

Comments by the International Center for Transitional Justice

Truth, Justice, and Reconciliation Commission Bill, 2008

(Published in the Kenya Gazette Supplement No.34 (Bill No.10) on 9 May 2008)

10 June 2008

INTRODUCTION

1. The International Center for Transitional Justice (ICTJ) previously released commentary on an earlier draft of the Kenyan Truth, Justice, and *Reconciliation* Commission Bill, 2008 (“the Bill”). In this paper the ICTJ provides more detailed comment and analysis on the Bill published in the Kenya Gazette Supplement No.34 (Bill No.10) on 9 May 2008.
2. The ICTJ is particularly concerned with the amnesty provisions and mechanisms set out in Part III of the Bill are largely modelled on the similarly titled chapter 4 of the *South African Promotion of National Unity and Reconciliation Act* 34 of 1995 (“the South African law” or “the SA TRC Act”). There are however significant constitutional and statutory differences which must be carefully considered.
3. The ICTJ is concerned that Kenya has uncritically adopted the South African model. Several of the amnesty provisions from the South African law have been adopted word for word and simply cut and pasted into the Bill. While there are several aspects of the South African experience that are worthy of emulation, we are of the view that the amnesty process was its least successful feature. There are important lessons to be gleaned from South Africa. We fear that the failure to grasp these lessons will result in Kenya making the same errors.
4. This commentary deals with the following issues:
 - 4.1. **Inadequate preamble.**
 - 4.2. **Shortcomings in the interpretation section.**
 - 4.3. **Objectives, powers and functions.** Certain anomalies are highlighted and questions are raised in relation to conditional amnesty and the provision of amnesty for economic crimes.
 - 4.4. **Establishment.** Recommendations are made in respect of the selection, service and removal of commissioners.
 - 4.5. **The truth for amnesty formula.** This section considers whether the South African model should be followed.

- 4.6. **The constitutionality of the amnesty provisions.** It is likely that the amnesty provisions will face legal challenges on the grounds that they infringe entrenched rights and that such infringements are not authorised by the Constitution.
- 4.7. **Technical concerns.** This includes:
- 4.7.1. the fact that no amnesty committee is provided for in the Bill;
 - 4.7.2. the ambiguity in relation to whether the Commission grants or recommends amnesty;
 - 4.7.3. the question as to who actually issues amnesty;
 - 4.7.4. whether amnesty is provided for “violations” or “gross human rights violations”;
 - 4.7.5. the impermissibly wide amnesty criteria;
 - 4.7.6. the amnesty provisions are not clear, comprehensible or predictable; and
 - 4.7.7. international law concerns.
- 4.8. **Victims are excluded from the amnesty process.** This section highlights the almost total exclusion of the victims from meaningful input into the determination of amnesty.
- 4.9. **Alternatives,** where the ICTJ explores alternatives to amnesty and proposes that rather than granting or recommending amnesty, the Commission should recommend appropriate cases for prosecution and recommend cases which are not appropriate for prosecution.
- 4.10. **Reparations and rehabilitation.** Concerns are raised in relation to the application procedure for reparations.
- 4.11. **Financial independence.**
- 4.12. **The final report.**

INADEQUATE PREAMBLE

5. The preamble of a law such as the proposed *Truth, Justice and Reconciliation Commission Act*, ought to have a comprehensive preamble.
 - 5.1. The preamble of a legislative text plays a recognisable role in the interpretation of its individual provisions.
 - 5.2. The preamble and the long title stand as statements of purpose. The preamble ought to indicate the fundamental purpose of the law. It stands as the expression of the intention of the legislature.
 - 5.3. The preamble ought to connect up, reinforce and underlie all of the text that follows it.
6. The current preamble does nothing more than state that the Act provides for the establishment of a Truth, Justice and Reconciliation Commission (TJRC).
 - 6.1. It fails to set out the relevant context of the law;
 - 6.2. It fails to state why the law is necessary for Kenya at this time and what are the primary reasons and motivations behind the enactment of the law;
 - 6.3. It does not set out any guiding principles that underpin the law and guide its implementation.
 - 6.4. It does not make out an overall aspirational statement of what the law is intended to achieve.

INTERPRETATION

7. Although this section is titled ‘interpretation’ it only sets out various definitions.
 - 7.1. It does not set out who the Act will apply to. Will the law apply to all natural and juristic persons and to all organs of state?
 - 7.2. It does not deal with the possibility of extra-territorial application. It does not authorise the Commission to investigate acts or omissions that may have taken place beyond the borders of Kenya, nor does it authorise the Commission to interview or attend to the needs of Kenyans who may have sought refuge in other countries.
 - 7.3. The Bill does not state what happens if the provisions of the proposed law conflict with those of another law. It does not state that the provisions of this law must be preferred over those of earlier laws; nor does it require

that a court must adopt a reasonable interpretation of the law in order to avoid an interpretation that results in a conflict with another law.

