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The Truth, Justice and Reconciliation
Commission of Kenya

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Truth, Justice, and Reconciliation Commission

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**THE KENYAN TRUTH JUSTICE AND
RECONCILIATION
PROCESS.**

(OCTOBER 2010)

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1.0 TRUTH JUSTICE AND RECONCILIATION COMMISSION

The Truth Justice and Reconciliation Commission was established in 2008 by an Act of Parliament. The Commission has been established to inquire into gross human rights violations and other historical injustices in Kenya between 12th December 1963 and 28th February 2008 with the specific objective of promoting peace, justice, national unity, healing and reconciliation among the people of Kenya. The Commission consists of 8 commissioners and 8 Directors heading various Units. It has its headquarters in Nairobi and has 4 regional offices in Mombasa, Kisumu, Eldoret and Garissa. The secretariat when fully set up is anticipated to have 433 employees; this number includes 304 statement takers.

2.0 BACKGROUND

The Kenya Truth Justice and Reconciliation Commission (TJRC) was established by an Act of Parliament¹ and it came into force in July 2009 with the appointment of the commissioners.

The Commission has 8 Commissioners² who were all appointed as set out in the Act.³The Commission has a mandate period of 2 years.

The TJRC is part of the accountability component of Agenda Four (4) of the National Accord signed in 2008 that provides a framework for transitional justice.

In the wake of a new constitutional dispensation in Kenya, the work of TJRC is crucial to the people of Kenya as it:

- Provides justice for those who suffered violations and historical injustice and will make proposals for prosecutions, reparations and amnesty for victims
- Addresses past conflicts that have caused disharmony among Kenyans, fostering reconciliation and unity necessary for co-existence in the new Kenya
- Will, on the basis of the broad constitutional framework for institutional reforms, propose more concrete and specific ways to reform our institutions implicated in gross violations
- Will guard against sectarianism and revisionist narratives of the history of abuses and conflict by piecing together a common narrative to move a united and developed Kenya forward.

The Commission's final outcome is a Report, which shall detail its findings and recommendations. The Report is to be submitted at the end of the Commission's mandate which has been statutorily provided as November 2011, or May 2012 should the statutory six month extension be granted, with a three month winding up period.

¹ The Truth Justice and Reconciliation Act, 2008

² See Annex 1 – Names and Profiles of TJRC Commissioners

³ Truth Justice and Reconciliation Act, 1st Schedule – Procedure for Appointing Commissioners

3.0 STATUS, TRENDS AND ISSUES

3.1 PROBLEM ANALYSIS: MANDATE

The Commission's mandate is to establish an accurate, complete and historical record of violations and abuses of human rights and economic rights on persons by the state, public institutions and holders of public office both serving and retired between 12th December 1963 and 28th February 2008, as set forth in Sec 5 of the TRUTH, JUSTICE AND RECONCILIATION (hereinafter TJR) Act of 2008. The Commission is also expected to establish as complete a picture as possible of the causes, nature and extent of the gross violations of human rights and economic rights committed during the period.

3.2 STAKEHOLDER ANALYSIS

The Commission will work with a number of both implementing and operational partners, who are stakeholders of the entire process. This will include, but not limited to the government of Kenya, civil society organisations, community based organizations, victims and donors.

Further the Commission shall partner with Civil Societies that have been engaging with the process such as Action Aid, Catholic Justice and Peace, PACT, Kituo cha Sheria, Legal Resources Foundation, NCKK amongst others. Civil societies shall mobilize persons to engage with the process as well as monitor progress by the Commission.

3.3 SITUATION ANALYSIS

Despite a few challenges at the inception of the Commissions mandate, the Commission is now fully operational and has rolled out its work-plan. Statement taking is ongoing, hearings are scheduled to begin no later than December 2010, community dialogues have been initiated with a concept paper on the same underway and a skeleton of the final report already prepared.

The commission has developed policies, rules, procedures and concept papers that enable it to fully perform its duties.

