

# Mutual Assistance in Criminal Matters in Nigeria and the Role of the Attorney General of the Federation

By

Bashir Mohammed Chalawa\*

Salim Bashir Magashi\*\*

## Abstract

*Mutual assistance is a mechanism of cooperation in criminal matters whereby states cooperate with one another in order to obtain the evidence required for criminal investigations and prosecutions. It is a process by which states seek and provide assistance in gathering evidence for use in criminal cases. It is sometimes described as pursuing the evidence mechanism of cooperation in criminal matters. This paper examines the specific role of the Attorney General of the Federation as the statutory actor in the implementation of laws and policies in mutual assistance in criminal matter especially within the Economic Community of West African States (ECOWAS) sub-region. The paper finds specifically that non-domestication of the treaty on this subject matter; language barrier and some procedural matters hinder the effective realization of mutual assistance within the ECOWAS sub-region. Consequently, the paper recommends the urgent need for the domestication of the ECOWAS Convention on Mutual Assistance in Criminal Matters. The paper adopted as methodology the doctrinal approach which entails the use of relevant literature including international instruments, reports and general comments/recommendations.*

**Keywords:** Attorney General of the Federation; Mutual Assistance in Criminal Matters; ECOWAS, Mutual Cooperation.

## 1.1 Introduction

International cooperation in criminal matters becomes imperative against the backdrop of globalization, advances in technology and exponential increase in mobility of people and goods. The international community derives immense benefit from a borderless global world but has to deal with international crimes as a negative impact of globalization. It is worthy of note that crimes are increasingly committed across borders and may be described as borderless but the operation of the law enforcement agencies is confined to the borders of a state.

Mutual assistance is a mechanism of cooperation in criminal matters whereby states cooperate with one another in order to obtain the evidence required for criminal investigations and prosecutions.<sup>1</sup> It is a process by which States seek and provide assistance

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\* LLB, LLM (ABU), Ph.D (In view) BL, Lecturer Department of Public Law, Faculty of Law, Taraba State University, Jalingo, [bmchalawa@gmail.com](mailto:bmchalawa@gmail.com) 08039319257

\*\* LLB, LLM, Ph.D, BL, Senior Lecturer and Head, Department of Public Law, Faculty of Law, Ahmadu Bello University, Zaria (Corresponding author) [salimmagashi@gmail.com](mailto:salimmagashi@gmail.com)

in gathering evidence for use in criminal cases. It is sometimes described as pursuing the evidence mechanism of cooperation in criminal matters.

The Economic Community of West African States (ECOWAS) Convention on Mutual Assistance in Criminal Matters is a regional framework which is an attempt to ease the process of investigation and prosecution of both conventional crimes which have assumed transnational dimension and organized trans-border crimes. The convention seeks to extend to one another, the widest mutual assistance in order to combat offences of all kinds particularly of serious crimes as an effective way of dealing with the complex aspect and serious consequences of criminality in all its forms and new dimensions.

In order to achieve the above objective, the Convention, stipulates that request for mutual assistance shall be made or received by the competent authority of a Member State.<sup>2</sup> Competent authority as mentioned in the Convention means the minister of Justice of a member state.<sup>3</sup> Requests therefore, for mutual legal assistance do not go directly to the judiciary, the police or the prosecution but to the Minister of Justice.

The problem of this research is that while the Convention appoints the Attorney-General of the Federation (AGF) to be the Competent Authority for receiving requests and executing same from a member country, the Mutual Assistance in Criminal Matters Act<sup>4</sup> does not vest the power of execution (investigation) on the AGF. The power of investigation is the responsibility of some agencies<sup>5</sup> which are also empowered by their enabling laws. The power of the Minister is thus not holistic, being that as the Competent Authority under the Convention, he has to rely on some other agencies not directly under his control. For example in the James Onanefo Ibori's case,<sup>6</sup> the former Attorney General of the Federation refused the request made by the Fraud Prosecution Service and Organized Crime Division of the British Crown Court. This in essence leads to delay and inefficient response to requests made by other member States for legal assistance.

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<sup>1</sup> Cameron, I. (2016) *Mutual Assistance in Criminal Matters*. The International and Comparative Law Quarterly, Vol.38, p.954.

<sup>2</sup> Article 3 ECOWAS Convention on Mutual Assistance in Criminal Matters, Convention A/P.1/7/92, Entered into in Dakar, on 29<sup>th</sup> Day of July, 1992 (hereinafter referred to as ECOWAS Convention)

<sup>3</sup> See the meaning of Competent Authorities in the definition Section of the Convention.

