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TJRC Press Release on Indemnity Act

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9 February 2010

TRUTH COMMISSION RESPONDS TO THE INDEMNITY ACT

A number of individuals and organizations have raised concerns that the Indemnity Act of 1972 (Chapter 44 of the Laws of Kenya) is a barrier to the work of the Truth, Justice & Reconciliation Commission (TJRC).

After reviewing the terms of the Indemnity Act, and after reviewing our own powers and obligations under the TJRC Act, we as the TJRC take the position that the Indemnity Act does not and will not affect our ability to fulfill our mandate of investigating *all* violations of human rights committed throughout the *entire* country of Kenya, including those violations that occurred between 1963 and 1967 in the areas covered by the Indemnity Act (North-Eastern Province, and the Isiolo, Marsabit, Tana River, and Lamu Districts).

Specifically, it is the considered view of the TJRC that the Indemnity Act **does not**:

- i) Bar in any way the TJRC from inquiring into, investigating, analyzing, or making recommendations with respect to human rights violations that happened in the areas during the period covered by the Indemnity Act;
- ii) Recommending reparations for harm suffered as a result of said violations;
- iii) Identifying perpetrators of said violations; and
- iv) Recommending prosecution of any alleged prosecutions.

There are three reasons the Indemnity Act does not apply to the TJRC. (See below for more details on each of these arguments.)

1. Parliament did not subject the TJRC to the Indemnity Act when it passed the TJRC Act. Under basic rules of statutory construction, the more recent legislation passed by Parliament takes precedence over any earlier conflicting legislation. Thus the TJRC Act takes precedence over the Indemnity Act.
2. Even if some still believe that the TJRC is subject to the Indemnity Act, by its own terms the Indemnity Act does not apply to the TJRC. There are two arguments:
 - a. The Indemnity Act clearly states that it does not apply to the institution of any proceedings on behalf of the Government. The TJRC was created by the Government and thus it is exempt from the provisions of the Indemnity Act.
 - b. The Indemnity Act only applies to acts committed in good faith in furtherance of the public interest. It is well settled that violations of fundamental human rights like those to be

investigated by the TJRC cannot, by definition, be conducted in good faith. From Nazi Germany to Cambodia to Bosnia to Rwanda, it is clearly established that crimes against humanity and other fundamental violations of human rights cannot be done in good faith.

The TJRC therefore wants to reiterate that the Indemnity Act does not provide any barrier to its activities. We want to assure the people of Kenya that we will, as our mandate requires, thoroughly investigate *all* violations of human rights that have occurred throughout *all* of Kenya, including those acts that are the subject of the Indemnity Act. Thus the TJRC will investigate all violations of human rights that occurred in North-Eastern Province and the districts of Isiolo, Marsabit, Tana River, and Lamu Districts, including those committed between 1963 and 1967.

Finally, the TJRC notes that members of Parliament have proposed legislation to repeal the Indemnity Act. As an institution committed to human rights, justice, and reconciliation, the TJRC wholeheartedly and unreservedly supports these efforts.

Further Information

Argument 1:

The Truth, Justice and Reconciliation Act of 2008, as amended, clearly requires that the TJRC look at all violations of human rights that occurred between 12 December 1963 and 28 February 2008. The TJRC is to establish “an accurate, complete, and historical record of violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office, both serving and retired, between 12 December 1963 and 28 February 2008....” (TJRC Act, Art. 5) Under basic principles of statutory construction, when two pieces of legislation cover the same issue and are in conflict, the later legislation is the operational law *unless* the later legislation makes clear that the earlier legislation is still to apply. Parliament chose not to subject the TJRC to the Indemnity Act. Parliament made clear that the TJRC is to establish a *complete* historical record of violations during the entire mandate period, including the period covered by the Indemnity Act. Parliament did not include in the TJRC Act any reference to the Indemnity Act. To the extent the Indemnity Act conflicts with or otherwise hinders the work of the TJRC, it does not apply. (This is in contrast to other pieces of legislation that are specifically mentioned in the TJRC Act and to which the TJRC is still subject.)

Argument 2(a):

The Indemnity Act specifically states that its provisions do not prevent “the institution...of proceedings on behalf of the Government.” (Indemnity Act, Art. 4). In creating the TJRC, the Government instituted proceedings on its own behalf. Thus even by its own terms, the Indemnity Act does not apply to anything undertaken by the TJRC.

Argument 2(b):

The TJRC is required to look at violations of fundamental human rights, including summary executions, sexual violence, and other atrocities. Such acts clearly violate both Kenyan and international law (including numerous treaties to which Kenya is a party), and thus by definition cannot be undertaken in good faith. The Indemnity Act specifically applies only to those acts done in good faith in furtherance of the public interest. (Indemnity Act, Art. 3.) The violations of fundamental rights within the mandate of the Commission cannot, by definition, be carried out in good faith in the public interest. In fact Parliament reaffirmed this position by making clear that the TJRC cannot recommend amnesty for any act that constitutes a gross violation of human rights, including crimes against humanity. To do otherwise would violate well established international law, the Constitution of Kenya, and the commitment Kenya has made over the years to the highest ideals of human rights and justice.