

Open Letter to President Mwai Kibaki and Prime Minister Raila Odinga

Date: Wednesday August 5th, 2009

To The President
Harambee House

The Prime Minister
Treasury House

Dear His Excellency President Mwai Kibaki and Prime Minister Right Honourble Raila Odinga ,

RE: ***IMPUNITY IN KENYA***

Greetings Your Excellencies.

We, the undersigned individuals and organizations, disappointed by your statement of Thursday July 30th, 2009 to Kenyan people and the whole world, take this opportunity to address our concerns and disapproval. We note with disapproval your decision not to dialogue with Parliament and your respective political parties as avenues of finding solutions to the crisis that face the country despite the fact that those institutions played significant roles initially. Your choice of the cabinet as the arena of dealing with the important questions before the country is evidence that you are either incapable of or unwilling to lobby and get the support of the representatives in parliament and political parties which were themselves the principle institutions at the center of the conflict that rocked the country between December 2007 and February 2008.

We underscore the importance of the inherent relationship between the victims' right to truth and the urgency of adequate judicial investigations and prosecution of human rights violations related to post-election violence.

We are also informing you that as people and institutions who believe in the rule of law, human rights and fair administration of justice, we are urging Kenyans and the international community based in Kenya and respectively across the world, to reject the government of Kenya's collective conspiracy to protect suspects responsible for the horrendous atrocities of the 2007/08 post-election violence from criminal accountability. By undermining the law, your cabinet decision encourage some to always resort to institutionalized violence as an acceptable practice and contribute to the recurrence of similar abuses in the future.

Sirs, the precise reasons for dismissing your cabinet resolution and calling for concerted action against it are the following:

1. The police, having been implicated in the violence, are not capable of conducting independent and impartial investigations and prosecutions. This is an institution that lacks not only the moral credibility and authority but also the confidence and trust of the Kenyan public unless it is subjected to an overhaul and transformation with full independent civilian oversight put in place. This is a long term process and Kenyans want justice from a just and independent body that meets international standards. You would appreciate that some of the

crimes that were committed during the post election violence are international crimes and criminal human rights violations which will require to be tried by a special court following appropriate amendments to the current constitution.

2. The judiciary, as presently constituted, is incapable of adjudicating on the post-election violence crimes. We are indeed taken aback by the decisions and resolution of your cabinet that the Kenyan judicial system redresses the sufferings of the post election violence more so when flanked by your Attorney General. We wish to bring to your attention that all the five post- election violence related cases that the Attorney General has attempted to prosecute have been dismissed save for one where the accused are alleged to have killed police officers. Your proposal to use such an inept and corrupt criminal justice system to try horrific post-election violence crimes is an affront to the intelligence and the rights of the Kenyan people and that those cabinet Ministers engaging in choreographed defense of such a move are ill advised in defending the indefensible in the Kenyan public eye. Yes, Kenya must build its criminal justice system but giving that as the road to prosecute those bearing responsibility for the post-election violence crimes is to both delay and deny justice to the victims. It shows your indifference to their sufferings.

3. The Truth Justice and Reconciliation Commission (TJRC), as envisaged in the mediation and its own Act, was only meant to deal with the underlying genuine historical injustices and roots of the violations and violence, not the violence itself, and that the concerns we have had with the TJRC have nothing to do with 'representation' but rather to do with conflict of interest, effectiveness and impunity. The Truth commission is distinct from courts of law and does not normally determine individual criminal liability or order criminal sanctions rather; it produces a raft of recommendations which will depend on government's will or ability to act on them. It is not a substitute for justice in the form of full and fair prosecutions. We are therefore, unequivocally putting it to you that the jurisdiction of the Special Local Tribunal on the one hand and the Truth, Justice and Reconciliation Commission on the other, are mutually exclusive. It is hence a deliberate misrepresentation of facts and intent 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 International Criminal Court (ICC). Indeed such a call is a material call and support for impunity.

Sirs, it is important for you to remember that the agreements you signed consequent to the National Accord and Reconciliation Act never allocated any role to the cabinet. Indeed the cabinet collectively and individually appears to sabotage the realization of the objects of the Accord. Further, the agreements you signed were never envisaged nor understood by Kenyans to be contingent to unspecified political consideration such as seems to have happened in the cabinet.

4. Lastly Dr. Kofi Annan's Panel of Eminent African Personalities, the African Union and the broader international community must view the cabinet decision as a complete violation of the National Accord, and a complete repudiation of the Commission of Inquiry into Post-Election Violence report recommendations which Parliament had adopted without reservations or alteration. Your government has, by that decision, taken this country back to where it was on 28th February 2008.

