

ESSENTIAL CONSIDERATIONS IN THE ESTABLISHMENT OF A SPECIAL TRIBUNAL FOR KENYA

On December 3rd, 2008, International Center for Policy and Conflict ¹organized an experts' workshop to discuss the Agreement and the Statute establishing the Special Tribunal for Kenya as per the recommendations of the Commission Inquiry into Post-Election Violence (CIPEV). Below are the key emerging issues that have to be properly addressed in the process of setting up the Tribunal.

This summary document outlines the following:

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

1. Establishment of the Special Tribunal for Kenya

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.

¹**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.

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 non-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?
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 overburdened 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 law. 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 send representation to Kenyan to examine the particularities of this situation. 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 and institutional reforms should be examined closely to ensure that these mechanisms do not undermine each other.