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TJRC Monitoring Project (ICJ Kenya)

Truth, Justice, and Reconciliation Commission

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Kenyan Section of the International Commission of Jurists

TJRC Monitoring Project

First Confidential Monitoring Report

I. Methods

ICJ-Kenya has been monitoring the work of the Kenya Truth, Justice and Reconciliation Commission since May 2011. ICJ-Kenya draws on international standards related to combating impunity to monitor the TJRC's work. Specifically, ICJ-Kenya reviews the information that it receives through monitoring in light of the [United Nations Updated Set of Principles for the protection and promotion of human rights through action to combat impunity](#) (UN Doc. E/CN.4/2005/102/Add.1). These guidelines contain standards on the right to know, including principles of operation for entities undertaking truth seeking. ICJ-Kenya also reviews monitoring information in light of the United Nation's [Rule of Law Tools for Post-Conflict States: Truth Commissions](#).

ICJ-Kenya's monitoring programme includes multiple components, including:

- observation of TJRC public hearings
- meetings with TJRC staff
- meetings with civil society and other institutional stakeholders in the TJRC process
- meetings with victims groups.

To date ICJ-Kenya has observed public hearings on the following dates: May 18, May 24, June 2, June 6, June 8, June 9, and June 14. ICJ-Kenya has informally met with staff of the TJRC; we decline to name those individuals in this report so as to maintain the anonymity of their feedback and respect the confidential nature of their communications to ICJ-Kenya. ICJ-Kenya has also to date conducted meetings with or gathered informal feedback from TJ stakeholders including:

- Kenya National Commission on Human Rights
- National Cohesion and Integration Commission
- International Center for Policy and Conflict
- Kenya Human Rights Commission
- National Victim and Survivors Network
- FIDA
- MUHURI
- International Center for Transitional Justice

II. Positive Findings

A. Public Hearings Compliance with International Standards

Monitoring of the public hearings indicate that the hearings comply with international standards on truth seeking bodies. It is clear from the conduct of the hearings and from media reports about legal interactions that several parties have had with the commission that:

- Due process protections are afforded to individuals who testify before the commission. Legal counsel is in attendance, is afforded an opportunity to raise concerns before the start of each day's hearing, and is clearly undertaking regular communication with the Commission to address concerns.
- Persons of interest to the commission are treated with respect and dignity during the public hearings. Commissioners act respectfully toward witnesses, even when challenging their testimony and require that the audience act in a similarly respectful manner. Reminders about the dignity of the process and the respect to be accorded to all witnesses are provided when necessary. Photographs of witnesses during their testimony are not permitted, although photographs may be taken before and after the testimony.
- It is clear that persons of interest have been provided the opportunity to provide a statement to the commission laying forth their version of the events in question. Those persons who have been summoned by the commission are afforded the opportunity to read their statements describing their version of events before any questions are asked and before any contrary information is presented.
- The Commission has obviously made attempts to corroborate information implicating individuals before they are publicly named as persons of interest. Summoned witnesses are provided with documentation of their involvement – often in the form of media reports, government reports, or other historical documentation – by the Commission and are asked to respond to such documentation during their testimony. The Commission's research appears to be very thorough and rigorous in this regard.
- The Commission's hearings to date have been focused on securing recognition of such parts of the truth as were formerly denied, in particular the Wagalla Massacre. (UN Principle 6, see attachment). The Commission has spent substantial time on this incident, with hearings both in the North Eastern region and in Nairobi with summoned persons of interest. This is an important component of international standards on truth seeking and the Commission is clearly undertaking its best effort to illuminate as much detail as possible about this previously denied event in Kenyan history. Moreover, it is clear from the questions asked of witnesses by the commissioners that the panel is trying to establish the facts about and responsibility for specific human rights and humanitarian law violations, such as collective punishment, arbitrary arrests and detentions, extrajudicial killings, and other serious violations against communities in North Eastern Province. The Commission is clearly also interested in chain of command related to orders that were given to undertake operations that resulted in mass human rights violations.

B. General Conduct of Public Hearings

In general, the conduct of the public hearings has been positively received (but please do see concerns below) based on our monitoring and information gathering. Although, ICJ-Kenya has not been able to attend public hearings outside of Nairobi to date, we have received positive reports from colleagues who have been in attendance at those hearings. It has been ICJ-Kenya's observation that:

- The hearings are conducted in locations and with procedures to ensure the dignity of the process.

