

**IN THE SECOND MEETING OF THE SECOND SESSION OF THE FIFTH PARLIAMENT
OF THE FOURTH REPUBLIC**

**REPORT OF THE COMMITTEE ON CONSTITUTIONAL, LEGAL AND
PARLIAMENTARY AFFAIRS ON THE MUTUAL LEGAL ASSISTANCE BILL**

1.0 INTRODUCTION

1.1 The Mutual Legal Assistance Bill was presented and read the first time in Parliament on the 27th of October, 2009. Rt. Hon. Speaker referred the Bill to the Committee on Constitutional, Legal and Parliamentary Affairs for consideration and report pursuant to Article 106 (4) and (5) of the Constitution and Standing Order 179 of the House.

2.0 DELIBERATION

2.1 The Committee held a workshop with relevant stakeholders to consider the Bill. The technical team from the Attorney-General's Office led by the Honourable Attorney-General and Minister for Justice Mrs. Betty Mould Iddrisu, the Chairman of the Serious Fraud Office Board, Mr. Justice Amonoo Money as well as a representative from the British High Commission, Mr. Roger Coventry were all in attendance at the invitation of the Committee to assist in deliberations. The Committee reports as follows:

3.0 ACKNOWLEDGEMENT

3.1 The Committee is grateful to the Attorney-General and her technical team and all the other resource persons for their attendance and technical assistance during the consideration of the Bill. The Committee is also grateful to GTZ-Ghana for supporting the facilitation of the workshop.

3.0 REFERENCE DOCUMENTS

3.1 The Committee had recourse to the under-listed documents during its deliberations:

- a. The 1992 Constitution,
- b. The Standing Orders of Parliament,
- c. The Anti-Money Laundering Act, 2008 (Act 749),
- d. Anti-Terrorism Act, 2008 (Act 762),
- e. Narcotic Drugs (Control Enforcement and Sanctions) Law, 1990 (P.N.D.C.L. 236), and
- f. Mutual Legal Assistant Bill

4.0 BACKGROUND

4.1 Transnational crimes continue to pose serious threats to the international community, particularly in the wake of globalisation with the attendant ease of effective communication across jurisdictions. The unfamiliar nature of the legal systems of various states tends to undermine co-operation between states in the prosecution of crimes across national borders. Further to this, sovereignty precludes the enforcement of legal processes generally on behalf of a foreign State in another State. There is therefore the need for reciprocal agreements to aid co-operation amongst states for the prosecution of offenders on different parts of the globe.

Ghana's effort to lend support to the comity of nations in furtherance of the above finds expression in the passage of a number of legislations. The Narcotic Drugs (Control Enforcement and Sanctions) Act, 1990 (P.N.D.C.L. 236) makes provisions for assistance that may be rendered by Ghana to foreign states in relation to drug related matters. The Security and Intelligence Agencies Act, 1996 (Act 526) provided for the integration of domestic and foreign security policies. The Transfer

of Convicted Persons Act, 2007 (Act 743) also provides for the facilitation of the transfer of convicted persons from the Republic to a foreign country and from a foreign country to the Republic for the purpose of serving prison sentences amongst others. The Anti-Money Laundering Act, 2008 (Act 749) establishes a Financial Intelligence Centre which ensures co-operation between some local investigative bodies and their foreign counterparts to combat money laundering activities globally. The Anti-Terrorism Act, 2008 (Act 762) is another piece of relevant legislation which sought to provide for universal jurisdiction for the prosecution of offences considered as terrorist offences in Section 5 of the Act 762 universal jurisdiction is granted for the prosecution of offenders. There is however no specific law for general legal assistance to tackle criminal issues that need international co-operation.

It is in this connection that the Bill provides for the establishment of a one stop-shop legal framework between the Republic and foreign states for the implementation of agreements for mutual legal assistance, in the combating of crime across different jurisdictions.

