

## **Special Tribunal Workshop by the International Centre for Policy and Conflict (ICPC)**

### **About the International Centre for Policy and Conflict (ICPC)**

The International Center for Policy and Conflict, ICPC, is registered in Kenya under the Trustee (Perpetual Succession) Act as non-government, non-profit organization fostering democratic, peaceful, secure and just societies in the Great Lakes and Horn of Africa by engendering the principles of justice, accountability, the rule of law and sustainable human security. These goals are accomplished through research, documentation, capacity building and technical assistance, networking, dialogue, information sharing and advocacy. The Center's core programmes are: Transitional Justice; Conflict Resolution and Peacebuilding; Gender Justice; Capacity building and Technical Assistance; and Human Security and Displacement.

### **The Special Tribunal Workshop Concept Note**

Re-establishing the rule of law, and ending impunity for past and present crimes, remains a key to securing sustainable peace. Justice is about transcending impunity and the promotion of the rule of law. The International Center for Policy and Conflict has for long advocated for a comprehensive and coherent transitional justice, aimed at addressing past in historical injustices, present and future gross human rights violations.

In desire to move towards realizing this noble goal, the Center in collaboration with other civil society organizations has pushed for the full implementation of the Commission of Inquiry into Post-Election Violence (CIPEV) report recommendations and transitional justice mechanisms-prosecutions and institutional reforms- to promote and consolidate genuine national healing and reconciliation in Kenya. The workshop is part of the Center's Transitional Justice Programme focusing on: a) Truth Justice and Reconciliation process; b) Special Tribunal for Kenya Monitoring; c) Institutional reforms

The purpose of this workshop includes:

1. To learn and share experiences acquired outside Kenya in the relation to Special Courts and Tribunals which are relevant to the establishment of the Special Tribunal for Kenya.
2. To discuss and build consensus on the structure, mandate and character of the Special Tribunal for Kenya and
3. To agree on the framework and strategies to push for institutional reforms as per CIPEV recommendations

## **Introductory Remarks by Ndung'u Wainaina, Executive Director, International Center for Policy and Conflict**

The ICPC strongly supports the immediate establishment of the Special Tribunal for Kenya (STK) as recommended by the CIPEV report. The mandate of the STK is cut out to focus on who bears the greatest responsibility for the alleged commission of grave crimes related or connected to the post election violence. This STK once formed and in focusing those that bear the greatest responsibility should locate responsibility with the people who actually made decisions as planning of these crimes usually occurs at the highest level of decision making and the likelihood of criminal prosecution provides the best chance for deterrence. This therefore provides the best chance of reaching the greatest number of victims.

The domestic laws especially those that define grave human rights violations need to be reviewed and lack of capacity to investigate and prosecute the Post Elections Violence perpetrators by our current institutions has been acknowledged, thus the recommendation for implementation of the International Crimes Bill. The ICPC calls upon the Ministry of Justice and Constitutional Affairs, Kenya's National Assembly and the Attorney General to hasten the process of enacting a proper conceptualized domestic law dealing with Crime Against International Humanitarian Law that defines and penalizes crimes Against International Humanitarian Law and other serious international crimes in order to face and confront the culture of impunity through a fair, credible and effective mechanism of holding perpetrators accountable.

Domestic law once properly enacted will enable and empower Kenya to prosecute International crimes, strengthen its criminal justice system and contribute to an effective international criminal justice regime. This will also provide a threshold for both the Government of Kenya and the International community through the Panel of Eminent African Personalities to ensure there is firm and decisive action through legislation that ensures that proper, thorough and professional investigations and prosecutions of both persons bearing the greatest responsibility and those most responsible for committing human rights violations including the culpable institutions in the post election violence. This guarantees that the survivors and victims of the post election violence get appropriate remedy and that the culture of impunity that has endured for long in Kenya posing a serious threat to the rule of law, human rights and democracy in Kenya is eradicated.

**Guest Speaker, Hon Gitobu Imanyara, Member of Parliament for Imenti Central and Advocate of the High Court of Kenya**

**Background**

In his background presentation Hon. Imanyara noted that there is reluctance on the part of the executive to implement the CIPEV report and therefore efforts by Civil Society Organizations to ensure the report is implemented are crucial and must be sustained. He noted that the International Humanitarian Law and Human rights law recognizes individuals with inalienable Human Rights. The same law he noted does not recognize titles such as Presidents, Prime Ministers and ministers among other senior government officials.

Sadly he noted that there are instances where there is immunity and in such instances impunity. However he noted that those who seek to deny other human beings their Human Rights on alleged stolen elections, land, historical injustices shall not use this as an excuse. In 2007 Tribal chiefs got the impression that they could escape liability as it had happened previously therefore the reason for hot debates witnessed after the release of the Waki Report, underestimating the moral falls of the International Humanitarian Law. The leaders failed to realize this time that the Commission of Inquiry into the Post Election Violence and its subsequent report was not a Kenyan affair and is not a project that can and could be manipulated locally. Those who think they can manipulate this report are falsified. The National Assembly through the 20 member Inter Parliamentary Unit which was formed to deal with the implementation of the recommendations in Waki report led to subsequent actions by cabinet which Cabinet had failed to provide leadership initially. The cabinet had held three cabinet sittings and it did not address the issues of the implementation of the Waki report. This should be read within the context of time extension and the failure of key members of the executive such as the president to appear before the commission

**The implementation of the CIPEV Report**

There is no option on the implementation of the CIPEV report and having knowledge of this; the cabinet formed a committee headed by the President to spear head the implementation of this report. Kenyans have learnt that Impunity when not conclusively dealt with invites further anarchy. Prompt, thorough and impartial investigation is the rationale for the CIPEV recommendations.

