

STATEMENT BY HON. GITOBU IMANYARA, CCU PARTY
LEADER AND MP, CENTRAL IMENTI CONSTITUENCY WHEN
MOVING THE CONSTITUTION OF KENYA (AMENDMENT) NO. 3
BILL, 2009 ON 11TH NOVEMBER 2009

Mr. Speaker, Honourable members of the 10th Parliament;

I stand before you with great humility and profound gratitude to move The Constitution of Kenya (Amendment) No. 3 Bill, 2009.

If enacted, as I will plead we do, we will amend the Constitution of Kenya to create the Special Tribunal for Kenya to investigate, prosecute and determine cases against persons responsible for genocide, gross violations of human rights, crimes against humanity and also investigate prior and subsequent events, circumstances and factors relating to the offences arising from and connected with the December 2007 General Elections.

Mr. Speaker Sir, Honourable Members, on the 16th December 2008 His Excellency Mwai Kibaki President and Commander in Chief of the Armed Forces together with the Rt. Hon Raila Amolo Odinga signed a historic agreement which was in the following language:

**AGREEMENT FOR THE IMPLEMENTATION OF THE
RECOMMENDATIONS OF THE COMMISSION OF
INQUIRY INTO POST ELECTION VIOLENCE**

RECALLING the Agreement on the Principles of Partnership of the Coalition Government made on February 28th, 2008 and the Agreement for the

Establishment of a Commission of Inquiry on Post-Election Violence dated March 4, 2008;

CONVINCED that the fundamental reforms must be instituted to create a better, more secure, more prosperous Kenya for all;

DESIROUS to establish a framework for the implementation of the recommendations of the Commission of Inquiry into Post Election Violence as contained in the Report dated October 16th, 2008 (the CIPEV Report"); and

PURSUANT to the National Accord and Reconciliation Act as entrenched in the Constitution of Kenya,

NOW THE PARTIES HERETO HEREBY AGREE AS FOLLOWS:

Article 1: Establishment of the Special Tribunal for Kenya

The Parties shall prepare and submit to the National Assembly for enactment a Bill to be known as "The Statute for the Special Tribunal" to give effect to the establishment of the Special Tribunal to seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya. The Bill shall provide for the matters recommended by the CIPEV Report in relation to the Special Tribunal for Kenya.

Article 2: Legislative Agenda

The Parties shall mobilize Parliamentary support for the enactment of the Freedom of Information Bill, 2008 and take such administrative measures as may be necessary to fully operationalize the Witness Protection Act, 2008 and the International Crimes Act, 2008.

Article 3: Comprehensive Reform of the Kenya Police and Administration Police

The Parties shall initiate urgent and comprehensive reform of the Kenya Police and the Administration Police. Such reforms shall be undertaken by the panel of policing experts and will include but not limited to a

review of all tactics, weapons and use of force, establishment of an independent Police Service Commission to oversee both the Kenya Police and the Administration Police, an Independent Police Conduct Authority for both the Kenya Police and the Administration Police, creation of a modern code of conduct for the Kenya Police and the Administration Police and achieving ethnic and tribal balance in the Force.

Article 4: Public Officers and Offices

The Parties shall ensure that any person holding public office or any public servant charged with a criminal offence related to 2008 post-election violence shall be suspended from duty until the matter is fully adjudicated upon.

The Parties shall ensure that any person convicted of a post-election violence offence is barred from holding any public office or contesting any electoral position.

Article 5: Conflict and Disaster Early Warning and Response System

The Parties shall ensure that the Conflict and Disaster Early Warning and Response Systems as articulated in the First Medium Term Plan (2008-2012) are developed and implemented as a matter of priority.

Article 6: Framework for Implementation

The Parties hereby designate the Cabinet Sub-Committee of National Accord comprising H.E. Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, Rt. Hon. Raila Amolo Odinga Prime Minister of the Republic of Kenya and the Eight Ministers who represent the Parties to the Kenya National Dialogue and Reconciliation as the body to oversee the day-day to day management and implementation of the Agreement.

Mr. Speaker Sir and colleague Honourable Members, this bill is our contribution as members of the 10th parliament to the realization of the objectives of His Excellency the President

and the Rt. Hon. Prime Minister together with the Eight Ministers charged with the solemn responsibility of overseeing and day-to-day management and implementation of the Agreement.

Mr. Speaker, the Eight Ministers representing the Parties to the Agreement are Hon. Moses Wetangula, Hon. Mutula Kilonzo, Hon. Prof. Sam Ongeru, Hon. Martha Karua (later replaced by Hon. Beth Mugo), Hon. Musalia Mudavadi, Hon. James Orengo, Hon. William Ruto and Hon. Sally Kosgey.