<sup>4</sup> The Act was signed into law in June 2019.

<sup>5</sup> (i) The Nigerian police (ii) The State Security Service (SSS) (iii) The Interpol Nigeria (iv) The Economic and Financial Crimes Commission (EFCC) (v) The Independent Corrupt Practices and other Related Offences Commission (ICPC) (vi) The National Drug Law Enforcement Agency (NDLEA) (vii) The National Agency for the prohibition of Traffic in persons (NAPTIP) (viii) National Agency for Food and Drug Administration and Control (NAFDAC) (ix) The Nigeria Immigration Service, and (x) The Nigeria customs Service.

<sup>6</sup> Oyibo, "AGF to stop asks Yar'Adua to stop Ibori's trial in UK" <http://www.oyibosonline.com/agf-asks-yaradua-to-sto-iboris-trail-in-uk> accessed on March 25, 2021

In view of the above problem, this paper aims at examining the role and powers of the AGF in the implementation of Mutual Legal Assistance (MLA) requests in Nigeria. This is with a view to finding out how effectively the AGF, as the Competent Authority under the ECOWAS Convention on Mutual Assistance in Criminal Matters, carries out his role with the assistance of the executing authorities as contained under the Nigerian domestic laws.<sup>7</sup> In line with this aim, the objective of the paper is to examine the meaning and nature of mutual legal assistance as well as ground for refusal of MLA request.

## 1.2 Conceptual Discourse

This section discusses and clarifies the concepts that are central to this paper. These concepts are: Mutual Legal Assistance, Central Authority Unit and Executing Authority.

### 1.2.1 The Concept of Mutual Legal Assistance

Mutual Legal Assistance is a mechanism whereby States cooperate with one another in order to obtain the evidence required for criminal investigations and prosecutions.<sup>8</sup> The Mutual Legal Assistance includes a formal process of obtaining and providing assistance in gathering of evidence for use in criminal cases, transferring of criminal proceedings to another state or executing foreign criminal sentences. In some instances, it is used to recover proceeds of corruption.<sup>9</sup> MLA is used to enforce public and criminal laws,<sup>10</sup> and it ranges from identifying and locating suspects, obtaining information and evidence, tracing and confiscating the proceeds of crime. It is sometimes described as pursuing the evidence mechanism of cooperation in criminal matters. Generally, Mutual Legal Assistance is the formal way in which countries make request and provide assistance in obtaining evidence located in one country to assist in Criminal investigations or proceedings in another country. It is an agreement between two countries for the purpose of gathering and exchanging information in an effort to enforce public laws of the requesting state. MLA is the provision of assistance on a formal legal basis, usually in the gathering and transmission of evidence, by an authority of one country to an authority in another, in response to a request for assistance. “Mutual” simply denotes the fact that assistance is usually given in the expectation that it would be reciprocated in like circumstances, although reciprocity is not always a pre-condition to the provision of assistance.<sup>11</sup>

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<sup>7</sup> Ibid

<sup>8</sup> Ibid.

<sup>9</sup> *A.G. Nassarawa State vs A.G Plateau State* (2012) 10 NWLR (Pt. 419) SC.

<sup>10</sup> Thematic Review and Final Report of the ADB and OECD on Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific, <http://www.oecd.org/site/adboecdanti/corruptio-initiative>. Accessed on November 16<sup>th</sup>, 2019 2 :00 pm

<sup>11</sup> Bose, M. (2019) *International Law and Treaty Obligations, Mutual Legal Assistance, and EU Instruments*, Oxford Handbooks Online, Oxford University Press, London, p. 3.

### **1.2.2 The Concept of Central Authority Unit**

Central Authority Unit is the unit that coordinates the procedure of receiving and executing a request for mutual assistance coming from a member country. The Convention appoints the AGF of a member State to be referred to as the competent authority that preside over and carry out the above function. However, local legislations in Nigeria took away the powers of execution from the AGF (central authority). Therefore, requests sent by the authority other than the recognized competent authority shall not be honoured. For example, In Nigeria, the request made by the British Government during the trial of Mr. James Ibori was denied because the letter of request was not signed by the proper authority.<sup>12</sup>

