

A TRAIL OF LIES AND DECEPTION

Post-Election Violence: Impunity Constraint to Justice¹

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 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 reflects and engages in public policy and law making 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.

Background information

The Commission of Inquiry into Post-Election Violence (Waki Commission) was set up by the Kenyan coalition government as part of the peace and reconciliation mediation process that brought the violence of early 2008 under control. The commission reported in October, recommending a series of reforms and establishment of a special tribunal of international and Kenyan judges to investigate and prosecute those most responsible for the violence. The Waki report contained a strict timeline for setting up the tribunal and putting it to work, which, if breached, would require the mediator -Kofi Annan- to pass a sealed envelope with the names of chief suspects to the International Criminal Court (ICC).

On February 12, 2009, the Kenyan parliament voted against a Constitutional Amendment Bill establishing the proposed tribunal made up of Kenyan and international judges. The Waki Commission had set a deadline of January 30 to pass the legislation but on February 24, Annan granted the government of Kenya more time to re-introduce the bills.

The International Center for Policy and Conflict has been working and advocating for the enactment of the Special Tribunal for Kenya (STK) to try the perpetrators of the 2007/8 post election violence. The Center engaged vigorously with the Commission of Inquiry into Post-Election Violence (CIPEV) popularly known as 'Waki Commission' in conjunction with, Kenyans for Peace with Truth and Justice (KPTJ) and other Civil Society organizations (CSOs).

Waki Commission released its report on October 16th 2008. Immediately, ICPC initiated consultations with CSOs, particularly those working under the auspices of MultiSectoral Task Force on Transitional Justice, and held a series of consultative meetings on the Special Tribunal for Kenya. These meetings interrogated the Waki Commission proposals and looked at practical technicalities and challenges (legal and political obstacles) to be overcome. They made the following proposals/ requirements to be met;

- Constitutional safeguards and tribunal statute to meet criteria set by the Waki report
- For tribunal to win confidence of victims it must be credible, impartial and have independent investigations and prosecutions done
- It must guarantee international standard of fair trials
- It must uphold appropriate penalties in event of convictions
- The criminal jurisdiction must ensure that as wide crimes and perpetrators are prosecuted
- It must have financial and political independence

¹ This briefing report is prepared by the International Center for Policy and Conflict (ICPC) as part of its advocacy and monitoring of the post-election violence prosecutorial mechanisms measures

- A strong effective victims and witness protection mechanisms must be provided

The official government Bills for the Special Tribunal were published in late December 2008. But due to its deep flaws and lack of consultations the Constitutional Amendment Bill 2008 was defeated in Parliament on February 12, 2009. Since then there has been no serious genuine commitment, will and intention to prosecute the perpetrators of the post-election violence crimes.

Preliminary Assessment Report

Introduction

Today marks almost one year after the Commission of Inquiry into Post-Election Violence (CIPEV) handed over its groundbreaking report on October 16th, 2008. The report set the date of March 31st, 2009 as default line for the Kenyan Government to enact the Special Tribunal for Kenya. On December 16th, 2008 President Mwai Kibaki and Prime Minister Raila Odinga signed an agreement detailing the roadmap towards executing the CIPEV recommendations. However, the agreement roadmap omitted certain key aspects of the recommendations while overlooking others. The Office of the Chief Prosecutor of the International Criminal Court (ICC) made its examination of the Kenyan Situation public on February 2008. The Chief Prosecutor has received numerous Article 15 communications on the post-election violence including the CIPEV report, envelop containing the prime suspects and the documents with supporting evidence and materials.

Special Tribunal for Kenya

In a desperate attempt to enact the Special Tribunal for Kenya, the Government of Kenya convened a special session of the Parliament. Regrettably no substantial business relating to the Tribunal was conducted. Instead, the Government waited until the last moment to the deadline and without serious consultations introduced a deeply flawed Constitutional Amendment 2009 Bill on February 12, 2009. Civil society (see media advert February 9th, 2009), a section of Parliamentarians and international community pleaded for the withdrawal of the Bill to allow for more consultations and amendments to the flaws with no avail. The Bill was defeated. Consequently, the Kenyan government requested for extension of the deadline to August 2009.

