

ANNEX I

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

Proposed amendments to the Truth, Justice and Reconciliation Bill, 2008.

SCHEDULE OF AMMENDMENTS

NOTE ON 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.

The Task Force is pleased to propose the following amendments to the TJRC Bill-

1. That the Bill be amended by inserting the following new Preamble immediately before the long title-

Preamble

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

Concerned that since independence there has occurred in Kenya gross violation of human rights, abuse of power and misuse of public office;

Concerned that some of the transgressions against our country and its people cannot be properly addressed by our judicial institutions due to procedural and other hindrances and conscious, however, that we must as a nation address the past in order to prepare for the future by building a democratic society based on the rule of law;

Aware that the process of achieving lasting and real peace and harmonious co-existence among Kenyans would best be served by enabling Kenyans discuss certain matters in a free and reconciliatory forum;

Deeply concerned that the culmination of the polarization of our country and the feeling of resentment among Kenyans was the tragic post election violence that followed the announcement of the 2007 Presidential election results;

Desirous to give the people of Kenya a fresh start where justice is accorded to the victims of injustice and past transgressions adequately addressed.

It is enacted by the Parliament of Kenya as follows-

2. That the Bill be amended by deleting the word “Commission” appearing in the title thereto.

The Bill is not merely about the establishment, et al, of the Commission. It is about the wider issue of Truth, Justice and Reconciliation process and even after the Commission has wound up. That should be reflected in the title to the Bill.

3. That the Bill be amended by adding the words “which shall not be later than thirty days after the date of assent to the Bill by the President” immediately after the word “appoint”

This is to ensure that the Minister does not abuse the discretion and fail to appoint the date of commencement as may be appropriate given the need to urgently dispose of the issue of Truth, Justice and Reconciliation process.

4. That Clause 2 of the Bill be amended in the definition of “gross violation of human rights violations” by inserting a new paragraph (g) immediately after paragraph (f) as follows-

(g) crimes against humanity.

5. That the Bill be amended by deleting clause 5 and substituting therefor the following new clause 5-

5. The objectives of the Commission shall be to promote peace, justice, national unity, healing and reconciliation among the people of Kenya by-

(a) establishing of far as possible an accurate and complete record of violation of human rights inflicted on persons in Kenya by the state, public institutions and holders of public office between 12th December 1963 and 28th February 2008 including-

- (i) antecedents, circumstances, contest and other factors pertaining to human rights violating, and crimes against humanity;
- (ii) perspective of the victims of the human rights violation and crimes against humanity;
- (iii) perspectives, including the motive, of the persons responsible for commission of the violations;

(b) establishing a far as possible the causes, nature and extent of the violation of rights committed during and crime against humanity during the period between 12th December 1963 and 28th February 2008;

(c) considering the reports of the various relevant inquiries conducted in Kenya under the Commissions of Inquires Act and under any other

arrangement and making recommendations with respect to implementation of the recommendations of the such inquiries;

- (d) providing victims, perpetrators and the general public with a platform for non – retributive truth telling that would chart a new moral vision, and value based society for Kenyans;
- (e) providing repentant perpetrators of human rights violations and crimes against humanity with a forum to confess their actions as a means of enabling reconciliation;
- (f) providing victims of human rights violations with a forum to be heard in order to facilitate the restoration of their dignity and self worth.

6. That the Bill be amended by deleting clause 6 and substituting therefor the following clause 6-

6. The functions of the Commission are to-

- (a) investigate gross violation of human rights and crime against humanity by the state , public institution and persons holding public office suffered by any person between 12th December and 28th February 2008;
- (b) investigate the context, causes and other circumstances under which the human rights violations and crime against humanity occurred;
- (c) determine the role of the state and the identity and role of public institutions and public officers, and of any person purporting to have acted on behalf of any public institution or the state,

responsible for or otherwise involved in the human rights violation and crimes against humanity;

(d) consider the report of the Commission of Inquiry on land and make recommendations on the implementation thereof;

(e) inquire into cases of misuse of public institutions and positions for political objectives;

(f) inquire into acts of state repression including torture, cruelty and degrading treatment massacres, mass murder, extra judicial execution and to determine the identity of those responsible for the commission of such violation;

(g) inquire into acts relating to sexual violations and gender specific violence or abuse by state agents or persons holding themselves as state agents;

(h) inquire into the causes of ethnic tension in Kenya and make recommendations on the promotion of healing reconciliation and peaceful co – existence among the different ethnic communities;

