
amnesty international

Kenya
Concerns about the Truth, Justice
and Reconciliation Commission
Bill



May 2008
AI Index: AFR 32/009/2008

INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM

TABLE OF CONTENTS

EMBARGOED: 21 May 2008 Public	1
Kenya	1
TABLE OF CONTENTS	1
Kenya	3
Introduction.....	3
1. Positive aspects of the Bill.....	4
2. Mechanisms and procedures for an illegal amnesty.....	5
3. Creating other obstacles to prosecutions	7
4. A flawed selection process does not guarantee competence, independence and impartiality	7
5. No protection for victims and witnesses	8
6. Reparations for victims.....	10
7. Overloading the Commission?.....	11
8. Which human rights violations?	11
9. Lack of consultation with civil society.....	12
Conclusions and recommendations	14

Kenya

Concerns about the Truth, Justice and Reconciliation Commission Bill

Introduction

Amnesty International has a number of serious concerns about the Truth, Justice and Reconciliation Commission Bill of Kenya (the Bill), published on 9 May 2008 and due to be submitted for debate in Parliament.¹

Amnesty International recognizes the decision to establish the Truth, Justice and Reconciliation Commission in Kenya as an important first step towards ensuring accountability for past human rights violations and guaranteeing that victims of those violations know the truth, obtain justice and are provided with full reparation.

The organization welcomes the provisions in the Bill intended to ensure that the establishment and functioning of the future Truth, Justice and Reconciliation Commission (the Commission) comply with international law and standards. Such provisions are discussed below (see para1).

However, Amnesty International is seriously concerned about several aspects of the Bill, which do not comply with international law, standards and best practices. These include:

- The provisions allowing the Commission to recommend amnesty for gross human rights violations such as torture, enforced disappearance and extrajudicial executions (para2);
- Other provisions creating obstacles to prosecutions of gross human rights violations (para3);
- The procedure for nominating Kenyan Commissioners, which does not ensure their independence, impartiality and competence (para4);
- The lack of provisions for the establishment of a comprehensive, long term and effective protection programme for victims and witnesses (para5);
- The lack of provisions authorizing the Commission to recommend a broad range of reparations for victims (para6);
- The lack of full consultation with civil society organizations, victims, human rights defenders, women, children, and persons belonging to minorities and vulnerable groups on the establishment, mandate and powers of the Commission (para9).

The establishment of the Truth, Justice and Reconciliation Commission of Kenya was decided by the parties to the Kenyan National Dialogue and Reconciliation, which defined its general framework in an agreement on 4 March 2008.²

According to the Bill, the Commission's main tasks are: establishing the facts about human rights violations committed between 12 December 1963 and 28 February 2008, recommending the prosecution of suspected perpetrators and reparations for the victims and providing a forum for reconciliation (section 5). In particular, the Commission would: investigate the violations, as well as their context, causes and circumstances; identify the individuals and institutions responsible for the violations; identify the victims; educate and engage the public; and make recommendations for reparations and prosecutions, as well as institutional, administrative and legislative reform (section 6).

This briefing is a constructive critique to the Bill, intended to contribute to continuing discussions by government officials, parliamentarians, civil society and other interested parties.

In June 2007 Amnesty International published *Truth, justice and reparation: establishing an effective truth commission* (AI Index: POL 30/009/2007). <http://www.amnesty.org/en/library/info/POL30/009/2007>. The paper analyzes best international practices and lessons learned by past truth commissions, as well as the framework of international law and standard within which truth commissions should operate. Readers are referred to it for a more detailed discussion.

1. Positive aspects of the Bill

Amnesty International welcomes the provisions in the Bill designed to align the mandate of the Commission to international law and standards and to enhance its powers. In particular, positive elements of the draft are:

- **Gender equity.** In selecting, nominating or appointing persons as Commissioners, the Selection Panel, the National Assembly and the President shall have regard to gender equity (section 10.3 and First Schedule, section 7).
- **Broad powers.** The Bill grants the Commission “all powers necessary for the execution of its functions”, including broad powers of investigation (section 7). It also imposes on “all persons, including members of political parties and officers of the Government”, a duty to co-operate with the Commission and grant it unrestricted access (section 7.2 [bis]).