**Commitment by the Government**

The Commitment by government in the implementation of the report has been deficient and the following instances in the report will show:

*“One time consuming matter that kept the commission from immediately addressing its substantive work was the lack of Office space. .... The Panel of Eminent African Personalities kindly assisted with temporary quarters even though they were not formally responsible for the commission... it took three weeks of discussions with the Panel and various government officials until the commission was properly settled ...”<sup>1</sup>*

This lack of office space after an undertaking by the Government of Kenya speaks volumes on the government's commitment to this process. Further the commission did not have time to visit all areas that had been heavily affected by the Post Election Violence.

*The commission thus wrote to his Excellency the president of the Republic of Kenya and the Panel of Eminent African Personalities asking for a sixty day extension while the Panel of Eminent African Personalities supported the request the National Dialogue and Reconciliation Team which comprised of the Kenyan Component and the final decision maker did not.<sup>2</sup>*

This diminished the capacity of the commission to engage in forward planning. As a result therefore the commission was denied the time to conduct proper investigations. This attitude speaks volumes on the commitment by the government.

### **Witness protection**

There is no reliable witness protection program and even if the law has been enacted the Attorney General has not operationalized this Act and this has contributed to diminishing the content of the CIPEV report.

### **The number of People who testified**

The vast majority of people who wanted to testify came forward much later. There needs to be consideration of whether there should be extension of time for the purpose of seeking more evidence and testimonies from victims and witnesses.

In the instance of the Rift Valley province which was heavily affected by the Post Election Violence only 30 persons testified with only 15 of these witnesses being victims and witnesses while the rest were members of the Provincial Administration and members of the police services. In Western province the commission did not find first hand information which was peculiar as the province also witnessed post election violence.

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<sup>1</sup> *Report of the Commission of Inquiry into Post Election Violence at page 2*

<sup>2</sup> *Ibid page 3*

### **The choice to name names**

Those named in the CIPEV report are powerful individuals in politics, government, powerful businessmen and members of the police force and elsewhere whose capacity for interference cannot be underestimated. Civil society organizations have a responsibility to exercise caution and Kenyans of goodwill have to be careful not to render the recommendations useless.

### **The role of the Media**

The media has an obligation to inform the public in the proper content of the Waki report clear from the distortions of politicians

### **Challenges to the implementation of the CIPEV Report**

1. The International Crimes Bill and the Witness Protection Act have both not been tested. The Witness Protection Act has not been fully operationalized by the office of the Attorney General and this may diminish the value of the tribunal.
2. As we make recommendations we need to be satisfied that the fears of the CIPEV commissioners are met as stated in the report. Witnesses have not testified; government officials refuse to come forward to testify among other challenges. These issues must be addressed so that we do not lose the opportunity to combat impunity
3. The Waki report does not provide a basis for a local tribunal in their own admission due to the shortcomings already in the report. Further Kenyans need a dispassionate look from the politicians and be objective on the implementation of this report. The report does not set the threshold of a local tribunal and this may provide perpetrators an opportunity to escape and perpetuate impunity.

### **Recommendations**

The investigative capacity of the CIPEV report locally may be inadequate and there is need to think about embracing international capacity for investigation and prosecution. Further the challenges faced by CIPEV should be considered in the implementation of the report.

### **George Kegoro, Executive Director International Commission of Jurists (ICJ) Kenya chapter and former Secretary CIPEV**

*Mr. Kegoro had the role of providing an overview of the Special Tribunal as recommended in the Waki tribunal report and provide a context on ensuing discussions.*

### **The Special Tribunal according to the CIPEV Report**

The Special Tribunal for Kenya shall act as a Court that shall sit in the territorial boundaries of Kenya. The law to be applied shall be Kenyan Law and the International Crimes Bill (once enacted). The tribunal shall consist of both Kenyan and international staff.

The Political elite will display within 60 days (expiring on 17<sup>th</sup> December 2008) commitment to the establishment of the Special Tribunal for Kenya by signing an agreement thereafter the Statute of the Special Tribunal Bill, legislation that shall be enacted within 45 days.

### **Date of commencement of the Special Tribunal for Kenya**

The date of commencement shall be determined by the president in consultation with the Prime Minister, the Chief Justice and the Minister for Justice and Constitutional Affairs

### **Default moments**

The report provides for instances where there is failure to enact the Bill establishing the Special Tribunal for Kenya:

1. If agreement is not signed
2. Failure to enact legislation- lack of sufficient support
3. If the tribunal fails to commence its work
4. If its Purposes are subverted that is if the Special Tribunal becomes ineffective, there is sabotage

In the event of such moments this then triggers a reference by the Panel of Eminent African Personalities a list bearing the names of and relevant information on those suspected to bear the greatest responsibility for the crimes falling the jurisdiction of special tribunal shall be forwarded to the special prosecutor of the International Criminal Court and he shall be requested to analyze the seriousness of the information received with a view to proceed with investigations and prosecuting such suspects.

