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International Center for Policy and Conflict

Hazina Towers 9th Floor
Utalii Lane, off University way
P.o. Box 44564-00100

POSITION PAPER ON PROSECUTORIAL ACCOUNTABILITY MECHANISMS FOR KENYA

TITLE:
BUILDING SUSTAINABLE PEACE THROUGH ENDING CYCLE OF IMPUNITY IN KENYA

About International Center for Policy and Conflict

The International Center for Policy and Conflict (ICPC) is a non-profit and non-partisan organisation founded in 2005 to create a platform to foster democratic, peaceful, secure and just societies in Africa and globally. The Great Lakes and Horn of Africa region which have experienced widespread political instability for decades is the ICPC's major focus. The Center is registered in Kenya under the Trustees (Perpetual Succession) Act Chapter 164.

Institutional Objective

The International Center for Policy and Conflict proactively reflects and engages in public policy and legal dialogues, research and analysis as well as advocacy and capacity building on the broad realms of transitional justice, human security, conflict resolution and gender justice in order to prevent conflict recurrence; promote accountability and equality; and deepen culture of justice and respect for human rights and democracy. The Center is meant to establish, promote and build a sustainable human development; and democratic human rights adhering states.

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Transitional justice processes like the Special Tribunal cannot succeed without objective and

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Foreword

The December 2007 post-election violence in Kenya has been described as unprecedented, not because it was the first time that violence associated with elections had been experienced, but because the violence after the 2007 election was "by far the most deadly and the most destructive (as well as being), more widespread than the past".[1] While the immediate cause of the violence was the disputed results of the 2007 general elections, the deeper causes of the violence have been attributed to a range of factors, in particular the institutionalisation of the use of violence, the manipulation of ethnicity for political and economic gain with concomitant marginalisation and inequality in access to resources, as well as the breakdown of state institutions.

In a post-conflict situation, justice and peace are not contradictory but complementary forces. It is argued that the question is not whether to pursue justice and accountability but rather when and how? Justice in post conflict is context specific and requires comprehensive approaches since justice; peace and security are interrelated and interdependent. Further, this integrated approach to post conflict justice demands balancing of several factors namely: preservation of peace and security; individual criminal accountability; reconciliation through truth seeking; reparations for victims; domestic institutional reforms, re-establishing the rule of law and democratic governance and memorialization. However, it is accepted globally that amnesties and pardons concerning internationally recognized crimes would not be allowed.

A society in transition may draw on a variety of institutional models and practices which have been adopted in other situations; they may provide guidance and suggest choices which lend themselves to transposition in different national contexts. This diversity of choice is coupled with framework of ICC system, which is in itself flexible enough to allow for multi-layered judicial structures and certain alternative forms of justice. This multi-faceted framework of mechanisms and institutions still offers no single blueprint/solution for transitional justice discourse. However, any society cannot claim that its challenges are unique and are not within the potential of institutional problem solving.

There are certain core factors guiding the choice of accountability and justice mechanism. These include: a) domestic capacity; whether the particular country's authorities are unable or unwilling to try perpetrators; that domestic institutions are not sufficiently legitimate and independent to conduct impartial trials and prosecutions; and gaps in the applicable law. Transitional type of the country is important in determining what options are critical whether it calls for immediate intervention to fill the rule of law vacuum- no domestic institutions exist or are extremely dysfunctional; and or only help build domestic justice capacities without substituting national structure. The nature and type determines character of justice mechanism and the transformation process. There are three types of transition i.e. overthrow (violate or authoritarian system resistant to change is overthrown either by democratic forces

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[1] See Report of the Commission of Inquiry into Post Election Violence (CIPEV) (Waki Report), Government Printers, October 2008; See also KNCHR, "On the Brink of the Precipice: A Human Rights Account of Kenya's Post 2007 Election Violence (August 2008); A multi-party system of government was reintroduced in 1991, and since then three general elections have been held: in 1992, 1997 and 2002

or force), reform (facilitated by old order to shift to democracy), and compromise (negotiations between equally strong parties in a conflict). The strength of the old order is crucial in determining the extent to which accountability and justice can be undertaken. Hybrid and mixed national trials mostly apply in context of ethnic violence and systematic oppression as national institutions are vulnerable and lack legitimacy. However, it is strongly advisable to integrate domestic actors in the process to restore confidence in the judicial institutions.

b) The enforcement powers of the country in terms of location of and access to suspects; trial in absentia being unacceptable therefore, enforcement powers and strong regime cooperation is necessary/prerequisite of any transitional justice mechanisms. Also utilization of laws that supersede existing domestic law e.g. existence of domestic amnesty clause play an important role in promoting accountability. Hybrid court acts as the only option to repudiate perpetrators from the realm of impunity. The degree and scope of involvement of international actors in the peace process also influence the accountability mechanism choice.

Hybrid Courts are vital mechanisms of accountability mechanisms locally as they are independent entities with domestic and international judges and offer partial response to challenges of legitimacy and capacity in post- conflict environment. The set of national-international transitional justice mechanisms also have additional advantages for example better equipped to address directly the needs of local people and society affected by conflict; appointment of domestic judges to the proceedings and on site location for close identification by domestic actors with the process; operating outside the realm of domestic justice system allows preservation of their independence; and positive impact on the application and development of substance norms of criminal law in post-conflict situation.

The International Criminal Court (ICC) offers an additional international choice which complements the existing models of other forums of justice. The court has three features which define its relationship with other institutions in a situation of transition: The ICC try the most serious crimes; judicial activity will remain focused on prosecution of a select number of high-level perpetrators; and jurisdiction of court is limited to crimes committed after the entry into force of the Rome Statute. The ICC can not prosecute mass atrocities and national tragedies that occurred before 1st July 2002. These crimes may be prosecuted by other internationalized bodies without competing with the jurisdiction of the court; and the court is complementary to domestic jurisdiction, encourages a state to deploy a variety of different forums of justice in a peace process, in addition to the court. State parties to the statute must ensure that their choices are in accordance with the statute; states should consider advantages ICC proceedings may have over other forums. ICC membership forces domestic society to be more vigilant in the design of multi-level judicial forums.

By ratifying the ICC statute, a state acknowledges that the crimes within the jurisdiction of the court shall, in principle, either be investigated or prosecuted by a domestic jurisdiction, or by the court itself. This has consequences for the accountability architecture in that domestic society in relation to the crimes over which the court has jurisdiction. Ratification of the statute grants the ICC an independent right of assessment over the situation and the choices of the transitional justice mechanisms adopted in the domestic context.

The ICC is in particular entitled to initiate investigations on its own motion and determine on its own motion, whether it has jurisdiction over crimes committed, and whether proceedings before the court. Blanket and unconditional amnesties will hardly ever lead to the in admission of proceedings. An amnesty law, which impedes prosecution or which does not provide for an investigation, cannot be invoked as a bar to ICC proceedings, because it does not even meet the basic requirements for inadmissibility under Article 17(1) (a) or (b).

The ICC offers a uniquely balanced and inclusive framework for judicial proceedings which will influence a states institutional design. The ICC trials will be limited in quantity, however make an important contribution to the process of peace-making. The court is well placed to ensure objectivity, help establish an objective historical record of the crimes, which is an important precondition to reconstruction and reconciliation. The court can help avoid a collective stigma, by clearly identifying individuals responsible for crimes. The ICC may be in the special interest of victims of crimes, where proceedings before the court offer an unprecedented form of inclusiveness. There is a provision in the statute and rules of procedure and evidence that specifically the need for protection of victims and witnesses, particularly victims of gender violence and violence against children.

The ICC gives those directly affected by crimes a voice in claiming their rights, attending the proceedings and affecting their outcomes. Victims will have the right to legal representation and assistance from the victims and witnesses unit within the courts registry. This mechanism ensures that those who suffered most will have the chance to take part in the process of doing justice. The possibility of victim's participation it is complemented by a reparation regime, which provides for the possibility of restitution, compensation and rehabilitation. The court is by no means comparable to a truth commission. But its inclusiveness and focus on the victims rights, distinguishes it visibly from other mechanisms of criminal adjudication.

ICC framework is flexible enough to support pluralist and complementary approaches to transitional justice, encompassing parallel mechanisms at the domestic and international level. The court works on the principle of complementarity, it only acts when domestic jurisdictions are unwilling or unable to bring perpetrators to justice. It ensures that a state will maintain the option to establish a multi-layered design of justice, in which the ICC and other judicial and non-judicial entities may positively complement each other, either in a vertical or in horizontal fashion. Some attention must be devoted to the co-ordination of parallel choices, and their relation to the ICC. Local tribunal or Truth Commission may be established parallel to the ICC, but they are not necessarily a substitute for ICC proceedings. The question of to what extent proceedings before truth commission may bar accountability before the ICC is essentially a question of statutory interpretation and institutional design. Truth commission and criminal accountability are not mutually exclusive. Both can work simultaneously provided there is clarity of relationship. A combination of both would be significantly necessary in order to promote holistic approach to determining truth and facilitating accountability and reconciliation.

