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Quote of the Month

"My Crusade for reforms and anti-corruption is in the public domain. I have no fear."

Hon. James Orengo,
Lands Minister

THE INTERNATIONAL CRIMINAL COURT: IS IT AN OPTION FOR KENYA?

By Philip Kichana

The opinion polls previously conducted showed that majority of Kenyans prefer the post-election violence perpetrators to be tried at the International Criminal Court also known as "The Hague"; essentially a secondary institution as majority of Kenyans have lost faith in the justice system.

The court system in Kenya is set up in the Constitution and the Judicature Act. The High Court of Kenya has unlimited original

jurisdiction in all civil and criminal cases alike. The Magistrates Act establishes the Magistrates Courts whereas the laws that the courts apply in Kenyan courts is set out in the Judicature Act. Kenyan courts have jurisdiction over all the post-election offences and should therefore try all the suspects.

That of course depends on the Attorney General (AG) who enjoys a monopoly of

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The International Criminal Court: Is it an Option for Kenya?

prosecutorial powers. The crimes that were committed during the post-election violence already exist in various Acts of Parliament notably the Penal Code and are prosecutable in Kenyan courts by the AG. Indeed, some of the accused in the arson and murder of the Kiambaa church victims were put on trial and acquitted. It is not clear why there haven't been many other trials such as this.

Since the post election violence of 2008 Kenya has been having a coalition government comprising the two broad and major political groupings: the Orange Democratic Movement Party and the Party of National Unity. However, the members of each group (political parties) seem to be disenchanting and are busy making preparations to disengage and realign in preparation for the next general election (2012).

Due to the public clamour, attempts have been made to establish a local tribunal meeting international standards to try suspects who perpetrated the post 2007 election offences. So far these have been unsuccessful. Currently, a bill sponsored by Member of Parliament Mr. Gitobu Manyara is pending before Parliament. Its objective is to amend the Constitution to create a 'Special Tribunal for Kenya' for an initial term of three years to give effect to the recommendations of the Commission on Post Election Violence (CIPEV). The bill purports to give concurrent jurisdiction to the Special Tribunal and the ICC to try post 2007 election violence offenders. The ICC statute provides only for complimentary jurisdiction to State institutions that carry the primary jurisdiction to investigate and try suspects who have transgressed the law by committing war crimes, crimes against humanity, and genocide.

Kenya passed the International Crimes Act last year which gives its national legal system jurisdiction over the above crimes, in their international nomenclature, from the date of enactment of the law. As a result, Kenyan courts, which already have jurisdiction over those crimes in their Penal Code sense, can only try them to the extent of the Penal Code.

It must be emphasized that Kenya's excitement with the ICC is fraught with

misunderstanding and over expectations. It is only the Kenyan State that seems to be so eager to give away its primary responsibility of trying criminal suspects. The Rome Statute that establishes the ICC was negotiated on the clear understanding that the ICC could have jurisdiction over a case only if national authorities are "unwilling or unable" to carry out a genuine investigation and, if appropriate, prosecution. In addition and only when it has acquired it, can the ICC exercise 'jurisdiction only over the most serious concern to the international community as a whole'. In effect the ICC will only deal with crimes of a certain magnitude or threshold. Do the crimes committed after the 2007 post election violence meet this threshold?

What lies in wait?

It would appear that the moment for a 'fresh start' has been with us since 1991 but the bridge has been only half-way crossed. The question lingers whether we are in a transition today. Valid questions have been raised about the suitability (rather than qualifications) of the current chairman of the TJRC. There is a real possibility of the chairman being called as a witness before the TJRC to shed light on the well known case of the late Robert Ouko and other government policy matters during the time he served as a civil servant under President Moi's government. The widespread view is that the greater public good would be better served if the Chairman reconsidered his position.

To the political actors, the TJRC seems to offer a softer option in dealing with the problem of post election violence. Peace and reconciliation seem to be favoured by the political class over justice. Perhaps it should be pointed out here that for transitional justice to succeed there has to be a delicate balance between justice and reconciliation to ensure lasting peace. To avoid dealing with the issue of justice will be merely carrying forward post election violence to the next election.

