



International Center for Policy and Conflict

PRESS STATEMENT

Special Tribunal Enactment: Cabinet Erred, More Needed

Nairobi, July 21, 2009. While we commend the Kenyan government for renewing efforts to enact the Special Tribunal to try those responsible for 2007 election violence, the International Center for Policy and Conflict believes that nothing short of momentous symbolic shock therapy to the political elite would incentivize formation of an effective, independent and impartial Tribunal locally. This would not only be symbolic but more importantly, it would act as catalysis towards the enactment of a serious Special tribunal.

It is unfortunate and unacceptable that cabinet is turning into a hub of impunity horse trading in the full sight and knowledge of the Two Principals. We strongly condemn the cabinet for allowing political considerations to block raising the bar of the Special Tribunal in order to meet the mandatory international standards. It is our expectation that the cabinet and the Parliament will act in a sense of sobriety and responsibility in the pursuit of national goals and objectives.

It is regrettable that an attempt at jump-starting the enactment of the Tribunal begins on a wrong footing for it fails the most basic test of its independence and credibility. The tribunal cannot bring justice to the thousands of post-election violence victims if it tries only a handful of the most notorious individuals, while scores of top officials and other prime suspects remain free.

However, ICPC notes a tremendous improvement on the current Bills compared to the ones defeated last February in Parliament. We are happy to observe that in the current Bills, which we have seen and are under discussion in the cabinet, substantively reflect what ICPC and other civil society groups advocated for in the last defeated Bills. There is progress being made towards addressing the following key critical areas for the independence and credibility of the Tribunal:

- i. The Constitution Amendment Bill 2009 (amendment of section 3a of the Kenyan constitution) protects the Statute and the Tribunal from constitutional challenge
- ii. The Special Tribunal Statute and the bodies that it establishes respect human rights including the rights of suspects to a fair trial, and the observance of principles of equality and non-discrimination.
- iii. The issue of retroactivity (section 77) and time limitation does not apply.
- iv. No provision of the Special Tribunal Statute, and no decision of the Tribunal made under the authority of the Special Tribunal Statute shall be deemed to be inconsistent with any provision of the current Constitution, and no such provision or decision shall be challenged in any other court, whether on the basis of current constitution or on the basis of any other rule or principle of law.
- v. For the avoidance of doubt, no powers under sections 26 (Attorney-General), or 27 - 29 (Presidential Prerogative of mercy and pardon) shall be exercised
- vi. Independent funding should be provided
- vii. Watertight victims' and witnesses' protection require to be enhanced

- viii. Tribunal has the primacy and exclusive jurisdiction powers
- ix. No immunity under section 14 (Protection of President in respect of legal proceedings during office) shall be enjoyed, in relation to the Special Tribunal.
- x. Where any law is in conflict with the Special Tribunal Statute, the provisions of the Statute shall prevail.
- xi. The Bill should provide that no Act, including an Act to amend the Special Tribunal Statute, may alter any decision of the tribunal or relieve any person of any penalty imposed by the tribunal.
- xii. The Bills should ensure no executive act, whether under the authority of current Constitution or any other law, may alter any decision of the tribunal or relieve any person of any penalty imposed by the tribunal, except as provided by the Special Tribunal Statute.
- xiii. No Kenyan Court including the High Court of Kenya would interfere with proceedings or the work of the Tribunal (section 60)
- xiv. The President, Prime Minister and Chief Justice must play nominal role.

In conclusion we are further stating that:

- a. The Special Tribunal is the best option for justice for the victims of last year's election violence as opposed to a transfer of jurisdiction outside of Kenya. However, the fragmentation and absurd protection rackets in the cabinet and Parliament might turn out to be the single biggest impediment to the crucial exercise. We wish to emphasize that the International Criminal Court (ICC) and Special Tribunal are not mutually exclusive but rather complementarity.
- b. The International Criminal Court should take further steps to ensure that all the international standards that form the basis of other international and mixed criminal processes are explicitly incorporated in the tribunal for Kenya. ICPC doesn't want 'show' trials but fair trials. The ICC must bear the burden of responsibility in ensuring that international standards for fair trial and due process are not undermined. Kenya is a party to the Rome Statute, which sets out the legal framework for the International Criminal Court. No court, including the proposed tribunal, should therefore fall short of the international standards which the Kenyan government is bound to uphold.
- c. Under international standards, it is the responsibility of the governmental authorities of a country where human rights violations have occurred to bring to justice according to international standards for fairness those against whom there is credible evidence that they perpetrated political killings, torture or any other domestic and international crimes.
- d. The governments of other countries have obligations under international standards to cooperate with the authorities of the country where such crimes took place and with each other to ensure that the perpetrators are brought fairly to justice. We believe that bringing the perpetrators of post-election violence gross human rights violations to justice in a manner that also safeguards their human rights will contribute greatly to preventing future human rights violations in Kenya.

Thank you

Signed by

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Executive Director