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MUTUAL LEGAL ASSISTANCE ACT

CHAPTER 75A

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CHAPTER 75A

MUTUAL LEGAL ASSISTANCE ACT

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CHAPTER 75A**MUTUAL LEGAL ASSISTANCE ACT**

[Date of assent: 11th November, 2011.]

[Date of commencement: 2nd December, 2011.]

An Act of Parliament to provide for mutual legal assistance to be given and received by Kenya in investigations, prosecutions and judicial proceedings in relation to criminal matters, and for connected purposes

[Act No. 36 of 2011.]

PART I – PRELIMINARY**1. Short title**

This Act may be cited as the Mutual Legal Assistance Act, 2011.

2. Interpretation

In this Act, unless the context otherwise requires—

“**Central Authority**” means an authority established under section 5 of this Act;

“**Competent Authority**” means the Attorney-General of the Republic of Kenya, any criminal investigation agency established by law, or any other person designated as such by the Attorney-General by notice in the *Gazette*;

“**communications**” includes telecommunications and the transmission of an item through the public postal service;

“**communications data**” includes—

- (a) traffic data;
- (b) subscriber information;
- (c) any information not falling within paragraph (a) or (b) that is held or obtained by the provider of a postal service or a telecommunications service and which relates to the provision of that service but does not include content data;

“**confiscation proceedings**” means proceedings, whether civil or criminal, for an order to—

- (a) confiscate any property derived or obtained whether directly or indirectly from an offence or used in, or in connection with, the commission of an offence; or
- (b) impose a pecuniary penalty calculated by reference to the value of any property derived or obtained whether directly or indirectly from an offence or used in, or in connection with, the commission of an offence;

“**content data**” means the subject or purpose of the communication, or the message or information being conveyed by the communication, whether or not any interpretation, process, mechanism or device needs to be applied or used to make the meaning of the communication intelligible;

“covert surveillance” means surveillance carried out in a manner that is calculated to ensure that the persons who are subject to the surveillance are unaware that it is or may be taking place.

“covert electronic surveillance” means covert surveillance carried out by or with an electronic surveillance device which transmits records or otherwise captures audio product or visual images, but does not include either surveillance by a tracking device which only provides the location or position, or the interception of telecommunications;

“criminal matter” means an investigation, prosecution or judicial proceedings relating to a criminal offence and includes an investigation, prosecution or proceedings relating to—

- (a) the forfeiture or confiscation of proceeds of crime;
- (b) the imposition or recovery of a pecuniary penalty in respect of a prescribed offence;
- (c) the tracing, freezing and restraint of property that may be forfeited or confiscated.

“dual criminality” means conduct which would constitute an offence under the laws of Kenya and requesting a requesting state;

“freezing” means to prohibit the transfer, conversation, disposition, or movement of funds or other assets on the basis of, and for the duration of the validity of an action initiated by the appropriate authority or a court;

“instrumentality of crime” means any property—

- (a) used in, or in connection with, the commission of an offence or unlawful activity; or
- (b) intended to be used in, or in connection with, the commission of an offence or unlawful activity.

“interception of communications” means the disrupting, destroying, opening, interrupting, suppressing, stopping, seizing, recording, copying, listening to and viewing of communications in the course of its transmission so as to make some or all of the contents of the communication available, while being transmitted, to a person other than the sender or intended recipient of the communication;

“international entity” includes any court or tribunal set up by an international instrument and includes any investigatory, prosecutorial or adjudicatory organ of such court or tribunal;

“offence” means criminal conduct under the laws of Kenya;

“postal item” means any letter, parcel, package, or other thing which is being or will be carried by a public postal service;

“postal service” means any service which—

- (a) consists in the collection, sorting, conveyance, distribution and delivery of postal items; and

- (b) is offered or provided as a service the main purpose of which, or one of the main purposes of which, is to make available, or to facilitate, a means of transmission from place to place of postal items containing communications.

“preservation of communications data” means the protection of communications data which already exists in a stored form from modification or deletion, or from anything that would cause its current quality or condition to change or deteriorate:

Provided that communications data that is stored on a highly transitory basis and already exists in a stored form as an integral function of the technology used in its transmission shall not be communications data for the purposes of this definition;

“proceeds of crime” includes any property, benefit or advantage that is wholly or partly obtained, derived or realised directly or indirectly as a result of the commission of a criminal act or omission;

“public postal service” means any postal service which is offered or provided to the public, or to a substantial section of the public;

“requesting state” means a state requesting for legal assistance and may for the purposes of this Act include an international entity to which Kenya is obligated;

“requested state” means a state being requested to provide legal assistance under the terms of this Act;

“seizure” means freezing coupled with the administration, control, possession, or management of the funds or other assets;

“telecommunication” means a communication transmitted or received by means of guided or unguided electromagnetic or other forms of energy;

“telecommunications service” means a service provided to any person for transmitting and receiving telecommunications, being a service, the use of which enables communications to be transmitted or received over a telecommunications system operated by a service provider.

