



Kenya National Commission on Human Rights

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KNCHR POSITION ON AMNESTY FOR ALLEGED PERPETRATORS OF POST-ELECTION VIOLENCE

I. Introduction

Recently, a debate in Kenya has raged regarding whether persons arrested in the wake of the post election violence should be prosecuted or granted amnesty. These persons comprise mainly youths from Rift Valley, Nyanza, Coast, Central and Nairobi Provinces who are alleged to have committed diverse offences between December 27th and February 28th. There are conflicting figures as to how many youths are being held and the offences they are alleged to have committed. According to a statement attributed to Agriculture Minister Ruto, around 12,000 youths are being held in police and prison custody following the violence. However, the police dispute this figure and claim that less than 1000 people are in custody.

II. The different shades of arguments

1. One argument made, supporting the case for amnesty, is that by doing what the youths are alleged to have done, they contributed to the formation of the grand coalition government and it therefore does not make sense to have the youths languishing in jail while the politicians they 'fought for' enjoy power. It has also been argued that holding the youths in custody discriminates against the poor since politicians who mobilized the youths to those actions are themselves enjoying their liberty.

2. Another argument advanced is that 'host communities' are unlikely to cooperate with the return of the internally displaced people (IDPs) while their own sons are languishing in jail. It is a compelling argument from the point of view that the situation is still volatile in some of the regions with some locals threatening not to allow the IDPs to return. Indeed violence has broken out since the return of some IDPs in places like Molo. However this argument is countered by those who say that Kenyans have a right to property and to settle anywhere in the republic and the government should not be blackmailed into releasing alleged perpetrators on the pain of communities sabotaging the IDP return programme.

3. A third argument, rejecting amnesty, suggests that granting amnesty to the suspects would encourage impunity and threaten the rule of law. This would be tantamount to abolishing civilized society and going back to the rule of the jungle. This would also encourage organized violence.

III. Amnesty in other jurisdictions

Kenya is not the first country to consider amnesty following violent conflict. Amnesty has been used to avoid expensive prosecutions especially where massive numbers of violators are

involved; prompting violators to come forward who might otherwise have eluded authorities; and prompting reconciliation between offenders and society.

In a number of instances, it has been used in the context of a truth telling process following protracted social conflict. The mandate of the Guatemala Truth Commission for instance prohibited it from having any “judicial aim or effect”. In El Salvador, the release of the truth commission report was answered with immediate passage of a sweeping amnesty law.¹ In South Africa, the truth commission was empowered to recommend amnesty to individuals (not groups) who made full disclosure of all the material particulars of their offence which must have been perpetrated to further a political aim.²

Supporters of amnesty seem to borrow from the South African example by arguing that the youths in custody were pursuing a political aim and that their actions helped bring about a more democratic dispensation. This line of argument has however been countered by pointing out that it is not legitimate to use undemocratic means – such as indiscriminate violence directed at civilian population rather than political or military interests – to pursue democratic ends.

Whenever and wherever it has been applied, amnesty has been a controversial feature. Its opponents see it as impunity that encourages lawlessness and leads to the breakdown of a society’s moral fibre. Human rights advocates often object that amnesties repudiate the principles of individual responsibility for criminality. It is difficult to build a society based on the rule of law unless it is understood that everyone is responsible for his or her own acts and that everyone is subject to punishment for violating the law.

The proponents of amnesty on the other hand see it as an important part of a political transition from dictatorial to democratic regimes. In most cases where amnesty is granted, former military dictators are still very influential and would threaten the transition to democracy if they knew that they might end up behind bars.

The injustice of the amnesty law to the victims of human rights violations in the case of South Africa was tempered by the requirement that amnesties would be accompanied by full disclosure and the promise of reparations for the victims. Most of the perpetrators were spared a trial and imprisonment, but only if they acknowledged their individual responsibility. The South African approach represents an innovative attempt both to honour a bargain that permitted a peaceful transfer of power, and to promote the interests of truth and justice, by requiring perpetrators to publicly acknowledge their crimes as a precondition to receiving a pardon.

IV. Amnesty and International Law

While every government has the prerogative to issue an amnesty or to pardon criminal offences or offenders under its domestic law, when the effects of such measures deprive victims of judicial protection that are guaranteed by international instruments to which the state is a party, then the matter can no longer be regarded as purely domestic. According to international law and

¹ Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, p. 86

² Chapter 4 of the South African *Promotion of National Unity and Reconciliation Act* No 34 of 1995

Article 27 of the Vienna Convention on the Law of Treaties, “a party may not invoke the provisions of its internal law as justification for failure to perform a treaty. The doctrine of *pacta sunt servanda* under Article 26 of the Vienna Convention, which establishes that “every international agreement in force is binding upon the parties to it and must be performed by them in good faith” also reinforces states’ obligations not to interpose their own domestic laws as justifications for non-compliance with international agreements.