Article 17(1) (a) appears to allow some flexibility for temporary deference to quasi-judicial truth and reconciliation in the case of parallel and ongoing investigations in a domestic forum. Moreover, Article 53(1) (c) and (2) (c) enable the prosecutor to defer investigations or

prosecutions in the 'interest of justice'. These safeguards allow the court to adjust its investigation and prosecution strategies and the timing of proceedings to the dynamics of a peace process. But there is no guarantee that proceeding before truth commission will permanently relieve a perpetrator from criminal accountability before the ICC. This question is open to judicial interpretation. The answer appears to depend on the design of the truth commission. It may be argued that some quasi- judicial procedures may bar court proceedings under Article 17(2) if these proceedings retain the possibility of criminal prosecution as an option of last resort e.g. because the perpetrator does not comply with certain procedural conditions (e.g. full disclosure) or because the crime is too serious to be dealt with in quasi-judicial proceedings. Such forms of proceedings might be said to be in accordance with the 'intent to bring the person to justice'.

It is important for societies in transition to construe and present truth commission as an addition, rather than as an alternative, to mechanisms of criminal accountability. In addition to a truth commission, ICC also has to design a working relationship with a locally established hybrid courts. The judicial practice of these mixed national-international courts (hybrid tribunal such as the Special Tribunal Kenya) may be viewed as an exercise of domestic jurisdiction by the state, on whose behalf these institutions act. These courts come therefore within the scope of application of the complmentarity regime under Article 17, which establishes a vertical relationship of cooperation with the court.

Mixed national-international courts which form part of a domestic jurisdiction, such as the proposed Special Tribunal for Kenya, Lebanon Tribunal, Extraordinary Crimes Chambers in Cambodia, Special War Crimes Chamber- Bosnia and Herzegovina, among others come under the framework of admissibility under Article 17 of the ICC statute. These types of courts are merely internationalized in terms of their composition and their applicable law, while forming part of the jurisdiction. Their investigations and prosecutions can be qualified as proceedings by a state under Article 17, because their action is attributed to the domestic legal system in question.

These same principles, attributable to these tribunals, must apply in relation to mixed national-international courts, which were not formally established by a state but created by an external actor e.g. United Nations example Serious Crimes Panels- East Timor or Sierra Leone Special Court. The nature and function of these courts are identical to those that of state-created. These institutions act formally on behalf of a domestic jurisdiction. Both courts operate in an organized relationship with the ICC, which is based on deference, and judicial supervision. The court exercises a general supervisory role.

International tribunals and hybrid courts, which function outside a domestic jurisdiction, are detached from the state and independent in their action. They exist in a horizontal relationship with the ICC. The ICC statute does not offer conclusive solutions to address a potential conflict of jurisdiction between such entities and itself. The fact that such courts may be created by way of international agreement with the consent of a state does not suffice to subject them to rules of complementarity which govern the relations between the ICC and domestic jurisdictions.

The imports of Article 17, which is partly to respect domestic sovereignty, does not apply in

the same fashion to international tribunals and hybrid courts which do not form part of a national judiciary. Moreover, the vertical system of supervision under Article 17 (2) can not be easily transposed to other independent international institutions, which enjoy a separate legal personality of their own. Those types of institutions are therefore in principle, independent of the ICC in structural terms.

In relation to investigations and prosecutions, they may be carried out simultaneously and bar ICC proceedings only in accordance with the principle of *neb is in dem* under Articles 17(1) (c) and 20 (3), namely when a person has already been tried for conduct which is the subject of the(ICC)complaint. The proliferation of international tribunals and independent hybrid courts may create overlaps of jurisdiction and give rise to the duplication of work in situations which come within the competence of the ICC.

It is becoming apparent that international criminal justice and domestic justice are no longer opposed, but mutually interdependent and overlapping systems. Both systems may constructively complement each other in scenarios of transition. This interplay produces positive results on the basis of two conditions. First there is systemic inclusiveness and institutional cooperation. The domestic structures need to be flexible enough to allow for a temporary internationalization or externalization structures in situations of transition where national frameworks encounter legitimacy or capacity gaps. And secondly, international frameworks on the other hand, must be sensitive to the needs of domestic actors and local ownership, in order to enable societies in transition to develop their own solutions to the consequences of past atrocities.

Introduction

The Commission of Inquiry into Post-Election Violence hereinafter referred to as (CIPEV), was established to investigate the violence that occurred after the 27th December, 2007 elections in Kenya. The Commission officially submitted its groundbreaking report to President Mwai Kibaki and Prime Minister Raila Odinga on 15th October 2008 and to the Chair Panel of Eminent Persons (PEAP) Dr. Kofi Annan on 18th, October 2008. CIPEV was vested with the mandate to investigate the facts and circumstances surrounding the violence, the conduct of State security agencies in their handling of it, and to make recommendations concerning these matters and related matters.

A key recommendation of the CIPEV is that, those responsible for committing the most heinous crimes during the post election period be prosecuted. In this regard, the commission recommended for the establishment of prosecutorial accountability mechanisms that is, the creation of a Special Tribunal for Kenya (STK) to ensure an objective and a political justice process. The report also provided for a fall back position. In case of reluctance to establish a local tribunal, the matter should be taken over by the International Criminal Court (ICC). This recommendation has caused a major stir in Kenya, both within political and business circles. A substantial segment of the Kenyan society (majority being political players) expressed concern that pursuing justice at this time might unhinge Kenya's tenuous peace process. However, a large proportion of the population feels that the failure to end impunity, will fuel revenge, and possibly reignite the conflict in the long run.

It is important to underscore the following key points in relation to the Special Tribunal for Kenya. First, the recommendation relating to the establishment of the Special Tribunal was to be implemented under the auspices of the Panel of Eminent African Personalities (PEAP). These personalities mediated the resolution of the political crisis and brokered a power-sharing deal leading to the formation of the Grand Coalition Government in consultations with the President, and the Prime Minister (herein after referred to 'Principals'). While the role of the PEAP and former UN secretary General Kofi Annan in particular, would remain political of ensuring that the two principals are focused on recommendation implementation, the so called Principals' view will in no doubt be affected by the dynamics of politics of the Grand Coalition Government.

There is already a fallout and bitter debate on whether prosecutorial accountability measures should be conducted. This has had the net effect of the defeat of the Constitutional Amendment (2008) Bill and Tribunal Statute 2008 in Parliament in March 2008. The original deadline was March 31st, 2009. However, Chief mediator Dr. Kofi Annan has since then extended the timeline to August 2009. The President's political party, Party of National Unity (PNU), which originally advocated for prosecutions without reservations, has since changed its position. Some high-ranking members of PNU are allegedly mentioned by the CIPEV report as key perpetrators of post election violence. While the views within the President's party are not unanimous, the President himself is on record calling for 'tempering justice with

forgiveness', [2]sending a message that he would not wholly support thoroughgoing prosecutions. The Prime Minister's Orange Democratic Movement (ODM) called for amnesty. As time went by however, divisions within the rank and file of the Prime Minister's party emerged with some advocating for prosecutions. This is attributed to the political dynamics with opponents eager to seize an opportunity to 'fix' their named opponents in the party and block them in future party advancement. It is therefore clear that there are real threats and risks that the Special Tribunal for Kenya may be manipulated, interfered with or completely fail to be established due to high political stakes involved.

Second, the STK, which will sit in Kenya, will prosecute 'persons bearing the greatest responsibility for crimes, particularly; crimes against humanity'. The STK shall apply an amalgam of Kenyan Law, and the new International Crimes law. This is to be achieved by incorporating the Rome Statute of the International Criminal Court (ICC) into Kenyan law. In what appears to be perhaps the weakest element of the recommendations regarding the STK; the Commission made no attempt to explore what is meant by 'crimes against humanity', except for its rather cursory intimation that some of the attacks were 'systematic'. The failure to engage this issue, which lies at the core of its recommendations, the report opens itself to legitimate concerns about its vagueness on key issues, which could in turn, lead to implementation challenges.

The report hints at the possibility of lack of conclusive evidence and hence the call for further independent investigations. The Commission warns that the evidence collected may indeed not meet the standard of crimes against humanity. If these views are correct, then the commission's recommendations for persecuting crimes against humanity, and the very establishment of the STK- and possible involvement by the ICC-could be problematic. CIPEV has recommended that the ICC should be engaged to prosecute, should the STK fail to do so. It is notable that the International Criminal law under which international crimes are to be charged is a law but without a commencement date.

