

MUTUAL LEGAL ASSISTANCE FOR THE PURPOSE OF ASSET CONFISCATION AND ASSET RECOVERY

*Saffiatou Nyang**

I. INTRODUCTION

In December 2016, The Gambia conducted the most important election in its history – the election that put an end to the 22-year dictatorial regime of former President Jammeh. A new President was sworn into office on 19 January 2017. Preliminary investigations carried out by the Financial Investigations Unit (FIU) and the Police, revealed evidence of massive corruption. This culminated in the establishment of a Commission of Inquiry. The Commission revealed serious financial mismanagement, abuse of office and corrupt practices.

II. LEGAL FRAMEWORK

The Gambia is a dualist state: therefore, international treaties and other international instruments are not legally enforceable unless domesticated. The sources of laws in The Gambia, as provided for in the 1997 Constitution, do not include international law (treaties, conventions, protocols etc.). In 2012, an attempt was made to domesticate the United Nations Convention Against Corruption (UNCAC) by enacting the Anti-Corruption Commission Act, 2012. However, the Act falls short of acceptable international standards and best practices. For example, the Anti-Corruption Commission provided for in the Act is not given power to prosecute cases. Furthermore, the government did not take steps to establish the Commission. The new administration that took power in 2017 included anti-corruption efforts as part of its legislative agenda, and there is currently an elaborate Anti-Corruption Bill before the National Assembly (parliament). There have not been any criminal prosecutions under the Anti-Corruption Act 2012 due to the nature of the Act.

The Gambia does not currently have a domestic law that governs MLA. Therefore, we resort to bilateral and multilateral agreements, conventions and the principle of reciprocity to which we are signatories. The Drafting Department at the Ministry of Justice is currently working towards an MLA Bill that will regulate MLA in The Gambia. The Bill provides for mutual assistance between The Gambia and other countries in a quest to improve the prevention, investigation and prosecution of crime through cooperation and mutual assistance in criminal matters.

III. CASE STUDIES

The Government of The Gambia relied on MLA in order to trace and subsequently obtain a freezing order in respect of a property in the United States that was obtained through proceeds of bribery and abuse of office. The Commission of Inquiry that was established to investigate the corrupt practices of former President Jammeh revealed that monies were paid into an account belonging to the former president by businessmen that wanted to secure government contracts. These proceeds were then transferred to the US, and a property was purchased. The FIU was able to trace the transactions, and the local bank involved was summoned to produce all transactions relating to the account. This information was provided to the US government, and they were able to assist through MLA. A freezing order was obtained by US officials, and the property was frozen. In 2020, the US Department of Justice filed a civil forfeiture complaint seeking the forfeiture of the property. In September 2021, a Court in Maryland granted the application, and the property

* State Counsel, Criminal Division, Ministry of Justice, Republic of The Gambia.

was forfeited.

However, cases are not always as straightforward as the above case. We have had cases wherein MLA was hindered because the receiving country's procedures are not followed to the letter. An instance happened where a team of investigators went to Senegal to request information on a former Military General and close associate of former President Jammeh. The Senegalese authorities were reluctant to provide assistance because a *Commission Rogatoire* was not sent. Senegalese procedure required that a *Commission Rogatoire* be sent, and based on that the relevant authorities would be instructed to provide the information. The Central Authority had to start the process afresh. This delayed the process, and the Commission of Inquiry could not get adequate information in relation to this General.

This is the major hurdle with MLA, especially when the other country is not willing to use its resources to assist the requesting country. At times, language barriers come into play or different legal systems. Countries operating in the Common law system are very different from the Civil system.

IV. THE WAY FORWARD

The Gambia recently emerged from a 22-year dictatorial regime and is currently on a transitional justice programme. There was no political will to tackle and fight corruption. However, since the change of administration, steps are being taken to create a robust legal regime that will fight corruption. The Anti-corruption Bill is drafted in line with international best practices. The Anti-Corruption Commission, once established, will be an independent entity that will have the authority to investigate and prosecute corruption cases. The law on MLA is also being developed. There is a series of other legislation.

V. CONCLUSION

The Gambia has benefitted from MLA, but there is still a need to strengthen cooperation with other countries. We also need to improve our local capacity, particularly the Police and the Financial Investigations Unit. This will enable us to catch up with the new digital trends.