“telecommunications system” means any system, including the apparatus comprised in it, which exists, whether wholly or partly in Kenyan territory or in a requesting state, for the purpose of transmitting and receiving telecommunications;

“traffic data” means computer data—

- (a) that relates to a communication by means of a computer system; and
- (b) is generated by a computer system that is part of the chain of communication; and
- (c) shows the communication’s origin, destination, route, time, date, size, duration or the type of underlying services.

“stored communication” means the content data that is no longer in the course of transmission and which has been stored in a form allowing retrieval;

“**subscriber information**” means any information that is held by a provider of a postal service or telecommunications service relating to subscribers to its services and by which a subscriber’s identity, affairs or personal particulars can be established, but does not include traffic data.

“**surveillance**” includes—

- (a) monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications;
- (b) recording anything monitored, observed or listened to in the course of surveillance; and
- (c) surveillance by or with the assistance of a surveillance device.

3. Scope of application

This Act shall—

- (a) apply to requests for legal assistance from any requesting state or international entity to which Kenya is obligated on the basis of a legal assistance agreement or not;
- (b) regulate the rendering of legal assistance to any requesting state, unless otherwise regulated by agreement.

4. Limitations with respect to scope of application

Notwithstanding the provisions of section 3 of this Act nothing shall be construed to preclude Kenya from—

- (a) an agreement, arrangement or practice respecting co-operation between Kenya and a requesting state or international entity or organization;
- (b) rendering of a broader range of legal assistance to another state under this Act than may be provided for in an agreement.

PART II – ESTABLISHMENT OF CENTRAL AUTHORITY

5. Central Authority

(1) There is established an authority to be known as the Central Authority to perform functions specified in this Act.

(2) The office of the Attorney-General shall be designated as the Central Authority established under subsection (1) of this section.

6. Functions of central authority

(1) The functions of the Central Authority shall include—

- (a) transmitting and receiving requests for legal assistance and executing or arranging for the execution of such requests;
- (b) ensuring that requests for legal assistance conform to the requirements of law and Kenya’s international obligations;
- (c) where necessary, certifying or authenticating, or arranging for the certification and authentication of, any documents or other material supplied in response to a request for legal assistance;

- (d) taking practical measures to facilitate the orderly and rapid disposition of requests for legal assistance;
- (e) negotiating and agreeing on conditions related to requests for legal assistance, as well as to ensuring compliance with those conditions;
- (f) making any arrangements deemed necessary in order to transmit the evidentiary material gathered in response to a request for legal assistance to a requesting state or to authorize any other authority to do so;
- (g) carrying out such other tasks as provided for by this Act or which may be necessary for effective legal assistance to be provided or received.

(2) For the purposes of this Act, legal assistance means mutual legal assistance in criminal matters and includes, but is not limited to—

- (a) identifying and locating of persons for evidential purposes;
- (b) examining witnesses;
- (c) effecting service of judicial documents;
- (d) executing searches and seizures;
- (e) examining objects and sites;
- (f) providing, including formal production where necessary, originals or certified copies of relevant documents and records, including but not limited to government, bank, financial, corporate or business records;
- (g) providing information, evidentiary items and expert evaluations;
- (h) facilitating the voluntary attendance of witnesses or potential witnesses in a requesting state;
- (i) facilitating the taking of evidence through video conference;
- (j) effecting a temporary transfer of persons in custody to appear as a witness;
- (k) interception of items during the course of carriage by a public postal service;
- (l) identifying, freezing and tracing proceeds of crime;
- (m) the recovery and disposal of assets;
- (n) preserving communications data;
- (o) interception of telecommunications;
- (p) conducting covert electronic surveillance;
- (q) any other type of legal assistance or evidence gathering that is not contrary to Kenyan law.

PART III – MAKING AND EXECUTION OF LEGAL ASSISTANCE REQUESTS

7. Request from Kenya

(1) A request for legal assistance from Kenya shall be made by the Competent Authority.

(2) A request made under subsection (1) may be initiated by any law enforcement agency, or prosecution or judicial authority competent under Kenyan law.

(3) In the event of urgency or as permitted by any other written law, requests may be sent by direct transmission from a Competent Authority to a competent authority of a requested state for execution subject to domestic law of the requested state.

