

**Executive Summary Report of Special Tribunal Workshop organized by
International Center for POLICY AND Conflict (ICPC) December 3rd 2008, Silver
Springs Hotel, Nairobi, Kenya**

About 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**.

Background 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
- 4.

PRESENTATIONS

Introductory Remarks- 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.

Guest Speaker, Hon Gitobu Imanyara, MP 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 recognized that there are instances in the past where there was political immunity for the violators of Human Rights and in such instances the culture of impunity flourished. However he believed that those who seek to deny other human beings their

Human Rights on alleged stolen elections, alleged land grievances and historical injustices shall not use this as an excuse to escape liability.

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 in to 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 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 ...”

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.

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.

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.

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 the 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 short comings 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 17th 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. Purposes are subverted...-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 concerned 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 develop alternative strategies. Kenyans may in light of the foregoing need to prepare for The Hague and the 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 Crime 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 ministers in the Commission of Inquiry in to the Post Election Violence and the processes therein are very telling in terms of how they have operated and how they may operate. Parliament needs to free itself from

manipulation so that they can implement the recommendations of the Waki report. The issues of impunity cannot escape scrutiny.

SESSION 2

Considerations in the establishment of a special tribunal: Comparative Experiences

This session was facilitated by Mariek Weirda(Director of Prosecutions and Cecile Aptel (Senior Fellow, Prosecution) 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 how this mechanism is linked to TJRC and police 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**

1. Establishment of the ST

This process of establishing Special Tribunals started in 1993 when the United Nations Security Council established the International Criminal Tribunal for 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) and consequently the Special Tribunal for Lebanon (2007) are purely of an International nature and entirely all judges are international resources from United Nations. However there is emergence of a new trend where the United Nations and governments concerned negotiate agreements on the establishment of Special Tribunal initiatives as the case has been in Sierra Leone 2002, Cambodia 2003 and Guatemala 2007. These Special Tribunals have a combination of both local and international personnel.

Partnership with the United Nations in establishing these Special Tribunals is vital as the special tribunals Cost a lot of money. Further strong involvement by the international community especially in the common occurrence of none functioning of government such support further goes to sustain and fortify the establishment and reconstruction of national courts. However one disadvantage is that these special tribunals are mainly far removed from the people as for the instances witnessed in Rwanda and Yugoslavia.

The main issue that needs to be resolved 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 and issues before. These include;

1. What does Kenya want to achieve?
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 for the government and possibly of the United Nations and 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?

The panel of Eminent African Personalities is not a legal entity and is not part of an international organization and has no power to enter into agreements with the government. 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 has powers to sign the agreement for the establishment of the Special Tribunal for Kenya with the United Nations if this option is preferred.

What is the nature of the court?

In addressing and determining the nature of the Special Court several questions need to address such as who will investigate, what is the role of the Kenya Police Services, should the investigator rely on the Kenya police, has the prosecutor got power to subpoena and what procedures will be used?

The registrar

The registrar usually has a huge role in the functioning of the 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 give 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 gives exclusive jurisdiction to the Special Tribunal. However there needs to be a clear distinction between concurrent jurisdiction and Primacy 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 to 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 provides a lot of resources. In making such determination it is important to consider who in this agreement has the power to employ, pay, and vet personnel

2. Jurisdiction

The Jurisdiction of the Special Tribunal for Kenya 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 has preference on 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 conducted in Kenyan as part of an armed conflict? There are evidentiary standards in International crimes that apply and may complicate matters and some Human Rights Violations may lack precision and need to be looked at. There are strong arguments for both local and international crimes and it is best is to provide both 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 tribunals such discretion is left to the judges to apply their rules of criminal procedures and be guided by the circumstances of the cases before them. Further It is also not clear as to how the evidence by CIPEV will be handed over to the Tribunal and what shall be the evidentiary threshold of the evidence of the CIPEV commission and how will the Special Tribunal work with the Kenyan criminal system and institutions such as the Kenya Police Services.

Victim participation

In the establishment of the Special Tribunal for Kenya there needs to 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 established and also addresses issues of deterrence.

Due Process

The Special Tribunal must also ensure that the issues of due process that guarantees of the fundamental and respect all of the legal rights that are owed to the suspects. This similarly ensures that the principle of impartiality is practiced and diminishes the perception of unfair treatment as the case witnessed in the Saddam Hussein Trial.

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 is where Judges admit written affidavits and testimonials as evidence.

Witness Protection

The Witness Protection law provides for the protection a threatened witness before, during and after a trial usually by the Police or other institution. While a witness may only require protection until the conclusion of a trial, some witnesses may live out the rest of their lives under government protection. In Kenya this law needs to be used to protect witnesses from intimidation so that victims and other witnesses can testify in confidence before the tribunal.

