

SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

PROTOCOL ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

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PREAMBLE

We, the Heads of State or Government of:

The Republic of Angola

The Republic of Botswana

The Democratic Republic of the Congo

The Kingdom of Lesotho

The Republic of Malawi

The Republic of Mauritius
The Republic of Mozambique
The Republic of Namibia
The Republic of Seychelles
The Republic of South Africa
The Kingdom of Swaziland
The United Republic of Tanzania
The Republic of Zambia
The Republic of Zimbabwe

CONSIDERING Article 21 of the Treaty of the Southern African Development Community in which Member States undertake to cooperate, inter alia, in the areas of social welfare, peace and security;

CONSIDERING FURTHER, Article 22 of the Treaty, which calls upon Member States to conclude such Protocols as may be necessary in each area of cooperation;

CONVINCED that the adoption of common rules in the field of mutual assistance in criminal matters will contribute to the development of integration;

DESIROUS of extending to Member States the widest possible mutual legal assistance within the limits of the laws of their respective jurisdictions;

HEREBY AGREE AS FOLLOWS:

ARTICLE 1: DEFINITIONS

1. In this Protocol, terms and expressions defined in Article 1 of the Treaty shall bear the same meaning unless the context otherwise requires.
2. In this Protocol, unless the context otherwise requires:

"confiscation" means a permanent deprivation of property by order of a court or other competent authority and includes forfeiture where applicable;

"offence" means the fact or facts which constitute a crime under the laws of a Member State;

"property" means assets of any kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible and any document or legal instrument evidencing title to, or interest in such assets;

"proceeds of crime" means any property suspected, or found by a court, to be property directly or indirectly derived or realized as a result of the commission of an offence or to represent the value of property and other benefits derived from the commission of an offence;

"Requested State" means a State being requested to provide assistance in terms of this Protocol;

"Requesting State" means a State making a request for assistance in terms of this Protocol;

"sentence" means any penalty or measure imposed or pronounced by a court of competent jurisdiction as a result of criminal conviction;

"State Party" means any Member State which has ratified or acceded to this Protocol;

"Third State" means any State other than the Requested State or Requesting State.

ARTICLE 2: SCOPE OF APPLICATION AND OBLIGATION TO PROVIDE MUTUAL LEGAL ASSISTANCE

1. The State Parties shall, in accordance with this Protocol, provide each other with the widest possible measure of mutual legal assistance in criminal matters.
2. Mutual legal assistance is any assistance given by the Requested State in respect of investigations, prosecutions or proceedings in the Requesting State in a criminal matter, irrespective of whether the assistance is sought or is to be provided by a court or some other competent authority.
3. Criminal matters include investigations, prosecutions or proceedings relating to offences concerning transnational organized crime, corruption, taxation, custom duties and foreign exchange control.
4. Assistance shall be provided without regard to whether the conduct which is the subject of investigation, prosecution, or proceedings in the Requesting State would constitute an offence under the laws of the Requested State.
5. Assistance to be provided includes:
 - a. locating and identifying persons, property, objects and items;
 - b. serving documents, including documents seeking the attendance of persons and providing returns of such service;
 - c. providing information, documents and records;
 - d. providing objects and temporary transfer of exhibits;
 - e. search and seizure;
 - f. taking evidence or obtaining statements or both;
 - g. authorizing the presence of persons from the Requesting State at the execution of requests;
 - h. ensuring the availability of detained persons to give evidence or to assist in possible investigations;
 - i. facilitating the appearance of witnesses or the assistance of persons in investigations;
 - j. taking possible measures for location, restraint, seizure, freezing or forfeiture of the proceeds of crime.
6. This Protocol is intended solely for mutual legal assistance between the State Parties. The provisions of this Protocol shall not give rise to a right on the part of any private person to obtain, suppress or exclude any evidence or to impede the execution of a request.
7. This Protocol shall not apply to:
 - a. the arrest or detention of a person with a view to the extradition of that person;
 - b. the enforcement in the Requested State of criminal judgments imposed in the Requesting State except to the extent permitted by the laws of the Requested State; or
 - c. the transfer of persons in custody to serve sentences.

ARTICLE 3: CENTRAL AUTHORITIES

1. Each State Party shall designate a Central Authority to make and receive requests pursuant to this Protocol. Such designation shall be communicated to the Member States through the Secretariat.
2. The Central Authorities shall communicate directly with one another for the purpose of this Protocol. Such communication may also be effected through diplomatic channels or through the International Criminal Police Organisation (INTERPOL).