(i) recommend the prosecution of the perpetrators of gross human rights and crimes against humanity;

(j) determine ways and means of redress for victims of gross human rights violations and crime against humanity and to make recommendations therefor;

(k) make recommendations with respect to the grant of conditional

amnesty to perpetrators who make full disclosure of their involvement in the gross violation of human rights and crime against humanity;

(l) investigate and make recommendation with respect to commission by state agencies of crime of sexual nature and other forms of gender specific violence;

(m) educate and the public on its work and give sufficient publicity to its work so as to encourage positive and extensive participation of Kenyans in the objectives of the Commission and the discharge of its functions under this Act;

(n) make recommendations with regard to the policy to be adopted or measures to be taken with regard to granting of reparation to victims or measures aimed at rehabilitating and restoring the human and civil dignity of the victims;

(o) make recommendations with regard to institutional, administrative and legislative measures that should be taken for purposes of preventing human rights violation and to enable an establishment of a stable and fair society for Kenya.

Clauses 5 and 6 seem to have mixed up the concepts of “objectives” and “functions”. Reading both one is not sure what are considered ‘objectives’ and what are ‘functions’. It is proposed to keep the “objectives” to the broad goals of the Commission and have under the “functions” the particular aspects of the work of the Commission. This is both for purposes of clarity and elegance of a legal document.

7. That clause 7 of the Bill be amended by-

(a) deleting paragraph (j) appearing in sub clause(1);

(b) by inserting the following new sub clause immediately after clause (5)-

(6) The police shall, on request being made by the Commission, provide the Commission with such service and assistance as may be required by the Commission.

8. That the Bill be amended by inserting the current clause 8 immediately after clause 5 and renaming it as clause 5A.

Clause 8 provides for powers which are possessed by the Commission in its capacity as a body corporate. Inserting it immediately after the functions of the Commission does not present good arrangement of the provisions of the Bill.

9. That clause 9 the Bill be amended –

(a) in sub clause 1-

(i) by deleting the words “and the Kenya National Union of Teachers” appearing in paragraph(d);

KNUT is an affiliate of COTU. No justification to require the two to jointly nominate. It is actually safer to have COTU represent KNUT on this matter.

(ii) by deleting the word “and the Federation of Kenya Employers” appearing in paragraph (g);

KFE is a member of KEPSA or would adequately represent the interest of that group.

(c) by deleting sub clause (2) and substituting therefor the following new sub clause (2)-

(2) The function of the selection

panel shall be to –

- (i) nominate persons to be appointed as commissioners under section 10(1) (a);
- (ii) perform the functions with respect to the removal of Commissioner or chair person as set out in section 17(3).

The current provision provides for functions of the selection panel in a manner that suggests that the selection panel can recommend appointment of non-Kenyan commissioners. That is not the case as the non- Kenyan commissioners are proposed to be recommended by Africa Union panel of eminent persons. Secondly it should be clear who recommends the removal of which commissioner. Since the selection panel does not recommend appointment of non Kenyan commissioners, it is not appropriate to empower it to have a say on their removal. The involvement of AU Eminent persons is necessary.

10. That clause 10 of the Bill be amended-

(a) in subclause (1)-

- (i) by deleting the word “seven” and substituting therefor the word” nine”;
- (ii) by deleting the word “three” in paragraph (a) and substituting therefor the word “four”;
- (iii) by deleting the word four appearing in paragraph(b) and substituting therefor the word “five”;

This seeks to increase the number of commissioners. Since the Commission will be expected to constitute committees and owing to the tight timeframe allowed it to complete its work, it would be appropriate to increase the number of commissioners to enable the efficient discharge of the Commission’s mandate.

(b) in sub clause (2) by inserting the expression “appointed under subsection (1) (b)” immediately after the word “commissioners”

The commissioners to be selected by the selection panel are the local commissioners (Kenyan) only. The foreign ones are to be selected by the panel of AU Eminent persons. That is not reflected here for it appears all commissioners would be selected by the selection panel. That is not what the Bill says in clause 10(1).

(c) by inserting the following new clause (2) immediately after clause (2) –

(2A) The commissioners to be appointed under paragraph (a) shall be nominated in accordance with such procedure as may be determined by the Panel of Eminent African Personalities.

The process/ procedure of nomination/ selection of the non Kenya commissioners has not been provided for in the Bill; probably an oversight. This amendment seeks to do so.