### **Organs of the tribunal**

1. Trial Chamber-chair Kenyan, two international members  
Appeals chamber- chair Kenyan, two international members
2. The prosecution
3. The Registry
4. The Defense office

### **Prosecutor**

The qualifications of the prosecutor are identical to those of the international judges while the Head of Investigation within the Prosecutor's office shall be none Kenyan. The inclusion of international investigative component instills trust and is of great benefit as they bring in expertise, independence and trust for the persons who interact with the investigators as was witnessed in the proceedings of the Commission of Inquiry in to the Post Election Violence.

### **Jurisdiction of the tribunal**

There is an Appeals chamber that facilitates insulation of the Special Tribunal processes completely from the ordinary courts and provides for due procedure and rights of appeal. There is an ouster of the ordinary courts which Kenya has had no track record for dealing with cases of this nature.

The materials and documents received and used by CIPEV shall be handed over to the tribunal once it's constituted but shall not limit the materials that the tribunal shall use.

### **Questions from the Plenary**

1. Why doubt on the mandate to investigate locally
2. Do we have hope that The Hague will take on the Kenyan case?
3. Why not reinforce the local mechanisms?
4. Will Hague have the capacity to deal with all involved?
5. Is parliament ready to get the legislation enacted before the recess?

### **Responses**

Members expressed concern on the implementation of the CIPEV report in light of the deadlines set in the report vis-a-vis the Parliamentary calendar. Hon. Imanyara clarified that the government has a mandate to fulfill its political platform and parliamentary business. This mandate is exercised by the government business through the house business committee chaired by the leader of government business. The conduct of Government in handling the implementation of the Waki Report and the apparent delay in presenting proposed amendments to the Constitution and tabling of Bills before parliament fortifies the misgivings expressed on the capacity and the willingness of government to implement the report. Parliament goes on recess on December 18, 2008 and there have been no legislative proposals by the government. At this rate it may be necessary to study the default clauses and develop alternative strategies. Kenyans may in light of the foregoing need to prepare for The Hague and the International Criminal Court (ICC) as an option especially considering the Kenya has not domesticated the International Crimes Bill and this provides wider latitude for implementation. There are warrants out as the instances in Yugoslavia and Sudan. The Politicians in Kenya fear the capacity of The Hague and their current support for the Special Tribunal

for Kenya is not genuine. Let Kenyans not underestimate the capacity of the ICC to bring perpetrators to justice the Crimes Against Humanity do not know geographic boundaries. Hon Imanyara fears that an entirely local Tribunal will not lead us to the Promised Land as the report addresses people who have control to state resources. These doubts are informed by history and the government does not have a track record of acting on recommendation of Commissions of Inquiry set up by itself. Actions by government and the members representing both sides of the divide in the National Dialogue and Reconciliation process, now ministers and the processes in the Commission of Inquiry into the Post Election Violence, is very telling in terms of how they have operated and how they may operate. Parliament on the other hand needs to free itself from manipulation so that they can implement the recommendations of the Waki report. The issues of impunity cannot escape scrutiny. Crimes Against Humanity have no boundaries and the Waki commission was not local.

## **SESSION 2**

### **Considerations in the establishment of a special tribunal: Comparative Experiences**

*Marieke Wierda (Director of the Prosecutions Programme) and Cecile Aptel (Senior Fellow) of the International Centre for Transitional Justice (ICTJ) provided technical knowledge and facilitated discussions on the Special Tribunal for Kenya as recommended by the Waki Report, and indicated how this mechanism is linked to TJRC and institutional reforms.*

The mandate of the ICTJ is to assist countries pursuing accountability for past mass atrocities or human rights abuse. ICTJ also works in societies emerging from repressive rule or armed conflict, and established democracies emerging from historical injustices or systemic abuse and where such injustices remain unresolved.

In this presentation titled the Considerations in the Establishment of a Special Tribunal: Comparative Experiences the outline of the presentation is as follows:

- **Establishment of the ST**
- **Jurisdiction of the ST**
- **Procedure**
- **What are the required resources for the ST to operate properly**
- **Relationship with the ICC**

### **Establishment of the Special Tribunal**

After the precedents of the International Military Tribunals of Nuremberg and Tokyo established after the World War II, new international Tribunals were

established in the early 1990's when the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, under chapter VII of the United Nations charter which relates to Action with respect to threats to the peace, breaches of the peace, and acts of aggression. The ad hoc Tribunals for Yugoslavia (1993) and Rwanda (1994) are purely of an international nature and the judges and chief prosecutors are international employed by the United Nations. Subsequently, as of the late 1990's there is emergence of a new trend where the United Nations and governments concerned negotiated agreements on the establishment of Special Tribunal initiatives as the case has been in Sierra Leone 2002, Cambodia 2003 Guatemala 2007 and the Special Tribunal for Lebanon 2007. These Special Tribunals have a combination of both local and international judges, prosecutors and personnel.

