

## **The Spectre of Impunity and the Politics of the Special Tribunal in Kenya**

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On 9 July 2009, Kofi Annan the former chief mediator in the aftermath of Kenya's post-electoral violence, transferred an undisclosed list of senior politicians to the Prosecutor of the International Criminal Court, Luis Moreno-Ocampo. These politicians are alleged to have committed crimes against humanity during the post-electoral violence between December 2007 and February 2008. What prompted Annan's actions?

The Office of the Special Adviser of the United Nations Secretary-General on the Prevention of Genocide (OSAPG) has developed a framework of analysis which includes indicators regarding the proclivity to genocidal acts in a particular country. Among these indicators are the prevalence of atrocities and extra-judicial executions, the presence of illegal arms, armed elements formed around a particular identity group, a break-down in inter-ethnic relations and exclusionary political practices. However, the most salient issue that the OSAPG framework of analysis identifies is the persistence of impunity for atrocities committed, particularly those targeting particular ethnic groups. As far as this framework of analysis is concerned, Kenya's political situation, especially following the post-electoral violence of 2007 and 2008, contains all of these indicators and more. The question is therefore whether the current climate in Kenya can be described as one in which the proclivity towards genocidal acts remains high.

In order to remedy this predisposition and the legacy of the crisis, the National Accord and Reconciliation Agreement was signed on 28 February 2008 between the Party of National Unity (PNU) and the Orange Democratic Movement (ODM), following the Annan-led mediation effort. This Agreement identified a range of measures that were necessary in order to prevent the future outbreak of inter-ethnic violence. The Commission of Inquiry into on Post-Election Violence (CIPEV) also known as the Waki Commission produced a series of 'recommendations concerning measures to be take to prevent, control, and eradicate similar violence in the future; bring to justice those responsible for criminal acts; eradicate impunity and promote national reconciliation'.<sup>1</sup> The Waki Commission also recommended the establishment of a Special Tribunal of Kenya to try suspected sponsors and organisers of the post-electoral violence. This would serve as an in-country legal framework for the adjudication and administration of justice for the alleged suspects and thus confront the spectre of impunity which threatens to foster future violence.<sup>2</sup>

Specifically, the Waki Report insisted that 'it is imperative to guard against further encouragement of the culture of impunity by granting blanket amnesty to all and sundry in the post-election mayhem'.<sup>3</sup> Astutely, the Waki Commission ensured that the recommendations in its report were accompanied by sunset clauses that would initiate consequences for in-action or intransigence. The Report stated that if 'an agreement for the establishment of the Special Tribunal is not signed, or the Statute for the Special Tribunal fails to be enacted', then 'a list containing names of, and relevant information on, those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the Special Prosecutor

of the International Criminal Court'.<sup>4</sup> This list was in the hands of Annan who has now delivered it to the Prosecutor of the ICC in The Hague.

The Grand Coalition Government failed to establish a Special Tribunal when the proposed Constitution of Kenya (Amendment) Bill 2009 was defeated by 101 to 93 votes in the Kenyan parliament, on 12 February 2009. The deadline that the Waki Commission stipulated had passed, but the Grand Coalition Government did not seem capable of re-visiting the issue. A number of senior political figures in both the PNU and ODM camps have allegedly been implicated in organising and instigating the post-election violence. Specifically, this included Kalenjin leaders from the Rift Valley Province who allegedly financed and organised pogroms against supporters of the PNU. It also included leaders in the Central Province who in retaliation allegedly organised and financed revenge attacks on Kalenjin, Luo, Luhya and other pro-ODM communities in the province. According to analysts, Kenya politicians on both sides were concerned that the local tribunal would be open to manipulation and therefore preferred the Hague option.

The OSAPG framework of analysis also notes that a trigger event, such as an election, is often necessary to unleash political tensions and to foment violent acts between people and ethnic groups. The impending Kenyan presidential and general elections of 2012 may turn out to be the trigger event that unleashes political violence on a scale not witnessed before in the country. Regrettably, a number of the country's politicians believe that by frustrating the implementation of the provisions of the National Accord and Reconciliation Agreement and the specific recommendation to establish the Special Tribunal, they would improve their chances or those of their co-conspirators to capture the presidency. However, there is still time to avert this scenario. In particular, the issue of impunity has to be addressed as a matter of urgency.

The failure of the Grand Coalition Government to establish a Special Tribunal forced Annan's hand. The Coalition had continued to pay lip service to the need to end impunity without any genuine commitment to punishing those who were guilty of crimes against humanity. Several politicians argued that it was necessary to promote healing and reconciliation through the proposed Truth, Justice and Reconciliation Commission rather than pursuing judicial persecution. Others argued that the prosecutions would threaten the stability of the country, but this revealed a lack of understanding that the short-term neglect of justice for the victims would lay the foundation for future violence and instability in the Kenya.

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## Notes

<sup>1</sup> Government of Kenya, Report of the Commission of Inquiry into Post-Election Violence (CIPEV – The Waki Commission), Nairobi, Kenya, 2008, p.21-22.

<sup>2</sup> The Waki Commission Report, p.i.

<sup>3</sup> The Waki Commission Report, p.468.

<sup>4</sup> The Waki Commission Report, p.473.