Third, the CIPEV attempts to remedy the inertia to prosecute the suspects of post election violence likely to be borne out of political considerations. This is through imposing a bureaucratic 'roadmap' to be followed; from the time the report is handed to the principals, to the establishment of the STK. The report states that the principals are to sign an accord agreeing to establish the STK within 60 days of receiving the report. The STK should be enacted within 45 days of signing the agreement. The President is to assent to the Special Tribunal Statute within 30 days after being passed by Parliament. If the recommendations stand, the tribunal should have been in place by 28th February 2009. The clocks started ticking on 15th October, 2008.

Fourth, CIPEV recommends that, should the government of Kenya fail to establish the Special Tribunal for Kenya and implement the prosecutorial related elements, the International Criminal Court (ICC) should immediately take up the prosecutions of the alleged perpetrators. This recommendation assumes that the jurisdictional triggers of ICC will apply. ICC triggers are government (self) referral, United Nations Security referral, and ICC Prosecutor initiated investigations. None of these options appear likely in the short run

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[2] Presidential Speech on Jamhuri Day, December 12th, 2008.

considering the political environment, the Security Council process and the ICC performance on the self referrals. The CIPEV recommendation is based on the assumption that the Panel of Eminent Persons, would hand over the Kenya case to the ICC if the STK fails to take of. The truth of the matter is that the ICC Prosecutor is bound by neither the envelope nor the information (evidence) therein. However, the information would form key references or the basis for the Prosecutor to commence independent investigations. The International Criminal Court is an independent judicial body established to ensure accountability for, and deter, the most heinous international crimes.

Fifth, CIPEV recommended that the Special Tribunal would use both domestic and international laws. It also recommended that the bench and prosecution should have international components. That is to say, a huge segment of the judges, prosecutors and investigators should be non-Kenyans. This is to ensure independence, impartiality and credibility. And finally, CIPEV prepared a list of alleged perpetrators but did not make the names public. The envelope containing the names and evidence was kept under the custody of the Panel of Eminent Persons awaiting the establishment of the Special Tribunal for Kenya.

Thus far, there are indicators that enormous political challenges require to be overcome in order to realize an effective, impartial and credible Special Tribunal for Kenya. There is urgent need to fundamentally alter the ground upon which political calculations are being made. The Grand Coalition Government is fragile and is facing serious internal political complications. These are major obstacles to not only the establishment of the Tribunal, but also in executing other crucial reforms that were agreed upon. It's imperative to point out however that the ramifications of non implementation of CIPEV recommendations are serious. This is particularly when one reviews the risks accruing from lack of justice and the danger it poses for durable peace in the context of a fragile situation. Ending impunity in Kenya is imperative.

Government of Kenya Obligation

Kenya is under an international legal obligation to investigate, gather credible evidence and prosecute all those suspected of having committed crimes under international law. Kenya cannot miss another opportunity to fight impunity for the crimes committed during the post-election violence of 2007-2008. The International Centre for policy and Conflict (ICPC) regret that the Kenyan Parliament rejected the Constitution of Kenya (Amendment) Bill 2009 and the special Tribunal for Kenya Bill. Parliament should have adopted the necessary amendments to empower the tribunal as a vehicle for justice in the country. Sitting back and waiting for the International Criminal Court to intervene, is not the best option for the country. Kenyan authorities cannot wait for the International Criminal Court to end impunity for crimes committed within its borders. If the International Criminal Court were to intervene, it would only be able to prosecute prime suspects responsible for post election violence. This will leave an enormous impunity gap that will not serve the vicarious lessons much needed to stem such crimes. This can only be achieved if Kenya acted internally.

We feel that President Mwai Kibaki, Prime Minster Raila Odinga and individual Kenyan Parliamentarians have to demonstrate their full commitment to justice by immediately instructing all relevant ministries, departments and agencies to open prosecutions against all suspected perpetrators or those involved in any way, in the post election violence. The

priority of the government of Kenya must be accountability on behalf of the victims. In a ruling at the **High Court of Kenya at Nakuru Republic Versus Stephen Kiprotich Letting and Others**, the judge indicted police for shoddy investigations (pg 34). It is therefore significance to observer short of establishing credible, impartial and effective Special Tribunal or International Criminal Court (ICC) referral to prosecute the post-election violence; the setting up of a Special Division of the Kenyan High Court for the trial of perpetrators of the post-election crimes there is still no credible indication that the Kenyan justice system presently has the capacity to try such crimes. Prosecuting rights abusers will require political will and legal reforms. The ICC statute favors national trials where possible. However, under the court's statute and other international standards, trials should be credible, independent, and impartial. They should adhere to international fair trial standards, and impose penalties that are appropriate given the gravity of the crime, namely imprisonment.

Given the ICC's jurisdiction over crimes in Kenya and Kenya's obligations as a party to the ICC, the ICC will determine whether a domestic trial is an adequate alternative to prosecution by the ICC itself. The ICC can retake a case if necessary. It is the ICC judges who decide if a national trial will be sufficient for their cases. National trials are not a route to impunity. Measures to ensure comprehensive witness protection and support, security, and outreach to the affected communities are other important components to national trials for serious crimes.

In utilizing watertight internal criminal justice system, all impediments to the course of criminal justice system including for members of the police would have to be removed. As the alteration of the political ground is being effected, the President and Prime Minister must take full responsibility of ensuring re-working of the Bills including facilitating adequate consultations, to establish a Special Tribunal. The Tribunal should take all legitimate constitutional and other inputs on board so that the Bills are in tandem with international standards. We are talking about holding highly sensitive trials in a country with a history of attempted interference with the judiciary and no real witness-protection program.

The CIPEV found that politicians from across the political divide organized violence against their opponents/supporters and that security forces used excessive force against civilians and failed to investigate and prosecute those responsible for these human rights abuses. The report further drew the parallel which fail to take prosecutorial accountability measures with political violence in the past. Kenya's government has yet to hold perpetrators of political violence accountable for their actions since the inception of multipartism in 1992. The Parliament rejected the proposed constitutional amendments and a special Tribunal Bill that would have brought perpetrators of violence to justice.

Kenyan government has an obligation to establish independent and impartial prosecutorial accountability mechanisms into the post-election violence, to ensure that perpetrators of human rights violations do not enjoy impunity. Those responsible for killings or committing other human rights abuses must be brought to justice in proceedings that comply with international standards of fair trial. Victims and their families must benefit from the right to redress and reparation, protection of the law, including compensation.

It is the government's responsibility to create a Special Tribunal that is in consistent with

international standards of law. The Tribunal has to be independent of political or other interference that would provide effective protection for victims and witnesses and guarantee fair trials to suspects. In particular, the Bill should ensure that the definition of the crimes, principles of responsibility and defenses are consistent with the strict requirements of international law; the special tribunal is guaranteed independence from any political or other interference; and effective provisions on victim and witness protection are included. The unwillingness and or failure of the government to uphold the rule of law, sends dangerous signals to Kenyans that the abusers of fundamental rights are above law.

ICPC emphasizes that by failure to bring the perpetrators of post election violence, and the failure to ensure that victims have a right to reparations will only store up underlying political and socio-economic problems in Kenya. A tribunal involving both domestic and international investigators, prosecutors and judges would be the best placed to end impunity and restore faith in the Kenya judicial system. Parliament should be afforded the necessary time and resources for debate and further public consolations.

What Prosecutorial Accountability Mechanisms? [3]

The two most significant are whether trials for the post election violence should be held in Kenya or The Hague. If the tribunal is to be in Kenya, the legal framework should be in line with International Law. It is patently clear that the future of the country depends by and large on these decisions. The ethnic violence that followed the 2007 elections traumatized the whole nation and threatened its unity. If those responsible for the violence are not brought to justice ,impunity and the general absence of the rule of law characterizing Kenya' s political and public life would continue unabated.

Overwhelmingly, Kenyans believe that trials in Kenya will be fatally flawed, judges are likely to be bribed, the prosecution and the police will deliberately conduct a shoddy investigation, tamper with evidence and the government will exert pressure to ensure that its senior members are acquitted {R v Stephen Kiprotich Leting and three others CC No. 34 of 2008, on Kiambaa Church Trial}. They fear that trials could be brought to an abrupt end by the ruling of a Kenya court, that the basis of the trials is unconstitutional. As the Waki commission implies, all these fears are perfectly justified given the past record.

