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TRUTH, JUSTICE AND RECONCILIATION ACT

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NO. 6 OF 2008

TRUTH, JUSTICE AND RECONCILIATION ACT

[Date of assent: 28th November, 2008]

[Date of commencement: 9th March, 2009.]

An Act of Parliament to provide for the establishment powers and functions of the Truth, Justice and Reconciliation Commission, and for connected purposes

[Act No. 6 of 2008, L.N. 33/2009; Act No. 6 of 2009, Act No. 12 of 2012, Act No. 44 of 2012, Act No. 44 of 2013.]

PART I – PRELIMINARY

1. Short title and commencement

This Act may be cited as the Truth, Justice and Reconciliation Act, 2008.

2. Interpretation

(1) In this Act, unless the context otherwise requires—

“**chairperson**” means the chairperson of the Commission appointed under section 10;

“**Commission**” means the Truth, Justice and Reconciliation Commission established by section 3;

“**commissioner**” means a member of the Commission appointed under section 10;

“**Court**” means the High Court of Kenya;

“**crimes against humanity**” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack—

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation or forcible transfer of population;
- (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) torture;
- (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) persecution against any identifiable group or collectivity on political, racial, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law;

- (i) enforced disappearance of persons;
- (j) other inhuman acts of a similar character intentionally causing great suffering, or serious injury to the body or to mental or physical health;

“enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or any other form of deprivation of liberty committed by agents of the State or persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law;

“Fund” means the Truth, Justice and Reconciliation Fund established by section 44;

“genocide” means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such—

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group from one place to another;

“gross human rights violations” means—

- (a) violations of fundamental human rights, including but not limited to acts of torture, killing, abduction and severe ill-treatment of any person;
- (b) imprisonment or other severe deprivation of physical liberty;
- (c) rape or any other form of sexual violence;
- (d) enforced disappearance of persons;
- (e) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or gender or other grounds universally recognized as impermissible under international law;
- (f) any attempt, conspiracy, incitement, instigation, command, procurement to commit an act referred to in paragraph (a) and (c), which was committed during the period between 12th December, 1963 and 28th February, 2008, and the commission of which was advised, planned, directed, commanded or ordered by any person acting with a political motive; or
- (g) crimes against humanity;

“Minister” means the Minister responsible for matters relating to justice and constitutional affairs and includes the Attorney-General;

“Panel of Eminent African Personalities” means the African Union Panel of Eminent African Personalities spearheading the mediation efforts in Kenya following the post-2007 election crisis;

“**reparation**” means dignifying the victims by measures that will alleviate their suffering, compensate their social, moral and material losses, restitute their rights;

“**secretary**” means the secretary appointed under section 13;

“**selection panel**” means the panel constituted under section 9; and

“**victim**” includes any person who, or group of persons, which, with the occasion or because of the human rights violation, has suffered any individual or collective harm, loss or damage by acts or omissions which violate the rights granted under the Constitution or any written law in Kenya, International Human Rights Law and International Criminal Law.

(2) Despite subsection (1), after the first elections under the Constitution, references in this Act to the expression “Minister” shall be construed to mean “Cabinet Secretary”.

[Act No. 44 of 2012, s. 2, Act No. 44 of 2013, s. 2.]

PART II – ESTABLISHMENT, POWERS AND FUNCTIONS OF THE COMMISSION

3. Establishment of the Commission

(1) There is established a Commission to be known as the Truth, Justice and Reconciliation Commission.

(2) The Commission shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of—

- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable or immovable property;
- (c) borrowing money; and
- (d) doing or performing all other things or acts for the furtherance of the provisions of this Act, which may be lawfully done or performed by a body corporate.

4. Headquarters

(1) The headquarters of the Commission shall be in Nairobi.

(2) Subject to the provisions of any other written law as to the meetings of the Commission, the Commission may hold its sittings at any place in Kenya.

5. Objectives of the Commission

The objectives of the Commission shall be to promote peace, justice, national unity, healing, and reconciliation among the people of Kenya by—

- (a) establishing an accurate, complete and historical record of violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office, both serving and retired, between 12th December, 1963 and 28th February 2008, including the—
 - (i) antecedents, circumstances, factors and context of such violations;
 - (ii) perspectives of the victims; and

- (iii) motives and perspectives of the persons responsible for commission of the violations,
by conducting investigations and holding hearings;

- (b) establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights and economic rights which were committed during the period between the 12th December, 1963 and the 28th February 2008, including the—
 - (i) antecedents, circumstances, factors and context of such violations;
 - (ii) perspectives of the victims and the motives; and
 - (iii) perspectives of the persons responsible for commission of the violations,by conducting investigations and holding hearings;
- (c) investigating gross human rights violations and violations of international human rights law and abuses which occurred, including massacres, sexual violations, murder and extra-judicial killings and determining those responsible for the commission of the violations and abuses;
- (d) recommending the prosecution of the perpetrators of gross human rights violations;
- (e) determining ways and means of redress for victims of gross human rights violations;
- (f) facilitating the granting of conditional amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with gross human rights violations and economic crimes and complying with the requirements of this Act;
- (g) providing victims, perpetrators and the general public with a platform for non-retributive truth telling that charts a new moral vision and seeks to create a value-based society for all Kenyans;
- (h) providing victims of human rights abuses and corruption with a forum to be heard and restore their dignity;
- (i) providing repentant perpetrators or participants in gross human rights violations with a forum to confess their actions as a way of bringing reconciliation;
- (j) compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission under paragraphs (a), (b), and (f), with recommendations on measures to prevent the future occurrence of such violations.

(2) Subsection (1) shall not limit the power of the Commission to investigate or make recommendations concerning any other matter with a view to promoting or achieving justice, national unity and reconciliation within the context of this Act.