- **Implementation of the Commission's recommendations.** The Bill includes provisions to guarantee the implementation of the Commission's recommendations (sections 48-49). Such provisions are particularly important in the light of the experience of previous judicial and non-judicial commissions of inquiry in Kenya, whose recommendations have not been implemented. For this reason, efforts to address the broader problem of ensuring the implementation of the Commission's recommendations are to be welcomed. However, compliance with international law should be a requirement for the Commission's recommendations to be implemented.
- **Institutional reform.** The Bill envisages that the Commission would recommend the creation of institutions "conducive to a stable and fair society" as well as the institutional, administrative and legislative measures necessary "to prevent the commission of violation of human rights" (sections 5.r and 6.l).

Despite these positive aspects, Amnesty International is seriously concerned about other provisions in the Bill which conflict with international law and standards. The lack of a wide consultation process during the drafting of the Bill is also a source of concern. Such concerns are discussed in the following paragraphs.

2. Mechanisms and procedures for an illegal amnesty

"[Amnesties] can never be permitted to excuse genocide, war crimes, crimes against humanity or gross violations of human rights."

United Nations Secretary-General Kofi Annan³

Amnesty International is seriously concerned about Part III of the Bill (Amnesty Mechanisms and Procedures), as it is in violation of the international prohibition of amnesties for gross human rights violations such as torture, enforced disappearance and extrajudicial executions.

According to the 4 March agreement, the Commission does not have the power to recommend a "blanket amnesty for past crimes". However,

"Individual amnesty may be recommended by the Commission in exchange for the full truth, provided that serious international crimes (crimes against humanity, war crimes, or genocide) are not amnestied, nor persons who bear the greatest responsibility for crimes covered by the Commission."

Amnesty International welcomes section 34 of the Bill, which excludes any sort of amnesty for crimes against humanity or genocide “within the meaning of international human rights law”. However, the Commission would have the power to grant conditional (individual) amnesty precluding criminal or civil proceedings regarding “any violations” other than genocide or crimes against humanity committed between 12 December 1963 and 28 February 2008 if the applicant “has made a full disclosure of all relevant facts” (section 38.1 and 2).

The granting of an amnesty with respect to “any violation” is illegal under international law, as this body of law prohibits amnesty not only for crimes against humanity, war crimes and genocide, but also for other gross human rights violations such as torture, extrajudicial executions and enforced disappearances. Amnesties for such crimes are prohibited whether conditional (individual) or unconditional (blanket), as they deny the right of victims to justice and to reparations.⁴

The prohibition of both conditional and unconditional amnesties for crimes such as genocide, crimes against humanity, war crimes and other gross human rights violations is increasingly reflected in the practice of states.⁵ The conditional amnesty process of the South African Truth and Reconciliation Commission is now considered to be unacceptable under international law.⁶ In December 2006 the Constitutional Court of Indonesia declared as not having binding legal force the law establishing a Truth and Reconciliation Commission, among other things because it included a procedure for granting amnesty to perpetrators of gross human rights violations.⁷

In addition, the power to grant amnesties for gross human rights violations could cost the Commission the support of the international community. The United Nations refused to co-operate with the Commission of Truth and Friendship, jointly established by Indonesia and Timor-Leste, because the Commission’s terms of reference do not exclude that it may recommend amnesty for crimes against humanity, gross violations of human rights or serious violations of international humanitarian law.⁸ A similar consideration was formulated, with respect to Kenya, by the UN Fact-finding Mission:

“Perpetrators of gross human rights violations should under no circumstances be recommended for amnesty. The United Nations rejects such amnesties and is therefore unable to provide support to institutions and mechanisms recommending or granting amnesties for gross human rights violations.”⁹

As required under international law, the Commission should not recommend amnesties or similar measures of impunity (either conditional or unconditional) with respect to criminal or civil proceedings concerning gross violations of human rights. The Bill must be amended to exclude the power to recommend amnesties not only for genocide and crimes against humanity, but also for other gross human rights violations such as extrajudicial executions, enforced disappearances and torture.