ARTICLE 4: EXECUTION OF THE REQUESTS

1. The Central Authority of the Requested State shall promptly execute the request or when appropriate, shall transmit it to the competent authorities having jurisdiction to do so. The competent authorities of the Requested State shall do everything in their power to execute the request.
2. The Central Authority of the Requested State shall make all necessary arrangements for representation in the Requested State of the Requesting State in any proceedings arising out of a request for assistance.
3. Requests shall be executed in accordance with the laws of the Requested State and the terms of this Protocol.
4. If the Central Authority of the Requested State determines that the execution of the request would interfere with an ongoing criminal investigation, prosecution or proceeding in that State, it may postpone execution, or make execution subject to conditions determined to be necessary after consultations with the Requesting State. If the Requesting State accepts the assistance subject to the conditions, it shall comply with the conditions.
5. The Requested State shall use its best efforts to keep confidential a request and its contents if such confidentiality is requested by the Requesting State. If the request cannot be executed without breaching such confidentiality, the Central Authority of the Requested State shall so inform the Requesting State which shall then determine whether the request should nevertheless be executed.
6. The Requested State shall respond to reasonable inquiries by the Requesting State concerning progress in executing the request.
7. The Requested State shall promptly inform the Requesting State of the outcome of the execution of the request. If the request cannot be successfully executed in whole or in part, the Requested State shall inform the Requesting State of the reasons therefor.

ARTICLE 5: CONTENTS OF REQUESTS

1. In all cases, requests for assistance shall indicate:
 - a. the competent authority in the Requesting State conducting the investigation, prosecution or proceedings to which the request relates;
 - b. the nature of the investigation, prosecution or proceedings, and include a summary of the facts and a copy of the applicable laws;
 - c. the purpose of the request and the nature of the assistance sought;
 - d. the degree of confidentiality required and the reasons therefor; and
 - e. any time limit within which the request should be executed.
2. In the following cases, requests for assistance shall include:
 - a. in the case of requests for the taking of evidence, search and seizure, or the location, restraint or forfeiture of proceeds of crime, a statement indicating the basis for belief that evidence or proceeds may be found in the Requested State;
 - b. in the case of requests to take evidence from a person, an indication as to whether sworn or affirmed statements are required and a description of the subject matter of the evidence or statement sought;
 - c. in the case of temporary transfer of exhibits, the current location of the exhibits in the Requested State and an indication of the person or class of persons who will have custody of the exhibits in the Requesting State, the place to which the exhibit is to be removed, any tests to be conducted and the date by which the exhibit will be returned; and
 - d. in the case of ensuring the availability of detained persons an indication of the person or class of persons who will have custody during the transfer, the place to which the detained person is to be transferred and the date of that person's return.
3. Where possible, requests for assistance shall include:
 - a. the identity, nationality and location of a person who is the subject of the investigation, prosecution or proceedings;
 - b. details of any particular procedure or requirement that the Requesting State wishes to be followed and the reasons therefor.

4. If the Requested State considers that the information is not sufficient to enable the request to be executed, it may request additional information.
5. A request shall be made in writing. In urgent circumstances, a request may be made orally but shall be confirmed in writing promptly thereafter.

ARTICLE 6: GROUNDS FOR REFUSAL OF ASSISTANCE

1. Assistance may be refused, if in the opinion of the Requested State:
 - a. the request relates to a political offence or an offence of a political character;
 - b. the request relates to an offence under military law which would not be an offence under ordinary criminal law;
 - c. the execution of the request would impair its sovereignty, security, public order, public interest or prejudice the safety of any person; or
 - d. the request is not made in conformity with this Protocol.
2. Reasons shall be given for any refusal of mutual assistance.

ARTICLE 7: LOCATING AND IDENTIFYING PERSONS, PROPERTY, OBJECTS OR ITEMS

The competent authorities of the Requested State shall endeavour to ascertain the location and identity of persons, property, objects or items specified in the request.

ARTICLE 8: SERVICE OF DOCUMENTS

1. The Requested State shall serve any document transmitted to it for the purpose of service.
2. The Requesting State shall transmit a request for the service of a document pertaining to a response or appearance in the Requesting State within a reasonable time, before the scheduled response or appearance.
3. The Requested State shall return a proof of service in the manner required by the Requesting State.

ARTICLE 9: AUTHENTICATION OF DOCUMENTS

1. Where the laws of the Requested State require authentication, documents shall be authenticated in accordance with the domestic laws of the Requesting State.
2. Authentication procedures of State Parties shall be communicated to the Secretariat.