(4) Where further information is required before a request under this section is executed, in so far as practicable, such information shall be provided for and within any deadlines as may be set by a requested state.

8. Incoming requests for legal assistance

(1) A request from a requesting state shall be made in writing to the Central Authority.

(2) Upon receipt of the request under subsection (1), the Central Authority shall as soon as is reasonably practicable acknowledge receipt of such request and forthwith transmit the same to the relevant competent authority.

(3) For the purpose of subsection (1), "in writing" includes e-mail, facsimile or other agreed forms of electronic transmission provided that appropriate levels of security and authentication are put in place.

(4) Subject to the provisions of this Act, the Competent Authority shall grant the legal assistance requested in subsection (1) as expeditiously as practicable.

(5) The Competent Authority may seek additional information from a requesting state if it considers necessary.

(6) If the Competent Authority considers that—

- (a) the request does not comply with the provisions of this Act; or
- (b) in accordance with the provisions of this Act, the request for legal assistance is to be refused in whole or in part; or
- (c) the request cannot be complied with, in whole or in part; or
- (d) there are circumstances which are likely to cause a significant delay in complying with the request,

it shall promptly inform a requesting state, giving reasons.

9. Content of request for legal assistance

Except in the case of a request for the preservation of communications data under section 31, a request under this Part shall—

- (a) have the official designation of the requesting authority;
- (b) have the legal basis of the request;
- (c) specify the nature of the criminal matter, the assistance requested and details of any particular procedure to be followed in compliance with the request;
- (d) indicate the purpose for which the evidence, information or any other material is sought;

- (e) indicate any time limit within which compliance with the request is desired, stating reasons;
- (f) whether or not criminal proceedings have been instituted;
- (g) where criminal proceedings have been instituted, contain the following information—
 - (i) the court exercising jurisdiction in the proceedings;
 - (ii) the identity of the accused person;
 - (iii) the offence for which he stands accused, and a summary of the facts;
 - (iv) the stage reached in the proceedings; and
 - (v) any date fixed for further stages in the proceedings;
- (h) where criminal proceedings have not been instituted, state the offence which the Competent Authority has reasonable grounds to suspect has been, is being or will be committed with a summary of known facts;
- (i) provide assurance of reciprocity;
- (j) contain relevant documents and exhibits;
- (k) have the signature and official stamp of the requesting authority and the date of the request;
- (l) contain any other information relevant for the proper execution of the request.

(2) A request for legal assistance and the documents in support thereof, as well as documents or other material supplied in response to such a request, may not require certification or authentication.

10. Postponement of the execution of request

The Competent Authority may postpone the execution of the request if its immediate execution would interfere with an ongoing investigation or prosecution.

11. Grounds for refusal

A request for legal assistance under this Act shall be refused if, in the opinion of the Competent Authority—

- (a) the request relates to the prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Kenya would not have constituted an offence under Kenyan law;
- (b) the request relates to the prosecution or punishment of a person in respect of an act or omission where, if it had occurred in Kenya at the same time and had constituted an offence against Kenyan law, the person responsible could no longer be prosecuted by reason of lapse of time or any other reason;
- (c) the request relates to the prosecution of a person for an offence in a case where the person has been acquitted or pardoned by a competent tribunal or authority in a requesting state, or has

- (d) the request relates to the prosecution or punishment of a person in respect of an act or omission that if it had occurred in Kenya would have constituted an offence under the Kenyan law but the circumstances in which it is alleged to have been committed or was committed is an offence of a political character;
- (e) there are substantial grounds for believing that the request is made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, sex, religion, nationality or political opinions;
- (f) the granting of the request would prejudice the sovereignty, security or any other national interest of Kenya;
- (g) the provision of the legal assistance could prejudice an investigation or proceedings in relation to a criminal matter in Kenya;
- (h) the provision of the legal assistance would or is likely to prejudice the safety of any person, whether in or outside Kenya.

PART IV – REQUEST FOR SPECIFIC FORMS OF LEGAL ASSISTANCE

12. Service of documents

(1) A request under this Act may seek assistance in the service of documents relevant to a criminal matter.

(2) The request made under subsection (1) shall be accompanied by the necessary documents to be served.

(3) The Central Authority shall ensure that the documents to be served are served either by—

- (a) any particular method stated in the request, unless such method is contrary to Kenyan law; or
- (b) any method prescribed by Kenyan law for the service of documents in criminal proceedings.

(4) The Central Authority shall transmit to a requesting state a certificate or other proof as to the service of the documents or, if they have not been served, as to the reasons which have prevented service.