3. Creating other obstacles to prosecutions

The Commission would have the power to recommend “the prosecution of the perpetrators of gross human rights violations” (section 5.k). However, the Bill does not clarify the relationship between the Commission and national prosecution authorities. In addition to this lack of clarity, several provisions of the Bill would create obstacles to prosecutions, rather than facilitate them.

The Bill provides that persons appearing before the Commission would not be subject to any criminal or civil proceedings in respect of evidence or information given (section 24.3). This provision could be used by perpetrators to shield themselves from future prosecutions and civil suits for reparations regarding any crime.

Similarly, the Bill grants confidentiality to all documentation concerning amnesty applications and provides that the confession of past crimes would not be used against the perpetrator in any criminal or civil court proceedings, even if amnesty is denied (section 36.9.c). This provision would create obstacles to the transmission of evidence and information to national prosecution authorities and to plaintiff victims and their families in civil proceedings for reparations.

The Commission should have the power to inquire into credible evidence indicating individual criminal responsibility. It should forward its findings (on a confidential basis) to the relevant prosecution authorities for further investigation, with a view to bringing the suspected perpetrators to justice without delay. The provisions in the Bill creating obstacles to prosecution should be amended.

4. A flawed selection process does not guarantee competence, independence and impartiality

The membership of truth commissions is particularly important, indeed vital, for their effective functioning, as the actions and personal qualities of the commissioners frequently set the tone for the activities of the commission as a whole. Members of a truth commission should be selected on the basis of their competence in human rights and other relevant fields, proven independence and recognized impartiality.

Amnesty International welcomes the provisions in the Bill designed to promote the Commission’s competence, independence and impartiality.¹⁰ Despite these positive aspects, Amnesty International is seriously concerned that the procedure for nominating Kenyan Commissioners does not ensure their independence, impartiality and competence.

Under the Bill, the Commission will be composed of seven members, four Kenyan citizens short-listed by a Selection Panel and three non-Kenyan citizens selected by the Panel of Eminent African Personalities (section 10.1).¹¹ The Selection Panel will be composed of nine representatives of religious organizations, professional bodies, trade unions and the Kenya National Commission on Human Rights (section 9). It will have the responsibility of considering public applications and providing the National Assembly with a short-list of “suitably qualified persons”. The four Kenyan Commissioners will be appointed by the President, from a list of six persons nominated for appointment by the National Assembly (First Schedule, sections 1-6).

The 4 March agreement recognized the importance of consultation in the selection of the Commissioners, “in keeping with international best practices and to ensure broad public trust in, and ownership of, the process of seeking the truth”. Amnesty International welcomes the exclusion of political parties of other political bodies from the Selection Panel.¹² However, the organization is concerned that the civil society organizations represented in the Selection Panel were not chosen in a transparent way. In addition, previous formulations requiring consultation with a broad section of Kenyan society have been removed from the current version of the Bill. As a result, the selection process in the current Bill does not ensure full consultation with all civil society organizations, victims, human rights defenders, persons belonging to minorities and vulnerable groups and other Kenyans concerned.

If the Commission is to be accepted as credible and capable of achieving its vital objectives, its members must be selected by a transparent process that inspires public confidence. **All those concerned, including civil society organizations, victims, human rights defenders and persons belonging to minorities and vulnerable groups should fully and actively participate in the process of selection and appointment of the Commissioners. They should suggest names and conduct a careful evaluation of the qualification and experience of each candidate being considered.**

5. No protection for victims and witnesses

Amnesty International welcomes the principles on the treatment of victims detailed in the Bill (compassion, respect, non-discrimination and fairness) (section 25.5.a). The Bill also permits the Commission to establish “special units” and adopt specific mechanisms and procedures to promote participation of women, children, persons with disabilities and vulnerable groups (section 27).