8. It is not clear why certain definitions have been included and others omitted.
 - 8.1. Crimes against humanity and genocide are defined but other international crimes are not.
 - 8.2. ‘Gross human rights violations’ are defined but ‘violations’ are not even though they are referred to throughout the Bill.
 - 8.3. Do gross human rights violations include crimes against humanity and other international crimes?
 - 8.4. The Bill provides for the granting of amnesty for ‘economic crimes’ but such crimes are not defined. Grand corruption referred to in s 5(d) is not defined.
 - 8.5. Victims are defined but perpetrators are not. Are perpetrators those responsible for all violations or just gross human rights violations and economic crimes?
 - 8.6. The definition of a ‘victim’ is unclear and ambiguous.
 - 8.6.1. It speaks of a victim including “*any person who, or group of persons, which, with the occasion or because of the 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 [and international law]*”
 - 8.6.2. It is not clear whether the harm has to arise from acts or omissions that are ‘human rights violation’; or whether the harm can arise from a human rights violation as well as other acts or omissions that contravene Kenyan law.
9. There can be little doubt that for the purposes of the law perpetrators should be those found responsible for all violations (not just gross human rights violations) and similarly victims are those who have suffered harm from all violations (not just human rights violations).

OBJECTIVES, POWERS AND FUNCTIONS

10. The objectives (s 5) and functions (s 6) mirror and largely duplicate each other. They should be consolidated into a single list.

11. Section 5(a) should include a reference to establishing an ‘*impartial*’ historical record.
12. Determining the ‘*causes*’ of violations should be stated upfront in s 5(a)(i).
13. Although referred to in the functions of the Commission, it should be stated upfront under s 5(a) that a primary objective is the determination of whether the violations and abuses were the result of deliberate planning, policy or authorisation by any government, group or individual.
14. No reference is made under the functions of the Commission to its functions in relation to amnesty. The powers sections (7 and 8) are also curiously silent on what the Commission’s powers are in relation to amnesty. Part III of the Bill dealing with amnesty is ambiguous as to what the Commission’s actual powers and functions are with regard to amnesty.
15. There is much duplication within s 6, the functions section. The Bill makes no attempt to distinguish between economic crimes, economic abuses or violations of economic rights referred to in ss 6(f) and (g); No attempt is made to define these terms. There is duplication between these subsections. There is also unnecessary duplication in the identifying and recommending of persons to be prosecuted in ss 6(f) and 6(k)(ii). These 2 subsections should be rolled into one.
16. It is not clear why the power to search premises in s 26 is not included as one of the investigatory powers of the Commission under s 7.

Conditional amnesty

17. Section 5(m) provides for the “*facilitating the granting of conditional amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with gross human rights violations and economic crimes...*” It is not clear how the Commission is meant to facilitate the granting of conditional amnesty. The making of full disclosure is the condition upon which amnesty is granted. While the whole process may be characterised as a ‘conditional amnesty’, once the condition is met full amnesty rather than conditional amnesty is granted.
18. Section 5(m) limits the grant of amnesty to two categories of crimes: gross human rights violations and economic crimes. The implication is that those responsible for lesser crimes committed with a political objective such as assault and arson do not qualify for amnesty, even if they are willing to disclose in full. The Bill offers no explanation for such an anomaly. There can be no justification for creating

opportunities for more serious perpetrators to escape justice while less serious offenders have to face the full force of the law.¹

19. Section 5(m) requires the making of “*full disclosure of all the relevant facts relating to acts associated with gross human rights violations and economic crimes...*”
 - 19.1. However, there is no mention of this requirement anywhere in Part III of the Bill which deals with the amnesty procedures and mechanisms. It is not listed as one of the criteria that have to be met for amnesty under s 38(3).
 - 19.2. The Amnesty Committee of the South African TRC interpreted a similar provision narrowly. Perpetrators were only required to disclose their knowledge in relation to the specific act for which amnesty was applied. There was no requirement that perpetrators disclose their involvement in or their direct knowledge of other human rights violations. As a result most perpetrators who applied for amnesty did not disclose in full and confined their disclosure largely to facts that were already in the hands of investigators.
 - 19.3. Perpetrators ought to be required to disclose the full details of all human rights violations they were involved in, as well as their direct knowledge of other human rights violations. Failure to do so should result in the revocation of any amnesty granted. If it comes to light that a perpetrator who was granted amnesty failed to disclose in full in any material respect, the Commission (during its lifetime) or a court should be empowered to revoke such amnesty.
 - 19.4. A further consideration is the question of what constitutes an “act” in terms of s 5(m). The South African Amnesty Committee interpreted “acts or omissions” narrowly. The Committee required the identification of each and every act or omission. However those offenders who played a supervisory role in the planning, strategising and resourcing of human rights violations were often never aware of the actual acts that took place as a result of their actions. This resulted in many senior perpetrators avoiding the amnesty process.²

¹ See the discussion below under the heading “Truth for amnesty” for a fuller discussion on conditional amnesty.