### **1.2.3 Executing Authorities**

The Executing Authorities are under the scope of Mutual Assistance in Criminal Act and the Nigerian guidelines for MLA<sup>13</sup> where it enumerates the following as executing authorities; the Nigerian Police, the State Security Service, the Interpol Nigeria, the Economic and Financial Crimes Commission, the Independent Corrupt Practices and other Related Offences Commission, the National Drugs Law Enforcement Agency, the National Agency for the Prohibition of Traffic in Person, the National Agency for Foods and Drugs Administration and Control, the Nigerian Immigration Service, the Nigerian Customs Service and any other agency specified by the AGF.<sup>14</sup>

### **1.3 Treaty with Nigeria on Mutual Legal Assistance in Criminal Matters**

In response to the need for some sort of cooperation between State's towards combating transnational crimes, Nigeria has ratified some mutual legal assistance agreements in criminal matters with different countries in the world;<sup>15</sup> like the Treaty between the Federal Republic of Nigeria and the United States of America<sup>16</sup> on Mutual Legal Assistance in Criminal Matters, the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth;<sup>17</sup> and the Multilateral ECOWAS Convention on Mutual Assistance in Criminal Matters.<sup>18</sup> Others are the Mutual Legal Assistance Agreements with France, United Kingdom<sup>19</sup> South Africa<sup>20</sup> and Belgium.<sup>21</sup> As well as Dubai (UAE) it is the recent.

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<sup>12</sup> Mr. Aondaakaa as Attorney-General of the Federation refused the request by the British Authorities under the Agreement between the Government of the Federal Republic of Nigeria and United Kingdom and Northern Ireland Concerning the Investigation and Prosecution of Crime and the Confiscation of Proceeds of Crime, 1990.

<sup>13</sup> Mutual Legal Assistance Guidelines for the Federal Republic of Nigeria, 1<sup>st</sup> Edition, 2013.

<sup>14</sup> Section 1 (e), Ibid.

<sup>15</sup> Mutual Legal Assistance Guidelines for the Federal Republic of Nigeria, 1<sup>st</sup> Edition, Prepared by the Federal Ministry of Justice on the 1<sup>st</sup> October, 2013, p.10

<sup>16</sup> Signed in Washington on 2<sup>nd</sup> November 1987

<sup>17</sup> The Scheme on MLA is called the Harare Scheme of 1990.

<sup>18</sup> No. A/P1/7/92.

<sup>19</sup> Signed at London on the 18<sup>th</sup> September 1989

The purpose of an agreement on Mutual Legal Assistance is to increase the level and scope of assistance rendered to contracting States in Criminal Matters, but it is in no way to derogate from, similar existing forms of formal and informal cooperation; and to encourage the development of enhanced cooperation arrangements in other fora.<sup>22</sup> Such agreements make provision for the giving of assistance by the competent authorities of one country referred to as “the requested country” in respect of criminal matters arising in another country referred to as “the requesting country”.<sup>23</sup> For instance, Article 1(1) of the Treaty between the Government of the United States of Africa (USA) and the Federal Republic of Nigeria on Mutual Legal Assistance in Criminal Matters provides that the contracting parties shall, upon request and in accordance with the provisions of the Treaty, provide Mutual Assistance in connection with the investigation, prosecution and prevention of crimes of transnational nature, and in proceedings related to criminal matters.<sup>24</sup>

#### **1.4 The Role of the Attorney-General in Effecting Mutual Legal Assistance in Nigeria**

In Nigeria, it is the office of the AGF that is basically in charge of all mutual legal assistance agreements. This is because Section 5 subsection (1) of the Mutual Assistance in Criminal matters Act provides that the AGF is designated as the Central Authority for Nigeria and shall be responsible for making, receiving and transmitting requests for assistance; executing or arranging for the execution of requests; taking practical measures to facilitate the expeditious execution and transmission of requests for assistance. He handles the application and approval of legal assistance being the chief legal officer of the federation<sup>25</sup> although he has limited powers in the control of other important agencies of government, but with substantial powers of prosecutions, and advice on the activities of all institutions of government to ensure compliance with all relevant legislations of municipal and international flavour in the day to day business of government. The AGF also works in tandem with other executing authorities to defend public and the national interest and ensure respect for the rule of law, even though there are instances where the AGF is seen to sacrifice the rule of law on the altar of certain reasons<sup>26</sup> which may be attributed to the fact that the AGF is a political appointee of the President despite the sacred constitutional duty

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<sup>20</sup>Ratification and Enforcement Act, 2005

<sup>21</sup> Mutual Legal Assistance Guidelines for the Federal Republic of Nigeria, 1<sup>st</sup> Edition, Prepared by the Federal Ministry of Justice on the 1<sup>st</sup> October, 2013, p.10

<sup>22</sup>Idornigie, P.O. (2014): *Mutual Legal Assistance as a Bilateral Treaty in Mutual Legal Assistance*, (ed) Epiphany Azinge, NIALS Press Abuja, p.98.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> *A.G. Anambra State vs. A.G. Federation* (2005) 9 NWLR (pt. 931)572, (2005)5 S.C (pt.1) 73.