A primary purpose is to repudiate emphatically the conspiracies and horrible crimes that have set one community against another. This can only be achieved by holding perpetrators to account. Trials in Kenya will be more accessible to Kenyans (hopefully televised). Kenyans will be able to judge for themselves the responsibility of accused individuals, through detailed recounting of the conspiracies for the atrocities, and not to blame whole communities. There will be opportunities for the victims or their relatives to participate.

Whereas the judiciary has suffered an unprecedented loss of confidence which, understandably has led to calls for the ICC to intervene in Kenya, a well- crafted local arrangement will allay the fear that domestic justice will not work in Kenya.

A special Tribunal is the preferred option as opposed to a transfer of jurisdiction outside of

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[3] This section has benefited enormously contribution from Prof Yash Pal Ghai, a constitutional and human rights law expert and former, Chairman, Constitutional Review Commission of Kenya

Kenya for the following reasons: Impunity is likely to go unchecked in the event of referral to The Hague or ICC as the conditions for an ICC referral and investigations may be hard to establish; a domestic led and involved investigation is more likely to produce accurate and cogent evidence for perpetration; identification of perpetrators responsibility ought to be the priority of any process and necessarily requires full local engagement; the delay which will result in any referral to an outside jurisdiction will be detrimental to justice, and will assist the perpetrators to evade justice ; it is in the Kenyan national interest to develop strong, transparent and accountable mechanisms, which will enhance local justice rather than undermine the legal and judicial infrastructure; it is also in the Kenyan national interest to develop a sense of ownership and participation in the justice process, in order to ensure that the victims and relatives are able to witness and participate in the process; it is further in the Kenyan national interest that such mechanisms implicitly incorporate a process that allows for meaningful justice and reconciliation, between communities affected by the violence; and any recommendations and lessons to be learnt are likely to be of sustainable benefit if they are produced by a local and engaged national tribunal assisted by, a willing partnership of relevant institutions and individuals including an international component when necessary.

National Prosecutions Alternative to ICC[4]

The International Center for Policy and Conflict believes that sustainable peace will not be achieved without fair and credible prosecutions of those responsible for the most serious crimes committed during the post-election for those bearing greatest responsibility, together with accountability measures for lesser offenses. Ensuring that there is no impunity is not only essential to accountability, but to establishing a durable peace in Kenya. This involves addressing serious crimes using procedures that conform to international human rights standards. This section enumerates why credible national prosecutions of those responsible for the most serious crimes in accordance with international standards and benchmarks are so important. These benchmarks are effectively the same standards that should apply for the trial of any person brought to justice for a serious criminal offense, namely: credible, independent and impartial investigation and prosecution; rigorous implementation of internationally recognized standards of fair trial; and penalties on conviction that are appropriate and reflect the gravity of the crime.

I. The importance of credible prosecutions in accordance with international standards

International law mandates prosecutions for serious crimes, such as crimes against humanity and war crimes, which help to ensure individual victims' rights to truth, justice, and an effective remedy, along with combating impunity.3 Major international treaties to which Kenya is party – the Convention against Torture, the Geneva Conventions, and the Rome Statute of the International Criminal Court – provide that alleged perpetrators of serious crimes must be fairly prosecuted. But it is not only international legal obligations that make justice necessary. International Center for Policy and Conflict deems that meaningful prosecutions in accordance with international standards of those responsible for the most serious international crimes are a crucial component to achieving a durable peace. Such prosecutions send the message, especially to would-be perpetrators, that no one is above the law. They also help to consolidate respect for the rule of law by solidifying society's confidence in judicial institutions. This in turn helps cement peace and stability.

The UN secretary-general's 2004 report on the rule of law and transitional justice in conflict and post-conflict societies states that: "[E]xperience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice."4 Failure to hold perpetrators of the most serious international crimes to account helps to fuel future abuses. In other countries, communities have experienced how measures conferring immunity from prosecution for serious offenses have had devastating consequences. In Sierra Leone in 1999, the rebel leader Foday Sankoh, who had been implicated with his Revolutionary United Front (RUF) in many war crimes, received an amnesty in exchange for signing the Lomé Peace Accord. Only months later, Sankoh's RUF went on to attack government forces and UN peacekeepers, and continued to commit war crimes by taking hundreds hostage and

[4] Human Rights Watch Memorandum on Uganda peace agreement signed on 29th June 2007

committing rampant sexual assault. The collapse of the accord also brought about a marked increase in human rights abuses by government forces. A return to peace only occurred two years later. Meanwhile, the Special Court for Sierra Leone pursued prosecutions, including of government officials, which helped to marginalize abusive leaders of the warring parties.

Achieving a meaningful, durable peace in Kenya will require the prosecution of the most serious crimes in accordance with international standards. Broader accountability efforts for lesser offenses through national and local initiatives that could include trials and an effective truth telling exercise will be important. As the UN secretary-general's 2004 report further states, "[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives."5

II. Benchmarks for assessing possible national alternatives to ICC cases

Prosecuting perpetrators of the post-election violence is a significant step to ensuring justice for some of the most serious crimes committed during the course of the conflict. Also prosecutions of security officers responsible for the most serious human rights violations must take place, along with efforts aimed at more comprehensive accountability. The ICC statute favors domestic prosecution of serious crimes where possible. At the same time, the Rome Statute and international human rights standards require that any national alternative which would oust ICC jurisdiction meet substantial benchmarks.

A. Credible, impartial and independent investigation and prosecution

Any national alternative to the ICC would need to involve credible, impartial and independent investigation and prosecution. The updated UN principles for the protection and promotion of human rights through combating impunity specify that a right to justice means: a) "prompt, thorough, independent and impartial investigations," and b) "appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under International law are prosecuted, tried and duly punished."8 Article 17 of the Rome Statute provides that a national alternative must involve a state genuinely being able and willing to conduct investigation and prosecution. This involves both procedural and substantive elements. In terms of procedure, the Rome Statute requires that domestic investigation and prosecution must be conducted independently and impartially. Investigation and prosecution also must not be undertaken to shield the person from criminal responsibility, nor be conducted in a way that is inconsistent with intent to bring a person to justice.9 In terms of substance, Rome Statute crimes and theories of individual criminal responsibility should be applied, which requires their substantive incorporation into Uganda law.10 Incorporation of Rome Statute crimes and forms of responsibility has been an important byproduct of the establishment of the ICC in many states.

Any national prosecution of ICC cases would need to include charges that reflect the crimes that ICC prosecutes. Prosecutions should also be able to be brought on the same basis of criminal responsibility as before the ICC. This would include commanding responsibility, and other forms of participation in planning and execution of the crimes including what is known as participation in a joint criminal enterprise. The different forms of responsibility are particularly important when leaders are tried for serious crimes. They are necessary to establish culpability even where the defendant is not accused of directly committing the

crimes with which he is charged.

Such national trials must be impartial and able to conduct independent investigation capable of leading to the identification of those responsible, and a determination of liability before an independent tribunal, during which an accused benefits from fair trial guarantees and, if convicted, appropriate punishment. A process which uses justice measures and the possibility of prosecution only in the event the measures are not fully complied with would be insufficient if it precluded criminal prosecution for the most serious crimes. On the same basis, a process which uses a truth and reconciliation commission and the possibility of prosecution only if the commission's terms are not complied with would be inadequate.

B. Rigorous adherence to international fair trial standards

Internationally recognized fair trials standards would need to be rigorously observed in any national alternative to ICC prosecutions. The government of Kenya would need to demonstrate that any national alternative respects such standards both in principle and in practice. International fair trial standards are largely contained in the International Covenant on Civil and Political Rights (ICCPR) and are crucial to a trial's legitimacy. They include the following rights: a fair and public hearing before a competent, independent and impartial tribunal; a presumption of innocence; adequate time and facilities to prepare a defense; not be compelled to testify against oneself or to confess guilt; have a lawyer of the accused's own choosing; be protected from torture or cruel, inhuman or degrading treatment; and have a conviction be reviewed by a higher tribunal.

Any trial for war crimes and crimes against humanity is politically sensitive, and prosecution of post-election before a Kenyan court would be particularly so. It is therefore especially important that a national alternative to the ICC would have to show that fair trial protections can be ensured in practice – it is not enough for them to be provided on paper – in order to demonstrate an ability to conduct prosecutions. Moreover, if alternative national trials were to become politicized or otherwise fail to fully adhere to international fair trial standards, it would be highly damaging to ensuring respect for the rule of law in Uganda.