² See *A Second Bite at the Amnesty Cherry? Constitutional and Policy Issues*, South African Law Journal, Part 3, November 2000 (Republished with a postscript in Villa-Vicencio and Doxtader, *The Provocations of Amnesty*, David Philips, 2003).

Economic crimes

20. The second category of crimes that may be amnestied in terms of s 5(m) is 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.
- 20.1. Economic crimes are not defined anywhere in the Bill.³ An economic crime, which is a crime of greed, is presumably a crime committed in the pursuit of personal gain.
- 20.2. 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.
- 20.3. It seems that the framers of 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.
21. The question has to be raised: if crimes for personal gain are excluded from the amnesty process why does the exclusion not apply to economic crimes.
- 21.1. It would in any event be nonsensical 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.
- 21.2. We can think of no plausible explanation or justification for amnestying offences which by definition involve gross acts of greed clearly committed for personal gain.
22. Equally disturbing is the fact that the s 38(3) criteria, which apply to the determination of a gross human rights violation, do not apply to economic crimes.
- 22.1. 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

³ In terms of *The Anti-Corruption and Economic Crimes Act, No. 3 of 2003*, “economic crime” means — (a) an offence under section 45; or (b) an offence involving dishonesty under any written law providing for the maintenance or protection of the public revenue. Section 45 sets out a number of offences related to the protection of public property and revenue.

show a political purpose,⁴ but the Bill as currently formulated, relieves them of this burden.

- 22.2. The effect is to create a special and generous dispensation for those who have committed crimes of greed in Kenya. There can be no justification for this. It is also a clear contravention of the *Constitution of Kenya, 1963* which upholds the rule of law and which prohibits unjustifiable unequal treatment.
- 22.3. Such provisions will serve to condone, perpetuate and promote corruption. While indemnities from prosecution and plea bargains may be granted to those who cooperate with prosecutors, crimes of greed should never be amnestied.⁵

ESTABLISHMENT

Selection of commissioners

- 23. Section 9 provides for the appointment of a selection panel to nominate persons for appointment as commissioners. The independence of commission is primarily secured by the appointing of commissioners of highest competence and integrity. They should enjoy unquestionable public confidence. Persons of such repute are able remove the subject matters of the inquiry from the area of partisan politics.
 - 23.1. While there is strong representation of professional bodies on the panel no provision is made for the representation by non-governmental organisations (NGOs). At least two members of the panel ought to be representatives of the NGO sector.
 - 23.2. The time period provided for in clause 3 of the First Schedule for the consideration of applications and the submission to the National Assembly is wholly unrealistic. Seven days is way too short for the assessment of written applications, the conducting of interviews and the decision making involved. Six weeks is a more practical time frame.
 - 23.3. The schedule requires the panel to rank and provide comments on the “finalists” but does not limit the number of finalists. It is recommended

⁴ Exceptions may include illegal acquisitions of public land committed for political purposes. However it is not clear whether such acts would constitute ‘economic crimes’ in terms of the law. It is also unclear why s 5(e) only refers to illegal acquisitions of public land, rather than the illegal taking of all land.

⁵ In this regard we find it disturbing that the *Statute Law (Miscellaneous Amendments) Act, 2007* published in a special issue of the Kenya Gazette Supplementary No.100 (Acts No.7) inserts a new s 25A(1) into the *The Anti-Corruption and Economic Crimes Act No. 3 of 2003* to provide for an effective indemnity against prosecution for those who *inter alia* make full disclosure of economic crimes, without imposing a requirement that such persons become state witnesses against more serious offenders.

that the number of finalists submitted to the National Assembly should be less than ten.

- 23.4. Since it is the National Assembly that is required to select six candidates for submission to the President it is the National Assembly that is the effective selection panel. The National Assembly is ill suited to playing this role since its members will inevitably make decisions along party political lines. However, the reality of Kenya today is that, as a result of a negotiated compromise, there is a coalition government and there are two national leaders from different political interests fulfilling high office. It is probably correct then that the National Assembly be required to play a role in the selection of Commissioners so as to lend greater credibility to the process.⁶
- 23.5. The sting of political intervention can be alleviated by:
- 23.5.1. a requirement imposed on the selection panel to submit a ‘short’ shortlist of less than ten to the National Assembly;
- 23.5.2. inserting additional requirements to s10(5) that the commissioners shall be fit and proper persons who are widely regarded as impartial⁷, who do not have a political profile and who have a respected track record in public life or human rights, and
- 23.5.3. requiring the President to appoint the commissioners in consultation with the Cabinet.
24. The peremptory requirement in s 10(4) that four Commissioners shall have experience in, amongst other skills, forensic auditing, psycho-sociology, anthropology and conflict management is unrealistic. The subsection requires 4 commissioners to be blessed with 8 highly technical skills. Such a requirement should not be peremptory as there is little prospect that it can be strictly complied with.