<sup>26</sup> The case of *SamboDasuki vs. Federal Republic of Nigeria*, where bail was granted by four different courts, including the ECOWAS Court of Justice, but the decisions have not been complied with by the Nigerian Government, keeping Dasuki in continuous detention, citing national security as more important than rule of law.

for him to exercise his powers, by having regard to public interest, the interest of justice and the need to prevent abuse of legal processes.<sup>27</sup> The condition precedent in all mutual Legal Assistance policies including that of Nigeria where the AGF is a key figure in the entire process include the following:

- i. There must be an agreement on legal assistance with the requesting state.
- ii. The object of the request must be expressly stated. It could be for an investigation to be carried out and evidence subsequently gathered against a person or for further and perhaps better evidence to be gathered against the person. In either of these or any other, the language has to be express and be free from ambiguity.
- iii. There should be a precise data on the person or subject matter. These include for instance, names, dates<sup>28</sup>, profession or occupation, known addresses and description of the subject.
- iv. An assurance that will be given that all evidence and information obtained regarding the request will only be used against the suspect in the allegation stated in the request and not for any other.
- v. The allegation so stated must not be of a political, racial or religious nature.<sup>29</sup>

All requests for assistance are communicated to the Central Authority which is the AGF through the Ministry of Foreign Affairs where they are reviewed according to the policy guidelines and national interest of the country. If considered to be within the context of the National Interest, the request is referred to the relevant executing authority for action depending on the nature of the request.<sup>30</sup> Assistance is granted only where the issues requested are specifically stated. Where appropriate, court orders will be obtained for arrests, searches and seizures. Upon compilation of a case file, the filing of the case in a criminal court, and the issuance of warrant, where applicable, the case diary is referred to the central authority for final determination of the request. The Central Authority is a unit under the control of the AGF in the Ministry of Justice of the Federation. This is the procedure where Nigeria is the party to which a request is made. The AGF decision is not a unilateral one because he must seek for the consent of the presidency before his decision can be valid.

Where Nigeria is the requesting party, there will be made available appropriate evidence which will be registered in a court of competent jurisdiction and which if deem fit, will issue a warrant for the arrest of the subject. The file and warrant will then be transmitted to

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<sup>27</sup>Section 174(3), 1999 Constitution of the Federal Republic of Nigeria (As Amended).

<sup>28</sup> This refers to the necessary dates such as the date of birth or the date that the act was committed.

<sup>29</sup>Wakama, S.L., (2015): *Transnational Organised Crime and the Role of Extradition and Mutual Legal Assistance Treaties*, <http://www.unafei.or.jp/english/pdf>. Accessed on November 16<sup>th</sup>, 2019 2: 30pm.

<sup>30</sup> This is in accordance with Art 1891, 30 of UNTDC which specifically states that state parties shall designate a central authority that shall have the responsibility and powers to receive MLA and that requests for MLA or any communication relating to it shall be transmitted to the central authority who shall execute the request or transmits it to a competent authority.

the AGF for further vetting, and upon approval, a request will duly be made by his office.<sup>31</sup> There is always a reciprocity clause which is actually the basis for Mutual Legal Assistance. It is a creation of obligation where the requesting party undertakes to correspondingly engage in the practice in the future. The requesting party undertakes to comply with a future request for similar assistance in matters involving an offence that corresponds with that for which assistance is sought.<sup>32</sup> When a request for mutual legal assistance is properly made through the proper channel, it is expected that the request be approved and the assistance given. Approval comes in various forms depending on the nature of the request. The types of MLA which may be provided include the following:<sup>33</sup>

- i. Taking of evidence for onward transmission to the requesting government or for the production of document or information. This is a request by requesting government to make available admissible evidence to be used in a trial. Here the requested government may be required to take such steps as are necessary to record the evidence of the witnesses and transmits same to the central authority of the requesting state.<sup>34</sup>
- ii. Request for the attendance of persons to testify as witness in a trial in which case there will be a list of the names and particulars of the witnesses as well as the nature of evidence or assistance they will be providing. In all these, there should be statement which should be relevant to the matter in question.
- iii. In the case of a request for search and seizure, the request should include a specific description of the possible location to be searched, the documents or items to be seized and the relevant time frame for the search where necessary as well as reasonable grounds to believe that the thing sought is located at the place specified, reasonable grounds to believe that the document or thing will afford evidence of commission of the offence which is the subject of investigation or proceedings in the requesting State. There should also be an inclusion or explanation of any known information about third parties who may have rights in the property.<sup>35</sup>