3.4 STATISTICS

4.0 TJRC WORK-PLAN

The TJRC work-plan is divided into four deliverables or activities:

4.1 Statement taking

Statements recorded from victims across the country are the main source of information for the TJRC on gross human rights violations suffered by them during the mandate period. The statement taking process provides victims with the opportunity to tell the truth about their experiences and those of close friends and relatives.

Statement taking constitutes one of the primary ways that the Commission is getting information. Other ways include interviews (audio, video and written), memoranda from members of the public and institutions.

Secondary sources of information are other Commission reports (for example parliamentary select committees, commissions of inquiry *et cetera.*) and print media.

Statement taking is a crucial and key process for the Commission. It is also the first step for the Commission as it seeks to collect data on historical injustices and gross violations of human rights. The Commission has already successfully undertaken statement taking in Mount Elgon District within Western province and in September launched the exercise across the country. Statement taking as a data collection process is central in the work of the Commission. The success of the work of the commission is dependent on how well information is collected, processed, stored and managed.

With experience from the exercise in Mount Elgon, the Commission is cognizant that training of the Statement Takers is crucial for the success of statement taking. The Commission developed a manual on statement taking and 304 statement takers⁴ were trained and hired to take statements across the country.

Provision of psycho-social support to the witnesses, statement takers and staff of the Commission, is vital and this should be provided all through the statement taking, community dialogues and hearing processes.

For the proper management and security of the information to be gathered and received by the commission, it is essential for the Commission to develop a state of the art database. In this regard, the Commission proposes to engage the services of competent IT Consultants and procure the necessary equipments. It will also be necessary to train the data entry clerks whose responsibility it shall be to enter the information into the database.

A lesson learnt from Mount Elgon is that the Commission must undertake continuous civic education and partner with civil society organisations so that the public is well informed on the mandate and process of the Commission.

Over and above the statements, individuals, institutions and groups of people can also submit memoranda in regard to the issues under inquiry by the Commission. The Commission has developed a guide to preparing memorandum.

4.2 Hearings

The TJRC will conduct public and private hearings at which victims, perpetrators, experts will give testimony relating to gross violations of human rights.

There will be three types of hearings:

- a. Individual hearings, which will focus on individual cases, and the experience of individuals with respect to violations within the mandate of the Commission

⁴ 113women and 189 men

- b. Thematic and Event hearings, which will focus on types of violations and other broad themes within the mandate of the Commission
- c. Institutional hearings, which will focus on the role played by an institution or institutions with respect to violations within the mandate of the Commission.

Hearings will be held both as forums to enable public participation in the process as well as to enable victims and perpetrators to be heard. The hearings will be opportunity to highlight particular patterns of crimes either in geographic region, or on thematic issues, for example, violence against women. Rules of procedure for the hearings have been developed and gazetted.⁵ As provided for in the TJRC Act, private hearings will be held wherever necessary, in the interest of security of victims or witness, or in order to safeguard their privacy and dignity.

In preparation for the upcoming hearings, the Legal Services Unit of the Commission has developed policies on General Immunity for all witness before the Commission, the Right to Counsel during hearings, Summons and Compulsory Processes, Hearings Generally and on Amnesty and Prosecution.

The Commission has selected Mt. Elgon as the first region to sit for hearings. This draws from ongoing analysis of statements that were taken from Mt. Elgon in June where over 1500 statements were received.

4.3 Community dialogues

The TJRC will hold discussion forums bringing together different groups across the country to chart ways of establishing reconciliation, harmonious co-existence and national unity. This aspect of the TJRC's work presents avenues for collaboration with the National Cohesion and Integration Commission and other Agenda Four Commissions.

Community Dialogues will be local level participatory processes that provide a platform for addressing and resolving conflict within those communities. These should build on the work of existing peace committees and religious bodies such as Catholic Justice and Peace Commission (CJPC) and National Council of Churches in Kenya(NCCK) at the local level as well as the work of the National Cohesion and Integration and Commission (NCIC).

The community dialogues will also be critical forums for civic education on the work of the Commission as well as ensuring that there are structures and processes to continue conversations started as a result of the Commission's work.