The journey to this stage began with the unanimous decision of the NARC government through the then Minister of Justice and Constitutional Affairs, Hon. Kiraitu Murungi to ratify the Rome Statute that set up the International Criminal Court in Rome.

This country proudly ratified the Rome Statute on March 15th 2005 and therefore joined the international efforts to end the culture of impunity.

Mr. Speaker Sir, the Rome Statute that this country ratified contained exhaustive provisions that were designed to tackle some of the worst atrocities in the history of humanity.

In too many cases across the world, these crimes had been committed with impunity which had only encouraged others to flout the laws of humanity.

Honourable members, the International Criminal Court was created due to that urgent need to end impunity and stop gross violations of international humanitarian law.

Mr. Speaker, on 17 July 1998, the international community reached a historic milestone when 120 States adopted the Rome Statute, the legal basis for establishing the permanent International Criminal Court.

The states were mindful that millions of children, women and men have been victims of unimaginable atrocities that have deeply shocked the conscience of humanity.

The states were affirming that the most serious crimes of concern to the international community must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation.

Honourable members, among the provisions of the Rome Statute are the following Articles:

a) **ARTICLE 27 – IRRELEVANCE OF OFFICIAL CAPACITY**

This Statute shall apply equally to all persons without any distinction based on official capacity...

ARTICLE 29 – NON-APPLICABILITY OF STATUTE OF LIMITATIONS

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Mr. Speaker, the ratification was followed by the next major step of domesticating the Rome Statute when this House approved the government's efforts of domesticating the Rome Statute by enacting the International Crimes Bill.

Mr. Speaker and Honourable Members, our efforts towards the establishment of a truly democratic environment under which the rule of law and respect for human rights prevail were dealt a near fatal blow by the events surrounding the declaration of the results of the presidential election of the 2007 General Elections.

Mr. Speaker, I need not repeat the tragic circumstances that saw more than 1,000 Kenyans slaughtered in an unprecedented orgy of ethnic mayhem that also left more than half a million of our fellow Kenyans living as refugees or internally displaced persons within our borders.

The tensions, suspicions, prejudices and fears provoked by those events unfortunately remain with us.

Against the above background the international community did not disappoint and at this moment Mr. Speaker we must pay tribute to the Secretary-General of the United Nations H.E. Ban Kim Moon, the then President of Ghana H.E. John Kuffour, H.E. Benjamin Mkapa, former President of the United Republic of Tanzania, former Secretary-General of the United Nations H.E. Kofi Annan and Her Excellency Madam Graca Machel.

It is through the efforts of the United Nations and the international community that the National Accord and Reconciliation Committee was formed after the disputed elections held on 27th December 2007.

The Committee held its deliberations under the auspices of the Panel of Eminent African Personalities and through them

the National Accord was born and not only signed into a law on 28th February 2008 but also enacted in the Constitution to ensure that its noble intentions were not manipulated or subverted.

Under the National Accord signed by President Mwai Kibaki and Prime Minister Raila Odinga the Commission of Inquiry into Post Election Violence (CIPEV) was established vide a Gazette Notice No. 4473 on 22nd May, 2008.

Its mandate was to investigate the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these and other matters.

Mr. Speaker, under the Chairmanship of the Hon. Mr. Justice Philip N. Waki Judge of the Kenya Court of Appeal, CIPEV carried out its mandate and completed its task within reasonable time and in accordance with its provisions made fundamental recommendations among them:

a) A Special Tribunal, to be known as the Special Tribunal for Kenya be set up as a court that will sit within the territorial boundaries of the Republic of Kenya and seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya. The Special Tribunal shall achieve this through the investigation, prosecution and adjudication of such crimes.

- b) The Special Tribunal shall apply Kenyan law and also the International Crimes Bill, once this is enacted, and shall have Kenyan and international judges, as well as Kenyan and international staff to be appointed as provided hereunder.
- c) In order to fully give effect to the establishment of the Special Tribunal, an agreement for its establishment shall be signed by representatives of the parties to the Agreement on National Accord and Reconciliation within 60 days of the presentation of the Report of the Commission of Inquiry into the Post Election Violence to the Panel of Eminent African Personalities, or the Panel's representatives. A statute (to be known as "the Statute for the Special Tribunal") shall be enacted into law and come into force within a further 45 days after the signing of the agreement.
- d) If either an agreement for the establishment of the Special Tribunal is not signed, or the Statute for the Special Tribunal fails to be enacted, or the Special Tribunal fails to commence functioning as contemplated above, or having commenced operating its purposes are subverted, a list containing names of and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the Special Prosecutor of the International Criminal Court. The Special Prosecutor shall be

requested to analyze the seriousness of the information received with a view to proceeding with an investigation and prosecuting such suspected persons.

