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Makau Task Force Report - Overview

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Republic of Kenya

**Report of the Task Force
on the Establishment of a
Truth, Justice and Reconciliation Commission**

Chairperson
Prof. Makau Mutua

Presented to
Hon. Kiraitu Murungi
The Minister for Justice and Constitutional Affairs

August 26, 2003

CHAPTER ONE: AN OVERVIEW

CHAPTER 1: Overview

Section 1. EXECUTIVE SUMMARY

On April 17, 2003, the Republic of Kenya appointed the Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission. Its mandate was to find out if a truth commission was necessary for Kenya, and, if so, to make recommendations on the type of truth commission that ought to be established. The Task Force has drawn its conclusions and recommendations from a comprehensive and open process of fact-finding, research, public hearings, written submissions, data collection, interviews, consultations, a national conference, an international conference addressed by, among others, Archbishop Desmond Tutu, Professor Ali A. Mazrui, Professor Henry Steiner, and Justice Albie Sachs, and deep deliberations and reflections among its members. The process and methodology adopted by the Task Force put the sovereign will of the Kenyan people at the centre of its activities. Above all, the Task Force has been guided at all times by Kenya's national interests and the unequivocal belief that Kenya must become a human rights state so that all those who live in it can realize their full potential as human beings.

The Task Force is aware that the question of a truth commission is an emotive issue for the country. At the same time, the Task Force believes that the quest for democracy, economic prosperity and development are difficult tasks for which there are no shortcuts. Difficult choices have to be made by the people and government of Kenya if democracy, the rule of law, economic renewal, and respect for human rights are to become a reality. It is now an internationally acknowledged fact that transitional justice is an inescapable imperative for countries emerging from decades of gross misrule, abominable human rights violations, and large-scale plunder of public resources, shameless graft, and theft of public wealth.

Equally indisputable is the fact that a ravaged state, such as Kenya, cannot be recreated without an agenda for transitional justice to end public corruption and prevent human rights abuses. But transitional justice cannot be achieved unless the mistakes and atrocities of the past are properly, fairly, and comprehensively investigated, the perpetrators held accountable, and victims recognized and their dignity restored. In other words, the past must be confronted, the state must be audited, and the country must be exorcized of the ghosts of the past that still haunt it. Amnesia would simply lead to the certain death and failure of state and society.

It is important to state, however, without fear of contradiction, that the question of transitional justice is not a matter of theory or the concern of only academics and human rights advocates. It is a time-tested vehicle for national recovery and reconciliation. It is the one, and the only, option for banishing impunity from the national practice and psyche. No one, especially the head of state, or any other official, is above the law. Respect for the rule of law must start with the chief executive, for it is the head of state that is the embodiment of the sovereignty and legality of the state. In fact, successful transitions in other countries have dealt with the question of impunity for former officials, including heads of state, without fear or favor.

In South Africa, for example, former President Nelson Mandela was subjected to sustained scrutiny by the courts on any number of matters. It is an undeniable fact that the unrivalled reverence, unprecedented, and iconic status that Mr. Mandela enjoys in the world today is largely attributable to the respect that he showed for the rule of law and the transitional processes that he set in motion. Elsewhere, in South Korea, Chile, and now in Zambia, former heads of state have been subjected to judicial and other forms of official investigation for abuse of office and theft of public resources. Former public officials who plundered their economies and committed atrocities have nowhere to run because of the emerging jurisprudence of universal jurisdiction, which is evidenced by the creation of the International Criminal Court.

The work of the Task Force has been guided by all these considerations, although it must be clearly stated that the Task Force itself does not have any views that are independent from those of the people of Kenya. The conclusions of the Task Force are those of the majority of Kenyans who submitted their views to the Task Force, and which conclusions the Task Force believes are a reliable barometer of the opinion of the majority of Kenyans. It is encouraging, and a testimony to the maturity of Kenyans, that their views comport with the views of the international community and those of international law. This is all the more fitting because in December 2002, Kenyans overwhelmingly rejected despotism and kleptocracy. They peacefully brought about regime change for the first time in forty years through the power of the ballot. A rare occurrence in the troubled states of Africa, the December 2002 elections marked real and fundamental regime change, and set in motion a break with a past marked by illiberalism, atrocities, and impunity.