Of all categories of international cooperation, extradition is the most concrete as it involves a direct means of taking back the fugitive offender to stand trial and serve sentence in the jurisdiction of the state where he fled. It is regarded as a tool to prevent the fleeing away of

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<sup>31</sup> Ibid.

<sup>32</sup> UNODC (2011) *International Cooperation in Criminal Matters: Counter-Terrorism*, United Nations, New York, p. 2. See also Kolb, R. (2004) *The Exercise of Criminal Jurisdiction over International Terrorists*. In: Andrea B. (ed.) *Enforcing International Law Norms against Terrorism*, Hart Publishing, pp. 227-282.

<sup>33</sup> Art 1(2) of the Treaty on Mutual Legal Assistance in Criminal Matters between the Government of the Federal Republic of Nigeria and the Government of South Africa (Ratification and Enforcement) Act, 2004 for the Scope of Assistance under that Treaty.

<sup>34</sup> Request for Mutual Legal Assistance in a Criminal Matter, <http://app.agc.gov.sg/DATA/o/does/Request-for-taking-of-evidence.pdf>, Accessed on November, 16<sup>th</sup>, 2019.

<sup>35</sup> United Nations report of the Informal Expert Working Group on Mutual Legal Assistance Case work Best Practice, Vienna 2001, <http://www.unodc.org>. Accessed on, November 17<sup>th</sup>, 2019 3: 00 pm

transnational criminals who usually take advantages from the limits of law enforcement, which often end at the border, as well as loopholes arising from the different laws and practices among nations to escape from justice.<sup>36</sup>

### **1.5 The Responsibility of the Central Authority Unit**

The designated Central Authority Unit is a specialized segment and subordinated to the Attorney-General of the Federation which acts on the instructions of the AGF. The AGF may exercise any of the powers granted him either personally or by proxy through other Law officers in his chambers, and in this case, through the staff of the Central Authority Unit under his office, acting in accordance with any general or special instruction. The Central Authority Unit is saddled with the responsibilities of receiving, acceding to and ensuring the execution of MLA requests. All formal requests for assistance must be forwarded to the Central Authority Unit for processing.<sup>37</sup> A request for MLA in Criminal Matter is appropriate if evidence from Nigeria is required for criminal matters or criminal investigation, and same can be reciprocated in respect of all forms of requests for mutual legal assistance, whether or not Nigeria and the requesting State are parties to any bilateral or multilateral agreements.<sup>38</sup>

The Central Authority Unit is to operate in tandem with the executing authorities. this is however not always the case because by the provisions of the Constitution and mutual assistance regimes, a very key area which is investigation, where mutual legal assistance may be required is not directly performed by the AGF but through the executing authorities which are also empowered by their enabling laws. This creates a distance between the receiving authority and executing authority leading to unnecessary delay in responding to requests for MLA.

The distance seems to be taken care of by the provision of the Mutual Assistance in Criminal Matters Act,<sup>39</sup> which provides that the AGF is designated as the Central Authority for Nigeria and shall be responsible for making, receiving and transmitting requests for assistance; executing or arranging for the execution of requests; taking practical measures to facilitate the expeditious execution and transmission of requests for assistance. However, the challenge from Section 5, which empowers the AGF to take practical measures to facilitate the expeditious execution and transmission of requests for assistance. The section does not spell out the manner in which the AGF can take those ‘practical measures to facilitate the expeditious execution and transmission of requests for assistance’ neither the

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<sup>36</sup>Tiyapan, S. (2015); *Extradition and Mutual Legal Assistance in Thailand*, Resource Material Series No. 57, 109, <http://www.unafei.or.jp/english/pdf> Accessed on 23<sup>rd</sup> November, 2019 4: 15 pm

<sup>37</sup> Mutual Legal Assistance Guidelines for the Federal Republic of Nigeria, Op.cit, p.3

<sup>38</sup>Ibid, p.5.

<sup>39</sup>Section 5, Mutual Assistance in Criminal Matters Act, 2006, Op.cit.

