

ANNEX 27

The Constitution of Kenya (Amendment) (No.) Bill, 2009

THE CONSTITUTION OF KENYA (AMENDMENT) (NO. ...) BILL, 2009

A Bill for

AN ACT of Parliament to amend the Constitution of Kenya.

ENACTED by the Parliament of Kenya, as follows -

- | | |
|--|--|
| Short title. | 1. This Act may be cited as the Constitution of Kenya (Amendment) (No.) Act, 2009. |
| Amendment to section 3 of the constitution | 2. The Constitution is amended in the proviso to section 3 in the third sentence of the proviso by inserting the following new phrase immediately after the phrase “section” and immediately before “15A(3)” —
“3A and”. |
| Insertion of new section 3A. | 3. The Constitution is amended by inserting the following new section immediately after section 3 – |
| Special Tribunal for Kenya. | 3A. (1) There is established a Tribunal to be known as the Special Tribunal for Kenya which shall have exclusive jurisdiction in accordance with this Constitution to- <ul style="list-style-type: none"> (a) investigate, prosecute and determine cases against persons responsible for genocide, gross violations of human rights, crimes against humanity; and (b) investigate prior and subsequent events, circumstances and factors relating to the crimes and to prosecute related offences arising from and connected with the crimes committed in Kenya in connection with the December, 2007 General Election. <p>(2) Notwithstanding the provisions of this section, the International Criminal Court established under the Rome Statute shall have</p> |

The Constitution of Kenya (Amendment) (No.) Bill, 2009

concurrent jurisdiction to investigate, indict and prosecute persons bearing the greatest responsibility and the Tribunal may at any stage, make a referral to the International Criminal Court as set out in Article 14 of the Rome Statute with reasons thereof, if it deems it expedient provided that no persons shall be subjected to prosecution by both the International Criminal Court and the Special Tribunal at the same time.

(3) Crimes within the jurisdiction of the Tribunal shall not be subject to any statute of limitations.

(4) The Tribunal shall be governed by the Statute of the Special Tribunal for Kenya set out in the Schedule.

(5) For the avoidance of doubt, the provisions of this section establishing the Tribunal shall not be deemed to be inconsistent with any section of this Constitution.

(6) This section shall cease to be effective upon expiry of three years from the date of the establishment of the Tribunal provided that Parliament may extend the life of the Tribunal which may be extended, in appropriate circumstances and at the request of the Tribunal, by a resolution of the National Assembly supported by not less than sixty-five percent of all the members of National Assembly, excluding *ex-officio* members.

The Constitution of Kenya (Amendment) (No.) Bill, 2009

FIRST SCHEDULE

Section 3A(4)

STATUTE OF THE SPECIAL TRIBUNAL FOR KENYA

Arrangement of paragraphs

PART 1 - PRELIMINARY

- 1—Short title
- 2—Interpretation.

PART II – ORGANIZATION, POWERS AND FUNCTIONS OF THE TRIBUNAL

- 3—Organization of the Tribunal.
- 4—Functions of the Tribunal.
- 5—Jurisdiction of the Tribunal.
- 6—Personal jurisdiction.
- 7—Exclusive jurisdiction.
- 8—Territorial and temporal jurisdiction.
- 9—Jurisdiction of the Chambers and Special Magistrate.
- 10—Elements of crime.
- 11—Individual criminal responsibility.
- 12—*Ne bis in idem*. (Double jeopardy prohibited).
- 13—Composition of the Trial Chamber.
- 14—Composition of the Appeals Chamber.
- 15—Appointment of judges of the Chambers.
- 16—Additional Trial Chambers.
- 17—Qualifications for appointment of judges.
- 18—Oath of office.
- 19—Tenure of office of judges.
- 20—Terms and conditions of service of the judges.
- 21—Vacancy in the office of judge.
- 22—Removal and replacement of judges.
- 23—Special Magistrates Courts.
- 24—Qualification for appointment as Special Magistrates.
- 25—Tenure and terms of service of Special Magistrates.
- 26—Rules of procedure and evidence.
- 27—The Prosecutor.
- 28—The Registrar.
- 29—The Defence Office.

The Constitution of Kenya (Amendment) (No.) Bill, 2009

30—Terms and conditions of service of the Prosecutor, Deputy Prosecutor, Registrar, Deputy Registrar, Chief Defence Counsel , Deputy Chief Defence Counsel, and other staff of the Tribunal.

31—Staff of the Tribunal.

32—Investigation and preparation of indictment.

33—Summons to appear and warrant of arrest.

34—Interim release and fresh warrants.

35—Pre-trial proceedings.

36—Trial proceedings.

37-Trial in absentia.

38—Appeal proceedings.

39—Review proceedings.

40—Procedure before Special Magistrates.

41—Investigations and prosecutions before Special Magistrates.

42—Administration and support services to special Magistrates.

43—Appeal from Special Magistrates.

44—Official language of the Tribunal.

45—Rights of a suspect.

46—Rights of the accused.

47—Rights of victims.

48—Foreign counsel to have right to appear.

49—Judgement.

50—Penalties.

51—Forfeiture and preservation of property.

52—Compensation of victims.

53—Enforcement of sentences.

54—Miscellaneous provisions relating to Special Magistrates.

55 — Effect of investigation, indictment and conviction on holders of public office

PART III – FINANCIAL PROVISIONS

56—Funds of the Tribunal.

57 —Establishment of the Fund.

58—Annual Estimates.

59—Accounts and audit.

60—Annual report of the Tribunal.

61—Records of the Tribunal.

62—Report of the Tribunal.

63—Dissolution of Tribunal.

The Constitution of Kenya (Amendment) (No.) Bill, 2009

**THE PEOPLE OF KENYA THROUGH THE NATIONAL
ASSEMBLY-**

DESIROUS that our nation achieves its full potential in social, economic and political development;

MINDFUL that during and after the 2007 General Elections, Kenya witnessed tragic violence in which serious crimes and violations of human rights were committed with impunity against our people;

RECALLING the Agreement on the Principles of Partnership of the Coalition Government made on February 28, 2008 and the Agreement for the Establishment of a Commission of Inquiry on Post - Election Violence dated March 4, 2008;

AFFIRMING that such serious crimes should not go unpunished and aware that these transgressions cannot be properly addressed by our judicial institutions due to procedural and other hindrances;

DETERMINED to bring to justice those responsible for these crimes and to put an end to impunity:

RECOGNIZING that the Government established the Commission of Inquiry into Post Election Violence with a mandate to-

- (a) investigate the facts and surrounding circumstances related to acts of violence that followed the 2007 elections;
- (b) investigate the actions or omissions of state security agencies during the course of the violence and make recommendations as necessary; and
- (c) recommend measures of a legal, political or administrative nature, as appropriate, including measures with regard to bringing to justice those responsible for criminal acts;

CONSCIOUS that the Commission on Post Election Violence completed its work and recommended the establishment of a special tribunal to bring to account those who bear the greatest responsibility for the post election violence;

The Constitution of Kenya (Amendment) (No.) Bill, 2009

RECALLING the Agreement for the Implementation of the Recommendations of the Commission of Inquiry into Post-Election Violence (which is set out in the First Schedule to this Statute);

DETERMINED to restore confidence of the nation in the rule of law democracy and human rights and to build a cohesive nation going forward:

NOW THEREFORE, establish the Special Tribunal for Kenya as hereinafter provided:-

PART I – PRELIMINARY

Short title. **1.** This Statute shall be referred as “the Statute on the Special Tribunal for Kenya” hereinafter “the Statute.”