- Commissioners are well-prepared and engaged with the hearings process and the witnesses.
- Technical problems are rare and the process proceeds smoothly for the most part.
- Commissioners are clearly in control of the hearings process.
- The commission is taking seriously its responsibility to make testimony accessible to members of the public who attend, through sign language interpretation and other simultaneous translation. (However it is not clear whether the sign language interpretation is being captured on the video so that in the future, members of the deaf community could review the hearings testimony via video. Moreover, it is not clear whether the simultaneous translation of the hearings into Swahili and Somali is being audio archived for future use.)

III. Areas of Concern

- A. *Public Hearings* - Although generally conducted effectively and in compliance with international standards, based on ICJ-Kenya observations there remain some areas of concern related to the public hearings, as outlined below.
- The hearings are very legalistic and almost court-like. This is not inherently problematic, but the style of the hearings impacts the way in which they are perceived by victims and the public at large. When hearings are particularly legalistic, in combination with persons of interest obstructing the process without consequence (e.g., failing to remember or blatantly lying), it can create the impression that those individuals are escaping justice. It may also confuse victim-participants into thinking that the TJRC is some type of court – this has been noted by TJRC staff who have indicated that some victims believe that the TJRC is a court process.
 - Moreover, the highly legalistic nature of the hearings provides less opportunity for reconciliatory interactions. For instance, the Commission is heavily focused on minute details during questioning of witnesses, sometimes seemingly irrelevant details. This focus seems to be at the expense of encouraging summoned persons of interest to engage in any kind of discussion about the emotional content of the events, to consider whether they regret anything that happened, or to offer an opportunity for them to make a statement of apology or reconciliation directly to the victims. It seems that the Commission’s reconciliation mandate might be better served if both victim-witnesses and “persons of interest” were encouraged to share the emotional content of their experience and if summoned persons were specifically afforded the opportunity in the hearings to make expressions of regret and/or apology (even though they may nevertheless refuse to admit any responsibility). This concern has been raised by civil society stakeholders as well as victims groups.
 - The extent of victim participation in the planning and conduct of the hearings is unclear. Although victims have clearly been participating as witnesses and have been attending the testimony of summoned individuals, whether and how victims groups have been consulted related to the selection of witnesses, the manner of questioning, any rituals performed and/or symbols contained in the hearing rooms, etc. is unclear. This issue is particularly relevant in relation to minority and indigenous communities which have a recognized human right to effective participation in the planning and conduct of processes that impact them.
 - It is of concern to ICJ and others that the CEO of the Commission is also acting as its main leader of evidence throughout several weeks of hearings in Nairobi. ICJ-Kenya

is aware of the understaffing of the Commission, but this decision raises major concerns about the management of the daily operations of the Commission when its CEO is continually occupied in very intensive preparation and conduct of the hearings themselves. Moreover, ICJ has been made aware that when the Commission is out in the field at hearings, operations in Nairobi largely cease because there is little remaining administrative structure to keep the Commission functioning. Given the TJRC's incredibly short timeframe this is a major concern.