Nigerian Guidelines for Mutual Assistance in Criminal Matters which is a document meant to spell out the modus operandi for executing requests does so.

An oral interview conducted in the course of this research with a Chief State Counsel, Central Authority Unit, AGF Office, reveals that the Central Authority Unit, only forwards requests for assistance to the executing authorities and subsequently send letters of reminder to the relevant executing authority in case of any delay without giving them any time limit within which the request is to be executed. Letters of reminder seems not being enough in giving effect to the provision of Section 5 of the Act, and facilitates expeditious execution of request for assistance in cases of emergency situations where time is of the essence. This practice is a constraint regarding the inability of the AGF to exercise control over the executing authorities.

The executing authorities are: (i) The Nigerian police (ii) The State Security Service (SSS) (iii) The Interpol Nigeria (iv) The Economic and Financial Crimes Commission (EFCC) (v) The Independent Corrupt Practices and other Related Offences Commission (ICPC) (vi) The National Drug Law Enforcement Agency (NDLEA) (vii) The National Agency for the prohibition of Traffic in persons (NAPTIP) (viii) National Agency for Food and Drug Administration and Control (NAFDAC) (ix) The Nigeria Immigration Service, and (x) The Nigeria customs Service.<sup>40</sup> In conformity with established international practice, the Central Authority Unit will neither confirm nor deny the existence of a MLA request, nor disclose any of its content outside government circles, agencies, the courts or enforcement agencies in Nigeria without the consent of the requesting State. Requests are not disclosed further that is necessary to obtain the cooperation of the witness or other person concerned.<sup>41</sup> To the extent permitted by Nigerian law, evidence obtained from foreign jurisdictions pursuant to an MLA request will not be used in Nigeria for any other purpose other than that specified in the request without the consent of the foreign jurisdiction.<sup>42</sup>

Requests for MLA must be sent to Nigeria's Central authority, i.e. the AGF and Minister of Justice. Any competent authority under the law of the requesting country may make a request to Nigeria. A request for assistance shall be made pursuant to a bilateral or multilateral agreement or according to the law of the state to which the request is made with reciprocity clause and made to the AGF and Minister of Justice.<sup>43</sup> A request shall identify the agency or authority initiating the request; specify the purpose for which the assistance is sought; a certification from the Central Authority of that foreign state that the request is made in respect of a criminal matter, a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws, a description

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<sup>40</sup> Mutual Legal Assistance Guidelines for the Federal Republic of Nigeria, Op.cit, p.5.

<sup>41</sup> Ibid, p.6.

<sup>42</sup> Ibid, p.6.

<sup>43</sup> Ibid.

of the offence to which the criminal matter relates including its maximum penalty; details of the procedure which that foreign state wishes Nigeria to follow in giving effect to the request including details of the manner and form in which any information or thing is to be supplied to that foreign state pursuant to the request, where the request is for assistance relating to an ancillary criminal matter and judicial proceedings to obtain a foreign forfeiture order have not been instituted in that foreign State, a statement indicating when the judicial proceedings are likely to be instituted.<sup>44</sup> Others are statement setting out the wishes of that foreign State concerning the confidentiality of the request and the reason for those wishes; details of the period within which that foreign State wishes the request to be met; details of allowances to which a person traveling to a foreign State will be entitled and arrangement for safety and accommodation for the person while he is in that foreign State pursuant to the request and any other information required to be included with the request under any treaty or other agreement between Nigeria and that foreign State, if any.<sup>45</sup>

The request shall also state where it relates to the location of a person who is suspected to be involved in or to have benefitted from the commission of a serious offence or the tracing of property that is suspected to be connected with a serious offence, the name, Identity, nationality, location or description of that person or the location and description of the property if known, and a statement setting out the basis for suspecting the matter referred to above. Failure to comply with the above is a ground for refusing assistance.<sup>46</sup> The request shall be in writing and, unless otherwise agreed, in English language, dated and signed by or on behalf of the person making the request, and may be transmitted by electronic or through other means, and Nigeria shall ordinarily meet the costs and expenses that may be incurred for providing assistance, but the requesting country shall be responsible for travel and incidental expenses of a witness or expert required to travel to the foreign state; an accompanying official of a witness, fees of an expert, costs of translation required by the foreign state, costs related to evidence gathering through the use of technology, including evidence by video, costs related to the interception by the use of service providers; costs related to storage of communications and the preservation of communications or computer data; and such other costs as Nigeria and the requesting country may have agreed on.<sup>47</sup> Where it considers that the expenses required in order to comply with the request of a foreign state are of an extraordinary nature, Nigeria shall consult with the requesting country to resolve it, and if the requested assistance no longer be required, the central authority should be informed immediately quoting the reference number and date of the request<sup>48</sup>. The request is transmitted through diplomatic channel in Nigeria but the Central Authority can accept and acknowledge any request forwarded directly.

