

UNIVERSITY OF NAIROBI

INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

**Transitional Justice: A Case Study of Kenya's Truth Justice and
Reconciliation Commission**

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**A Project submitted in partial fulfillment of the Degree of Master of Arts in
International Studies, Institute of Diplomacy and International Studies,
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DECLARATION

I hereby declare that this project is my original work and has not been submitted for any award in any other University.

Kenneth Okoki Dindi

Signature.....  Date. 15/10/2013.

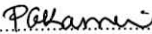
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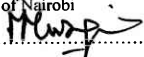
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DEDICATION

I wish to dedicate this work to my dear family, my wife Edith and to our children Byrone, Olive, and Arnold for their overwhelming support and sacrifices they made to see me comfortably complete this study.

ACKNOWLEDGEMENT

I truly thank GOD for enabling me in everything thus far. I would like to acknowledge the endless support of my supervisors Prof. Patricia Kameri Mbote and Prof. Makumi Mwangiru who have guided me patiently throughout this study and to my colleagues for all their advice, corrections and suggestions that positively shaped this work.

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ABSTRACT

There has been a remarkable increase in the number and type of truth commissions being created globally. This study examines the Kenyan Truth Justice and Reconciliation Commission (TJRC). This study aims to answer the question? How does the TJRC work? What the TJRC achieve during its preparatory phase? And what are the principal activities. The TJRC was established under section 3(1) of the Truth, Justice and Reconciliation Act No. 6 of 2008 with the objective of promoting peace, justice, national unity, healing, reconciliation and dignity among the people of Kenya. It is mandated to inquire into and investigate historical injustices and gross human rights violations, including violation of socio-economic rights that occurred between 12 December 1963 and 28 February 2008. The study applied Peace Building Theory. The researcher used qualitative data collected to make general statements on how categories or themes of data are related and the main steps in the data analysis involved; data organization, creating (identifying) categories, themes and patterns, analyzing and interpreting information. The discourse of Truth, Justice and Reconciliation in Kenya comes against a backdrop of Kenya's experience in the post-election violence of 2007-2008 which left about 1500 dead and over 360,000 displaced. The leaders of the principal parties of ODM and PNU under the auspices of the Africa Union Panel of Eminent Persons signed the Agreement on the Principles of Partnership in the Coalition Government on 28th February 2008. Within the structure of the Kenya National Dialogue and Reconciliation Forum, the parties agreed to the establishment of the National Accord and Reconciliation Act of 2008. Truth Commissions have been used in many countries around the world as effective vehicles for transitioning from a period of political upheaval, abuse of human rights and in some cases armed conflicts, to an era where there is no abuse of human rights, the reign of the rule of law and the upholding of general values of democracy. The ease of the functioning of Truth Commissions is dictated in most cases by various issues such as whether the transition is political (such is the case of a previous armed conflict), or a democratic transition (which is called for by the need to reform and better entrench the rule of law). In all cases, it is never easy to conclude whether to engage more in punitive measures such as prosecution against the perpetrators of human rights violations, or to embrace a restorative form of justice. In conclusion, it is imperative to have a wholesome appreciation of justice and see the existing mechanisms, especially those that are government instituted, as embracing a complementary role towards the uncovering of our beloved country's past truths, promoting restorative justice and national healing.

LIST OF ABBREVIATIONS

CBO	Community Based Organization
ICC	International Criminal Court
ICTJ	International Center for Transitional Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
KANU	Kenya African National Union
MA	Masters of Arts
NGO	Non-governmental Organization
NHIF	National Hospital Insurance Fund
ODM	Orange Democratic Movement
PEV	Post-Election Violence
PNU	Party of National Unity
TJ	Truth Justice
TJRC	Truth Justice and Reconciliation Commission
TRC	Truth and Reconciliation Commission
UN	United Nations

CHAPTER ONE INTRODUCTION TO THE STUDY

1.0 Introduction

There has been a remarkable increase in the number and type of truth commissions being created throughout the world in recent years.¹ The idea of a non-judicial inquiry into past (widespread) human rights abuses and violations has caught the attention of several new governments since the Truth and Reconciliation Commission of South Africa was launched in 1995. In the past twenty-five years more than thirty countries, most prominent among these in Africa has been South Africa's Truth and Reconciliation Commission, Rwanda, Sierra Leone, the Central African Republic, Ghana, Morocco and Nigeria have created truth commissions which are officially temporary bodies established to investigate pattern of violations over a period of time, and that conclude with a final report and recommendations for reforms.² There is a paradigm shift in the means by which new leaders address their Countries' violent past by creating truth commissions.³ Truth commissions have been the most visible transitional justice mechanism in recent years. Commissions have been created in Burundi (1995), South Africa (1995), Nigeria (1999), Ghana (2002) Rwanda, Sierra Leone (2002), the Central African Republic (2003) and Morocco (2004). Kenya's Truth, Justice and Reconciliation Commission was set up in 2008 and it has retribution of justice, power to recommend prosecution and also looks at historical injustices. These are some African countries that have embarked on "truth-telling" processes that emphasize reconciliation.⁴ There is a debate among legal scholars whether political transitions

¹ Hayner 2006, "Truth Commissions: A Schematic Overview" *International Review* Vol. 88 N.862, pg 629-32.

