec. 108	Yes

FORESTRY ACT			
Offence	Penalty or Penalties	Authority	Serious Crime
Any person who, without authority, fells, cuts, takes, destroys, removes, collects, uproots any tree and other vegetation or forest property in a forest reserve or protected area	Fine of K5,000,000 and imprisonment for ten years, and forfeiture	Forestry Act, Sec. 64(1)(a), 64(2), 74(1)(a)	Yes
Any person who, without authority, connives with or causes another person to fell, cut, take, destroy, remove, collect, uproot any tree and other vegetation or forest property in a forest reserve or protected area	Same as above	Forestry Act, Sec. 64(1)(b), 64(2), 74(1)(a)	Yes
Any person who, without authority, squats, resides, erects a building, hut, livestock enclosures or any structure in a forest reserve or protected area	Same as above	Forestry Act, Sec. 64(1)(c), 64(2), 74(1)(a)	Yes
Any person who, without authority, clears, cultivates, digs or breaks up land for any road or for any purpose whatsoever and grazes livestock in a forest reserve or protected areas	Same as above	Forestry Act, Sec. 64(1)(d), 64(2), 74(1)(a)	Yes
Any person who pursues, kills, hunts, molests, captures or injures any animal, bird, fish, or reptile, or collects eggs or spawns from a forest reserve, a protected forest area or a village forest area	Fine of K5,000,000 and imprisonment of 10 years, and possible forfeiture	Forestry Act, Sec. 66, 74(1)(a)	Yes
Any person who knowingly receives forest produce illegally	Fine of K5,000,000 and imprisonment for 10 years, and forfeiture	Forestry Act, Sec. 68(1)(a), 68(4), 74(1)(a)	Yes
Any person found in possession of forest produce without a permit, or trafficking in forest produce without a licence	Same as above	Forestry Act, Sec. 68(1)(b-c), 68(4), 74(1)(a)	Yes
Any person who obstructs or hinders any officer in the	Fine of K2,000,000 and imprisonment for 5 years, and	Forestry Act, Sec. 69(a),	Yes

performance of his functions under this Act	possible forfeiture	74(1)(a)	
Any person who wilfully or recklessly gives to any officer false or misleading information which the officer is entitled to obtain under this Act	Same as above	Forestry Act, Sec. 69(b), 74(1)(a)	
Any person who refuses to furnish to any officer on request, particulars or information which the officer is entitled to obtain under this Act	Same as above	Forestry Act, Sec. 69(c), 74(1)(a)	Yes
Any person who without lawful authority, counterfeits or alters any licence, permit or pass required under this Act; or alters or defaces any prescribed document issued under this act; or makes upon or affixes to any forest produce a mark used in connexion with forest produce by the Department of Forestry	Fine of K5,000,000 and imprisonment for 10 years, and possible forfeiture	Forestry Act, Sec. 70(a-c), 74(1)(a)	Yes
Any person who contravenes the provisions of section 43 (offences relating to possession or use of weapons, traps, explosives and poisons for hunting animals)	Same as above	Forestry Act, Sec. 71(1), 74(1)(a)	Yes
Any person who imports, exports, or re-exports or attempts to import, export or re-export any forest produce through any place other than a custom's post or port; or without producing to a customs officer a valid licence to import or export or re-export	Fine of K10,000,000 and imprisonment for 15 years	Forestry Act, Sec. 73(a-b)	Yes

FISHERIES ACT			
Offence	Penalty or Penalties	Authority	Serious Crime
No local registrable fishing vessel shall be used for commercial fishing in the fishing waters unless it is registered under section 10 and the person using the vessel or a person working on his behalf is authorised so to fish by a licence	Fine of K50,000 and imprisonment for 10 years, and K200 per day for each day after conviction; and forfeiture of permit or licence	Fisheries Act, Sec. 11	Yes
No foreign fishing vessel shall be used for commercial fishing in the fishing waters unless the owner or charterer thereof is authorised to fish by a licence	Fine of K20,000 and imprisonment for 10 years, and K200 per day for each day after conviction; and forfeiture of permit or licence	Fisheries Act, Sec. 12	Yes
No person shall engage in commercial fishing in the fishing waters except under the authority of a licence	Fine of K20,000 and imprisonment for 4 years; and forfeiture of permit or licence	Fisheries Act, Sec. 14	Yes
Sale of fish taken with prohibited fishing methods	Fine of K30,000 and imprisonment for six years; and forfeiture of permit or licence	Fisheries Act, Sec. 42(3)(b)	Yes
Non-commercial fisherman selling by wholesale or retail fish caught by him	Fine of K5,000 and imprisonment for one year; and forfeiture of permit or licence	Fisheries Regulations, Sec. 49(1-2), 50 (2)	No
No person shall kill, take or sell or offer to expose for sale any fish listed in the First Column of the fifteenth schedule of less than the lengths set out in the second column measured	Same as above	Fisheries regulations, Sec. 36, 49(1-2)	No
Any master who tranships, receives on board a fishing vessel, transports or in any other manner deals with fish caught or transhipped in contravention of this Act	Fine of K20,000 and imprisonment for 4 years; and forfeiture of permit or licence	Fisheries Act, Sec. 45(7)	Yes

