

Review Article

Obtaining Evidence from another Country under the Law of Somalia (International Letters Rogatory)

Anton Girginov*

A former State Prosecutor and University Professor, PhD, DSc; International Prosecution Adviser in Mogadishu with European Union Capacity Building Mission in Somalia

*Corresponding Author

Anton Girginov

Abstract: The execution of letters rogatory (international requests for evidence) is the typical method of obtaining admissible evidence collected in another country for some criminal proceedings in the requesting country. This is a traditional modality international judicial cooperation in criminal matters. Although it assists some criminal proceedings, this modality is not any part of them. Moreover, the execution of letters rogatory is a specific procedure based on different principles. After the extradition, this procedure is the second most important and most difficult modality of international judicial cooperation. As a result, the obtaining evidence from abroad is a serious challenge to both lawmakers and judicial actors (criminal judges, prosecutors, investigators), especially in countries with outdated criminal legislation and weak criminal justice system, such as Somalia. This research paper describes the current situation and resorts to the comparative law approach, mainly. It aims at explaining Somali law on letters rogatory [both incoming and outgoing], with its hurdles and gaps, to eventually facilitate the process of turning Somalia into a predictable international partner in the common struggle of nations against crime.

Keywords: letter rogatory, law, evidence, legal assistance, judicial cooperation, international agreement.

I. INTRODUCTION

The letter rogatory is the typical device for requesting evidence from another country which shall be admissible in court. The letter rogatory is a formal request issued by the magistrate (a prosecutor or a judge) in charge of official criminal proceedings [Micu, 2015; Fowler, 2016; Ladjal, 2016; Орлов & Лясковец, 2013]. It is the more important of the two basic modalities of international legal assistance in criminal matters. The other one is the request for the service of procedural documents abroad.

The Somali requirements for incoming letters rogatory are less stricter than for incoming extradition requests. In contrast to extradition requests, letters rogatory do not need any prior international agreement to be granted by the judicial authorities of Somalia – Article 275 of the Somali Criminal Procedure Code {CPC}. Moreover, even reciprocity is not required for the consideration of foreign letters rogatory. This brings Somalia close to countries, such as Portugal and Romania, which the interests of justice may be sufficient to grant incoming requests.

It is also noteworthy that, again, in contrast to extradition requests, dual criminality is not required for letters rogatory. Moreover, there is no Somali provision requiring a description of the crime in respect of which the assistance is sought.

Lastly, unlike extradition requests whose author is the requesting country as a whole represented by its central authorities, a letter rogatory is expected, usually, to come from the public prosecutor or the judge/court in charge of the criminal case for which the evidence is sought. This prosecutor or judge/court signs the request. The requesting country's central authorities (mostly, the Ministry of Justice and/or the Attorney General's Office) support the letter rogatory only by forwarding it to the other country. In view of there, Somali authorities should not require that the letters rogatory which they receive are signed by the central authority of the requesting country.

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II. Judicial Requests for Evidence and Non-Judicial Requests for Information

1. The first prerequisite for the issuance of a letter rogatory is existing criminal proceedings. Prejudicial inquiries or pre-investigations carried out by police, customs, or other law-enforcement officers are, generally, not a sufficient condition for making any formal request for evidence from abroad.

Often, when the data of some reported crime is not sufficient for the initiation of an official criminal investigation, police officers turn to their counterparts in other countries for more information. Such officers may do this on their own initiative or encouraged even by the supervising prosecutor. If such information is received, it can never be converted into admissible evidence in many countries. The information has been collected during a pre-investigation by foreign police under their law while, usually, the established judicial practice and even some CPC explicitly require for admissibility into evidence of the information, obtained in a pre-investigation, that it was collected by the own police under the national law. This legal requirement is embedded, for example, in Article 287 (2) of the Serbian CPC¹ and in Article 219 (3) of the State CPC of Bosnia and Herzegovina [BiH]². As this is an exception, it shall not be construed expansively for the purpose of including information from foreign police officers and, eventually, converting also this information into evidence. Hence, if Somalia receives a request from foreign non-judicial police, customs, or other law-enforcement officers, it shall not treat and process it as a letter rogatory.

The problem, however, is not only that international police activities fail to provide the evidence that the magistrates need. The actual problem is that such police activities may create serious difficulties in obtaining true and admissible evidence. This is likely to happen when police activities try to achieve what is achievable through international legal assistance only.

It is not a rare case when police officers request information from some foreign country about facts, which later have to be the subject of a letter rogatory to the same country. A case in Mostar, BiH, around ten years ago (2008-2010), was remembered for

¹. It reads: „Evidence obtained by the police by conducting evidentiary actions may be used in the further course of the criminal proceedings if the evidentiary actions were conducted in accordance with this Code“.