Partnership with the United Nations in establishing these Special Tribunals is critical notably in terms of resources. Further, strong involvement by the international community especially in a context of none-functioning government, goes to sustain and fortify the establishment and reconstruction of national courts. However one disadvantage is that these special tribunals are sometimes far removed from the people as for the instances witnessed in Rwanda and Yugoslavia.

### **Some of the main issues that needs to be addressed in relation to the Special Tribunal for Kenya**

From the onset of the establishment of a tribunal, Kenya has to clarify and resolve several factors. These include;

1. What does Kenya want to achieve through the Special Tribunal for Kenya?
2. What is the nature of such tribunal; shall it be a local, international or hybrid tribunal?
3. Is there adequate political commitment to support the tribunal?
4. How is the tribunal domesticated, is it through an agreement, an act of parliament (Bill) or both?
5. If Kenya wants a Hybrid model is there possibility of an agreement between the government and possibly the United Nations or another international organization? What then shall be the role of the Panel of Eminent African Personalities?
6. What is the nature of the court?
7. How will funding for this tribunal be secured?

### **What is the role of the Panel of Eminent African Personalities?**

It seems that the panel of Eminent African Personalities is not a separate legal entity and is not an international organization. Does it have the power to enter into

agreements with the government with a view to establish a new international organization such as a truly hybrid tribunal? Usually such an agreement is made in partnership with an international organization. The agreement that the Government enters into has an impact on the nature of the court. Government would have to negotiate and sign an agreement for the establishment of the Special Tribunal for Kenya with the United Nations - or possibly the African Union - if this option is preferred.

### **What is the nature of the court?**

In addressing and determining the nature of the Special Tribunal several questions need to address such as who will investigate, what will be the role of the Kenya Police Services, should the Special Tribunal's investigators rely on the Kenya police, has the prosecutor got power to subpoena or take other coercive measures and what procedures will be used?

### **The registrar**

The registrar usually has a huge role in the functioning of a special tribunal as (s)he is responsible for securing and authorizing utilization of funding, facilitates witness protection, is in-charge of communication among other crucial functions of the Special Tribunal. In establishing the Special Tribunal for Kenya therefore these issues need to be addressed and there is need for clarity.

### **Appointment and removal procedure**

In setting up appointment and removal mechanisms it is important to see which institution or office is bestowed this responsibility and what is the capacity for influence and how does this affect the independence of the Special Tribunal.

### **Victims' participation**

In setting up a special tribunal it is important that the Victims of necessity understand the mechanisms set out to achieve justice for them and the victims must further have confidence in these mechanisms.

### **How will the Special Tribunal for Kenya operate?**

Several factors need to be considered, Will the Special Tribunal for Kenya be parallel to the Kenyan courts in terms of jurisdiction? Will there be concurrent jurisdiction over the same crime or will the Special Tribunal have primacy over the national courts? It is recommended that the statute establishing the Special Tribunal for Kenya should provide for primacy of jurisdiction. The CIPEV Report recommends exclusive jurisdiction for the Special Tribunal, however there needs to be a clear distinction between concurrent jurisdiction and primacy of jurisdiction and in so doing care should be taken so that the Special Tribunal is not over

burdened and this will further determine the duration upon which the Special Tribunal will work.

### **Other factors to be considered**

In the process of establishing the tribunal the following issues need to be considered:

- What is the relationship of the Special Tribunal with Kenyan criminal Jurisdiction?
- The Positive impact and legacy the Special Tribunal will have for the Kenyan criminal jurisdiction in terms of training.
- Further the issue of funding and Resources must be addressed. In Agreements with the United Nations the United Nations usually provides a lot of resources. In making such determination it is important to consider who in this agreement has the power not only to recruit and employ judges, prosecutors, investigators, and other personnel, but also who will pay them, and if need be vet them.

### **2. Jurisdiction**

The Jurisdiction of the Special Tribunal for Kenya as provided in the draft published by the media lacks clarity. The ground for responsibility according to the Special Tribunal Bill borrows from the ICC statute. Clarity in the area of the crimes to be tried by the STK is necessary. The Waki report recommends a subject matter jurisdiction extending to international crimes, but what about ordinary crime? Should the STK try only international crimes or should it provide for both domestic crimes and international crimes? International crimes and definition of international crimes also attract threshold questions such as do the incidences of the Post Election Violence amount to the gravity of international crimes? Were Crimes Against Humanity committed in Kenya? There are evidentiary standards in International crimes that apply and may complicate matters. In addition, the reference to Human Rights Violations may lack precision and need to be looked at. There are strong arguments for including both local and international crimes in the subject matter of a Special Tribunal, and it is best is to provide safety nets.

The jurisdiction of the STK necessitates a critical look at the Retroactivity principle and how this shall apply in the Kenyan context.

### **3. Procedure**

#### **Law to be applied**

The Special Tribunal for Kenya according to the Waki report shall apply the Kenyan law and the International Crimes Bill (if enacted). In these terms therefore it is not very specific. In most special tribunals the adoption of the rules of procedure and evidence is left to the judges, who are usually guided by the applicable rules of

criminal procedures and adapt them to suit the circumstances of the context. Further it is also unclear if and how the evidence by CIPEV will be handed over to the Tribunal, what was the procedure and evidentiary threshold that guided the CIPEV commission in its collection of evidence, and how will the Special Tribunal work with the Kenyan criminal system and institutions including the Kenya Police Services.