(5) Notwithstanding the provisions of section 8(1) a requesting state may send legal documents directly to the intended person who is present in Kenya unless—

- (a) the address of the person for whom the document is intended is unknown or uncertain; or
- (b) the relevant law of a requesting state requires proof of service; or
- (c) it has not been possible to serve the document by post; or
- (d) there are reasons to believe that the dispatch by post will be ineffective or is inappropriate.

13. Provision or production of Records

(1) A request under this Act may seek the provision or production of any documents, records or other material relevant to a criminal matter arising in a requesting state.

(2) Where documents or records requested under subsection (1) are not publicly available, the Competent Authority may provide copies of such documents, records or other material to the same extent and under the same conditions as applies to provision of such records to Kenya law enforcement agencies or prosecution or judicial authorities.

14. Examination of witnesses

(1) A request under this Act may seek assistance in the examination of witnesses.

(2) The request made under subsection (1) shall specify as appropriate, and so far as the circumstances of the case may permit—

- (a) the names and addresses or the official designations of the witnesses to be examined;
- (b) the questions to be put to the witnesses or the subject matter about which they are to be examined;
- (c) whether it is desired that the witnesses be examined orally or in writing;
- (d) whether it is desired that an oath be administered to the witnesses or, as Kenyan law allows, that they be required to make their solemn affirmation;
- (e) any provisions of the law of the requesting state as to privilege or exemption from giving evidence which appear especially relevant to the request;
- (f) any special requirements as to the manner of taking evidence relevant to its admissibility in a requesting state; and
- (g) any other relevant information.

(3) The request may seek permission for, so far as Kenyan law permits, the accused person or his legal representative to attend the examination of the witness and ask questions of the witness.

15. Attendance of witness in requesting state

(1) A request under this Act may seek legal assistance in facilitating personal appearance as a witness before a court exercising jurisdiction in a requesting state.

(2) In making a request under subsection (1), a requesting state shall apply to the Central Authority at least thirty days prior to the date of appearance.

(3) In the event of urgency, the Central Authority may accept a shorter period of notice.

(4) The request under this section shall specify—

- (a) the subject matter upon which it is desired to examine the witness;

- (b) the date on which the appearance of the witness is required;
- (c) the reasons why personal appearance of the witness is required; and
- (d) details of the travelling, subsistence and other expenses payable by a requesting state in respect of personal appearance of the witness.

(5) The Central Authority shall notify a person, in accordance with Kenyan law, whose appearance as a witness in a requesting state is desired, and shall—

- (a) enquire whether the person agrees to appear;
- (b) inform a requesting state of the answer; and
- (c) if the person is willing to appear, make appropriate arrangements to facilitate personal appearance of the witness.

(6) A person whose appearance as a witness is the subject of a request may refuse to appear as a witness where Kenya law, either permits such a refusal or does not make him a compellable witness.

(7) Where a refusal is based on the grounds contained in subsection (6), the Central Authority shall provide a requesting state with a certificate setting out the relevant statutory provisions which permits such a refusal or does not make the witness a compellable witness under Kenyan law.

(8) A person served with summons to appear as a witness in a requesting state and who fails to comply with the summons shall not by reason thereof be liable to any penalty or measure of compulsion in either Kenya or the requesting state notwithstanding any contrary statement in the summons.

16. Voluntary attendance of persons in custody

(1) Subject to section 17, a request under this Act may seek the temporary transfer of a person in custody in Kenya for purposes of identification, providing assistance in obtaining evidence for investigations or prosecutions or to appear as a witness before a court exercising jurisdiction in a requesting state.

(2) A request made under this section shall—

- (a) state the name of the person in custody;
- (b) if possible, state the place of confinement of the person in custody;
- (c) state the place to which the person in custody is sought to be transferred;
- (d) specify the subject matter on which it is desired to examine the witness;
- (e) state the reasons for which personal appearance of the witness is required; and
- (f) specify the period of time at or before the expiration of which the person in custody is to be returned.

(3) A statement of consent from the person in custody whose copy shall be made available to the Central Authority shall be a prerequisite for the transfer.

(4) A person in custody whose transfer is the subject of a request and who does not consent to the transfer shall not by reason thereof be liable to any penalty or measure of compulsion in either Kenya or a requesting state.

(5) Where a person in custody is transferred, the Central Authority shall notify a requesting state of—

- (a) the date upon which the person is due under the law of Kenya to be released from custody;
- (b) the date by which the Central Authority requires the return of the person;
- (c) any variations in such dates in (a) and (b).