Interpretation. **2.** In this Statute unless the context otherwise requires-

“artificial persons” means organizations, bodies or associations having corporate personality and recognized in law as legal persons;

“crimes against humanity”, means any of the following acts committed knowingly as part of a widespread or systematic attack against any civilian population -

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) deportation or forcible transfer of population
- (f) forced pregnancy
- (g) imprisonment or other severe deprivation of physical liberty;
- (h) torture;

The Constitution of Kenya (Amendment) (No.) Bill, 2009

- (i) rape and other forms of sexual violence;
 - (j) harassment;
 - (k) persecutions on political, racial, ethnic, cultural, gender and religious grounds;
 - (l) other inhumane acts,
- and in this definition-

- (i) “extermination” includes the intentional destruction of life, or creation or alteration of adverse conditions; *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (ii) “enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (iii) “deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (iv) “torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused;
- (v) “forced pregnancy” means unlawful impregnation and/or unlawful confinement of a woman or girl made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law;
- (vi) “persecution” means the intentional and severe

The Constitution of Kenya (Amendment) (No.) Bill, 2009

deprivation of fundamental rights contrary to international law by reason of the identity of a group or collectivity;

“Fund” means the Special Tribunal for Kenya Fund established under Section 56;

“genocide”, means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such-

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group from one place to another;

“gross violations of human rights”, means-

- (a) violations of fundamental human rights, including but not limited to acts of torture, killing, abduction and severe ill-treatment of any person;
- (b) unlawful imprisonment or other severe deprivation of physical liberty;
- (c) rape or any other form of sexual violence;
- (d) enforced disappearance of persons;
- (e) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or gender or other grounds

The Constitution of Kenya (Amendment) (No.) Bill, 2009

universally recognized as impermissible under international law; or

- (f) any attempt, conspiracy, incitement, instigation, command, procurement to commit an act referred to in paragraphs (a) to (e);

“indictment” includes a charge;

“Minister” means the Minister for the time being responsible for matters relating to justice and constitutional affairs;

“Registrar” means the Registrar appointed under Section 27;

“Rome Statute” means Rome Statute establishing the International Criminal Court;

“Panel of Eminent African Personalities” means the African Union Panel of Eminent African Personalities spearheading the mediation efforts in Kenya following the post-2007 election crisis leading to the signing of the National Accord on the 28th February 2008;

“Parliamentary Committee” means the Parliamentary Committee in charge of legal affairs and the administration of justice;

“persons bearing the greatest responsibility” means a person or persons who were knowingly responsible for any or all of the following acts: planning, instigating, inciting, funding, ordering or providing other logistics which directly or indirectly facilitated the commission of crimes falling within the jurisdiction of the Tribunal; in determining whether a person or persons falls within this category, the Tribunal shall have regard to factors including the leadership role or level of authority or decision making power or influence of the person concerned and the gravity, severity, seriousness or scale of the crime committed.

“Public Officer” means any public officer in the Republic including the President, Prime Minister, Vice President, Minister, Assistant-Minister, Member of Parliament or any other office as set out in any other written law.

“Speaker” means the Speaker of the National Assembly of Kenya.

The Constitution of Kenya (Amendment) (No.) Bill, 2009

“victim” includes any person who, or group of persons which, with the occasion or because of a human rights violation, has suffered any individual or collective harm, loss or damage by acts or omissions which violate the rights granted under the Constitution or any written law in Kenya, International Human Rights Law and International Criminal Law;

“Tribunal” means the Special Tribunal for Kenya established under Section 3A of the Constitution.

“Secret Waki Envelope” means the list of person/persons suspected to bear the greatest responsibility for the post election violence of 2007, handed over to the Prosecutor of the International Criminal Court by the Chairman of the Panel of Eminent African Personalities on 16th July, 2009.

PART II: POWERS AND FUNCTIONS OF THE TRIBUNAL

Organization of the Tribunal. **3.** (1) The Tribunal shall be a body corporate with perpetual succession and a common seal.

(2) The Tribunal shall consist of the following organs-

- (a) the Chambers, comprising a Trial Chamber and an Appeals Chamber;
- (b) the Prosecutor;
- (c) the Registry;
- (d) the Defence Office; and,
- (e) Special Magistrates.

(3) The Tribunal shall sit at such places as the Chairman of the Appeals Chamber may determine.

Functions of the Tribunal. **4.**(1)The functions of the Tribunal shall be to investigate, prosecute and determine cases against persons bearing responsibility for genocide, gross violations of human rights, crimes against humanity and other crimes which occurred in relation to the General Elections held on 27th December,2007.

The Constitution of Kenya (Amendment) (No.) Bill, 2009

- (2) The Tribunal shall have the power to investigate prior and subsequent events, circumstances and factors relating to the crimes and to prosecute related offences arising from and connected with the crimes.

Jurisdiction of the Tribunal. **5.** The Tribunal shall, through its various organs, have the power to investigate, prosecute and determine cases against persons responsible for genocide, gross violations of human rights, crimes against humanity and other crimes committed in Kenya in accordance with the provisions of this Constitution.

Personal Jurisdiction. **6.** The Tribunal shall have jurisdiction over natural and artificial persons.

Exclusive Jurisdiction. **7.** (1) The Tribunal shall have exclusive jurisdiction to investigate, prosecute and determine cases against persons as recommended by the Commission on Post Election Violence of 2007.

- (2) The Tribunal shall have primacy over the courts at any stage of the proceedings of a court for a crime that may be prosecuted under this Statute.

- (3) Where criminal proceedings relating to a crime referred to in this Statute are pending before a court, the Tribunal shall formally request the court to defer to its competence and where the Tribunal makes such request, the proceedings in the court shall be terminated.

- (4) For the avoidance of doubt, previous or ongoing proceedings in any court shall not be a bar to the jurisdiction of the Tribunal.

- (5) Without prejudice to (1) above, the Tribunal may invoke Article 14 of the Rome Statute if deemed necessary and for avoidance of doubt it is declared that the person or persons on the list submitted to the International Criminal Court by the Chair of the Panel of Eminent African Personalities shall be deemed to have been referred to the International Criminal Court.

- (6) If the International Criminal Court upon investigation of

The Constitution of Kenya (Amendment) (No.) Bill, 2009

suspects stated in Paragraph (5) above deems it expedient, it shall remit any such case to the Tribunal and shall not be deemed to occasion double jeopardy.

Territorial and temporal jurisdiction.

8. (1) The territorial jurisdiction of the Tribunal shall extend to the territory of Kenya.

(2) The temporal jurisdiction of the Tribunal shall extend to the period between 3rd December 2007 and 28th February 2008.

Jurisdiction of the Chambers and Special Magistrate.

9. (1) Subject to section 3A -

(a) Without prejudice to the jurisdiction of the International Criminal Court, the Trial Chamber shall exercise jurisdiction over persons bearing responsibility for crimes falling within the jurisdiction of the Tribunal;

(b) Subject to 9 (1) (a) above, the Special Magistrates shall exercise jurisdiction in respect of crimes defined in the Penal Code or any other written law committed in the period between 3rd December 2007 and 28th February 2008.

(2) The Appeals Chamber shall exercise appellate jurisdiction over matters determined by the Trial Chamber and the Special Magistrates as provided for.

Elements of crime.

10. The elements of the international crimes which are subject to the jurisdiction of the Tribunal shall be as defined in the elements of crime of the International Criminal Court.