Between March 29 and April 2, 2009, Civil Society Delegation held consultations with Kofi Annan and the International Criminal Court on the Complementarity nature of the ICC and the Special Tribunal for Kenya. It was agreed that ICC would only intervene if the Kenyan Government fails to enact a national mechanism that meets international standards and lack of genuine investigations and prosecutions. There was also a felt need for the ICC to conduct an outreach program to cause an understanding of its jurisdiction, operations and its work in general among the Kenyan population and more specifically, the victims.

International Criminal Court

Kenya became a member of the ICC in 2005. This means that without any further action on the part of Kenyan authorities or any international actor, the ICC prosecutor may choose to seek to open an investigation into genocide, crimes against humanity, and/or war crimes that have been committed in Kenya or by Kenyan nationals. In order to determine whether to seek to open an investigation, however, the ICC prosecutor must first carry out an analysis of whether alleged crimes fall within the court's jurisdiction and whether any case based on these crimes would be admissible. See below for discussion of the factors that the prosecutor will take into account in his analysis. This analysis or active monitoring, thus, precedes any decision to investigate, and may in fact lead to a decision not to investigate.

On 3rd July 2009, the Kenyan government delegation including the Justice Minister, Lands Minister and the Attorney General met the ICC Chief Prosecutor. This was one day after meeting the Chief Mediator Dr. Kofi Annan. After the meeting with Prosecutor, a common statement was issued in The Hague by a Government delegation from Kenya and the Chief Prosecutor. It stated that in order to prevent a recurrence of violence during the next election cycle, those most responsible for previous post-election violence must be held accountable. Kenyan authorities committed themselves to refer the situation to the Court if efforts to conduct national proceedings fail.

Two months later, after the signing of the agreement between the ICC and Kenyan government delegation, no substantial progress has been made. It is significant to observe that since October 16th, 2008 when the CIPEV was released, nothing tangible has been implemented flowing from the groundbreaking report. This raises grave legitimate concerns as to the genuineness, commitment and or will on the part of the Coalition Government, specially the President, to bring to justice those bearing responsibility for the post-election violence.

On 9th July 2009, the African Union Panel of Eminent African Personalities, Chaired by Kofi Annan, submitted to the ICC Chief Prosecutor the sealed envelope containing a list of persons allegedly implicated and supporting materials previously entrusted to Mr. Annan by the Waki Commission on the post-election violence.

On 16th July, Prosecutor Moreno-Ocampo received the sealed envelope and 6 boxes containing documents and supporting materials compiled by the Commission. The Prosecutor opened the envelope, examined its content and resealed it. On 14 July, the Prosecutor received two reports from the Kenyan authorities on witness protection measures and on the status of legal proceedings carried out by national authorities(this is partly adhering to the agreement signed on the 3rd, July 2009).

On 17th September, 2009, the Prosecutor met with Kenyan Minister of Lands James Orengo. The Minister emphasized the need to fight impunity for post-election violence in Kenya in order to prevent a recurrence of violence in 2012. The Prosecutor confirmed his invitation to Justice Minister Kilonzo to visit The Hague again at the end of the month i.e. September 30th, 2009. On 18th September 2009, the Chief Prosecutor met with representatives of Kenyan civil society and the national statutory human rights institution, Kenya National Commission on Human Rights (KNCHR). The civil society present included International Center for Policy and Conflict (ICPC), Kenya Human Rights Commission (KHRC), Kenyan Chapter of the International Commission of Jurists (ICJ-K) and the International Center for Transitional Justice (ICTJ-K) in The Hague(see picture below). The Prosecutor emphasized that Kenya can prove an example of how to work together with the international community and the Court to prevent recurrence of violence in future.



Picture of the Kenyan CSOs representatives together with the ICC Chief Prosecutor Moreno Ocampo at The Hague, Netherlands.