6. Functions of the Commission

The functions of the Commission are to—

- (a) investigate gross violations and abuses of human rights including abductions, disappearances, detentions, torture, sexual violations, murder, extrajudicial killings, ill treatment and expropriation of property suffered by any person between 12th December, 1963 and 28th February, 2008;

- (b) investigate the context in which and causes and circumstances under which the violations and abuses occurred and identify the individuals, public institutions, bodies, organizations, public office holders, the State, state actors, or persons purporting to have acted on behalf of any public body responsible for or involved in the violations and abuses;
- (c) identify and specify the victims of the violations and abuses and make appropriate recommendations for redress;
- (d) investigate and determine whether or not the violations and abuses were deliberately planned and executed by the State or by any person referred to in paragraph (k)(ii);
- (e) conduct investigations relevant to its work and or seek the assistance of the police and any public or private institution, body or person for the purpose of an investigation;
- (f) identify any persons who should be prosecuted for being responsible or involved in human rights and economic rights violations and abuses;
- (g) investigate economic crimes;
- (h) investigate and provide redress in respect of crimes of a sexual nature against female victims;
- (i) educate and engage the public and give sufficient publicity to its work so as to encourage the public to contribute positively to the achievement of the objectives of the Commission;
- (j) investigate any other matter that it considers requires investigation in order to promote and achieve national reconciliation;
- (k) make recommendations with regard to—
 - (i) the policy that should be followed or measures that should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims;
 - (ii) prosecution of persons responsible for or involved in human rights and economic rights violations and abuses;
- (l) make recommendations with regard to the creation of institutions conducive to a stable and fair society and the institutional, administrative and legislative measures that should be taken or introduced in order to prevent the violation of human rights;
- (m) consider the reports of the relevant commissions of inquiry and make recommendations on the implementation of such reports;
- (n) investigate economic crimes including grand corruption and the exploitation of natural or public resources and the action, if any, taken in respect thereof;
- (o) inquire into the irregular and illegal acquisition of public land and make recommendations on the repossession of such land or the determination of cases relating thereto;

- (p) inquire into and establish the reality or otherwise of perceived economic marginalization of communities and make recommendations on how to address the marginalization;
- (q) inquire into the misuse of public institutions for political objectives;
- (r) inquire into acts of state repression including torture, cruelty and degrading treatment for political objectives;
- (s) inquire into the causes of ethnic tensions and make recommendations on the promotion of healing, reconciliation and co-existence among ethnic communities; and
- (t) investigate into the whereabouts of victims and restore the human and civil dignity of such victims by granting them the opportunity to relate their own accounts of the violations of which they are victims, and recommend reparation measures in respect of victims.

7. Powers of the Commission in relation to investigations

(1) The Commission shall have all powers necessary for the execution of its functions under this Act, and shall not be subject to the direction or control of any other person or authority.

(2) Without prejudice to the generality of subsection (1), the Commission shall have the power to—

- (a) gather, by any means it deems appropriate, any information it considers relevant, including requisition of reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information as and when necessary;
- (b) visit any establishment or place without giving prior notice, and to enter upon any land or premises for any purpose which is material to the fulfilment of the Commission's mandate and in particular, for the purpose of obtaining information or inspecting any property or taking copies of any documents which may be of assistance to the Commission, and for safeguarding any such property or document;
- (c) interview any individual, group or members of organizations or institutions and, at the Commission's discretion, to conduct such interviews, in private;
- (d) call upon any person, subject to adequate provision being made to meet his expenses, to meet with the Commission or its staff, or to attend a session or hearing of the Commission, and to compel the attendance of any person who fails to respond to a request of the Commission to appear and to answer questions relevant to the subject matter of the session or hearing;
- (e) require that statements be given under oath or affirmation and to administer such oath or affirmation;
- (f) request information from the relevant authorities of a foreign country and to gather information from victims, witnesses, government officials and others in foreign countries;

- (g) summon any serving or retired public officer to appear in person before it to produce any document, thing or information that may be considered relevant to the function of the Commission;
- (h) issue summonses as it deems necessary in fulfilment of its mandate;
- (i) request and receive police assistance as needed in the enforcement of its powers.

(3) All persons, including members of political parties and officers of the Government, shall co-operate with and provide unrestricted access for the Commission and its staff for any purposes necessary in the fulfilment of the Commission's mandate under this Act.

(4) The provisions of subsection (3) shall apply subject to the Protected Areas Act (Cap. 204).

(5) Any person who wilfully obstructs or otherwise interferes with the Commission or any of its members or officers in the discharge of its functions under this Act, commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings, or imprisonment for a term not exceeding one year, or both.

(6) Any person who, without lawful cause, fails to appear before the Commission pursuant to any summons by the Commission commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings, or to imprisonment for a term not exceeding one year, or both.

(7) The police shall, on request being made by the Commission, provide the Commission with such services and assistance as may be required by the Commission.

8. Powers generally

Without prejudice to the provisions of section 7, the Commission shall have power to—

- (a) may enter into association with such other bodies or organizations within or outside Kenya as it may consider desirable or appropriate and in furtherance of the purpose for which the Commission is established;
- (b) control, supervise and administer the assets of the Commission in such manner and for such purposes as best promote the purpose for which the Commission is established;
- (c) receive any grants, gifts, donations or endowments and make legitimate disbursements therefrom;
- (d) open a banking account or banking accounts for the funds of the Commission.

