

Truth and Accountability for Kenya

The National Accord, negotiated in February 2008 by the Panel of Eminent African Personalities led by Kofi Annan, ended the months of violence that followed Kenya's 2007 presidential election. The transitional justice mechanisms established by the accord have created an opportunity to investigate the causes of long-standing grievances, hold government officials accountable, and alter the high-stakes, winner-takes-all nature of the country's political culture.

BACKGROUND

The post-election attacks and counter-attacks of 2007 and early 2008 marked a new, deadlier chapter of the political violence that dates back to colonial-era land grievances and the struggle for independence. The 2002 election, which brought Mwai Kibaki to power on a reform platform, initially appeared to mark a new beginning for Kenya. Unfortunately, President Kibaki's reform agenda stalled amid increased corruption and a failure to reach agreement on constitutional reforms. As a result, the 2007 election became a competition among regions and ethnic groups for state resources, with little incentive for any party to accept defeat. Although voting itself went relatively smoothly, confusion and irregularities marred the tallying of the vote. This sparked post-election violence that claimed over 1,000 lives. The Independent Review Commission on the General Elections concluded in September 2008 that it was impossible to determine who had won the vote.

ICTJ'S INTEGRATED APPROACH

ICTJ's work in Kenya relies on the strategy that transitional justice initiatives are most likely to succeed when used as part of a comprehensive package supported by civil society and the public. Police reforms are more likely to hold if high-level perpetrators are held to account, and constitutional reforms are more likely to gain lasting acceptance if Kenya's Truth, Justice and Reconciliation Commission conducts a thorough accounting of past injustices. The necessary transitional justice tools include the following:

Criminal Prosecutions: ICTJ supports formation of a domestic Special Tribunal for violations of human rights committed in the post-election violence. While ICTJ criticized legislation that was defeated on 13 February 2009, we encourage passage of an amended bill. If the government is unwilling or unable to form such a court and to

prosecute perpetrators of these crimes, ICTJ fully supports intervention by the International Criminal Court. Real reform is unlikely without accountability at the highest levels of government and business.

Truth-Seeking: Although ICTJ had expressed serious reservations about many aspects of the Truth, Justice and Reconciliation Commission Bill, it welcomed the bill's passage and the prospect of a truth-seeking process. Together with local partners, ICTJ will offer support to the Commission, advocating for extensive outreach to and inclusion of victims, with special attention to gender issues. ICTJ cannot, however, condone the amnesty process provided by the bill, which may prevent accountability for numerous crimes, including crimes of greed. ICTJ will oppose such inappropriate and unnecessary amnesties and, insofar as possible, encourage the Commission to concentrate on the truth-seeking and reconciliation activities at the core of its mandate.

Police Reform: The Waki Report (see reverse) offers a helpful list of recommendations for police reform. Philip Alston, the UN Special Rapporteur on Extra-Judicial Killings, underscored the urgency of reform. A first step has been taken with the formation of a police reform task force headed by retired judge Philip Ransley. That task force can succeed, however, only if civil society presses for implementation of the task force's recommendations.

Constitutional Reform: The strong presidency created by Kenya's current Constitution has raised the stakes of Presidential elections and exacerbated regional and ethnic tensions. An amended constitution is a necessary part of any effort to defuse these tensions. The Committee of Experts on Constitutional Review, whose mandate is to harmonize all previous draft constitutions and prepare for a referendum on an agreed version, is currently at work. As with the police task force, however, its impact will depend on the political will for substantial reform.

Gender: The 2008 post-election unrest included widespread gender-based violence, and the marginalization of women is among the causes and consequences of conflict that transitional justice mechanisms must address. ICTJ will press for the inclusion of gender as a central component of each transitional justice mechanism.

ICTJ's work in Kenya is generously sponsored by the Embassy of the Kingdom of the Netherlands in Nairobi.

THE WAKI REPORT: THE FACTS

Background

- Breaking with a long history of ineffective commissions in Kenya, the Commission of Inquiry into Post-Election Violence (CIPEV) conscientiously investigated crimes committed during Kenya's post-election violence.
- CIPEV, also known as the "Waki Commission" after chairman Judge Philip Waki, was originally established as part of the March 4 power-sharing agreement negotiated by Annan and the Panel of Eminent African Personalities.
- The Commission included Philip Waki, a judge of Kenya's Court of Appeal, and two foreigners, Gavin McFadyen of New Zealand and Pascal Kambale of the Democratic Republic of Congo.

Findings

- The Commission's report, released October 15, 2008, documents 3,561 injuries, 117,216 instances of property destruction and 1,133 deaths as a result of the post-election violence. (For the full report, see http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf)
- Gunshot wounds caused more than a third of the deaths. The report suggests that police were responsible for all of these deaths.
- The report finds evidence of massive failures by the state security agencies, especially the police, to anticipate and contain the violence.
- The report details sexual violence committed against both women and men, as well as internal displacement, which primarily affected women and children.
- The report identifies land grievances and the centralization of power in the Presidency as root causes of the violence.

Recommendations

The report calls for establishment of a Special Tribunal to try those suspected of bearing the greatest responsibility for crimes committed during the post-election period.

- This should include a Trial Chamber and an Appeals Chamber, each composed of two foreign judges and one domestic judge who would preside over the Chamber.
- The prosecutor for the court should be a foreigner who, like the foreign judges, should be chosen from a list provided by the Panel of Eminent African Personalities.
- When the report was released, Judge Waki handed Annan a sealed list of key persons accused of orchestrating the violence. The report specified that the list would be forwarded to the ICC if an agreement establishing a Special Tribunal was not signed within 60 days—by December 17, 2008. After the agreement was signed, Parliament had a further 45 days to enact it into law. It failed to do so. Annan extended the deadline, and there is still a possibility that a Special Tribunal will be formed if parliament can muster the necessary political will.

Due to the pervasive nature of sexual and gender based violence, the commission recommended the appointment of a Special Rapporteur on Sexual Violence to monitor the Gender Commission as well as the gender units in various ministries, and to provide an annual report to Parliament. Finally, the Commission recommends police reform, in several steps.

- Integration of the politicized Administration Police into the Kenya Police Force.
- Creation of an expert, independent Police Reform Group, reporting to the Minister of Justice with a six-month mandate to oversee the reform process.
- Creation of a permanent political oversight body for the police and an investigative/disciplinary body.

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