- One of the main concerns about the public hearings has been lack of public interest and attendance, especially at hearings in Nairobi. Although there have been positive reports about attendance at hearings outside of Nairobi, for the Nairobi hearings, locations and dates seem to be in constant flux and there is no centralized way for the public to discover when hearings are being held or where. Moreover, the hearings are conducted during weekday working hours, making it impossible for most members of the public to attend. Lack of attendance also relates directly to the public outreach and communication difficulties confronting the Commission – please see Items C-D below.
- B. *Victim Witness Support and Protection* - The Commission's resources and procedures to provide psychosocial support to those who provide statements or testify before the commission are unknown. Information about these systems should be widely and publicly available.
- Concerns have been raised about the fact that the Commission is not fulfilling its duty in all cases to bear all expenses incurred by victims who testify (see UN Principle 10(c) (see attachment). ICJ-Kenya realizes that this may be the result of communication difficulties or misunderstandings, but notes that it is important for the Commission to remain vigilant about its obligation in this regard and to allocate sufficient funds to support victims' testimony.
 - Discussions with TJRC staff members have revealed serious concerns about the TJRC's procedures and resources for witness protection. This issue cannot be ignored or excused based on "lack of resources." It is a clear obligation of the Commission to provide for witness protection regardless of budgetary constraints. If the Commission needs assistance in this regard it should immediately reach out to experts and partners to craft creative solutions so as to ensure the protection of those who have provided information to the Commission over the short and long term.
- C. *Public Outreach* – Outreach and sensitization of the Kenyan public is one of the central responsibilities of the Commission. It cannot achieve its mandate without public interest in and knowledge about the process. Although ICJ-Kenya acknowledges certain TJRC efforts in this regard, it remains clear that the Commission is having serious difficulty in capturing the attention of the vast majority of the Kenyan public related to its purpose, activities, or future plans. In meetings with TJRC staff engaged with outreach, the main excuse presented has been lack of funds. Although this is a real concern, this cannot excuse the Commission from its duty in this regard. For example, truth commissions in other countries have mobilized alternative resources to assist in their outreach efforts, including volunteers and student workers. Regular email communication to partners and others requires virtually no funding. Commissioners giving media interviews and making their presence very publicly felt is a part of their work that requires no additional funding.
- D. *Information Dissemination* – Given that the Commission's mandate is to illuminate the truth for the Kenyan public, it is often difficult to obtain information about the Commission itself. For example, observers from ICJ-Kenya have found that the only way to obtain information

about the hearings schedule and location in Nairobi is to call the Commission offices every morning to determine what is happening on a given day. The Commission has been fulfilling its statutory responsibility to publish schedules in the newspapers, but those schedules often are instantly out of date or come out the day before a given event. There appears to be no reliable way to garner information about the programme of the Commission's activities. IT is unclear why the website cannot be regularly updated with this type of information. This state of affairs undermines the Commission's credibility as an institution dedicated to making the truth widely known to the Kenyan public.

- Website – The Commission's website needs substantial updating to make it fully functional for purposes of public use. Uploaded documents are often missing, links are broken (for example the Hearing rules were inaccessible on the website as of the writing of this document), pages are out of date, and much relevant information is missing.
- E. *Community Follow-up* – In discussions with TJRC staff and with TJ stakeholders, concerns have been raised about follow-up with communities where the TJRC has taken statements or has conducted public hearings. For example, ICJ-Kenya has been in close contact with members of the community in Hamisi who have interacted with the TJRC. They have indicated to us that they were contacted by the TJRC, although there was no outreach or sensitization prior to statement taking, community leaders mobilized statement givers, three different statement takers came at three different times, including one female statement taker to gather information on sexual violence, but then the statement takers failed to return to the community as promised, without explanation. When community leaders followed up to find out what had happened, the TJRC representative reportedly cited lack of funds as the reason for the truncated statement taking. Among other issues (see outreach/information dissemination, budgetary issues), this incident demonstrates a concern about communication and follow-up with communities that are interacting with the TJRC. More serious perhaps, have been concerns raised about follow-up in communities that have traditionally been conflict-hot-spots. ICJ-Kenya is still gathering information about this issue given that ICJ-Kenya was unable to attend the hearings outside of Nairobi, but discussions with TJRC staff and other observers have revealed that there are strong concerns about the fact that the TJRC is not conducting ongoing reconciliation activities or following up with communities once the public hearings have been completed in a given area.
- F. *Transparency* – Principle 11 of the Updated UN Principles (see attachment) discusses the requirement of transparency in funding of truth commissions as an important component of credibility. Given the nature of truth commission work, it seems logical to extend this principle generally. In order to maintain credibility and integrity in its operations, a truth commission should release as much information as possible to the public about its work. Clearly, this principle does not extend to confidential statements and other documentation obtained by the commission during the course of its investigations. However, documents such as the Commission budget, training materials, outreach plans, general statistics about the operation of the Commission and other comparable information should be made immediately publicly available. This is particularly important in the case of Kenya given that the Commission has suffered serious credibility setbacks and remains in a phase of rebuilding that credibility.
- G. *Research and Report Writing* – ICJ-Kenya is concerned that the research department is understaffed and under-resourced. It is our understanding that the research unit has only four full-time researchers on staff, plus a research director, which is very low in comparison to other previous truth commissions both inside and outside Africa. We understand that the TJRC has reached out to consultants, and had plans to reach out to civil society groups for assistance with research and background documentation. Because the final report for the

TJRC is its most critical legacy, we urge the TJRC to immediately engage with key stakeholders on development of the outline and substance of the report (see recommendations) as well as to creatively brainstorm on means to support the Commission's research and report writing activities.