The establishment of the Task Force, the anti-corruption campaign, the Judicial Commission of Inquiry into the Goldenberg Affair, which has revealed the massive looting of the public purse by officials of the former regime, the requirement for the declaration of wealth by public officials, the determination to create a new constitutional dispensation, the reformation of the judiciary, the dramatic shift in public discourse, and the stated commitment by President Mwai Kibaki to foster a rule of law state are irrefutable testimonials of a break with the past and the undeniable transition which the state has embarked on.

The people of Kenya have spoken, and it is the obligation of the Task Force to faithfully report on what Kenyans have told it. Kenyans have asked their government to immediately establish a truth, justice, and reconciliation commission. They have overwhelmingly said that the truth about the past must be known, that perpetrators must be identified and punished, that victims must be accorded justice, and that reconciliation is only possible after the truth is known and justice is done. Kenyans want an effective and credible truth commission, an institution that will not engage in a witch-hunt or a whitewash. Such a commission must have the powers to recommend lustration, that is, to bar offenders from holding public office. It must be empowered to recommend redress for victims, such as compensation, restitution, and reparations. It should be authorized to inquire into stolen property and funds, and to recommend that they be returned to the public or the individuals from whom they were stolen. The truth commission should investigate gross human rights violations and economic crimes and recommend prosecutions. The truth commission should be established before June 2004, be independent, and be fully supported by the state. It must make recommendations on measures that must be implemented to prevent a recurrence of past abuses.

Such a commission should last anywhere from 1-2 years and be composed of commissioners who are beyond reproach. The truth commission must have the power to summon anyone and investigate any person in connection with past atrocities and abuses.

Section 2. TERMS OF REFERENCE

On April 17, 2003, by a special issue of the Kenya Gazette, the Government of the Republic of Kenya through Hon. Kiraitu Murungi, the Minister for Justice and Constitutional Affairs, appointed the Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission. Professor Makau Mutua, who is also the Chairman of the Kenya Human Rights Commission, chaired the Task Force. The Task Force was set up four months after the ascension to power of the National Rainbow Coalition under President Mwai Kibaki.

The terms of reference of the Task Force were to recommend to the Minister for Justice and Constitutional Affairs whether the establishment of a truth, justice, and reconciliation Commission was necessary for Kenya. If so, the Task Force was mandated to recommend to the Minister how and when such a commission should be established; the membership of such a commission; the terms of reference of such a commission; the powers and privileges that should be conferred upon the commission in the execution of its mandate; and the historical period to be covered by the commission's investigations. The Task Force was empowered to make such further recommendations incidental to the foregoing, as it may consider necessary. It also was given all the necessary or expedient powers for the proper execution of its mandate.

The Task Force was mandated to hold public meetings in any locations of its choice for the proper discharge of its functions. Further, the Task Force was authorized to determine all questions before it, including the adoption of its final report, which would be by a simple majority of the members present. Among its other mandates, the Task Force was authorized to receive views from members of the public and oral and or written submissions from any person with relevant information. It could use any official reports of any previous investigations relevant to its investigations, and it could carry out or cause to be carried out any such studies, research, and evaluations of the experiences of other countries where truth commissions have been established. The Task Force was required to submit its final report to the Minister by August 31, 2003.

The Task Force was composed of the following members: Professor Mutua, the Chairperson, Rev. (Dr.) Timothy Njoya, the Vice Chairperson, Rev. Mutava Musyimi, Bishop (Prof.) Zablon Nthamburi, Rev. Patrick Rukenya, Mr. John Githongo, the Permanent Secretary for Ethics and Governance or his representative (Mr. Kairichi Marimba), Mr. Tirop Kitur, Mr. Julius Sunkuli, Ms. Raychelle Omamo, Ms. Jane Kiragu, Dr. Josephine Ojiambo, Ms. Mumina Konso, Mr. Davinder Lamba, Dr. Amukowa Anangwe, Ms. Zarina Patel, Mr. Kibe Mungai, Sheikh Ali Shee, and Ms. Roselyne Lagat-Korir, the Task Force Secretary. The Secretariat staff of the Task Force was composed of three lawyers, Ms. Jennifer Wanjiku Miano, a Senior Program Officer seconded to the Task Force from the Kenya Human Rights Commission, Mr. Ronoh Tuimising from the Office of the Attorney General, and Ms. Wanza Kioko, a consultant from CLARION.