5.0 OBJECT AND PURPOSE OF THE BILL

5.1 The Bill seeks to establish a comprehensive legal framework for the implementation of agreements on mutual legal assistance to facilitate the prosecution of transnational crimes and the administration of criminal justice across jurisdictions and related matters.

6.0 PROVISIONS OF THE BILL

The Bill is organised into 13 subject matter areas spanning 86 clauses namely: application; request for mutual legal assistance; grounds for refusal of mutual legal assistance and provision of assistance with conditions; request for specific forms

of assistance; procedures for handling persons in custody as witnesses; procedural measures related to the presence, transfer and transport of persons through Ghana; request for evidence gathering by technology; interception and preservation of communications data; special request for investigative measures; requests by foreign states for confiscation of proceeds or instrumentalities of crime; related court orders; lending exhibits under a loan order and production of judicial or official records; admissibility in Ghana of evidence obtained outside Ghana; and miscellaneous provisions

6.1.1 Clauses 1 - 5

Clauses 1-4 deal with the application of the Bill to foreign States and foreign entities and the administrative arrangements that affect reciprocal agreements between the Republic and other foreign states. However offences with a political character, offences connected with political offences and offences not recognised by Ghanaian Law have been excluded from the provisions of the Bill. Clause 5 on the other hand deals with the definite requests that can be made by a foreign state for assistance.

Clauses 6 & 7

Clauses 6 and 7 vest power in the Ministry of Justice to act as the Central Authority of the Republic. The Ministry therefore has the mandate to make and receive requests on behalf on the Republic. The provisions here also outline processes involved in requests made by the Republic, and further mandate the Attorney-General as the person responsible for making and receiving of request by or on behalf of the Republic for assistance.

Clause 8, 9 & 10

These clauses specify the contents of a request, the procedures to follow when making such requests and the modalities required for response to the request of a foreign state.

Clauses 11 & 12

Clause 11 which reflects the Harare Scheme of the Commonwealth imposes obligation on respective states to protect the confidentiality of requests. Clause 12 places limitation on the use of evidence received.

Clause 13

This clause expressly provides for the split responsibility in relation to expenses incurred in the granting of requests. A body to be determined by the Minister shall bear the expenses for the grant of a request whereas the foreign state shall bear miscellaneous expenses specific to the grant of the request. The clause further provides for consultation between the Minister and the foreign state in cases of substantial requests.

Clause 14

This clause addresses the issue of a defence request that may be made by an accused person or his legal representative and provide for instances where this clause may be invoked and also provides the grounds for refusal of assistance.

Clause 15

Clause 15 spells out the basis on which the Minister may decline a request especially where the offence is of a political character. Offences that fall within the ambit of an international convention to which both the Republic and foreign states

are parties, and offences recognised by a convention that require the extradition or prosecution of an accused persons are also excluded.

Clause 16 & 17

Clause 16 deals with the principle of the dual criminality. The provision of assistance is based on what constitutes a crime in both the foreign state and the Republic. Clause 17 vests discretion in the Minister to grant a request subject particular conditions which are acceptable to the requesting state.

Clauses 18 & 19

These clauses relate to requirements in respect of request for the identification and location of persons as well as the service of documents.

Clauses 20 - 25

These clauses highlight the various relevant matters for search processes and procedures which include the issue of search warrants, the contents and execution, correlation reports and hearing connected to the search warrants.

Clause 26 & 27

Clause 26 provide for the examination of witnesses and permission for the accused person's legal representative to be in attendance. Clause 27 permits requests for the temporal transfer of persons in custody.

Clause 28 & 29

Clause 28 stipulates the considerations for a transfer order as well as the terms and conditions for such orders. In upholding the constitutional principle of respect for human dignity, clause 29 makes provision for the Minister's refusal of

requests by foreign states for the transfer of persons as witnesses where such persons do not consent to the transfer.