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<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid, p.9.

<sup>48</sup> Ibid.

Request for MLA from Nigeria can be initiated by any competent/Executing or Law enforcement authority but it is only the central authority that can formulate, sign and direct the transmission of a formal request for MLA to any jurisdiction internationally, even though the informal police-to-police correspondence in order to obtain intelligence may take place for the purpose of administrative assistance which does not involve the Central Authority.<sup>49</sup>

### 1.6 Grounds for Refusal of Mutual Legal Assistance

Generally, the decision to grant MLA depends on the requested state's legal framework as well as its willingness to cooperate. Although due to the considered importance of this process in the fight against transnational crimes, states are being enjoined to render MLA. The Attorney-General of the Federation would refuse approval of requests under the following grounds.

- i) Where the offence is political or of a political nature:<sup>50</sup> Political crimes are not considered to be of a relatively anti-social character. This is because the political offender is not considered a criminal but on the contrary, as an honest man, although he has been forced to take recourse to means which are punishable.<sup>51</sup> The offender is still entitled to a different treatment because his acts were inspired by higher motive which is the fight for new revolutionary ideas. It is therefore believed that political offenders are morally superior to common offenders because they fought for better order and did not act from personal motives but in the interest of the society as a whole. An offence has a political character if it is based on a person's political beliefs or affiliation and where the conduct involved does not otherwise constitute a violation of that country's criminal laws.<sup>52</sup>
- ii) Where the request relates to an offence under military law which would not be an offence under ordinary criminal law.<sup>53</sup> Where the execution of the request would prejudice the national security or any other essential interests of the requested State. This refers to assistance or cooperation that will jeopardize their essential interests which will generally include their sovereignty, security and national interests. It could also include the safety of any person or an excessive burden on the resources

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<sup>49</sup> Ibid.

<sup>50</sup> Art 3(1) (a) of the Treaty between Nigeria and South Africa; Art 6 of the Mutual Assistance in Criminal Matters within the Commonwealth (Enactment and Enforcement) Act 1998.

<sup>51</sup> Stigall, D. E. (2013) *Ungoverned Spaces, Transnational Crime and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law*, Notre Dame Journal of International and Comparative Law, vol. 3, p. 1.

<sup>52</sup> The issue of political offence has however been qualified as not co-extensive with the class of offences against the state that it will not suffice that a treasury clerk embezzles public funds or that a judge pervert justice. Defense Santiago, M. (1977); *Political Offences in International Law*, Phillipines; U. P. Law Center, p.45.

<sup>53</sup> Art. 3(1) (b) of the Treaty Between Nigeria and South Africa; Osita, M., Extradite Ibori to the U.K., open letter to AGF Adoke, SAN, II April, 2010.

- of the requested State. It was based on this that the former Attorney-General of the Federation, Mr. Aondoakaa SAN, refused a request by the UK government under the MLA Treaty existing between the two countries to extradite Mr. Ibori to the UK to take part in the prosecutions of his associates. According to the AGF, approving the request for Ibori's extradition to the U.K to face trials for money laundering would damage and undermine the integrity of Nigeria's criminal justice system.
- iii) Where the request is not made in accordance with the enabling laws, memorandum of understanding or other agreement between the countries and some states require dual criminality for all requests,<sup>54</sup> this means they will only execute a request for assistance from another country where the crime is also an offence under their domestic law. Nigeria considers the principle of dual criminality in the issue of international cooperation. The Intergovernmental Action Group Against Money Laundering in West Africa (GIABA) has noted that Nigeria's constitution and criminal legal principles do not permit granting of MLA request in all cases where dual criminality is required and that this does not comply with financial Action Task Force on Money Laundering (FATF) standards.
  - iv) Other reasons advanced for refusal include the contention that the fugitive ought not to be withdrawn from his national judges, the state owes its subjects protection under its laws, it is impossible to have confidence in the justice meted out by a foreign state, especially regarding a foreigner, and that it is disadvantageous to be tried in a foreign language, separated from friends, resources and character witnesses.<sup>55</sup>