Individual criminal responsibility.

11.(1) A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime shall be individually responsible for the crime.

(2) A person who contributed in any other way to the commission of a crime under the interpretation section hereinabove by an individual, a group or persons acting with a common purpose, where such contribution was intentional and was made-

(a) with the aim of furthering the general criminal activity

The Constitution of Kenya (Amendment) (No.) Bill, 2009

or purpose of the individual or group;

- (b) with knowledge of the intention of the individual or group to commit the crime; or
- (c) if in the circumstances of the person, the intention of the individual or group to commit the crime ought to have been in the knowledge of such person,

shall be individually responsible for the crime.

(3) (i) this section shall apply equally to all persona without any distinction based on official capacity and shall in no case exempt a person from criminal responsibility nor shall it in and of itself constitute a ground for reduction of sentence;

(ii) Immunities or special procedural rules which may attach to the official capacity of a person whether under national or international law shall not bar the Tribunal from exercising jurisdiction over such a person with respect to the Vienna Convention.

(4) The fact that any of the acts under the interpretation section hereinabove was committed by a subordinate does not relieve his superior of criminal responsibility if the superior knew or had reason to know, or ought to have known, or owing to the circumstances at the time, should have known, or consciously disregarded information which clearly indicated that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to submit the matter to the Competent Authorities for investigation and prosecution.

(5) The fact that an accused person acted pursuant to an order of a Government official or of a superior shall not relieve him or her of criminal responsibility.

(6) The Tribunal shall have no jurisdictions over any person who was under the age of 15 years at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Tribunal, he

The Constitution of Kenya (Amendment) (No.) Bill, 2009

or she shall be treated with dignity and a sense of worth, taking into account the young age and the desirability of promoting the rehabilitation, reintegration into and assumption of a constructive role in society in accordance with international standards in particular the rights of a child.

Ne bis in idem. (Double jeopardy prohibited.) **12.** (1) No person shall be tried before a court for acts constituting genocide, gross violations of human rights and crimes against humanity for which he or she has already been tried by the Tribunal.

(2) A person who has been tried before a court for acts constituting a serious violation of international human rights law may be subsequently tried by the Tribunal only if-

- (a) the act for which he or she was tried was characterized as an ordinary crime;
- (b) the proceedings in the court were for the purpose of shielding the person from criminal responsibility for crimes falling within the jurisdiction of the Tribunal;
- (c) the trial was not conducted independently or impartially in accordance with the norms of due process recognized by international law and was conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

(3) In considering the penalty to be imposed on a person convicted of a crime under this Statute, the Tribunal shall take into account the extent to which any penalty imposed by a court on that person for the same act has already been served.

Composition of the Trial Chamber. **13.** (1) The Trial Chamber shall consist of the chairperson of the Trial Chamber and two other judges.

(2) The chairperson of the Trial Chamber shall be a citizen of Kenya and shall be appointed by the President with the concurrence of the Prime Minister.

(3) The other two judges of the Trial Chamber shall be non-

The Constitution of Kenya (Amendment) (No.) Bill, 2009

citizens and shall be appointed by the President, with the concurrence of the Prime Minister, from a list of persons nominated by the Panel of Eminent African Personalities.

Composition of the Appeals Chamber. **14.** (1) The Appeals Chamber shall consist of the chairperson of the Appeals Chamber and four other judges.

(2) The chairperson of the Appeals Chamber shall be a citizen of Kenya and shall be appointed by the President with the concurrence of the Prime Minister from a list of nominees by the Panel of Eminent African Personalities.

(3) Three of the four judges of the Appeals Chamber shall be non-citizens and shall be appointed by the President, with the concurrence of the Prime Minister, from a list of persons nominated by the Panel of Eminent African Personalities.

(4) One of the four judges of the Appeals Chamber shall be a citizen of Kenya and shall be appointed by the President with the concurrence of the Prime Minister.

Appointment of judges of the Chambers. **15.** (1) The President shall, with the concurrence of the Prime Minister, appoint the chairperson of the Trial Chamber and the chairperson of the Appeals Chamber within twenty one days of the commencement of this Section

(2) The Panel of Eminent African Personalities shall, within fourteen days of the commencement of this Section, submit the names of its nominees for appointment to the Chamber to the President and the Prime Minister.

(3) The President shall, with the concurrence of the Prime Minister, notify the appointment of the judges in the Gazette, within seven days of receipt of the names of the nominees submitted under paragraph (2).

(4) Where the President and the Prime Minister are unable to agree on any of the appointments under this section within twenty-one days from the commencement of this Statute, the National Assembly shall, by a resolution supported by not less than half of all its members (excluding the *ex-officio* members) nominate the person and the Speaker shall forthwith cause appointment to be Gazetted.

The Constitution of Kenya (Amendment) (No.) Bill, 2009

- Additional Trial Chambers. **16.** (1) The President may, with the concurrence of the Prime Minister and the Panel of Eminent African Personalities, create additional Chambers if it is in the interest of justice.
- (2) The structure of additional Chambers, including the mode of appointment of judges thereto shall be similar to that of the Trial Chamber.
- (3) Additional Chambers shall be created by proclamation in the Gazette.
- Qualification for appointment of judges. **17.** (1) A judge of a Chamber shall be a person who –
- (a) possesses the qualifications required in their respective countries for appointment to the highest judicial offices;
 - (b) has extensive experience in criminal law and practice;
 - (c) is of recognized professional competence;
 - (d) is of good character and integrity; and
 - (e) is impartial.
- (2) In the overall composition of the Chambers, due account shall be taken of gender equity and the experience of the judges in criminal law, international law including International Criminal Law and International Human Rights Law.
- Oath of office. **18.** The chairperson of the Appeals Chamber, the chairperson of the Trial Chamber, judges of the Chamber, the Registrar, the Prosecutor, Chief Defence Counsel and Special Magistrates shall each make and subscribe to the oath or affirmation set out in the Third Schedule before embarking on the duties of the Tribunal.
- Tenure of office of judges. **19.** The judges of the Chambers shall be appointed for a period of three years which period may be extended, in appropriate circumstances, by a resolution of the Parliament supported by not less than half of all the members of the National Assembly, excluding *ex-officio* members:

The Constitution of Kenya (Amendment) (No.) Bill, 2009

Provided that on the recommendation of the Chairperson of the Appeals Chamber, a judge with substantially part-heard cases may be retained for such period as may be necessary to conclude such part-heard cases.

Terms and condition of service of the judges.

20. The terms and conditions of service of the judges of the Chambers shall be determined by the President with the concurrence of the Prime Minister and the Panel of Eminent African Personalities and shall not be reviewed to the disadvantage of the judges during their term of office.

Vacancy in the office of judge.

21. (1) The office of a judge of a Chamber shall become vacant if the holder –

- (a) dies;
- (b) resigns from office by writing under his hand addressed to the President;
- (c) is removed from office in accordance with the provisions of Section 22; or
- (d) is declared bankrupt.

(2) The President shall notify every vacancy in the Gazette within seven days of the occurrence of the vacancy.

Removal and Replacement of Judges.

22. (1) Without prejudice to Section 21, a chairperson or a judge of a Chamber may be removed from office by the President with the concurrence of the Prime Minister and the Panel of Eminent African Personalities –

- (a) for misbehavior or misconduct;
- (b) if the chairperson or the judge is convicted of an offence involving moral turpitude but not sentenced to a term of imprisonment; or
- (c) if the chairperson or judge is unable to discharge the functions of his office by reason of physical or mental infirmity.