Service of commissioners

25. Section 10 ought to contain a requirement that local commissioners must work on the Commission on a full time basis and that the international commissioners must be required to work as close to full time as possible.

⁶ An alternative to the role of the National Assembly may be a requirement that the President be required to consult with the Cabinet and be required to act on Cabinet’s advices.

⁷ In addition to the requirement in s 10(5)(d) for Commissioners to act impartially in the execution of their functions.

26. Clause 3 of the Third Schedule to the Bill provides that a quorum for decisions of the Commission ought to be no less than 4 commissioners, one of whom should be an international commissioner. However, for purposes of making the Commission's findings and recommendations and approving the final report of the Commission it should be stipulated that all seven commissioners must be involved in the decision making.

Removal of commissioners

27. It is not clear why the s 17 procedure for the removal of commissioners provides for an 'application procedure' for the removal of commissioners.
- 27.1. The procedure is in any event cumbersome and unworkable. There should be no application procedure. The absence of an application procedure for removal will not stop any interested party from making representations for the removal of a commissioner.
- 27.2. The President ought to be able to remove a commissioner on the grounds of misbehaviour, incapacity or incompetence. Currently incompetence is not a ground for removal.
- 27.3. The President is required to act upon the recommendation of the selection panel. It will not be practical to reconvene the selection panel for this purpose. Its members may after the passing of time be unavailable. Consideration should be given to the establishment of a joint committee of Parliament to recommend the removal of commissioners and to deal with other matters arising from the work of the Commissions.

Temporal mandate

28. The Commission's temporal mandate of two years as stipulated in s 20(1) is wholly unrealistic. A minimum of three years should be permitted, with an option of an extension of one year as approved by the President on good cause shown.

THE TRUTH FOR AMNESTY FORMULA

29. The truth for amnesty formula of the South African approach was innovative and it has been credited with assisting that country through its successful transition. The proposal of the conditional amnesty was instrumental in getting the conflicting parties to participate in a negotiated transition. This was the real value of the concept. However, the amnesty process itself was plagued with problems and shortcomings.
30. Can it be said that conditions in Kenya today warrant the establishment of a amnesty process? In South Africa a conditional amnesty was offered to secure the

delicate transition and to ensure the participation of key role-players. Kenya already has a government of national unity and a constitutional reform process is under way. Is an amnesty actually necessary to secure such processes?

The South African experience

31. The conditional amnesty was meant to incentivize perpetrators, particularly senior perpetrators, to come forward and speak the truth. This did not happen.
 - 31.1. Very few senior role players came forward. Those that did provided largely sanitized versions of the truth. The bulk of applicants for amnesty were serving prisoners whose crimes were not associated with political objectives. If the amnesty process is to be assessed on whether it was able to incentivise or persuade perpetrators to come forward and speak the full truth, (particularly senior perpetrators), it must be stated that it was an unqualified failure.
 - 31.2. The bulk of the truth that comprises the comprehensive report of the South African TRC was not yielded by the amnesty process. This truth emerged largely from the work of the Human Rights Violations Committee, the research and investigation teams; and from the statement taking and hearings processes. If the amnesty process is to be judged on the truth it generated, then it must be said that it was a spectacular failure.
 - 31.3. It has to be considered how such an amnesty process will be played out in Kenya. Can it be said, with any degree of confidence, that the experience in Kenya will be any better?
32. While the logic and design of the South African approach required a focus on both truth and prosecutions it was only the former that received consistent attention.
 - 32.1. Those perpetrators who were denied amnesty or who did not apply for amnesty ought to have faced investigation and prosecution. This lay at the heart of the compact struck with victims. This has not happened.
 - 32.2. There was no strategic plan to investigate and prosecute crimes of the past in South Africa notwithstanding the truth for amnesty formula which demanded that there be a coordinated criminal justice response. The compact with victims has not been kept.
 - 32.3. Not only have very few crimes of the past been prosecuted, but the South African government has recently amended its prosecution policy to permit a backdoor amnesty to be given to perpetrators under the guise of prosecutorial discretion. The failure of the state to act against perpetrators has added insult to the injuries sustained by victims.

Should the South African model be adopted?

