

ANNEX 33



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THE JOINT VICTIMS AND CIVIL SOCIETY COMMUNIQUÉ TO KENYANS, THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT (ICC) AND THE INTERNATIONAL COMMUNITY THURSDAY November 5, 2009

Preamble

Prior to the visit of the Chief Prosecutor of the International Criminal Court (ICC) Mr. Moreno Ocampo to Kenya, the civil society and victims of 2007/008 post election violence have been holding series of consultative meetings. Three significant meetings were held in Nairobi and Eldoret under the leadership and sponsorship of the International Center for Policy and Conflict (ICPC). The meetings made resolve on the importance of ending the vicious cycle of impunity in Kenya. Further, it was observed that two crucial reports namely: the Independent Commission of Inquiry into the Post Election Violence (CIPEV) and the Independent Review Electoral Commission (IREC) have attested to this fact, recommending that thorough accountability be prioritized as the first step in ending impunity and preventing future violence.

For years, Government of Kenya has been forming commissions and task forces without acting on the wealth of information and evidence documented. There has been a worrying trend of filing the reports and lack of political will to enforce accountability and bring to justice the perpetrators. However, Kenyans are unrelentingly unified in demanding for accountability. The victims and civil society groups unanimously agreed that the Post Election Violence suspects as well as those protecting or shielding them need to be held accountable appropriately, as a matter of priority. It is further noted there is significant need for Kenya to invest massively in transforming the current corrupt, inept and ineffective criminal justice system in order to build institutions that command trust, confidence and legitimacy of Kenyans and satisfactorily mitigate future crisis.

We are fully convinced that if post election violence (PEV) suspects are not individually held criminally liable, and prosecuted appropriately through an effective and independent judicial mechanism, there is high potential for the next general election or any other major political event, such as a Constitutional referendum, to be violent since the perpetrators know they will not be punished. In addition, it is instructive to note that how the (PEV) serious crimes are handled will influence and determine the public perception, support and engagement with the Truth, Justice and Reconciliation Commission (TJRC). Truth commission is a non-judicial mechanism that documents historical grave systematic human rights abuses and not substitution to criminal prosecution.

Further to not acting on post-election violence serious crimes, and despite incriminating evidence, Government of Kenya has never investigated, prosecuted and convicted those behind the enforced disappearances and extra-judicial killings graphically documented by the statutory human rights body, Kenya National Commission on Human Rights (KNHCR).

LACK OF POLITICAL WILL FOR ACCOUNTABILITY

It is necessary to put into sharp perspective the inconsistencies, contradictions and inertia of the government of Kenya in the pursuit of accountability that has lead to the coming of the Chief Prosecutor of the International Criminal Court Mr. Luis Moreno-Ocampo to Kenya. Key pointers of this can be demonstrated by the following telling events:

- The Kenyan Parliament vide unanimous resolution adopted the Commission of Inquiry into the Post Election Violence (CIPEV) report without amendment, alteration or caveat. The President and the Prime Minister signed on December, 16 2008 an agreement detailing the roadmap towards executing the Commission of Inquiry into the Post Election Violence (CIPEV) recommendations. However, there are little signs to indicate or demonstrate ability or will to live to the letter and spirit of this agreement and compliance to the CIPEV recommendations. The agreement roadmap omitted certain key aspects of the CIPEV recommendations while overlooking others.
- In a desperate attempt to enact a special tribunal, the Government of Kenya convened a special session of the Parliament in late 2008 and early 2009. Regrettably no substantial business relating to the special tribunal was

conducted leading to protest by some Parliamentarians. The Government waited until the last moment to the deadline and without serious consultations introduced a deeply flawed Constitutional Amendment Bill 2009 on February 12, 2009, which was defeated.

- On February 24, 2009 the Chief Mediator, Dr. Kofi Annan extended by six Months the time to allow for more consultations, building consensus and enactment of a special tribunal. And as usual close to the deadline on 3rd July 2009, the Kenyan government delegation including the Justice Minister, Lands Minister and the Attorney General met the ICC Chief Prosecutor and resolved that in order to prevent a recurrence of violence during the 2012 general election; those most responsible for 2007/8 post election violence must be held accountable. This was exactly one day after meeting the Chief Mediator in Geneva. This agreement has not been adequately honoured.
- The Justice and Constitutional Affairs Minister tabled twice a re-drafted watertight Special Tribunal for Kenya Bill 2009 that was in conformity with and meets international standards before the cabinet. The cabinet rejected the Bill. On July 30th, 2009, the cabinet resolved to strengthen the Truth Justice and Reconciliation Commission and reform the criminal justice system in order to deal with post-election violence cases. However, despite denials by some cabinet ministers that this was not the true position that was adopted, there has never been a collective cabinet position on the contrary. Further, Kenyans, particularly victims, gallantly objected this cabinet decision and instead continue to demand for criminal accountability with overwhelming support for the International Criminal Court to try perpetrators of 2007/8 post election violence.
- Despite claims by the government that the Kenyan justice system is well suited to effectively try Post Election Violence (PEV) suspects; to date, out of four cases presented in court, only one has successfully been prosecuted leading to convictions, two have gone to trial and dismissed due to shoddy investigations and another is underway at the High Court of Kenya. While it is critical to overhaul the Kenyan criminal justice system, we do not think it is realistic to achieve such a tall order and successfully prosecute crimes related to post-election violence. Post-election violence crimes are a unique and peculiar and thus demand special mechanism to prosecute.

