

Kenyans for Peace with Truth and Justice (KPTJ)

Submission to the National Dialogue and Reconciliation Team

A. In respect of decisions reached on agenda items 1, 2, and 3

1. *Immediate action to stop the violence, including disarming and demobilising organised militias; and ensuring the security forces exercise their mandate within the limits of the Constitution and the law*

Note:

- There has been no evidence of what happened to monies collected to buy arms, arms bought or disarmament; no evidence of follow up and no capacity established to assess follow up;
- The on-going recruitment of armed forces, while offering some relief in terms of absorbing unemployed youth, has not been sufficiently insulated against bribery, corruption and should have awaited the conclusion of the Commission of Inquiry into the Post Election Violence (CIPEV);
- Continued cases of extraordinary use of force by security forces;
- Continued actions constraining democratic space such as numerous attacks by the police against peaceful assemblies of citizens such as the teargassing of Nobel Peace Prize Laureate Wangari Maathai, and civil society members facing court charges for exercising their freedoms of assembly and expression;
- Continued extrajudicial executions by security forces;
- Lack of public debate on security sector reform;
- The Oversight Board just established by the Ministry of Internal Security lacks independence as well as a statutory base and amendments to the Police Act to give it authority over the police.

The Commission of Inquiry into the Post-Election Violence (CIPEV)

- The CIPEV deserves commendation for its inclusive and systematic approach to its work, which has impacted positively on the quality of the submissions and testimony received. The CIPEV has worked well with civil society and allowed KPTJ to appoint *amicus curiae* to its proceedings;
- However, a problem with Commissions of Inquiry is that of implementation of their recommendations;
- In addition, recommendations emanating from the CIPEV for institutional reforms (such as of security agencies and the judiciary) may require progress on constitutional reform for their effective implementation
- And existing laws of Kenya may be insufficient to address the crimes and human rights violations identified by the CIPEV.

Recommendations

- Invoke the principle of complementarity to establish special courts applying the procedures of the International Criminal Court (ICC) here in Kenya;

- Secure the independence of investigations and prosecutions arising from recommendations of the CIPEV;
- Ensure participation by civil society in discussions on how to further investigate and prosecute crimes identified by the CIPEV and establishing the special courts;
- Safeguard the recommendations of the CIPEV against challenges, such as insulating the CIPEV against litigation relative to its findings and sensitising the judiciary as to the same;
- Secure the integrity of the information obtained from the CIPEV's inquiries;
- Ensure the passage of more comprehensive legislation than the recent Witness Protection Act to protect witnesses involved in further investigations and prosecutions arising from the CIPEV's recommendations.

2. *Immediate measures to deal with the humanitarian crisis and the restoration of fundamental liberties, including the provision of assistance to and the return of internally displaced persons (IDPs)*

IDPs

Note:

- The resettlement process has not always been voluntary and some IDP leaders have been targeted for resisting involuntary resettlement;
- No ground work was done to reassure residents in resettlement areas that their land rights concerns would be addressed, resulting in continued hostility and displacing some resettled IDPs;
- Accounts of progress on resettlement differ—some IDPs continue to be in transit camps, with varying statistics as to their numbers emanating from the United Nations (UN) Office for the Coordination of Humanitarian Affairs (OCHA) and the Office of the President (OP);
- Solutions to reintegrate IDPs being proposed, such as ethnically homogenous “ecovillages” are unacceptable and unsustainable.

Recommendations

- Ensure solutions to the problems of IDPs recognise the diversity of IDPs;
- Plan a second phase of the resettlement taking into account the above;
- Address the underlying causes of displacement.

3. *Resolution of the political crisis, including Constitutional, legal and institutional measures.*

The Independent Review Commission (IREC)

Note:

- KPTJ sought for the formation of IREC and have tried to be useful to the IREC in the fulfilment of its mandate;
- Grave concern about public pronouncements by the IREC's Chair, Justice Johann Kriegler, his conduct of the IREC's hearings and his attitude towards civil society;

- The IREC has defined stakeholders of the process as being the two major contending political parties and the Electoral Commission of Kenya (ECK), rather than the Kenyan people and has resisted participation by civil society. In contrast to the CIPEV, the IREC ignored repeated civil society applications to participate in and contribute to its proceedings;
- KPTJ's participation was allowed only after representation by international partners and, even then, KPTJ's submissions were treated in a contemptuous, disrespectful and hostile manner;
- The IREC may not fulfil its mandate in respect of assessing the integrity of the presidential vote;
- If recommendations emerging from the IREC do not address the full ambit of its mandate and do not go beyond recommendations relating to capacity building and addressing insufficiencies in the electoral law, this may contribute to delegitimising elections and to making electoral violence the norm;
- The IREC's recommendations must address the accountability and independence of the ECK;
- Justice Kriegler's unacceptable castigation of KPTJ for their inference of fraud in the conduct of the elections, including charging KPTJ with having been "inflammatory" and causing the post-election violence (see attached letter) requires a public retraction and apology.