The Commission is required to pay particular attention to gender-based violations, investigating and providing redress in respect of crimes of a sexual nature against women and girls (sections 6.h and 27.2). Amnesty International notes with concern,

however, that section 6.h also implies that sexual violence committed against men and boys will receive less attention by the Commission.

Despite these provisions, Amnesty International is concerned that the measures included in the Bill are insufficient to take into account the needs and rights of victims. The experiences of other truth commissions around the world show that victims and witnesses, especially women, fear that participation in the process would put them at risk of retaliation, and need the truth commission to provide them with comprehensive and effective protection. The draft Bill fails to respond to such concerns. The Commission has a vaguely worded power to ensure that “appropriate measures” are taken for the victims’ safety (section 25.5), *In camera* hearings (hearings behind closed doors) and confidentiality of information and documents are the only specific measures intended to protect the rights and safety of victims and witnesses (section 25, 2-4). However, the Bill does not include any provisions establishing comprehensive, long-term and effective protection measures for victims and witnesses.

Kenya adopted in 2006 a Witness Protection Act, which seeks to put in place measures for the protection of witnesses. However, it is not clear whether the provisions of the Witness Protection Act will regulate the protection of victims and witnesses giving statements to the Commission.

The Witness Protection Act, 2006

Amnesty International is concerned about the wide and discretionary nature of the powers granted to the Attorney General, a political official, under the Witness Protection Act. The centralization of any decision concerning witness protection measures in the hands of the Attorney General is likely to cause delay when immediate action may be imperative. The organization is also concerned that courts other than the High Court and commissions of inquiry such as the Truth, Justice and Reconciliation Commission have no powers to issue protection orders, when they are best placed to assess the risk in individual cases and order measures tailored to the specific situation.

Witness protection programmes should build upon the experiences of similar programmes established by international and hybrid tribunals and by other truth commissions.

To ensure the protection of victims and witnesses who may be at risk as a result of their participation in the process, the Commission should establish a comprehensive, long-term and effective victim and witness protection programme.

Special units, mechanisms and procedures to address the experiences of women, children, and vulnerable groups should be established as a matter of priority.

6. Reparations for victims

The Bill provides a broad definition of reparations:

“reparation’ means dignifying the victims by measures that will alleviate their suffering, compensate their social, moral and material losses, restitute their rights” (section 2).

Other provisions reflect a similar broad understanding of reparations (section 5, l, o and p). However, these provisions do not expressly state that they include all five forms of reparation to which victims of human rights violations are entitled: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹³

The Bill allows the Commission to recommend reparations only in two cases: after amnesty has been recommended to the perpetrator (section 40); or after the individual victim submitted an application for reparations (section 41.1). Amnesty International is concerned that these procedures for individual reparations may limit the Commission’s ability to recommend a broad range of reparations measures.

The UN Fact-finding Mission recommended:

*“The Commission should also have a mandate to recommend and provide guidance to the establishment of a Government reparations programme in line with the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”.*¹⁴

The Commission should recommend a broad range of reparations for victims, including measures of restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition. These include measures that would prevent repetition of past violations, such as reforming laws, administrative procedures and practice; strengthening the justice system; and promoting human rights education.

Recommendations for reparation should never be seen as a substitute for bringing perpetrators of crimes under international law to justice or preclude victims from also seeking compensation through the courts.

7. Overloading the Commission?

The Bill states that the Commission's objectives would be promoting "peace, justice, national unity, healing and reconciliation" (section 5). To this purpose the Commission has the power to investigate or make recommendations concerning "any" matter (section 5.2 and 6.j). In addition to the core task of investigating past human rights violations, the Bill includes in the mandate of the Commission a wide set of other issues, such as corruption, irregular and illegal acquisition of public land, economic marginalization, ethnic tensions, the misuse of public institutions for political objectives, political violence before, during and after elections and economic crimes (section 5, d-g and i-j; section 6.g).