Clause 30

Clause 30 addresses the conditions for the custody of a person transferred to a foreign state and the return of such a person to Ghana.

Clause 31 & 32

These clauses relate to variation of the terms and conditions of a transfer order and the communication of same.

Clauses 33, 34 & 35

The concept to avoid the stigmatisation of juveniles and the exclusion of their transfer are enumerated in these clauses. The issue of immunity of persons in foreign states is also dealt with.

Clause 36

This clause empowers the Minister of the Interior to permit persons prohibited under the Immigration Act entry into the country at designated places for a clearly defined reason.

Clause 37, 38 and 39

Clause 37 empower the Minister to request the transfer of escaped persons detained in a foreign state to Ghana and further empowers the Minister to request for appropriate consequential orders from Court in relation to the detainee: Matters relating to the escape and arrest of a detained person and the requisite punishment and the guarantee of the safety of such a persons whilst in the jurisdiction are provided for in clauses 38 and 39 respectively.:

Clauses 40, 41 & 42

Request for hearing involving foreign states or authorities by video conferencing and the application of such methods in evidence gathering subject to prescribed procedures and processes as well as the use of that method in hearing of accused persons are dealt with in clauses 40, 41 and 42 respectively.

Clauses 43 & 44

The request for interception of communications in the jurisdiction including the nature of the request and the mode of the interception as well as the content of such requests are provided for in clauses 43 and 44.

Clauses 45 & 46

Clause 45 provide for circumstances in which the request for interception of communications in the jurisdiction may be made by a service provider and clause 46 specify the procedure for and the conditions pursuant to which an order for interception of communication may be ordered by the Court.

Clause 48, 49 & 50

The conditions precedent under which telecommunications would be intercepted with technical assistance are also provided in clause 47, while specific request for the interception for the purpose of providing stored communication including the procedures and requirements for granting such requests are dealt with in clauses 48 and 49 respectively.

Clauses 50 & 51

Bilateral arrangements for the interception of communication as well as the request for and the procedure involved in the preservation of communication data pending the submission of request for production of same are dealt in clauses 50 and 51 respectively.

Clauses 52, 53 & 54

Matters relating to and the requirements for special co-operation between Ghana and a foreign state in carrying out investigations and the conditions precedent for covert investigations as well as joint investigations including the procedures and processes are stated in clauses 52, 53 and 54 respectively.

Clauses 55, 56 & 57

The request for freezing, seizure and confiscation of proceeds of crime including corresponding qualifying conditions, procedures and processes involved are also dealt with in clause 55. Clause 56 states the procedures and conditions which shall guide a receiving Central Authority in handling requests for the enforcement of restraint and confiscation orders while clause 57 empowers a foreign court to request for alternative Court orders from Ghana.

Clauses 58 & 59

Clause 58 provide for the power to amend a foreign restraint and confiscation order and its subsequent enforceability. Clause 59 vests the High Court with the power to and the conditions for setting aside the registration of foreign restraint and confiscation order.

Clauses 60 & 61

Clause 60 empowers third parties with interest in properties subjected to restraint

or confiscation orders to apply to the Court for return of such properties upon satisfactory proof before the court. Clause 61 on the other hand provide for the admissibility of and effect of facsimile of restraint and confiscation order within specified time.

Clauses 62 & 63

In clause 62, foreign restraint order or confiscation order is made applicable in respect of properties relating to money laundering, terrorist acts and other related proceeds of crime. Clause 63 on the other hand provides the power to and the conditions and procedure for reciprocal sharing of confiscated property by specified relevant authorities.

Clauses 64 & 65

Clause 64 empowers the disposal or release of property which is a subject matter of restraint or confiscated order as well as the procedure for the disposal or release of same. Clause 65 provides for the use of exhibits by empowering a foreign state to request for assistance to obtain an exhibit admitted in evidence in a Court in the Republic. It also imposes obligations on the relevant authority in Ghana to comply under specified conditions.