### **Victim participation**

In the establishment of the Special Tribunal for Kenya there should ideally be an elaborate Victim participation component. This shall ensure that the victims participate in the process and feel this justice and the process therein is justice that they deserve. This component also resolves and clarifies whose justice is the Special Tribunal served to establish and also potentially addresses issues of deterrence.

### **Due Process**

The Special Tribunal must also ensure that the issues of due process concerning fundamental guarantees and respect all the legal rights that are owed to the suspects and accused. This similarly ensures impartiality and diminishes risk of perception of unfair treatment.

### **Admission of written evidence**

The Special Tribunal for Kenya needs to consider the possibility to bring live testimony as well as the Admission of written evidence. This mechanism could be adopted as a way of saving crucial time if the Judges admit written affidavits as evidence.

### **Witness Protection**

Witness Protection is needed for the protection of all threatened witnesses before, during and after a trial. While a witness may only require protection until the conclusion of a trial, some witnesses may live out the rest of their lives under protection.

## **4. What are the required resources for the Special Tribunal to function properly?**

Hybrid Tribunals generally take a lot of resources and the Special Tribunal for Kenya should consider ways to minimize such costs such as the use of already existing evidence as the evidence received by the Commission of Inquiry into the Post Election Violence. Further in addressing the issue of resources consideration should be made in to how broad should be the mandate of the Special Tribunal for Kenya and how many cases it will deal with?

### **Modalities for investigation**

Investigations need to be multi disciplinary that is they need to show a pattern as opposed to single isolated cases. Evidence linking the crimes on the ground with those bearing the highest level of responsibility need also to be acquired by the prosecutor. The investigative team should be multi disciplinary and this should include security experts, gender crimes specialists, and historians among others.

### **Funding**

The funding component needs to be linked to the independence of the Special Tribunal at the onset

### **5. Relationship with the ICC**

The Waki report links the discussion on the Special Tribunal with the International Criminal Court. The International Criminal Court (ICC) is an independent international organization that will exercise its jurisdiction through the prosecutor, a Security Council referral or by a state referring a case as in Uganda and the Democratic Republic of Congo. Handing over evidence does not qualify as state referral. It is impossible to say how the prosecutor would treat this case. However Kenya has an opportunity to maintain a dialogue and request the ICC to sent representation to Kenyan to examine the particularities of this situation. Civil society needs to sustain dialogue on complimentarity of ICC as there is a high degree of uncertainty of how the prosecutor would react.

The Relationship with other accountability mechanism such as the Transitional Justice and Reconciliation Commission Act should be examined closely to ensure that these mechanisms do not undermine each other.

In conclusion of the presentation it was noted that there are several areas of continued discussions and these areas remain unclear. There should be more clarity on the following issues:

- Will this be a domestic tribunal or hybrid and who is the international counterpart?
- On process questions (and referring to the Bill that appeared in the in paper today) how are the nomination procedures defined?
- How will the Special tribunal be resourced for example staff and other resources?
- Focus on the removal clauses on as the grounds as currently presented are reasonably unclear
- What should be the interplay with the ICC?

In responding to all these issues the Civil Society Organizations have a very crucial role to play.

**Betty Murungi, Executive Director, Urgent Action Fund**

*Ms Murungi provided a reflection of the proposed Special Tribunal for Kenya*

She noted that there has been no opportunity to sufficiently examine the Special Tribunal for Kenya Bill which was released by some sections of the press this morning but there is room for more dialogue on the Draft Bill.

The Special Tribunal for Kenya will have exclusive jurisdiction for Crimes Against Humanity, human rights crimes and genocide. There is no temporal jurisdiction as the crimes can go as far back as before the Post Election violence. Concurrent criminal jurisdiction is assumed but is not expressed in the STK Bill and this is derived from reading the Bill together with the Transitional Justice and Reconciliation Commission law.

The Special Tribunal for Kenya has a lot of cut and paste from the ICC and the domestication of the International Crimes Bill poses problems of retroactivity. Further the International Crimes Bill may be construed to be unconstitutional as it does not recognize immunity for Heads of States. Further glaring inconsistencies in sentencing between the International Crimes Bill and other Kenyan laws must be harmonized.

The Waki report Special Tribunal proposal is supposed to be a hybrid as references on the personnel will show but the report did not go further to propose or think of the partner. The Panel of Eminent Personalities is from the African Union and the United Nations supported this initiative so it is possible to trace this partnership. The National Dialogue Agreement would trace these issues. This will be an expensive undertaking with no details on how they will be financed. Further the office of the defense does not make sense in Kenya as it common Knowledge that those responsible are people who are capable of getting their own lawyers.

The Waki report concurrent criminal jurisdiction is assumed but is not expressed in the Special Tribunal Bill but this needs to be read together with the TJRC law. The narrow definitions of the crimes of the Special Tribunal Bill fail to define crimes and we need more action and consultation before the International Crimes Bill is passed. Further we must note that Genocide is not a crime under Kenyan law and Kenya is not a signatory to the Genocide Convention. The recommendation in the Waki report on the enactment of the International Crimes Bill needs to be implemented.

