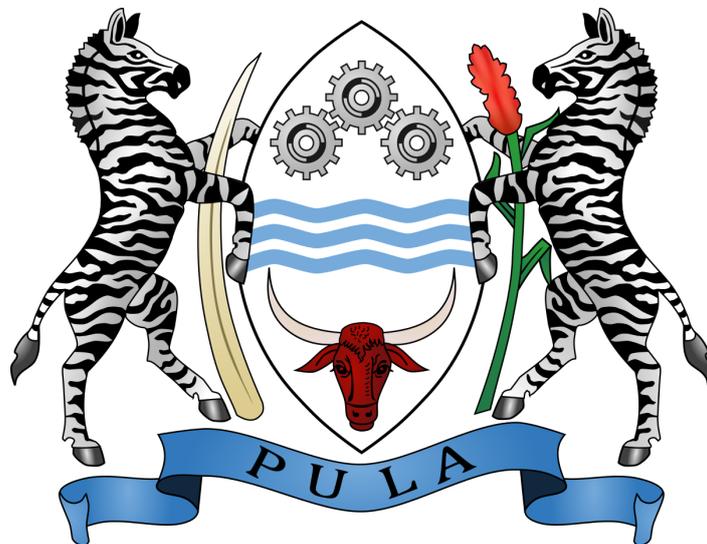


REQUESTS FOR MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

Guidance for Authorities Outside of Botswana



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Role of the Director of Public Prosecution

Director of public prosecution of Botswana has the function of receiving, acceding to and ensuring the execution of mutual legal assistance (MLA) requests. All formal requests for assistance MUST be sent to the Director of Public Prosecution for consideration to the below address:

The Director of Public Prosecutions

Directorate Public Prosecutions

Private Bag 356,

Gaborone, Botswana.

Tel: 00267 3640304

Telefax: 00267 3900363

Mobile : +267 72305938

Email: pmusindo@gov.bw

International and Bi-Lateral Agreements

Botswana has legislation on mutual legal assistance that enables assistance to be rendered to any country. The Mutual Legal Assistance in Criminal Matters Act regulates assistance in cooperation. Assistance by Botswana is extended on the basis that where States are members of the Commonwealth, the Commonwealth Scheme on Mutual Legal Assistance Agreement (Harare Scheme) will apply with a requisite undertaking of reciprocity.

PART A:INCOMING LETTER OF REQUEST

Transmission of a Request

All requests from foreign states are to be directed to the Director of Public Prosecutions through Diplomatic channels. The Director of Public Prosecution as the Central authority of mutual legal assistance has the function of receiving, acceding to and ensuring the execution of MLA requests.

Within the Office of the Director of Public Prosecutions there is International Cooperation Branch comprising of trained attorneys who receive, assess, analyse and supervise the execution of mutual legal assistance requests from foreign countries.

FORMAT

Informal Requests

It is recognised that in some instances preliminary information is needed before a formal request can be made to the Director of Public Prosecutions. The International Cooperation Branch can be contacted to provide this kind of assistance. Through this process witnesses, property, proceeds of crime requests concerning restraint or forfeiture of assets, and property owners, can be identified and secured whilst the formal request is underway.

Formal Requests

MLA should be in the form of a letter. A request for assistance must include all the information required by domestic law as well as any applicable treaty. The Request shall be accompanied by:

- the name of the authority concerned with the criminal matter to which the Request relates;
- a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;

- a description of the purpose of the request and of the nature of the assistance being sought;
- details of the procedure that the foreign country wishes to be followed by Botswana in giving effect to the Request, including details of the manner and form in which any information, document or thing is to be supplied to the foreign country pursuant to the Request;
- a statement setting out the wishes of the foreign country concerning the confidentiality of the Request and the reasons for those wishes;
- details of the period within which the foreign country wishes the Request to be complied with;
- if the Request involves a person travelling from Botswana to the foreign country, details of allowances to which the person will be entitled, and of the arrangements for accommodation for the person, while the person is in the foreign country pursuant to the Request;
- any other information required to be included with the Request under an arrangement between Botswana and the foreign country
- any other information that may assist in giving effect to the Request; but failure to comply with this subsection is not a ground for refusing the request
- that certain copy of documents should be certified or authenticated as true copies of the original by a notary or judicial officer. These documents will include court orders, warrants and anything that would reasonably be relied upon in court proceedings in order to give effect to the Request

