



PERMANENT MISSION OF THE REPUBLIC OF KENYA
TO THE UNITED NATIONS

No. 674/10

The Permanent Mission of the Republic of Kenya to the United Nations presents its compliments to the Office of the United Nations Secretary-General and pursuant to the latter's Note Verbale reference LA/COD/50 dated 8th January 2010, has the honour to submit the Government of Kenya's comments on the issues raised in operative paragraph 3, 4, 5 and 14 of General Assembly Resolution 64/110 on Criminal Accountability of United Nations Officials and Experts on Mission as requested.

The Permanent Mission of the Republic of Kenya to the United Nations avails itself of this opportunity to renew to the Office of the United Nations Secretary-General the assurances of its highest consideration.

2nd June, 2010 - New York

The Office of the United Nations Secretary-General
United Nations Headquarters
New York



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KENYA PAPER ON CRIMINAL ACCOUNTABILITY OF UNITED NATIONS OFFICIALS AND EXPERTS ON MISSION: RES. A/RES/64/110

This paper is in two parts. It seeks to shed light on pertinent questions raised in the United Nations Assembly Resolution 64/110 that touch on the culpability of United Nations Officials and experts on mission who may have committed serious criminal offences and whether Member States have some form or another of legal frameworks to handle such instances. The first part will deal with the issue of whether Kenya as a Member States of the UN can argue that it has established jurisdiction over crimes of a serious nature, as known in Kenya's domestic criminal laws. This jurisdiction should cover Kenyan nationals serving as United Nations officials or experts on mission. This portends extra-judicial jurisdiction of sorts, and requires the State to be able to pursue any such serious criminal act beyond Kenyan borders.

PART I

Some pertinent questions raised in this respect would be as follows: -

1. Is serious crime mentioned in our statutes?
2. Who fall within the ambit of such crimes?
3. Can the State pursue effectively alleged commissions outside of Kenya, and if so how?

Section 3 of the Constitution of the Republic of Kenya provides that it shall have the force of law throughout Kenya and, subject to section 47 (on its amendment), if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void. Thus, constitutionally, the jurisdiction for the Constitution and all other laws is limited to the territorial boundaries of the Republic of Kenya.

Furthermore, under Chapter V of the Constitution of Kenya, Section 70 provides that: -

“Whereas **every person in Kenya** is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, color, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely: -

- a) Life, liberty security of the person **and the protection of the law;**
- b) Freedom of conscience, of expression and of assembly and association; and
- c) Protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the

purpose of affording protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

From a reading of this it is evident that any person who is for the time being resident in Kenya shall enjoy security from these provisions. This would include United Nations officials and experts on mission within Kenya, including Kenyans.

This should be read in tandem with Section 74 (1) which provides that “No person shall be subject to torture or to inhuman or degrading punishment or other treatment.” Section 77 contains comprehensive provisions to ensure that in the trial of criminal offences, all persons in Kenya shall be entitled to a free and fair trial and hearing in any tribunal. It is reproduced below to show the protections offered within its ambit.

“77. (1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

The Penal Code Chapter 63 Laws of Kenya is an Act of Parliament that was enacted to establish a code of criminal law in Kenya. It contains general rules that govern criminal responsibility such as ignorance of law, mistake of fact, intoxication, insanity and other principles that are germane to the practice of criminal law. It contains different kinds of punishments, with death being prescribed as punishment for two serious offences namely murder and robbery with violence.¹

Rape, which is another serious criminal offence, is covered under the Sexual Offences Act, Number 3 of 2006, and may attract a minimum of ten years maximum of life imprisonment should an accused person be convicted. This Act is quite thorough as it covers sexual offences relating to positions of authority and persons in positions of trust (Section 24).

The international Crimes Act Number 16 of 2008 makes provision for the punishment of certain international crimes, genocide, crimes against humanity and war crimes, and enables Kenya to cooperate with the International Criminal Court. The obligations imposed on the Government of Kenya by the Rome Statute are exercised by the Attorney General (Section of the Act).

¹ Kindly refer to the Appendix for the complete section 77 of the Constitution wherein the due processes are explicitly described.

The Merchant and Shipping Act cover the emergent crime of piracy within Kenyan territory or of Kenyan-registered vessels. Section 371 provides that:

371. Any person who

- a) Commits any act of piracy;
- b) In territorial waters, commits any act of armed robbery against ships shall be liable, upon conviction, to imprisonment for life.

It is evident from the above references that there is ample coverage of serious crimes within the legal framework of Kenya. As elucidated at the commencement of the references, these laws apply to all persons within Kenya regardless of their nationality, race, creed or social disposition. The lacuna in these efforts to ensure that there is ample criminal jurisprudence to cover all within the Republic stems from the fact that the State cannot extend crimes to Kenyan nationals who, while working as United Nations officials or experts on mission outside Kenya, commit serious criminal offences.