². It reads: *In gathering information from persons, the authorized official shall act in accordance with Article 78 of this Code or in accordance with Article 86 of this Code. In that case, the records on gathered information may be used as evidence in the criminal proceedings“.* Article 78 regulates the interrogation of suspects while Article 86 regulates the interview of witnesses.

difficulties experienced as a result of seeking information prior to sending a letter rogatory. The police in Mostar turned to their counterparts in Zagreb, Croatia, for questioning a lady about a possible crime. The idea was to collect sufficient information about the alleged crime to allow launching an official criminal investigation into it. The information must substantiate the so-called “*grounds for suspicion that a criminal offence has been committed exist*” – Article 216 (1) of the State CPC of BiH and Article 231 (1) of the CPC of the Federation of BiH.

Such information was collected and, as a result, an official investigation was opened in Mostar. Then, the prosecutor in charge realized that he must legalize the information received from the lady which had been questioned in Zagreb. The only way to achieve this result, though, was by sending a letter rogatory to Croatia for her official interview. The prosecutor did this and, as one may guess, the lady answered the same questions quite differently.

Therefore, magistrates make a mistake, if they do not prevent police from trying to obtain preliminary information about facts which shall necessarily be clarified by future letters rogatory. Actually, such police requests (for statements, copies of documents or pictures) preceding letters rogatory weaken the position of the magistrates in need of evidence from abroad.

First, police requests eliminate the element of surprise in evidence collection and may warn persons interested in the failure of the criminal case. They may easily calculate what is likely to be officially requested later. This, in turn, gives them the chance: to find the person questioned by non-judicial police and to intimidate him/her as a potential witness, to destroy, or replace the document copy of which has been obtained through police cooperation, etc. One must be aware, in addition, that foreign police are less careful when they do not work for their own country.

Second, police requests, which precede letters rogatory for the same facts, slow down the work. This two-step approach causes delays in domestic proceedings with all accompanying negative consequences. If one needs some evidence from abroad, it would be the lesser evil to always launch an official investigation and send the necessary letter rogatory rather than undertake extrajudicial activities for the purpose to be perfect with the initiation of the investigation.

Police requests which precede letters rogatory for the same facts also reveal a **third** important weakness. The problem with them is that such police requests may be taken for actual letters rogatory by the requested foreign authorities. This cannot occur in a neighbouring country but easily happens with some faraway country with a different legal system.

Two negative results may occur when a police request is mistakenly taken for a letter rogatory. The first result is that the foreign country turns down the request. This is more likely to happen with a police request than with a letter rogatory because police requests are less punctual. Later, when the actual letter rogatory arrives, the other country is likely to claim that its authorities have already considered this request. The conclusion of the country approached would be that no second consideration of the same request is necessary.

The second possible result is that the foreign country has granted and executed the police request which does not give any actual evidence to the requesting country. In this situation, when the actual letter rogatory arrives, the likely reaction of the other country is an explanation that they have already done our job. This is why they would request not be bothered about this issue anymore.

2. The role of international police cooperation shall not be underestimated. On the contrary, this cooperation results in gathering precious information from abroad. In many cases, such information tells the magistrate in charge what to write in the letter rogatory. This police information is necessary for the preparation of an executable letter rogatory. Such is the police information about addresses, phone numbers, the probable location of items, bank accounts, etc. These data, received on the basis of non-judicial (police or/and other law-enforcement) cooperation between the Parties, are not pieces of evidence *per se*, admissible in court, and can never become such evidence. The data in question only facilitate the collection and obtaining the evidence *per se*. Any attempt to use such data, obtained through non-judicial cooperation, is likely to be rejected in court and even thwart the requested country's judicial authorities in gathering the respective *per se*.

This is why the international police cooperation shall not overstep its auxiliary role when it comes to obtaining actual evidence from abroad. In particular, international police cooperation shall not try to obtain what is achievable solely by means of a letter rogatory. If international police cooperation oversteps its role, the probability of negative results is too high and the efforts of the police might become even counterproductive.

III. The Applicable Somali Law to Incoming Letters Rogatory

1. First of all, it goes without saying that the requesting country's law shall be applied to all internal procedures in its own territory related to the issuance of its outgoing letters rogatory. As per Article 16 of the 1983 Riyadh Arab Agreement for Judicial Cooperation {the Riyadh Convention}, any such letter "*shall be written in accordance with the laws of the requesting contracting party, and shall carry the relevant date, the signature and seal of the requesting body along with all*

accompanying papers, but neither request nor enclosures need be officially certified".

Further on, Article 18 of the same Convention opens the way to the application of criminal procedure rules of the requesting country to the process of execution of the letter rogatory in Somalia. It is true that, in general, the execution "*shall be carried out in accordance with the legal procedures set by the law of the requested Party*" (Para 1 of the Article). Moreover, most foreign countries have and follow a domestic legal rule, such as Article 277 (3) (i) of the Somali CPC that "*Evidence shall be taken in conformity with the general provisions of this Code*".