(c) by deleting sub clause (3) and substituting therefor the following new sub clause-

(3) Subject to subsection (4A), the selection panel in nominating persons for appointing as commissioners shall have regards to the principle of gender equity.

(d) by inserting the following new sub clause immediately after sub clause 4-

(4A) At least four of the commissioners appointed shall be women, at least two of whom shall be appointed under subsection 1(a) and at least two of whom shall be appointed under subsection 1(b).

This is to ensure equitable gender representation on the Commission.

(d) in sub clause (5) by

(i) deleting paragraph (a);

It is both inappropriate and impracticable to have the condition of “sound mind” as a prerequisite for appointment. This is normally a condition for removal and couched in different terminology such as “unable to perform functions of office due to infirmity of body or mind”. Secondly is there danger of having a person of “unsound mind” going through the selection process all the way to appointment?

(ii) by deleting paragraph (c) and substituting therefor the following new paragraph-

(b) has not been any way been involved, implicated, linked or associated with human rights violation of any kind or in any matter that is to be investigated under this Act;

(iii) by deleting paragraph (d) and substituting therefor the following new paragraph-

(d) he has, for the last fifteen years immediately preceding the appointment, not participated in the activities of any political party or in any way participated in active politics;

This amendment seeks to ensure that the prohibition on appointment is broad enough to take care of all manner of transgressors on matters to be investigated under the proposed law.

(e) by deleting subclause (6) and substituting therefor the following new subclause (6)-

(6) A commissioner shall not participate in the affairs of any political party, or any organization that propagates any particular position with respect to the matters that fall within the mandate of the Commission.

This is to editorially harmonize this provision with the amendment proposed to subclause (5)(d). Also whether “active” or not, a participant in the affairs of a political party should not be allowed to continue being such participant once appointed

to the Commission.

(f) by deleting clause (7) ;

This provides another set of guidelines for appointments to the Commission. This has potential for conflict with guidelines in sub clause (4)

11. That the Bill be amended in clause 11 –

(a) in sub clause (1) by deleting the words “appointed by the President from amongst the commissioners” and substituting therefor the words “elected by the commissioners from among themselves”;

The commissioners should be allowed to elect one from amongst themselves to be the chairperson of the Commission. This would ensure the accountability of the chairperson to the Commission and not to political figures. This is important to ensuring confidence in the Commission and especially so given the experience with the credibility crisis currently facing the chairman of the Electoral Commission.

(b) in sub clause (3) by deleting paragraph (c).

The chairperson acts collectively with other commissioners. This paragraph appears to give him /her some curious excess powers over the Commission of which he/she is a member, albeit the chair, and is in conflict with the principle of the collectivity of the Commission.

12. That the Bill be amended by clause 12 by deleting the expression “under section 7”.

This is wrong cross reference. The provision would however do without any cross referencing.

13. That the Bill be amended in clause 13 by deleting sub clause (2).

It is unnecessary to indicate that the secretary shall serve on a full time basis. Practice and tradition demand so and other statutes have not similarly so provided as is being proposed here.

14. That clause 15 of the Bill be amended (a) in sub clause (2) by inserting the following words immediately after the word “fund” at the end of the sub clause “and

shall not be reviewed to the disadvantage of any commissioner during his term of office”

This is a critical measure to shield commissioners from financial blackmail.

15. That clause 16 of the Bill be amended by deleting paragraphs (e) and (f).

These paragraphs are to be transferred to clause 17. If left at 16, the contemplated grounds for removal can technically lead to automatic vacation of office by a commissioner while the grounds should in the ideal be subjects of inquiry. Clause 17 provides for that inquiry into circumstance which may lead to removal of a commissioner.

16. That clause 17 of the Bill be amended-

(a) (i) sub clause (1) by importing former paragraphs (e) and (f) of clause 16 and inserting the same immediately after paragraph (b) and by renaming them respectively as paragraphs (c) and (d).

See justification for amendment to clause 16.

(b) by deleting sub clauses (2) (3) (4) and (5) and by substituting therefor the following new sub clauses (2) to (5)-

(2) Where circumstances arise under section 17 for the removal of a commissioner any person may petition the Minister for the removal of the commissioner.

(3) The Ministers shall on receipt of the petition referred to in subclause (1), forthwith, but in any case within a period of not more than fourteen days convene the selection panel.

(4) The selection panel shall inquire into the allegations against the commissioner concerned and submit its report and recommendation thereon to the Minister who shall table the report before the National Assembly.