9. Selection panel

(1) For the purposes of this Act, the Minister shall constitute a selection panel consisting of—

- (a) two people jointly nominated by a joint forum of religious organizations comprising—
 - (i) the Kenya Episcopal Conference;

- (ii) the National Council of Churches of Kenya;
- (iii) the Evangelical Alliance of Kenya;
- (iv) the Hindu Council of Kenya;
- (v) the Seventh Day Adventist Church; and
- (vi) the Supreme Council of Kenya Muslims;
- (b) one person nominated by the Law Society of Kenya;
- (c) one person nominated by Federation of Kenya Women Lawyers;
- (d) one person jointly nominated by the Central Organization of Trade Unions and the Kenya National Union of Teachers;
- (e) one person nominated by the Association of Professional Societies of East Africa;
- (f) one person nominated by the Kenya National Commission on Human Rights;
- (g) one person jointly nominated by the Kenya Private Sector Alliance and the Federation of Kenya Employers; and
- (h) one person nominated by the Kenya Medical Association.

(2) The function of the selection panel shall be to nominate persons for appointment as commissioners in accordance with the First Schedule.

(3) Members of the selection panel shall elect a chairperson and vice-chairperson of the selection panel from amongst their number.

(4) the chairperson and vice-person elected under subsection (3) shall be persons of opposite gender.

(5) Subject to the provisions of the First Schedule, the selection panel shall determine its own procedure.

[Act No. 6 of 2009, Sch.]

10. Membership of the Commission

(1) The Commission shall consist of nine commissioners, of whom—

- (a) three shall be non citizens, at least one of whom shall be of opposite gender, selected by the Panel of Eminent African Personalities; and
- (b) six shall be citizens of Kenya selected by the selection panel in accordance with the procedure prescribed in the First Schedule.

(2) The Commissioners appointed under subsection (1)(a) shall be selected by the Panel of Eminent African Personalities and forwarded to the National Assembly which shall forward the names of the nominees to the President for appointment.

(3) The commissioners appointed under subsection (1)(b) shall be selected and recommended in accordance with the procedure prescribed in the First Schedule, and appointed by the President.

(4) In selecting persons for appointment as commissioners, the selection panel shall have regard to principle of gender equality and regional balance.

(5) Subject to subsection (8), of the nine commissioners referred to in subsection (1)—

- (a) four shall have knowledge of and at least fifteen years' experience in matters relating to human rights law;
- (b) five shall have knowledge of and experience in forensic audit, investigations, psycho-sociology, anthropology and social relations, conflict management, religion or gender issues.

(6) Notwithstanding the provisions of subsection (5), no person shall be qualified for appointment as a commissioner unless such person—

- (a) is of good character and integrity;
- (b) has not in any way been involved, implicated, linked or associated with human rights violations of any kind or in any matter which is to be investigated under this Act; and
- (c) shall be impartial in the performance of the functions of the Commission under this Act and who will generally enjoy the confidence of the people of Kenya.

(7) A commissioner once appointed shall cease active participation in the affairs of any political party or other organization, whether registered or unregistered, propagating partisan views with respect to the work of the Commission.

(8) Subject to subsection (1)(a), the Commission shall, as much as practicable, be balanced, representative of Kenyan society, perceived to be impartial in its collectivity and of diverse professional and religious backgrounds.

[Act No. 6 of 2009, Sch.]

11. Chairperson

(1) There shall be a chairperson of the Commission who shall be appointed by the President from amongst the commissioners.

(2) The chairperson shall, within seven days of the appointment of the commissioners, convene the first meeting of the Commission at which the commissioners shall elect the vice-chairperson of the Commission from amongst the commissioners appointed under section 10(1)(b).

(3) The chairperson and vice-chairperson of the Commission shall be persons of opposite gender.

(4) The chairperson shall—

- (a) preside over all meetings of the Commission;
- (b) be the spokesperson for the Commission; and
- (c) supervise and direct the work of the Commission.

(5) In the absence of the chairperson, the vice-chairperson shall perform the functions of the chairperson under subsection (4).

12. Tenure of office of commissioner

The term of office of a commissioner shall be from the date of appointment and shall, unless the office falls vacant earlier owing to any reason specified in section 16, terminate on the dissolution of the Commission.

13. Secretary

(1) There shall be a secretary to the Commission who shall be appointed by the Commission on such terms and conditions of service as the Commission may determine.

(2) The secretary shall be the chief executive of the Commission and shall be responsible to the Commission for the—

- (a) day to day administration and management of the affairs of the Commission;
- (b) planning, directing and co-ordinating all studies, research and evaluations to be carried out by the Commission;
- (c) custody of all records and documents of the Commission;
- (d) management of the assets of the Commission; and
- (e) performance of such other duties as may be assigned by the Commission from time to time.

(3) The secretary shall, unless in any particular case the Commission otherwise directs in writing, attend all meetings of the Commission but shall have no vote on any matter falling to be decided by the Commission at any such meeting.

(4) The secretary may be removed by the Commission only for—

- (a) inability to perform the functions of his office arising out of physical or mental incapacity;
- (b) misbehaviour or misconduct; or
- (c) incompetence.

(5) Before the secretary is removed under subsection (4), he shall be informed of the case against him and shall be given an opportunity to defend himself against any allegations against him.

14. Oath of office

(1) The chairperson, the commissioners and the secretary shall each make and subscribe to the oath or affirmation set out in the Second Schedule prior to embarking on the duties of the Commission.

(2) Every oath or affirmation by the chairperson, a commissioner or the secretary shall be—

- (a) administered by the Chief Justice; and
- (b) deposited with the Chief Justice and the secretary.

15. Terms and conditions of service

(1) The salaries and allowances payable to, and other terms and conditions of service of the chairperson and the Commissioners shall be such as may be determined by the Minister in consultation with the Minister for the time being responsible for finance and shall not be reviewed to the disadvantage of any commissioner during the commissioner's term of office.