The timeframe of 3 years for the TJRC coincides with the 2012 elections. We are sure that one year before the general elections and during the election year, the

work of the Commission will suffer severe disruption and lack of visibility.

The TJRC's climate analysis must also take into consideration other public developments. In this regard, the reappointments of the KACC top brass who are in charge of performance contracting by government but who seem to be re-appointed without regard to their performance is seemingly an endorsement of a culture of excuses in the fight against corruption. A proper five-year cost-benefit analysis of the money spent on KACC and its returns would at best be even or in debit. This is not good enough.

The TJRC will most likely fall short in meeting its objectives. Witnesses to most scandals involving government mandarins were 'either taken out' or have succumbed to natural attrition. For those still alive, their memory (as regards reconstruction of history) may fail or be inadequate to form a basis for solid action. For the younger ones, the effectiveness of witness protection may need to be guaranteed before they testify. For example, the vast majority of the witnesses to the Ouko Commission of Inquiry have died from natural or physical causes.

There have not been sufficient social, political and economic reforms to change institutions involved in governance and justice. The Ringera purge of judges and magistrates did not cure the patient. The GJLOS reform programme has been implemented for more than five years now yet the concerns of the sectors involved therein have hardly changed. Most importantly, many institutions in these sectors are driven by people who are not known to be pro-reforms.

The courts in Kenya have become a refuge for many. The TJRC has no powers to compel witnesses to testify. If it does so, many will head to the High Court of Kenya. The way to that court is paved with smoothness for applications of all types of protections, prohibitions and injunctions. This road will be taken as surely as it remains open-the bad boys and girls have a fair chance of 'getting off the hook'.

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As things stand, it seems quite unlikely that the already expansive mandate of the Commission will be augmented. Press reports suggest that the Minister for Justice and Constitutional Affairs is content with the Act and shall not add to its mandate.

The hungering after international institutions and foreigners to solve our problems only makes those who hold power in Kenya more intoxicated with it. We keep sending them the message that we can not help ourselves yet we can and should.

International experiences that Kenya can Learn from

Chile

Patricio Aylwin took over as President from March 1990 after 16 years of military dictatorship under Augustino Pinochet who came to power through a coup de tat after the assassination of Chile's elected President Salvador Allende.

The human rights policy of the Aylwin government had to focus as a priority on revealing the truth about the fatal victims of political violence; victims of assassinations and disappearances and torture committed by government agents but also political assassinations committed by rebel groups.

A second factor the Aylwin administration had to take into account was the set of institutional and political restraints it inherited. Among the most salient was an amnesty law decreed by the military government in 1978. In addition, the government had to deal with questions of correlation of forces as neither side had been vanquished.

Reparation and prevention were defined as the objectives of the Chilean human rights policy. Truth (to ensure that shared memory was in step with national identity) and justice were the primary means of achieving these objectives. The result to be achieved was genuine reconciliation and social peace. Justice was to be achieved through the courts.

The Chilean Commission report named victims not perpetrators. It mentioned the branch of the armed forces or police



responsible for the acts and even the specific unit, but did not attribute guilt to individuals. It sent to the courts the incriminating evidence it had gathered as the Commission was not a tribunal and was therefore not conducting trials. It was argued on its behalf that to name culprits who had not defended themselves and were not obliged to do so would have been the moral equivalent to convicting someone without due process. Chile's proceedings were held in private.

South Africa

The South Africa Truth and Reconciliation Commission was based on the final clause of the Interim Constitution and stated as follows:

"This Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and future rounded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."

The Commission had to deal with a transition from the apartheid regime to a new democratic order of inclusiveness and equality. It was the first Commission to grant amnesty to individual perpetrators and to offer them protection from prosecution. The amnesty granted by the Commission was unconditional and required no requirement for application or confession (this was before

the International Criminal Court Statute became operational).

The South African Commission had subpoena power to search and seize, a concept that Kenya has borrowed heavily and it was the first of its kind to create a witness protection programme. Kenya has a witness protection programme under a separate Act of Parliament which is in the early years of implementation.

The Commission also held its proceedings in public. An interim report of the Amnesty Committee of the Commission noted that 'a considerable part' of the committee's workload remained incomplete.