4.4 Final report

As the Commission's main product, the product will document the Commissions work relating to three aspects: a historical record of gross human rights violations; outline of the Commission's

⁵ Truth Justice and Reconciliation (Hearing Procedure) Rules, 2010. Legal Notice 131. Kenya Gazette Supplement No. 53. 20 August, 2010. Enclosed.

findings and detail recommendations; how to address past violations and injustices through reparations and prosecutions; legal and institutional reforms and memorialisation to prevent future violations.

The report of the Commission is the culmination of all its work and shall be the basis for implementation of the Commission's recommendations – from prosecutions to reparations and the granting of amnesty for crimes that do not qualify as a gross violation of human rights. Drawing from lessons and good practice of other truth commissions, this Commission plans to develop thematic reports drawn from the larger report, including, a Women's Report, Children's report, and an abridged version of the report in Braille.

Experience of Truth Commissions in other countries has informed TJRC that its value as a commission is to meet its wide mandate and deliver on time. To this end adequate funding over and above government sponsorship, that forms a small fraction of its budget, cannot be over-emphasized.

In historical perspective, the Kenyan TJRC prides itself in being the first Commission to incorporate socio-economic crimes and cultural rights violations as part of its core mandate. Whilst this escalates the finesse of the Commissions outcome, it similarly demands of exquisite expertise and extensive justicious and reconciliatory mechanisms that require finances budgeted for but not yet acquired.

5.0 PROGRESS REPORT

5.1 304 statement takers have already been trained. There shall be regular review and reflection to monitor progress and quality of the work, and also to allow for debriefing of the statement takers and thus build their capacity to undertake the statement taking exercise. This training shall be undertaken on a regional basis. It is also proposed to include civil society partners in this process. This will guarantee that these partners who are supporting the work of the Commission are well versed with the work of the Commission.

The success of the statement taking will contribute substantially towards the realization of at least three aspects of the Commission's mandate. First, statements are a critical source of information geared towards establishing a complete and accurate record of gross human rights violations and historical injustices in Kenya as required under the Act. Secondly, as the main source of information on victimization, statement taking is key to the justice aspect of the commission's work. The statements will enable the Commission to: identify victims of gross violations of human rights, to obtain a picture of harm suffered by them and form the basis of the reparations process. Statements will also contribute to the identification of perpetrators and form the foundation of the commission's recommendation relating to prosecutions and amnesty. Critically statements will give voice to the victims of violations of human rights

5.2 A database needs to be developed for documentation of the statements received and to inform analysis of information received. Data entry clerks shall be trained so as to guarantee that the information collected is correctly fed into the data management system of the Commission.

The Commission will have a state of the art database that will enable secure documentation of information as well as analysis of the data on various parameters e.g. by sex, or by specific themes. The database will help inform the cases to be selected for hearing as derived from the analysis.

5.3 The Commission has developed a civic education and media communication strategy aimed at communicating effectively the mandate of the Commission and its process. The Commission is alive to the fact that misinformation on the work and process of the Commission serves to impede public participation in the process. Civic education information and materials shall be tailored to different target groups, for example women, children and persons living with disabilities. Already the Commission has conducted successful media campaigns using vernacular radio stations. The Civic Education and outreach continues to expand the Commissions network of partnering organisations at the grassroots level.

The Commission has held several forums and meetings across the country including the Coastal region, Western, Nyanza, Rift Valley, Central, North Eastern and Nairobi.

The Kenya TJRC has a website that gives accurate information. The website is interactive and will go a long way in enhancing the Commissions communication to the various public audiences.

5.4 There shall be need for continuous psycho-social support for witnesses and staff. The Commission has already identified the Kenya Association of Professional Counsellors (KAPC) as a partner for the provision of psycho social support.. KAPC through its networks provided counsellors who trained the statement takers on trauma management.

In a number of cases the Commission shall support participation of witnesses by for example, provision of transport to and from hearing venues and accommodation wherever necessary. Where medical treatment is necessary for witnesses, particularly as a result of the crimes they witnessed or were affected by, the Commission shall provide support or make references to institutions that can provide the needed services..

Witnesses' participation shall be enhanced and their well-being both psychosocial and physical, shall be catered for – ensuring that they not only participate, but do so in safety and dignity.