The mandate of a truth commission must be broad enough to cover all human rights violations committed in the past. While a broad mandate is to be welcomed, insofar as it deals with a range of issues deemed pertinent in Kenya, energies should not be dispersed. The UN fact-finding Mission recommended:

*"The mandate of the TJRC needs to be comprehensive but narrow enough to be manageable in time and scope. The Commission's investigative responsibility in relation to corruption, land distribution and other "historical injustices" must be realistic and commensurate with resources and time assigned to the Commission."*¹⁵

Amnesty International is concerned that an excessively broad mandate could hamper, rather than help, the Commission's operations and divert its attention from the investigation of human rights violations.

The Commission should focus on the investigation of past human rights violations. If the investigation of corruption, land distribution and other historical injustices is to be part of its mandate, this investigation should be specifically linked to their impact on human rights or assigned to a subsidiary body of the Commission with its own budget.

8. Which human rights violations?

The parties to the Kenyan National Dialogue and Reconciliation agreed that the Commission would inquire into "human rights violations, including those committed by the state, groups, or individuals".¹⁶ Despite such a clear indication, the Bill fails to define in a consistent way the subject-matter of the Commission's investigations.

The Bill refers to the mandate of the Commission using at least four different and conflicting formulations – none of them reflecting the text of the 4 March agreement.¹⁷ Human rights violations as such are not defined. However, a set of human rights violations is referred to in relation to the definition of "victim" (section

2). Despite a general definition of “gross human rights violations” (section 2), the Bill introduces a different definition of “gross human rights violation” for the purposes of the amnesty procedure (section 38.3).

Other definitions in section 2 of the Bill are not consistent with international law:

- Amnesty International is concerned that the definition of crimes against humanity provided in section 2 of the Bill does not include some of the elements of the definition of crimes against humanity in article 7.1 of the Rome Statute of the International Criminal Court, ratified by Kenya on 15 March 2005 (Rome Statute).¹⁸ Such omitted elements are: “national” grounds in the elements of the crime against humanity of persecution; the crime against humanity of apartheid; and the essential definitions in article 7.2 of the Rome Statute.
- The definition of enforced disappearance of persons in section 2 of the Bill appears to have been modelled on article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.¹⁹ However, the discrepancies between the definition in the Bill and the one in the Convention need to be clarified.
- The definition of genocide in section 2 of the Bill appears to reflect article 6 of the Rome Statute. However, it omits the act of “forcibly transferring children of the group to another group” and replaces it with the act of “forcibly transferring children of the group from one place to another”. It is not clear whether this new wording is designed to be broader than that in article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute.²⁰ If so, this point should be made clear; if not, the wording should be corrected.

The mandate of the Commission, including the definitions of enforced disappearance, crimes against humanity and genocide, should be defined in accordance with international law and standards. The Commission should investigate all cases of past human rights violations and abuses (i.e. violations of both civil and political and economic, social and cultural rights), whether committed by government forces or by non-state actors.

9. Lack of consultation with civil society

Amnesty International is concerned that Kenyan civil society appears not to have been sufficiently involved from an early stage in the discussions on the establishment, mandate and powers of the Commission. No broad consultation process appears to have been organized with all those interested in the process, including civil society organizations, victims, human rights defenders, persons belonging to minorities and vulnerable groups.

According to information gathered by Amnesty International, the draft Bill was prepared by the Ministry of Justice and only a handful of non-governmental organizations (NGOs) were invited to a few meetings regarding the Bill. Since the first draft was released, a number of NGOs have formed a 'multi-sectoral task force' which has analyzed and made comments on the first drafts of the Bill.²¹ There is scope for a further, albeit limited, consultation with civil society and the public before the Bill is tabled for debate in Parliament.