However, Paragraph 2 of the same Article 18 prescribes that "*should the requesting contracting party wish, by virtue of an explicit demand to this effect, that the commission be carried out in a specific manner, the contracting party so requested shall respond to such wish so long as it does not contradict its laws or regulations*". This possibility makes the law on letters rogatory less strict than extradition law which does not provide any exception in favour of the requesting country's law.

2. As explained, letters rogatory may be non-treaty based as well. Hence, unlike the case with extradition, it is not international agreements that open the way to the consideration of the incoming letters rogatory and eventually, to the applicability of the domestic law of Somalia, where necessary. Nevertheless, as in the case with extradition, the applicable international agreements still take precedence over the domestic law of Somalia in case of a conflict between them. This is a principle which covers the other modalities of international judicial cooperation as well. Pursuant to Article 275 (2) of the Somali CPC "*International letters rogatory on criminal matters, recognition of foreign the criminal judgments and other relations with foreign judicial authorities regarding criminal matters shall be governed by international conventions and customs and, where no provision is made therein, in accordance with the rules of this Part*." This Part (which contains the quoted Article as well) is titled 'JUDICIAL RELATIONS WITH FOREIGN AUTHORITIES'. In this way, the quoted provision provided an external hierarchy between international legal instruments and domestic law on the same issue, prioritizing the former over the latter.

3. When it comes to the international legal framework of Somalia for letters rogatory, again, the Riyadh Convention holds the leading role. Its Part III (Articles 14-21) governs letters rogatory between Parties.

Again, as in the case with extradition, Article 68 of the said Convention sets up an internal hierarchy, within international legal instruments on international judicial cooperation, stipulating the priority of the Convention.

Lastly, in some cases, two or more international legal instruments on letters rogatory may exist with no formal hierarchy between them as there no provision prioritizing any. In such situations, the more reliable (less risky, more often used, better known, etc.) international instrument should be used to achieve the desired result.

4. Another international legal instrument which might be relevant to international judicial cooperation, including obtaining evidence from abroad through letters rogatory, is the UN Convention on the Sea. It was ratified by Somalia on 24 July 1984 and by 166 other countries as well. Pursuant to Article 100 of this Convention,

“All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.”

The provision refers to the crimes of piracy only. It is, nevertheless, challenging, in general, as its interpretation might be useful for the understanding of any similar texts referring to other serious crimes. Specifically, the provision raises the question as to whether any such broad text is sufficient to create a legal basis for international judicial cooperation and letters rogatory for considering and execution of letters rogatory, in particular.

Presumably, such a text alone is not sufficient to create the desired legal basis. It is too risky to rely on a text of this sort since it does not define in any way (direct or indirect) the cooperation mentioned as “judicial” or “legal”. On the one hand, many requested countries would find it easier to execute a letter rogatory from Somalia (interview a witness and/or provide a certified copy of some document), as they are not responsible for the result of the Somali case, rather than take part in discussions on the correct interpretation of the Article. On the other hand, though, the court in the requesting country, incl. Somalia, is not always likely to unconditionally admit into evidence the result of the letter rogatory on the basis of such a text only. The competent judge in the requesting country would inevitably compare the quoted Article 100 with Article 7 [Mutual Legal Assistance] 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 18 [Mutual Legal Assistance] of the UN Convention against Transnational Organized Crime and Article 48 [Mutual Legal Assistance] of the UN Convention against Corruption. The judge will find that the first of the three

articles contains 20 paragraphs, the second and third articles separately contain 30 paragraphs regulating letters rogatory, mainly. If this judge accepts that such a detailed legal framework is necessary, s/he is likely to conclude that the legal framework under Article 100 of the UN Convention on the Sea is not sufficient for the same result, the one achievable through execution of letters rogatory, namely: the production of evidence admissible in court. This is why a bilateral treaty on international legal assistance would be irreplaceable to this end.

IV. The Content of the Letter Rogatory forwarded to Somalia

Article 16 (2) of the Riyadh Convention defines the content of the letter rogatory. This reads as follows:

“The request shall include the type of legal action sought, the name of the requesting body, the name of the body requested to execute the action, and all the detailed representations related to the facts of the action, the undertaking to be carried out, particularly the names of witnesses, their domiciles, and the questions to be put to them”.

Given the international customs and in accordance with Article 275 (2) of the Somali CPC, the letter rogatory must generally enclose some further information depending on the nature of the assistance sought. For example,

(i) When the letter rogatory aims at **questioning** someone to obtain oral evidence, it should be stated in what capacity the individual is to be interviewed, i.e. as a suspect or an accused, as a material witness or an expert witness. In addition, the legal provision determining his/her legal status in the requesting country must be attached. A list of questions or written interrogatory (questionnaire) should also be enclosed.