The 1993 World Conference on Human Rights called on states to prosecute those responsible for gross human rights violations such as torture and other humanitarian violations. Although the Rome Statute for the creation of the International Criminal Court (ICC), to which Kenya is a signatory, does not prohibit amnesties, it provides for the principle of ‘complementarity’, giving both national and international courts jurisdiction over international crimes such as crimes against humanity, war crimes, genocide, apartheid, torture and other international humanitarian violations.

The duty of states to prosecute perpetrators of human rights violations can also be found in regional and international case law. In the *Velasquez Rodriguez* case³, the American Court of Human Rights held that the Honduras government was under an obligation to investigate and prosecute perpetrators of gross human rights violations. The Inter-American Commission on Human Rights has held that amnesty laws in Argentina and Uruguay were incompatible with the American Convention on Human Rights. In *Prosecutor v Furundzija*⁴ the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held that amnesties for torture were null and void and cannot be afforded international recognition. In the *Pinochet* case⁵, the British House of Lords held that the ex-Chilean dictator could be extradited to Spain to face charges of torture and crimes against humanity committed during his reign, despite an amnesty law being in force in Chile prohibiting the authorities from prosecuting him.

Proposals for blanket amnesty in other jurisdictions have been roundly rejected by such high ranking officials as the former UN Secretary General, Kofi Annan. In a report to the UN Security Council responding to similar proposals in Sierra Leone, Annan said:

"As in other peace accords, many compromises were necessary in the Lome Peace Agreement. As a result, some of the terms which this peace has been obtained, in particular the provisions on amnesty, are difficult to reconcile with the goal of ending the culture of impunity, which inspired the creation of the United Nations Tribunals for Rwanda and the Former Yugoslavia, and the future International Criminal Court. Hence the instruction to my Special Representative to enter a reservation when he signed the peace agreement stating that, for the United Nations, the amnesty cannot cover

³ American Court of Human Rights (series C) no.4, para. 165 (1988).

⁴ IT-95-17/1-T (10 December 1998).

⁵ *R v Bow Street Metropolitan Stipendiary Magistrate Ex Parte Pinochet* (1998) 3 WLR 1456 (HL).

international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law [...]."⁶

V. KNCHR POSITION AND ADVICE

The Kenya National Commission on Human Rights recognizes the fact that the violence that took place after the disputed election results were announced took place in extraordinary circumstances and that there is need to balance this fact with the right of victims to judicial remedy for violations committed against them. In the circumstances, the Commission advises as follows:

1. That the Police and the prosecution authorities should make public the exact number of people being held in custody, undergoing trial and being investigated as a result of the post election violence. There is also need to categorize the seriousness of the offences with which they are charged.
2. That persons being detained without charge should be produced in court without further delay or released forthwith.
3. That in the interest of truth and justice, no blanket amnesty should be allowed. Blanket amnesty would violate the rights of victims to life, property and equal protection of the law, which are all guaranteed by the Constitution and in international law. Indeed one of the agreements signed at Serena Hotel on 4th March 2008 provides: "No blanket amnesty will be provided for past crimes. Individual amnesty may be recommended... in exchange for the full truth..."
4. That amnesty can be considered for certain minor offences but must be granted only upon individual application and within a legislative framework. To qualify for amnesty, alleged perpetrators must make full disclosure of the act for which they are applying for amnesty and tell the whole truth which might lead to the arrest and prosecution of the financiers and planners of the violence. Before amnesty is granted, the views of the victims should be sought and taken into account.
5. That no amnesty should be granted for international crimes, such as crimes against humanity, war crimes, genocide, torture and other serious violations of international humanitarian law. The Serena agreement also states, "... 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"
6. That prosecution of alleged perpetrators of post election violence should be fast-tracked. This might be done through the establishment of special courts for this purpose.
7. That while the mechanism for amnesty is being legislated, suspected perpetrators, who may not be facing charges of serious human rights violations, should be bonded to keep the peace.
8. That amnesty should apply across the country without discrimination and based purely on the type of crimes committed.

⁶ Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone S/1999/836, 30 July 1999. Para 55.

9. That the law should be applied equally, and robust investigations into the activities of politicians who incited the violence and the conduct of police who used excessive force should continue and all the culprits brought to justice without discrimination.

Finally, the Commission wishes to restate its position that violence must never be rewarded and that while reconciliation is important, holding perpetrators of violence to account is crucial if we are to combat the culture of impunity.