Sirs, impunity is brought about not only by the lack of a diligent investigation, but also by the absence of political will to institute competent process of indictment, arrest, prosecution, conviction and sentencing, of perpetrators of any violation of the rights of the Kenyan people. Due to this, impunity has fostered chronic recidivism of human rights violations, and total defenselessness of victims. Impunity continuously manifests itself when individuals get away with criminal liability. This is a result of the unwillingness or inability of your government to punish, and people's erosion of faith in the current criminal justice system. Impunity activates a self-propelling, and re-energizing cycle that leads to additional infringement as a result of the low risk of punishment.

Sirs, lack of accountability is hindering progress in building a sustainable peace process in Kenya. We categorically urge and call for perpetrators of violations, committed during post-election violence, to be brought to justice. We draw your attention to the shameful legacy of many governments' commissions of Inquiry reports of the violations and the fact that none of the alleged violators of human rights have been tried for their actions. We condemn the general political amnesty that your government is silently executing,

despite the many express recommendations that suspected perpetrators be further investigated and prosecuted.

Mr. President and Prime Minister, the victims of post-election violence violations and their families have the right to know the truth and to a remedy. Furthermore, they should be at the heart of everyone's concerns. The parties to the February 28, 2008 peace agreement agreed that addressing the root cause and accountability is necessary for sustainable peace. But, regrettably, little progress has been made and worse, you led your cabinet in violating this crucial agreement. The demands of victims and their families are not mere wishes; they are supported by law. Until these demands for justice are fulfilled and accountability for past violations is ensured, a truly new Kenya will not emerge, and indeed, the peace process will be jeopardized.

Sirs, it is important to inform you that the International Covenant on Civil and Political Rights provides a basis for defining impunity. It is about upholding the rights of victims to be redressed for violations that have caused them to suffer. Article 2 in Part II (Paragraph 3) reads and we quote: Each State Party to the present Covenant undertakes: a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; and c) To ensure that the competent authorities shall enforce such remedies when granted.

Sirs, in order to reaffirm the above, the principles established as core requirements for a State's response to human rights violations are as follows: i) identification of victims; ii) identification of perpetrators; iii) victims' participation in the investigations; iv) domestic publicity of the procedures, v) judicial control of the right to truth; vi) judicial independence, and vii) public and international accountability for State's policies limiting and restricting fundamental rights. Unfortunately, your cabinet's decisions fly in the face of these principles and communicate strong message of sanctioning and endorsing impunity. The rights of the victims are violated because of impunity guaranteed by political protection and corruption. It is regrettable that the level of impunity is highest at the highest echelons of power.

Sirs, going by what is happening, it can be concluded that alleged criminals continue to escape justice, even in cases where their crimes violate the victims' human rights or have broader societal implications. The outcome of denial of justice and violations of human rights not only affects the victims in the short-term but also leads to a dilution in their trust in the entire justice administration system. Impunity or continued scorn at justice not only weakens the principle of the rule of law but also violates the human rights of the victims and society at large. The human rights abuses continue day in day out with sections of the populations seeming to enjoy impunity for decades as their victims cry for justice to deaf ears.

Finally Sirs, we would like to reiterate that we, the people of Kenya, do demand that a Special Tribunal for Kenya be established in order to deal with the perpetrators and financiers of the post election violence. This position however, does not and cannot take away the residual responsibility of the International Criminal Court.

In the event that you both feel that you are unable to govern the country past the narrow interests of your bloated cabinet, then you should do the only honourable thing.

We will now embark on the suitable actions to ensure that your government lives up to the expectations of Kenyans. May we remind you that the establishment of the coalition government was never intended by Kenyans to be an end in itself. It was a means to resolving Kenya's many fundamental socio-political and economic governance problems. You have failed to show that you were ever up to the billing.

Thank you,

Signed by

1. Ndung'u Wainaina
Executive Director
International Center for Policy and Conflict
2. Haron Ndubi
Executive Director,
Haki Focus
3. Kenyans for Peace with Truth and Justice
(Coalition of 30 Civil Society organizations)
4. Constitutional Reform and Education Consortium (CRECO)
5. Citizens Coalition for Constitutional Culture (4Cs)
6. Release Political Prisoners

- Cc. Hon Dr Kofi Annan,
Panel of Eminent African Personalities
C/o The African Union
Addis Ababa
- Cc The African Commission of Human and Peoples' Rights
Banjul, The Gambia
- Cc The Hon Speaker of the National Assembly
Parliament House
Parliament Road
NAIROBI
- Cc All Members of Parliament
NAIROBI
- Cc The Kenya National Commission of Human Rights
CVS Plaza
NAIROBI
- Cc The secretary General
Orange Democratic Party
NAIROBI
- Cc The secretary General,
The Party of National Unity
NAIROBI
- CC All Foreign Missions and Consulars based in Kenya.