



Multi-Sectoral Task Force on Truth, Justice and Reconciliation Commission [MSTF]
c/o

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To:

His Excellency President, Mwai Kibaki

Right Honourable Prime Minister, Raila Odinga

Dr.Kofi Annan, Chair, African Union Panel of Eminent Persons

All The Eight Members of Kenya National Dialogue and Reconciliation Committee

Hon Minister, Justice, National Cohesion and Constitutional Affairs

All 222 Members of Parliament

All Media Houses

All Civil Society Organisations

The Development Partners /Donor Community

All Faith Based Organisations

All Community Based Organisations

All Victims/Survivors' Organizations

Re: Creating a Credible and Effective Truth Justice and Reconciliation Commission in Kenya

Background

Back in 2003, the then newly-elected National Rainbow Coalition (NARC) government expressed support for a Truth, Justice and Reconciliation Commission (TJRC) to inquire into historical injustices, massive or systemic human rights violations, economic crimes and the illegal or irregular acquisition of land committed by the previous ruling party Kenya African National Union (KANU). It appointed a Task Force on the Establishment of a TJRC, chaired by Professor Makau Mutua. The Task Force's 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 was needed. The Task Force reported a 90% public support for one and recommended the immediate establishment of a TJRC before June 2004, with specific mandate, powers and functions. However, its recommendations were never implemented.

The calls for a TJRC re-emerged after the violence triggered by the 2007 disputed presidential elections. The Kenya National Dialogue and Reconciliation Committee (KNDRRC), led by former United Nations (UN) Secretary-General Kofi Annan and the Panel of Eminent African Personalities, noted that the post-elections violence exposed decades-old divisions over power and resources. The KNDRRC agreed on a number of reforms – key among them being the creation of a truth, justice and reconciliation commission (TJRC) to promote national reconciliation, justice and unity.

Subsequently, the government drafted a Bill to facilitate the establishment of a TJRC. The Commission is expected to inquire into human rights violations, including those committed by the state, groups, or individuals; major economic crimes, in particular grand corruption; the illegal or irregular acquisition of land; and other historical injustices. On May 9th, 2008, the Government of Kenya published the Truth Justice and Reconciliation Commission Bill, 2008 (in a special supplement *Gazette notice*, no 23), to establish and define the mandate, objectives and processes of the Commission and begin the journey to truth, justice and reconciliation for Kenyans.

About the Multi-Sectoral Task Force on Truth, Justice and Reconciliation Commission

The Multi-Sectoral Task Force on the Truth, Justice and Reconciliation Commission (TJRC) process is a Kenyan umbrella body of civil society organizations (including community-based organizations, women organizations, youth groups, faith-based groups and networks of survivors of human rights violations) and public (statutory) bodies. Its mission is to push for a people-centered, effective and credible Truth, Justice and Reconciliation Commission for Kenya and advance transitional justice. The task force has undertaken various events, including technical workshops and public fora, to draw out concerns regarding a TJRC, an operational framework for a TJRC and to review the draft TJRC legislation.

The Multi-Sectoral Taskforce has been collaborating to ensure that the truth, justice and reconciliation process is carried out in a manner beneficial to Kenyans and the posterity of the Country. The Taskforce is also working to ensure that the process does not succumb to political interference and interests and that Kenyans are well informed about, and are able to meaningfully engage in the process. These efforts are focussed on ensuring a people-centred, effective and credible Truth, Justice and Reconciliation process for Kenya. It has undertaken various events, including technical workshops, public forums and an editor's luncheon, to draw out concerns regarding a TJRC, an operational framework for a TJRC and

to review the draft legislation, which culminated in the production of a revised TJRC Bill. The Task Force maintains that there can be no peace without political, economic and social justice for all Kenyans. The dictates of justice require that we face the truth of our history and of the 2007 election, and seriously address the deep schisms and inequities in Kenyan society.

Fundamental Issues

Civil society does not want the Truth Justice and Reconciliation Commission (TJRC) to be yet another empty commission. Kenya had seen several commissions of inquiry over the years. None of these commissions resulted in any meaningful changes or reforms. Their recommendations were largely ignored by government. To avoid this, the TJRC must be given some teeth. It should not have to rely heavily on discredited and emasculated institutions to achieve all its objectives. The Commission must be placed in a position in which it will be able to have a real impact on Kenyan society.

Emerging Concerns on the TJRC Legislative Process and Parliament's Handling of the Bill

- a. The framing of the amnesty, reparations and gender related clauses is the main cause for concern to many. The amnesty clause in the TJRC bill appears designed to grant freedom to perpetrators of human rights and economic saboteurs.
- b. The parliament should ensure that the truth, justice and reconciliation process remains independent and people-centred.
- c. The TJRC bill should first be presented to the public for more thorough debate and critique on fundamental issues, before being re-introduced in parliament.
- d. The mediated talks have presented Kenya with a unique and historic opportunity to undertake real transitional justice – an opportunity which should not be wasted.

Demand for Comprehensive Amendments to the Truth, Justice and Reconciliation Commission Bill, 2008.