Section 3. PROCESS AND METHODOLOGY

Immediately upon its official launch on May 11, 2003, by the Minister for Justice and Constitutional Affairs, the Task Force produced its work plan to effectuate its mandate. The main challenge of the Task Force was to ascertain the views of Kenyans on the necessity of a truth commission. It was then to advise the state on the institutional architecture of a truth commission according to the views of Kenyans. The Task Force devised a comprehensive process and methodology for establishing the views of Kenyans with respect to a truth commission. Although the Task Force was cognizant of the fact that Kenyans had recommended the formation of a truth commission to the Constitution of Kenya Review Commission (CKRC), it nevertheless was determined to solicit the views of Kenyans afresh so that it makes its recommendations to Kenyans without the fear of contradiction. To this end, it conceptualized and carried out a number of activities and events to make sure that all competing views on the subject were heard, digested, and analyzed.

The Task Force disseminated and publicized its work and mandate, which it considered to be crucial and of national significance, through the press and other fora so as to effectively reach the public. Hence, the Task Force immediately embarked on a public information campaign to publicize the terms of its reference. The Task Force held its first press conference after the completion of its work plan to advise the country of its purpose, activities, and events, and invited Kenyans to engage it. It requested every Kenyan with a view about a truth commission to make that view known to it. But in order to reach the widest scope of Kenyans, the Task Force produced a comprehensive schedule of visits to every province in the country.

During the provincial visits, the Task Force held publicized and open public hearings at town halls and other open theatres. Such visits were announced in the local, national, and even international print and electronic media. The provincial, district, and local authorities widely publicized the hearings. Churches, human rights groups, veteran organizations, Mosques, development groups, women's organizations, farmers' groups, teachers, local and national politicians, as well as individual Kenyans helped mobilize the citizenry for the public hearings. As a consequence, many Kenyans turned out in large numbers in many locations to give their views before the Task Force. On the average, the Task Force held public hearings in at least three districts in every province. Hearings were held in Nairobi, Nakuru, Molo, Narok, Eldoret, Mombasa, Garsen, Kisumu, Kisii, Gucha, Kehancha, Kapsakwony, Kakamega, Machakos, Meru, Wagalla, Garba Tula, Isiolo, Garissa, Wajir, Nyeri, Murang'a, and Kiambu.

In the course of the provincial visits, the Task Force listened to hundreds of Kenyans, talked with many more, and saw numerous sites of interest to a truth commission process, such as the Wagalla Airstrip where the Wagalla Massacre took place. The Task Force also received views from numerous provincial, district, and local administrators on a truth commission. Suffice it to note that the public hearings were emotive, candid, and open. The hearings would start in the mornings and go on until dusk. On the whole, the hearings were well attended, although the numbers of women was low. The Task Force went out of its way to encourage and recognize women speakers and persons with disabilities. But many important opinion-makers including common

citizens, victims of violations, few numbers of perpetrators, members of parliament, local politicians, religious leaders, former public officials, journalists, housewives, pastoralists, the poor, the well-to-do, businesspeople, teachers, students, farmers, the unemployed, the self-employed, persons with disabilities, government officials, groups representing institutions and organizations, and a host of other Kenyans presented their views before the Task Force. Many made oral presentations and others gave written submissions. The majority spoke in English and Kiswahili, yet others expressed themselves in their local languages for which translators volunteered. Kenyans showed enthusiasm for the creation of institutions to deal with the abuses of the past. After the initial introduction of the Task Force and its terms of reference by the chair, presenters were keen to make submissions. In all, the Task Force was extremely impressed with the decorum and civility with which the speakers conducted themselves.