(2) The salaries and allowances provided for under subsection (1) shall be a charge on the Consolidated Fund.

16. Vacancy

The office of the chairperson or a commissioner shall become vacant if the holder—

- (a) dies;
- (b) resigns from office by writing under his hand addressed to the President;
- (c) is removed from office in accordance with the provisions of section 17;
- (d) is convicted of an offence and sentenced to imprisonment for a term of three months or more without the option of a fine;
- (e) is declared bankrupt.

(2) The President shall notify every vacancy in the *Gazette* within seven days of the occurrence of the vacancy.

17. Removal of commissioners

(1) Without prejudice to section 16, the chairperson or a commissioner may be removed from office by the President—

- (a) for misbehaviour or misconduct;
- (b) if the chairperson or commissioner is convicted of an offence involving moral turpitude but not sentenced to a term of imprisonment;
- (c) if the chairperson or commissioner is unable to discharge the functions of his office by reason of physical or mental infirmity; or
- (d) if the chairperson or commissioner is absent from three consecutive meetings of the Commission without good cause but shall not be removed except in accordance with this section.

(2) Where the question of the removal from office of the chairperson or a commissioner arises under subsection (1)—

- (a) the Chief Justice shall, by notice in the *Gazette*, appoint a Tribunal which shall consist of a chairperson and two other members selected by the Chief Justice from among persons who hold or have held office as judges of the High Court;
- (b) the Tribunal shall inquire into the matter and report on the facts to the Chief Justice and recommend whether the chairperson or the commissioner ought to be removed from office and the Chief Justice shall communicate the recommendations of the Tribunal to the President.

(3) Where the question of the removal the chairperson or a commissioner has been referred to a Tribunal under subsection (2), the President may suspend the chairperson or the commissioner from the Commission and the suspension may at any time be revoked by the President and shall in any case cease to have effect if the Tribunal recommends to the President that the chairperson or the commissioner, as the case may be, should not be removed.

18. Filling of vacancy

(1) Where a vacancy occurs in the membership of the Commission under section 16, the President shall appoint a replacement—

- (a) where the vacancy is in respect of a citizen of Kenya, from among the short-listed persons considered by the selection panel in accordance with the First Schedule, giving due consideration to the rankings and comments of the selection panel, if any; and
- (b) where the vacancy is in respect of a non-citizen, from a list of persons recommended by the Panel of Eminent African Personalities.

(2) No act or proceedings of the Commission shall be invalid by reason only of a vacancy or defect in the composition of the Commission.

19. Vice-chairperson to act

If the chairperson of the Commission vacates office under section 16 or is removed under section 17, the vice-chairperson shall act as the chairperson.

[Act No. 6 of 2009, Sch.]

20. Inauguration

(1) The Commission shall be inaugurated within twenty one days of the appointment of its members and shall operate for two years.

(2) Before the commencement of the period of two years specified in subsection (1), the Commission shall have a preparatory period of three months during which it may undertake all tasks necessary to ensure that it is able to work effectively from the commencement of its operations.

(3) Where for any reason the Commission is unable to finalize its work within the period of two years in accordance with subsection 1, it shall, at least three months before the expiry of the two years period, submit a progress report to the National Assembly together with a request for extension of the period beyond two years.

(4) The National Assembly may, if satisfied as to the reasons why an extension of the life of the Commission is necessary, extend the duration for the Commission to continue its work but shall not in any case extend such duration for more than six months.

(4A) Notwithstanding the provisions of subsections (3) and (4), where the Commission is unable to complete and submit its report within the time extended under section (4), the Commission shall, submit a progress report to the National Assembly together with the request for a further extension.

Provided that a request under this subsection may be made notwithstanding that the period in respect of which it is made has expired.

(4B) The National Assembly may, if satisfied with the reasons for the request under subsection (4A), extend the duration for the Commission to complete and submit its report, but shall not in any case extend such duration for more than three months.

(4C) Notwithstanding any other provision of this Act, the Commission shall operate for a further period of nine months with effect from the 4th August, 2012.

(5) The Commission shall, after its inauguration—

- (a) inform the public of its existence and the purpose of its work; and
- (b) when appropriate, invite all interested parties who may wish to do so, to make statements or give information to the Commission.

[Act No. 12 of 2012, Sch., Act No. 44 of 2012, s. 3.]

21. Independence of the Commission

(1) In the performance of its functions under this Act, the Commission shall not be subject to the control or direction of any person or authority.

(2) Each commissioner and member of staff of the Commission shall serve in his individual capacity, independent of any political party, Government or other organizational interests, and shall avoid taking any action, which could create an appearance of partiality or otherwise harm the credibility or integrity of the Commission.

22. Committees of the Commission

The Commission may establish such committees of the Commission as it considers necessary for the better performance of its functions under this Act.

23. Disclosure of information

No Commissioner or member of staff of the Commission shall make private use of, or profit from, any confidential information gained as a result of his work in the Commission, or divulge such information to any other person except in the course of his functions as a member of staff of the Commission, and any contravention of this provision shall constitute a misconduct.

24. Privileges

(1) A commissioner or the Secretary shall not be liable to any civil action or suit for or in respect of any matter or thing done or omitted to be done in good faith as a commissioner or as the Secretary.

(2) A commissioner or the Secretary shall not be liable to arrest under civil process while proceeding to, participating in, or returning from any meeting of the Commission or of any committee thereof.

(3) No person who appears before the Commission shall, whether such appearance is in pursuance of any summons by the Commission under this Act or not, be liable to any criminal or civil proceedings, or to any penalty or forfeiture whatsoever in respect of any evidence or information given to the Commission by such person.

25. Hearings of the Commission

(1) The hearings of the Commission shall be open to the public.