The South African Commission found that the state and its security, intelligence and law enforcement agencies, the South Africa Police, the South Africa Defence Forces and the National Intelligence Service were all involved in the perpetration of gross violations of human rights in the apartheid regime. So were the homeland governments and their security forces and right wing organizations.

It also found that liberation movements and organizations which sought to bring about change through armed struggle and which operated outside South Africa and by covert and underground means inside the country were also culpable. And so were non-state paramilitary formations such as the Africa National Congress's self-defence unit and the Inkatha Freedom Party's self-protection units. 🌐

AN ANALYSIS OF THE TJRC ACT

History and purpose of transitional justice

Justice comes in many facets. It can be redistributive, retributive, restorative or transitional. Transitional justice can be defined as justice that is rendered unto a people during a period of transition from one State to the next. Transitional justice is how a society chooses to deal with a violent or oppressive past while safeguarding a fragile peace. Transitional justice does not detract from criminal justice; it merely offers a deeper and broader vision of justice which seeks to deal with perpetrators but also deal with the needs of victims and promotes reconciliation and reconstruction.

Salient features of the Kenyan Truth, Justice & Reconciliation Commission

Kenya has established a TJRC Commission to address past atrocities of human rights. The Preamble to the Act of Parliament, 2008 (Kenya Supplement No.84 Acts No.6) establishing the TJRC lays the basis for the TJRC and states in part that it is among other things:

...Desirous to give the people of Kenya a fresh start where justice is accorded to the victims of injustice and past transgressions adequately addressed....

It is therefore fair to suggest that the preamble to the Act recognizes the fact that many injustices have been committed against Kenyans and its purpose is to give Kenyans a 'fresh start' in which justice shall be done and past transgressions redressed.

Among the Commission's objectives are to promote peace, justice, national unity, healing, and reconciliation among the people of Kenya by establishing an accurate, complete and historical record of violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office, "both serving and retired between 12th December 1963 and 28th February 2008" by conducting

investigations and holding hearings. It is not clear whether retired as used in the Act includes State operators who are now dead-some of these died before retirement. Does it mean the crimes they committed are not covered under the Act?

The Commission's other main objective is to generate a complete picture of the causes, nature and extent of the 'gross violations of human rights and economic rights' which were committed between 12th December, 1963 and the 28th February 2008, through similar means as in the first objective. It might be thought that it is progressive to include investigations on gross economic rights violations, but this goes against the coalition government's own blue print of investigating these under a proposed Economic Crimes Commission. Has the coalition government abandoned this route?

The third objective for the Commission is to investigate gross human rights violations and violations of international human rights law abuses which occurred including massacres, sexual violations, murder and extra-judicial killings and determining those responsible for the Commission of the violations and abuses and recommending the prosecution of the perpetrators.

The Commission has other objectives intended to facilitate justice, reconciliation, amnesty, reparation, confessions and 'truth telling that charts a new moral vision and seeks to create a value-based society for all Kenyans'.

The commission will inquire into the causes of ethnic tensions in Kenyan and make recommendations on the promotion of healing, reconciliation and co-existence among ethnic communities.

Functions

The Commission's functions follow the above objectives and are set out in Section 6 of the TJRC Act. The expansive functions are to investigate gross violations and abuses of human rights including abductions, disappearances, detentions, torture, sexual violations, murder, extra-judicial killings, ill-treatment and expropriation of property suffered by any person between 12th December, 1963 and 28th February, 2008.

It is a function of the Commission to identify the individuals, public institutions, bodies, organizations, public officeholders, the state, state actors, or persons purporting to have acted on behalf of any public body responsible for or involved in the violations and abuses. The Commission will also investigate and determine whether or not the violations were deliberately planned and executed by the State or by any other person.

The Commission will also inquire into and establish the reality or otherwise of perceived economic marginalization of communities and make recommendations on how to address the marginalization. The Commission will inquire into acts of state repression including torture, cruelty, and degrading treatment for political objectives.

The Commission will inquire into the causes of ethnic tensions in Kenyan and make recommendations on the promotion of healing, reconciliation and co-existence among ethnic communities.