The Task Force was deeply concerned by the low numbers of women who turned up at its public hearings to make submissions. Although the Task Force encouraged the few women present to speak up, this problem will have to be addressed once the truth commission is set up so that the issues that are particular to women are adequately dealt with. Kenya, like most countries, has deeply embedded prejudices, policies, and traditions that have historically marginalized women and made them invisible in the public square. Discrimination against women, violence, rape, and the patriarchy have consigned women to the margins of society. Human rights violations and the economic crimes committed by the state have a special gendered effect on women. That is why violations against women have disproportionately multiplied adverse effects and are rarely addressed. A truth commission must pay particular attention to the participation of women and the abuses perpetrated against them. Otherwise, a truth commission will have little or no beneficial value in addressing the plight of women.

The work of the Task Force was constrained by several factors, including time limitations, the wide geographical stretch of Kenya, and limited audiences. These constraints notwithstanding, the hearings, which were open to all, provided a reasonable barometer of the nation's pulse. Many who wanted to speak expressed themselves at the hearings. Speakers were recognized without any bias, except for gender and disabilities, and only the limitation of time allotted for the hearings prevented more presentations. Kenyans of all ethnicities and races, creeds, religions, age, sex, education, political affiliation, and other classifications presented their views before the Task Force without let or hindrance. By far the provincial visits reached the widest scope of Kenyans and gave citizens the most transparent and easily accessible fora to air their views. The Task Force took copious notes of all public hearings and tape-recorded the majority of them. It kept precise and accurate records of all those who attended, all those who spoke, and what they said. It prepared verbatim reports of all the presentations. It has produced statistics, charts, and other pictorial graphics of the hearings. These statistics and views form one of the fundamental bases for the findings, conclusions, and recommendations of this report.

Conferences have formed the other key bases for this report. In July, the Task Force organized a highly successful national two-day conference on a truth commission in Nairobi. The conference, which was opened by the Minister for Justice and Constitutional Affairs, and addressed by senior members of government, hosted speakers from civil society, the clergy, commissioners of the

CKRC, the Law Society of Kenya, members of parliament, common wananchi, victims, policy-makers, women's organizations, senior academics, the youth, and Kenyans from all walks of life. They vigorously interrogated the need for a truth commission for Kenya and ended the conference with a strongly worded resolution calling for a truth, justice, and reconciliation commission. The conference gave Kenyans a chance to publicly debate the necessity of a truth commission for Kenya in one setting.

In August, the Task Force organized a highly successful international conference on a truth commission. The purpose of the international conference was to allow Kenyans an opportunity to learn from the experiences of truth commissions in other countries. The idea was to inform Kenyans so that they can make a mature and deliberate choice given prior experiences. The conference was addressed by, among others, Archbishop Desmond Tutu, the revered cleric who chaired the South African Truth and Reconciliation Commission. It was also addressed by Professor Ali Mazrui, an internationally renowned scholar, Professor Henry Steiner of Harvard Law School and one of the most respected human rights scholars, Justice Albie Sachs of the Constitutional Court of South Africa, Professor Issa Shivji of the University of Dar-es-Salaam, and Dr. Alex Boraine, who was the vice chair of the South African Truth and Reconciliation Commission. Other speakers included leading academics, such as Professor Chris Peter of the University of Dar-es-Salaam, renowned religious leaders, senior lawyers, and human rights advocates, internationally acclaimed academics and policy-makers from Kenya and abroad, members of parliament, and other highly distinguished speakers. The conference was inspiring, emotive, and informative. It afforded Kenyans an opportunity to appreciate the necessity and complexity of a truth telling and justice seeking process. But it also made clear that a truth commission is one mechanism for cleansing and transforming the moral and political fiber of the nation.

Written submissions have also formed a significant component of the database of this report. The Task Force was aware that not every Kenyan could make oral submissions before it. It therefore announced through the media, in its public hearings, and elsewhere, that Kenyans were encouraged to send written submissions to its postal address, through its fax number and email addresses, and in person at the Task Force offices at NSSF Building in Nairobi. In fact, written submissions were handed in at public hearings and sent by mail, both postal and electronic, and brought to the offices in person. Many submissions came from individual persons, religious organizations and other organizations. Some were even sent to the Task Force from as far as the United States. The vast majority of the written submissions are serious and considered documents that address issues of human rights violations, economic crimes, and matters pertinent to the mandate and terms of reference of the Task Force.