ARTICLE 10: COSTS

1. The Requested State shall pay all costs relating to the execution of the request, except for the fees of expert witnesses, the costs of translation, interpretation, and transcription, and the allowances and expenses related to travel of persons pursuant to Articles 12, 13 and 14, which costs, fees, allowances, and expenses shall be paid by the Requesting State, unless the Parties agree otherwise.
2. If, during the execution of a request, it becomes apparent that fulfillment of the request will entail expenses of an extraordinary nature, the respective Central Authorities shall consult to determine the terms and conditions under which execution may continue.

ARTICLE 11: LIMITATIONS ON USE

1. The Requested State may require that the Requesting State does not use any information or evidence obtained under this Protocol in any investigation, prosecution, or proceeding other than that described in the request without the prior consent of the Requested State. In such cases, the Requesting State shall comply with the requirement.
2. The Requested State may request that information or evidence furnished under this Protocol be kept confidential or be used only subject to terms and conditions it may specify. If the Requesting State accepts the information or evidence subject to such conditions, the Requesting State shall comply with the conditions.

3. Nothing in this Article shall preclude the use or disclosure of information or evidence to the extent that there is an obligation to do so under the laws of the Requesting State in criminal proceedings. The Requesting State shall notify the Requested State in advance of any such proposed disclosure.
4. Information or evidence which has been made public in the Requesting State in accordance with paragraph 1 or 2 may thereafter be used for any purpose.

ARTICLE 12: TESTIMONY OR EVIDENCE IN THE REQUESTED STATE

1. A person in the Requested State from whom testimony or evidence is requested pursuant to this Protocol shall be compelled, if necessary, to appear and testify or produce items, including documents, records, and articles of evidence.
2. Upon request, the Requested State shall furnish information in advance about the date and place of the taking of the testimony or evidence pursuant to this Article.
3. The Requested State shall permit the presence of such persons as specified in the request during the execution of the request, and shall allow such persons to question, directly or indirectly, the person giving the testimony or evidence.
4. If the person referred to in paragraph 1 asserts a claim of immunity, incapacity, or privilege under the laws of the Requesting State, the claim shall be made known to the Requesting State for resolution by the authorities of that State.

ARTICLE 13: OFFICIAL RECORDS

1. The Requested State shall provide the Requesting State with copies of publicly available records, including documents or information in any form, in the possession of organs of State and government departments and agencies in the Requested State.
2. The Requested State may provide copies of any documents, records, or information which are in the possession of an organ of state or a government department or agency in that State, but which are not publicly available, to the same extent and under the same conditions as such copies would be available to its own law enforcement or judicial authorities. The Requested State may in its discretion deny a request pursuant to this paragraph entirely or in part.

ARTICLE 14: TESTIMONY IN THE REQUESTING STATE

1. When the Requesting State requests the appearance of a person in that State, the Requested State shall invite the person to appear before the appropriate authority in the Requesting State. The Requested State shall promptly inform the Requesting State of the response of the person.
2. A person appearing in the Requesting State pursuant to this Article shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty, by reason of any act or conviction which preceded his departure from the Requested State.
3. The safe conduct provided for by this Article shall cease fifteen (15) days after the Requesting State has notified the Requested State and the person concerned that his or her presence is no longer required, or when the person, having left the Requesting State, voluntarily returns. The Requesting State may, in its discretion, extend this period if it determines that there is good cause to do so.

ARTICLE 15: AVAILABILITY OF PERSONS IN CUSTODY TO GIVE EVIDENCE OR TO ASSIST IN INVESTIGATION

1. Upon request, a person in custody in the Requested State shall be temporarily transferred to the Requesting State to assist investigations or to testify, provided that the person consents.
2. When the person transferred is required to be kept in custody under the law of the Requested State, the Requesting State shall hold that person in custody and shall return the person in custody at the conclusion of the execution of the request.
3. When the sentence imposed expires, or where the Requested State advises the Requesting State that the transferred person is no longer required to be held in custody, that person shall be set at liberty and be treated as a person present in

the Requesting State pursuant to a request seeking that person's attendance in terms of Article 14.

ARTICLE 16: TRANSIT OF PERSONS IN CUSTODY

1. The Requested State may authorize the transit through its territory of a person held in custody by a Third State whose personal appearance has been requested by the Requesting State to give testimony or evidence or otherwise provide assistance in an investigation, prosecution or proceedings.
2. Where such transit is authorized, the Requested State shall have the authority and the obligation to keep the person in custody during transit in accordance with the laws of the Requested State, and the terms of this Protocol.

ARTICLE 17: SEARCH AND SEIZURE

1. The Requested State shall execute a request for the search, seizure, and delivery of property, objects or item to the Requesting State if the request includes the information justifying such action under the laws of the Requested State.
2. Upon request, every official who has custody of a seized item shall certify the continuity of custody, the identity of the item, and the integrity of its condition.
3. The Requested State may require that the Requesting State agrees to the terms and conditions necessary to protect third party interests in the property, objects or item to be transferred.