5.5 The Commission's work will culminate in a final report that will form the record of its work. Thematic reports shall also be drawn from the main report. This will enable dissemination and follow up of recommendations and civil society groups following expiry of the Commission's mandate.

There shall be a comprehensive record capturing witnesses' voices and participation and enabling dissemination and follow-up of the recommendations.

6.0 IMPLEMENTATION PROCEDURES

6.1 STRUCTURES

The Commission has organized its work-plan into 4 deliverables. These outcomes will be realised through the structures established within.

These include:

- a. Formation of Committees as provided for in the Act⁶.

The Commission has established the following Committees; Human Rights Violations Committee, Amnesty Committee, Reparations and Rehabilitation Committee, and Reconciliation Committee – each convened by a Commissioner.

The Committees then implement their work through the support of the various Units.⁷

- b. The secretariat

The Secretariat is comprised of the Secretary of the Commission and 8 directors⁸, and will ensure the implementation of the work-plan and the daily functioning of the Commission.

There are currently 6 directors, THE Directors of Investigation and Information and Documentation are yet to be recruited.

- c. Conceptual framework and rules

The Commission has developed several frameworks and rules to govern it and manage the demarcation of its mandate.⁹ They set out the approaches that will govern taking of statements, hearings, community dialogues and the final report.

In place also is a code of conduct that all staff of the commission abide to that among other things works to curb conflict of interest and ensure that professional and ethical standards are respected and honoured within the Commission.

The statement takers are also signatories to code of conduct and confidentiality agreement that has been developed.

7.0 PARTNERS

The Commission is working together with partners to implement its work plan. The partners include the government of Kenya, civil society organisations, community based organisations, victims' networks and donors.

The partners are an integral part of the Commissions outcome by facilitating various aspects of its work-plan.

8.0 WITNESS PROTECTION

⁶ Truth Justice and Reconciliation Act, S. 22

⁷ See Annex 2 – TJRC Organisation Structure.

⁸ Director Investigation, Director Research, Director Legal Services, Director Communications, Director Finance and Administration, Director Information and Documentation and Director Special Support.

⁹ Hearing rules, Commissioners Code of Conduct, Policies on Hearings, Amnesty, Immunity, Warrants, Right to Counsel, Gender Policy and Concept on Participation of Children

An independent witness protection Agency has been established as per the Witness Protection Act (as amended in May 2010), the Commission is currently in discussions with the Agency to develop a framework that will facilitate protection of witnesses before, during and after the hearings.

The Witness Protection Act (WPA) was born out of the difficulties Kenya experienced in successfully investigating and prosecuting corruption, organised criminal gangs, and militias and cases arising out of ethnic clashes¹⁰, due to the unwillingness of witnesses and victims to cooperate for fear of reprisal.

Kenya is the second country in Sub-Saharan Africa after South Africa to have witness protection legislation.

UNODC has been involved in assisting Governments, including Kenya, to build up effective witness protection programmes that ultimately help to prosecute offenders.

With UNODC support, amendments to the Witness Protection Act and relevant regulations have been finalized ensuring that the witness protection programme in Kenya meets international standards¹¹.

Amendments to the Act improved it as follows;

1. It dissolves the Witness Protection Unit and replaces it with the establishment and incorporation of an independent Witness Protection Agency that will be delinked from the AG's office and enjoy independence and autonomy. Under the previous legislation which was enacted in 2006, all aspects of witness protection were left to the AG.
2. The Agency will be chaired by a director (not AG) who will be a qualified advocate, the agency will run a witness programme which will include securing witnesses, concealing their identity, sometimes giving them new identities and relocating them if the need arises. The director, who is chief executive and accounting officer, enjoys the security of tenure.
 - a. The director will have an assistant and protection officers who enjoy powers, privileges and immunities of a police officer.
3. The Agency, which has special exemption from other laws, has the powers to buy, stock, and use firearms and spy gadgets that will be required in their covert operations.
4. Agency officers will have the powers to summon public officers and individuals to produce documents linked to their work.