### **Discussions from the Plenary**

Stephen Musau of Release Political Prisoners Trust wondered if Kenya is keen on putting in place an objective and credible tribunal noting that despite the timeline set by the CIPEV report no agreement had been signed. Nor has there been involvement of the Panel of Eminent African Personalities. Civil society and their participation was totally lacking in this process. He further that noted that the International Criminal Bill, which provides a basis for the prosecution of crimes under the Special Tribunal has not been enacted. The Members of Parliament need to be put on notice and be reminded of their crucial role in this process otherwise Kenya shall not totally eradicate impunity.

Njenga Mwangi Advocate who represented the internally displaced persons at the Commission of Inquiry into the Post Election Violence (CIPEV) lauded The Special Tribunal for Kenya as timely and may contribute to the cutback of the culture of impunity that has evolved over time. However the fear of reprisals by victims is a factor that affects the performance of the functions of the investigating team. Some of the witnesses who testified in the Commission of Inquiry into the Post Election Violence have already been threatened. Sadly the Attorney General has not operationalized the Witness Protection Act. Kenya should learn from the Rwandan experience. It is possible that witnesses may upon the establishment of the Special Tribunal disappear or renounce their evidence. He further recommended the application of concurrent jurisdiction is most crucial so that the Special Tribunal for Kenya tries those who bear the greatest responsibility such as the planners, the instigators, the financiers and other crimes be tried by the ordinary courts.

The Member of Parliament for Ndaragwa Hon Jeremiah Kioni told the meeting that there is a lot of lobbying going on within the precincts of parliament to ensure that Kenya does not go to The Hague. He noted that addressing the current problems that relate to the Post Election Violence, we need to use routes and avenues that are devoid of political manipulation and all must take responsibility for the role they played in violating the Human Rights of other Kenyans. He warned that if the government is given the responsibility for funding, the process will definitely die. The effectiveness of this Special Tribunal will fall in to the mischief and politics of control of the next government. Further Hon Kioni informed the forum that the victims have given up on local solutions. Many Kenyans and victims do not know or understand what The Hague option is about but they have more confidence in a process outside the jurisdiction due to the fear of manipulation and based on the poor record Kenya has in the implementation of reports of the Commissions of Inquiry. In light of this therefore whatever options Kenya picks we must move and take note of the concern of the victims and the Kenyan populace. On constitutional

amendments Hon Kioni noted that due to the high threshold required for Constitutional amendments there may be challenges faced in the possible amendment on the constitution. With the cracks in the political parties and political power struggles amongst leaders and members of parliament, these politicians cannot be trusted to have the best interest of the nation at heart. Whatever option is preferred Political will, will be central.

Murugi Maina of UN OCHA wondered what other measures can be put in place to protect witnesses especially borrowing from other experiences in other jurisdictions.

Apollo Mboya of the Law Society of Kenya observed that there are certain constitutional provisions that have so far not been addressed such as Section 26 of the Constitution dealing with the doctrine of Nolle prosequere and Section 29 dealing with the Prerogative of Mercy or Presidential pardon. These provisions pose a challenge to the implementation of the International Crimes Bill and their application especially considering the doctrine of the supremacy of the Constitution. Further there is a big Challenge in terms of investigation as the police force were highly indicted and implicated in the Waki report and the big question is how then does Kenya proceed?

Kang'ethe Mungai wondered what the limitations of the International Criminal Court are and why Kenyans cannot confront their own problems. Kenyans must be ready to address and face their problems when they occur.

On the ICC members wondered whether the option is feasible especially while noting that the International Criminal Court was never meant to supply complementarity in criminal justice. Should Kenyans totally reject the local Jurisdiction? Evidence of unwillingness and lack of commitment by the government may be the reason why the ICC may be approached.

On the Retrospectivity or the retroactivity principle is it possible for parliament to apply this principle? If this is not achieved then what happens to the Post Election Violence crimes?

Fears were expressed on whether what happened in Kenya during the Post Election violence amounts to genocide noting that the thresholds in the definition of genocide have not been achieved.

The Special Tribunal must meet international standards such as impartiality, independence and the involvement of the international community.

The CIPEV report needed to shielded from long standing historical injustices as the witnesses existed and not to allow complication by the issues of the TJRC. The issues of criminal responsibility were not to be interfered with.

Members expressed a real apprehension that the Witness Protection Act has not been tested and reprisals may emerge from this.

Can the legal personality of the Panel of Eminent African Personalities be inferred by the National Dialogue Agreement?

### **Responses to the points raised in the discussion**

#### **On the Police**

In cases such as in Guatemala, the police and some prosecutors were apparently heavily involved and there was little confidence in their capacity to conduct investigations as is currently the case in Kenya. In such contexts, methods should be employed to insulate the capacity of a special court to investigate by having internationals in the investigation team, working well with their local counterparts, who are ideally vetted before joining the investigation team. Further there needs to be a multidisciplinary approach to investigation will neutralize and deal with the fears Kenyans have of the Police force..