The Constitution of Kenya (Amendment) (No.) Bill, 2009

(2) Where the question of the removal from office of a chairperson or a judge arises under paragraph (1), representations on the removal of the chairman or judge shall be made way of petitions made to the President in writing: where the President and Prime Minister agree on the decision to remove a chairperson or a judge, and before this decision is submitted for approval by the Panel of Eminent African Personalities, the National Assembly must by a resolution supported by not less than half of all its members (excluding the *ex-officio* members) ratify the removal of the person.

Provided that where the President and the Prime Minister are unable to agree on the decision to be made on a petition within twenty-one days of its consideration Parliament shall by a resolution supported by not less than half of all its members (excluding the *ex-officio* members) determine whether the person should be removed or not.

(3) A chairperson or a judge against whom a representation has been made shall have the right to respond to the allegations before a decision is made.

(4) In the event of a vacancy in the Chamber, replacements shall be made in accordance with the procedure for appointment.

Special
Magistrates
Courts.

23. (1) There shall be four Special Magistrate Courts.

(2) The President may, with the concurrence of the Prime Minister in consultation with the Panel of Eminent African Personalities, establish additional Special Magistrates Courts if it is in the interest of justice to do so.

(3) Each of the Special Magistrates Court shall be presided over by a panel of three magistrates appointed in accordance with this Statute.

(4) There shall be such number of Special Magistrates as shall be nominated by the Parliamentary Committee and appointed by the President with the concurrence of the Prime Minister.

(5) The nomination and appointment of the Special Magistrates shall be in accordance with the procedure set out in the Second Schedule.

The Constitution of Kenya (Amendment) (No.) Bill, 2009

- Qualification for appointment as Special Magistrates. **24.**(1) A person shall be qualified to be appointed a Special Magistrate if that person –
- (a) has extensive experience in criminal law and practice;
 - (b) is of recognized professional competence;
 - (c) is of good character and integrity; and
 - (d) is impartial.
- (2) A person shall not be qualified to be appointed a Special Magistrate unless he or she has served in the rank of principal magistrate or a higher rank, or has practiced as an advocate for seven years or more.
- (3) The provisions relating to the removal of judges shall apply with necessary modifications to the removal of Special Magistrates.
- Tenure and Terms of Service of Special Magistrates. **25.** (1) A Special Magistrates shall be appointed for a renewable term of three years.
- (2) The terms and conditions of service of the Special Magistrates shall be determined by the President with the concurrence of the Prime Minister and the Panel of Eminent African Personalities and shall not be reviewed to the disadvantage of the Special Magistrates during their term of office.
- Rules of Procedure and Evidence. **26.** The Tribunal shall develop rules of procedure and evidence for the conduct of proceeding before it including the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the Tribunal.
- The Prosecutor. **27.** (1) There shall be a Prosecutor who shall be responsible for investigation and prosecution of cases against persons responsible for crimes falling within the jurisdiction of the Tribunal.
- (2) The Prosecutor’s Office shall consist of the Prosecution and Investigation Divisions.

The Constitution of Kenya (Amendment) (No.) Bill, 2009

(3) The Prosecutor shall be a non-citizen appointed by the President with the concurrence of the Prime Minister from a list of persons nominated by the Panel of Eminent African Personalities.

(4) A person shall be qualified to be appointed a Prosecutor if such person –

- (a) possesses the qualifications required in their respective countries for appointment to the superior judicial offices;
- (b) has extensive experience in criminal law and practice;
- (c) is of recognized professional competence;
- (d) is of good character and integrity; and
- (e) is impartial;

(5) In the performance of his functions under this Statute, the Prosecutor shall-

- (a) act independently as a separate organ of the Tribunal;
- (b) not seek or receive instructions from any person or authority; and
- (c) not be subject to the control or direction of any person or authority.

(6) In the interest of proper administration of justice, the Prosecutor may charge jointly persons accused of the same or different crimes committed in the course of the same transaction.

(7) The Prosecutor shall be assisted by a Deputy Prosecutor who shall be a citizen of Kenya appointed by the President with the concurrence of the Prime Minister from a list of persons nominated by the Parliamentary Committee in the same manner as the Special Magistrates, with necessary modifications.

(8) in execution of the prosecutor duties, the Prosecutor may hire such other local and international staff provided that the foreign staff shall not exceed one-third of total staff so hired.

The Constitution of Kenya (Amendment) (No.) Bill, 2009

- The Registrar. **28.** (1) There shall be a Registrar of the Tribunal who shall be responsible for the administration and management of the affairs of the Tribunal.
- (2) There shall be a Registry which shall consist of a Registrar and such other staff as may be required.
- (3) The Registrar shall be a non citizen appointed by the President with the concurrence of the Prime Minister from a list of persons nominated by the Panel of Eminent African Personalities.
- (4) A person shall be qualified to be appointed as a Registrar if such person—
- (a) possesses the qualifications required for appointment as a judge of the High Court of Kenya;
 - (b) has extensive experience in the administration and management of court registries;
 - (c) is of recognized professional competence;
 - (d) is of good character and integrity; and
 - (e) is impartial;
- (5) The Registrar of the Tribunal shall be assisted by a Deputy Registrar who shall be a citizen of Kenya appointed by the President in concurrence with the Prime Minister, from a list of persons nominated by the Parliamentary Committee in the same manner as the Special Magistrates, with necessary modifications.
- (6) The Registrar shall set up a victims and witnesses unit within the Registry which shall, in concurrence with the Office of the Prosecutor, provide measures to protect the safety, physical and psychological well-being, dignity and privacy of the victims and witnesses, and such other appropriate assistance for witnesses who appear before the Tribunal and others who are at risk on account of testimony given or to be given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.
- (7) Subject to sub section (6), the Registrar may, in setting up the victims and witness protection unit, apply statutory provisions as

The Constitution of Kenya (Amendment) (No.) Bill, 2009

may be provided for by an Act of Parliament, in strict conformity with international codes under the Rome Statute.

The Defence Office.

29. (1) There shall be a Defence Office headed by the Chief Defence Counsel who shall be a non-citizen appointed by the President, with the concurrence of the Prime Minister from a list of nominees by the Panel of Eminent African Personalities.

(2) A person shall be qualified to be appointed as a Chief Defence Counsel if such person—

- (a) possesses the qualifications required for appointment as a judge of the High Court of Kenya;
- (b) has extensive experience in the administration and management of court registries;
- (c) is of recognized professional competence;
- (d) is of good character and integrity; and
- (e) is impartial.

(3) The Chief Defence Counsel of the Tribunal shall be assisted by a Deputy Chief Defence Counsel who shall be a citizen of Kenya appointed by the President, in concurrence with the Prime Minister, from a list of persons nominated by the Parliamentary Committee in the same manner as the Special Magistrates, with necessary modifications.

(4) The Defence Office shall protect the rights of the defence, provide support and assistance to defence counsel and to persons entitled to legal assistance, including, where appropriate, legal research, collection of evidence and advice, and appearing before the judges in respect of specific issues.

(5) Legal assistance shall be provided to persons who are indigent in accordance with criteria prepared by the Tribunal.

(6) The Chief Defence Counsel shall draw up a list of competent Defence Counsel who may be deployed to assist persons

The Constitution of Kenya (Amendment) (No.) Bill, 2009

entitled to legal assistance.

(7) Legal assistance shall only be provided to persons for whom an indictment has been issued and confirmed by the Chamber.