Clauses 66 & 67

Clause 66 enjoins the Court to grant a loan order for use as exhibits outside Ghana and indicates the terms and conditions under which such an order should be granted. Clause 67 places the burden of proof of tempering with the loan order on the party who makes such an allegation.

Clauses 68 & 69

Clause 68 provides for the processing and production of requests by foreign states for judicial or official records, imposes obligation on relevant authority for compliance with such requests and also specifies the procedure for making the request. Clause 69 vests the power to grant such request in the Court and further indicates the conditions under which the Court may grant it.

Clauses 70, 71 & 72

Clause 70 provides for the transmission and return of materials to and from the jurisdiction as well as the conditions, procedures and processes involved. Clause 71 relates to the conditions precedent for admissibility or otherwise of foreign records. Clause 72 permits the admissibility of things including certificates and affidavits and limits the effect of the Evidence Act, 175 (NRCD 323) in that regard.

Clauses 73, 74 & 75

Clause 73 indicates and conditions under which documents would be considered as duly authenticated and clause 74 states the conditions precedent for notification and admissibility of foreign documents and things. Clause 75 on the other hand specifies the requirement for proof of service abroad.

Clauses 76, 77 & 78

The conditions under which a person may be restricted from disclosing foreign documents and the use of foreign materials obtained by mutual legal assistance are dealt with in clause 76. Clause 77 indicates the procedures for lodging an appeal under this Bill and clause 78 vests power in the Court to determine the validity or otherwise of a refusal by a foreign state to give up a record or produce a document at the request of the Minister for Justice.

Clauses 79 & 80

Clause 79 enjoins prompt consultation between the relevant authorities in Ghana and a foreign state subject to prescribed conditions. Clause 80 also empowers the relevant authority in Ghana to extend voluntary assistance to a foreign entity under prescribed conditions and within specified time limit.

Clauses 81 & 82

The Minister is empowered by clause 81 to delegate any of the functions assigned to a competent authority. Clause 82 provides for the modification of Acts and Agreements in force prior to the coming into force of this Bill to give effect to the provisions of the latter.

Clauses 83 & 84

Under clause 83, the Chief Justice is empowered to designate a Court to handle matters under this Bill, while clause 84 also empower the Minister and the Minister for Foreign Affairs to enter into memoranda of understanding on the handling of requests made under the Act.

Clauses 85 & 86

Clause 85 empowers the Minister to make Regulations for the implementation of the provisions of the Bill and clause 86 provides for interpretation.

7.0 OBSERVATIONS

The Committee observed that mutual legal assistance, particularly in criminal matters is a well established principle in international co-operation with regards to criminal justice processes. Article 73 of the Constitution of the Republic enjoins the Government to conduct its international affairs in consonance with the accepted

principles of public international law and diplomacy in a manner consistent with the national interest.

The Committee further observed that the Bill provides for co-operation among states in the use of special investigative techniques such as video conferencing or other technology, the lawful interception of telecommunications in Ghana, the provision of stored communications, the preservation of communications data, covert investigations, electronic surveillance as means of assistance for evidence gathering, the enforcement of foreign restraint and confiscation orders and reciprocal sharing of confiscated property between the Republic and a foreign State. Due to the need to consider privacy matters, implementation of the above bold initiatives is subject to prior arrangements between a foreign state or foreign entity and the Republic.

The Committee further observed that the baseline for the grant of assistance is reciprocity and therefore a request will not be declined or modified without stating the reason or consulting the foreign state. The passage of this Bill would constitute additional legislative leap in furtherance of international co-operation through more formalised channels in the combat of transnational crimes.

The Committee finally observed that the all embracing and robust nature of the provisions of this Bill would fill the identifiable gaps in our existing legal frame work for mutual legal assistance in combating transnational crimes across jurisdictions.