C. Penalties that reflect the gravity of the crimes

Given the seriousness of the charges brought by the ICC, imprisonment should be the principal penalty for conviction in any alternative national trial. To do otherwise would suggest an intent other than bringing a person to justice (which as already described is what is required under the Rome Statute for a national trial to be an adequate alternative). For example, the ICC's primary penalties include either imprisonment for a specified number of years up to thirty years or life imprisonment when justified by the extreme gravity of the crime and individual circumstances.[17] Other international and international-national tribunals that prosecute serious crimes, such as the ad hoc international tribunals for Rwanda and the Former Yugoslavia and the Special Court for Sierra Leone, provide imprisonment as the principal form of punishment.

Meanwhile, the death penalty should not be available as a punishment in any national alternative to ICC prosecutions. International and international-national tribunals do not permit the death penalty as an option for punishment of war criminals. ICPC opposes the death penalty in all circumstances as it is an inherently cruel and inhuman punishment.

Finally, fines following conviction, unless imposed in addition to imprisonment, would also be inappropriate as penalties for serious crimes under international law. The ICC includes fines as a penalty, but only in addition to imprisonment. It would also be an unlawful form of collective punishment.

III. Determining the sufficiency of a national alternative to ICC prosecutions

Under article 19 of the Rome Statute, it is the ICC judges who decide whether a trial in a domestic jurisdiction is an acceptable alternative to its cases. Uganda, like all other states, cannot take the decision unilaterally. Furthermore article 19 suggests that a case tried domestically against a person on whom an ICC warrant has been issued, but which does not meet the Rome Statute's criteria for national alternatives, could be brought back to the ICC for trial. Otherwise, it would be easy for states to circumvent the spirit and purpose of the Rome Statute's requirements. Specifically, article 19 of the Rome Statute states: "If the Court has decided that a case is inadmissible, the Prosecutor may submit a request for a review of the decisions when he or she is fully satisfied that new facts have arisen which negate the basis of which the case had previously been found inadmissible." Accordingly, any national alternative to trial by the ICC would need not only to meet the requirements of genuine willingness and ability to try the case, but live up to these requirements.

Essential considerations in the establishment of a Special Tribunal for Kenya [5]

On December 3rd, 2008, International Center for Policy and Conflict organized an experts' workshop to discuss the Agreement and the Statute establishing the Special Tribunal for Kenya, as per the recommendations of the Commission of Inquiry into Post-Election Violence (CIPEV). The Center invited several experts from outside Kenya among them from International Center for Transitional Justice (ICTJ) New York. ICTJ is a partner of ICPC in transitional justice. Below are the key emerging issues from the workshop that have to be properly addressed in the process of setting up the Tribunal.

1. Establishment of the Special Tribunal for Kenya

After the precedents of the International Military Tribunals of Nuremberg and Tokyo which were established after the World War II, new international Tribunals were established in the early 1990's. 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 taking 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 internationally employed by the United Nations. Subsequently, as of the late 1990's there is the emergence of a new trend where the United Nations and governments concerned negotiated agreements on the establishment of Special Tribunal initiatives as has been the case 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 a 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 need 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 a tribunal; shall it be; local, international or a hybrid tribunal?
3. Is there adequate political commitment and goodwill 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 the possibility of an agreement between the

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[5] December 3rd, 2008 Special Tribunal Workshop report recommendations organized by ICPC and supported by HIVOS

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, 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 /summon or take other coercive measures and what procedures will be used what will be the consequences of defying summons or orders by the tribunal?

The Registrar of the Special Tribunal

The registrar Special Tribunal usually has a huge role in the functioning of a special tribunal as 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 as 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's jurisdiction have primacy over the national courts? It is recommended that the statute establishing the Special Tribunal for Kenya provides primacy of its jurisdiction. The CIPEV Report recommends exclusive jurisdiction for the Special Tribunal, however there is need to distinguish between concurrent jurisdiction, and primacy of jurisdiction. In so doing, it is prudent to ensure that the Special Tribunal is not over

burdened. 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 the Kenyan criminal justice system?
- The Positive impact and legacy the Special Tribunal will bequeath the Kenyan criminal justice system 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 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 and burden of proof 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 afresh. There are strong arguments for including both local and international crimes in the subject matter of a Special Tribunal, and it is better to provide safety nets.

The jurisdiction of the STK necessitates a critical look at the Retroactivity /retrospectivity principle and how this shall apply in the Kenyan context. Conduct that did not amount to crime before the law was passed becomes crime under the new law.

3. Procedure

Law to be applied

The Special Tribunal for Kenya according to the Waki report shall apply an amalgam of 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 not clear how the evidence by CIPEV will be handed over to the Tribunal, The procedure and evidentiary threshold that guided the CIPEV in its collection and collation of evidence need some reflection. It is also important to address on how the Special Tribunal will work with the Kenyan criminal justice 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 mechanism. This shall ensure that the victims participate and own the process and feel justice. This is the only way they will appreciate the justice that would accrue fro process. This component also resolves and clarifies whose justice the Special Tribunal serves. It also potentially addresses issues of deterrence.

Due Process

The Special Tribunal must also ensure the issues of due process concerning fundamental guarantees and respect for 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. However, this is likely to prejudice fair trial. Except for written submissions but not testimony which must be cross examined for rules of natural justice to apply.

Witness Protection

Witness Protection is needed for the protection of all threatened/vulnerable 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.

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 of minimizing such costs. The Tribunal should for instance consider 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 the mandate of the Tribunal must be borne in mind; how broad should the mandate of the Special Tribunal for Kenya be , and how many cases will it handle?

Modalities for Investigation

Investigations need to be multi disciplinary thus; they need to be systematic in a pattern as opposed to isolated cases. Prosecution should lead evidence linking the crimes committed to prime suspects before the tribunal. 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 outset.

Relationship with the International Criminal Court (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. The 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 mechanisms such as; the Transitional Justice and Reconciliation Commission, institutional reforms, reparations and memorialization should be examined closely to ensure that these mechanisms do not undermine each other.

FRAME WORK FOR THE SPECIAL TRIBUNAL IN KENYA

The 'Waki' commission of inquiry into the post election violence was clear that an essential component of the process is the return to a peaceful and democratic Kenya where the rule of law is respected. It was also forthright that the persons bearing the responsibility for the violence are tried and prosecuted. It seems that the list of persons prepared by the Waki Commission for further investigations includes some who are in politically powerful positions, even in the cabinet. Many Kenyans are outraged that these persons enjoy state power and there is all the likelihood that may continue to do so in the future. The ethnic violence that followed the 2007 elections, traumatized the whole nation, threatened its unity and led to a sense of deep grievance. If those responsible are not brought to justice, impunity which has characterized Kenya's political and public life especially after the country turned back to multi partism in the early 90s will continue unabated, and the illegitimacy of the government, will become acute.

A compelling reason for an international court, or at least a hybrid court, (with significant participation of international judges and prosecutors) would be for the trials weaknesses in the national legal and judicial system. The Kenyan system has the appearance of independence, competence, and effectiveness (at least as compared to Cambodia). However, the Waki report points to the lack of political will to prosecute persons in high authority for serious offences. This is regardless of whether they are involved in illegal appropriations of land, embezzlement of astounding sums of money, incitement to ethnic hatred and violence, and killings. The initiation and termination of prosecutions are politically driven, so that when private groups have tried to bring highly placed suspects before the court, the Attorney General has used his powers to terminate the trials. [Clifford Derrick Otieno V First Lady] The judiciary has the reputation of subservience to the government. The commission on the Goldenberg scandal describes how the courts have been used to launder stolen public funds and to whitewash perpetrators of theft. {Courts have already cleared Saitoti and Erick Kotut of any Goldenberg wrongdoing by way of judicial review} Akiwumi Report was challenged in court and the name of former Member of Parliament for Keiyo South was expunged from the report. The Waki commission says, "…….nothing short of comprehensive constitutional reforms will restore the desired confidence and trust in the judiciary" (p.463)

Added to the political manipulation of the legal and judicial process are deficiencies in the system, as the Attorney General himself admitted to the Waki Commission. Particularly weak, is the investigative capacity; the commission cites many cases of prolonged delays in investigations, (R v Stephen Kiprotich Letting and three others CC No. 34 of 2008 on Kiabaa Church Trial}. Capacity for the conduct of persecutions is also weak. The commission concluded, in view of the lack of visible prosecutions against perpetrators of politically related violence, the perception has pervaded for sometime now that the Attorney General can not effectively or at all deal with such perpetrators and this, in view, has promoted the sense of impunity and emboldened those who peddle their trade of violence during election period, to continue doing so" (p.455)

The commission has provided a number of carefully considered principles for the structure and jurisdiction of the Special Tribunal. If the legislation does not fully implement them, then

the commission's conditions will not have been met and the list of suspects could be handed over to the Special Prosecutor of the international Criminal Court.