(8) Legal Counsel enlisted for this purpose shall be paid such honorarium or legal fees as may be determined by the Tribunal.

(9) The Chief Defence Counsel shall be assisted in his function by other staff appointed by the Tribunal.

Terms and conditions of service of the Prosecutor, Deputy Prosecutor, Registrar, Deputy Registrar, Chief Defence Counsel, Deputy Chief Defence Counsel and other staff of the Tribunal.

30. (1) The Prosecutor, Deputy Prosecutor, Registrar, Deputy Registrar, Chief Defence Counsel, Deputy Chief Defence Counsel and other staff of the Tribunal shall be appointed on contract.

(2) The terms and conditions of service of the Prosecutor, Deputy Prosecutor, Registrar, Chief Defence Counsel and other staff of the Tribunal shall be set by the President with the concurrence of the Prime Minister, upon consultation with the Panel of Eminent African Personalities.

(3) in the event of a vacancy in the office of the Prosecutor, Deputy Prosecutor, Registrar or Chief Defence Counsel, replacements shall be made in accordance with the procedure for appointment.

(4) The procedure for the removal of judges shall apply in the removal of the Prosecutor, Deputy Prosecutor, Registrar, Deputy Registrar, Chief Defence Counsel and Deputy Chief Defence Counsel.

(5) Other staff of the Tribunal may be removed from office for incompetence, misbehavior or for any other conduct that may bring the proceedings of the Tribunal into disrepute.

(6) The Tribunal shall make provisions in respect of discipline and removal of its other staff including other grounds that may justify removal of such staff.

Staff of the Tribunal.

31. (1) The Tribunal may appoint such officers and other staff of the Tribunal as it may consider necessary for the proper performance of its functions and mandate herein.

The Constitution of Kenya (Amendment) (No.) Bill, 2009

(2) Any appointment made under paragraph (1) shall be made with regard to the principle of gender equality.

(3) The officers and other staff of the Tribunal appointed under paragraph (1) shall serve on such terms and conditions as the Tribunal, in consultation with the Treasury, may determine.

(4) The Tribunal may engage experts or consultants to assist the Tribunal in execution of its functions and mandate herein.

Investigation
and
preparation of
indictment

32. (1) The Prosecutor shall initiate investigations on the basis of the Report of the Commission of Inquiry into Post-Election Violence, on his own motion or on the basis of information obtained from any source.

(2) The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

(3) The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations.

(4) (a) In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of relevant government agencies/officer; all government agencies shall render such assistance, and no other laws or obligations shall be considered withstanding this duty, except for the individual privilege of obligations of non-self-discrimination of an officer, which to take effect, must be expressly invoked.

(5) If questioned, a suspect shall be entitled to be assisted by counsel of his or her own choice.

(6) Upon a determination that reasonable evidence for indictment exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under this Statute.

The Constitution of Kenya (Amendment) (No.) Bill, 2009

(7)The indictment prepared under subsection (6) shall be transmitted to a judge of the Trial Chamber.

Summons to appear and warrant of arrest **33.** (1) Upon confirmation of an indictment by the judge, the judge shall issue summons to the person in respect of whom the indictment relates to appear before the Tribunal.

(2) Summons issued under paragraph (1) shall be effected on the person concerned personally or where it is not practicable, through advertisement in the local print and electronic media and shall contain the full names of the person to whom it is issued, the nature of the crimes, a brief description of the facts and shall state the date on which the person it is directed to is required to appear before the Tribunal.

(3) The person upon whom summons to appear is served shall present himself before the judge within seven days.

(4) Where after issuance of summons a person fails to present himself to the judge within seven days or where it appears to the judge that it is necessary to effect an arrest in order to compel the person concerned to appear before the Tribunal, the judge shall issue a warrant of arrest against that person.

(5) A warrant of arrest shall be addressed to the Commissioner of Police requiring him to apprehend the person whose details and particulars shall be clearly described in the warrant which shall also contain a description of the crimes for which the person to whom it is addressed is required to answer to as well as brief facts of the crime.

(6) A warrant of arrest shall remain in force until revoked by the Tribunal.

(7) Where a person is arrested within Kenya, he shall be held in custody and presented to the Tribunal within twenty-four hours of

The Constitution of Kenya (Amendment) (No.) Bill, 2009

his arrest.

Interim release and fresh warrants. **34.** (1) A person who is arrested and taken into custody may apply for interim release.

(2) Where the judge hearing the application under paragraph (1) is satisfied that there are urgent and exceptional circumstances to warrant interim release and that there are sufficient safeguards to ensure the subsequent appearance of the person arrested, the judge shall allow the interim release with or without conditions.

(3) Where conditional release is made with conditions, any breach of the conditions may entitle the judge, upon application by Prosecutor, to issue a fresh warrant of arrest and where a fresh warrant is issued, the person against whom the warrant is issued shall not subsequently be entitled to interim release.

Pre-trial proceedings. **35.**(1) Pre-trial proceedings shall be conducted by a pre-trial Judge to determine whether there is a case to warrant the person accused to stand trial.

(2) At the pre-trial proceedings, the Prosecutor shall support every charge with evidence to establish reasonable grounds to believe that the accused person ought to stand trial.

(3) At the pre-trial hearings, the accused may object to the charge, challenge the evidence presented or present evidence.

(4) At the end of the pre-trial hearings, the pre-trial judge shall determine whether there is sufficient evidence to establish substantial grounds to believe that the accused person committed the offence and may-

- (a) commit the accused person to stand full trial if satisfied that there is sufficient evidence; or
- (b) decline to commit the accused person for trial in relation to those charges where there is no sufficient evidence.

The Constitution of Kenya (Amendment) (No.) Bill, 2009

(5) Where the pre-trial judge finds that there is no sufficient evidence, shall order discharge or release of the accused provided that such discharge or release shall not be a bar to the Prosecutor to bring a fresh indictment.

(6) Notwithstanding any provision to the contrary, the Prosecutor shall have a right to amend or withdraw a charge at the pre-trial proceedings provided that where an amendment is made, the ordinary process for review and confirmation of such charge and a pre-trial shall be followed.

(7) The decision of the pre-trial judge under this section shall be final; the office shall be held in rotational basis.

(8) An accused person is entitled to legal representation during the proceedings.

Trial
proceedings.

36.(1) The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Tribunal's rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

(2) A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the Tribunal, be taken into custody, immediately informed of the charges against him or her and transferred to the custody of the Tribunal.

(3) The Trial Chamber shall study the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea and then set the date for trial.

(4) The hearings of the Tribunal shall be open to the public unless the Trial Chamber decides to hold the proceedings *in camera* in accordance with its Rules of Procedure and Evidence.

Trial in
absentia.

37. (1) The Tribunal may conduct a trial in the absence of the accused if the accused has-

(a) expressly and in writing waived his right to be present;

The Constitution of Kenya (Amendment) (No.) Bill, 2009

(b) absconded or otherwise cannot be found and all reasonable steps have been taken to secure his appearance before the Tribunal and to inform him of the charged confirmed by the Trial Judge.

(c) by his conduct or otherwise made it impossible to conduct the trial in his presence.

(2) Where hearings are conducted in the absence of the accused, the Tribunal shall ensure that-

(a) the accused has been notified or served with the indictment, or notice has otherwise been given of the indictment through the media;

(b) the accused has designated a counsel or if it is proved that the accused is indigent, a counsel has been provided by the Tribunal;

(c) where the accused refuses or fails to appoint a Defence Counsel, such counsel has been assigned by the Defence Office with a view to ensuring full representation of the interests and rights of the accused.