¹⁰ The Nation (Kenya), Kenya: Attorney general tells off UN's Alston over police killings, Africa News Update: The Norwegian Council for Africa, 3 May 2009 <http://www.afrika.no/Detailed/18019.html> (accessed 4 May 2009).

¹¹ UNODC "Good Practices in the Protection of Witnesses in Criminal Proceedings Involving Organized Crime". The good practices which were launched in February 2008 provide a comprehensive picture of available witness protection measures and offer practical options for adaptation and incorporation in the legal system, operational procedures and particular social, political and economic circumstances of UN Member States. They have been developed in a series of regional meetings with the active participation of expert representatives from law enforcement, prosecutorial and judicial authorities of Member States. They reflect experience from different geographical regions and legal systems, together with existing literature, previous and ongoing work by UNODC as well as other international and regional organizations.

5. The Agency has financial autonomy, stating that its money will be drawn directly from the Consolidated Fund.
 - It will also have the powers to receive grants and donations.
6. The penalty to be meted out on any person who obstructs the work of the proposed Witness Protection Agency has been increased.
7. The Agency will among others have powers to establish and maintain a witness protection programme.
 - It is also mandated with determining the criteria for admission and removal of a person from the programme.
8. Witnesses will now be guaranteed State protection complete with the option of relocation.
9. Oversight Witness Protection Advisory Board, a Witness Protection Appeals Tribunal as well as a Victims Compensation Fund to ensure compensation for the death of any victim of a crime committed during the period when under state protection.

The Challenge that the Commission shall have on relying on this institution is that it is still in the formative stages and may therefore not have the institutional capacity to provide protection to the TJRC witnesses.

To provide protection to its witnesses the Commission shall place a high premium on confidentiality and where necessary proceedings shall be held in Camera.

9.0 REPARATIONS

The Research Unit has prepared a draft policy on reparations and is developing a broader conceptual paper on reparations and the same can be supported by partners through the Commission.

Strategies of interim reparations are being considered, in situations that the same will alleviate permanent suffering and damage to victims.

Reparations is not financial compensation only, meant to silence victims neither is it meant to serve only one set of victims, but rather it should provide;

- ◆ Recognition - Recognize suffering and acknowledge responsibility, But who should acknowledge? It should not only come from perpetrators; the State in many cases is accountable for its failure to protect, investigate, prosecute perpetrators.
- ◆ Repair¹² - Victims cannot be completely restored to their previous state; this should not diminish the importance of all efforts at repairing victims, physically as well as spiritually.

12. Reform – Reparations are not backward-looking only; one of the goals is non-repetition, to prevent future violations/ensure future accountability. This can be done as early as the TRC recommendations process, through victim participation in the process. By allowing victims a voice, specific reforms that are feasible can already be made (e.g. civilian authority over the military and how to implement that) and violations prevented. Cite guarantees of non-repetition.

- ◆ Rights - Reparations policy should be understood in terms of victims' right to redress rather than a benevolent handout by the government
- ◆ Reconciliation - Cannot be compelled but reparations can help restore "civic trust." But reparations should not be conditioned on reconciliation. See Indonesia example; Nepal public rituals.
- ◆ Realistic¹³ - Realism is implicitly part of every objective, and even incorporated into the guidelines: "... victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation..."
- ◆ Redistributive? - Should reparations attempt to redistribute economic resources?

The TJR Act state that reparations should aim at "...dignifying the victims by measures that will alleviate their suffering, compensate their social, moral and material losses, and restitute their rights."

Section 42 of the TJR Act states that the Commission shall make recommendations for reparations for the victims, it may make regulations to provide for reparation and section 49 states that all recommendations shall be implemented.

The UN Basic Guidelines state that reparation should provide

- ◆ Restitution¹⁴
- ◆ Compensation¹⁵
- ◆ Rehabilitation
- ◆ Satisfactionⁱ
- ◆ Guarantees of non-repetition

When TJRC looks at victims, distinction between those who testify and those who don't/can't: too many, harm is common across Kenya; yet, should look at collective harm and seek testimony there too: Inter-American Court of Human Rights has ordered States to provide communities with reparations

¹³ But realism is most important when designing a reparations program: the program must not overpromise – compare South Africa; Sierra Leone; Timor Leste; Liberia. The recommendations of a TRC become the basis for reparations programs. Hence, those recommendations must be realistic.