This article discusses the recommendations of the commission; unfortunately, the Bill for the Tribunal has not yet been published. The time for the deadline of the establishment of a local tribunal continue to approach. The required law is not a matter for horse trading between politicians but of the greatest public interest, and full public discussion of the Bill before Parliament passed it is essential.

SPECIAL TRIBUNAL DESIGN

A self-contained tribunal

Going by the precedence set by the prosecution and the judiciary, the commission recommends that the Special Tribunal should be detached from the other courts and the Attorney General. They will have no jurisdiction in relation to the proceedings of the tribunal, which will have its own judges, prosecutor and investigators. Appeals from the Tribunals Trial chamber would go to the appeal chamber (also part of the Tribunal).

Internationalization

A majority of judges would be foreigners, drawn from the commonwealth, and appointed on the nomination of the Panel of Eminent African Personalities, by the president, in consultation with the Prime Minister. The prosecutor would be appointed on the nomination of the panel in the same way, and presumably, be an outsider qualified to be a judge in a Commonwealth country. Reflecting its hybrid nature, the Tribunal will have two Kenyan judges, one presiding over the Trial Chamber and the other the Appeal Chamber. They will be appointed by the president in consultation with the Prime Minister, both acting on the advice of the Chief Justice (which means they must accept that advice). The hybrid nature is also reflected in the jurisdiction of the Tribunal, covering both Kenyan panel law and international crimes.

Independence

The tribunal will have authority to recruit and control its own staff, which will consist of Kenyan and international personalities. Investigations will be conducted under the direction of the Tribunal's prosecutor. The head of investigations and at least three other members of the team will be non Kenyans "so as to provide an independent approach to the investigative function of the Tribunal". Similarly, having judges and the prosecutor from outside and detached from local politics will enhance independence. The Tribunal will take custody of all investigative material and witness statements and testimony collected and recorded by the commission. The commission seeks to ensure non-interference with the Tribunal, by requiring that holders of public office (including civil servants) who are charged by the tribunal shall be suspended from duty.

Constitutional status

The commission wants the Tribunal to be "insulated against objections on constitutionality". This will be achieved by way of anchoring it in the constitution. It is no doubt concerned that the typical Kenyan ploy, under which culprits in conjunction with lawyers, judges, and the

government, conspire to derail important cases or processes, should not be available to subvert the Tribunal. The provisions to be entrenched must be carefully drafted, not merely to give the Tribunal a constitutional status, but to ensure its independence, internationalization, detachment from the ordinary and legal process (specifying for example that the Attorney General's powers of investigation and the institution and termination of prosecutions do not apply in relation to the Tribunal). There may also be questions over the retrospective application of the international crimes legislation (dealt with later) although some offences there were also effectively prohibited in Kenya (like torture).

Good faith and integrity

The Special Tribunal is a hybrid court but with a clear twist. If the government were to subvert the purposes of the Tribunal or fail to enact it, then the International Criminal Court would act i.e. the cases would be "internationalized" by reference to the ICC. It remains to be seen, whether, with Kenya's political culture, this threat will be sufficient to ensure an honest process locally.

Supporting environment

The Commission recommends three measures to create a supportive environment for the Tribunal i.e. enactment of the legal foundation for its jurisdiction and the speedy enactment of International Crimes law, which was gazetteed in April 2008 and backed to operational date on 1st January. Secondly, it wants the freedom of information law enacted to facilitate access to state information to assist in arresting and prosecuting of persons responsible for gross violations of the law. Thirdly, it wants the strengthening and operationalization of the 2006 Witness Protection Act to ensure protection for informers and witnesses. These principles provide an effective framework for the Tribunal.

SPECIAL TRIBUNAL FRAMEWORK

Tightening Waki Recommendations

The appointment and tenure of judges: the ultimate decision on appointment of the Kenyan judges seems to be left to the Chief Justice. This would be unfortunate, for in practice the initial and the ultimate decision would be the President, leaving little discretion for the Prime Minister or Chief Justice. To overcome the problem of a Chief Justice who is widely perceived to be allied to the executive, and a judicial Service Commission which is heavily under the influence of its official members, the rule could be revised to require the Chief Justice to send the President names of three persons for each chamber, in consultation with other members of the Court of Appeal. Preferably the Kenyan judges should be drawn from senior practitioners, rather than serving judges and thoroughly vetted. In principle, the role of the President, Prime Minister and the Chief Justice should be minimized. The tenure of judges should be specified, for the duration of the Tribunal. Provision should be made for the removal due to misconduct, to be determined by a tribunal constituted by commonwealth judges appointed by the panel. There should also be immunities and other privileges of judges (and other Tribunal staff).

Funding of the Tribunal: Hybrid tribunals tend to be expensive, and the source of funds also affects the independence of the Tribunal. No doubt the usual donors will assist, and it is to be hoped that funds would be sufficient and timely. Also, the tribunal should prepare its own budget through the Registrar's office and withdraw directly from the Consolidated Fund. In particular, the salaries and expenses of foreign judges and staff should be provided from such sources.

Legal representation: The Commission envisages a Defense component of the Tribunal but is short on detail. The Tribunal should be allowed funds to set up a Defense Office or provide payment to lawyers chosen by the accused. Unfortunately, no scheme of official legal aid exists, despite a long standing constitutional requirement. Also, in keeping with the internationalization of the Tribunal, foreign lawyers briefed by the accused should be permitted to represent them.

Tribunal jurisdiction: Jurisdiction is restricted to "serious crimes, particularly Crimes against Humanity, related to the 2007 election violence". It is necessary to specify the jurisdiction clearly (at least as an elaboration of "serious crimes" such as murder, rape and other sexual violations, torture, forced disappearances, massive destruction of property-most of these are to be found in Kenya's penal laws). Crimes, comprehended by the concept of "Crimes against Humanity" are well understood now (and the International Crimes Bill adopts the definition in the Statute of the ICC). However, that Bill is not yet law, and even when it is, its application could be challenged on the grounds of retrospectivity. It is therefore all the more important to clarify that Kenya's penal laws covering charges of the "serious crimes" mentioned above are made applicable.

Jurisdiction in respect of persons bearing the greatest responsibility for serious crimes also needs to be specified. The Tribunal will start with a list of potential accused and the evidence against them collected by the Commission, but the Tribunal should be free to investigate

others. But only the most reprehensible persons should, additionally, be charged, in order to bring the trial to closure within a reasonable time. Kenya cannot afford the luxury of the trials going on without end. Among the suspects are leading politicians and the early determination of responsibility and remedial action are essential for the peace, stability and justice. The law on the Tribunal should specify that the ordinary process of investigation and prosecution should apply after the Tribunal process ends.

Effective internationalization: In hybrid tribunals, the role of the international community, particularly the United Nations, has been crucial. The "international" status of the Tribunal comes from its association with the Panel of Eminent African Personalities headed by Kofi Annan. The Commission urges that its recommendations should be implemented under the auspices of the panel, and in addition, gives it specific tasks (as in the appointment of judges and prosecutors). Oversight by the Panel should be free to use such institutions as it deems appropriate to discharge its responsibilities.

Monitoring and Oversight: Monitoring and oversight by local and international civil society and Panel of Eminent Persons would play a major role in the accountability of the Special Tribunal for Kenya. This is important and should be provided in the law.

INSULATING THE TRIBUNAL FROM INTERFERENCE

Lessons of recent experience have been that there is a general distrust in Kenya of public institutions: politicians, the holders of major elected office, the courts, the police and the public service. It is precisely for this reason that the Tribunal as institution is clearly independent of those institutions, and that has considerable constitutional and foreign elements. This must be balanced with the need for the involvement of individual Kenyans.
Independence of the Tribunal is key to Kenyans to have confidence with the Tribunal. In order for this to happen certain aspects have to be revised including:

- Too much power is given to the President and the Prime Minister (whose impartiality cannot be assumed, and indeed between whom a conflict of interest cannot be assumed!)
- ideally no Minister, and not the Attorney-General, should have any decision making power in regard to the Tribunal
- Parliament should have no role in appointments or dismissal of judges and other staffs
- The provisions about a pre-trial judge appear to make possible (or do not clearly preclude) the insinuation of decisions of the existing judiciary
- The role given to the pre-trial judge (whose appointment is not provided for) makes it possible for him or her to stop an entire prosecution, there being no appeal from the decision
- It is not crystal clear that no existing member of the judiciary is to have any role in the Tribunal
- There is a risk that, even if they are not already members of the judiciary, Tribunal members may be candidates for future posts and (in view of the absence of any clear tradition of independent judicial appointments) may be influenced in their work by a hope of future advancement
- Audit is to be by the Kenyan Controller and Auditor General only (in fact this is one Kenyan institution that is not discredited).