Appeal
proceedings.

38. (1) The Appeals Chamber shall hear appeals from orders, judgment and other final determinations made by the Trial Chamber.

(2) An appeal under this section shall only be made by the Prosecutor, an accused person or a person against whom an order is directed.

(3) An appeal may be made only on the grounds of an error -

(a) on a question of law invalidating the decision; or

(b) an error of fact due to a misapplication of procedural law, or to a grave infringement of the rights of the accused or of the rights of the victims.

(4) The Appeals Chamber may affirm, reverse or revise any

The Constitution of Kenya (Amendment) (No.) Bill, 2009

decision taken by the Trial Chamber.

(5) An appeal shall be lodged within thirty days of the delivery of the order, judgment or determination of the Trial Chamber unless leave to file the appeal after this period is granted where there are compelling reasons that justify the delay.

(6) The determination of the Appeals Chamber shall be final.

Review
proceedings.

39.(1) Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgment.

(2) An application for review under subsection (1) shall be submitted to the Appeals chamber which –

- (a) may reject the application if it considers it to be unfounded; or
- (b) if it determines that the application is meritorious, may, as appropriate-
 - (i) reconvene the Trial Chamber; or
 - (ii) retain jurisdiction over the matter.

Procedure
before Special
Magistrates.

40. (1) The Special Magistrate has discretion to apply partially or fully the Special Tribunal Rules and Procedures as provided under section 26 herein, either in addition to, or in lieu of, the Kenyan national laws and rules.

(2) Subject to subsection (1), in exercising his jurisdiction, a Special Magistrate shall apply-

Cap.75
Cap.80

- (a) the Criminal Procedure Code, the Evidence Act and any other written law that makes provision for the procedure in respect of crimes falling under the jurisdiction of a Special Magistrate;
- (b) where appropriate, the principles and norms of International Criminal Law and Procedure as applied by

The Constitution of Kenya (Amendment) (No.) Bill, 2009

the Tribunal herein or other tribunals of comparable nature and character including the International Criminal Court.

(3) Where the principles and norms of International Criminal Law and Procedure as applied are at variance with the Criminal Procedure Code, the Evidence Act and other written law, the principles and norms of International Criminal Law and procedure shall take precedence.

(4) Notwithstanding anything to the contrary, the Tribunal may prescribe rules of procedure for application by the Special Magistrates.

Investigations
and
prosecutions
before Special
Magistrates.
Administration
and support
services to
Special
Magistrates.

41. The Prosecutor of the Tribunal or such other staff authorized by the Prosecutor shall conduct investigations and prosecutions in respect of cases falling within the jurisdiction of the Special Magistrates.

42. (1) The Registrar herein shall provide registry services to the Special magistrates and be responsible for the overall administration and co-ordination of the work of the Special Magistrates.

(2) The functions of the Defence Office shall be carried out by the Chief Defence Counsel or such staff provided to him by the Tribunal for that purpose.

(3) In carrying out the responsibilities specified under paragraphs (1) and (2), the Registrar and the Defence Office shall work in consultation with the Chairperson of the Appeals Chamber.

(4) The Chairperson of the Appeals chamber shall exercise overall policy control over the Special Magistrates.

Appeal from
Special
Magistrates.

43. (1) The Appeals Chamber shall hear appeals from determinations of the Special Magistrates.

(2) An appeal under this section shall only be made by the Prosecutor, an accused person or a person against whom an order is directed.

The Constitution of Kenya (Amendment) (No.) Bill, 2009

(3) The Appeals Chamber may affirm, reverse or revise any decision taken by the Trial Chamber.

(4) The decision of the Appeal Chamber shall be final.

(5) The Tribunal shall make rules to govern appeals from Special Magistrates.

Official
language of
the Tribunal.

44. (1) The official language of the Tribunal shall be English.

(2) The accused and the victims have the right to use their native language, and qualified interpreters for either shall be provided at the expense of the Tribunal.

Rights of a
suspect.

45.(1) A suspect who is questioned by the Prosecutor shall not be compelled to incriminate himself or to confess guilt and shall have the following rights of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands-

- (a) the right to be informed that there are grounds to believe that he has committed a crime within the jurisdiction of the Tribunal;
- (b) the right to remain silent, without such silence being considered in the determination of guilt or innocence, and to be cautioned that any statement he makes shall be recorded and may be used in evidence;
- (c) the right to have legal assistance of his own choice, including the right to have legal assistance provided by the Defence Office where the interests of justice so require and where the suspect does not have sufficient means to pay for it; and
- (d) the right to be questioned in the presence of counsel unless the person has voluntarily waived his right to counsel.

The Constitution of Kenya (Amendment) (No.) Bill, 2009

Rights of the accused.

46. (1) All accused persons shall be equal before the Tribunal.

(2) In the determination of any charge against him, the accused shall be entitled to a fair and public hearing:

Provided that in appropriate circumstances, the Tribunal may hold its proceedings *in camera*.

(3) An accused person shall be presumed innocent until proved guilty according to the provisions of section 3A.

(4) The onus shall be on the Prosecutor to prove the guilt of the accused.

(5) In order to convict the accused, the relevant Chamber must be convinced of the guilt of the accused beyond reasonable doubt.

(6) The accused person shall be entitled to the following minimum guarantees-

- (a) to be informed promptly and in detail in a language which he understands of the nature of the offence with which he is charged.
- (b) to have adequate time and facilities for the preparation of his defence and to communicate without hindrance with counsel of his choice;
- (c) to be tried without undue delay;
- (d) subject to this Statute, to be tried in his presence and to be entitled to defend himself in person or through counsel of his choice, and to be provided with legal assistance if he requires one and cannot afford the services of counsel;
- (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) to examine all evidence to be used against him during the pre-trial and the trial in accordance with the Rules of Procedure and Evidence of the Tribunal;
- (g) to have the free assistance of an interpreter if he cannot understand or speak the language of the Tribunal;
- (h) not be compelled to testify against himself or to confess

The Constitution of Kenya (Amendment) (No.) Bill, 2009

to guilt; and

- (i) to make statements in court at any stage of the proceedings, provided such statements are relevant to the case at issue.

(7) The Chamber shall decide on the probative value, if any, of any statement made under subsection (6) (i) above.

(8) The Tribunal shall make rules on the making of personal statements in respect of proceedings before it.

Rights of victims. **47.** (1) The Tribunal shall permit their views and concerns to be presented and considered at any stage of the proceedings determined to be appropriate by the Pre-Trial Judge or the Trial Chamber or Appeals Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and the principles of a fair and impartial trial.

(2) The views and concerns of the victims referred to in subsection (1) shall be presented by the victims in person or through their legal representatives.

(3) The Tribunal shall ensure that victims are treated with respect and dignity throughout the proceedings.

(4) Victims have a right to appeal or recur against a decision or final determination of the Pre-Trial Judge and the Trial Chamber where they are affected by it , including compensations under section 52 herein, all in the same manner as the Prosecutor.

Foreign counsel to have right to appear. **48.** Notwithstanding the provisions of any other law, qualified legal counsel from common law jurisdictions shall have the right to appear in proceedings before the Tribunal provided they are qualified to appear before a court equivalent to the High Court of Kenya in their jurisdictions.

Judgement. **49.** (1) The Trial Chambers or the Appeals Chamber shall pronounce judgements and impose sentences and penalties on persons convicted of the crimes as provided herein.