(2) Notwithstanding subsection (1), the Commission may, in any proceedings before it, direct that proceedings be held *in camera* and that the public or any particular individual or individuals shall not be present at proceedings or any part thereof if it is satisfied that—

- (a) the security of perpetrators, victims or witnesses is threatened;

- (b) it would be in the interests of justice; or
- (c) there is a likelihood that harm may ensue to any person as a result of proceedings being open to the public.

(3) A victim, perpetrator or witness may apply to the Commission for proceedings to be held *in camera*.

(4) Where the Commission directs that the public or any part thereof shall not be present at any proceedings or part thereof, the Commission may direct that—

- (a) no information relating to the proceedings or any part thereof held *in camera* shall be made public in any manner;
- (b) no person may, in any manner, make public any information which may reveal the identity of any witnesses in the proceedings;

(5) A person who disobeys any direction of the Commission under subsection (4) commits an offence and is liable on conviction to imprisonment for a term not exceeding two years, or a fine not exceeding two hundred thousand shillings, or both.

(6) The Commission may give such directions in respect of the record of proceedings as may be necessary to protect the identity of any witness before it.

(7) When dealing with victims, the Commission shall ensure that—

- (a) victims are treated—
 - (i) with compassion and respect for their dignity;
 - (ii) equally, without regard to race, ethnicity, religion, language, sex, or nationality,

and procedures dealing with victims are expeditious and fair;

- (b) appropriate measures are taken to minimize inconvenience to victims and, when necessary, to protect their privacy, to ensure their safety and that of their families or witnesses testifying on their behalf; and
- (c) sufficient measures are taken to allow victims to communicate in the language of their choice.

26. Power to search premises

(1) The Commission may make an *ex-parte* application to the Court for a warrant to search any premises suspected to contain any record or property or thing relevant to its investigation.

(2) Upon an application under subsection (1), the Court may issue a warrant to the Commission upon being satisfied that there are reasonable grounds that any record or property or thing is reasonably suspected to be in or on the premises and that it is relevant to the investigation.

(3) The Commission may, with a warrant, enter upon and search any premises for any record, property or other thing reasonably suspected to be in or on the premises and that is relevant in the investigation and determination of matters under this Act.

(4) The power conferred on the Commission by this section is in addition to, and does not limit or restrict, a power conferred by any other provision of this Act.

27. Establishment of special units

(1) The Commission may put in place special arrangements and adopt specific mechanisms and procedures to address the experiences of—

- (a) women;
- (b) children;
- (c) persons with disabilities; and
- (d) other vulnerable groups.

(2) The procedures and mechanism adopted under subsection (1) shall—

- (a) pay particular attention to gender-based violations;
- (b) provide opportunities for the people to relate their experiences; and
- (c) enhance accessibility.

28. Legal representation

(1) Subject to subsection (3), any person whose conduct is the subject of inquiry under this Act or who is in any way implicated or concerned in any matter under inquiry, shall be entitled to be represented by an advocate in the proceedings of the inquiry or any part thereof, and any other person who desires to be so represented may, by leave of the Commission, be so represented.

(2) Any person whose conduct is the subject of inquiry under this Act or who is implicated or concerned in any matter under inquiry under this Act and who is summoned to appear before the Commission in person shall appear in person.

(3) The Commission may, in order to expedite proceedings, place reasonable limitations with regard to the time allowed in respect of the examination of a witness or any address to the Commission.

29. Conduct of business of the Commission

The conduct and regulation of the business and affairs of the Commission shall be as provided in this Act and the Third Schedule but subject thereto, the Commission shall regulate its own procedure.

30. Staff of the Commission

(1) The Commission may appoint such officers and other staff of the Commission as it may consider necessary for the proper performance of its functions under this Act.

(2) Any appointment made under subsection (1) shall be made with regard to the principle of gender equality.

(3) The officers and other staff appointed under subsection (1) shall serve on such terms and conditions as the Commission, in consultation with the Treasury, may determine.

(4) The Public Service Commission may, upon the request of the Commission, second thereto such number of public officers as may be necessary for the purposes of the Commission.

(5) A public officer seconded to the Commission under subsection (4) shall, during the period of his secondment, be deemed to be an officer of the Commission and shall be subject only to the direction and control of the Commission.

(6) The Commission may engage experts or consultants to assist the Commission as appropriate under this Act.

31. The common seal of the Commission

(1) The common seal of the Commission shall be kept in such custody as the Commission may direct and shall not be used except on the order of the Commission.

(2) The common seal of the Commission when affixed to a document and duly authenticated shall be judicially and officially noticed and unless and until the contrary is proved, any necessary order or authorization of the Commission under this section shall be presumed to have been duly given.

32. Protection from personal liability

No matter or thing done by any officer, employee or agent of the Commission shall, if the matter or thing is done in good faith for executing the functions, powers or duties of the Commission, render the officer, employee or agent personally liable to any action, claim or demand whatsoever.

33. Liability of the Commission for damages

The provisions of section 32 shall not relieve the Commission of the liability to pay compensation for damage to any person for any personal or proprietary interest sustained by the person as a result of the exercise of any power conferred by this Act or by the failure, whether wholly or partially, of any works.

PART III – AMNESTY MECHANISMS AND PROCEDURES

34. No amnesty for international law crimes

(1) A person may make an application for consideration of amnesty to the Commission for any act or omission which constitutes a matter to be investigated under this Act.

(2) The Commission may in accordance with this Part, and subject to subsection (3), recommend the grant of conditional amnesty to any person liable to any penalty under any law in Kenya.

(3) Notwithstanding subsection (2), no amnesty may be recommended by the Commission in respect of genocide, crimes against humanity, gross violation of human rights or an act, omission or offence constituting a gross violation of human right including extrajudicial execution, enforced disappearance, sexual assault, rape and torture.