International Criminal Court Intervention Procedures

According to ICC procedures, the ICC prosecutor must first make an independent determination to proceed with an investigation and must seek authorization to initiate an investigation, and any other aspect, from a chamber of ICC judges. The suspects' names contained in the envelope prepared by the Waki Commission would be further information in addition to that which the prosecutor has already received from the Kenyan National Human Rights

Commission, individuals, and NGOs-on which to base his decision as to whether or not to seek to open an investigation. If the ICC prosecutor determines that there is no reasonable basis to proceed with an investigation under the ICC's statute, he is not required to seek to open an investigation. He may always reconsider this decision on the basis of new facts of information.

ICPC has compiled and tried to answer a few commonly asked questions below:

1. What is the ICC prosecutor taking into consideration in determining whether or not to begin an investigation?

The ICC prosecutor's decision to initiate an investigation is guided by requirements set out in the ICC treaty. First, there must be a reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed. ICC crimes include genocide, crimes against humanity, and war crimes. Second, even where an ICC crime or crimes have been committed, the ICC prosecutor must determine whether they would be admissible. Admissibility has two components: gravity and complementarity.

Gravity: The ICC's jurisdiction is limited to only the most serious crimes of concern to the international community. To assess whether the crimes alleged have the requisite gravity, the ICC prosecutor considers the scale, nature, and manner of commission of crimes, as well as the impact of crimes.

Complementarity: The ICC's jurisdiction is also limited to cases where national authorities are unwilling or unable to act to investigate the crimes in question for purposes of prosecution. This is known as "complementarity" and makes the ICC's international jurisdiction secondary to that of national authorities.

2. Why is the ICC's jurisdiction complementary? What are the advantages of national trials?

National authorities, including those in Kenya, have the primary responsibility to bring those responsible for international crimes to account. Providing judicial remedies to victims and administering criminal justice fairly are core aspects of good governance and help to build respect for the rule of law and to deter future crimes. The ICC's authority to act only where national authorities are unable or unwilling, thus, respects the role of national courts and encourages the development of credible and independent judicial systems within national jurisdictions.

National trials have several distinct advantages in practical terms. Trials by the ICC are most likely to be carried out at the seat of the court in The Hague. Although the ICC is attempting to develop robust outreach and public information programs, proceedings in Kenya are likely to be more accessible, including by those communities directly affected by the crimes tried. National trials would also strengthen Kenya's judicial system and would add to the experience and expertise of national authorities in the investigation and prosecution of international crimes, particularly through taking on board lessons from the tribunal's proposed mix of national and international staff.

Moreover, this mix will enable international staff to perform their functions more competently. It is likely that such investigations and prosecutions could also be conducted more quickly than those of the ICC, which will need to develop specialized expertise on Kenya. The ICC's indispensable role is in closing the impunity gap for serious international crimes where credible national investigation and prosecution are not possible.

3. If the ICC prosecutor opens an investigation in Kenya, how many people will be charged?

It is the policy of the ICC prosecutor to target only those persons bearing the greatest responsibility for the gravest crimes. While ICPC has advocated that the ICC Chief Prosecutor apply this standard flexibly, it is unlikely that more than a handful of persons would be charged were the ICC to open an investigation and proceed with prosecutions in Kenya. The prosecutor's case in Uganda yielded five arrest warrants, while the two cases in the DRC have yielded two arrest warrants each. The prosecutor has sought a total of six arrest warrants in the Darfur situation, and just one in the Central African Republic.

Therefore, even if the ICC acts with regard to the situation in Kenya, it will most likely prosecute at most a handful of individuals. To bring full accountability and, moreover, to break long-standing cycles of impunity, Kenyan authorities will need to pursue national investigations and prosecutions. Indeed, it is legally obliged to do so under national and international law. As the UN special rapporteur for extra-judicial executions, Philip Alston, concluded in his recent report, the Waki Commission-recommended special tribunal "is absolutely indispensable if justice is to be done and if the appropriate lessons are to be learned before the next elections. An international tribunal cannot possibly achieve justice on a broad scale in this regard."