(2) The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, shall be delivered in public and shall be accompanied by a reasoned opinion in writing,

The Constitution of Kenya (Amendment) (No.) Bill, 2009

to which any separate or dissenting judgement shall be appended.

Penalties. **50.** (1) The penalty imposed by the Tribunal upon a convicted person shall be imprisonment for life or for a specified number of years and only cases of lesser and small gravity shall be granted probation.

(2) In determining the terms of imprisonment for the crimes provided herein, the Trial Chamber shall, as appropriate, have recourse to international practice regarding imprisonment;

(3) In addition to imprisonment, the Tribunal may impose a fine not exceeding ten million Shillings on a convicted person:

Provided that for artificial persons, fines, forfeiture and compensation shall be considered in lieu of imprisonment.

(4) In imposing penalties, the Tribunal shall take into account such factors as the level of responsibility of the accused, the gravity of the offence and the individual circumstances' of the convicted person.

(5) Persons convicted of crimes by the Tribunal shall, be barred from holding any public or elective office in Kenya or contest any electoral position, for a period of at-least ten years.

(6) The Trial Chamber, the Appeal Chamber and the Special Magistrates shall hear presentations from victims before pronouncing sentence.

Forfeiture and Preservation of Property. **51.** (1) The Tribunal may order forfeiture of property proceeds or assets used in furtherance or derived directly or indirectly from crimes under its jurisdiction, to the rightful owners or to the State.

(2) The Tribunal may make an order prohibiting the transfer or disposal of or other dealing with property on evidence that the property was acquired as a result of, or was applied in furtherance of crimes under its jurisdiction.

(3) An order made under this Section may be made against a person who was involved in the crime or against a person who

The Constitution of Kenya (Amendment) (No.) Bill, 2009

subsequently acquired the property.

(4) A person against whom an order is made under this section may challenge it within fourteen days.

(5) Where an application to challenge such an order is made, the Tribunal shall upon hearing all the parties, discharge or vary the order or decline the application.

(6) A person who is served with an order under this Section and who contravenes it commits an offence and is liable on conviction to a fine not exceeding two million shillings or twice the value of the property in question, whichever is the higher, or to imprisonment for a term not exceeding ten years or to both fine and imprisonment.

(7) The Tribunal may before determining matters under this Section hear representations from the victims.

Compensation
of victims.

52. (1) The Tribunal may identify the victims who have suffered as a result of the commission of crimes by an accused person convicted by the Tribunal or omission thereof.

(2) The assessment of compensation shall be undertaken by a special magistrate identified for that purpose by the Tribunal, with an appeal lying to the Appeals Chamber within thirty days of such a determination.

(3) The Tribunal shall determine who should pay the compensation to the victim.

(4) For the purposes of a claim for compensation, the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person.

(5) The Special Magistrate may hear representations from victims before assessing the compensation due to them.

(6) No appeal shall lie from the decision of a Special Magistrate on a claim for compensation.

(7) The Tribunal shall make rules for the assessment of compensation as provided for under this section.

The Constitution of Kenya (Amendment) (No.) Bill, 2009

Enforcement of sentences. Cap.90 **53.** Sentences of imprisonment imposed herein shall be served in the prisons as established under the Prisons Act

Miscellaneous provisions relating to Special Magistrates. **54.** (1) The rights of suspects, accused persons and victims as provided herein shall also be applicable to persons who are the subject of jurisdiction of the Special Magistrates.

(2) The Special Magistrates shall have the same powers as the Trial Chamber to review their judgements.

(3) The Special Magistrates shall have the same power with regard to forfeiture and preservation of property and compensation of victims as the Trial Chamber.

(4) Judgements of Special Magistrates shall be enforced in the same manner as the judgements' of the Trial Chamber.

Effect of investigation, indictment and conviction on holders of public office. **55.** (1) A public officer under investigation shall stand relieved of duties until exonerated.
(2) A public officer who is indicted or convicted of a crime under this Statute shall cease to hold public office.

PART III – FINANCIAL PROVISIONS

Funds of the Tribunal. **56.** (1) The funds of the Tribunal shall consist of –
(a) monies charged from the consolidated fund without further appropriation and such monies or assets as may accrue to the Tribunal in the course of the exercise of its powers or the performance of its functions under this Constitution;
(b) grants, donations and all monies from any other source provided for the use of the Tribunal:

Provided that such grants and donations shall not be made or received for purposes of influencing the decision of the Tribunal in any way and shall be disclosed in the annual report of the Tribunal.

The Constitution of Kenya (Amendment) (No.) Bill, 2009

(2) The Registrar shall be the accounting officer of the Tribunal

Establishment
of the Fund.

57. (1) There is established a Fund to be known as the Special Tribunal Fund which shall be administered by the Registrar on behalf of the Tribunal.

(2) The sources of the Fund shall consist of—

(a) a direct charge from the consolidated fund for the purposes of this Constitution.

(b) any gifts, grants, donations and bequests received by the Tribunal.

(3) All expenses of the Tribunal shall be paid out of the Fund.

(ii) The Registrar shall, in administering the Fund, subject to the provisions of the Government Financial Management Act, manage the Fund in such manner as promotes the object and purpose of the Tribunal.

(iii) Upon the dissolution of the Tribunal under section 62, any assets standing to the credit of the Fund shall, subject to any condition attached to a gift, donation or bequest, be credited to the Consolidated Fund

No. 5 of 2004
Annual
Estimates.

58. (1) At least three months before the commencement of each financial year, The Tribunal shall cause to be prepared estimates of the revenue and expenditure of the Tribunal for that year.

(2) The annual estimates shall provide for all the estimated expenditure of the Tribunal for the financial year concerned.

(3) The Minister shall, in consultation with the Tribunal, approve the annual estimates before the commencement of the financial year to which they relate.

(4) No expenditure shall be incurred for the purposes of the Tribunal except in accordance with the annual estimates approved under paragraph (3).

The Constitution of Kenya (Amendment) (No.) Bill, 2009

Accounts and audit. **59.** (1) The Tribunal shall cause to be kept all proper books and records of account of the income, expenditure, assets and liabilities of the Tribunal.

(2) The accounts of the Tribunal shall be audited and reported upon by the Controller and Auditor-General in accordance with the provisions of the Public Audit Act.

No. 12 of 2003 Annual report of the Tribunal. **60.** (1) The Tribunal shall every year prepare and publish a detailed report of its operations on quarterly basis.

(2) The Minister shall table the reports of the Tribunal in National Assembly within fourteen days of its publication.

Records of the Tribunal. **61.** (1) The Tribunal shall keep comprehensive records of its proceedings and work.

(2) For purposes of paragraph (1), the Tribunal shall have regard to international best practice in record management.

Report of the Tribunal. **62.** (1) Upon completion of its work, the Tribunal shall prepare and submit its Report to the National Assembly.

Dissolution of Tribunal. **63.** (1) The Tribunal shall stand dissolved three months after the submission of its final report to the National Assembly.

(2) The Tribunal shall ensure that in the winding up process, public funds and assets are properly accounted for.

(3) Before the Tribunal is dissolved, the Tribunal shall, among the final administrative activities of the Tribunal –

(a) organize its archives and records, as appropriate, for possible future reference, giving special consideration to-

(i) the materials or information that may be made available to the public either immediately or when conditions and resources allow; and

(ii) the measures that may be necessary to protect confidential information; and

The Constitution of Kenya (Amendment) (No.) Bill, 2009

(b) organize the disposal of the remaining property of the Tribunal.

