PRESS STATEMENT BY THE ICJ KENYA ON THE ESTABLISHMENT OF THE SPECIAL TRIBUNAL FOR KENYA

The Kenyan Section of the International Commission of Jurists together with its partners drawn from Uganda, Sudan, the Democratic Republic of the Congo, Tanzania, Rwanda and the Central Africa Republic and collectively constituting the Eastern Africa International Criminal Justice Initiative (The EAICJI) have been meeting in Mombasa for the last there days to discuss the state of international criminal justice in the region.

The group has noted the handing over yesterday by the Chair of the Panel of Eminent African Personalities, His Excellency Kofi Annan of the envelope containing the names of persons suspected to bear the greatest responsibility for the post election violence in Kenya to the International Criminal Court (ICC) for its further action.

The group notes that this development is consistent with the recommendations of the Commission of inquiry into the Post Election Violence, which compiled the list of names contained in the envelope. This development is to us an indication that the latitude and opportunity that the Government of Kenya has been provided with to demonstrate ability to put in place domestic arrangements for establishing accountability in relation to the post election violence has been wasted, and has now necessitated engagement with the ICC, with the possibility of intervening in Kenya.

We would like to point out that although intervention by the ICC in Kenya is now perilously close to materializing, this does not have to happen and can still be forestalled: the Kenya government has *the* last chance to demonstrate to the ICC that it has not only the *capacity* but, more importantly, the *willingness* to put in place a credible programme for prosecuting offenders in relation to the post election violence with a view to obviating intervention by the ICC.

One of the options that under consideration by the Kenya government is the establishment of a special division of the High Court as its vehicle for bringing accountability in relation to the post election violence. For the reasons which follow, we hold the view that this option is totally unacceptable to the country, and is an insult to our collective painful experiences if not a downright attempt to further entrench impunity in the country.

The Commission of Inquiry into the Post Election Violence recommended that a Special Tribunal be formed to apply Kenyan law. The proposed tribunal is a hybrid one with the significant

participation of international judges and prosecutors. This approach is meant to address the weaknesses existing in the national judicial system.

The President and the Prime Minister of Kenya have in the past pledged their commitment towards the reform agenda and in particular Agenda Item Four. The President, in his speech during the state opening of the 3rd session of the tenth Parliament, restated the government's commitment to reformulate the establishment of a local tribunal to try the perpetrators of the Post Election Violence. The Prime Minister in his maiden speech to the tenth Parliament talked of the need 'to restore the faith of the public by working together to realize the recommendations of Agenda Item Four'. He also reminded the House that the public was losing patience with the snail pace at which Parliament was putting institutional structures needed for the implementation of the reforms. Our political leaders have talked; it is now time to walk the talk.

The lack of public confidence and trust in the Kenyan Judiciary was one of the triggers of the post election violence. Since then, there have been no reforms achieved in this institution. The very idea that the same Kenyan judicial system can be trusted to prosecute gross violations of human rights is unacceptable. Creating a special division in the High Court to prosecute International crimes with an unreformed High Court in which public confidence is yet to be restored only serves to perpetuate the culture of impunity. Further it delays the reform of the Judiciary, which must remain a critical national priority.

In our opinion, the police do not have the capacity to conduct proper and credible investigations, and to preserve evidence for the crimes to be prosecuted and thus secure convictions. By way of example, persons suspected of arson resulting in several deaths during the Kiambaa church incident, one of the most egregious occurrences during the post election violence and which received global attention, were amazingly acquitted for lack of evidence. Further there is ample information implicating the police themselves as suspects in the perpetration of sexual and other forms of violence. In this regard, it will be recalled that the police has gone on record as denying the occurrence of sexual violence as one of the forms of the post-election violence.

While upholding the principle that a person is deemed to be innocent until he or she is proved, or confesses to be, guilty, it is in the public domain that a good number of possible suspects of the Post Election Violence are senior members of the current government. There can be no serious expectation that these persons will lead efforts in processes that are likely to bring accountability against themselves.

A logical implication of the proposal for a special division of the High Court is that any prosecution to be undertaken would be the responsibility of the Attorney General. The greatest concern, and by far the worst fear, that this fact poses is that the Attorney General has vast powers under the Constitution which allow him to commence, proceed with, or terminate, criminal proceedings. There are many other well founded concerns, and these revolve around the ability of the Attorney General to discharge that responsibility. To begin with, the impunity

that exploded in the post election violence was the result of a build up of hate speech during the campaigns in 2007, in the face of which the Attorney General remained impotent. Secondly, as evidenced in the numerous interventions he has made on behalf of his political friends when they face corruption charges, the Attorney General is likely to enter *nolle prosequi* if any highly placed official is brought to court in connection with the post election violence. Thirdly the Attorney General has never prosecuted persons recommended for prosecution by the Akiwumi Commission on Land Clashes, which reported in 1998. Why would he begin now, eleven years later?

ICJ KENYA RECOMMENDATIONS

A move to establish a tribunal short of the one recommended by the CIPEV commission will not only be serving the interests of the political elite who do not want to see justice but it will be a serious denial of redress for the many victims of the post election violence who still wait for the day justice will finally and firmly be served.

ICJ Kenya is of the view that the proposed Special Tribunal for Kenya will be an effective tool in establishing accountability against persons responsible for massive human rights violations suffered by the country and in the broader fight against impunity. The surest way for ensuring that the ICC comes to Kenya is no doubt going on with the plans for the establishment of the Special Division of the High Court.

ICJ Kenya reiterates that the time has come for the country to take steps with a view to ending the historical cycle of impunity which has brought massive suffering to individuals and communities in this country, but also now has a debilitating effect on the country's future. ICJ Kenya repeats the warning that Kenya is now perilously close to becoming a failed State.

PRESS STATEMENT READ TO THE MEDIA

DATED AT MOMBASA THIS 10TH DAY OF JULY 2009

SIGNED

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MR. WILFRED NDERITU
CHAIRMAN, ICJ KENYA