8.0 AMENDMENT PROPOSED

- i. Clause 2 – Amendment proposed – Sub-clause (2) delete
- ii. Clause 6 – Amendment proposed –Sub-clause (2) delete and insert the following:

"(2) a competent authority of the Republic shall not make or receive a mutual legal assistance request except through the Central Authority."

- iii. Clause 6 – Amendment proposed – Sub-clause (4) delete.
- iv. Clause 13, – Amendment proposed – Sub-clause (2) after paragraph (g) insert the following new paragraph:

"any other expense incurred for the grant of a request made by a foreign State or foreign entity."

- v. Clause 14 – Amendment proposed – Sub-clauses (1) and (2) delete and insert the following new Sub-Clauses:

"(1) Where a criminal proceeding has been instituted against a person or a person is joined in a criminal proceeding, a competent authority of the foreign State or foreign entity concerned may on application made by

(a) that person, or

(b) The Commission on Human Rights and Administrative Justice on that person's behalf issue a request for assistance to another foreign State.

(2) The Commission on Human Rights and Administrative Justice shall obtain certification of the Central authority to make the request before making the request under subsection (1).

(3) The Minister may lay down any condition including that related to confidentiality that the Commission is required to comply with in handling the request of the accused person.

(4) The costs related to a request made under subsection (1) shall be borne by the accused person".

- vi. Clause 15 – Amendment proposed – after Sub-clause (3) add a new Sub-Clause:

"(4) A person aggrieved by the refusal to comply in whole or in part with a request for mutual legal assistance may apply to the High Court for judicial review."

- vii. Clause 46 – Amendment proposed – Sub-clause (3) the opening paragraph delete and insert the following:

“the court to which application is made under subsection (1) or (2), may make an order for the prevention of crime upon reasonable grounds to”

- viii. Clause 49 – Amendment proposed – Sub-clauses (1) and (2) delete and insert the following:-

“(1) Subject to any other enactment, where the Central Authority receives a request from a foreign State or foreign entity for assistance for the interception of an item or its copy to the foreign state, the Minister may if satisfied that the foreign State or competent authority of the foreign entity has jurisdiction over the criminal matter for which the request is sought, apply without notice to the relevant court for an order to

- (a) intercept the item in the mail of a postal service, and
- (b) subsequently transmit the intercepted item or its copy to the foreign State.

“(2) A judge to whom an application is made under subsection (1) may make an order on reasonable grounds to

- (a) require the use of an investigative technique or other procedure to intercept the item in Ghana,
- (b) authorise the relevant authority to intercept the item.”

- ix. Clause 60 – Amendment proposed – delete and insert the following:

“Interested parties and restraint and confiscation orders

60 (1) The Court may in an action relating to a restraint or confiscation order pursuant to section 56, require notice to be given to a person who appears to have an interest in terrorist property and that person shall be added as a respondent to the application.

(2) If the Court is satisfied that the person added as a respondent to the application has

- (a) an interest in the property the subject of the application,
- (b) exercised reasonable care to ensure that the property is not from the proceeds of a serious offence

the Court shall order that the interest of that person shall not be affected by the order and the order shall also declare the nature and extent of the interest of the person.

(3) Without limiting subsection (2), the Court may make an order to payment of damages or costs in relation to the registration of the restraint or confiscation order."

x. Clause 61 – Amendment proposed – delete and insert the following:

"Electronic communication of restraint and confiscation orders

61 (1) A foreign restraint order or foreign confiscation order or an amendment to either may be received by means of electronic communication and registered by the court.

(2) An electronic copy of an order under subsection (1) shall have the same effect as a duly authenticated copy of the order or its amendment.

(3) Registration of an order under subsection (1) shall cease to have effect after fourteen days from the date of registration, unless an authenticated copy of the original order is registered.

xi. Clause 85 – Amendment proposed – delete and insert the following "85 The Minister may by legislative instrument make Regulations for:-

- (a)
- (b).....
- (c).....