33. The South African model should not be followed unless there is in fact the capacity and the most serious intention to prosecute those who do not qualify for amnesty. Those framing the truth and justice process in Kenya need to ask serious questions in relation to:
 - 33.1. The actual capacity of the Kenyan criminal justice system to investigate and prosecute crimes of the past;
 - 33.2. Whether there is in fact the political will and appetite to prosecute such cases, including the most politically sensitive matters.
34. It turned out that in South Africa there was very little political will for investigations and prosecutions. Very few resources have been devoted to this task. This is reflected in the stark fact that not a single case from the conflicts of the past is pending before South African courts today.
35. The truth for amnesty formula is premised on the classic ‘carrot and stick’ approach. Amnesty is the carrot and the real prospect of prosecution is the stick. In South Africa there was the carrot of amnesty but there was never a stick in the form of a clear and present threat of prosecution. There is plainly no point in offering the carrot if there is no stick.
36. A conditional amnesty exercise accordingly requires a robust and coherent criminal justice response. This will require the setting up of a dedicated and well resourced unit of detectives and prosecutors to investigate crimes of the past at the same time as the establishment of the commission. Is this likely to happen? If it is not then the conditional amnesty approach must be abandoned.
37. Should the Kenyan State fail to follow up on investigations and prosecutions arising from the conditional amnesty process it will result in a betrayal of all those who participated in good faith in the process. Such a failure will stand as a betrayal of victims who will be expecting and waiting for the prosecutions of those who failed to apply for amnesty or who were denied amnesty. The failure of the State to act against such perpetrators will add considerably to the trauma of victims. It will stand as a lamentable postscript to Kenya’s truth and reconciliation process.
38. South Africa was unable to live up to expectations and to meet its obligations in terms of its conditional amnesty approach. If Kenya adopts this model will the outcome be any different?

THE AMNESTY PROVISIONS ARE LIKELY TO FACE CONSTITUTIONAL ATTACK

39. The most significant point of departure between the Bill and the South African law is the constitutional context.
- 39.1. The amnesty provisions of the South African law were rooted in the erstwhile 1993 Interim Constitution. The postscript to the *Constitution of the Republic of South Africa Act 200 of 1993* (“the Interim Constitution”) authorised an amnesty process through the establishment of mechanisms, criteria and procedures, all regulated by law, in order to achieve the objectives of national unity and reconciliation. The suspension of the rule of law and the rights of victims to justice were accordingly authorised by the Interim Constitution.
- 39.2. The SA TRC Act was challenged on the basis that it infringed the rights of victims as enshrined in the Bill of Rights. While the Constitutional Court accepted that such rights would be infringed it upheld the amnesty provisions of the law only because they were specifically authorised by Interim Constitution.⁸

No constitutional authority

40. The *Constitution of Kenya, 1963* as amended in 1999, provides no specific authority for the suspension of the rule of law or the denial of the rights to justice of victims in peace time. Part III of the Bill, should it become law, will accordingly enjoy no constitutional authority. Article 3 of the Kenyan Constitution stipulates that any law or provision inconsistent with the Constitution is void. Part III of the Bill, which facilitates the denial of justice to victims, is inconsistent with several provisions of Chapter V of the Kenyan Constitution which enshrines fundamental rights and freedoms. The amnesty provisions are directly inconsistent with the Constitution in that they violate, amongst other rights:
- 40.1. The right to life since they facilitate an amnesty for perpetrators who committed acts of murder and enforced disappearances.
- 40.2. The right to the security of the person since they facilitate an amnesty for perpetrators who have violated the freedom and security of people by committing acts of torture, assault and other cruel and inhuman treatment.
41. In the absence of specific constitutional authority for such far-reaching violations of human rights it is unlikely that the public interest exception contained in article 70 of the Kenyan Constitution will serve to justify such infringements. Such a ruling would presumably have very serious implications for the administration of

⁸ *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*, CCT17/96

justice in Kenya. The amnesty provisions as presently formulated are likely to invite protracted legal challenges. For this reason alone, Part III of the Bill ought to be reconsidered.

TECHNICAL CONCERNS

Application for amnesty

42. Section 35 provides for an application for amnesty in the prescribed form within 1 month from the date of announcement of amnesty. Several aspects of this section are unclear.
- 42.1. It is not clear whether the application is one for actual amnesty or a recommendation of amnesty. The announcement of amnesty is presumably an announcement when applications will be accepted by the Commission.
- 42.2. The prescribed form is not set out in the Bill or in the schedules. It is not clear whether the Commission will prescribe the form or whether any regulations made under the proposed law will set out the prescribed form.

No amnesty committee

43. The Bill does not make provision for the establishment of a body or committee of suitably qualified persons to handle the amnesty process.
- 43.1. Section 16 of the South African TRC Act provided for the establishment of a “Committee on Amnesty” comprising “fit and proper” and “appropriately qualified persons” who are “broadly representative of the South African community”. The chairperson was required to be a judge or a retired judge and three members of the Committee also had to be serving commissioners.
- 43.2. The amnesty process is a large and complex administrative and logistical process. The South African Amnesty Committee was supported by a several investigators and researchers (who were required to check and verify claims made by applicants) together with considerable support staff.

Grant or recommend amnesty?

44. The Bill is ambiguous as to whether authority is granted to the Commission to “grant or recommend amnesty”.
- 44.1. Article 34 sets out circumstances when the Commission will not “*grant or recommend amnesty*”.

