



International Center for Policy and Conflict

Press Statement

CIVIL SOCIETY FOR THE END OF IMPUNITY

Date: Sunday July 19, 2009
We Must Purge Impunity Now.

Introduction

Kenyans recall that on February 28th 2008, Mwai Kibaki and Raila Odinga (thereafter referred to as Principals) signed the Kenya National Dialogue and Reconciliation Agreements - Agenda One to Four. All these decisions and agreements are now part of the Constitution of Kenya and unless the National Accord is repealed, the only just and proper thing to do is to have full implementation of their contents.

We further recall that on December 2008, the National Assembly adopted the Commission of Inquiry into Post-Election Violence (CIPEV) without any alteration or amendment.

We state that impunity is not an option for the perpetrators of the post election violence that rocked this country between December 2007 and February 2008. We reiterate that it is self defeating for anyone to assume that sustainable peace can be built on foundations of impunity. No lasting reconciliation without justice is possible.

We note that the toll of impunity is manifested in the continuing suffering of victims, the continuing use of unlawful violence and the undermining of the rule of law in the management of national affairs.

The current situation of impunity, deteriorating access to essential commodities such as water and food, dwindling job opportunities, escalating insecurity, wanton environmental destruction and the total collapse of the rule of law, are clear indicators that this country is fast moving to the status of a failed state. Indeed, Kenya is currently ranked 14th, next to the military junta that ruled Burma in terms of countries considered as Failed States in the World according to the US-based Fund for Peace, Failed States Index 2009.

Following the unacceptable and regrettable unfolding political developments in the Cabinet and the Parliament, we the undersigned state and observe the following:

1. Agreed Reforms and Accountability Subverted by cabinet

The current political altercation by Cabinet Ministers and Members of Parliament smacks of outright political sabotage to the agreed reform agenda and accountability measures. The National Accord as captured in the constitution does not envision a role of the cabinet. In fact the agent of the reforms intended by the agreements is and must remain Parliament with the nominal participation of the two principals. Cabinet must desist from the function of countermanding the reform agenda. Parliament however has not demonstrated willingness, impartiality, responsibility and capacity to facilitate

delivery of the reforms. This is largely due to the parochial, ethnic and party based approach to national issues. It must therefore reengineer itself and rise to the occasion of salvaging the country.

It is unacceptable that the President and the Prime Minister appear to feign inability and helplessness to mitigate the situation; and give the impression that they are held hostage by the pillars of impunity. They must act fast if ever they were to avoid the impression they are creating that they are part of the tree of impunity.

The two principals and cabinet will need to usefully spend public time and resources to immediately resettle the abandoned Internally Displaced Persons (IDPs). It would appear to us that the IDPs have become a useful pawn in the political chase game between the major political parties. It is a shame that the government seems to have surrendered the responsibility of rehabilitating the IDPs to foreign missions and non governmental organizations.

2. Local Tribunal and International Criminal Court

The current debate being peddled by Parliamentarians is conducted as though the choice before Kenya was whether to investigate and prosecute the suspects identified by the Waki Commission in Kenya or at the International Criminal Court (ICC). Members of Parliament (MPs) claim that they lack confidence in a national process, but fail to understand that Kenya has a responsibility under international law to bring criminals to justice regardless of whether or not Parliament obstructs the Special Tribunal enactment.

In this regard we note:

- It is the responsibility of the National Assembly to ensure that a national court or Special Tribunal can exercise jurisdiction over anyone suspected or accused of grave crimes under domestic and international laws regardless of their official capacity. International Criminal Court remain a court of last resort.
- Kenya needs to apply the principle of complementarity offered by the Rome Statute to enact a credible, impartial and independent local tribunal.
- The local trial of those most responsible for post-election violence will make such proceedings fully accessible to Kenyans particularly victims. The International Criminal Court retains jurisdiction at all times and if at any point the Kenyan government proves unwilling or unable to administer justice, the ICC reserves the right to step in; so the guarantee of justice is still there.
- Kenya government so far is not serious on national prosecutions. If it were it would have by now mobilized all resources at its disposal, to have the low and middle rank of perpetrators effectively and expeditiously prosecuted through domestic trials. Government of Kenya is notorious for rarely acting to bring the perpetrators of crimes to justice. This situation must now change.