(4) Where a criminal penalty attaches in respect of a matter on which amnesty has been requested under this Act the Commission shall not recommend amnesty in respect thereof—

- (a) until the Commission has considered any reasonable objection from the victim;
- (b) in respect of economic crimes, if the applicant has not made restitution.

[Act No. 6 of 2009, Sch.]

35. Application for amnesty

(1) Any person who wishes to apply for amnesty in respect of any act, omission or offence, shall—

- (a) within one month from the date of an announcement of amnesty by the Commission, or
- (b) such extended period as may be prescribed,

submit such application to the Commission in the prescribed form.

(2) The Commission shall give priority to persons in custody and shall prescribe measures in respect of such applications after consultation.

36. Consideration of application for amnesty

(1) Upon receipt of an application for amnesty, the Commission may—

- (a) give such directions in respect of the completion and submission of the application as may be necessary; or
- (b) request the applicant to provide such further particulars as it may consider necessary.

(2) The Commission shall review the application and make such enquiries as it may consider necessary.

(3) After an investigation carried out under subsection (2), the Commission may—

- (a) inform the applicant that the application does not qualify for amnesty;
- (b) afford the applicant the opportunity to make a further submission;
- (c) reject the application and inform the applicant accordingly.

(4) If the Commission is satisfied that there is no need for a hearing upon an application and investigation under this section, the Commission shall recommend amnesty and inform the applicant accordingly.

(5) If the Commission conducts a hearing for amnesty upon application under this section, the Commission shall—

- (a) notify the applicant and any victim or person implicated or having an interest in the application, of the hearing; and
- (b) inform the persons of the right to be present at the hearing and testify.

(6) Notwithstanding the provisions of section 34(1), the Commission may consider jointly the individual applications in respect of any particular act, omission or offence to which such applications relate.

(7) If the act or omission which is the subject of an application under section 34 constitutes the ground of any claim in civil proceedings instituted against the person who submitted that application, the court hearing that claim may at the request of such person, if it is satisfied that the other parties to such proceedings have been informed of the request and afforded the opportunity to address the court or to make further submissions in this regard, suspend those proceedings pending the consideration and disposal of the application.

(8) If the person who submitted an application under section 35 is charged with any offence constituted by the act or omission to which the application relates, or is standing trial upon a charge of having committed such an offence, the Commission may request the appropriate authority to postpone the proceedings pending the consideration and disposal of the application for amnesty.

(9) Subject to the provisions of section 25—

- (a) the applications, documentation in connection therewith, further information and evidence obtained before and during an investigation by the Commission, the deliberations conducted in order to come to a decision or to conduct a hearing contemplated in section 25(2), shall be confidential.
- (b) the confidentiality referred to in paragraph (a) shall lapse when the Commission decides to release such information or when the hearing commences.
- (c) the confession or admission shall not be used in any court proceedings against the applicant whether or not amnesty is granted

37. Limitation of time

(1) Where proceedings have been suspended under section 36(7) or (8), the Commission shall investigate and determine the application for grant of amnesty—

- (a) in criminal cases, within forty five days; and
- (b) in civil cases, within ninety days,

from the date the order suspending or staying the proceedings was made.

(2) Where the investigation and determination of an application for grant of amnesty is not concluded within the period stipulated under subsection (1), the suspended hearings shall proceed.

38. Recommendation for amnesty

(1) Subject to section 34, the Commission may recommend amnesty for any violations committed during the period 12th December, 1963 to 28th February, 2008.

(2) If the Commission, after considering an application for amnesty, is satisfied that—

- (a) the application complies with the requirements of this Act;
- (b) the applicant has made a full disclosure of all relevant facts,

it may recommend the granting of amnesty in respect of that act, omission or offence.

(3) Whether a particular act, omission or offence qualifies for the grant of amnesty, shall be decided with reference to the following criteria—

- (a) the motive of the person who committed the act, omission or offence;
- (b) the context in which the act, omission or offence took place;

- (c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;
- (d) the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;
- (e) whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organization, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and
- (f) the relationship between the act, omission or offence and the political objective pursued.

(4) The Commission shall inform the person concerned and, if possible, any victim, of the decision of the Commission to recommend amnesty to such person in respect of a specified act, omission or offence.

(5) The Commission shall *Gazette*—

- (a) the names of any person to whom amnesty has been recommended; and
- (b) sufficient information to identify the act, omission or offence in respect of which amnesty has been recommended.

(6) If any person has been—

- (a) charged with and is standing trial in respect of an offence constituted by the act or omission in respect of which amnesty is recommended in terms of this section; or
- (b) convicted of, and is awaiting the passing of sentence in respect of, or is in custody for the purpose of serving a sentence imposed in respect of, an offence constituted by the act or omission in respect of which amnesty is so recommended,

the Commission shall make recommendations on the action to be taken on the criminal proceedings.

(7) If the Commission has recommended amnesty to any person in respect of any act or omission which formed the ground of a civil judgment which was delivered at any time before the granting of the amnesty, the publication of the recommendation for amnesty under subsection (6) shall not affect the operation of the judgment in so far as it applies to that person.

[Act No. 6 of 2009, Sch.]

39. Recommendation for amnesty to be submitted to the Attorney-General

Where the Commission is of the view that a recommendation for amnesty should be made in respect of an application under section 34(1), the Commission shall submit that recommendation to the Attorney-General and the institution of, or continuance with, prosecution of case shall be subject to the amnesty application.

40. Refusal of amnesty

If the Commission has refused any application for amnesty, it shall as soon as practicable notify its decision in writing, giving the reasons for its refusal, to—

- (a) the person who applied for amnesty;
- (b) any person who is in relation to the act, omission or offence concerned, a victim.