(6) A requesting state shall keep the person transferred in custody, and shall return the person to Kenya when the presence of such person as a witness in the requesting state is no longer required, and in any case by the earlier of the dates notified under subsection (5) of this section.

(7) The obligation to return the person transferred shall subsist notwithstanding the fact that the person is a national of a requesting state.

(8) A requesting state to which the person is transferred shall not require Kenya to initiate extradition proceedings for the return of the person.

(9) Where a person in custody who is serving a term of imprisonment in Kenya is transferred to a requesting state under a request made in this section, the time spent in custody shall count as part of any sentence required to be served by that person in custody for the purposes of the Prisons Act (Cap. 90).

(10) Nothing in this section shall preclude the release in a requesting state without return to Kenya of any person transferred where the two States and the person concerned have agreed to such release.

17. Exception for Kenyan citizens or young persons

Section 16 shall not apply in respect of a person who, at the time the application is presented, is a Kenyan citizen or a child within the meaning of the Children Act (No. 8 of 2001).

18. Search and seizure

(1) A request under this Act may seek assistance in the search and seizure of property in Kenya.

(2) The request made under subsection (1) shall specify the property to be searched and seized and shall contain, so far as is reasonably practicable, all information available to a requesting state which may be required to be adduced in an application under Kenyan law for any necessary warrant or authorization to effect the search and seizure.

(3) Subject to the relevant law, the Competent Authority shall provide such certification as may be required by a requesting state concerning the result of any search, the place and circumstances of seizure, and the subsequent custody of the property seized.

19. Lending of exhibits

(1) A request under this Act may seek to have an exhibit that was admitted in evidence in a proceeding in respect of an offence in a court in Kenya lent to a requesting state.

- (2) An application made under subsection (1) shall—
- (a) contain a description of the exhibit requested to be lent;
 - (b) designate a person or class of persons to whom the exhibit is sought to be given;
 - (c) state the reasons for the request, as well as contain a description of any tests that are sought to be performed on the exhibit and a statement of the place where the tests will be performed;
 - (d) state the place to which the exhibit is sought to be removed; and
 - (e) specify a period of time at or before the expiration of which the exhibit is to be returned.

(3) Where an exhibit is lent to a requesting state upon request made under subsection (1), the Central Authority shall notify a requesting state of—

- (a) description of the exhibit;
- (b) description of any tests thereby authorized to be performed on the exhibit, as well as a statement of the place where the tests will be performed; and
- (c) the period of time of which the exhibit shall be returned.

20. Presumption of continuity

The burden of proving that an exhibit, lent to a requesting state pursuant to a request under section 19 and returned to Kenya, is not in the same condition as it was when the lending was made or that it was tampered with after the lending was made shall be on the party who makes that allegation and in the absence of that proof, the exhibit shall be deemed to have been continuously in the possession of an authorized person or authority.

21. Defence request

(1) Where criminal proceedings have been instituted in Kenya against a person, or where a person is joined in such proceedings as a third party, the Competent Authority may, on application to the court by either the said person or his legal representative, issue a request for legal assistance to a requesting state.

(2) The fact that a request under subsection (1) originates from a person charged or his legal representative shall not be a ground for refusal by the Competent Authority to execute the request.

22. Use of video conferencing technology

A testimony, identification of a person or thing or any other form of legal assistance under this Part may be provided by use of video or audio transmission technology.

PART V – RECOVERY, FREEZING, CONFISCATION AND DISPOSAL OF ASSETS

23. Identification, tracing etc.

(1) Kenya shall assist in proceedings involving the identification, tracing, freezing, seizure and confiscation of the proceeds and instruments of crime under its laws or any other arrangement to which Kenya may be bound in relation to a requesting state.

- (2) A request for legal assistance under this section shall include—
- (a) details of the property in relation to which co-operation is sought;
 - (b) the connection, if any, between the property and the offences in respect of which the request is made;
 - (c) where known, details of any third party interests in the property; and
 - (d) a certified copy of the freezing or seizing decision or final decision of confiscation made by a court.
- (3) Nothing in this section shall prejudice the rights of *bona fide* third parties.