(ii) When it comes to requests for **search and seizure**, the interested judicial authorities must be aware that the common expression "searches and seizures" might have different meanings in different jurisdictions. The expression might be used in the sense of searching places, premises, vehicles, etc. and compulsorily acquiring physical evidentiary material found there. It may also be interpreted in a much more technological context, e.g. the search of computers and computer systems. However, this expression alone should not be used in requests for legal assistance, particularly not in cases where the requesting and requested countries have different legal systems. In this case, it is much better to exceptionally describe also the result that shall be achieved rather than use a legal methodology only, such as "search and seizure".

If the surrender of seized objects is wanted, the requested country's authorities may require a declaration that the rights of third parties will remain unaffected and/or that objects surrendered will be returned immediately upon request or once they are no longer needed as physical evidence in the requesting country. In this case, such a declaration shall be drawn up and forwarded to the authorities of the other country.

V. The Impediments to the Execution of Foreign Letters Rogatory

There is only one such impediment in the Somali domestic law. According to Article 277 (1) of the CPC, the collection of specific evidence in the territory of Somalia may be granted if *"the taking of such evidence is not contrary to the general principles of the law of the State"*. However, the Riyadh enlarges the circle of the impediments and is also more specific. Its Article 17 authorizes Somalia as a requested Party to refuse the execution of the foreign letter rogatory:

- (i) If the request concerns a political crime – see Article 8 (3) of the PC or
- (ii) the execution would prejudice the sovereignty of Somalia as the requested Party or the public order in its territory.

VI. The Channels of Communications

1. International agreements tend to avoid diplomatic channels. Parties to international conventions usually agree to prompt ways of communication. Thus, according to Article 15 (2) of the Riyadh Convention, letters rogatory between *"the Contracting Parties shall be dispatched directly through their respective Ministries of Justice"*.

However, in some situations, it might be safer to make use of the diplomatic channels as they are likely to reduce misunderstanding about partners from requested countries. In view of this positive value of the diplomatic channels that are prescribed for transmission of letters rogatory and the return of their execution not only by the Somali domestic legislation in Article 276 (1) of the CPC: *"Letters rogatory to foreign judicial authorities regarding evidence to be taken in a foreign country shall be transmitted through diplomatic channels"*. Obviously, Somalia, in turn, might be approached through the same channels. As they are customary channels, their use would be fully in line with *Article 275 (2) of the CPC that international customs also govern the work with letters rogatory* [McClellan, 2002].

Whichever the requested country is (Somalia or a third country), the communication channel to it is a matter of law rather than a matter of courtesy only. If not complied with, the judicial authorities of the requested country may conclude that the request is not to be valid and reject it as they have not been properly approached. Of course, the same request might be sent again by using this time the proper channel, but meanwhile, the source of wanted evidence might have

disappeared, e.g. the targeted witness could have moved to a third country. Besides, even if the requested country disregards the fact that it has not been properly approached, the court in the requesting country may reject upon this legal ground the validity of evidence collected, if any.

VII. Presence at the Execution of the Letter Rogatory in Somalia

1. No one can directly obtain valid evidence in the territory of a foreign country. It is true that under Paragraph 2 of Article 18 the Riyadh Convention *"should the requesting contracting Party wish, by virtue of an explicit demand to this effect, that the commission is carried out in a specific manner, the Contracting Party so requested shall respond to such wish"*, in general. Yet, the CPC of the requesting Party may not be applied in full. The procedural rules of that country, determining the competent judicial actors authorized to collect evidence for court, shall not be applicable. This principle has been confirmed and expressed by Article 2 (2) of the Inter-American Convention on Mutual Assistance in Criminal Matters: *"This convention does not authorize any state party to undertake in the territory of another state party the exercise of jurisdiction or the performance of functions that are placed within the exclusive purview of the authorities of that other party by its domestic law."* Hence, only rules regulating investigative actions (requested formalities and/or procedures) shall be applied and this shall be done by the competent judicial bodies of the requested country. Article 8 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters is also in this sense. It reads: *"Where requests specify formalities or procedures which are necessary under the law of the requesting Party, even if unfamiliar to the requested Party, the latter shall comply with such requests to the extent that the action sought is not contrary to fundamental principles of its law"*. Therefore, if a foreign judicial actor oversteps the restrictions set up by the quoted provisions by conducting investigative actions in person in the requested country's territory, the collected evidence being gathered in violation of the applicable law would be inadmissible in any court.

This is why no judicial actor of the requesting country is in the position to conduct in the territory of the requested country, including Somalia, the investigative actions, which s/he wants. Therefore, no one is allowed to have any **access to witnesses** or other sources of evidence abroad. If a judicial actor establishes direct contact with any witness in Somalia or any other foreign country and interviews him/her, the evidence produced would be in gross violation of applicable rules and eventually be inadmissible in any court.