41. Reparation and rehabilitation

Where amnesty is recommended to any person in respect of any act, omission or offence, and the Commission is of the opinion that a person is a victim in relation to that act, omission or offence, the Commission may recommend reparation to, and rehabilitation of, that person.

PART IV – REPARATION AND REHABILITATION**42. Application for reparation**

(1) Any person who is of the opinion that he has suffered harm as a result of a gross violation of human rights may apply to the Commission for reparation in the prescribed form.

(2) If upon consideration of any matter or application submitted to it under subsection (1), and any evidence received or obtained by it concerning such matter or application, the Commission is of the opinion that the applicant is a victim, it shall, having regard to criteria prescribed, make recommendations in an endeavour to restore the human and civil dignity of such victim.

(3) After consideration of an application under subsection (2), the Commission may recommend—

- (a) the basis and conditions upon which reparation may be granted;
- (b) the authority responsible for the reparation; and
- (c) measures that should be taken to grant urgent interim reparation to victims.

(4) The Commission may make regulations to provide for reparation under this Act.

PART V – FINANCIAL PROVISIONS**43. Funds of the Commission**

The funds of the Commission shall consist of—

- (a) monies appropriated by Parliament for the purposes of the Commission;
- (b) such monies or assets as may accrue to the Commission in the course of the exercise of its powers or the performance of its functions under this Act; and
- (c) all monies from any other source provided for or donated or lent to the Commission.

44. Establishment of the Fund

(1) There is established a Fund to be known as the Truth Justice and Reconciliation Fund, which shall be administered, on behalf of the Commission, by the Secretary.

(2) There shall be paid into the Fund—

- (a) such monies as may be appropriated out of the Consolidated Fund for the purposes of this Act; and
- (b) any grants, gifts, donations or bequests received under section 43(c).

(3) There shall be paid out of the Fund all payments in respect of any expenses incurred in pursuance of the provisions of this Act.

(4) The secretary shall, in administering the Fund, subject to provisions of the Government Financial Management Act, 2004 (No. 5 of 2004), manage the Fund in such manner as promotes the object and purpose of the Commission.

(5) Upon the dissolution of the Commission under section 51, any assets standing to the credit of the Truth, Justice and Reconciliation Fund shall, subject to any condition attached to a gift, donation or bequest, be credited to the Consolidated Fund.

45. Annual estimates

(1) At least three months before the commencement of each financial year, the Commission shall cause to be prepared estimates of the revenue and expenditure of the Commission for that year.

(2) The annual estimates shall make provision for all the estimated expenditure of the Commission for the financial year concerned and in particular, shall provide for—

- (a) the payment of the salaries, allowances and other charges in respect of the staff of the Commission;
- (b) the payment of pensions, gratuities and other charges and in respect of benefits which are payable out of the funds of the Commission;
- (c) the maintenance of the buildings and grounds of the Commission;
- (d) the funding of training, research and development activities of the Commission;
- (e) the proper maintenance, repair and replacement of any installation and of the equipment and other movable property of the Commission;
- (f) the creation of such funds to meet future or contingent liabilities in respect of benefits, insurance or replacement of buildings or installations or equipment and in respect of such other matters as the Commission may think fit.

(3) The annual estimates shall be approved by the Commission before the commencement of the financial year to which they relate, and shall be submitted to the Minister for approval and after the Minister has given approval, the Commission shall not increase any sum provided in the estimates without the written consent of the Minister.

(4) No expenditure shall be incurred for the purposes of the Commission except in accordance with the annual estimates approved under subsection (3), or in pursuance of an authorization of the Commission given with the prior approval of the Minister.

46. Accounts and audit

(1) The Commission shall cause to be kept all proper books and records of account of the income, expenditure, assets and liabilities of the Commission.

(2) The Minister for the time being responsible for finance may prescribe the form of any book required to be kept under subsection (1) and unless a form has been prescribed, a form suitable for the purpose shall be used.

(3) Within a period of three months after the end of each financial year, the Commission shall submit to the Controller and Auditor-General the accounts of the Commission in respect of that year together with—

- (a) a statement of the income and expenditure of the Commission during that financial year; and
- (b) a statement of the assets and liabilities of the Commission on the last day of that financial year.

(4) The accounts of the Commission shall be audited and reported upon by the Controller and Auditor-General in accordance with the provisions of the Public Audit Act, 2003 (No. 12 of 2003).

47. Investment of funds

(1) The Commission may invest any of its funds in securities in which for the time being trustees may by law invest trust funds or in any other securities which the Treasury may, from time to time, approve.

(2) The Commission may place on deposit with such bank or banks or financial institutions as it may determine, any moneys not immediately required for the purposes of the Commission.

PART VI – REPORT OF THE COMMISSION

48. Report

(1) The Commission shall submit a report of its work to the President at the end of its operations.

(2) The report shall—

- (a) summarize the findings of the Commission and make recommendations concerning the reforms and other measures, whether legal, political, or administrative as may be needed to achieve the object of the Commission;
- (b) make recommendations for prosecution;
- (c) recommend reparations for the victims;

- (d) recommend specific actions to be taken in furtherance of the Commission's finding;
- (e) recommend legal and administrative measures to address specific concerns identified by the Commission;
- (f) make recommendations on the mechanism and framework for the implementation of its recommendations and an institutional arrangement in that connection.

(3) Immediately upon submitting the report to the President, the Commission shall publish the report in the *Gazette* and in such other publications as it may consider appropriate, and shall make copies of the report, or summaries thereof, widely available to the public in at least three local newspapers with wide circulation.

(4) The Minister shall table the report in National Assembly for consideration within twenty one days after its publication.