#### **The Constitutional provisions**

On the Constitutional provisions relating to presidential pardon and Nolle Prosequere, presidential immunity from prosecution and related provisions must be addressed in the statute establishing a Special Tribunal for Kenya. The requirement for a two thirds majority in the amendment of constitutional provisions is however very prohibitive. The Special Tribunal for Kenya may have its immunity bolstered through the adoption of a Special Tribunal of a hybrid nature.

#### **Witness Protection**

The Witness Protection in Kenya has a more general application through the Witness Protection Act in Kenya but it is not specific to the Special Tribunal for Kenya structure. Usually in the hybrid structure the United Nations Witness Protection mechanisms are usually applied.

#### **The Panel of Eminent African Personalities**

The Panel of Eminent African Personalities does not have legal personality as strictly defined and have no know technical competencies based on previous experience in dealing with similar situations. The legal status of the Panel of Eminent African Personalities need clarification and it is important that technical competencies be duly considered in the appointment process, which should also be

transparent. Their role in the establishment of the special Tribunal and related mechanisms needs to be defined.

The International Crimes Bill needs to encompass the bill and build safety nets in the process for instance persons with the highest responsibility is not sufficient as mid level perpetrators may also be highly involved and justice may not be properly achieved if such a high threshold is set. In Sierra Leone only 10 people were indicted as persons bearing the highest responsibility for the crimes and there is still a feeling amongst the people of Sierra Leone that justice has never been fully achieved.

The International Criminal Court has many restrictions and there needs to be continued evaluation of the circumstances. The International Criminal Court looks at gravity and compares with other human rights violations such as the case of Columbia and others. Comparatively domestic processes have far more impact against international processes and shall be more in touch with other reform processes. However there still remains an issue of whether Kenya can have a credible process. The Waki commission recommendations are comparable closely to the Ugandan situation

### **Responses**

- The ICC has many restrictions and there needs to be continued evaluation of the circumstances.
- ICC looks at gravity and compares each situation with others in terms of gravity to define its priorities.
- Domestic processes seem to have more impact than international processes and shall be more in touch with other processes
- Can we have a credible process here in Kenya?

### **Inputs and positions of Plenary**

1. The International Crimes Bill should have a broader definition of crimes that such as ethnic cleansing among others that are adaptable to the experiences witnessed in Kenya's Post Election Violence as the case in Uganda.
2. The Witness Protection Act should adopt independent strategies such as the ones used by the UN jurisdiction and consider options such as relocation of the witnesses
3. Concurrent criminal jurisdiction should be pursued so that ordinary prosecutions are conducted in the ordinary courts

### **Session 3**

#### **Anthony Kuria, advocate of the High Court of Kenya and member of the Kenyans for Peace with Truth and Justice**

*Mr. Kuria made a presentation of the Civil Society version of the Statute establishing the Special tribunal for Kenya*

The Civil Society proposes that report from the Human Rights Watch, Kenya National Human Rights Commission, UN OCHA and the Kenya Human Rights Commission reports in relation to the Post election violence in Kenya as materials for purposes of discharging the mandate of the Special Tribunal for Kenya.

The Civil Society Statute acts as innocuous as fundraising are included for being in furtherance to the post election violence actions - there is in depth breakdown of individual responsibility.

The statute has provisions that relate to command responsibility and vicarious responsibility, police and Minister in charge and even substantively higher-threshold similar to that of the Rome Statute. There is congruence with the government bill that the Special Tribunal should have supremacy over the High court

The organs of the special tribunal similar to the once proposed in the government Bill and as proposed by the Waki Report to include the trial and appeals chamber, the prosecution, the registry and the defense. These organs will elect form among themselves a chair and spokesperson. There is a further requirement that the president shall appoint in making appointments in consultation with Law Society of Kenya as well as the other institutions proposed and that further the persons to be appointed shall have knowledge of International Humanitarian Law, International Criminal Law and this serves to raise the bar for persons who will work in the Special Tribunal.

#### **The office of the prosecutor**

The office of the prosecutor provides for a safety valve on the independence of the tribunal as the prosecutor is not in direct control by the judges and the prosecutor shall be in control of investigation and prosecution with qualifications and high skills. This office is at the heart of this special tribunal.

The prosecutor shall appoint the Head of Investigation from upon recommendations by the Panel of Eminent African Personalities. The Head of Investigation and other members of the investigation members must be members from the commonwealth

The civil society also proposes that no member of the Kenya Police Services shall be recruited or seconded to the Special Tribunal.

### **Office of the registrar**

The Office of the registrar shall be responsible for the running of the day to day activities of the Tribunal. The registrar who shall hold this office should be one who has proven management experience at complex levels. The registrar should not have an open ended contract.

### **The defense office**

The defense office it is established for the purposes of the balancing of arms and further for the purposes of representing accused persons who cannot afford legal services. The recipients will have to prove that they are indigent

### **On Rules of Procedure and Evidence**

The judges of the Special Tribunal will be in charge of formulating their rules of procedure and evidence. The investigator shall have full autonomy of the reports he shall rely on as evidence. The presumption of innocence of the persons' indicted and the rights of the accused person shall still subsist under the tribunal and as provided for under the current constitution.

The Trial Chamber and the Appeals Chamber shall have recourse to the criminal sentences procedures currently available. The tribunal shall not however use provisions of sentencing that relate capital punishment.