In regard to design of the Tribunal, there are certain aspects that require further scrutiny. These are:

- The desirability of creating not just a trial mechanism for those bearing the greatest responsibility but also the Special Magistrate structure for other offenders. This is not to say that it is not desirable, but it makes for greater complexity.
- The relationship with the ordinary courts – including the "double jeopardy" provisions i.e. whether the exclusive jurisdiction provision is desirable
- The desirability of creating one global institution (all within the expression "Tribunal"), including the courts, the prosecutor and the defence office. This is the pattern in various other international hybrid tribunals though it has been criticized.[6] Ideally the Prosecutor should be a separate body, created under the same statute, and the same goes for the defence. Similarly the functions of the Registrar, it has been suggested, should not include the witness protection programme. This makes the registrar also an adjunct to the prosecution.[7]
- The desirability of including "genocide" as one of the crimes over which the Tribunal is to have jurisdiction
- Clarity about the jurisdiction of the Tribunal
- Clarity over the roles of different aspects of the "Tribunal".

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[6] See the comments of Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (London: Allen Lane, the Penguin Press, 1999) p. 308.

[7] Ibid.

KEY AREAS IN REDRAFTING THE SPECIAL TRIBUNAL FRAMEWORK

Arising from the criticisms leveled against the Bills that were defeated in Parliament, there are many issues that impinge on the effective working of the Tribunal that require more attention and amendments. These include:

- Jurisdiction
  - The definition of crimes against humanity departs from international law in that it limits all acts to those based on national, ethnic, racial or religious grounds, whereas the ICC refers to such grounds only in relation to "persecution".
  - "Other inhumane acts" is too vague to be used in law: The ICC definition narrows this to "similar acts causing great suffering"
- The procedure for getting an indictment into court
  - Why is the indictment submitted to "a judge" of the Trial Chamber
  - What is confirmation of the indictment, and who is "the judge"
  - What is the relationship between these provisions and on pre-trial proceedings? This is a particular problem; it seems to be a committal hearing. Who is the pre-trial judge? A member of the Tribunal? But if that judge has committed the person for trial, how can he/she then be part of the trial chamber for that person's substantive trial? Could that person be the Trial Chamber President (a Kenyan)? But the whole design is surely that any substantive decision requires at least one foreign judge. The Sierra Leone Special Court has a designated judge for pre-trial proceedings. But there at least the committal is much more of a formality not involving any assessment of the evidence. Why it is necessary to have any form of committal proceedings for the main Tribunal yet there is a high powered Prosecutor?
- Appointment of the Kenyan Judges
  - Waki proposed that this be done by the President in consultation with the Prime Minister acting on the advice of the Chief Justice. Note that the Chief Justice has been taken out of the process and the decision is that of the President with the concurrence of the Prime Minister. In default of agreement, the matter is referred to the National Assembly, which must decide by a resolution supported by at least 50% of its members. This could be a device to hold things up. It is perfectly possible that the assumption that the President and Prime Minister will have to compromise and thus appoint a neutral person will not be justified – and that they will be able to agree on a Kenyan who is not neutral. Perhaps it would be better for the choice to be made out of a limited list put forward by the Judicial Service Commission despite its shortcomings, or, preferably, a body comprising the Judicial Service Commission plus representatives of the Kenya Law Society. If the President and the Prime Minister can not agree, it is suggested that the matter revert to the Panel of Eminent Persons.
- Tenure of Judges
  - This should be for the duration of the Tribunal. It is undesirable to have reappointment because it can act as an incentive to behave in a certain way.
- Dismissal of Judges

    - There should be a mechanism for dismissal of judges somewhat similar to that in the current Constitution, but including at least 2 foreign judges (or retired judges) of superior courts from the Commonwealth in the tribunal. It should not be politicized by going to the National Assembly
- Qualifications of Judges
    - The expression "qualifications required in their respective countries for appointment to the highest judicial offices" comes from the Sierra Leone statute. It could restrict judges to those qualified for appointment to the other country's highest appeal court. Waki used the familiar expression about "superior courts of record", which is well understood in common law jurisdictions, or the expression from the current Constitution could be used: "unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or in the Republic of Ireland or a court having jurisdiction in appeals from such a court".
    - Should it be possible to appoint retired judges from other countries? If so – perhaps they do not possess the qualifications required
    - It should be clear that Kenyans who are already judges are not eligible
- Appointment and Qualifications of Special Magistrates
    - Is it right that existing magistrates should be eligible?
    - It is suggested that the National Assembly should play no part in the appointments
- Qualifications of Registrar
    - Is registrar going to be non-Kenyan?
    - It is not clear why the Registrar must be a lawyer. The first Registrar of the Sierra Leone Tribunal was someone who had 40 years of experience in the UK courts, as an administrator.
- Qualifications of Chief Defence Counsel
    - Is this person to be Kenyan or a foreigner?
    - Why should that person have experience in administration of court registries?
- Trials in absentia
    - This goes totally contrary to common law traditions. It is not possible in the ICC.
- Trials in public
    - Only in exceptional circumstances should hearing in camera be possible e.g. protection of witnesses. The Statute should be restrictive on this.
- Quorum: presumably it is intended that all three members of the Trial Chamber, and all 5 members of the Appeal Chamber, sit in any full trial or appeal.
- Accountability in most of these hybrid courts is through very active involvement of the United Nations. It is important the Special Tribunal to have oversight mechanism
- The possibility of amicus curiae submissions by groups or organizations not actually a party or "victims"
- Immunity from suit of judges
- The status of the Tribunal as a legal personality, able to make contracts etc
- The role of the Tribunal as custodian of evidence require spelling out
- The need for special facilities for women and child victims/witnesses
- Outreach. The Tribunal must be something that Kenyans can understand; the Registry should have an outreach section that can educate the public, the profession etc.

- Monitoring and oversight
    - There should perhaps be more provision for monitoring by the Panel of Eminent African Personalities, including regular reporting
    - Perhaps audit could be jointly done by the Kenyan Auditor General and some United Nations or other independent body
    - There should be a role for the civil society in monitoring the work of the Tribunal
- In case offenders flee the country, there should be some provision to ensure extradition
- A particular concern expressed by Kenyans is the absence of the rule that once a person holding public office is being investigated (or at least indicted), he or she must step aside until the investigations or the trial end.

Redrafting Constitutional (Amendment) Bill and the Special Tribunal Statute

The preamble of the Tribunal Bill should clearly set out the background to, and the purposes of the legislation, and by implication reminds us of the implications of NOT getting it right: namely that there is a "fall back" plan if these "serious crimes go unpunished" in the form of the ICC in The Hague. Not getting it right can involve not just failure to pass the law, but failure to enact an effective process.

The purpose of amending the Constitution is to ensure that no challenge can be made to the law setting up the Tribunal, or to its acts or decisions. In other words, the Special Tribunal is to be something that, although in a sense is there to reinforce constitutionality, will be independent of the constitution, especially because this would make it independent of the existing courts.

The redrafted Constitution Amendment Bill 2009 must protect the Statute from constitutional challenge and everything done under the Act. Also other key areas of focus include:

1. The Special Tribunal Statute and the bodies that it establishes must respect human rights including the rights of suspects to a fair trial, and the observance of principles of equality and non-discrimination on any grounds including gender, nationality, race or ethnicity, political or religious belief or affiliation, age or disability.
2. No provision of the Special Tribunal Statute, and no decision of the Tribunal made under the authority of the Special Tribunal Statute shall be deemed to be inconsistent with any provision of this Constitution, and no such provision or decision shall be challenged in any other court, whether on the basis of this constitution or on the basis of any other rule or principle of law.
3. For the avoidance of doubt, no powers under sections 26 (Attorney-General), or 27 - 29 (Prerogative of mercy of the President) shall be exercised, and no immunity under section 14 (Protection of President in respect of legal proceedings during office) shall be enjoyed, in relation to the Special Tribunal.
4. Where any law is in conflict with the Special Tribunal Statute, the provisions of the Statute shall prevail.
5. No Act, including an Act to amend the Special Tribunal Statute, may alter any decision of the tribunal or relieve any person of any penalty imposed by the tribunal.
6. No executive act, whether under the authority of this Constitution or any other law, may alter any decision of the tribunal or relieve any person of any penalty imposed by the tribunal, except as provided by the Special Tribunal Statute.