¹⁴ Restitution has been a key element in reparations programmes in the former Soviet bloc countries. In many of them, restitution for smaller housing and farms was possible, but not for industrial property – specially after 70 years in the case of the Soviet Union. Ghana provided restitution of brewery but not market stalls; Shows the problem of restitution: do we restore unequal relationships and lack of access to economic resources?

¹⁵ "Compensation" in the UN Guidelines includes payment of money for both physical harm and economic damage.

10.0 VICTIM ASSISTANCE

The Commission is alive to the fact that most of the witnesses/victims who will come forward to testify have undergone suffering and are of meagre economic status. This means that the Commission has to facilitate their participation in the Hearings.

It is evident that a lot of psycho-social support will be mandatory especially during the hearings.

During statement taking, hearings and community dialogues, the commission will be responsible for according assistance to victims to enable them access the different forums of the Commission. This will entail providing transportation and accommodation when necessary. Immediate medical assistance that will enable witnesses and victims to testify, will be necessary to ensure cases are heard and natural justice prevails.

11.0 WORKPLANS AND TIMETABLES

The Commission has a work-plan that guides its activities towards fruition of its mandateⁱⁱ.

1st September 2010 – January 2011 (5 months): statement taking nationally and individual hearings in Mt.Elgon

February 2011 – August 2011 (7 months): individual hearings in the eight regions; Thematic, Event and Institutional Hearings in Nairobi or other appropriate venues

August 2011 – Progress report and Interim Report

September 2011 – November 2011: Final Report of the TJRC; presentation and publication

December 2011 – February 2012: statutory winding down period.

12.0 ANALYSIS OF KEY RISKS AND ASSUMPTIONS

12.1 Assumptions

- That the Commission shall continue to enjoy increasing support and goodwill from stakeholders thus guaranteeing it the resources that it needs to fulfil its mandate.
- That Civil society shall support the work of the Commission by *inter alia*, providing civic education, mobilising the public to participate in the process.
- That the Commission shall have sufficient funds to carry out its work.

12.2 Risks

- That the delayed roll out of the Commissions work-plan might necessitate application of the statutory 6 months extension.
- That the Commission may not have enough funds during its extension

12.3 Analysis

- At the moment the Commission is solely funded by the government. The Commissions budget for the current financial year is Kshs 1.2 billion. The Government has allocated Kshs 190m and is also paying the salaries and allowances of the Commissioners out of the Consolidated fund. The Commission is aggressively seeking support from other donors. The Commission is optimistic that it will gradually bridge the funding gap.
- Notwithstanding the bumpy start the Commission is gradually stabilising. Admittedly the Commission does not enjoy the support and confidence of a number of civil society organisations. However the Commission is broadening its network of organisations who are primarily based outside of Nairobi. These organisations have been instrumental in providing the Commission with logistical support as the commission undertakes the statement taking exercise across the country. The Commission has maintained open lines of communication even with the organisations that have declared that they will not engage with the process.
- The Commission continues to work. Substantial progress has been made. The Secretariat is staffed and programmes are rolling out on schedule.
- To mitigate risks the Commission shall conduct massive civic education. The Commission is painfully aware that part of the public discussion around it is fuelled by misinformation. The Commission is also aware that public opinion is likely to shift as we move into the public phase of our work that is the statement taking and the hearings.

13.0 HUMAN RESOURCES¹⁶

The Commission has made deliberate efforts to ensure that there is regional and gender balance in the recruitment of staff.

14.0 MONITORING AND EVALUATION

Whereas the Commission does not have an internally designated unit on monitoring and evaluation, it does have strong internal structures that monitor and evaluate its progress or otherwise. The Commission's work-plan is monitored through periodic activity reports and at the end of the project the Commission shall compile a comprehensive report.

The engagement of civil society in implementing the Commissions work-plan serves as external monitoring and evaluation mechanisms, as they critique the execution of their areas of interest and expertise.

15.0 BUDGET¹⁷

¹⁶ See Annex on structure and staffing levels