2. This does not mean, though, that interested judicial officials (prosecutors, judges) or other interested persons from the requesting country, such as defence lawyers/counselors, can never attend any investigative work undertaken on their request abroad. On the contrary, unlike the situation with extradition proceedings, officials and/or other interested persons from the requesting country may be present at the execution of their letters rogatory, if duly authorized by the requested country's authorities.

Most requested countries agree to such presence. It is in line with Article 18 (3) of the Riyadh Convention which reads: "*Should the requesting Party state its wish to be informed in a timely fashion of the date and place of carrying out the commission so that the parties concerned or their representatives could be present, this shall be done within the limits permissible by the laws of the requested Party.*"

3. Even if allowed to be present at the execution, usually no attendee is further allowed under the law of the requested country to take part in the investigative actions. They may not obtain any evidence: by asking questions, performing searches and seizures, etc. Pursuant to local law, this is solely the task of the commissioned magistrate (the competent judicial actor) of the requested country in charge of the execution of the letter rogatory. In Somalia, the issue is settled by Article 277 (1) (ii) of the CPC. It reads: "*The President of the Court of Appeal shall either take the evidence himself or direct that it be taken by the Regional or District Court within whose jurisdiction the necessary action has to be taken.*"

No public prosecutor or judge from the requesting country has the authority to replace any of them. If s/he does, this will be, most likely, in violation of the applicable law and the selected materials shall not be admissible into evidence in the requesting country court. This is why the presence at the execution of the letter rogatory (also called "passive participation") shall never turn into any "active participation" in investigative actions, even if, in one way or another, thereto invited or encouraged by the judicial authorities of the requested country.

If the collection of oral evidence has been requested and granted, the list of questions enclosed to the letter rogatory should be followed during the interview. After the interviewee answers them some additional questions to him/her may seem necessary. However, the requesting country's representatives, present at the execution of the letter rogatory, may not be allowed to pose any additional questions even though the executing magistrate from the requested country. To avoid misunderstanding and confusion, it would be wise to obtain in advance the consent of the requested country for posing additional questions.

When the request for presence at the execution of the letter rogatory is not contained in the letter, it may additionally be transmitted by the channels laid down for such requests. Understandably, the requested country's consent may be given to the extent that country's law does not prohibit it.

Furthermore, if Somalia as the requested country consents to the presence of a magistrate (prosecutor, judge) or judicial investigator and permits him/her to pose additional questions beyond the initial questionnaire to the interviewee, it should be clarified in advance as to how the questioning is to be done. This additional questioning may be performed in two ways: by asking the questions orally through the requested country's official in charge of the letter rogatory execution or by sending/giving in writing an additional list of questions after the interview through the same channel used for the letter rogatory. In any case, the decision on this issue is taken by the competent authorities of the requested country.

VIII. After the Execution of the Letter Rogatory

1. Written materials obtained during the execution of the letter rogatory are sent in the official language of the requested country as it executes the request pursuant to its own laws, in general, using for this purpose its official language. They are not translated into the official language of the requesting country, although the letter rogatory was necessarily translated into the official language of the requested country. There is no 'reciprocity' on this issue. Therefore, the requesting country will not obtain the execution in any of its official languages. It follows that the requested Somali authorities do not have the duty to translate the execution of the letters rogatory at their own expense into the language of the requesting country. This translation is never part of the assistance to that country.

Also, Somalia as the requested country does not need to authenticate the documentation resulting from the rendered international legal assistance. The authentication should be done neither by its Foreign Ministry nor by any other Somali State institution. It is a sufficient guarantee that the documentation was produced by the competent judicial authorities of Somalia. International customs and law are also in this sense. Thus, Article 17 of the European Convention on Mutual Assistance in Criminal Matters stipulates that "*Evidence or documents transmitted pursuant to this Convention shall not require any form of authentication*". Article 27 of the Inter-American Convention on Mutual Assistance in Criminal Matters is in the same sense. It reads that "*Documents processed through the central authorities in accordance with this convention shall be exempt from certification or authentication.*"

2. The requesting country does not need to process the translated materials either. According to Article 20 [Legal effect of a rogatory commission] of the Riyadh Convention,

Procedures implemented by a rogatory commission according to the provisions of this agreement shall have the same legal effect as though they were carried out before the competent body in the requesting party.

Finally, under the generally accepted 'Rule of Speciality' for executed letters rogatory, the requesting country's authorities must use the evidence transferred to them by the other country solely for the purpose for which it was originally delivered. In particular, the requesting judicial authority is not allowed to forward the materials or information obtained in the course of a legal assistance procedure to any different authority. Moreover, the requesting judiciary is, often, barred from using these materials or information without prior consent of the requested country, even in own criminal cases not mentioned in the letter rogatory and agreed on by the executing authorities of that country.