(5) The National Assembly shall within fourteen days of the receipt of the report from the Minister make its recommendation to the President who shall, where the recommendation provides for the removal the commissioner, forthwith remove the commissioner.

These proposals are to make simple and clear the procedure for the removal of a commissioner. It is also sought to subject the removal process to the concurrence of the National Assembly. There is no use appointing commissioners through parliamentary approval only for the President to remove them through the backdoor, sidestepping the National Assembly.

(c) in sub clause (6) by deleting the word “member” appearing at the end thereof and substituting therefor the word “commissioner” .

17. That clause 18 of the Bill be amended-

(a) in sub clause (1) by deleting paragraph (a) and substituting therefor the following new paragraph (a)-

(a) where the vacancy occurs in respect of the office of a commissioner appointed under section 10(1) from amongst the persons recommended by the National Assembly but not appointed by the President in the first of such appointment in accordance with the First Schedule.

This is to require the President only to pick from the list submitted by the National Assembly and not from the list submitted by the selection panel as is being suggested here.

(b) by deleting sub clause (2).

This is superfluous and is well taken care of in clause 12.

18. That the clause 20 of the Bill be amended -

(a) in sub clause (1) by inserting the words “subject to subsection (2)

between the words “shall” and “operate”.

(b) in sub clause (2) by deleting the expression “Before the commencement of the period of two year specified in subsection (1)” appearing at the beginning thereof and substituting therefor the expression “after the inauguration of the Commission under subsection (1)” .

These amendments are meant to streamline the timelines provided for in the Bill. As currently rendered, it is not possible to know which period runs from when.

(c) by inserting the following new sub clauses immediately after sub clause (2)-

(2A) Where for any reason the commission is unable to finalize its work within the period of two years in accordance with subsection (1) it shall, at least three months before the expiry of the two years period, submit a progress report to the National Assembly together with a request for extension of the period beyond two years.

(2B) The National Assembly may, if satisfied as to the reasons why an extension of the life of the Commission is necessary, extend the duration for the Commission to continue its work but shall not in any case extend such duration for more than six months.

This is to ensure flexibility should the Commission be unable to finalize its work while ensuring that the extension is scrutinized for justification and to limit the extension to six months.

19. That clause 25 of the Bill be amended-

- (a) in subclause (4) by deleting paragraph (c) and the proviso thereof;
- (b) by inserting the following new sub clauses immediately after sub clause (4)-

(4A) A person who disobeys any direction of the commission under subsection (4) commits an offence and is liable on conviction to imprisonment to term of not more than two years or a fine of not more than two hundred thousand shillings or both.

(4B) The Commission may give such directions in respect of the record of proceedings as may be necessary to protect the identity of any witness before it.

These redrafts are necessary for editorial purposes. Paragraph (c) has no relationship with the opening paragraph of sub clause (4). The proposal also provide for a penalty which was over looked or should in the ideal appear immediately after the offence created.

20. That the Bill be amended by deleting clause 26.

Clause 26 is in direct conflict with clause 7(3) which gives the Commission unlimited access to premises it deems appropriate to search. The unlimited access without need to seek court order is expedient especially given the two years limit on the life of the Commission.

21. That clause 27 of the Bill be amended by deleting the words “may establish special units “and substituting therefor the words “put in place special arrangements”.

It is not clear what “units” are about. A broader rendition of “special arrangements” would surely include “units” whatever these are.

22. That clause 28 of the Bill be amended by deleting subclause (1) and substituting therefor the following new subclauses –

(1) Subject to subsection (2A), any person whose conduct is the subject

of inquiry under this Act or who is in any way implicated or concerned in any matter under inquiry, shall be entitled to be represented by an advocate in the proceedings of the inquiry or any part thereof, and any other persons who desires to be so represented may, by leave of the Commission, be so represented.

(1A) Any person whose conduct is the subject of inquiry under this Act or who is implicated or concerned in any matter under inquiry under this Act and who is summoned to appear before the Commission shall present himself before the Commission in person.

The insertion of subclause (1A) is to ensure that the charade of the Goldenberg Commission of Inquiry is not allowed to play out at the hearings of the Commission. During the Goldenberg hearing the public was shocked at the impunity with which people mentioned adversely and therefore required to appear before the commission refused to come in person and instead sent lawyers. Under the present Bill the process of truth justice and reconciliation would suffer immensely if persons adversely mentioned and required to appear before the Commission were to treat such summons with contempt.