IV. Recommendations

ICJ-Kenya strongly encourages the Commission to:

- Immediately engage with civil society and other stakeholders to gather input on the form and substance of the TJRC's final report. Utilize creative strategies to meet the TJRC's research mandate, such as calling on civil society partners to provide input, utilizing pro bono support both nationally and internationally to support the TJRC's research, immediately issue pending contracts to consultants recruited through the TJRC's tender for research support.
- Hold an interim de-brief/ stock-taking session with the public to discuss achievements and provide an overview of what remains to be completed in terms of the TJRC mandate.
- Ameliorate poor public interest by having commissioners more effectively engage with the media through TV and radio interviews.
- Find means of engagement with the public outside of formal public hearings.
- Encourage the interim-chair to fully emerge as the Commission's leader so as to improve the profile of the TJRC.
- Call on partners to creatively strategize about developing effective witness protection.
- Work with partners on a plan to improve community follow-up and to monitor retraumatization and potential emerging conflict in communities where public hearings and statement taking have occurred.
- Make public the TJRC budget on its website. ICJ-Kenya is concerned by ongoing statements from TJRC staff that there is a lack of resources. However, in a meeting with the TJRC in March, ICJ-Kenya was informed that funding was no longer a problem as the Kenyan government was releasing almost the entire requested allocation to the TJRC.
- Find an immediate alternative to using the TJRC's CEO as its Leader of Evidence during the public hearings so that the CEO is able to effectively carry out her managerial duties.
- Increase the transparency, and thus image of the Commission as a credible entity, by publicly releasing statement taker training materials, public outreach plans, and other relevant documentation.

Appendix 1. Monitoring the Kenya TJRC Process – Observational Monitoring Guidelines for Public Hearings

Please record the following information related to public hearing testimony that you observe for ICJ-Kenya:

1. Date of Hearing
2. Location of Hearing
3. Commissioners Present
4. Name of witness, Age, Hometown, Ethnic background
5. Language of testimony
6. Brief overview of facts of the case

Please make notations about the following public hearings observation indicators whenever possible (indicators are based on [U.N. Updated Set of Principles for the Protection Promotion of Human Rights through Action to Combat Impunity](#)):

- Selection of cases (see Principle 6)
 - Is it evident why a particular case was selected?
 - Does there appear to be regional, ethnic, gender, age balance when appropriate?
 - What themes does the commission seem to be drawing out with the cases it has selected?
 - Do the cases appear to be focused on securing recognition of such parts of the truth as were formerly denied?
- Manner in which hearings proceed
 - What is the general feeling in the hearing room?
 - How is the room arranged and what impression does that give?
 - Can the witness and other participants be heard and understood?
 - What is the role of the public who attend the hearings? How do they respond to the witness? How do they interact with the proceedings if at all?
- Victim/witness support (Principle 10)
 - Describe the procedure by which victim/witnesses engage with the public hearings – how are they brought into the room, how are they introduced to the public, how are they treated by commissioners and staff, who is with them during their testimony, etc.
 - Do victims have advocates or other supportive persons available to them during the hearings?
 - Do you observe any obvious procedures in place to provide security and support for witnesses?
 - Are victims, witnesses and alleged perpetrators assured of separate, safe, and secure spaces within the commission areas?
 - Are measures to protect confidentiality apparent during the hearings?
- Treatment of Persons of Interest (Principle 9)

- Describe the procedure by which persons of interest/alleged perpetrators engage with the public hearings – how are they brought into the room, how are they introduced to the public, how are they treated by commissioners and staff, who is with them during their testimony, etc.
- Is it apparent whether the commission tried to corroborate information implicating individuals before they were named publicly during hearings?
- Is it apparent whether the individuals implicated were afforded an opportunity to provide a statement setting forth their version of the facts either at a hearing convened by the commission while conducting its investigation or through submission of a document equivalent to a right of reply?
- Does it appear that the commission has used a particular standard of evidence in allowing persons of interest or alleged perpetrators to be named?