Violations of licence conditions	Fine of K20,000 and imprisonment for 4 years; and forfeiture of permit or licence	Fisheries Act, Sec. 15(c)	Yes
Any person who resists arrest or wilfully obstructs a fisheries protection officer in the exercise of his powers under this Act; or refuses or neglects to comply with any order, requisition, direction or notice lawfully made or given under this Act; or fails without reasonable excuse to answer any question asked by a fisheries officer or to produce anything required to be produced	Fine of K30,000 and imprisonment for 6 years; and forfeiture of permit or licence	Fisheries Act, Sec. 44(1)(a-c)	Yes
Any person who, for the purposes of obtaining any licence, permit or registration; or in purported compliance with any requirement to provide any information under this Act, provides information which he knows to be false in a material particular or recklessly provides information which is false in a material particular	Fine of K10,000 and imprisonment for 2 years; and forfeiture of permit or licence	Fisheries Act. Sec. 44(2)(a)	No
Any person who, without lawful authority, alters or defaces any registration certificate, licence, permit, return, or other document issued under this Act	Fine of K5,000 and imprisonment for one year; and forfeiture of permit or licence	Fisheries Act, Sec. 44(3)	No

CUSTOMS ACT			
Offence	Penalty or Penalties	Authority	Serious Crime
Any person who, being required by or in accordance with the customs persons laws to answer any question or supply any information fails or neglects to do so or gives or makes any untrue, incorrect, false or incomplete answer or representation	Fine of K10.000 or three times the value of the goods with respect to which the offence was committed, and imprisonment for 3 years, and forfeiture of goods in respect of which the offence is committed	Customs Act, Sec. 132(a), 143, 145(1)	No
Any person who counterfeits or without authority uses any seal, signature, initials or other mark of, or used by, any officer for any purpose relating to the customs laws	Same as above	Customs Act, Sec. 132(e), 143, 145(1)	No
Any person who conspires with another to commit an offence against the customs laws	Same as above	Customs Act, Sec. 132(i), 143, 145(1)	No
Any person who attempts, causes, permits, aids, connives at or abets the commission of, any offence against the customs laws shall be deemed to have committed such offence and shall be punishable as if he had himself committed such offence.	Same as above	Customs Act, Sec. 133(c), 143, 145(1)	No
Any person who imports, exports, carries coastwise or in transit, loads, unloads, removes, posses or conveys goods contrary to the provisions of the customs laws	Same as above	Customs Act, Sec. 134(a), 143, 145(1)	No
Any person who imports or exports any goods in pursuance of any document in which a false declaration has been made	Same as above	Customs Act, Sec. 134(b), 143, 145(1)	No
Any person who except in accordance with the customs laws, buys, receives, harbours, offers for sale or deals in, or has in his possession any goods subject to customs control	Same as above	Customs Act, Sec. 134(c), 143, 145(1)	No

Any person who except in accordance with the customs laws, conceals, moves, alters, damages, destroys, removes, disposes of or in any way interferes or tampers with goods subject to customs control	Same as above	Customs Act, Sec. 134(d), 143, 145(1)	No
Any person who offers for sale or deals in or possesses any goods under the pretence that they are smuggled goods whether or not they are in fact smuggled goods	Same as above	Customs Act, Sec. 134(e), 143, 145(1)	No
Any person who makes or signs any declaration, bill of entry, certificate or other document made for submission to an officer which is untrue or incorrect	Same as above	Customs Act, Sec. 135(a), 143, 145(1)	No
Any person who knowingly uses or attempts to use for any purpose of the customs laws any book or document which has been forged, falsified or framed so as to deceive	Same as above	Customs Act, Sec. 135(d), 143, 145(1)	No
<p>If any conveyance is used in smuggling or in the carriage of smuggled goods;</p> <p>Any vessel fails to stop for boarding when lawfully required to do so;</p> <p>Any ship fails to depart from Malawi within twenty four hours after being so required by an officer; or</p> <p>Any goods on any conveyance are thrown overboard, staved or destroyed to prevent seizure</p>	The master or person in charge is liable to the same penalties as above	Customs Act, Sec. 137(2)(a-d), 143, 145(1)	No
Any officer who directly or indirectly asks for or takes, in connexion with to officers any of his duties, any payment or other reward whatsoever, whether pecuniary or otherwise, or any promise or security for such payment or reward, not being a payment or reward which he is lawfully entitled	Fine of K10.000 or three times the value of the goods with respect to which the offence was committed, and imprisonment for 3 years, and forfeiture of goods in respect of which the offence is committed	Customs Act, Sec. 139(1)(a), 143, 145(1)	No

to claim or receive			
Any person who, without lawful authority directly or indirectly offers or gives to any officer any payment or reward whatsoever, whether pecuniary or otherwise, or any promise or security for any such payment or reward	Same as above	Customs Act, Sec. 139(2)(a), 143, 145(1)	No