The UN special rapporteur also suggested that he saw powerful reasons for the ICC's involvement to try those most responsible. The complementary nature of the ICC's jurisdiction means, however, that it should only intervene if Kenya's authorities demonstrate that they are unable or unwilling to prosecute these individuals, and if the ICC's other jurisdictional pre-requisites are met.

4. Even after Kofi Annan has handed over the envelope to the ICC, and Gitabu Imanyara's Bill is up for debate in parliament soon, what steps should be taken to ensure a more credible process this time around?

Efforts to pass legislation establishing the special tribunal were marred by a failure of leadership. President Kibaki and Prime Minister Odinga made little effort to marshal support for the bills and to impress upon lawmakers their collective responsibility to establish the tribunal as a means to provide accountability. Severe limits were placed on the consultation process leading up to the tabling of the special tribunal legislation. Calls by civil society for further amendments to ensure the tribunal's credibility and independence were repeatedly rebuffed; as a result, the special tribunal bill and the constitutional amendment bill were poorly drafted. This allowed, in the words of the UN special rapporteur on extra-judicial executions, "opportunistic efforts by politicians with a clear vested interest in promoting impunity to undermine the steps required to create the Special Tribunal."

Every effort must now be made to avoid a repeat of this same outcome. The Kenyan government should hold consultations with civil society and legal experts to incorporate the many criticisms of the special tribunal and constitutional amendment bills as currently published, and parliament should involve itself in these consultations to guarantee that the concerns of members of parliament are addressed before the bills are introduced. Criticism of the bills and the process may be justified. It is important to note, however, that even if the special tribunal is established, the ICC will retain jurisdiction and can step in as needed. Thus, any member of parliament who argues that the special tribunal should be rejected in favor of the ICC option could be proving a lack of understanding of the fact that the two processes are not mutually exclusive.

International partners also have a role to play in ensuring a successful outcome. Foreign governments should impress upon Kenyan authorities that the establishment of the special tribunal is the key test of the commitment of the coalition government and the 10th parliament to the reform agenda brokered by Kofi Annan. Foreign governments could also pledge their financial support to the special tribunal, if it is established in a credible process. The International Criminal Court should continue its monitoring and analysis of the process.

5. If the special tribunal is established, but does not act independently and impartially, does this mean that the perpetrators of the post-election violence will not be brought to book?

Even if a special tribunal is established, the ICC retains its jurisdiction over the situation in Kenya. Regardless of the fact that Kofi Annan has transmitted the Waki Commission envelope to the ICC prosecutor, the prosecutor could decide at any point to seek to initiate an investigation and to bring prosecutions if he considers that the crimes alleged are sufficiently grave and that national proceedings are not being conducted credibly or have not been conducted with regard to particular individuals or incidents. Proceedings conducted in Kenya in a manner designed to shield those responsible from criminal responsibility or which suffer from unjustifiable delays or are not independent or impartial would not act as a barrier to the ICC's subsequent jurisdiction.

Right of Victims

While the punishment of individuals for violence has received much greater attention shifting more to individual criminal responsibility, the position of the victims of these crimes has not been equally addressed. Their rights and interests have largely been overlooked. Yet redress and reparation for victims of violations is an imperative demand of justice. The relevance of rights is questionable if victims have no legal capacity to enforce their rights, before either a national or an international court, once they claim to have become a victim. As pointed out by Lord Denning: “a right without a remedy is no right at all”.

The United Nations Commission on Human Rights has recognized the interests of victims of violations. The “Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law” (hereinafter “UN Principles on the Right to a Remedy”), adopted by the United Nations Commission on Human Rights at its 56th session in 2008 aim to provide victims of violations of human rights with a right to a remedy. The content of this right includes access to justice, reparation for harm suffered and access to factual information concerning the violations. It distinguishes between five forms of reparation: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition

The rights of victims of the post-election violence have been grossly disregarded. While the Rome Statute of the ICC provides for the right of victims to participate in its proceedings and the rights to reparations, we have to acknowledge its limitations. The uniqueness of the Special tribunal for Kenya Bill 2009 provides for both reparation and participation as an easier and quicker road compared to the ICC.