A good example of correct relations is the text of Article 12-13 of the PROTOCOL on Agreement for Establishing Mutual Cooperation in Combating All Forms of Serious Crime between the State Attorney's Office of the Republic of Croatia and the Prosecutor's Office of BiH. According to these Articles, any Party to whom the request has been submitted shall do everything to ensure that the letter rogatory and/or its content remain confidential if such confidentiality is required by the submitting magistrate. If the execution of a request may lead to a violation of confidentiality, the magistrate who has submitted the letter shall be notified of this issue prior to the execution.

The UN Corruption Convention also provides a confidentiality rule. Article 46 (19) prescribes that *"the requesting Party shall not transmit or use information or evidence furnished by the requested Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested Party. Nothing shall prevent the requesting Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting Party shall notify the requested Party prior to the disclosure and, if so requested, consult with the requested Party. If in an exceptional case, advance notice is not possible, the requesting Party shall inform the requested Party of the disclosure without delay"*.

Lastly, Article 25 [LIMITATION ON THE USE OF INFORMATION OR EVIDENCE] of the Inter-American Convention on Mutual Assistance in Criminal Matters is even more specific. It reads:

"The requesting state may not disclose or use any information or evidence obtained in the course of application of this convention for purposes other than those specified in the request for assistance without prior consent from the central authority of the requested state.

In exceptional cases, if the requesting state needs to disclose and use, in whole or in part, the information or evidence for purposes other than those specified, it shall request authorization therefore from the requested state, which, at its discretion, may accede to or deny that request in whole or in part.

The information or evidence that must be disclosed and used to the extent necessary for the proper fulfilment of the procedure or formalities specified in the request shall not be subject to the authorization requirement set forth in this article.

When necessary, the requested state may ask that the information or evidence provided remain confidential according to conditions specified by the central authority. If the requesting party is unable to accede to such request, the central authorities shall confer in order to define mutually acceptable terms of confidentiality."

3. This is the exact sense in which the 'Speciality Rule' restriction shall be understood when applied by the requesting country to the execution of letters rogatory [Abbel, 2010]. This understanding is different from the one which is valid for the Speciality Rule protecting the extraditee in the requesting country [Bernacchi, 1992].

As in the case with the extradition for trial, letters rogatory are also designed to support criminal proceedings for specified crimes. Moreover, in both cases, the crimes shall be described in the request (the extradition request, the letter rogatory). However, unlike the extradition with its Rule of Speciality, the use of no letter rogatory execution is restricted to the crime in respect of which the letter rogatory was requested and granted. The evidence obtained may be used to prove other crimes as well.

Yet, some countries may agree to a restriction which, actually, amount to the Speciality Rule in extradition. Thus, pursuant to Article 8 [Limitation of Use] of the West African Convention on Mutual Assistance in Criminal Matters,

"The requesting Member State shall not, without the consent of the requested Member State use or transfer information of evidence provided by the requested Member State for investigation or proceedings other than those stated in the request. However, in cases where the charge is altered, the material provided may be used in so far as the

offence, as charged is an offence in respect of which mutual assistance may be provided under this Convention.”

Such a text, though, equalizing the restrictions for the use of the execution of letters rogatory to those protecting extraditees, can hardly be justified. This is why it is not recommendable. The two modalities of international judicial cooperation are very different.

Extradition - vs. - Letter Rogatory

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| COMMON FEATURES | Both serve criminal justice | |
| | Requires description of the crime, in respect of which cooperation is being requested | |
| | The criminal law of the requesting country must be applicable to the crime | |
| | The death penalty in the requesting country for the crime, usually, constitutes an impediment to granting the request | |
| | The execution of the request, in general, is governed by the law of the requested country | |
| | No transfer of jurisdiction takes place | |
| DIFFERENCES | EXTRADITION | LETTER ROGATORY |
| <i>Is dual criminality required, in general?</i> | YES | NO |
| <i>Who issues the request?</i> | The country in need | The judicial authority in need |
| <i>What is the purpose?</i> | To obtain the surrender a fugitive from another country | To obtain valid evidence from another country |
| <i>Which procedural activity does it support?</i> | It supports prosecution and/or execution of a punishment imposed; thus, it may serve execution proceedings | It supports criminal proceedings and may never serve any execution proceedings |
| <i>Who can be present at the Execution of the Request?</i> | Interested persons from the requesting country may not be present at the execution of the request in the requested country | Interested persons from the requesting country may be present at the execution of the request in the requested country |
| <i>Applicability of the Speciality Rule, when the request is granted</i> | The requesting country is bound by the Speciality Rule, granting personal immunity of the extraditee | The requesting country is not bound by any Speciality Rule; therefore, no one enjoys personal immunity there |

IX. Outgoing Letters Rogatory by Somalia

1. The Somali law shall be applied to all internal procedures in Somalia related to the issuance of outgoing letters rogatory. As per the above quoted Articles 16 and 18 of the Riyadh Convention, any such letter “shall be written in accordance with the laws of the requesting contracting party, and shall carry the relevant date, the signature and seal of the requesting body along with all accompanying papers, but neither request nor enclosures need be officially certified”. In general, the execution “shall be carried out in accordance with the legal procedures set by the law of the requested Party”. Moreover, most foreign countries have and follow a domestic legal rule, such as Article 277 (3) (i) of the Somali CPC that “Evidence shall be taken in conformity with the general provisions of this Code”.

