

THE MULTI-SECTORAL TASK FORCE ON THE TRUTH, JUSTICE AND RECONCILIATION PROCESS

Memorandum on the Proposed amendments to the TJRC Bill, 2008

Background

In 2003, the Government appointed the Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission. Its mandate was to find out if a truth commission was necessary for Kenya, and, if so, to make recommendations on the type of truth commission that ought to be established. The Taskforce recommended for immediate establishment of a Truth Justice and Reconciliation Commission before June 2004 with specific powers and functions and mandate. However, the recommendations were never implemented by the Government.

The political crisis that followed the 2007 elections again brought to the fore the urgent need to address the deep seated political, social and economic issues facing Kenya. As a result, the Kenya National Dialogue and Reconciliation mediated by His Excellency Kofi Annan and a Panel of Eminent Personalities agreed on a number of reforms – key among them being the creation of a truth, justice and reconciliation commission through an Act of Parliament. The Commission is expected to inquire into human rights violations, including those committed by the state, groups, or individuals and major economic crimes, in particular grand corruption, historical land injustices, and the illegal or irregular acquisition of land, and other historical injustices.

Pursuant to this agreement, the Government of Kenya has published a bill the Truth Justice and Reconciliation Commission Bill, 2008 – to establish and define the mandate, objectives and processes of the Commission and provide for the process of truth, justice and reconciliation.

Civil Society Organisations and the Kenya National Commission on Human Rights working under a Multi-Sectoral Taskforce on Truth Justice and Reconciliation process has been collaborating to ensure that the truth, justice and reconciliation process is carried out in a manner beneficial to Kenyans and posterity and that the process is not lost through political interference and interests, and that Kenyans are well informed about and are enabled to meaningfully engage in the process.

Following the publication of the Truth, Justice and Reconciliation Bill, 2008 the Multi-Sectoral Task Force on Truth Justice and Reconciliation Process has undertaken an audit of the Bill and evaluated it against identified and tested standards.

The Multi-sectoral Taskforce is however concerned that a Bill of such significance to Kenya's development and continued existence as a cohesive nation suffers certain critical and manifest weaknesses which could have been taken care of before publication. We believe that the weaknesses and flaws in the Bill would have been prevented if there was adequate consultation with the stakeholders and full utilization of the relevant and available expertise. Debate on the weaknesses of the Bill now, though absolutely necessary, sadly detracts from the momentum that was provided by the signing of the Peace Accord. It is in the spirit of ensuring that the process of healing, truth and reconciliation succeeds that we make proposals for amendments to the Bill

Commentary on Proposed Amendments to the Bill

Truth, justice and reconciliation efforts mark a major watershed in a nation's life even though they are an acknowledgment that the existing institutions have failed to respond to the issues of concern in a manner that inspires confidence in the people. The publication of the Bill on the 9th May, 2008 marks a major step forward in the quest for a peaceful and more progressive Kenya. The outcome of the work of the Commission must therefore be targeted at affording a new beginning for Kenya. Any process or outcome that would indicate that the process was faulty or the outcome less than desirable would not bode well for the process of nation building in this country which suffered a major jolt in the wake of the 2007 election fiasco.

The strength of a law is in the achievement of its objectives. This is possible if these objectives are well thought out, realistic and are relevant to the policy questions concerned. The law as rendered in an enactment must be so rendered as to make it possible to ascertain clearly the intentions of the law maker and to enable effective implementation of the desired policy. It is for this reason that the Task Force is offering its views not only on the broad policy aspects of the Bill but also on the technical drafting matters which for some reason may have escaped the attention of the drafter.

We have prepared a matrix of proposed amendments (with explanatory notes) annexed to this memorandum.

In preparing the proposed amendments, the Task Force reviewed the various commentaries on the Bill proffered by various interest groups since publication of the Bill and held a workshop to discuss the Bill. The proposed amendments to some measure also collate these views. The Task Force has made use of these views for information and hereby acknowledges the use of these views in so far they were invaluable source of ideas especially with respect to the experience of foreign jurisdictions where the process of truth justice and reconciliation has been carried out. The taskforce is particularly grateful to the *International Center for Transitional Justice* for their invaluable comments on the Bill especially as regards the amnesty provisions and its impact on the South African truth and reconciliation process.

Need for a preamble

The Bill establishes the Commission without providing the context of the truth, justice and reconciliation process to be carried out through the Bill.

Truth, justice and reconciliation processes are informed by certain historical, political and other special realities in a society. A law that recognizes and regulates such a process must of necessity provide a framework of reference that would influence the implementers and serve as a constant reminder to them that the process is not mechanical but is borne out of peculiar and real historical, social and political circumstances. This is normally taken care of by the use of a preamble. The preamble would contain the guiding principle of the law and guide its implementation. Preambles also have an influence on the legal interpretation of the enactment. Examples in Kenya law where preambles have been used include the Kenya Wildlife and Conservation Act and the Environmental Management Act among others. In our view, a preamble is necessary in this Bill. The long title of the Bill merely states that it is an Act of Parliament to establish the Commission and this is hardly adequate.

We have proposed a few paragraphs of a preamble and we invite more contribution to its improvement since a preamble normally reflects a peoples deep feeling as to what they believe the process should be about; that definitely calls for participation of more minds in crafting the preamble.

Objectives and Functions of the Commission

The objectives of the Commission as set out in clause 5 and its functions as set out in clause 6 are both repetitive and contradictory. They also need to be set out in a precise manner so that there is no danger of the Commission being seized of so wide a mandate as to be unable to accomplish within the timeframe of the life of the Commission.