- e) **The Bill establishing the Special Tribunal shall ensure that the Special Tribunal is insulated against objections on constitutionality and to that end; it shall be anchored in the Constitution of Kenya.**

The above recommendations among other contained in the Waki Report led to the introduction before this House of the first attempt to create a Special Tribunal for Kenya.

The attempts failed when we in this House rejected it for the reasons, among others that:

- a) It did not meet constitutional safeguards or the criteria and conditions set by the Waki Report.
- b) As drafted it could not win the confidence of victims because of lack of credible, impartial, independent investigations and prosecution procedures.
- c) It did not guarantee standards of trials set out in the Rome Statute.
- d) It did not have financial and political independence.
- e) Provisions on witness and victim protections were inadequate.

Mr. Speaker Sir, despite advise in a "*Kamukunji*" held at the Old Chambers and attended by both President Mwai Kibaki

and Prime Minister Raila Odinga, the effort of the then Minister for Justice and Constitutional Affairs failed to yield.

Subsequent events thereafter led to the resignation of the Minister from the Government and she was succeeded by Hon. Mutula Kilonzo whose efforts also failed when his colleagues in Cabinet rejected a much improved version of the original Bill.

It was at that stage Mr. Speaker that the Civil Society led by the Law Society of Kenya and supported by others including ICJ, ICPC, FIDA-Kenya and a number of us in the Back Bench met, fine tuned and improved on the earlier Bill rejected by the Cabinet and in a departure from the traditions of this August House, published it in draft form in the website of End Impunity in Kenya seeking views from Kenyans within and without.

Mr. Speaker Sir, within days the website recorded more than fifty thousand (50,000) hits and close to five thousand (5,000) comments and suggestions for improvement.

The result Mr. Speaker is the Bill I am introducing for debate.

CONSTITUTION OF KENYA (AMENDMENT) (NO 3) BILL, 2009

Mr. Speaker, may I at this point remind Honourable Members that what is before this House today is the product of all the above efforts.

It is not the sole effort of one Gitobu Imanyara but the combined efforts of Kenyans determined to end the culture of impunity in our beloved republic.

Mr. Speaker, why this Bill? In line with **Recommendation No. 6** (six) of the Waki Report, the Bill proposes the following constitutional amendment:

3. *The Constitution is amended by inserting the following new section immediately after section 3-*

3A (1) There is established a Tribunal to be known as the Special Tribunal for Kenya which shall have exclusive jurisdiction in accordance with this Constitution to-

- a) Investigate, prosecute and determine cases against persons responsible for genocide, gross violations of human rights, crimes against humanity; and***
- b) Investigate prior and subsequent events, circumstances and factors relating to the crimes and to prosecute related offences arising from and connected with the crimes committed in Kenya in connection with the December, 2007 General Election.***

Clause 3A (6) – this section shall cease to be effective upon expiry of three years from the date of the establishment of the Tribunal provided that Parliament may extend the life of the Tribunal which may be extended, in appropriate circumstances and at the request of the Tribunal by a resolution of the National Assembly supported by not less than sixty-five percent of all the members of National Assembly excluding ex-officio members.

Mr. Speaker in line with **Recommendation No. 5** of the Waki Report, the Bill proposes in Clause 3A(2):

Notwithstanding the provisions of this section, the International Criminal Court established under the Rome Statute shall have concurrent jurisdiction to investigate, indict and prosecute persons bearing the greatest responsibility and the Tribunal may at any stage, make a referral to the International Criminal Court as set out in Article 14 of the Rome Statute with reasons thereof, if it deems it expedient provided that no persons shall be subjected to prosecution by both the International Criminal Court and the Special Tribunal at the same time.

Mr. Speaker, in line with **Recommendation No. 2** of the Waki Report, and in recognition that this country has fully operationalised the International Crimes Act, 2008 and in recognition of the Vienna Convention, section 11(3)(i) and (ii) of the Bill are couched in the following words:

11(3) (i) this section shall apply equally to all persona without any distinction based on official capacity and shall in no case exempt a person from criminal responsibility nor shall it in and of itself constitute a ground for reduction of sentence.