(4) This Statute shall lapse within ninety days from the date the Tribunal submits its report to the National Assembly.

FIRST SCHEDULE (Preamble of the Statute)

**AGREEMENT FOR THE IMPLEMENTATION OF THE
RECOMMENDATIONS OF THE COMMISSION OF INQUIRY INTO POST
ELECTION VIOLENCE**

Recalling the Agreement on the Principles of Partnership of the Coalition Government made on February 28, 2008 and the Agreement for the Establishment of a Commission of Inquiry on Post-Election Violence dated March 4, 2008;

Convinced that the fundamental reforms must be instituted to create a better, more secure, more prosperous Kenya for all;

Desirous to establish a framework for the implementation of the recommendations of the Commission of Inquiry into Post Election Violence as contained in the Report dated October 16, 2008 (“ the CIPEV Report”); and

Pursuant to the National Accord and Reconciliation Act as entrenched in the Constitution of Kenya,

NOW THE PARTIES HERETO HEREBY AGREE AS FOLLOWS:

Article 1: Establishment of the Special Tribunal for Kenya

The Parties shall prepare and submit to the National Assembly for enactment a Bill to be known as “ The Statute for the Special Tribunal” to give effect to the establishment of the Special Tribunal to seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya. The Bill shall provide for the matters recommended by the CIPEV Report in relation to the Special Tribunal for Kenya.

Article 2: Legislative Agenda

The Parties shall mobilize Parliamentary support for the enactment of the Freedom of Information Bill, 2008 and take such administrative measures as may be

The Constitution of Kenya (Amendment) (No.) Bill, 2009

necessary to fully operationalize the Witness Protection Act, 2008 and the International Crimes Act, 2008.

Article 3: Comprehensive Reform of the Kenya Police and Administration Police

The Parties shall initiate urgent and comprehensive reform of the Kenya Police and the Administration Police. Such reforms shall be undertaken by the panel of policing experts and will include but not limited to a review of all tactics, weapons and the use of force, establishment of an independent Police Service Commission to oversee both the Kenya Police and the Administration Police, an Independent Police Conduct Authority for both the Kenya Police and the Administration Police, creation of a modern code of conduct for the Kenya Police and the Administration Police and achieving ethnic and tribal balance in the Force.

Article 4: Public Officers and Offices

The Parties shall ensure that any person holding public office or any public servant charged with a criminal offence related to 2008 post-election violence shall be suspended from duty until the matter is fully adjudicated upon.

The parties shall ensure that any person convicted of a post-election violence offence is barred from holding any public office or contesting any electoral position.

Article 5: Conflict and Disaster Early Warning and Response System

The Parties shall ensure that the Conflict and Disaster Early Warning and Response Systems as articulated in the First Medium Term Plan (2008-2012) are developed and implemented as a matter of priority.

Article 6: Framework for Implementation

The Parties hereby designate the Cabinet Sub-Committee on National Accord comprising H.E. Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, Rt. Hon. Raila Amolo Odinga, Prime Minister of the Republic of Kenya and the Eight Ministers who represent the Parties to the Kenya National Dialogue and Reconciliation as the body to oversee the day-to-day management and implementation of this Agreement.

Done at Nairobi this 16th Day of December 2008

The Constitution of Kenya (Amendment) (No.) Bill, 2009

H. E. Mwai Kibaki
President and Commander-in-Chief
Party of National Unity Coalition

Rt. Hon. Raila Amolo Odinga
Prime Minister
Orange Democratic Movement

SECOND SCHEDULE (Section 23 of the Statute)

**PROCEDURE FOR NOMINATING AND APPOINTING
SPECIAL MAGISTRATES**

1. The Parliamentary Committee shall, within seven days of the commencement of this Statute, by advertisement in at least three daily newspapers with national circulation, invite applications from persons qualified under this Statute for nomination as Special Magistrates.
2. Applications under paragraph 1 shall be forwarded to the Parliamentary Committee within sixty days of the advertisement.
3. The Parliamentary Committee shall, within fourteen days of the expiry of the period prescribed under paragraph 2 –
 - (a) consider all the applications received under paragraph (2); and
 - (b) recommend to the National Assembly twelve suitably qualified persons for nomination as Special Magistrates.
4. The Parliamentary Committee shall provide comments regarding each of the nominees to the National Assembly.
5. The National Assembly shall, upon receipt of the recommendations of the Parliamentary Committee under paragraph 3, consider and approve the persons for appointment as Special Magistrates and the Minister shall cause the names to be Gazetted within 14 days.
6. In nominating persons as Special Magistrates, the Parliamentary

The Constitution of Kenya (Amendment) (No.) Bill, 2009

Committee shall ensure that at least one third of the nominees are of the opposite gender.

THIRD SCHEDULE

Section 18 of Statute

OATH/AFFIRMATION OF JUDGE/PROSECUTOR/ CHIEF DEFENCE COUNSEL/ REGISTRAR/SPECIAL MAGISTRATE
--

<p>I having been appointed (a Judge/Prosecutor/ Chief Defence Counsel/Registrar/ Special Magistrate) to the Special Tribunal for Kenya under the Special Tribunal for Kenya Act, 2009, do solemnly (swear/declare and affirm) that I will faithfully and fully, impartially and to the best of my ability, discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice. (SO HELP ME GOD).</p>
--

Sworn/Declared by the said

Before me this day of

.....

Chief Justice

The Constitution of Kenya (Amendment) (No.) Bill, 2009

MEMORANDUM OF OBJECTS AND REASONS

This Bill arises out of the deliberations of the National Accord and Reconciliation Committee formed after the political crisis triggered by the disputed elections held on 27th December, 2007. The Committee held its deliberations under the auspices of the Panel of Eminent African Personalities comprising the former Secretary-General of the United Nations, His Excellency Kofi Annan, His Excellency Benjamin Mkapa, former President of the United Republic of Tanzania and Her Excellency Madam Graca Machel.

The Bill seeks to implement the recommendations of the Commission of Inquiry into Post Election Violence submitted to the President on 16th October, 2008 (“the Waki Report”). The Bill also provides for suspension of a Public Officer under investigation including a member of Cabinet Office by establishing a Special Tribunal for Kenya which will seek accountability against persons bearing responsibility for crimes, particularly crimes against humanity relating to the 2007 General Elections in Kenya.

The First Schedule, hereinafter referred to as “the Statute” is in four parts:

Part I contains preliminary provisions.

Part II provides for the operations and structure of the Special Tribunal for Kenya as a body corporate. It sets out the procedure for the appointment of judges of the Tribunal, the Prosecutor, Registrar, Defence Counsel and Special Magistrates. The Part also specifies the Crimes to be prosecuted by the Tribunal.

Part III contains financial provisions in respect of the Tribunal and provides for the sources from which the funds for the Tribunal will be drawn.

Part IV contains miscellaneous provisions including the requirement that the Tribunal do prepare and submit a report on its work to the National Assembly.

Second Schedule	-	Agreement for the implantation of the Recommendations of the Commission of Inquiry into Post Election Violence.
Third Schedule	-	Procedure for nominating and appointing Special Magistrates.

The Constitution of Kenya (Amendment) (No.) Bill, 2009

Fourth Schedule - Oath/Affirmation of Judge/Prosecutor, Registrar/Special Magistrate.

The enactment of this Bill will occasion additional expenditure of public funds which shall be provided for through the estimates.

Dated 24th August, 2009.

Gitobu Imanyara

M.P. Central Imenti Constituency