Types of Assistance

- (a) serving documents of proceedings;
- (b) taking testimonies or statements from persons;
- (c) providing information and evidentiary items
- (d) obtaining and providing expert evaluations;
- (e) locating and identifying persons;
- (f) conducting judicial inspections or examining sites or objects;
- (g) making persons available for giving evidence or assisting in investigations;
- (h) transferring persons in custody for giving evidence or assisting in investigations and returning of such persons to the requested Party;

- (i) conducting inquiries, searches, freezing or restraining and seizures;
- (j) forfeiting or confiscating proceeds of criminal activities and instruments of crime;
- (k) the recovery of pecuniary penalties in respect of offences;
- (l) the restraining of dealings in property, or the freezing of assets, that may be confiscated, or that may be needed to satisfy pecuniary penalties imposed, in respect of offences;
- (m) the location of property that may be confiscated, or that may be needed to satisfy pecuniary penalties imposed, in respect of offences
- (l) notifying results of criminal proceedings and supplying criminal records;
- (m) the transfer of criminal proceedings;
- (n) any other forms of assistance which are not contrary to the laws of

Reciprocity

The Republic of Botswana does not generally require reciprocity as a legal requirement but would expect assistance from countries that it has assisted.

Language of Requests

All requests should be in writing and in English. If a supporting document is not written in English, translation into English shall be provided. If not provided the request shall not be carried out and it shall be sent back to the requesting State.

PART B: Grounds for Refusal of a LOR

A request by a foreign country for assistance under the laws of Botswana shall be refused if, in the opinion of the Director of Public Prosecutions-

- the request relates to the prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been

committed or was committed, an offence of a political character;

- there are substantial grounds for believing that the request has been made with a view to prosecuting or punishing a person for an offence of a political character;
- there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of his race, sex, religion, nationality or political opinions;
- the request relates to the prosecution or punishment of a person in respect of an act or omission that if it had occurred in Botswana, would have constituted an offence under the military law of Botswana but not also under the ordinary criminal law of Botswana;
- the granting of the request would prejudice the sovereignty, security or national interest of Botswana;
- the request relates to the prosecution of a person for an offence in a case where he has been acquitted or pardoned by a competent tribunal or authority in the foreign country, or has undergone the punishment provided by the law of that country, in respect of that offence or of another offence constituted by the same act or omission as that offence; or
- except in the case of a request under the Laws of Botswana, the foreign country is not a country to which this Act applies.

PART C: CONTENT OF REQUEST

This section deals with the forms of assistance that Botswana can provide and the specific information that must be included in the request

SERVICE OF DOCUMENTS

Where a foreign country requests the Director of Public Prosecutions to arrange for the service in Botswana of a process relating to a criminal matter in the foreign country, the Director of Public Prosecutions may arrange for the service of the process

Without limiting the manner in which the service of a document in a foreign country may be proved in Botswana, service of such a document may be proved by affidavit of the person who served the document

PROVISION OR PRODUCTION OF RECORDS

Documents or other articles in Botswana be produced, for the purposes of a proceeding in relation to a criminal matter in the foreign country, the Director of Public Prosecutions may by writing in accordance with the approved form, authorise the taking of the evidence or the production of the documents or other articles, and the transmission of the evidence, documents or other articles to the foreign country.

A magistrate may require the production of the documents or other articles and, where the documents or other articles are produced, he shall send the documents, or copies of the documents certified by him to be true copies, or the other articles, to the Director of Public Prosecutions. The accused person is entitled to legal representation during the hearing to determine the production of documents.

