

**International Center for Transitional Justice- International Center for Policy and Conflict**  
**Comments on the Draft Statute for the Special Tribunal for Kenya**  
**25 January 2009**

The following comments pertain to the final draft “Statute for the Special Tribunal for Kenya.” These succinct comments are not exhaustive. While this process is laudable and demonstrates the readiness of Kenya to foster accountability and the rule of law, the following comments concentrate on a few key aspects of the Statute which could undermine the functioning of the Tribunal and its capacity to deliver independent, effective and efficient justice. These comments also give proposal for a section (article) 50 dealing with the relationship between the Tribunal and Truth Justice and Reconciliation. Some of these comments reiterate previous concerns expressed when remarking on earlier drafts of the Statute. While this has incorporated many of earlier comments it raises a number of new and pressing concerns, for instance because the provisions pertaining to immunities (not binding on the Special Tribunal for Kenya) has been deleted.

**Immunities:**

- While previous drafts explicitly provided that immunities would not bind the Special Tribunal for Kenya (STK), such reference has been erased in this draft. It could be reinserted in article 11.

**Constitutional review/challenges:**

- Will the STK be subject to the regulations applicable to the rest of the Kenyan justice system? Will its statute and even its decisions and judgments be subject to constitutional review? Could this be the case for some provisions foregoing immunity for government officials? If constitutional reviews are possible, how long would they take? Would they lead to the suspension of proceedings before the STK pending a decision?
- Article 35(3) indicated that Special Magistrates should consider that international and criminal law and procedure shall take precedent over written Kenyan law: does this extend to the Kenyan jurisdiction?

**Subject matter jurisdiction:**

- Article 8 (ii) should criminalize only ‘unlawful imprisonment’ rather than just ‘imprisonment’.
- The insertion of ‘regional’ as a discriminatory ground for crimes against humanity is unusual and would deserve clarification so that ‘regional’ is well understood.
- Article 10 refers to the elements of the crime of the International Criminal Court (ICC), which may not apply mutatis mutandis before the STK in light of the difference of subject matter jurisdiction (the ICC has jurisdiction over war crimes, not the STK – conversely, the STK’s mandate encompasses human rights violations, which is not the case of the ICC). Also, some of the crimes are not defined similarly before both jurisdictions, for instance in terms of the discriminatory grounds for crimes against humanity.

### **Pre-trial judge:**

- Article 30 of the draft refers to a pre-trial judge with the power to determine” whether there is a triable case to warrant the person accused to stand trial.” How does this compare with the procedure provided for at article 27, according to which one of the judges of the trial chamber, reviews and confirms the indictment “if satisfied that a reasonable case for trial has been established”? What is the difference between a ‘reasonable case’ and a ‘triable case’?
- This procedure is unusual in comparison to other tribunals. While some other international or hybrid courts do provide for pre-trial proceedings, their purposes are either to manage the case or are aimed at replacing the stage of the confirmation of the indictment, not to repeat it. Delegating the power to dismiss cases at the pre-trial stage to a single individual gives rise to an increased risk of pressure being put on that individual.
- The important powers of the pre-trial judge are all the more crucial that article 30(7) stipulates that his/her decisions are final, and that there would thus be no possibility to appeal them.
- Apart from the provisions of article 30, which provide that the pre-trial judge can commit the accused to stand for trial or decline the accused for trial, the draft does not mention the pre-trial judge when it refers to the structure of the Chambers. There is no mention of whether the pre-trial judge should be Kenyan or non-Kenyan and how s/he is appointed, which is very surprising in light of the fundamental powers that s/he has. In fact, article 13(1) stipulates that the Chambers consist of the Trial Chamber and the Appeals Chamber but does not mention the pre-trial judge. Would this judge belong to a different jurisdiction?

### **Overburdening the Prosecutor?**

- In light of the exclusive jurisdiction granted to the STK (article 4) and the fact that all investigations and prosecutions concerning all the crimes committed between 3<sup>rd</sup> December 2007 and 28<sup>th</sup> February 2008 falls within the jurisdiction of the STK, or at least of the Special Magistrates, even when allegedly committed by persons other than those bearing the greatest responsibility or when they constitute crimes defined under Kenyan law (article 6), the amount of investigations and prosecutions will be sizeable and possibly overwhelming. Under article 36, all these investigations and prosecutions will be led by the Prosecutor: is there a risk that s/he could be overburdened; will he s/he has sufficient and adequate means to perform this enormous task?

### **Appointment and removal of judges and of the prosecutor:**

- The appointment processes provided for under articles 13 and 22(3) are not particularly transparent, and do not provide for external oversight or broader nomination processes (involving for instance civil society as has been recently the case for other special tribunals). For the sake of the credibility of the STK, it is important not only that the appointments and re-appointment processes be impartial and independent, but also that they be seen to be impartial and independent. To this extent, it would be useful that article 13 (2) and (3) specify who has the authority to prepare a list for consideration by the President and the Prime Minister when appointing Kenyan judges. Furthermore, the important role devoted to the Panel of Eminent Persons raises possible concern over-time: is the Panel a ‘sustainable’ body and how long is it supposed to function?