There are a number of things the Kenyan government needed to do before the 30th September deadline for it to submit a clear roadmap on a national mechanism it had put in place to punish the perpetrators of post election violence as recommended by the Waki Report. First on card was for it to provide a detailed report on genuine investigation and prosecution steps it had taken since adopting the recommendation of the Waki Report and secondly, to report on the witness protection and evidence preservation Acts.

The government has partly perfumed on the above two but has failed on the third one which was to submit a clear roadmap on a national mechanism it had put in place to punish the perpetrators of post election violence as recommended by the Waki Report and this is the crux of the matter. It is clear that the attorney general has already submitted a report that his department had already prosecuted over 500 cases related to the post election violence. The government has come up with the witness protection act and its operationalisation mechanism.

The question that renders itself for determination is whether by this action or omission, the country has done an act of self referral to the International Criminal Court. Experts are giving varying answers to this question. There are those whose school of thought is that by the country’s renegeing on its commitments after clear time frames, the country has automatically made a self referral and saves the ICC Chief Prosecutor the rigors of the pre trial chamber for the ICC to commence investigation for the Kenyan Case.

There are those who insist however that the Rome Statute will have to be followed to the latter before the Kenya case can see the light of the day. Be that as it may, indeed the events of the 2nd of July 2009 are very clear. That Constitutional Affairs minister and his lands counterpart met with the chairperson of the Committee of eminent persons Koffi Anan and one day later with the International Criminal Chief Prosecutor Luis Moreno Ocampo where the 30th September deadline was fixed. It was agreed that the country will come up with a mechanism to deal with post election violence perpetrators to stem recurrence of such violence.

As matters stand now, the deadline given by the International Criminal Court are final and any argument to the effect that it is not cast in stone is circular and a game of musical chairs to say the least. This was as advanced by Lands minister James Orengo. It is also without any doubt that the decision by the cabinet on the 30th of July to expand the mandate of the Truth Justice and Reconciliation Commission was vague and null and void ab initio. We need not reiterate that TJRC and the ICC are two quite different organs whose mandates are mutually exclusive and non substitutable.

Indeed the implementation of the Commission of Inquiry into post election violence was given impetus by signing of an agreement by both the President and the prime minister on the 16th of December 2008. Article one of that

agreement concerns the setting up of a special local tribunal. Article four of this agreement provides express provisions that those implicated in the post election violence should be suspended from any public office. Any attempt to circumvent the creation of a special tribunal for Kenya and adherence to the rigors thereof is an exercise in futility.

There are number of problems with the situation as it stands now.

1. The government is not likely to make a self referral. Yet the government has made an admission that it is unwilling or and unable to deal with post election violence.
2. The ICC can move on its own motion and refer the Kenyan case to the International Criminal Court. However, the Pre Trial chamber will asses whether it has the requisite jurisdiction over Kenya and whether the country has the necessary tools to deal with and legal competences to conduct credible investigation and impartial prosecution. At this stage, the Attorney General as the Chief government advisor is likely to come up with a preliminary objection on the ICC move claiming that Kenya is willing and competent to handle post election violence. If the Pre trial chamber upholds this argument then the country will be back to square one. However the consequences of dismissal of the preliminary objection are that the ICC chief prosecutor will now move in and prosecute the Kenya Matter.
3. The second phase will involve the Chief Prosecutor moving to the pre trial chamber to submit on the relevance, reliability and admissibility of the evidence at hand. At this juncture he will also submit on the threshold jurisdiction of the ICC upon the Kenyan case. If the pre trial chamber accedes to the submission on the above the prosecutor will move in and take specific cases already admitted at the pre trial chamber. The next procedure is the application of warrants of arrest from the pre trial chamber. Once it is granted, the ICC chief prosecutor will do akin to what he did against Sudanese's president Omar el Bashir and his two ministers.

With Kenya having not only ratified but also domesticated the Rome statute, it is obliged to corporate with the ICC; and should this not happen, the ICC has a wide discretion and can enforce its orders through any other country.