EXAMINATION OF WITNESSES

The request must fulfil the following conditions:

(a) A proceeding relating to a criminal matter has commenced in a foreign country;

(b) The foreign country has requested the attendance at a hearing in connection with the proceeding of a prisoner who is in Botswana (whether or not in custody);

(c) There are reasonable grounds to believe that the prisoner is capable of giving evidence relevant to the proceeding

(d) The Director of Public Prosecutions is satisfied that-

(i) the prisoner has consented to giving evidence in the foreign country; and

(ii) The foreign country has given adequate undertakings in respect of the matters.

The President may direct that the prisoner be released from prison for the purpose of travelling to the foreign country in the custody of a police officer or prison officer appointed by the Director of Public Prosecutions to give evidence at the proceeding.

VOLUNTARY ATTENDANCE OF PERSONS IN CUSTODY

The prisoner has to consent to giving evidence in the foreign country. The country on the other hand has to satisfy the following conditions in relation to the prisoner that he shall not:

(a) (i) Be detained, prosecuted or punished for any offence against the law of the foreign country that is alleged to have been committed, or that was committed, before his departure from Botswana;

(ii) Be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, or that occurred, before his departure from Botswana; or

(iii) Be required to give evidence in any proceeding in the foreign country other than the proceeding to which the request relates, unless he has left the foreign country and returned voluntarily; or he has had the opportunity of leaving the foreign country and has voluntarily remained in that country otherwise than for the purpose of giving evidence in the proceeding to which the request relates;

(b) That any evidence given by him in the proceeding to which the request relates will be inadmissible or otherwise disqualified from use in the

prosecution of him for an offence against a law of the foreign country other than the offence of perjury in relation to the giving of that evidence;

(c) That he will be returned to Botswana in accordance with arrangements agreed by the Director of Public Prosecutions;

(d) In a case where he is being held in custody in Botswana and the Director of Public Prosecutions requests the foreign country to make arrangements for his keeping him in custody while he is in the foreign country:

(i) the making of appropriate arrangements for that purpose;

(ii) that he will not be released from custody in the foreign country unless the Director of Public Prosecutions notifies an appropriate authority of the foreign country that he is entitled to be released from custody under the laws of Botswana; and

(iii) If he is released in the foreign country as mentioned in subparagraph (ii), that his accommodation and expenses pending the completion of the proceeding to which the request relates will be paid for by the foreign country; and

(e) Such other matters, if any, as the Director of Public Prosecutions thinks appropriate.

SEARCH AND SEIZURE OF PROPERTY IN BOTSWANA

A foreign country shall request for a search and seizure order where a proceeding or investigation relating to a criminal matter involving a serious offence has commenced in a foreign country; there are reasonable grounds to believe that a thing relevant to the investigation or proceeding is located in Botswana; and the foreign country requests the Director of Public Prosecutions to arrange for the issue of a search warrant the Director of Public Prosecutions may authorise a police officer, in writing, to apply to a magistrate in the district in which that thing is believed to be located for the search warrant requested by the foreign country.

Where a police officer who has been given authorization has reason to believe that the thing to which the request relates is, at a specified time, be- on a person; in the clothing that is being worn by a person; or otherwise in a person's immediate control, the police officer may lay before a magistrate

an information on oath setting out the grounds for that belief; and apply for the issue of a warrant under this section to search the person for that thing.

A magistrate shall not issue a warrant under this section unless the informant or some other person has given to him either orally or by affidavit, such further information, if any, as he requires concerning the grounds on which the issue of the warrant is sought; and he is satisfied that there are reasonable grounds for issuing the warrant.

If, in the course of searching, under a warrant issued under this section, for a thing of a kind specified in the warrant, the police officer finds another thing that he believes on reasonable grounds- to be relevant to the proceeding or investigation in the foreign country or to afford evidence as to the commission of a criminal offence; and is likely to be concealed, lost or destroyed if it is not seized, the warrant shall be deemed to authorise him to seize the other thing.

REQUESTS FOR CUSTODY OF PERSON IN TRANSIT

Where a person is to be transported in custody from a foreign country through Botswana to another foreign country for the purpose of giving evidence in a proceeding, or giving assistance in relation to an investigation, relating to a criminal matter in the other foreign country; and at least one of those foreign countries is a foreign country to which this Act applies, the person-

- (a) may be transported through Botswana in the custody of another person; and
- (b) If an aircraft by which the person is being transported lands at a place in Botswana, shall be kept in such custody as the Director of Public Prosecutions directs in writing until his transportation is continued.