(d). generally for the effective implementation of the provisions of this Act.”

- xii. Clause 86 – A mendment proposed –under Interpretation “senior police officer” delete and insert the following
“police officer” means a person not below the rank of Assistant Superintendent of Police,
- xiii. Clause 86 – Amendment proposed – under Interpretation “offence” delete and insert the following:
“serious offence” includes
(a) participation in an organised criminal group, terrorism and terrorist financing, money laundering, human trafficking, peopled smuggling rape, defilement, illicit trafficking in stolen and other goods, corruption and bribery, serious fraud, counterfeiting and piracy of products, smuggling, extortion, forgery, insider trading and market manipulation;
(b) murder, grievous bodily harm, armed robbery or theft where there are predicate offences for a serious offence; and
any other similar or related, prohibited activity punishable with imprisonment for a period of not less than twelve months; “competent authority” includes
- xiv. Clause 86 – Amendment proposed – under Interpretation, “Central Authority” delete and insert the following:
“Central Authority” means
(a) the designated Ministry of Justice under section 6 or
(b) the designated person of a foreign State or foreign entity responsible for the transmission, receipt and handling of requests for mutual legal assistance;

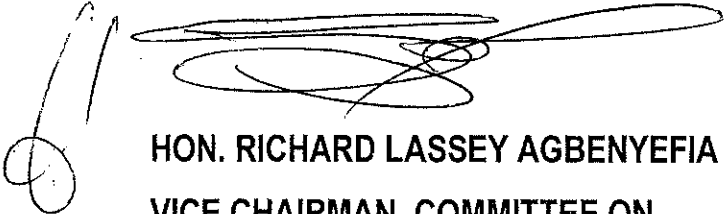
- xv. Clause 86 – Amendment proposed – under Interpretation delete “competent authority” and insert the following:
“competent authority” includes
- (a) the Serious Fraud Office, the Commission on Human Rights and Administrative Justice, the Narcotic Control Board, and any other organisation, agency or body of the Republic authorised by the Minister, and,
 - (b) an organisation, agency or body of a foreign State or foreign entity ordinarily competent or authorised by the Central Authority of that State to handle, submit or receive mutual legal assistance request
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- (i) the Serious Fraud Office, the commission on Human Rights and Administrative Justice, the Narcotic Control Board, the Police Service, intelligence agencies and any other organisation, agency or body of the Republic authorised by the Minister, and
 - (ii) an organisation, agency or body of a foreign State or foreign entity ordinarily competent or authorised by the Central Authority of that State to handle, submit or receive mutual legal assistance requests;
- xvi Clause 86 – Amendment proposed – under Interpretation add the following:
“military offence” means a service offence within the meaning of the Armed Forces Act, 1962 (Act 105) committed by an officer of the Armed Forces or a soldier enrolled in, attached to or seconded to the Armed Forces.

9.0 **RECOMMENDATIONS AND CONCLUSION**

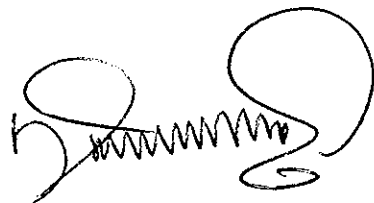
Ghana's journey towards the fulfillment of its international obligation by the provision of a legislative framework for mutual legal assistance in combating transnational crime spans over a decade. By the passage of this Bill, this country would not only be seen to be discharging this obligations but also enhancing the viability of its legal regimes towards a more effective and efficient combat of transnational crimes.

The Committee has carefully examined the provisions of the Bill in the light of its object and purpose and is of the view that, they are comprehensive enough to address concerns relating to the subject matter. Further to this, the provisions of the Bill have been found to be consistent with the tenets of the Constitution of the Republic and other relevant statutes. The Committee accordingly recommends the passage of the Bill by the House subject to the above proposed amendments.

Respectfully submitted



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