23. That clause 32 of the Bill be amended by deleting the words “a member of the commission or” appearing immediately after the words “done by” and by deleting the words “render the member “ appearing between the words “Commission” and office in the second last line thereof.

The commissioners are already accorded privileges under clause 24. Clause 32 also purports to give the same privileges. The proposed amendment confines the privileges therefore only to staff in this clause.

24. That clause 33 of the Bill be amended by inserting the expression “24” and immediately after the word “section” and by deleting the word “section”.

The clause affording commissioners privileges did not provide for the Commission to be liable to third parties. This seeks to do so.

25. That clause 43 of the Bill be amended in sub clause 4 by deleting the word “consult with the permanent secretary to the treasury and”.

This removes unnecessary bureaucracy in the management of the financial affairs of the Commission. It is sufficient to refer to the Government Financial Management Act.

26. That Part VI of the Bill be amended by deleting the title thereto and substituting therefor the following new title-

PART VI-REPORT OF THE COMMISSION.

The report of the Commission is probably the single most important outcome of the truth justice and reconciliation process. To lump provisions relating to its preparation, content and submission under "Miscellaneous" is most inappropriate.

27. That clause 47 of the Bill be amended in sub clause 2-

(a) by deleting paragraph (c) –

(b) by inserting a new paragraph (g) immediately after paragraph (f) as follows-

(g) make recommendation on the implementation mechanism and framework for the implementation of its recommendations and an institutional arrangement in that connection

This is to strengthen the implementation mechanisms for the Commission report. Experience with past inquiries in Kenya is that the implementation of the reports is very discouraging. It is sought by this amendment to empower the Commission to make recommendation on the implementation of its report. This will save time as the determination of the mechanisms of implementation will have been dealt with by the Commission and ensure that the mode of implementation is not left to the whims of the executive.

(a) by renumbering the second subclause (2) as sub clause (3).

This is editorial.

28. That the Bill be amended in clause 48-

(a) by deleting the words "establish an implementation committee" appearing immediately after the word "Commission" and substituting therefor the words "operationalise the implementation mechanism or arrangement in accordance with the recommendations of the Commission under section 47(2)(f)";

This amendment is to ensure that the implementation of the Commissions report is not unduly delayed by the Government determining its various aspects. It would be more appropriate to have the Commission recommend an implementation mechanism, institutions responsible, etc. See comment on immediate previous amendment.

(b) by deleting sub clause (2);

This is consequential to the amendment to subclause (1) and which now leaves it to the Commission to recommend the implementation mechanism of its report.

29. That the Bill be amended by inserting the following Part title immediately after Clause 49-

PART VII-MISCELLANEOUS

This is editorial consequent on the introduction of a new part on the Report of the Commission.

30. That the Bill be amended by inserting the following new clauses immediately after clause 50-

50A. The provisions of the Official Secrets Act shall not apply to any matter that is the subject of inquiry by the Commission under this Act.

It would be futile for the process that involves “truth telling” for the Government to bring into play the provisions of the Official Secrets Act.

50B. Copies of the report of the Commission and other records of the work of the Commission shall on the dissolution of the Commission be deposited with the Kenya National Commission on Human Rights which shall take the same into custody.

It is important that the record of the work of the Commission is safely kept for the sake of posterity.

31. That Clause 51 of the Bill be amended by deleting the words “ the disciplinary procedures” appearing in paragraph (b) and substituting therefor the words “a code of conduct”

Editorial

32. That the First Schedule to the Bill be amended

(a) by deleting the title thereto and substituting therefor the following new title –

**FIRST SCHEDULE- PROCEDURE FOR APPOINTING
COMMISSIONERS**

This Schedule provides for the process of appointment all the way to when the President appoints the commissioners, the title needs to reflect that.

- (b) in paragraph 3 by inserting the word “fifteen” between the words “assembly” and “suitably” in sub paragraph (b);

This is to set the number of those recommended by the selection committee at 15.

- (c) in paragraph 5 by deleting the word “six” and substituting therefor the word “ten”;

This is to increase the number of those recommended to the President by the National Assembly to ten persons.

- (d) in paragraph 6 by deleting the word “four” and substituting therefor the word “five” .

33. That the Bill be amended in the Third Schedule by deleting the word “four” and substituting therefor the word “five”.

This is to reflect the proposed increase in the number of commissioners from seven to nine. See proposed amendment to clause 10.