Requests for extradition must be processed with reasonable evidence of culpability without which it may be refused. This is called the evidential requirement in international cooperation and limitation to the concept of legal assistance. Disapproving mutual legal assistance could be an outright rejection or postponing acceptance. The former occurs as a result of a total disobedience to the laid down rules while the latter occurs where the execution of a request would interfere with an on-going criminal investigation or proceeding in the requested state. The requested state may make execution subject to conditions determined necessary after consultation with the Central Authority of the requesting State. It was based on this reason that the US government refused releasing the information requested by the Federal Government of Nigeria in the 180 million dollars bribery & scandal over the LNG projects facilitated by Halliburton. The U.S, acknowledging Nigeria's request for assistance in conformity with the Treaty on Mutual Legal Assistance in Criminal Matters 1986 between the U.S and Nigeria, categorically invoked a clause in the Treaty and deferred execution of the request, stating that executing

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<sup>54</sup> Chene, M. (2013); *Mutual Legal Assistance Treaties and Money Laundering*, <http://www.publications/mutual-legal-assistance-treatiesandmoney-laundering>. Accessed on November 18th, 2019.

<sup>55</sup> Tiyapan, S. Op.cit. p. 3.

the request at that time would interfere with an on-going criminal proceedings in that state. If the requesting state accepts the assistance subject to the conditions then it shall comply with the conditions.<sup>56</sup>

### **1.7 Conclusion /Recommendations**

The paper discussed the apparent conflict between the provision of the ECOWAS Convention on Mutual Assistance in Criminal Matters on one hand and the Mutual Assistance in Criminal Matters Act and Mutual Legal Assistance Guidelines on the other hand. The paper highlighted the challenge posed by conflict in these legal instruments which is to the effect that while the Convention appoints the AGF to be the Competent Authority for receiving requests and executing same from a member country, the Mutual Assistance in Criminal Matters Act<sup>57</sup> does not vest the power of execution (investigation) on the AGF. The power of investigation is the responsibility of some agencies<sup>58</sup> which are also empowered by their enabling laws. The Minister thus being the Competent Authority under the Convention is constrained by the fact that he has to rely on some other agencies not directly under his control. This in essence leads to delay and inefficient response to requests by other member States for legal assistance. The paper also discussed the meaning, nature and grounds for refusing MLA request. It as well examined the role of the AGF in the implementation of the ECOWAS Convention. From the foregoing attempt, the following findings are made:

- i) The paper finds that, the provision of Section 5 which makes the AGF to be responsible for making, receiving and transmitting requests for assistance; executing or arranging for the execution of requests; taking practical measures to facilitate the expeditious execution and transmission of requests for assistance does not spell out the manner in which these powers are to be performed. The Nigerian Guidelines for Mutual Assistance does not equally provide for such manner. This lack of clarity of the manner in which the AGF can exercise the powers may have the effect of making the powers inapplicable. This has weakened the viability of MLA as an effective mechanism of international cooperation in criminal matters in Nigeria.
- ii) That there is obvious conflict between the provision of Article 3 of the ECOWAS Convention on Mutual Assistance in Criminal Matters on one hand and Section 5 of Mutual Assistance in Criminal Matters Act and Mutual Legal Assistance Guidelines on the other hand.

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<sup>56</sup> Art. 3(4) of the Treaty Between Nigeria and South Africa, Section 20 of the Mutual Assistance in Criminal Matters Cap. 190 A 2000. Where there is a refusal of the request for MLA, reasons for the refusal shall be given to the requesting party. Art 18(23) of UNTOC.

<sup>57</sup> (i) The Nigerian police (ii) The State Security Service (SSS) (iii) The Interpol Nigeria (iv) The Economic and Financial Crimes Commission (EFCC) (v) The Independent Corrupt Practices and other Related Offences Commission (ICPC) (vi) The National Drug Law Enforcement Agency (NDLEA) (vii) The National Agency for the prohibition of Traffic in persons (NAPTIP) (viii) National Agency for Food and Drug Administration and Control (NAFDAC) (ix) The Nigeria Immigration Service, and (x) The Nigeria customs Service

The paper therefore recommends as follows:

- i) That, either the provision of section 5 should be amended to show how the powers contained in it should be exercised by the AGF or the MLA Guidelines should make such provisions on how the AGF can take practical measures to facilitate the expeditious execution and transmission of requests for assistance.

The provision of Section 5 of the Mutual Assistance in Criminal Matters Act be amended to bring it in tandem with the provision of Article 3 of the ECOWAS Convention on Mutual Assistance in Criminal Matters.