- Article 17 and 25(3) provide for very broad grounds of removal, notably of the judges, prosecutor and deputy-prosecutor 'for any [...] conduct that may bring the proceedings into disrepute'. Who decides and qualify what disrepute is? In other tribunals, removal of judges is an internal, judicial procedure. This clause leaves the door open for political interference. Also, in case of removal, no deadlines are prescribed for the replacement of those removed. This could cause delays and even obstruct proceedings, and a specific time within which the replacement should be made could be specified in both articles 17 (4) and 25 (4).

#### **Appointment and removal of other tribunal officials and of personnel – status of personnel:**

- Article 25 does not specify the modalities of selection and appointment when recruiting the personnel or considering their status (for those part of the police of the judiciary in Kenya, will they keep their status? Will they continue to accrue seniority, etc.). This may be particularly important for the staff assisting the prosecutor: will the investigators be required to have a police background?
- While the autonomy and independence of the judges, prosecutor and registrar would be reinforced if they are able to rely on their own teams, this would only be feasible if they have resources sufficient to recruit the personnel they need, and if they can decide or recommend both the number of staff that they need and their seniority.
- Including a provision regulating the gender representation/balance among the Special Magistrates and other officials and personnel of the STK, notably among investigators and prosecuting attorneys, would enable it to deal more adequately and representatively with cases of sexual and gender based crimes.

#### **The Defence Office:**

- The experience required to be appointed Chief Defence Counsel should be criminal practice rather than the practice of court registries.
- There seems to be a contradiction between the right of a suspect to have legal assistance of his own choosing, including the right to have legal assistance provided by the Defence Office' under article 40(1)(c) and the provision of article 24 (7) which envisages that legal assistance shall only be provided to persons against whom an indictment as been confirmed.

#### **Preventive detention:**

- International standards provide that, before conviction, freedom is the rule and preventive detention the exception. The wording of article 29(1) seems to envisage the opposite, where a suspect is released if the judge is satisfied that there are urgent and exceptional circumstances.

#### **Special Magistrates:**

- Article 35(3) indicated that international and criminal law and procedure shall take precedent over written Kenyan law

#### **Funding, budget and other financial matters:**

- To guarantee a transparent process and ensure accountability, Articles 50 and 51 could explicitly provide that the budget estimates and funding of the STK should be made public. To guarantee the independence of the Prosecutor, as envisaged under article 22(4), s/he should be entitled to prepare the budget estimate for his/her office, and to independently

authorize the disbursement of the funds allocated to the investigations and prosecutions.

**Dissolution of the STK:**

- After the dissolution of the STK as envisaged under article 55, what would happen in case of a need to review proceedings under the circumstances provided for in article 34? Should there be a 'residual' mechanism continuing beyond the STK?

**Immunities and inviolability:**

- The STK should be protected from undue pressure, notably by providing a legal framework recognizing the inviolability of its premises, documentation, archives, etc, and also immunity for both its international and national judges, prosecutors, registrar and personnel. For the internationals of the STK, some form of immunity corresponding to the guarantees granted to ambassadors or other diplomats would be ideal.

**New Section:**

**Article 50: Relationship between the Tribunal and the Truth Justice and Reconciliation Commission**

1. The Tribunal and the TJRC share a common objective, namely that of promoting accountability and ending impunity in order to build a new society based upon respect for human dignity, democracy and the rule of law.
  - a. The Tribunal and the TJRC shall work towards this common objective in a spirit of co-operation and mutual respect, and
  - b. In pursuit of such objective the Tribunal and the TJRC shall be equal partners.
2. The Tribunal and the TJRC shall enter into a written, binding and enforceable agreement for the regulation of their relationship within 90 days of the establishment of both bodies. Such agreement shall provide for and deal with, *inter alia*:
  - a. The mutual respect for the independence of each institution and their respective mandates;
  - b. Matters of important principle in relation to the conduct of operations vis-à-vis each other;
  - c. Guidelines for the simultaneous conduct of the operations of both bodies'
  - d. Public education and awareness programmes to educate the public on the roles and responsibilities of the two bodies;
  - e. Respect for confidential and other protected information, communications and evidence held by the other body;
  - f. The modalities of possible co-operation in regard to matters such as public education and awareness, witness protection, information sharing and translation services;

- g. The question of investigators from one body approaching the witnesses of the other body;
  - h. The basic rights of members of the public in relation to each body in different circumstances.
  - i. The question of the hiring and recruitment of staff members of the one body by the other body;
  - j. Binding dispute resolution;
3. Notwithstanding anything contained in the agreement the rights of members of the public to participate in the activities of both the Tribunal and the TJRC shall, subject only to reasonable conditions and restrictions, be upheld.
  4. The rights of detainees, accused persons and prisoners in the custody of the Tribunal or any other law enforcement body or facility to participate in the truth and reconciliation process of the TJRC, including its public hearings shall, subject only to reasonable conditions and restrictions, not be denied.