PENAL CODE			
Offence	Penalty or Penalties	Authority	Serious Crime
Any person who, being employed in the public service, and being charged with the performance of any duty by virtue of such employment, corruptly solicits, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office	Imprisonment between 5 and 12 years	Penal Code, Sec. 90(a)	Yes
Any person who corruptly gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, upon, or for any person employed in the public service, or to, upon, or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person so employed	Same as above	Penal Code, Sec. 90(b)	Yes
Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another	Misdemeanour, unless done for purposes of gain: felony and imprisonment for three years	Penal Code, Sec. 95	No
Any person who, being authorised or required by law to give any certificate touching any matter by virtue whereof the rights of any person may be prejudicially affected, gives a certificate which is, to his knowledge, false in any material particular	Misdemeanour	Penal Code, Sec. 96	No
Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding,	Misdemeanour	Penal Code, Sec. 101(1)	No

knowingly gives false testimony touching any matter which is material to any question then depending in that proceeding or intended to be raised in that proceeding,			
Any person who, knowing that any book, document, or thing of any kind whatsoever, is or may be required in evidence in a judicial proceeding, wilfully removes or destroys it or renders it illegible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence	Misdemeanour	Penal Code, Sec. 108	No
Any person who wilfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence,	Imprisonment for 12 months	Penal Code, Sec. 326	No
Any person who makes a document purporting to be what in fact is not; alters a document without authority	No penalty provided	Penal Code, Sec 353	No
Any person who conspires with another to commit any felony or misdemeanour, or to do any act in any part of the world which if done in Malawi would be a felony or misdemeanour, and which is an offence under the laws in force in the place where it is proposed to be done	Imprisonment for 7 years for felony if no other punishment is provided, and guilty of a misdemeanour if misdemeanour	Penal Code, Sec. 404, 405	Possibly, if felony

FINANCIAL CRIMES ACT			
Offence	Penalty or Penalties	Authority	Serious Crime
A person who, knowingly or who has reasonable grounds to believe that any property, including his own property, in whole or in part, directly or indirectly, represents proceeds of a predicate offence, converts or transfers property with the aim of concealing or disguising the illicit origin of that property, or of aiding any person, including himself, involved in the commission of the offence to evade the legal consequences thereof	In the case of a natural person, imprisonment for life In the case of a legal person, a fine of K500,000,000	Financial Crimes Act, Sec. 42(1)(a)	Yes
A person who, knowingly or who has reasonable grounds to believe that any property, including his own property, in whole or in part, directly or indirectly, represents proceeds of a predicate offence, conceals or disguises the true nature, origin, location, disposition, movement or ownership of the property	Same as above	Financial Crimes Act, Sec. 42(1)(b)	Yes

CORRUPT PRACTICES ACT			
Offences	Penalty or Penalties	Authority	Serious Crime
Any public officer who by himself, or by or in conjunction with any other person, corruptly solicits, accepts or obtains, or agrees to accept or attempts to receive or obtain, from any person for himself or for any other person, any advantage as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, anything in relation to any matter or transaction, actual or proposed, with which any public body is or may be concerned	Imprisonment for 12 years	Corrupt Practices Act, Sec. 24(1), 34	Yes
Any person who by himself, or by or in conjunction with any other person, corruptly gives, promises or offers any advantage to any public officer, whether for the benefit of that public officer or of any other public officer, as an inducement or reward for doing or forbearing to do anything in relation to any matter or transaction, actual or proposed, with which any public body is or may be concerned	Same as above	Corrupt Practices Act, Sec. 24(2), 34	Yes
Any public officer who uses, misuses or abuses his public office, or his position, status or authority as a public officer, for his personal advantage or for the advantage of another person or to obtain, directly or indirectly, for himself or for another person, any advantage, wealth, property, profit or business interest	Same as above	Corrupt Practices Act, Sec. 25B(1)	Yes
Any public officer who, being concerned with any matter or transaction falling within, or connected with, his jurisdiction, powers, duties or functions, corruptly solicits, accepts or obtains, or agrees to accept or attempts to receive or obtain for himself or for any other person any advantage in relation to such matter or transaction	Same as above	Corrupt Practices Act, Sec. 25(1)	Yes

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