Conclusion: Evidently, the right to justice and accountability is not guaranteed in Kenya. Efforts to establish a special tribunal have continued to be frustrated by partisan individualized politics mobilized around ethnic expression by key political leaders. Moreover, the government of Kenya lacks the intention, commitment and will to administer justice in relation to grave Post Election Violence crimes perpetrated in Kenya in 2007/8.

It is important to note that, Kenya is a signatory to the various international statutes or instruments of law including ratification (2005) and domesticating (2008) of the Rome Statute of the International Criminal Court. When the rule of law cannot be genuinely and justly enforced within a nation where crimes of international jurisdiction took place, the role of the ICC is paramount. Kenya must remain faithful and committed to the ICC.

ICC INTERVENTION IN KENYA

We recall the statement made on September 30, 2009 by ICC Chief Prosecutor Luis Moreno-Ocampo: "Kenya will be a world example on pre-empting violence". Reiterating his resolve to address the post-election violence of early 2008 with the Kenyan leaders and to prevent violence recurrence through a three-pronged approach: the ICC prosecuting those bearing greatest responsibility; internationally acceptable Special Tribunal for other perpetrators; and other reforms and mechanisms such as the Justice, Truth and Reconciliation commission to shed light on the full history of past grave human rights abuses and suggest mechanisms to prevent such violations in the future.

Following the visit of the Kenyan government delegation to the ICC, the authorities committed themselves to refer the situation to the Court if efforts to conduct national proceedings fail. Some government of Kenya top officials are on record stating categorically of non-compliance with referral. It is significant to observe, however that the Internal Security Minister set the commencement date of the International Crimes Act 2008 as January 2009. The net effect of this commencement date is that without the Special Tribunal law, or amendment of Section 77 of the Constitution of Kenya and/or International Criminal Court intervention it is impossible to prosecute some of serious crimes related or connected to post-election violence.

Kenya must remain faithful and committed to the International Criminal Court.

VICTIMS AND CIVIL SOCIETY POSITION

- Contrary to erroneous, misleading and the false impressions by the government of Kenya, it has had no will, intention and commitment to meet its obligation and duty to prosecute serious crimes within its jurisdiction and those responsible for the 2007/8 post election violence.
- We are convinced that the government is buying time while obstructing, delaying and denying justice to the victims. It is only appropriate for the Chief Prosecutor prioritizing having direct sessions with victims.
- Consequent to the two above and for the urgency and interest of justice, we highly recommend that the Chief Prosecutor of the ICC obtain an official referral of the Kenya situation to the ICC as per the agreement of July 3rd 2009.
- In the event that an official referral is not obtained, the Chief Prosecutor should secure the commitment of the government of Kenya to fully cooperate with the ICC and hand over all evidence, facilitate arrest of suspects and offer any other assistance required.
- There is an overwhelming demand for the establishment of the Special Tribunal for Kenya that is in conformity and meets international standards. Political accountability demands that Members of Parliament immediately enact the Special Tribunal Bill 2009. It is imperative that the Chief Prosecutor publicly support Special Tribunal for Kenya to avoid impunity gap.
- Every individual suspected to have any sort of involvement in planning; instigating, participating, abating and/or financing post election violence must be investigated, prosecuted and convicted appropriately.
- We request that the Chief Prosecutor issues open warrants and those under investigation suspended from holding public office.
- We emphasize that contrary to the political falsehoods created intentionally by the politicians, violations of integrity, dignity and humanity of a person has nothing to do with community or a region. Every victim regardless of their ethnicity demands justice and reparations.
- Government of Kenya has never instituted special mechanism to protect witnesses and preserve evidence related to post-election violence. We urge for urgent measures to be taken immediately.
- Regarding those women and children who were adversely affected by the violence, government of Kenya need to take urgent special measures to alleviate their gruesome sufferings.
- We urge Kenyans to speak out and expose the minority powerful clique of politicians and civil servants speaking against and hindering reforms and accountability. And that the President and Prime Minister must take appropriate punitive measures against these individuals if they are not speaking or acting on their behest.

Signed by

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