Where a person who is being held in custody and his transportation is not, in the opinion of the Director of Public Prosecutions, continued within a reasonable time, the Director of Public Prosecutions may direct that he be transported in custody to the foreign country from which the person was first transported.

Escaping

Any person, who being a person being kept in custody escapes from such custody, shall be guilty of an offence and liable to imprisonment for a term not exceeding two years.

Any police officer may, without warrant, arrest a person if the police officer has reasonable grounds to believe that the person was being kept in custody.

IDENTIFICATION, TRACING, ASSET RECOVERY, FREEZING, CONFISCATION, SEIZURE OF THE PROCEEDS AND INSTRUMENTS OF CRIME

When a foreign country requests the Director of Public Prosecutions to make arrangements for the enforcement of a foreign confiscation order made in respect of a serious offence, against property that is believed to be located in Botswana; the Director of Public Prosecutions is satisfied that a person has been convicted of the offence; and the conviction and the order are not subject to further appeal in the foreign country, the Director of Public Prosecutions may apply for the registration of the order in the High Court.

Where a foreign country requests the Director of Public Prosecutions to make arrangements for the enforcement of a foreign restraining order, made in respect of a serious offence, against property that is believed to be located in Botswana, the Director of Public Prosecutions may apply for the registration of the order in the High Court.

A foreign confiscation order, or a foreign restraining order, as the case may be, registered in the High Court may be enforced, as if it were an order made by a court under the Proceeds and Instruments of Crime Act

A copy of any amendments made to the order (whether before or after registration) may be registered in the same way as the order and the amendments do not have effect until they are registered.

Requests for search and seizure warrants in respect of tainted property is only allowed where a criminal proceeding or criminal investigation has commenced in respect of a foreign country in respect of a serious offence; there are reasonable grounds to believe that tainted property in relation to the offence is located in Botswana; and the foreign country requests the Director of Public Prosecutions to obtain the issue of a search warrant under the Proceeds and Instruments of Crime Act in relation to the tainted property, the Director of Public Prosecutions may authorise a police officer to apply to a magistrate for the search warrant requested by the foreign country.

Requests for restraining orders are only allowed where a criminal proceeding has commenced in a foreign country in respect of a serious offence; there are reasonable grounds to believe that property that may be made or is about to be made the subject of a foreign restraining order is located in Botswana; and the foreign country requests the Director of Public Prosecutions to obtain the issue of a restraining order under the Proceeds and Instruments of Crime Act against the property, the Director of Public Prosecutions may apply to a magistrate's court or the High Court for the restraining order requested by the foreign country.

Requests for information gathering orders are only allowed where a criminal proceeding or criminal investigation has commenced in a foreign country in respect of a serious offence; a document in relation to the offence is reasonably believed to be located in Botswana; and the foreign country requests the Director of Public Prosecutions to obtain the issue of a production order under Proceeds and Instruments of Crime Act in respect of the document; or a search warrant under the Proceeds and Instruments of Crime Act in respect of the document, the Director of Public Prosecutions may authorise a police officer to apply to a magistrate or a judge of the High Court for the order requested by the foreign country.

Botswana may request a financial institution to give up financial information to a foreign country where a criminal proceeding or criminal investigation has commenced in a foreign country in respect of a serious offence that is:

- (i) a money laundering offence in respect of proceeds of a serious offence; or
- (ii) An ancillary offence in relation to an offence of a kind referred to in subparagraph (I);

Information about transaction conducted through an account with a financial institution in Botswana is reasonably believed to be relevant to the proceeding or investigation; and the foreign country requests the Director of Public Prosecutions to obtain the issue of an order under the Proceeds and Instruments of Crime Act directing the financial institution to give information to the police about transactions conducted through the account.

The Director of Public Prosecutions may authorise a police officer to apply to a magistrate or a judge of the High Court for the order requested by the foreign country.