11(3) (ii) Immunities or special procedural rules which may attach to the official capacity of a person whether under national or international law shall not bar the Tribunal from exercising jurisdiction over such a person with respect to the Vienna Convention.

Mr. Speaker, in line with Article 28 of the Rome Statute, section 11(4) proposes as follows:

11(4) The fact that any other acts under the interpretation section hereinabove was committed by a subordinate does not relieve his superior of criminal responsibility if the superior knew or had reason to know, or ought to have known, or owing to

the circumstances at the time, should have known, or consciously disregarded information which clearly indicated that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to submit the matter to the Competent Authorities for investigations and prosecution.

11(5) The fact that an accused person acted pursuant to an order of a Government official or of a superior shall not relieve him or her criminal responsibility.

Contrary to assertions from some quarters, the Bill does not target any one personality, institution or community.

It targets the perpetrators of impunity wherever they are and from whatever community or racial group in Kenya.

Indeed, Mr. Speaker, Section 11(1) of the Bill is couched as follows:

...11(1) A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime shall be responsible individually for the crime.

Mr. Speaker, in line with **Recommendation No.1** of the Waki Report, the Bill has given the Tribunal wide powers to look at events that not only took place after the disputed presidential results were announced but also those that preceded the General Elections.

Section 4 of the bill gives the Tribunal the following functions:

4(1) - The functions of the Tribunal shall be to investigate, prosecute and determine cases against persons bearing responsibility for genocide, gross violations of human rights, crimes against humanity and other crimes which occurred in relation to the General Elections held on 27th December 2007.

4(2) - The Tribunal shall have power to investigate prior and subsequent events, circumstances and factors relating to the crimes and to prosecute related offences arising from and connected with the crimes.

Mr. Speaker, Section 52 of the Bill seeks to identify the victims of the post election violence for compensation.

The Tribunal shall determine who to pay compensation for the identified victims after assessment has been undertaken by a Special Magistrate.

And lastly Mr. Speaker, the effects of investigation, indictment and conviction on holders of public office are as stipulated in clause 55 of the Bill.

It is couched in the following terms:

55(1) A public officer under investigation shall stand relieved of duties until exonerated.

55(2) A public officer who is indicted or convicted of a crime under this Statute shall cease to hold public office.

Mr. Speaker the Bill before this House today does not aim to replace the normal criminal processes or work of the Kenyan Judiciary.

It is not imposed upon us from outside but as I have explained, it does recognize the efforts of the international community as entrenched in the Constitution through the Panel of Eminent African Personalities.

It is in four (4) parts

PART I contains preliminary provisions.

PART II provides for the operations and structure of the Special Tribunal for Kenya as a body corporate. It sets out the procedure for the appointment of judges of the Tribunal, the Prosecutor, Registrar, Defence Counsel and Special Magistrates. The Part also specifies the Crimes to be prosecuted by the Tribunal.

PART III contains financial provisions in respect of the Tribunal and provided for the sources from which the funds for the Tribunal will be drawn.

PART IV contains miscellaneous provisions including the requirement that the Tribunal do prepare and submit a report on its work to the National Assembly.

The Bill gives the two principal signatories to the National Accord extraordinary authority to ensure the proper functioning of the Special Tribunal.

All we are doing is being supportive of their efforts.

In conclusion Mr. Speaker I want to emphasize that the Special Tribunal that this Bill seeks to establish is a truly Kenyan tribunal.

It uses the best of international practice and of international legal know-how as recommended by the Panel of Eminent African Personalities.

It is created by the will of the Kenyan people and a creature of this House and none other.

The Special Tribunal is not answerable to the UN or to Kofi Annan or any foreign envoy.

The Bill clearly differentiates between main culprits and minor collaborators.

It has the necessary instruments for both.

It does not victimize any group or any class.

It serves the victims while dealing with nuance and differentiation with the culprits.

The Special Tribunal we are creating does not depend on the ICC but it will collaborate with it.

Passing this Bill into law Mr. Speaker, will strengthen our sovereignty and show critics and detractors that we are not a failed State but a State that is able, ready and willing to regulate her own affairs.

I urge the House to enact this Bill into law. In the words of Winston Churchill, "***we are still toiling up the hill; we have not yet reached the crest-line of it; we cannot survey the landscape or even imagine what its condition will be when that longed-for morning comes. The task which lies before us immediately is at once practical, more simple and more stern. I hope - indeed I pray - that we shall not***

be found unworthy of our victory if after toil and tribulation it is granted to u. for the rest, we have to gain the victory. That is our task."

Mr. Speaker, I beg to move and request Hon. Danson Mungatana to second.
