

Note on Handover of CIPEV Materials to the Prosecutor of the ICC

In view of the speculations as to the reasons why the Panel of Eminent African Personalities handed over to the Prosecutor of the International Criminal Court (ICC) the sealed envelope and its supporting evidence entrusted to it by the Commission of Inquiry into the Post- Election Violence (CIPEV), also known as the Waki Commission, it is important to clarify why the Panel took this step in early July.

First of all, it should be remembered that the Commission's recommendations when it entrusted the envelope and its supporting evidence to the Panel was that, if the efforts to establish a functioning Special Tribunal at the national level within a timeframe indicated in the Commission's report failed, the materials öshall be forwardedö to the ICC Prosecutor.

According to the Commission's plan, which had been accepted by the Government of Kenya, through an Agreement for the implementation of the recommendations of the Waki Commission, signed on 16 December 2008 by President Mwai Kibaki and Prime Minister Raila Odinga, the statute for the establishment of the Special Tribunal should have been enacted by 1 February 2009.

In this context, it is important to bear in mind that, on 27 January 2009, the report of the Waki Commission was adopted by the National Assembly. However, on 12 February 2009, the Constitution of Kenya Amendment Bill, 2009, which would have paved the way for the establishment of the Special Tribunal, was defeated in the National Assembly. The two Principals and the Panel then immediately engaged in discussions during which the Panel was assured that a good faith effort would be made to reengage the National Assembly to adopt the necessary legislation for the establishment of the Special Tribunal.

Against this background and based on the understanding reached between the two Principals and the Panel, the Panel deemed it appropriate that the Government be given some additional time beyond the date established by the Waki Commission to ensure that the necessary legislation for the establishment of the Special Tribunal could be enacted. In a letter dated 23 February 2009 sent by former UN Secretary-General Kofi Annan, the Chairman of the Panel, to the two Principals, he indicated that this should be done within a reasonable period of time. In a subsequent letter dated 22 June 2009, addressed by Mr. Annan to the two Principals, the end of August 2009 was set as the time limit.

However, in early July both the factual and legal basis for that extension changed.

On 2 July a Kenyan delegation, comprising the Minister of Justice, National Cohesion and Constitutional Affairs, Hon. Mutula Kilonzo, Minister of Lands, Hon. James Orendo, the Attorney General, Hon. Amos Wako, the Assistant Minister of Justice, Hon. William Cheptumo Kipkorir, Prime Minister's Adviser on Coalition Affairs, Mr. Miguna Miguna, and the Permanent Secretary in the Ministry of Justice, National Cohesion and Constitutional Affairs, Ambassador Amina Mohammed, met with Mr. Annan in Geneva.

At that meeting, the delegation and Mr Annan had a very constructive discussion on a range of issues, including the modalities for the establishment of a Special Tribunal. In that context, the delegation expressed concern that a renewed proposal for a Special Tribunal might not attract the necessary support in the National Assembly, at least not before a new constitution had been approved, and requested more time for consultations. The delegation further intimated that they intended to discuss the matter with the ICC Prosecutor the next day.

When the Panel was informed of the contents of the agreement reached on 3 July 2009 between the Kenyan delegation and the ICC Prosecutor, including the specific actions to be taken by the Government within prescribed timeframes, the obvious conclusion was that the extension of the time limit for handing over the envelope that had been granted by the Panel had become moot.

The agreement between the Kenyan delegation and the ICC Prosecutor made it evident that it would have been wholly inappropriate for the Panel to continue keeping the envelope and its supporting evidence in its custody. Moreover, in light of the agreement, the Prosecutor had declared that he was ready to receive the materials.

Since there are now direct contacts between the Government of Kenya and the ICC Prosecutor in this matter, the envelope would have to be handed over to the latter as soon as possible. The contents of the envelope will obviously be of importance for the preliminary examinations in which the Prosecutor is engaged, as mentioned in the agreement of 3 July 2009.

In addition, under the Rome Statute, the ICC Prosecutor has a duty to assess to what extent the requirements of the principle of complementarity are met ó in other words to assess to what extent Kenya is able to bring the perpetrators to justice at the national level. An important element in making such assessment in this particular case will no doubt be the contents of the sealed envelope and the accompanying materials.

In light of the factual and legal situation described, it is evident that the step taken by the Panel was necessary in order to preserve the integrity of the national procedure, the ICC and, indeed, of the Panel itself. The matter is now in the hands of the national authorities of Kenya and the ICC Prosecutor, as it should be.

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