

Special Tribunal Enactment: Why Cabinet, MPs, are Misleading Kenyans

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31 July 2009

Kenyans are very suspicious of the rare unity between the Cabinet and the Parliament as they jointly dismiss calls for the prosecution of the perpetrators of post-election violence atrocities. This unscrupulous behaviour is not coincidental, but a well crafted strategy: the Cabinet and Parliament are distorting facts on the requirements for a local tribunal, in order to escape accountability. Politicians are satisfied that they are now sharing the spoils and that it is business as usual. They prefer to push the issues that contributed to the crisis under the carpet in order to focus on efforts to capture power in 2012. While we commend the Kenyan government for renewing efforts to enact the Special Tribunal to try those responsible for the 2007 election violence, we believe that nothing short of momentous symbolic shock therapy to the political elite would incentivize formation of an effective, independent and impartial Tribunal locally. Here, we believe the International Criminal Court (ICC) continues to have a major role.

In order to expose the devious political maneuvering of the Cabinet and Parliament in opposing the enactment of an effective, credible and independent local Tribunal, we note that there is tremendous improvement on the current Bills being debated by Cabinet compared to the ones defeated in Parliament in February 2009. We are happy to observe that the current Bills, which we have seen and scrutinized substantively, reflect the recommendations of the International Center for Policy and Conflict (ICPC) and other civil society groups.

Following demands made by civil society groups on how to ensure independence and credibility of the Tribunal, major progress has been made: for instance, the Constitution Amendment Bill 2009 (amendment of section 3A of the Kenyan constitution) protects the Statute and the Tribunal from constitutional challenge, and ensures that the majority of judges, as well as the prosecutor, registrar and investigators, are foreigners. The Special Tribunal Statute and the bodies that it establishes respect human rights including the right of suspects to a fair trial; they observe principles of equality and non-discrimination and the issue of retroactivity (section 77) and time limitation do not apply. Where any law is in conflict with the Special Tribunal Statute, the Tribunal provides that the provisions of the Statute shall prevail: 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; no executive act, whether under the authority of current 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; and that No Kenyan Court including the High Court of Kenya shall interfere with proceedings or the work of the Tribunal (section 60). Further, the bills provide that no powers under sections 26 (Attorney-General), or 27 - 29 (Presidential Prerogative of mercy and pardon) shall be exercised with respect to the tribunal; independent funding shall be provided; and watertight victims' and witnesses' protection will be provided. Moreover, the Tribunal has the primacy and exclusive jurisdiction powers on all matters relating to post-election violence atrocities; the president does not enjoy immunity under section 14 (Protection of President in respect of legal proceedings during office) Finally, The Bills define the crimes, address individual criminal responsibility, command responsibility, and resignation of the suspects from public office.

With these provisions, it is our view that a Special Tribunal with major international representation is the best option for justice for the victims of violence and preferable to a transfer of jurisdiction outside of Kenya.

Regrettably, the enactment of the Tribunal has begun on the wrong footing, failing the most basic test of its independence and credibility. The Cabinet is turning into a hub of impunity, horse trading in the full sight and knowledge of the two principals, President Kibaki and Prime Minister Odinga. Kenyans strongly condemn the Cabinet for allowing political considerations to block the raising of the bar of the Special Tribunal in order to meet the mandatory international standards. It is our expectation that the Cabinet and Parliament will act in a sense of sobriety and responsibility in the pursuit of national goals and objectives. No efforts should be spared in confronting their insidious game of self preservation at the expense of the wheel of justice and accountability efforts against impunity. Kenyan legislators are among the highest paid in the world; the least they should do is to deliver quality legislation. Their ability to deliver an effective Tribunal should be the test of their legislative competence.

We believe that bringing the perpetrators of post-election violence and gross human rights violations to justice will contribute greatly to preventing future human rights violations in Kenya. However, the fragmentation and absurd protection rackets in the Cabinet and Parliament are likely to be the single biggest impediment to the crucial exercise. For this reason, we emphasize that the ICC and Special Tribunal are not mutually exclusive but rather complementary: if the local tribunal is not enacted as seems increasingly likely, the ICC should pursue the prime suspects. If the Tribunal is enacted, the ICC should still continue its monitoring role, as Kenyans do not want 'show' trials; they want fair trials. The Tribunal cannot bring justice to the thousands of post-election violence victims if it tries only a handful of the most notorious individuals, while scores of top officials and other prime suspects remain free. No court, including the proposed Tribunal, should fall short of the international standards which the Kenyan government is bound to uphold. The ICC must bear the burden of responsibility in ensuring that all the international standards that form the basis of other international and mixed criminal processes are explicitly incorporated in any process of accountability for Kenya.

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