{Act No. 44 of 2013, s. 3.}

49. Implementation of Commissions report

(1) The Minister shall, upon the consideration of the report of the Commission by the National Assembly, set in motion a mechanism to monitor the implementation of the report in accordance with recommendations of the National Assembly.

(2) The Minister shall cause the reports of the Government on the implementation to be published in the appropriate form for the public.

(3) Implementation of the report of the Commission shall commence immediately after consideration of the report by the National Assembly.

[Act No. 44 of 2013, s. 4.]

50. Report to the National Assembly

(1) The Minister shall report to the National Assembly within three months after the commencement of the implementation under section 49(3), and twice a year thereafter, as to the implementation of the Commission's recommendations.

(2) All recommendations shall be implemented, and where the implementation of any recommendation has not been complied with, the National Assembly shall require the Minister to furnish it with reasons for non-implementation.

[Act No. 44 of 2013, s. 5.]

PART VII – MISCELLANEOUS

51. Cap. 187 not to apply to inquiry by Commission

The provisions of the Official Secrets Act shall not apply to any matter that is the subject of inquiry by the Commission under this Act

52. Dissolution of the Commission

(1) The Commission shall stand dissolved three months after submission of its report to the President

(2) Before the Commission is dissolved, the commissioners shall, among the final administrative activities of the Commission—

- (a) organize its archives and records, as appropriate, for possible future reference, giving special consideration to—
 - (i) the materials or information that may be made available to the public either immediately or when conditions and resources allow; and
 - (ii) the measures that may be necessary to protect confidential information; and
- (b) organize the disposal of the remaining property of the Commission.

53. Regulations

(1) The Minister may make regulations generally for the better carrying into effect any of the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), regulations under this section may—

- (a) prescribe anything required by this Act to be prescribed;
- (b) prescribe a code of conduct applicable to the staff of the Commission.

FIRST SCHEDULE

[Sections 9(2) and 10(3), Act No. 6 of 2009, Sch.]

PROCEDURE FOR APPOINTING COMMISSIONERS

1. The selection panel shall, within fourteen days of the commencement of this Act, by advertisement in the Gazette and in at least three daily newspapers of national circulation, invite applications from persons qualified under this Act for nomination as commissioners.

2. An application under paragraph 1 shall be forwarded to the selection panel within twenty-one days of the advertisement and may be made by any—

- (a) qualified person; or
- (b) any person, organization or group of persons proposing the nomination of any qualified person.

3. The selection panel shall, within seven days of the expiry of the period prescribed under paragraph 2—

- (a) consider all the applications received under paragraph 2; and
- (b) submit to the National Assembly fifteen suitably qualified persons for nomination as commissioners.

4. The selection panel shall rank and provide comments regarding each of the finalists to the National Assembly.

5. The National Assembly shall, upon receipt of the recommendations of the selection panel under paragraph 3, nominate six persons for appointment as commissioners and shall submit the names of the six nominees together with those of the three nominees forwarded by the Panel of Eminent African Personalities to the Minister for onward transmission to the President.

6. The Minister shall forthwith forward the names of the persons nominated in accordance with paragraph 5 to the President who shall, by notice in the Gazette, appoint therefrom four commissioners.

7. In nominating or appointing persons as commissioners, the National Assembly and the President shall have regard to gender equity and regional balance.

SECOND SCHEDULE

[Section 14.]

OATH/AFFIRMATION OF THE OFFICE OF A COMMISSIONER/SECRETARY

I having been appointed (a commissioner of/the Secretary to) the Truth, Justice and Reconciliation Commission under the Truth, Justice and Reconciliation Commission Act, 2008, do solemnly (swear/declare and affirm) that I will faithfully and fully, impartially and to the best of my ability, discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice. (SO HELP ME GOD).

Sworn/Declared by the said before me this day of

..... Chief Justice

THIRD SCHEDULE

[Section 29.]

PROVISIONS AS TO THE CONDUCT OF BUSINESS AND AFFAIRS OF THE COMMISSION

1. Meetings generally

(1) The Commission shall meet not less than four times in every financial year and not more than four months shall elapse between the date of one meeting and the date of the next meeting.

THIRD SCHEDULE-*continued*

(2) Meetings of the Commission shall be held on such date and at such time as the Commission shall decide or, in the absence of such decision on a date and at a time determined by the chairperson in consultation with the Secretary.

2. Special meetings

The chairperson shall, on the application of at least three of the members, convene a special meeting of the Commission.

3. Quorum

The quorum of the Commission shall be six commissioners at least one of whom shall be a commissioner appointed under section 7(1)(a).

4. Presiding of meetings

The chairperson shall preside at every meeting of the Commission and in the absence of the chairperson, the members present shall elect one of their number who shall with respect to that meeting and the business transacted thereat, have all the powers of the chairperson.

5. Decisions

Unless a unanimous decision is reached, a decision on any matter before the Commission shall be by a majority of votes of the members present and in the case of an equality of votes, the chairperson or the person presiding shall have a casting vote.

6. Invalidity of proceedings

Subject to paragraph 5, no proceedings of the Commission shall be invalid by reason only of a vacancy among the members thereof.

7. Common seal

(1) The common seal of the Commission shall be authenticated by the signature of the chairperson and the Secretary and any document required by law to be made under seal, and all decisions of the Commission may be authenticated by the chairperson and the Secretary.

(2) In the absence of either the chairperson or the Secretary in any particular case or for any particular matter, the Commission shall nominate one member to authenticate the seal of the Commission on behalf of either the chairperson or the Secretary.

(3) All instruments made by and decisions of the Commission not required to be under seal may be authenticated by the chairperson and the secretary.

8. Minutes

The Commission shall cause minutes of all proceedings of its meetings to be entered in books kept for that purpose.