ARTICLE 18: RETURN OF PROPERTY, OBJECTS OR ITEMS

The Requested State may require that the Requesting State returns any property, object or items, including documents, records, or articles of evidence furnished to it in execution of a request under this Protocol, as soon as possible.

ARTICLE 19: LOCATION OF PROCEEDS OF CRIME

The Requested State shall, upon request, endeavour to ascertain whether any proceeds of crime or alleged crime are located within its jurisdiction and shall notify the Requesting State of the results of its enquiries. In making the request, the Requesting State shall notify the Requested State of the basis of its belief that such proceeds of crime or alleged crime are located within its jurisdiction.

ARTICLE 20: SECURING THE PROCEEDS OF CRIME

1. In pursuance of a request made under this Protocol, the Requested State shall endeavour to trace assets, investigate financial dealings, and obtain other information or evidence that may assist to secure the recovery of proceeds of crime.
2. Where, pursuant to paragraph 1, suspected proceeds of crime are found, the Requested State shall take such measures as are permitted by its laws to prevent any dealing in, transfer or disposal of, those suspected proceeds of crime, pending a final determination in respect of those proceeds by a court of the Requesting State.
3. State Parties shall, to the extent permitted by their laws, not decline to give assistance under this Article on the grounds of bank secrecy.

ARTICLE 21: REQUEST FOR FORFEITURE OR CONFISCATION

1. The Requested State shall upon request initiate proceedings for forfeiture or confiscation of any proceeds of crime.
2. Requests shall be executed in accordance with the laws of the Requested State.

ARTICLE 22: EFFECTS OF THE DECISION ON FORFEITURE OR CONFISCATION

1. The Requested State shall, to the extent permitted by its laws, give effect to or permit enforcement of a final order forfeiting or confiscating the proceeds of crime made by a court of the Requesting State or take other appropriate action to secure or transfer of the proceeds following a request by the Requesting State.
2. The States shall ensure that the rights of bona fide third parties and victims shall be respected in the application of this Protocol.

ARTICLE 23: RELATIONSHIP WITH OTHER TREATIES

The provisions of any treaty or bilateral agreement governing mutual legal assistance between any two State Parties shall be complementary to the provisions of this Protocol and shall be construed and applied in harmony with this Protocol. In the event of any inconsistency, the provisions of this Protocol shall prevail.

ARTICLE 24: SETTLEMENT OF DISPUTES

Any dispute arising from the interpretation or application of this Protocol which cannot be settled amicably shall be referred to the Tribunal for determination.

ARTICLE 25: WITHDRAWAL

1. Any State Party may withdraw from this Protocol upon the expiry of twelve (12) months from the date of giving the Executive Secretary a written notice to that effect.
2. Any State Party that has withdrawn pursuant to paragraph 1 of this Article shall cease to enjoy all rights and benefits under this Protocol upon the withdrawal becoming effective but shall remain bound by the obligations under this Protocol for a period of twelve (12) months, from the date of giving notice to the date the withdrawal becomes effective.

ARTICLE 26: AMENDMENT

1. Any State Party may propose amendments to this Protocol.
2. Proposals for amendments to this Protocol may be made to the Executive Secretary who shall duly notify all Member States of the proposed amendments at least thirty (30) days in advance of consideration of the amendments by State Parties. Such period of notice may be waived by the Member States.
3. Amendments to this Protocol shall be adopted by a decision of three quarters of all the State Parties, and shall become effective thirty (30) days after such adoption.

ARTICLE 27: SIGNATURE

This Protocol shall be signed by the duly authorised representatives of the Member States.

ARTICLE 28: RATIFICATION

This Protocol shall be subject to ratification by the signatory States in accordance with their respective constitutional procedures.

ARTICLE 29: ENTRY INTO FORCE

This Protocol shall enter into force thirty (30) days after the deposit of instruments of ratification by two-thirds of the Member States.

ARTICLE 30: ACCESSION

This Protocol shall remain open for accession by any Member State.

ARTICLE 31: DEPOSITARY

1. The original texts of this Protocol and all instruments of ratification and accession shall be deposited with the Executive Secretary who shall transmit certified copies to all Member States.
2. The Executive Secretary shall register this Protocol with the Secretariat of the United Nations and the Commission of the African Union (AU).

IN WITNESS WHEREOF, WE, the Heads of State or Government or our duly authorised Representatives, have signed this Protocol.

DONE at Luanda this 3rd day of October, 2002 in three (3) original texts in the English, French and Portuguese languages, all texts being equally authentic.