

Joint Statement on the prosecution of post election violence perpetrators

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The Kenyan Section of the International Commission of Jurists (ICJ-Kenya) and the Federation of Women Lawyers (FIDA Kenya)
 Joint Statement on the prosecution of post election violence perpetrators and Cabinet's proposed expansion of the mandate of the Truth Justice and Reconciliation Commission

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) and the Federation of Women Lawyers (FIDA Kenya) note with concern the decision of the Cabinet not to form a special tribunal for Kenya for the prosecution of persons bearing the greatest responsibility for the post election violence as recommended by the Commission of Inquiry into Post Election Violence (Waki Commission). Instead the government seeks to prosecute these perpetrators using ordinary courts by expanding the mandate of the Truth, Justice and Reconciliation Commission. ICJ Kenya and FIDA Kenya consider this position by the Cabinet as a clear attempt to deny justice to victims of the post election violence and evidence of the government's tolerance for impunity. The mandate of a truth commission is not judicial and consists of fact finding, investigation of past human rights violations and clarification of historical injustices. The truth commission acts as a supportive component of the process that will allow Kenya confront past violations of human rights and humanitarian law and allow healing and reconciliation to take place. The Kenyan Truth Justice and Reconciliation Commission is therefore not the relevant mechanism to deal with prosecution of perpetrators of crimes against humanity. In order to defeat impunity, a special mechanism is required to try suspects of international crimes and particularly those who bear the greatest responsibility for the 2007 post election violence. One of the effects of conferring the TJRC with a mandate to prosecute is that persons appearing before it will not feel free to speak for fear of self-incrimination and reprisals. Further, this will defeat the immunity provisions as provided in the current version of the TJRC. Furthermore, a process used to prosecute perpetrators of crimes of international concern must enjoy credibility and integrity in the public domain in order to succeed. The Kenyan judiciary and the state security forces do not enjoy public confidence owing to executive interference as well as the lack of transparency in the mode of appointment, removal and transfer of judicial officers and the general level of impunity within the police force. The police have been accused of being perpetrators of some of the worst forms of violations during the post election crisis in Kenya. The use of force by police, the allegations that members of the force were involved in sexual violence, and the failure to prosecute cases even when provided with strong evidence, demonstrates the inability of the force to investigate itself and the state law office to prosecute. Corruption and the enormous backlog of cases also make the Judiciary inefficient and ineffective. It may be recalled that the two cases brought to Court following the post election violence - that of Jackson Kibor (for alleged incitement to violence) and the 'Kiambaa Four' for their alleged role in the Church fire that killed several people collapsed due to shoddy investigations by the police and the State Law Office. To consider the Judiciary as capable of adjudicating cases involving the perpetrators of the post election violence is therefore incongruent with the lived experiences. The proposed reforms to the Judiciary and the state security agencies are yet to be implemented and could delay. Victims of post election violence should not be subjected to such delay in the dispensation of justice. The Waki Commission recommended the establishment of a special tribunal after carefully considering the institutional weaknesses of the national legal system including the potential frustration of prosecutions through litigation and the Attorney General's powers to take over and terminate criminal proceedings. ICJ Kenya and FIDA Kenya consider the recommendations of the Commission of Inquiry into Post Election Violence Report (Waki Report) to be the authoritative guide on Kenya's pathway towards securing justice for victims of gross human rights violations which occurred during the post election violence and a tangible means of ending the culture of impunity in our society. The formation of Special Tribunal for Kenya in keeping with international standards is the best way forward for the country. The Cabinet's deviation from this path constitutes an unwillingness to prosecute which satisfies the requirements for referral to the International Criminal Court (ICC). ICJ Kenya and FIDA Kenya therefore: Call upon the Minister of Justice, National Cohesion and Constitutional Affairs to immediately draft amendments to the Special Tribunal Bill, through wide consultations, that will ensure: protection of the Special Tribunal from political manipulation and legal challenges; both local and international representation at the Special Tribunal; Call upon Members of Parliament to re-consider their position with regards to the establishment of a Special Tribunal for prosecution of perpetrators of post election violence. Call upon the Cabinet to halt any proposed amendments to expand the mandate of the Truth Justice and Reconciliation Commission. Call upon Members of Parliament, Cabinet, the Prime Minister and the President to enact legislation that will enable the establishment of an independent Special Tribunal for the prosecution of perpetrators of post election violence. Call upon the people of Kenya to stand firm in their pursuit of peace and justice.