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

The Hybrid Tribunal and courts take a lot of resources and the Special Tribunal for Kenya should consider ways to minimize such costs such as the use 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 Be?

Modalities for investigation

Investigations need to be multi disciplinary that is they need to show a pattern as opposed to single isolated cases. This ensures that there are links between the crimes for those bearing the level of high culpability by the prosecutor.

The investigative team should be multi disciplinary and this should include security experts, gender 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 international independent body 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 and it's possible to maintain a dialogue and request the ICC to send representation to Kenyan to examine the particularities of the standards. Civil society needs to sustain dialogue on complementarity 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.

Betty Murungi

There has been no opportunity to examine the Special Tribunal for Kenya Bill which was released by some sections of the press this morning. 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.

Plenary

The participants 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 has been signed and the involvement of the Panel of Eminent African Personalities and other partner agencies and Civil society and their participation

They further noted that If we do not have the International Criminal Bill enacted which then provides a basis for the prosecution of crimes under the Special Tribunal the recommendations made by the Waki report we shall not totally eradicate impunity. The Members of Parliament need to be put on notice and be reminded of their crucial role in this process.

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

Hon Jeremiah Kioni MP Ndaragwa told the meeting thus

- There is a lot of lobbying that will ensure that we do not go to the Hague
- We need to go to routes that are devoid of political manipulation
- If government is given the responsibility for funding, the process will die.
- Control of the next government -
- Victims have given up on local solutions. Kenyans do not know what Hague is about but they have more confidence in the process.
- Whatever options we pick we must move with the Kenyan populace
- Possible amendment on the constitution will not go through
- Politically we already see the cracks in the political parties and we therefore cannot trust them to have the best interest of the nation at heart. Political will is important

There is a big Challenge in terms of investigation as the police force were highly indicted and implicated in the Waki report, how then do we proceed.

In Guatemala both the police and the prosecution team were heavily indicted and there was little confidence in their capacity to conduct investigations nevertheless methods should be employed to insulate their capacity to investigate by having international highlights in the investigation team working with a local context. Further there needs to be a multidisciplinary approach to investigation.

On the Constitution provisions relating to presidential pardon and Nolle Prosequere and related provisions must be addressed in the statute establishing the Special Tribunal for Kenya. The requirement for a 2/3 majority in the amendment of constitutional provisions

is however very prohibitive. The immunity of the Special Tribunal may have its immunity bolstered through the adoption of a Special Tribunal of a hybrid nature.

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 structure. Usually in the hybrid structure the United Nations Witness Protection mechanisms are usually applied.

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. Their role needs to be defined.

The International Crimes Bill - needs to encompass the bill and build safety nets in the process

Responses

- The ICC has many restrictions and there needs to be continued evaluation of the circumstances.
- ICC looks at gravity and compares with Columbia and others
- Domestic processes have far more impact against internal processes and shall be more in touch with other processes
- Can we have a credible process here in Kenya?

Recap

- Needs to be agreement as recommended in Waki
- ICB needs to be enacted with additional consideration
- How will witness protection work including possibilities for protection under the United Nations.
- Strategy around building political will considering possibilities of manipulation through money, change of government

AFTERNOON

Anthony Kuria-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.

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.

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 shall still subsist under the tribunal

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 beailable? The suspects' capacity to undermine the process cannot be underestimated. Crimes Against Humanity are fairly serous and should not be bailed

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 grounds for this Special Tribunal and it should not ignore the feeling of the Kenyan people.
3. Relocation as part of witness protection how can this be factored and employment of UN mechanisms needs to be considered
4. None Involvement of the Kenya Police Service is not an option as their role impacts on the criminal investigations in Kenya and cannot be totally isolated from the police, due to knowledge of the local networks, expertise- deal with the issues through vetting and professionalism
5. Funding no provision as to funding and this has to be secured in advanced as priorities of partners may change. Need to come up with estimates of how mush it will cost, how many people are involved. We need to insulate the ST and ensure that independence is upheld
6. The international oversight/advisory mechanism to the Special Tribunal for Kenya
7. Success of this Special Tribunal will be about the composition of the tribunal. We need to move beyond the tribunal and we are missing international oversight, channel for cooperation with other states, protection from constitutional challenges, funding and therefore we need to propose structures that build safeguards and is national in nature.
8. An outreach component is required Victim participation- how is this addressed needs an entire mechanism.
9. Civil society Organizations and the media need to create robust engagement on issues of process, content of the formation of the ST