

**A PAPER BY MR. KERIAKO TOBIKO, THE DIRECTOR OF PUBLIC PROSECUTIONS (KENYA), DURING THE UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (UNICTR) ROUND TABLE DISCUSSION ON INTERNATIONAL COOPERATION 26<sup>TH</sup> – 28<sup>TH</sup> NOVEMBER, 2008, EAST AFRICAN HOTEL, ARUSHA, TANZANIA.**

**Distinguished Guests, Colleagues, Ladies and Gentlemen;**

**All protocols observed;**

**Preamble**

1. We are gathered here today to discuss a subject which, for obvious reasons, is of great International importance, namely, **International Cooperation between International Criminal Tribunals and National Prosecuting Authorities in the investigation and prosecution of International Crime.**
2. The need for close and effective co-operation between International Criminal Tribunals and National Prosecuting Authorities cannot be over emphasized. International Criminal Tribunals have no law enforcement agencies and must necessarily rely on National Prosecuting Authorities for legal assistance, e.g. **for the conduct of searches; seizure of evidentiary material; execution of summonses and warrants; tracing and freezing of assets; arrest and surrender of accused; enforcement of**

**sentences; etc:** Without such co-operation, the International Criminal Tribunals would not be able to effectively discharge their mandates of investigating and prosecuting perpetrators of international crimes. As **Casese**<sup>1</sup> graphically notes, International Criminal Tribunals **“are like giants without arms and legs, who therefore need artificial limbs to walk and work. These artificial limbs are the State authorities. If the cooperation of States is not forthcoming, these tribunals are paralysed.”**

3. This Forum, which brings together key stakeholders in International Criminal Justice, offers a unique opportunity for participants to exchange ideas and experiences and develop common strategies, models and best practices to enhance and promote international co-operation in the fight against International Crimes.

### **International Cooperation: The Challenges facing Kenya**

4. Like most other African countries, Kenya faces a number of legal, operational and resource challenges in the area of International Cooperation in criminal matters. These include:
  - Lack of specific legislation on Mutual Legal Assistance (MLA);

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<sup>1</sup> A. Casese, **International Law** (2<sup>nd</sup> Edn.) (Oxford; Oxford University Press; 2005) at 461.

- Non-domestication of relevant conventions and treaties providing for international co-operation in criminal matters;
- Outdated extradition laws and treaties with strict application of the dual criminality, reciprocity and specialty Rules;
- Lengthy extradition hearings and burdensome appeals and review processes;
- Absence of a Central Authority to receive, review and transmit requests;
- Lack of specialized skills, capacity, training and resources within the various agencies dealing with Extradition/MLA matters.
- Lack of effective mechanisms for liaison, co-ordination and cooperation amongst and within the relevant domestic agencies.
- Unclear and overlapping of roles for the various agencies involved.
- Bureaucratic red-tapes and inordinate delays in the transmittal and processing of incoming and outgoing extradition/MLA requests.

- Absence of proper or modern records management system within the various agencies to facilitate tracking of and quick action on requests.
- Inadequate use of ICT in the transmittal and processing of requests due to lack of equipment and training.
- Under-develop case law and jurisprudence on the subject.
- Unnecessary use by requesting authorities on formal (MLA) requests even in cases where informal requests and use of personal contacts would have elicited the required assistance.
- Submission of requests that do not contain sufficient or relevant information to facilitate quick and timely action.

### **Significant Achievements**

5. Despite the afore-mentioned challenges, Kenya has made significant progress in the participation in and promotion of international cooperation in criminal matters. This includes the following:

## **International conventions/instruments**

I. Kenya is a party to a number of international conventions and instruments which provide for international cooperation in criminal/legal matters: e.g.

- UN Convention Against Illicit Traffic in Narcotic Drugs & Psychotropic substances (1988).
- UN Convention Against Transnational Organized Crime (2000).
- UN Corruption Convention (2003).
- The Rome Statute on the ICC
- The Commonwealth Scheme on Extradition (London Scheme).
- The Commonwealth Scheme on Mutual Legal Assistance in Criminal Matters (Harare Scheme).
- The Commonwealth Scheme for the transfer of committed prisoners. etc.

These Conventions and Instruments provide the legal basis for Kenya to participate in International Cooperation in criminal matters, notwithstanding the lack of domesticating legislations.

## **The Inter-Ministerial Task Team on Mutual Legal Assistance**

- II. An Inter-ministerial task Team has been set up to, among others, review the Extradition and related laws; prepare a comprehensive legislative framework on Mutual Legal Assistance; and to propose mechanisms/structures for enhancing international cooperation and coordination. This Team has, in conjunction with the Kenya Law Reform Commission, now produced a Draft Mutual Legal Assistance Bill.

## **Specialized Thematic Section on International Cooperation, Extradition and Mutual Legal Assistance**

- III. A specialized thematic Unit has been set-up in the Department of Public Prosecutions, to among other things, operate as the central authority, i.e. **deal with and process in-coming and out-going requests for Extradition/MLA on behalf of the Attorney General**, and to be the contact/focal point for the purposes of the Commonwealth Network of Contact Persons (CNCP). The unit is also mandated to promote and enhance International Cooperation with foreign prosecutorial/investigative authorities and between the various local agencies involved in extradition/MLA matters.

## **The Witness Protection Act (2006) And Setting up of A Witness Protection Unit (WPU)**

IV. Kenya enacted a Witness Protection Legislation in 2006, which came into operation w.e.f. 1<sup>st</sup> September, 2008. A Witness Protection Unit (WPU) has been set up under the Office of the Attorney-General. Its composition is multi-agency and multi-disciplinary in nature. We received technical advice and assistance from UNODC, ICTR, ICC and SCSL in designing and setting up of the Unit. The UNODC is in the process of appointing a Resident-Legal Consultant to assist the Unit. When fully operationalized, the Unit will provide protection not only to witnesses in domestic legal proceeding, but also witnesses in legal proceedings before international tribunals.

## **Cooperation/Collaboration with the ICTR and the ICC**

- V. ● Kenya through the relevant Ministries/Agencies has been working closely with both the ICTR and the ICC in the areas related to investigations and collection of evidence; arrest and surrender of fugitives; tracing and freezing of assets; and the relocation, protection and transit of witnesses.
- Both the ICTR and the ICC have provided tremendous support to Kenya in training of our prosecutors and more

recently in the setting up and operationalization of our Witness Protection Programme.

- May I also mention here that in order to domesticate the Rome Statute and to provide for greater cooperation with the ICC, we have published and tabled in Parliament the International Crimes Bill, 2008 and we hope that it will be debated and enacted in due course.

### **Concluding Observations**

6. Even as we underscore, as we must, the need for conventions, treaties, laws and institutions to promote cooperation between International criminal tribunals and national prosecuting authorities, let us not also lose sight of the critical importance of personal contacts and networks.
7. There is great value and benefit to be derived by establishing direct personal contracts and open communication channels between the Offices of the Prosecutor of the International Criminal Tribunals and those of the National Prosecuting Authorities. But, for such contacts to be meaningfully utilized, it would crucial to develop and sustain **mutual trust** and **respect** on both sides. Any patronizing, condescending or disrespectful attitude on either side, must be avoided at all cost.

8. Last, but not least, International Criminal Tribunals should provide National Prosecuting Authorities with the necessary technical assistance and training in order to build their own capacities and competencies not just to cooperate, but, more importantly, to be able in the long run to investigate and prosecute international crimes.

Thank you for your attention.

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