The report also draws from commissioned papers by individuals who have studied truth commissions. These papers have been invaluable for the Task Force in its quest to understand what benefits and problems truth commissions in other countries have yielded. The Task Force has benefited from literature review and the compilation of an annotated bibliography on truth commissions. The review of scholarly works and literature has therefore formed the other foundation of this report.

Finally, both the electronic and print media have been an indispensable partner in disseminating the work of the Task Force and providing civic education to members of the public. The Task Force through the Chair has conducted numerous interviews with the media, explaining the role and purpose of truth commissions. Different media houses have reported extensively on the quest for a truth commission for Kenya. Many Kenyans have taken positions on a truth commission based on these reports. There is little doubt that many Kenyans are now aware of the roles of truth commissions.

This report is a product of all these efforts by the Task Force. The report is based on the findings and analyses of the views expressed by Kenyans during the provincial visits, written submissions from individuals, groups, and institutions, the national and international conferences, literature review, commissioned papers, and individual and group conversations with Kenyans.

Section 4. RECOMMENDATIONS

These recommendations of the Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission are made pursuant to its terms of reference as follows;

1. That the Government of Kenya establishes a Truth, Justice, and Reconciliation Commission (TJRC);
2. That the President of the Republic of Kenya establishes a TJRC pursuant to the powers granted him by the Constitution of the Republic of Kenya;
3. That the TJRC have all the powers provided for, and contemplated, in the Commissions of Inquiry Act, Chapter 102 of the Laws of Kenya;
4. That a TJRC must be established immediately, and in any case, not later than June 2004;
5. That the TJRC be composed of commissioners drawn from a cross-section of the sectors in Kenya, and that it be composed of not more than 11 commissioners;
6. That the commissioners and the chair be appointed by the President of the Republic of Kenya after consultations with all stakeholders by the Minister for Justice and Constitutional Affairs;
7. That the commissioners be persons of high moral integrity, particular attention being paid to their knowledge and commitment to human rights and transitional justice;
8. That the TJRC be independent, fully funded by the state, and fully supported by the state;
9. That the TJRC have the power to make its own rules of procedure and compose its own secretariat;
10. That the TJRC have the power to determine its own schedule and work plan;
11. That the TJRC holds, unless it deems it necessary, all its sessions in public, which must be carried live on radio and television;
12. That the TJRC have the power to summon and compel any person to appear before it and provide testimony or answer questions;

13. That the TJRC have the power to investigate human rights violations and violations of economic, social and cultural rights;
14. That the TJRC have access to all government reports and other records as well as any evidence that it deems necessary for the discharge of its functions;
15. That the TJRC have the power to recommend redress such as restitution, compensation, and reparations;
16. That the TJRC have the power to recommend lustration or the barring of offenders from holding public office;
17. That the TJRC have the power to track down stolen public property and funds and recommend their return to the state or the individuals from whom they were stolen;
18. That the TJRC be empowered to negotiate with perpetrators of economic crimes for the return of stolen property and funds in exchange for recommendations of limited amnesty and immunity;
19. That the TJRC have the power to recommend prosecutions of offenders;
20. That the TJRC cover the period from 1963-2002;
21. That the TJRC shall endeavor to create a conducive environment for women and children to appear before it and address it;
22. That the TJRC and its commissioners enjoy immunity from prosecution or any other liability in the discharge of their functions;
23. That the chair of the TJRC enjoy the status of a judge of the Court of Appeal, and the commissioners that of the judge of the High Court;
24. That the TJRC enjoy all other privileges and immunities necessary for the discharge of its functions;
25. That the TJRC, in its final report, which shall immediately be made public, makes any other recommendations that it deems fit for the reform of the state;
26. That the Government of Kenya establishes a committee or similar institution to examine the atrocities of the colonial period and make recommendations on how they ought to be addressed.