Term of the Commission

The Commission has been mandated for two years and there are possibilities that the Commission may not finish its work within the stipulated time. The law under section 20(3) states that the Commission may file a progress report to the National assembly with request for extension of its term. Parliament may extend the Commission's term by a maximum of 6 months. Therefore,

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An Analysis of the TJRC Act

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in addition to the 3 months for preparing its report, the actual term of the Commission is three years. The question is whether that time is sufficient for the Commission to undertake all the functions outlined above.

Amnesty

The Act provides for limited situations when amnesty may be granted. Amnesty will be granted subject to the terms of Kenyan law or international treaty that Kenya is a

signatory. The Commission has no power to grant amnesty in respect of gross violation of human rights; or an act, omission or offence constituting a gross violation of human right including extra-judicial execution, enforced disappearance, sexual assault, rape and torture.

Reparation and rehabilitation

The Commission has the power to recommend reparation where it has recommended amnesty following confessions. The Evidence Act Cap 80 Laws of Kenya (as amended) however provides an elaborate procedure for confessions to be admissible in evidence. The confession has to be made before a magistrate or police officer from the rank of Inspector upwards with the maker's independent witness present. Will the Evidence Act apply or not? If it does, does this mean the members of the Commission have powers of magistrates/judges?

Any person who thinks he has suffered harm as a result of gross violation of human rights may apply to the Commission for reparation in the prescribed form. While this is commendable, it is clear that many individuals who were harmed in this way have approached civil courts in Kenya and obtained judgments giving substantive awards against the State. Why not use some of these

judgments to settle similar cases and reduce pressure on the Commission? And, will such individuals still be entitled to additional compensation under the TJRC Act?

Miscellaneous

The Official Secrets Act Cap 187 Laws of Kenya is not to apply to any matter that is the subject of inquiry by the Commission. This is curious. Why not go the whole hog and promulgate the Freedom of Access to Information Act rather than this dubious provision under the miscellaneous part of the statute. Can a former or sitting head of State be asked to give information under this miscellaneous provision in view of their constitutional oath of office?

Finally

The law states that after completion of its work, the Commission shall submit a report to the President and thereafter, the report will be published in the Kenya Gazette and such other publications as it may consider appropriate. The report shall summarize the findings of the Commission and make recommendations concerning the reforms and other measures, whether legal, political, or administrative as may be needed to achieve the object of the Commission;

A monitoring and evaluation mechanism for the implementation of the Commission's report shall be established under section 49 to make quarterly reports of progress in implementation by the Minister for Justice. The KACC makes its reports quarterly to Parliament but nothing has come of them. The KACC costs versus benefit analysis shows a negative. Why should Kenyans expect that this Commission will do better? Optimistically Section 50(2) states that 'all recommendations shall be implemented, and where the implementation of any recommendation has not been complied with the National Assembly shall require the Minister to furnish it with reasons for non-implementation'. Given the history of failure or neglect to implement recommendations made by all forms of Commissions, Kenyans are hoping this one will be treated differently. 🌐





International News Roundup

Burris, Jackson land on watchdog's corruption list

(Crain's) — Their quest for the vacant U.S. Senate seat of President Barack Obama has landed Sen. Roland Burris and U.S. Rep. Jesse Jackson Jr. on a watchdog group's annual list of the "15 most corrupt members of Congress."

"It's all about the Blagojevich matter," said Melanie Sloan, executive director of Citizens for Responsibility and Ethics in Washington. The group named the Illinois Democrats to its



Sen. Roland Burris

"most corrupt" list for the first time, based on disclosures stemming from the wiretap investigation and arrest of former Gov. Rod Blagojevich last year for his alleged attempts to sell the Senate seat.

Mr. Burris was appointed to the seat by the former governor in December, sparking a storm of controversy and investigations.

"Sen. Burris, by deliberately lying to senators about the conversations he had with Gov. Blagojevich and others connected to the governor in order to be appointed to a seat in the Senate, clearly engaged in improper conduct reflecting upon the Senate," a potential violation of the Senate




U.S. Rep. Jesse Jackson Jr.

ethics rules, the group's report said. However, Mr. Burris announced in July that he would not run in 2010, making it unlikely the Senate Ethics Committee will pursue the matter, Ms. Sloan said. "They generally punt."