The UN Fact-finding Mission recommended on this point:

*"In accordance with international best practices, structured and broad civil society participation in the drafting of the Act and in the selection of the Commissioners should be ensured."*²²

Given that the Commission may propose broad and transformative recommendations for reform at the end of the process, it is even more important that all relevant sectors of society – including women and children, and groups which are disadvantaged in Kenyan society – should have the opportunity to outline the mandate and focus of the Commission's work, in order to ensure that underlying inequalities which have contributed to the violation of human rights are dealt with effectively.

All those concerned, including civil society organizations, victims, human rights defenders, women, children and persons belonging to minorities and vulnerable groups should be fully involved in the discussions on the establishment, mandate and powers of the Commission, as well as in the selection of its members.

Conclusions and recommendations

Amnesty International recommends that:

- **As required under international law, the Commission should not recommend amnesties or similar measures of impunity (either conditional or unconditional) with respect to criminal or civil proceedings concerning gross violations of human rights. The Bill must be amended to exclude the power to recommend amnesties not only for genocide and crimes against humanity, but also for other gross human rights violations such as extrajudicial executions, enforced disappearances and torture.**
- **The Commission should have the power to inquire into credible evidence indicating individual criminal responsibility. It should forward its findings (on a confidential basis) to the relevant prosecution authorities for further investigation, with a view to bringing the suspected perpetrators to justice without delay. The provisions in the Bill creating obstacles to prosecution should be amended.**
- **All those concerned, including civil society organizations, victims, human rights defenders and persons belonging to minorities and vulnerable groups should fully and actively participate in the process of selection and appointment of the Commissioners. They should suggest names and conduct a careful evaluation of the qualification and experience of each candidate being considered.**
- **To ensure the protection of victims and witnesses who may be at risk as a result of their participation in the process, the Commission should establish a comprehensive, long-term and effective victim and witness protection programme.**
- **Special units, mechanisms and procedures to address the experiences of women, children, and vulnerable groups should be established as a matter of priority.**
- **The Commission should recommend a broad range of reparations for victims, including measures of restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition. These include measures that would prevent repetition of past violations, such as reforming laws, administrative procedures and practice; strengthening the justice system; and promoting human rights education.**
- **Recommendations for reparation should never be seen as a substitute for bringing perpetrators of crimes under international law to justice or preclude victims from also seeking compensation through the courts.**
- **The Commission should focus on the investigation of past human rights violations. If the investigation of corruption, land distribution and other historical injustices is to be part of its mandate, this investigation should be specifically linked to their**

impact on human rights or assigned to a subsidiary body of the Commission with its own budget.

- The mandate of the Commission, including the definitions of enforced disappearance, crimes against humanity and genocide, should be defined in accordance with international law and standards. The Commission should investigate all cases of past human rights violations and abuses (i.e. violations of both civil and political and economic, social and cultural rights), whether committed by government forces or by non-state actors.
- All those concerned, including civil society organizations, victims, human rights defenders, women, children and persons belonging to minorities and vulnerable groups should be fully involved in the discussions on the establishment, mandate and powers of the Commission, as well as in the selection of its members.

¹ A Bill for AN ACT of Parliament to provide for the establishment, powers and functions of the Truth, Justice and Reconciliation Commission, and for connected purposes (The Truth, Justice and Reconciliation Commission Bill, 2008), *Kenya Gazette Supplement No. 34*, 9 May 2008.

² Kenyan National Dialogue and Reconciliation, *Truth, Justice and Reconciliation Commission*, mediated agreement, 4 March 2008 (4 March agreement).

³ The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-general, UN Doc. S/2004/616, 23 August 2004, para32.

⁴ See: Amnesty International, *Sierra Leone: Special Court for Sierra Leone: denial of right to appeal and prohibition of amnesties for crimes under international law* (AI Index: AFR 51/012/2003), October 2003.