However, “should the requesting contracting party wish, by virtue of an explicit demand to this effect, that the commission be carried out in a specific manner, the contracting party so requested shall respond to such wish so long as it does not contradict its laws or regulations”. This possibility makes the law on letters rogatory less strict than extradition law which does not provide any exception in favour of the requesting country’s law.

2. Somali law on outgoing letters rogatory consists of the provisions of Article 276 [Letters Rogatory to foreign Judicial Authorities] of the Somali CPC mainly. Basically, this Article constitutes and, essentially, exhausts the domestic legal framework of Somalia for outgoing letters rogatory. Regrettably, its text establishes only the communication channels for such letters rogatory. It reads:

“1. Letters rogatory to foreign judicial authorities regarding evidence to be taken in a foreign country shall be transmitted through diplomatic channels.

2. In urgent cases, the Court may transmit such a request directly to of the Diplomatic and Consular Agents of the Republic in a foreign country, informing the Ministry of Grace and Justice.”

There is not a single word: (i) about the bodies in Somalia which are competent to issue letters rogatory, (ii) about the requirements for the contents of such letters, (iii) about the internal Somali procedure to be followed before a given letter rogatory reaches the Ministry of Foreign Affairs or Diplomatic and Consular Agent of Somalia in the requested country, (iv) about the participation or non-participation of interested Somali official in the execution of the letters rogatory abroad or (v) about the legal value of the results of their execution.

Hopefully, there will be provisions regulating the abovementioned issues. Otherwise, the competent authorities of requested countries may argue that the Somali letters rogatory, which they receive, have no legal basis. Hence, these letters are invalid and shall not be executed.

Also, the general rule in Article 275 (2) of the Somali CPC is relevant and important. It postulates that international legal instruments take precedence over the domestic law of Somalia in case of a conflict between them. This rule reads as follows:

“International letters rogatory on criminal matters, recognition of foreign the criminal judgments and other relations with foreign judicial authorities regarding criminal matters shall be governed by international conventions and customs and, where no provision is made therein, in accordance with the rules of this Part.”

This Part (which contains the two quoted Articles as well) is titled ‘JUDICIAL RELATIONS WITH FOREIGN AUTHORITIES’.

It is difficult to understand, let alone justify the exclusion of extradition from the general rule in Article 275 (2) of the Somali CPC. Many countries have such a rule concerning the relations between domestic and international laws. The rule is always a general one covering either all subject-matters or the international judicial cooperation, in particular. A rule which regulates all such matters is, for example, Article 151 [Legal value of international acts] of the Constitution of Azerbaijan: *“Whenever there is disagreement between normative-legal acts in legislative system of the Azerbaijan Republic ... and international agreements wherein the Azerbaijan Republic is one of the Parties, provisions of international agreements shall dominate.”* A rule which regulates the relations between domestic and international laws on international judicial cooperation, specifically, is, for example, Article 1 (1) of the Bosnian Law on International Judicial Cooperation in Criminal Matters: *“This Law shall govern the manner and procedure of international judicial cooperation in criminal matters, unless otherwise provided by an international treaty”* as its provisions are regarded as priority. Extradition is not excluded. Section 1 (3) of the German Law on International Judicial Cooperation, governing the same issue, does not exclude extradition either. It reads: *“Provisions of international treaties shall take precedence before the provisions of this law to the extent that they have become directly applicable national law.”*

It follows that, preferably, conflicts between domestic and international provisions on this modality of cooperation shall be solved in the same way as conflicts concerning letters rogatory. Therefore, if a

letter rogatory is combined with extradition, conflicts between domestic and international provisions, governing these modalities of cooperation, shall be solved in the same way for both. To avoid misunderstanding it is recommendable to include also the extradition in the text of Article 275 (2) of the Somali CPC. Probably, the best solution, after all, would be a codified text for all modalities of international judicial cooperation in criminal matters - as in the quoted Bosnian provision - without specifying any of them.

3. When it comes to the international legal framework of Somalia for outgoing letters rogatory, again, the Riyadh Convention holds the leading role. Its Part III (Articles 14-21) governs letters rogatory between Parties. Besides, it solves the potential conflict between any bilateral treaties of its Parties and this Convention. Pursuant to Article 68 [Provisions of the Agreement are binding to the Parties], letter “a” of the Riyadh Convention:

“The provisions of this Agreement shall be binding to all its contracting parties, and no two or more contracting parties may agree on whatsoever is in contravention of its provisions”. Obviously, if the Parties deviate from the provisions of the Riyadh Convention, the new agreement would violate them and be, therefore, invalid.