A state prosecutor found "insufficient evidence" to file perjury charges against Mr. Burris, but the report noted that the senator may still face federal perjury charges if he lied to FBI investigators.

Mr. Jackson was cited for alleged attempts by his supporters to raise money for the Blagojevich campaign to support his bid for the Senate. He is under investigation by both U.S. Attorney Patrick Fitzgerald in Chicago and the Office of Congressional Ethics, Ms. Sloan noted. "That made him a natural for the list. He's not cleared, and the allegations are pretty serious."

The report noted that Mr. Jackson has denied any wrongdoing and has said he is cooperating with the investigations.

Spokesmen for Messrs. Burris and Jackson did not return calls seeking comment. 

Chicago Business: <http://www.chicagobusiness.com/cgi-bin/news.pl?id=35475>

Niger corruption case ‘political’

Niger opposition leader Mahamadou Issoufou has said the corruption charges he faces are politically motivated. He strongly criticised President Mamadou Tandja’s recent moves to change the constitution to allow him to seek a third term in office. Mr Issoufou was recently prevented from flying out of the country. Several MPs at the former parliament which refused to change the constitution have also been charged.

After being charged and freed on bail, the Niger Party for Democracy and Socialism (PNDS) leader said: “I explained to the investigating magistrate that the matter was not really about the misappropriation of funds but rather it was a political affair,” reports the AFP news agency. Mr Tandja’s moves to remain in power aroused huge opposition domestically and from donors. But he won a huge majority in last month’s referendum on changing the constitution. He had earlier dissolved the country’s top court and parliament as he pushed through his plans to overhaul the system.

The 71-year-old was supposed to stand down in December after serving two terms in office. 🌐

Source BBC News : <http://news.bbc.co.uk/2/hi/africa/8256361.stm>



Picture courtesy of www.reachafrika.net.



Mr. Mahamadou Issoufou

Zuma’s phone crusade against graft



Mr Zuma

A South African woman phoned up a new anti-corruption hotline and was surprised to find herself talking to President Jacob Zuma. The woman phoned to complain that she had been ill-treated at a local magistrate’s court while trying to access her dead husband’s pension. She was in tears as she told Mr Zuma that she had been visiting the office since 2006 to no avail. The pair spoke for 10 minutes before she was told who she was talking to.

Be investigated

Mr Zuma assured her that the matter would be investigated and dealt with speedily. The free hotline was launched on Monday and in its first three hours received 7,300 complaints from frustrated citizens, the presidency’s Vusi Mona told the BBC. The number is 17737 from within South Africa.

Mr Mona said Mr Zuma was “moved” by the woman’s call and told the consultants at the Pretoria call centre to “always show empathy when dealing with people”. Mr Zuma also took a call from a man from Benoni, east of Johannesburg, who highlighted his disappointment that his area has been experiencing sewerage leakages for months without the municipality resolving the matter.

South African residents of Balfour rioted in July demanding better public services. The call centre was set up in response to concerns in the country about corruption and lack of accountability in public offices, poor service delivery and government’s inaccessibility to ordinary citizens. 🌐



Event: Transparency International Annual Membership Meeting <http://www.transparency.org/news_room/events/2008/transparency_international_annual_membership_meeting>

Date: 27th-28th October 2009

Organiser: Transparency International Secretariat

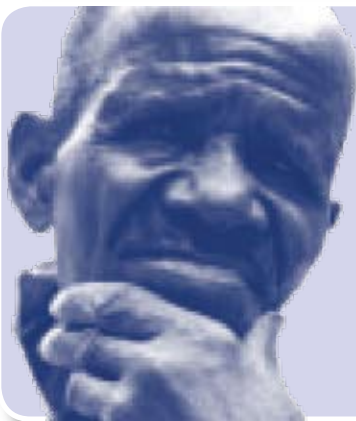
Venue: Athens, Greece

Event: 13th International Anti-Corruption Conference <http://www.transparency.org/news_room/events/2008/2008_10_30_iacc>

Date: 29th October -1st November 2009

Organiser: Transparency International Secretariat

Venue: Athens, Greece



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