24. Measures for asset recovery through international co-operation

When providing legal assistance under section 23 with respect to proceeds and instrumentalities of crime, Kenya shall take such measures, in accordance with the provisions of this Act or any other relevant law, as may be necessary to—

- (a) permit a requesting state to give effect to an order of confiscation issued by its competent court or authority;
- (b) permit competent authorities of a requesting state, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under Kenyan law;
- (c) allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.
- (d) permit competent authorities of Kenya to freeze or seize property upon a freezing or seizure order issued by a court or a competent authority of such a requesting state that provides a reasonable basis for a requesting state to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph (a) of this section;
- (e) permit competent authorities of Kenya to freeze or seize property upon a freezing or seizure order issued by a court or a competent authority of such a requesting state that provides a reasonable basis for a requesting state to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph (a) of this section;
- (f) recognize a requesting state's claim as a legitimate owner of property acquired through the commission of a criminal offence;
- (g) consider taking any additional measures as to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

25. Refusal of co-operation

In addition to the grounds of refusal set out in this Act, co-operation under this Part may be refused if a requesting state does not provide sufficient and timely evidence or if the property is of an insignificant value.

26. Return and disposal of assets

(1) Subject to the rights of third parties and in accordance with this Act or any other written law or any other arrangements to which Kenya is a bound, property confiscated under the provisions of this Act shall be disposed of, including return to a requesting state, upon request.

(2) Before the return of the property confiscated to a requesting state under subsection (1) and as a basis of return, Kenya shall—

- (a) reasonably establish prior ownership of such property by a requesting state; or
- (b) consider damage likely to be caused to a requesting state if the property is not returned; or
- (c) consider the need for compensation to the victims of the crime in a requesting state.

(3) Where appropriate, unless parties decide otherwise, Kenya may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property under this section.

PART VI – INTERCEPTION OF COMMUNICATIONS, PRESERVATION OF COMMUNICATIONS DATA AND COVERT ELECTRONIC SURVEILLANCE**27. Interception of telecommunications**

(1) For the purpose of a criminal investigation, Kenya may, in accordance with the provisions of this Act and any other relevant law, execute a request from a requesting state for—

- (a) the interception and immediate transmission of telecommunications; or
- (b) the interception, recording and subsequent transmission of telecommunications.

(2) Without prejudice to the generality of subsection (1), a request may be made in relation to the use of means of telecommunications by the subject of the interception, if this subject is present in—

- (a) Kenya and a requesting state needs the technical assistance of Kenya to intercept such communications; or,
- (b) Kenya and a requesting state communications are capable of being intercepted; or
- (c) a third state, which has been informed accordingly and a requesting state need the technical assistance of Kenya to intercept such communications.

(3) A request under this section shall include—

- (a) an indication of the authority making the request;
- (b) confirmation that a lawful interception order or warrant has been issued in connection with a criminal investigation, if such an order or warrant is required by law;
- (c) information for the purpose of identifying the subject of the requested interception;
- (d) details of the criminal conduct under investigation;
- (e) the desired duration of the interception; and
- (f) if possible, the provision of sufficient technical data, in particular the relevant network connection number, communications address or service identifier to ensure that the request can be met.

(4) Where a request has been made under subsection (1)(a) and the immediate transmission of the contents of an intercepted communication is not possible, Kenya shall undertake to comply with the request as though it were made under subsection 1(b).

(5) The information provided under this section shall be confidential and shall be kept in accordance with the provisions of this Act or any other relevant written law.

28. Stored communications

Nothing in this Part shall preclude a requesting state from making a request for legal assistance in accordance with Kenyan law for the provision of stored communications.

29. Interception of items during the course of carriage by a public postal service

For the purpose of a criminal investigation, a requesting state may, in accordance with the requirements of this Act or any other relevant law, make a request to Kenya for the interception of an item during the course of its carriage by a public postal service and immediate transmission of the said item or a copy thereof.

30. Bilateral or multilateral arrangements

Nothing in this Part shall preclude any bilateral or multilateral arrangements for the purpose of facilitating the exploitation of present and future technical possibilities regarding the lawful interception of telecommunications.

31. Preservation of communications data

(1) A requesting state may request Kenya for the preservation of communications data.

(2) A request made under subsection (1) may be directly transmitted to Kenya and shall be executed in accordance with Kenyan law.

(3) A request for the preservation of communications data made under this section shall—

- (a) specify the identity of the authority making the request;

- (b) contain a brief description of the conduct under investigation;
- (c) contain a description of the communications data to be preserved and its relationship to the investigation or prosecution, and in particular identifying whether the communications data to be preserved includes —
 - (i) subscriber information;
 - (ii) traffic data;
 - (iii) any other information falling within the definition of communications data.
- (d) contain a statement that a requesting state intends to submit a request for legal assistance to obtain the communications data within the period permitted under this section.

(4) The preservation of communications data pursuant to a request made under this section shall be for a period of one hundred and twenty days, pending submission by a requesting state of a request for legal assistance to obtain the preserved communications data however, following the receipt of such a request, the data shall continue to be preserved pending the determination of that request and, if the request is granted, until the data is obtained pursuant to the request for legal assistance.