- 44.2. Sections 35(1) and 36(1) refer to the requirement for an “*application for amnesty*” as opposed to an application for a recommendation for amnesty. Section 37(2) refers to a “*determination of an application for grant of amnesty*”. Section 39 refers to the refusal of an application for amnesty rather than a refusal of the Commission to make such a recommendation.
- 44.3. Sections 38(1) and (2) refer to a decision of the Commission to “*recommend the granting of amnesty*”, but section 38(4) refers to “*a decision of the Commission to grant amnesty*”. Section 38(7) refers to the power of the Commission to “*recommend amnesty*”, however, it also refers to the Commission’s power of “*granting amnesty*” itself.

Who issues amnesty?

45. The Bill is not clear on who the actual amnesty issuing authority is. Since the Bill does make reference to the Commission granting amnesty it might be construed that the Commission is the issuing authority. However, since the Bill also states that the Commission will recommend amnesty it may be that there is another authority that will be conferred with such power.
46. While the Commission’s final report has to be submitted to the President in terms of section 47 of the Bill, the Constitution does not authorise the President to grant amnesties or indemnities from prosecution.⁹ Unless there is an existing law conferring such powers on the President, a new law would have to be passed.

Amnesty for “violations” or “gross human rights violations”

47. The Bill appears to exclude those responsible for lesser offences committed in the course of the conflicts of the past from applying for amnesty. Section 36(3)(a) to (c) confines the reach of the amnesty provisions to “*gross human rights violations*”. This section authorises the Commission to reject an application if after a preliminary investigation the Commission concludes that an application does not relate to a gross human rights violation, as defined in the Act.
48. However, s 38(1) appears to contradict s 36(3) as it states that the Commission may recommend amnesty for “any violations” committed during the mandate period. If s 36(3) prevails then the following anomalies arise:
- 48.1. While the Bill makes provision for those behind gross human rights violations, such as killings, to gain amnesty; those responsible for lesser offences, such as arson, are excluded from the amnesty procedures. They must face the full wrath of the law. This is highly incongruous and plainly iniquitous. Part III of the Bill is likely to face a constitutional challenge

⁹ In terms of article 27A of the Kenyan Constitution, the President may grant to a person convicted of an offence a pardon. This power does not include the issuing of amnesties or indemnities from prosecution.

on the grounds that it unjustifiably discriminates between classes of offenders;

- 48.2. The amnesty provisions are confined to those who perpetrated gross human rights violations committed during political conflicts. This is so, even though it is likely that many, if not virtually all such crimes may be construed as crimes against humanity, which are excluded from the amnesty granting or recommending powers of the Commission.

Impermissibly wide criteria

49. If s 38(1) prevails then equally untenable anomalies arise since “*violations*” are not defined anywhere in the Bill. The only qualifying or limiting circumstances or criteria appear to be those set out in section 38(3). However s 38(3) does not speak of “*violations*” but rather the criteria to be considered when determining whether an offence constitutes an “*act of gross human rights violation*”. Assuming that s 38(3) will be amended to apply to all violations we would submit that the listed criteria are impermissibly wide.
- 49.1. They include factors such as “*motive*” in s 38(3)(a), “*context*” in s 38(3)(b) and “*legal and factual nature*” in s 38(3)(c). No attempt is made to state what kind of motive or context or legal or factual nature the law intends to cover. Accordingly, any motive or context may conceivably form the basis of a decision to grant or recommend amnesty.
- 49.2. Section 38(3)(d) refers to “*the objective*” of the offence. Although the objective includes whether an offence was directed at a political opponent, it does not confine the object to a political end or motive. So almost any other objective is potentially contemplated by the proposed law.
50. While there are similar criteria contained in section 20(3) of the South African law they are premised by certain qualifications which are absent in the Bill.
- 50.1. The section 20(3) criteria are qualified by the statement in section 20(1) that only offences associated with a political objective and committed in the course of the conflicts may be considered for amnesty.
- 50.2. The scenarios set out in section 20(2) served to provide specific circumstances when the s 20(1) requirement would be met. The factors contained in s 20(3) (which are largely the same as the criteria in s 38(3) of the Bill) merely provided the general criteria for the Amnesty Committee to consider when making a decision in terms of s 20(1).
- 50.3. The Bill does not provide an overall limitation on what acts or omissions may qualify for amnesty (as is done in s 20(1) of the SA TRC Act); nor does it set out the different scenarios in which the amnesty provisions are

intended to cover (as is done in s 20(2) of the SA TRC Act). The Bill simply drops South Africa's section 20(3) general criteria into section 38 without attempting to limit its reach or to guide its implementation.

Laws which limit rights should be clear and comprehensible

51. Only laws which are clear, comprehensible, and predictable in their application ought to be able to validly limit constitutional rights. The amnesty provisions manifestly limit constitutional rights but they are far from clear, comprehensible and predictable. This may provide further grounds for constitutional attack.