7. For the process the Kenyan court shall be distinct from the Special Tribunal.

These proposals are intended to ensure that no court, and no Minister, public official or even the President, undermines the working of the Special Tribunal whether while it is in existence or after it has finished its work. Incidentally, the "immunization" of the Tribunal from the impact of the Constitution or any other law might have some other effects (for example the removal of the normal immunity of the judiciary for acts committed in the course of their office. The Tribunal must act in accordance with human rights, but, as with the regular courts, the tribunal itself is the ultimate judge of whether this has been done.

ADVANTAGES OF INTERNATIONALIZED TRIBUNAL

Internationalized tribunals have several advantages including:

- Signal end of impunity and set a precedent of accountability.
- Enable prosecutions where effected national criminal justice system is inadequate or unwilling.
- Abide by due process protections and other human rights standards
- Thorough investigations of systematic crimes
- Aid development of international law and jurisprudence
- Considerable political impact

However, there are disadvantages

- Lack geographical and cultural proximity to the victims
- Difficulty of retaining international spot and funding
- Can only prosecute small number of offenders
- Public expectations may exceed resources and practical outcomes.

The International Criminal Court

The International Criminal Court (ICC) is the first world's permanent and independent court dealing with international crimes since it started operations in July 2002. The court founding treaty- The Rome Statute which governs the International Criminal Court's (ICC's) Work was signed in 1998 by 139 countries. Four years later a sufficient number of states (i.e. 60) had ratified the Statutes to make ICC a reality .As of December 31, 2007, 105 countries had become States Parties to the Statute and members of the "Assembly of State Parties" that funds the court, elects judges and provides management oversight. When a state becomes a party to the Rome Statute, is should criminalize and try war crimes, crimes against humanity, and genocide. Also the court handles crime of aggression though it is yet to fully be agreed upon. The implementing legislation must also contain provisions for government to cooperate with ICC. The ICC based in The Hague, Netherlands, is not a United Nations institution.

The ICC just like other international courts serves four basic aims namely:

- Try those accused of committing grave crimes and punish those found to be responsible
- Bring justice to victims if those crimes
- Deter future crimes
- Establish the facts to pave the way for accountability and reconciliation
- Strengthen the rule of law

The ICC has a mandate to investigate and bring justice to individuals who commit the most serious violations of international humanitarians' law including war crimes, crimes against humanity and genocide. However it should only do so if State are "unable or unwilling genuinely to investigate or prosecute" those crimes. This is known as the system of complementarity.

The ICC definition of crimes against humanity is more extensive than the definitions in other

legal instruments, showing the evolving nature of the crimes and lessons learned from other international tribunals. In addition, discussions are ongoing about whether the crimes of aggression should be added to the Rome Statute and if so, what the definition of that crimes should be.

In its jurisdiction unlike the ad hoc international tribunals, the ICC is not limited geographically, but it can only address crimes committed after July 1, 2002- the date of the Courts creation- by individuals who were ages 18 or older when they committed the crime.
The ICC can become involved in the case in one of the three ways:

- State itself may refer a case as has been done by the Democratic Republic of the Congo (DRC) and Uganda
- The UN Security Council may refer a case to the court as was the case in Darfur; or,
- The prosecutor himself may initiate a case if crimes have occurred in a state party's territory or have been committed by the nationals of a state party.

Relationship with the Local Courts
As mentioned, the ICC's jurisdiction complements, or is complementary to the domestic courts, which means that it is not intended to replace or compete with domestic courts and will only act when a state is unwilling or unable genuinely to carry out investigation or prosecution. A State may be deemed "unable" to prosecute if its domestic legal system is in a state of collapse or "unwilling" to prosecute if it is clear that any legal proceedings which it is holding or planning to hold are sham i.e. intended to shield parties. The standard of proof (i.e. threshold) is high reflecting the principle that the ICC should be a "court of last resort" that only acts if state do not act.

Procedure to Bring a Case before the ICC
The first steps of any case before the ICC will entail examining "communications" that they may alert the Chief Prosecutor- currently Luis Moreno Ocampo of Argentina- to the fact that Crimes are, or were committed. These communications may come from victims or other sources including nongovernmental organizations (NGOs) or government. This stage of the case is referred to as communication. Next the Prosecutor may decide to open an investigation. To do so he or she must consider the following.

- Whether the evidence and information indicates that a crime within the ICC's jurisdiction has been committed
- Whether the case is admissible (i.e. it is not already being investigated by the national authorities
- Whether, even if the first two thresholds are met, the substantial reasons to believe an investigation would not serve the interest of justice; with consideration given to the gravity of the crime, the interest of the victim, the age or infirmity of the alleged perpetrators and whether the suspects played a leading role in the alleged crime, and
- Whether there is reasonable basis for an investigation to proceed.

The Pre- Trial Chamber (a group of three judges assigned to the case) must authorize a decision to initialize an investigation and may review a decision not to investigate. National authorities must be informed before even very basic investigative steps are undertaken- such as interviewing witnesses-and may be required to cooperate on important issues, such as providing security, access to crimes scenes and potential witnesses, and arrests of suspects. In

this sense, the ICC is very dependant on its relations with national authorities to do its work. If an investigation is successful and yield sufficient evidence, it will result in an arrest warrant, including a listing of the charges against the accused. This has already happened to the five of the senior commanders of the Lords Resistance Army (LRA), who have been fighting in northern Uganda; the warlords from Eastern DRC; and individuals from Sudan.

A case can only go to the next stage i.e. prosecution, if the accused is actually arrested. Trial before the ICC will be quite different from those in other courts in that victims will have certain rights to participate directly, and may also claim reparations if an accused is convicted.

Relationship with the UN Security Council

The Security Council can trigger an investigation under chapter VII of the UN Charter by ''Referring an issue to the ICC, as happened in Darfur, Sudan. The Security Council can also ask for ''deferral "of investigations or prosecutions which, if granted, would mean that investigation or prosecution would have to stop for a period of 12 months (Article 16). This is in recognition of the role of the Security Council plays as guardian of international peace and security, and presumption is that the council would only use this power if it is considered that an investigation or prosecution would pose a threat to international peace and security.

Victims

The ICC has a number of departments' dealings with victims:

- The Victims and Witnesses Unit which deals with issues of trauma and witnesses security assessment;
- The Office of Public Counsel for victims (OPCV) of which provides lawyers who can represent victims in court; and,
- The independent Victims' Trust Fund which aims to provide reparations to victims and overseen by an independent board of directors.

Under the ICC Rome Statute, victims have a right to participate through legal representatives, in court proceedings. As with much of the ICC, the Rome Stature continues to be subject to various interpretations. In early June 2006, Chief Prosecutor Moreno Ocumpo argued during the pre trial phase of the case against former Congolese militia leader Thomas Lubanga that victims should only participate in trail of defendants after the investigations phase. He stated that wider participation could "jeopardize investigations" which were still ongoing. However, his argument was rejected by judges.

In practice, the level of victims' involvement and the extent to which their own representatives will be able to question the accused, may well be at the discretion of each individual trial chamber. Judges are obligated to balance victims' right of the accused to a fair trial and ensure the rights of one do not affect the other. In addition to participation in investigations and prosecutions, victims can also seek reparations. The court can order those found guilty of crimes to pay reparations. Further, the ICC plans to help victims by providing them with assistance or reparations through the Victims Trust Fund, which may among various options make collective awards and fund

project for victims. Support for the fund will come from governments, foundations, and private donors. As of January 2008, the fund had active programme in both DRC and Uganda.

CONCLUSION

It is imperative that the government and parliament get a proper and credible Special Tribunal system in place, for a great deal depends on it. Apart from dispelling the reputation, Kenya has also to convince Kenyans and the international community of the ability and willingness of political parties to end impunity, and to punish those who place the security of the people and the integrity of the country at risk. Kenya has a great opportunity not only to fight impunity but also to learn through the participation of foreign judges, prosecutors and investigators, how a proper criminal justice system works. Over the years Kenya has shamefully politicized its legal system, to the extent that not only have Kenyan people lost all confidence in it, but the government and the judiciary have forgotten the professional competence , skills, and integrity necessary for a just and effective legal system.

If the national authority is not interested in the punishment of the perpetrators of grave human rights violations, and domestic and international crimes, and particularly if important members of the government may have been implicated in the violence, it is exceedingly hard for the international community, particularly through a hybrid tribunal, to ensure that justice is done. Criminal trials can not achieve the variety of the tasks including accountability and reconciliation envisaged in Kenya, if their work is not based on impartial and thorough investigations, fair trials and punishment of guilty offenders.

Structural features, guaranteed in watertight legal framework, of the Special tribunal including the balance between local and international components and the extent and form of funding, will determine the effectiveness of the tribunal. It is important to have adequate systems of monitoring/oversight by the civil society officials and international community.