(5) If the Competent Authority considers that the preservation of communications data pursuant to a request made under this section will not ensure the future availability of the communications data, or will threaten the confidentiality of, or otherwise prejudice the investigation in a requesting state, it shall promptly inform a requesting state, which shall then determine whether the request should nevertheless be executed.

(6) Notwithstanding the grounds for refusal under this Act, a request for the preservation of communications data under this section may be refused only to the extent that it appears to the Central Authority that compliance would be contrary to the laws or Constitution of Kenya, or would prejudice the security, international relations, or other essential public interests of Kenya.

32. Covert electronic surveillance

(1) A request may be made to Kenya from a requesting state for deployment of covert electronic surveillance.

(2) Covert electronic surveillance shall take place in accordance with the procedures provided for under Kenyan law.

(3) Nothing in this section shall preclude a request for assistance involving surveillance, including the use of a tracking device, other than that provided for in this section.

PART VII – ADMISSIBILITY IN KENYA OF EVIDENCE OBTAINED ABROAD

33. Foreign records

(1) A record or a copy and any affidavit, certificate or other statement pertaining to the record made by a person who has custody or knowledge of the record sent to the Central Authority by a requesting state in accordance with a

Kenyan request, shall not be inadmissible in evidence in a proceeding with respect to which the court has jurisdiction by reason only that a statement contained in the record, copy, affidavit, certificate or other statement is hearsay or a statement of opinion.

(2) For the purpose of determining the probative value of a record or copy admitted in evidence under this Act the court may examine the record or copy, receive evidence orally or by affidavit, including evidence as to the circumstances in which the information contained in the record or copy was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record or copy.

34. Foreign things

A thing and any affidavit, certificate or other statement pertaining to the thing made by a person in a requesting state as to the identity and possession of the thing from the time it was obtained until its sending to the Central Authority by the a requesting state in accordance with a Kenyan request, are not inadmissible in evidence in a proceeding with respect to which the court has jurisdiction by reason only that the affidavit, certificate or other statement contains hearsay or a statement of opinion.

35. Status of affidavit, certificate etc.

(1) An affidavit, certificate or other statement mentioned in this Act shall be, in the absence of evidence to the contrary, proof of the statements contained without proof of the signature or official character of the person appearing to have signed the affidavit certificate or other statement.

(2) Unless the court decides otherwise, no record or copy thereof, no thing and no affidavit, certificate or other statement mentioned in this Act shall be received in evidence in a proceeding with respect to which the court has jurisdiction unless—

- (a) the party intending to produce it has given to the party against whom it is intended to be produced seven working days notice of that intention, accompanied by a copy of the record, copy, of the affidavit, certificate or other statement;
- (b) in the case of a thing, the party intending to produce it has made it available for inspection by the party against whom it is intended to be produced for five days following a request by that party that it be made so available.

36. Proof of service abroad

The service of a document in a requesting state may be proved by affidavit of the person who served it.

37. Special authorization to come to Kenya

(1) Notwithstanding the provisions of the Kenya Citizenship and Immigration Act, 2011 (No. 12 of 2011), the Minister responsible for immigration may, in order to give effect to a request of the Central Authority, authorize a person in a requesting state, who is not eligible to be in Kenya, to come into Kenya at a place

designated by the Minister responsible for home affairs and to go to and remain in a place in Kenya so designated for the period of time specified by the Minister responsible for home affairs.

(2) The Minister responsible for immigration may subject an authorization under subsection (1) to any terms and conditions he deems necessary, vary the terms of an authorization and, in particular, may extend the period of time during which the person is authorized to remain in a place in Kenya.

(3) A person to whom an authorization is granted under subsection (1) who is found in a place in Kenya other than the place designated in the authorization or in any place in Kenya after the expiration of the period of time specified in the authorization or who fails to comply with some other condition of the authorization shall, for the purpose of the Kenya Citizenship and Immigration Act, 2011 be deemed to be a person who entered Kenya as a visitor and remains therein after he has ceased to be a visitor.

38. Immunities

(1) Subject to subsection (2), where a person is in Kenya pursuant to a request made by the Central Authority the person shall not—

- (a) be detained, prosecuted or punished in Kenya for any offence that is alleged to have been committed, or that was committed, before the person's departure from a requesting state pursuant to the request;
- (b) be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, before the person's departure from the a requesting state pursuant to the request; or
- (c) be required to give evidence in any proceeding in Kenya other than the proceeding to which the request relates, if any.