The quoted provision of the Riyadh Convention set up an internal hierarchy, within international legal instruments on international judicial cooperation, whereas the already quoted Article 275 (2) of the Somali CPC provided an external hierarchy between international legal instruments and domestic law on the same issue, prioritizing the former over the latter [Girginov, 2016].

Lastly, in some cases, two or more international legal instruments on letters rogatory may exist with no formal hierarchy between them as there no provision prioritizing any of them. In such situations, the more reliable (less risky, more often used, better known, etc.) international instrument should be used to achieve the desired result.

4. Most often, letters rogatory are used for obtaining witness testimony. However, the other types of evidence, including expert evaluation, shall not be excluded.

It is no secret that a serious number of Somali investigators forward to some foreign countries, e.g. Kenya and South Africa, DNA samples, fingerprints or other traces from crime scenes for expert evaluations to obtain admissible evidence for their investigations of crimes. It is noteworthy that the investigators send the materials with friendly requests for evaluation. Besides, the evaluation activity in the requested country and the

result obtained are assessed by the Somali judicial authorities (investigators, prosecutors and judges) in accordance with the law of Somalia. The aforementioned materials are not sent with an international letter rogatory as required by Article 276 [Letters Rogatory to Foreign Judicial Authorities] of the CPC. Besides, the evaluation activity in the requested country and the result obtained are not assessed in accordance with that country's law, which is the applicable one when it comes to execution of incoming (foreign) requests. Somali investigators, prosecutors and judges apply their own law.

Additionally, Somali judicial authorities complain that the quality of the expert evaluations, which they receive from abroad, is low and it takes too much time to receive them. Along with building own capacities for expert evaluations, the solution to this problem is to use the mechanism of letters rogatory as Somali would always need foreign expert support. In general, letters rogatory are considered much more seriously and are executed much faster than other requests. Certainly, there are practical methods to make the requested country speed up the execution.

The much more important issue, however, is that under Somali law the mechanism of letters rogatory is the only means to secure admissible evidence from abroad. Since Article 276 of the CPC requires a letter rogatory for obtaining such evidence, it follows *per argumentum a contrario* that no other request shall bring admissible evidence to the requesting country. Therefore, the letter rogatory is a must. At the same time, the type of evidence obtained is not crucial. It might be oral evidence (the testimony of the expert witness assigned with the execution of the incoming letter rogatory) or written evidence (the document produced by the expert witness).

Any country needs a legal basis for the evidence, which may be admissible in court. It is worth mentioning that, along with the execution of letters rogatory, no other mechanisms (incl. communication channels) for receiving such evidence exist in Somalia, presently. They are two such mechanisms, in addition to letters rogatory, namely: the joint investigations (see article 49 of the UN Convention against Corruption, not yet acceded by Somalia) [Athenstaedt, 2014] and the transfer of criminal proceedings [Voynova, 2014] for which (unlike most foreign countries) no legal framework exists in Somalia at all. In all these cases, the applicable law is the one of the country where the evidentiary activity takes place rather than the law of the country which makes use of the result.

Lastly, by using in trials evidence, obtained on the basis of friendly (non-judicial) requests to other countries, criminal courts in Somalia make use of inadmissible evidence, actually. This means that Somali judicial authorities do not abide by any rule of law

principle in criminal justice matters. Such practice shall not be supported. On the contrary, the normal approach to obtaining evidence from abroad must be explained. It would be good if the explanation is accompanied by a legislative proposal that the criminal proceedings are suspended (the running time is not counted) until the execution of the Somali letter rogatory arrives.

The next step that should be taken is to explain to interested Somali factors as to how one can speed up the execution of a letter rogatory. Finally, Somalia must be encouraged to develop own capacities for expert evaluations. This would require not only physical conditions and trained local experts, but also a good legal framework for these complex activities, esp. those related to DNA samples and analysis.

CONCLUSION

Serious work must be done to enhance the capacity of the Somali judicial authorities in the field of international judicial cooperation in criminal matters, especially, when it comes to dispatching admissible evidence to and obtaining such evidence from another country. They need to have sufficient knowledge and skills to overcome potential hurdles that are likely to arise in the process of seeking international legal assistance.

The competent judicial actors in Somalia should abide by the law governing letters rogatory; the law itself should be improved taking into consideration the legislative achievements of foreign countries. Somalia should not desist from becoming a party to bilateral and multilateral extradition agreements. Obviously, the Riyadh Convention is not sufficient. Probably, the most appropriate and recommendable such agreements, containing rules on letters rogatory, are the UN Convention against Transnational Organized Crime and of the UN Convention against Corruption. The Somali authorities have already expressed the laudable intention to accede to them soon.

Finally, Somalia must find a way to explain well to its potential partners in legal assistance its domestic mechanisms for rendering such assistance. It must be a predictable partner. Otherwise, the level of its reliability would stay low.

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