The TJRC has a critical role to play in the shaping of a future Kenyan society but that the Bill was seriously flawed in several respects. If the flaws are not addressed it would render key aspects of the TJRC process meaningless, unconstitutional and inconsistent with Kenya's international law obligations. Concerns have been raised severally regarding insufficient public participation in the creation of the Bill and the glaring mismatch between the realities on the ground and the contents of the proposed law.

The TJRC law must be enforceable and take actual conditions on the ground into account;

- **Conditional amnesty is not workable in Kenya;**
- **Amnesty will prove to be little more than an insurance policy for the corrupt;**
- **The TJRC should be able to hold human rights violators and the corrupt to account;**
- **The current provisions on reparations will exclude the most marginalised in Kenya's society from resulting compensation**

Recommendations:

For Government:

- i. The formulation of TJRC law should be made open to wide consultations among Kenyans, a process which should include a clear and open explanation of the resultant effects of the different provisions of the current Bill.**
- ii. The amnesty clause be removed, as it is likely to aid perpetrators in escaping justice, thus promoting the culture of impunity.**
- iii. The TJRC Bill needs comprehensive redrafting, since it's fatally flawed, before being presented to parliament afresh for enactment.**
- iv. Gender parity should be applied in all processes of the Truth Commission.**

For Political Parties:

- v. Political parties need to be empowered to help them understand and appreciate the importance of TJRC and transitional justice processes and institutions.**
- vi. The amnesty clause be removed, as it is likely to aid perpetrators in escaping justice, thus promoting the culture of impunity.**

For Civil Society:

- vii. CSOs should step-up advocacy campaigns and make good use of their contact with grassroots to promote public debate regarding the process.**

For Parliament:

- viii. The TJRC Bill needs comprehensive redrafting, since it's fatally flawed, before being presented to parliament afresh for enactment.**
- ix. Gender parity should be applied in all processes of the Truth Commission.**
- x. The amnesty clause be removed, as it is likely to aid perpetrators in escaping justice, thus promoting the culture of impunity.**

What the TJRC Bill should look like

The members of the Multi-Sectoral Task Force have made concrete suggestions for the revision of the Bill in order to deal with the concerns raised above. The revised Bill, amongst other things:-

- i. Provides for the strong independence of the Commission; sets out the necessary values and principles which the Commission and staff must abide by;**
- ii. Simplifies the basic objectives and functions of the Commission;**
- iii. Requires the Commission to meet a gender parity employment target;**
- iv. Imposes a code of conduct including sanctions on commissioners and staff;**
- v. Provides for a preparatory phase, operational phase and outreach phase;**
- vi. Establishes a corporate services department to support the work of the Commission; and the establishment of 4 key committees to drive the work of the Commission:**
 - a. Truth Seeking**

- b. **Victim Support & Reparation**
 - c. **Gender**
 - d. **Outreach & Reconciliation**
- vii. **Specific powers and procedures are proposed in relation to investigations and hearings;**
- viii. **The scope of the findings and recommendations to be made are specified;**
- ix. **Recommendations include not only institutional, administrative, legislative and constitutional measures, but also**
 - a. **Justice recommendations in relation to specific cases which the Commission believes are appropriate for prosecution or pardon and those that are not (this replaces the amnesty provisions in the earlier Bill);**
 - b. **Public office recommendations for purposes of removal or barring from public office.**
- x. **The draft requires Government to respond to the recommendations and indicate which**
- xi. **Recommendations it will implement and state which ones it declines to implement; the response of Government must be debated in the National Assembly.**

We enclose for your consideration the MSTF's revised Bill, together with an Explanatory Note and a PowerPoint presentation.

We will be making contact with you shortly to arrange a meeting in order to discuss out proposals.

Yours truly,

KENYANS FOR PEACE WITH TRUTH & JUSTICE (KPTJ) and NATIONAL CIVIL SOCIETY CONGRESS (NCSC) coalitions of citizens and organizations working in the human rights, governance, democracy, gender, public policy and legal areas. Members include: International Center for Policy and Conflict, Kenya Human Rights Commission(KHRC), International Commission of Jurists (ICJ Kenya)Kenya Leadership Institute(KLI), FIDA-Kenya, Coalition for Violence Against Women (COVAW),Kituo cha Sheria, Law Society of Kenya(LSK), Mazingira Institute, MARS Group Kenya, Muslim Human Rights Forum, , Africa Centre for Open Governance (AfriCOG), National Convention Executive Council (NCEC), RECESSPA, Release Political Prisoners Trust, Sankara Centre, Society for International Development (SID), The Citizens's Coalition for Constitutionalism Culture (4Cs), Urgent Action Fund (UAF)-Africa, Youth Centre for the Development of Marginalized Communities (CEDMAC), Centre for Law and Research International (CLARION), Centre for Multiparty Democracy (CMD), Centre for Rights, Education and Awareness for Women (CREAW), The Cradle-the Children's Foundation, Constitution and Reform Education Consortium (CRECO), East African Law Society (EALS), Fahamu, Foster National Cohesion (FONACON), Gay And Lesbian Coalition of Kenya (GALCK), Haki Focus, Hema la Katiba, Independent Medico-Legal Unit (IMLU), Innovative Lawyering, Institute for Education in Democracy (IED), Youth Agenda. Mau Mau War Veterans Association, Bunge la Wananchi, CLICK-Kenya, Nyayo House Torture Survivors, IDPs Network