Again, the Work of the commission should be linked to work done by previous commissions including the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land and the Goldenberg Commission among others. We have offered proposals in this regard and recommend that the Commission be mandated to examine the reports of past inquiries and make recognition with respect to their implementation. It would be superfluous to have another inquiry on issues that have comprehensively been inquired into albeit not further acted upon.

Economic Crimes

The Bill seeks to bestow on the Commission the power to investigate cases of economic crimes. No threshold is given. It would not be realistic for the Commission to investigate all economic crimes. We propose amendment that would ensure that the economic to be investigated are clearly delineated, and where possible, the reports made by previous Commissions and other fact finding outfits be reviewed by the Commission with a view to making recommendations as to the implementation of the findings of such previous commissions, et al.

The Bill under clause 5 (m) proposes to avail amnesty to economic crimes. While the investigation of economic crimes is a legitimate function of the Commission there is no apparent rationale for the granting of amnesty for such crimes.

- (a) Economic crimes are not defined in the Bill. An economic crime is presumably a crime committed in the pursuit of personal gain.
- (b) However, s 38(3)(f)(i) states that no gross human rights violation committed for the purpose of personal gain may be amnestied. The definition of a gross human rights violation does not include economic crimes.
- (c) It seems that the Bill intended to exclude acts committed for *personal gain* and which are gross human rights violations from the amnesty provisions but did not intend such exclusion to apply to economic crimes.

- (d) If crimes for personal gain are excluded from the amnesty process why does the exclusion not apply to economic crimes.
- (e) It would in any event not make sense to apply the exclusion to economic crimes as most, if not all economic crimes, are committed for personal gain. This being the case the framers must have intended that crimes such as grand corruption and the defrauding of the public purse were specifically intended to be forgiven.
- (f) There is no justification for amnestying offences which by definition involve gross acts of greed clearly committed for personal gain.

Again the criteria set for violation of human rights in clause 38(3) which apply to the determination of a gross human rights violation, do not apply to economic crimes. This means that those responsible for economic crimes do not have to show that the crime was committed in pursuance of a political objective. It would be practically impossible for those committing crimes of greed to show a political purpose, but the Bill as currently formulated, relieves them of this burden.

The effect is to create a special and generous dispensation for those who have committed economic crimes in Kenya. There can be no justification for this. A provision such as this will serve to condone, perpetuate and promote corruption.

Independence of the Commission and the establishment generally

There are instances where the stated principles in the Bill are undermined by the more specific provisions of the Bill. For example, independence of the Commission is clearly undermined by the provisions of clause 44(3) which import too much state leverage on the financial autonomy of the Commission.

Again the proposed power of the President to appoint the chairperson of the Commission from amongst the members of the Commission without consulting anyone is a way of ensuring that the Chairperson is beholden to the President/the executive.

The need for the truth, justice and reconciliation process and indeed of the Commission is due to the failure of our existing institutions to deliver on the objectives for which they are established. It is therefore not useful having a

Commission that would suffer the same emasculation as many of our national institutions.

We propose amendments to the Bill that would ensure that the Commission is not vested with a facade of independence but one that is imbued with complete independence enabling it discharge its mandate as informed by the spirit of its establishment and the letter of the law. The provisions relating to the appointment of commissioners, their removal and replacement are not rendered clearly in the Bill. We have proposed relevant amendments to remedy that situation.

Amnesty Provisions

We are of the considered view that the provisions relating to amnesty are the weakest point in this proposed law. Summarised, the review of the amnesty provisions ought to seriously examine the following key concerns-

- (1) The amnesty provisions may face constitutional challenges on-
 - (a) The relationship with Chapter V of the Constitution;
 - (b) The constitutional discretion of the Attorney General as to who to prosecute especially were it to be assumed that the Commission was to have power to grant amnesty and not to merely recommend it;
- (2) The international legal position with respect to prohibition of amnesty to certain categories of crime.
- (3) The Bill fails to give a position as to whether the Commission will grant amnesty or recommend the grant of amnesty.

We strongly recommend that the amnesty provisions be reviewed to address the above concerns.

We have not proffered proposals for amendments with respect to the amnesty provisions particularly as these appear in Part III of the Bill. It is the view of the Task Force that the amnesty provisions present fundamental policy issues that have to be thrashed out. We propose a complete recast of the Amnesty Part and other provisions related to amnesty elsewhere in the Bill.

Since a process of this nature must necessarily benefit from the experience of other jurisdictions with matters of truth, justice and reconciliation, we have immensely benefited from the experience shared with us by the ICTJ on the amnesty process especially in South Africa. We have accordingly annexed an extract of the comments of the ICTJ on the amnesty provisions. We hope that our concerns and the views of the ICTJ would be found useful in informing how best to deal with the issue of amnesty in this Bill.

Implementation of the Recommendations of the Commission

Implementation of the recommendations of the Commission should be clearly spelt out. The problem is not that the authorities are not aware of their responsibilities but that those in authority oftentimes choose to ignore these responsibilities. It would be disastrous were the Commission's recommendations not be acted upon. We recommend that the Commission be empowered to propose an implementation mechanism for its recommendations in its report. It is of no benefit to have the Commission do a report that would end up in being frustrated at implementation.

For explanatory notes on the amendments, we invite you to read the schedule of amendments annexed to this memorandum. ANNEX I.