3. Options

Our position has been in favour of a local tribunal because of the high threshold required by ICC to come in, and the number of suspects that the ICC can try. We also root for a local tribunal for Kenyans to own the process that will punish both the financiers and their surrogates who committed the actual offences on the ground and bring an end to impunity. In this regard we observe the following:

- Sitting back and waiting for the International Criminal Court to intervene, is not the best option for the country. This will leave an enormous impunity gap that will not serve the vicarious lessons much needed to stem such crimes.
- The priority of the Kenyan government must be accountability on behalf of the victims. Regrettably, this is not the case, as the Kenyan government would want the International

Criminal Court to believe. For example, in a ruling at the High Court of Kenya at Nakuru, Republic Versus Stephen Kiprotich Letting and Others, the judge indicted police for shoddy investigations (pg 34), evidently the current Kenyan Criminal justice system does not have the capacity to try such crimes.

- It is therefore significant to observe that short of establishing a credible, impartial and effective Special Tribunal or International Criminal Court (ICC) referral to prosecute the post-election violence atrocities impunity will prevail.
- Given the ICC's jurisdiction over crimes in Kenya and Kenya's obligations as a party to the ICC, the ICC will determine whether a domestic trial is an adequate alternative to prosecution by itself. The ICC therefore, can retake a case, if the tribunal fails to adhere to international fair trial standards, and impose penalties that are appropriate given the gravity of the crime, namely imprisonment.
- National prosecution mechanisms must be backed by watertight measures to ensure comprehensive witness protection and support, security, and outreach to the affected communities.

4. Criminal Justice and Truth Justice Commission

As to whether the Truth Justice and Reconciliation Commission (TJRC) would substitute the criminal prosecutions, we state the following:

- That the Truth commission is distinct from courts of law and does not normally determine individual criminal liability or order criminal sanctions. A truth commission is not a substitute for justice in the form of full and fair prosecutions. However, whenever established it must not itself be a whitewash or an arena to offer amnesties.
- We unequivocally state that the jurisdiction of the Local Tribunal on the one hand and the Truth, Justice and Reconciliation Commission on the other, are mutually exclusive. It is therefore a waste of time for anyone to suggest that the truth commission can be called upon to do prosecutorial work which is reserved for the local tribunal or the ICC. At best Truth Commission offer restorative justice and accountability

5. International Community Role

The International Community has a significant role in ensuring criminal accountability for both domestic and international crimes committed in Kenya. The international community as a whole has a legitimate interest in the prosecution of grave crimes under international law in order to deter the commission of such crimes in the future, to punish the commission of these crimes in the past and in order to contribute to the redress for victims and re-establish the rule of law.

6. Conclusion

- The President and Prime Minister must stop the trend of cabinet to undermine the reforms and recommendations made pursuant to the Waki and Kriegler commissions as well as all other key reforms.
- The parliament must act in the best interest of the country and enact the necessary laws through constitutional amendments as well as statute to establish of a local tribunal which must be credible, impartial and independent with an international oversight mechanism.
- The President and Prime Minister, as principals and leaders of the respective parties in parliament must lead from the front and whip their members to support the agreements and consequent reforms they signed which led to restoration of the continuing uneasy calm.

- The Attorney General must provide public advice on the law relating to the International Criminal law as well as the constitution of Kenya rather than leave that responsibility to the politicians. The AG has a duty to Kenyans so that they are not misled to supporting positions of suspect criminals whatever their station in life.
- Meanwhile, we call upon the ICC to act with speed in event the Government of Kenya fails to establish a credible impartial and independent tribunal so as to lend to the people of Kenya some ray of hope in ending impunity.
- We are also calling for deliberate concerted efforts between the media, civil society, private sector and Faith Based Organizations to proactively project, sustain and push for the full implementation of the agreed reforms and accountability measures.
- We are therefore calling upon all Kenyans to move with commensurate haste to be proactive in demanding for justice and accountability. Kenyans must be more assertive in their demand for accountability and social justice and must know that the most sustainable reforms must emanate from them and they should not sit back and wait for politicians to help. Because they will not.