International law

52. While section 34 of the Bill excludes acts constituting crimes against humanity and genocide from the amnesty provisions, the question remains as to whether other serious international crimes are similarly excluded. The Bill is silent on Kenya's international law obligations. If serious international crimes are the subject of the amnesty provisions, Kenya will be in breach of its obligation to exercise criminal jurisdiction for such crimes under the Statute of the International Criminal Court.¹⁰
53. It should be stated explicitly that no provision in the law shall be construed as overruling Kenya international law obligations and in particular Kenya's obligation to bring to justice those responsible for international crimes as defined in the Statute of the International Criminal Court.

VICTIMS ARE EXCLUDED

54. It appears that victims are largely excluded from the amnesty process:
- 54.1. Section 36(4) authorises the Commission to recommend amnesty (on the basis of the amnesty application alone) and inform the applicant accordingly, if it is satisfied that there is no need for a hearing or investigation. Section 36 makes no provision or requirement for the representations of victims to be made or heard. The South African TRC Act also made no provision for the representations of victims to be made at this stage. The Bill rather than rectifying this deficiency has retained the same shortcoming.
- 54.2. In terms of s 36(9) all documentation and evidence pertaining to an amnesty application are kept confidential until the hearing actually commences or when the Commission decides to release such

¹⁰ However, this will not apply to international crimes committed prior to Kenya's ratification of the ICC Statute.

information.¹¹ It is entirely possible that victims and their representatives will be kept in the dark until the hearing commences.¹² This will place victims at a significant disadvantage.

- 54.3. Section 36(9) implies that where there is an investigation but no hearing, it is entirely possible that the documentation and evidence pertaining to an amnesty application will not be released at all. Victims will not be able to make any meaningful representations.
- 54.4. The only direct reference to victims in Part III is s 38(4) where the Bill, for the first time, obliges the Commission to “*inform..., if possible, any victim of the decision ...to grant amnesty*”. Section 38(5) requires the Commission to gazette the names of persons to whom amnesty has been recommended and to supply sufficient detail so as to enable people (including victims) to identify the offence for which amnesty has been recommended. This section is of no use to victims as the recommendation of amnesty will have already been made.
- 54.5. The only recourse left to victims will be to lobby those controlling the amnesty process thereafter (in respect of which the Bill is conspicuously silent); or to approach the courts to overturn the decision of the Commission or alternatively the decision of the amnesty issuing authority. Few victims will have the resources to take such action.

Victims and the amnesty process

55. It is fair to say that the Bill as it stands effectively shuts out victims from the amnesty procedures. Even though the South Africa TRC Act was similarly deficient in its measures for the protection of the rights of victims, the TRC itself imposed certain procedures to safeguard the rights of victims. The South African Commission issued detailed procedural rules to ensure that the rights of victims were protected during the amnesty process.¹³ These included the following measures:

- 55.1. A senior staff member of the Amnesty Department was appointed as an amnesty victim coordinator, with a staff complement.

¹¹ In terms of s 19(4) of the SA TRC Act the Commission was required to notify the victim of the place where and the time when the application will be heard and considered. The Commission was also required to inform victims of their right to be present at the hearing and to testify, adduce evidence and submit any article to be taken into consideration.

¹² Section 25 which deals with hearings is silent on what information must be disclosed to victims. However s 25(5)(ii) stipulates that “procedures dealing with victims” must be “fair”. Fairness demands disclosure to the victims of all relevant information and evidence pertaining to an amnesty application. However, given that victims are not included in the amnesty procedure it may be possible to raise the argument that the amnesty procedures are procedures dealing with offenders; and as such they are not “procedures dealing with victims”.

¹³ See paragraphs 57 - 59 in Volume 6, Section 1, Chapter 2 of the SA TRC Report.

- 55.2. Witness protectors who were experienced members of the security forces were available for the protection of victims.
 - 55.3. Investigators were required to obtain statements about the incidents in question from victims.
 - 55.4. The scheduling of hearings had to take into account the location and availability of victims and their legal representatives, so that they could attend the hearing. Victims had to be notified of the date and venue of the hearing at least fourteen days before the hearing. As far as was practical and reasonable, the Committee was responsible for providing transport and accommodation for victims.
 - 55.5. The hearing documentation containing the amnesty application and relevant documentation were made available to victims and their legal representatives.
 - 55.6. The Committee had to arrange for the services of a legal representative for victims who were not legally represented.
 - 55.7. Logistics staff had to take care of travel, accommodation and catering arrangements for victims.
 - 55.8. 'Briefers', who were qualified mental health workers, were responsible for attending to the emotional well-being of victims for the duration of hearings. Briefers played an invaluable role in assisting grief-stricken victims and relatives.
 - 55.9. Victims or the relatives of the victims and any witnesses they wished to call were permitted to give evidence at hearings. Victims who were unable to contribute towards the merits were allowed to make a statement rather than testify if they so preferred. These statements normally dealt with contextual or background factors and subjective views and experiences, often critical to issues of reconciliation and closure for victims.
56. The ICTJ is concerned that unless such protections are specifically provided in the Bill the rights of victims may not be upheld.