### **Protection of victims and witnesses**

Custodian of the Witness Protection Act is the AG and his office has the responsibility of supporting its implementation and in the last budget there was a budgetary allocation for the implementation of Witness Protection. However before full implementation *in camera* proceedings can be introduced for public interest pending implementation of the Witness Protection. In light of this therefore the Special Tribunal will be responsible for penal reform.

### **Privileges and immunities**

The Civil Society Law proposes that all officers working in the Special Tribunal shall enjoy full immunity from criminal and civil proceedings related to or arising out of work duties undertaken in the course of performance of its mandate. The judges, the Prosecutor and the Registrar shall further enjoy the privileges and immunities accorded to diplomatic envoys

### **The expenses of the Special Tribunal**

The expenses of the Special Tribunal shall be discussed in consultation with the Panel of Eminent African Personalities and parliament and shall be charged to the consolidated fund. Kenya has the capacity to raise the funds internally. If

constitution office holders were to be taxed and the country would deliberately control the waste within government through reducing use of fuel guzzlers and having too many ministries and further seeking support from international partners in the form of expertise then the Special Tribunal for Kenya can be sustained.

Further the chair of the Special Tribunal shall submit to parliament an annual report on its operations-this process will help monitor implementation of the Special Tribunal for Kenya Bill.

Kenyans should own the processes that shall bring an end to the culture of impunity. While the ICC option is viable Kenyans may need to consider the limitations of this option. The prosecutor to the International Criminal Court may have his hands full and Kenya needs to make the best effort to try the violators locally. The purpose of the Rome Statute is to make perpetrators pay for their crimes and Kenya should ensure that there is a mechanism for putting our house in order and send a message of deterrence to Human Rights violators in future.

#### **Further comments on the Government Bill**

The government Special Tribunal for Kenya Bill vide Article 25 on pre-trial proceedings gives a very high threshold that could defeat the purpose of the Special Tribunal and this provision needs review. Further the mechanisms for removal of the judges grossly interfere with the autonomy of the judges in the Special Tribunal.

#### Questions

The participants raised the following concerns:

1. Should the principals who brought us to the situation of violence and conflict have a role in the appointment of the judges?
2. How should outreach be conducted is it through the people of Kenya or through parliament as it has been witnessed recently and bearing in mind that the members of the August house and parliament generally is immoral?
3. Should The Hague option which presents an opportunity for independence and freedom from manipulation be entirely discarded or should it be considered alongside the local mechanism?
4. Since funding associated from such tribunals' is enormous shouldn't we seek support from the international community?
5. Are the people for whom these mechanisms are being lauded being part of the discussions for the debate?
6. Will the offences being handled by the Special Tribunal be bailable? The suspects' capacity to undermine the process cannot be underestimated. Crimes Against Humanity are fairly serious and should not be bailed

## **Responses**

- The established practice from Nuremburg, ICTY, Sierra Leone, in the ordinary course of things it is not possible that anyone indicted for crimes against humanity by special tribunal to be admitted to bail. The nature of our domestic law on bail and international traditions will be referred to on the issue of bail.
- The institution of the president and the Prime Minister are both ceremonial and are only limited to appointments.

## **Proposals**

- The ICC can help Kenya in the appointment of judges
- The crafting of the tribunal needs to be clear-is it hybrid or is it an arm of the high court

## **Recommendations**

1. A hybrid option needs to be supported in the Special Tribunal for Kenya Bill. The international community needs to be involved in this process and they could provide a space to engage in technical and logistical support for the process.
2. Kenya needs to raise the bar and set high standards for this Special Tribunal and it should not ignore the feeling of the Kenyan people.
3. Relocation as part of witness protection and how this can be factored and employment of UN mechanisms needs to be considered in establishing the Special Tribunal for Kenya.
4. Not involving the Kenya Police Service is not an option as their role impacts on the criminal investigations in Kenya, and the process cannot reasonably be totally isolated from the police, who have knowledge of the local networks, it would therefore be important to ensure that police officers assisting the Special Tribunals are vetted to ensure that they were not involved in any way in the alleged crimes, and to ensure that only the best professionals are selected. Security sector reform is very crucial
5. Funding: there are no provisions as to funding and this has to be secured in advance as priorities of partners may change. Need to come up with estimates of how much the Special Tribunal will cost, how many people it will employ, etc. Kenya needs to insulate the ST and ensure that independence is upheld
6. It is important to ensure that there is an international oversight/advisory mechanism to the Special Tribunal for Kenya.
7. Success of this Special Tribunal will be about the composition of the tribunal. Kenya is missing international oversight component, channels for cooperation with other states, protection from constitutional challenges and

funding and therefore civil society needs to propose structures that build safeguards and are national in nature.

8. An outreach component is required Victim participation- how is this addressed needs an entire mechanism.
9. to uphold its independence the Special Tribunal for Kenya Bill needs to be clear on the of mandate of the judge and the prosecutor and what happens if on person either dies or resigns
10. Civil society Organizations and the media need to create robust engagement on issues of process, content of the formation of the ST
11. Civil society organizations should provide leadership to the people of Kenya as to how the ICC comes to place and create popular versions of the bills. There is need to distribute the CSO Draft and the government draft on Special Tribunal and engage on this basis, through continued dialogue and discussions.