(2) Subsection (1) shall cease to apply to a person if—

- (a) the person has left Kenya; or
- (b) the person has had the opportunity of leaving Kenya and has remained in Kenya otherwise than for—
 - (i) the purpose to which the request relates;
 - (ii) the purpose of giving evidence in a proceeding in Kenya certified by the Central Authority, in writing, to be a proceeding in which it is desirable that the person give evidence; or
 - (iii) the purpose of giving assistance in relation to an investigation in Kenya certified by the Central Authority, in writing, to be an investigation in relation to which it is desirable that the person give assistance.

39. Privilege for foreign records

(1) Subject to section 33(2), a foreign record sent to the Central Authority by a requesting state in accordance with a Kenyan request shall be privileged and no person shall disclose to anyone the record or its purpose or the contents of the record, in compliance with the conditions on which it was so sent, it being made public or disclosed for the purpose of giving evidence.

(2) A person in possession of a record referred to in subsection (1) shall not be required, in connection with any legal proceedings, to give evidence relating to any information that is contained in the record or to produce the record.

PART VIII – GENERAL PROVISIONS

40. Dual criminality and reciprocity

Kenya shall adopt such measures as may be necessary to enable it to provide a wider scope of legal assistance to a requesting state in absence of dual criminality and reciprocity.

41. Rule of specialty

A requesting state shall not transmit to another party or use any information or evidence obtained in response to a request for legal assistance under this Act in connection with any matter other than the criminal matter specified in the request without the prior consent of Kenya.

42. Confidentiality

The confidentiality of a request and its contents and the information and materials supplied under this Act shall be maintained except for disclosure in the criminal matter specified in the request and where otherwise authorized by the other state.

43. Fiscal offences

Legal assistance shall not be refused solely on the grounds that the offence amounts to an offence of a fiscal nature or on the grounds of bank or other financial institution secrecy rules.

44. Language

The documents in support of a request for legal assistance made under this Act shall be in English language.

45. Costs

(1) Ordinary costs of executing a request shall be borne by Kenya, unless otherwise determined by the Kenya and a requesting state.

(2) If expenses of a substantial or extraordinary nature are or shall be required to execute the request, the parties shall consult in advance to determine the terms and conditions under which the request shall be executed as well as the manner in which the costs shall be borne.

46. Applicable law

The law of Kenya shall govern the procedure for complying with a request and the admissibility of evidence to be gathered under this Act.

47. Transmission and return of material

(1) Where compliance with a request under this Act would involve the transmission of any document, record or property, Kenya may—

- (a) postpone the transmission of the material if it is required in connection with proceedings in that state, and in such a case

- (b) require a requesting state to agree to terms and conditions to protect third party interests in the material to be transmitted and may refuse to effect such transmission pending such agreement.

(2) Where any document, record or property is transmitted in compliance with a request under this Act, it shall be returned to Kenya when it is no longer required in connection with the criminal matter specified in the request unless indicated that its return is not desired.

48. Special co-operation

Subject to any written law and without prejudice to its own investigations, prosecutions or judicial proceedings, Kenya shall take measures to permit it to forward information on proceeds of criminal offences to a requesting state without prior request, where it considers that—

- (a) the disclosure of such information might assist a requesting state in initiating or carrying out investigations, prosecutions or judicial proceedings; or
- (b) it might lead to a request by a requesting state under this Act.

49. Consultation in event of concurrent jurisdiction

(1) Where criminal proceedings are contemplated or pending in Kenya and a requesting state against the same person in respect of the same conduct, the states shall consider the appropriate venue for the proceedings to be taken in the interests of the proper administration of justice.

(2) In considering the appropriate venue for proceedings under subsection (1), account shall be taken of, but not limited to—

- (a) location of the accused;
- (b) location, protection and other interests of witnesses and third parties;
- (c) interests of any victim and third parties;
- (d) location of documents, exhibits and other relevant material;
- (e) availability and nature of sanctions in the event of conviction;
- (f) capability to address sensitive or confidential information or material;
- (g) delay;
- (h) evidential problems;
- (i) confiscation and proceeds of crime;
- (j) resources and costs;
- (k) any other issue of public interest.

50. Principles of mutuality and reciprocity

For the purposes of this Act, the principles of mutuality and reciprocity shall at all times be recognized.

51. Request for legal assistance not to cover arrest or extradition

Nothing in this Act shall be construed as authorizing the extradition, or the arrest or detention with a view to extradition of any person.

52. Regulations

The Attorney-General may make regulations prescribing matters necessary or convenient for the better carrying out, or giving effect to this Act.