ALTERNATIVES

57. The ICTJ is of the view that the amnesty provisions pose potentially insurmountable constitutional and policy obstacles. These are likely to

- completely distract, if not derail the Commission from focussing on its main tasks of pursuing the truth, accountability and reconciliation.
58. We recommend that consideration be given to removing the amnesty provisions from the Bill. Alternatives to amnesty should be explored. We suggest that rather than granting or recommending amnesty, the Commission should:
 - 58.1. recommend to the Attorney General cases that are appropriate or ripe for prosecution;
 - 58.2. recommend to the Attorney General cases that are not appropriate for prosecution; and
 - 58.3. recommend to the President selected cases for the exercise of his power in terms of article 27A of the Kenyan Constitution to grant pardons to persons convicted of offences.
 59. Truth commissions can play an important role in helping prosecuting authorities prioritise cases of the past for prosecution.
 - 59.1. The Commission may, for example, on the basis of inputs received from victims and perpetrators, and in the light of its own investigations, recommend that certain cases are not appropriate or ripe for prosecution.
 - 59.2. Such instances may include cases where a perpetrator has committed himself to the peace; where he has disclosed a full account of his story in which he has acknowledged his own role; where he has engaged with the victims; where his offence does not constitute a serious international crime; and where he is willing to cooperate in further investigations and possible prosecutions.
 - 59.3. Where a perpetrator does not meet one or more of these factors, the Commission may choose to recommend or highlight such a case as worthy of prosecution.
 - 59.4. The final decision as to whether to prosecute or not must however rest with the Attorney General.
 60. In relation to the question of pardons, it has to be asked whether there are convicted political prisoners or prisoners of conscious who are languishing in Kenyan jails. In such circumstances, it may be that a very limited and selective pardon process is warranted. The TJRC could play a role in selecting appropriate cases for the recommending to the President for the granting of pardons. Such recommendations ought to be based on a consideration of each case on its merits after applying criteria such as those listed in paragraph 59.2 above.

61. Such an approach will help to protect and maintain the peace, encourage genuine involvement in the truth and reconciliation process, promote nation building, reduce the workload of prosecutors and help them to identify the most important and pressing cases for prosecution and pardons. Most significantly this approach does not involve the making of false promises to victims.

REPARATIONS AND REHABILITATION

62. Section 41 of the Bill requires each victim to apply for reparations. The Commission is then required to verify each claim and make recommendations in respect of each victim. This will prove to be a cumbersome process. The Commission will be in no position to ensure that each victim actually receives the recommended reparations. Many if not most victims, through ignorance, incapacity or inability will not be able to make individual applications for reparations.
63. Rather than requiring individual applications and the making of recommendations per individual as the only means of securing reparations, the Bill should empower the Commission to investigate the needs of victims in order to recommend to government, civil society and the international community how best to respond to such needs at individual, community and national levels.

FINANCIAL INDEPENDENCE

64. Section 44 of the Bill provides for annual budget estimates to be submitted to the Minister of Justice for approval. It also requires the Commission to comply with such estimates or to gain authorisation for expenditure outside of the estimates. These provisions have been criticised for undermining the independence of the Commission. However it has to be accepted that all statutory bodies supported by public funds have to be subject to such controls.
65. Commissions should enjoy financial, administrative and operational autonomy. Financial autonomy means maintaining control over the commission's finances and retaining decisions on how to spend money. Inquiries should be allocated a reasonable budget in order to successfully complete its tasks.
66. Administrative and operational independence means having unfettered decision making powers in relation to the hiring and management of staff and experts. It also means retaining full control of administrative and information management systems and the day to day operations.

THE FINAL REPORT

67. While the Commission ought to be required to summarize the findings of the Commission as per s 47(2)(a) it should also be required to set out its full findings in the final report.
68. Section 49(1) requires the government to implement all the recommendations made by the Commission. This is not realistic. Commissions do not normally bind governments. A typical commission is a mechanism by which a government can obtain information and advice. The functions of a commission are therefore to determine facts and to advise government through the making of recommendations. A government however is bound neither to accept the commission's factual findings nor to follow its recommendations. If a commissions recommendations are binding on government the Bill ought to set out how such a requirement ought to be enforced. It does not do this.
69. Even though a head of state is not bound to accept findings nor implement recommendations, serious repercussions may still flow from a failure of a government to acknowledge findings and implement important recommendations. The implementation committee, the media and wider civil society can all play a role in exposing the failure of the government to implement the most pressing of the Commission's recommendations.