Constitutional measures

- The process, following the mediation process, has been state-driven without much public consultation (beyond select civil society organisations) or public input raising questions of legitimacy and ownership;
- The attitude on the part of, in particular, the Ministry for Justice, National Cohesion and Constitutional Affairs (MOJNCCA), is that adequate consultation has occurred and what is required is only expert input to proceed in keeping with timelines set up under the mediation process;
- The tendency among politicians is to treat the institutional arrangements set up under the Mediation Accord as if they are permanent, which may have implications for and pre-empt important aspects of constitutional reform;
- Legislation prepared after the signing of the National Accord (that is, the Truth Justice and Reconciliation Commission Bill, the National Ethnic and Race Relations Commission Bill, the Constitution of Kenya (Amendment) Bill and the Constitution Review Bill 2008) is now in advanced stages in Parliament.

Recommendations

- Ensure that all draft legislation subsequent to the mediation process is submitted by the MOJNCCA to the public for discussion in the current parliamentary recess.

The Grand Coalition Government

- Rather than achieving unity of purpose, the grand coalition government functions as two governments in one, risking alienating either support base with potentially dangerous consequences;

- Rather than committing to recovery from the crisis, politicians and the Grand Coalition government have indulged in waste while provisions under Agenda Items One-Four are either inadequately addressed or neglected.

Recommendation

- Ensure the Panel of Eminent Persons engages parliamentarians across the board and relevant line Ministries to impress upon them the need for sustained focus on recovery mode rather than premature political campaigning.

Executive Powers

- The Grand Coalition government is indulging in protocol wars and subjecting the achievements of the mediation process to bureaucratic rollbacks, using the pretext of the present Constitution.

Recommendation

- Engage the Executive and Head of the Civil Service to ensure commitment to the letter and spirit of the National Accord.

B. In respect of decisions reached under Agenda item 4

Long-Term Issues, including Land and other Transitional Justice Issues

- Politicians have not shown commitment to the Agenda Item Four issues;
- Of the long-term issues, only transitional justice, land, what is termed ‘negative ethnicity’ and constitutional reform have received some attention.

Transitional Justice

- KPTJ has engaged with the parliamentary committee on the administration of justice on several occasions with respect to the draft TJRC legislation;
- KPTJ has proposed extensive amendments to the draft TJRC legislation and held several stakeholder briefings on the same;
- Key among these amendments is the fact that amnesty should not be granted for gross, systematic and widespread human rights violations, which the crimes under consideration by the TJRC constitute;
- The danger is that the TJRC and the constitutional reform process will become a catchall for all Kenya’s long-term problems, including becoming the repositories of issues arising out of the IREC and the CIPEV;
- In addition, existing laws could undermine the authority and effectiveness of the TJRC, such as the Official Secrets Act.

Recommendations

- Ensure that a holistic policy framework is developed which will determine how the processes of truth, justice and reconciliation will be conducted, monitored and evaluated, address technical support and budgetary allocations;

- Ensure that the processes of constitutional reform and the TJRC are linked to address issues coming before the TJRC that are constitutional in nature (for example, that of amnesty).

So-Called ‘Negative Ethnicity’

- Civil society, including the Kenya Human Rights Commission (KHRC) have attempted to engage with the responsible Ministry on the National Ethnic and Ethnic Relations Commission Bill, which fails to define discrimination, ignores the fact that discrimination on one protected ground can be compounded by discrimination on other protected grounds and fails to propose adequate legal, policy and practice measures to address the same.

Recommendation

- Ensure the National Ethnic and Race Relations Commission Bill is replaced by the comprehensive anti-discrimination and equal opportunities bill long proposed by civil society and the Kenya National Commission on Human Rights (KNCHR).

Youth

- Present government initiatives such as the National Youth Fund and recruitment into the National Youth Service are not adequate responses to the demographic challenge of ‘youth bulge;’
- The provision of microcredit functions to redistribute income amongst the poor rather than addressing the inequality that characterises Kenya’s political economy as a whole;
- Widespread, violent school protests are a continuing manifestation of the underlying alienation of youth;
- The Ministry of Planning and the Treasury must engage with all individuals and institutions that have worked on issues of equality to address the above challenges.

Recommendations

- Ensure that the government goes beyond piecemeal, shallow responses and works to integrate equality, as it relates to youth and women, into national planning process and proactively engages and involves individuals and institutions that have been working on these issues.

C. To the Panel of Eminent African Personalities

- The closing down of the mediation process moved the locus away from the Kenya National Dialogue and Reconciliation to the government, making follow-up subject to political manoeuvring and posturing;
- The Panel, initially open and accountable to the public, is no longer, resulting in a disconnect between the National Dialogue and Reconciliation and the public.

Recommendations

- Ensure regular, proactive and substantive engagement by the public to maintain accountability and ensure oversight on progress with decisions of the mediation process.

(end/kptj/se8)