⁵ For example: the Brazilian Constitution of 5 October 1988 excludes amnesty for torture and “crimes defined as heinous crimes”. The 1991 Constitution of Bulgaria excludes limitation to prosecutions for “crimes against peace and humanity”. The 1994 Constitution of Ethiopia states that offences such as crimes against humanity, genocide, summary executions, forcible disappearances and torture may not be commuted by amnesty. The 1998 Ecuadorian Constitution excludes amnesty for genocide, torture and enforced disappearance of persons. The 1999 Constitution of Venezuela prohibits amnesties and pardons for serious human rights violations.

⁶ See, for example, the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, para618.

⁷ Constitutional Court of the Republic of Indonesia, Decision on the Petition for Judicial Review on the Law of the Republic of Indonesia no. 27/2004 concerning Truth and Reconciliation Commission against the 1945 Constitution of the Republic of Indonesia, 8 December 2006.

⁸ UN Secretary-General, “Secretary-General says UN officials will not testify at Timor-Leste Commission, as terms of reference include possible amnesty for human rights violations”, UN Doc. SG/SM/11101, 26 July 2007.

⁹ Office of the UN High Commissioner for Human Rights, *Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008*, 18 March 2008 (OHCHR Fact-finding Mission Report), p17.

¹⁰ The Commissioners are required to have knowledge and experience either in “matters relating to human rights law” or in “forensic audit, investigations, psycho-sociology, anthropology and social relations, conflict management, religion or gender issues” (section 10.4). Three of the seven Commissioners will be non-Kenyan citizens (section 10.1). Commissioners are required to be impartial and to “generally enjoy the confidence of the people of Kenya” (section 10.5). The Commission as a whole will have to “as much as practicable, be balanced, representative of Kenyan society, perceived to be impartial in its collectivity and of diverse professional and religious backgrounds” (section 10.7). The Commission will not be subject to the control or direction of any other person or authority (sections 7.1 and 21.1). The Commission’s members and staff are also required to be independent of any political party, government or other organizational interest (section 21.2).

¹¹ The Panel of Eminent African Personalities is a body of mediators selected to lead the Kenyan National Dialogue and Reconciliation. The panel comprises: Kofi Annan, former UN Secretary-General (chief mediator), Benjamin Mkapa, former President of Tanzania and Mrs Graca Machel of South Africa. Oluyemi Adeniji, former Nigerian diplomat, was chosen by both parties to lead the mediation in Mr Annan’s absence.

¹² In April 2008 Kenyan media reported that the membership of the Commission was being negotiated as part of the political agreement of the coalition government. “Mediation Talks in Quorum Hitch”, *The East African Standards* (Nairobi), 23 April 2008; “Serena Talks Resume”, *The East African Standard* (Nairobi), 24 April 2008.

¹³ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

¹⁴ OHCHR Fact-finding Mission Report, p17.

¹⁵ OHCHR Fact-finding Mission Report, p17.

¹⁶ 4 March agreement.

¹⁷ In section 5, letter a refers to “violations and abuses of human rights and economic rights” committed “by the State, public institutions and holders of public office”; letter b refers to “gross violations of human rights and economic rights”; letter c refers to “gross human rights violations and violations of international human rights law and abuses”; and letter h refers to “acts of state repression”. Section 6.a refers to “violations and abuses of human rights relating to killings, abductions, disappearances, detentions, torture, ill-treatment and expropriation of property”.

¹⁸ Statute of the International Criminal Court, adopted in Rome on 17 July 1998 and circulated as document A/CONF.183/9 of 17 July 1998.

¹⁹ Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance states: “For the purposes of this Convention, “enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”

²⁰ Convention on the Prevention and Punishment of the Crime of Genocide, approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948.

²¹ The NGO task force has prepared a memorandum on the publicized version of the Bill to be tabled in Parliament and plan to use this memorandum as a basis for consultation with parliamentarians.

²² OHCHR Fact-finding Mission Report, p17.