The Evidence Act Chapter 70 Laws of Kenya is an Act of Parliament to declare the law of evidence. It sets out very elaborately the rules of evidence that must be used in any judicial body established under the Constitution of Kenya. Section 2 provides that, "his Act shall apply to all judicial proceedings in or before any court other than a Khadi's Court, but not to proceedings before an arbitrator." It has provisions that touch on admissibility and relevance of evidence; the mode of obtaining confessions, which must be obtained before a magistrate to ensure probity is maintained; rules of estoppels; competencies or witnesses, among others. These ensure that the evidence produced in courts is competently interrogated to ensure that trials are free and fair.

This may be cured by the universality principle which is deemed to apply, inter alia, in cases where an alien has committed an act abroad deemed prejudicial to that State's interests, as distinct from harming the interests of nationals (the passive personality principle). The universality principle allows for the assertion of jurisdiction in cases where the alleged crime may be prosecuted by all states (e.g., war crimes, crimes against the peace, and crimes against humanity). This is where extradition laws and treaties come in, to bridge the gap and create the atmosphere where States combine forces to ensure that such crimes do not go unpunished.

PART II

The second part of this paper seeks to answer questions on Kenya's capacity to cooperate with other States and the United Nations in prosecuting serious offences/crimes. It seeks to engage in the process of facilitating investigations by multilateral and bilateral efforts, shows that there are

indeed structures in place to administer exchange of information and investigations, as well as providing protection for witnesses and victims of serious offences.

Kenya is the Headquarters to the United Nations Environment Programme, has entered into agreements with the International Criminal Court, the International Bank for Reconstruction and Development, the International Monetary Fund, the Asian African Legal Consultative Organization, among others. Kenya stands committed to promote cordial relations with the international society. Interaction with international institutions is predicated on legal basis through cooperation or Headquarters agreements whose aim is to ensure that such interactions are based on the Rule of Law.

With regard to criminal jurisprudence, as discussed already, Kenya enters into Mutual Legal Assistance agreements with various States to share information on serious crimes and how to combat them. This is necessary and imperative in light of the merging crimes such as transnational organized crime, trafficking in persons and even piracy. These cannot be effectively handled without international cooperation.

The Witness Protection Act was enacted to provide for the protection of witnesses in criminal cases and other proceedings. Section 4 (1) provides, "The Attorney-General, through the establishment and maintenance of a witness protection programme, shall take such action as he thinks necessary and reasonable to protect the safety and welfare of a witness." This entails cooperation with both domestic and international partners. This combined with the Extradition Acts (Chapter 76 and 77 of the Laws of Kenya, already mentioned above), provide a strong basis for cooperation.

Another area of cooperation comes from capacity building of the institutions in Government to handle issues of serious crimes. It is vital that the necessary skills and training are applied to the fight against serious crimes, especially within the context of United Nations officials and experts in mission. As a Member State of the United Nations, Kenya has the responsibility to ensure that no serious crime is committed within its territory. The set-up of the Constitution does not permit the State to exercise jurisdiction extra-territorially, but will permit the investigation and prosecution of crimes within Kenya. It is through cooperation and facilitating the conduct of investigations that any UN official or expert on mission can be brought to face the legal consequences of their actions.

APPENDIX

- 77 1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

- 2) Every person who is charged with a criminal offence:
 - a) Shall be presumed to be innocent until he is proved or has pleaded guilty;
 - b) Shall be informed as soon as reasonable practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged;
 - c) Shall be given adequate time and facilities for the preparation of his defence;
 - d) Shall be permitted to defence himself before the court in person or by a legal representatives in his own choice;
 - e) Shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and
 - f) Shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge, and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.
- 3) When a person is tried for a criminal offence, the accused person or a person authorized by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.
- 4) No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.
- 5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence or which he could have been convicted at the trial of that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.
- 6) No person shall be tried for a criminal offence if he shows that he has been pardoned for that offense.
- 7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

- 8) No person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefor is prescribed, in a written law:

Provided that nothing in this subsection shall prevent a court from punishing a person for contempt notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefor is not so prescribed.

- 9) A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.
- 10) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.
- 11) Nothing in subsection (1) shall prevent the court or other adjudicating authority from exclusion from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court or other authority:
 - a) May by law be empowered to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings; or
 - b) May by law be empowered or required to do in the interests of defense, public safety or public order.
- 12) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of:
 - a) Subsection (2) (a) to the extent that the law in question imposes upon a person charged with a criminal offence the burden of proving particular facts;
 - b) subsection (2) (e) to the extent that the law in question imposes conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds; or
 - c) Subsection (5) to the extent that the law in question authorizes a court to try a member of a disciplined force for a criminal offence notwithstanding a trial and conviction or acquittal of that member under the disciplinary law of that force, so,

however, that a court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under that disciplinary law.

- 13) In the case of any person who is held in lawful detention, subsection (1), paragraphs (d) and (e) of subsection (2) and subsection (3) shall not apply in relation to his trial for a criminal offence under the law regulating the discipline of person held in lawful detention.
- 14) Nothing contained in subsection (2) shall be construed as entitling a person to legal representation at public expense.
- 15) In this section “criminal offence” means a criminal offence under the law of Kenya.”