² Ibid

³ Graybill & Langerhan 2004 "Truth Justice & Reconciliation in Africa: Issues and Cases" *African Studies Quarterly* Vol.8 Issue 1, pp 1117-1130.

⁴ Ibid

genuinely require a unique type of justice or whether transitional justice (establishment of truth commissions) results from a mere political choice which compromises justice.

Truth commissions have been judged to succeed in some countries and failed in others. According to Hayner there are three distinct elements to evaluate the success of a truth commission; its process, product and eventual impact. The Commissions process is judged by the degree to which it engages the public in understanding unknowns (or in admitting that they have been denied), whether it gains full participation from all actors in the course of its investigations, including former perpetrators; and whether its work is positive and supportive of victims and survivors.⁵ The commission's final written product should be evaluated according to the extent of truth revealed, its proposals for reparations and reform.⁶

This study will examine the processes and product for the Kenya's Truth Justice and Reconciliation Commission. The study will further examine the operationalization of truth and reconciliation commissions with specific reference to Kenya. In addition this research will be an empirical study to identify operational lessons for the Truth Justice and Reconciliation process in Kenya.

⁵ Hayner, Priscilla. 2001. *Unspeakable Truths: Confronting State Terror and Atrocity*. New York: Routledge.

⁶ Ibid

1.1 Statement of the Research Problem

This study is important because there is a need for empirical studies of specific commissions to identify operational lessons.⁷ So far there has been no conclusive study undertaken on the processes and product of the Kenyan Truth Justice and Reconciliation Commission.

Earlier single-case studies have tended to focus on a few well-documented transitional cases such as Argentina, China and South Africa.⁸ This study will increase knowledge on transitional justice in Kenya which has not been documented before. The Kenyan commission is unique in that it incorporates justice, while past commissions worldwide have been on truth and reconciliation. The Kenyan commission was formed from an act of parliament, it looks at historical injustices and it could recommend prosecution. There is a limited body of literature devoted to the systematic and rigorous investigation of truth commissions. This study will endeavor to principally examine the operationalization of this emerging process and identify the gaps that would hinder TJRC from achieving its objectives.

The purpose of this study is to examine the process, product and eventual impact of the TJRC, identify operational lessons of TJRC and thereby give insights as to whether the Kenyan TJRC will achieve its objectives. The rationale for this study is that there seems to be knowledge gap about Truth Justice and Reconciliation Commission in Kenya as most research and studies done on TRC have been on truth and reconciliation commissions and the Kenyan one is unique because it incorporates justice. Further the Kenyan Commission has been set up at a time when an international process (The International Criminal Court) is on-going, thereby creating an

⁷ Graybill & Langerhan 2004 "Truth Justice & Reconciliation in Africa: Issues and Cases" *African Studies Quarterly* Vol.8 Issue 1, 1117-1130.

⁸ Hayner 2006, "Truth Commissions: A Schematic Overview" *International Review* Vol. 88 N.862.

interesting situation for inquiry as to whether the two processes will complement each other or whether the Commission will not be able to achieve its objective in the light of the international process.

1.3 Research Objectives

The objectives of the study are:

- a) To examine the establishment and operationalization of Truth Commissions with reference to the Kenyan Truth Justice and Reconciliation Commissions as a case study.
- b) To identify operational lessons of the Kenya Truth Justice and Reconciliation Commission.
- c) To examine the processes and product of the Kenya Truth Justice and Reconciliation Commission.

1.4 Research Questions

This study will answer the following questions:

- a) How does the Truth Justice and Reconciliation Commission work?
- b) What did the Truth Justice and Reconciliation Commission achieve during its preparatory phase?
- c) What are the principal activities of the Truth Justice and Reconciliation Commission?

1.5 Literature Review

1.5.1 Truth Commissions and Transition Justice

Truth commissions are bodies set up to investigate and compile reports about breaches of human rights in a country and in a certain conflict that took place in a precisely identified time period in the past.⁹ Human rights violations may include murders, torture, illegal arrest, crimes committed during an armed conflict by the military or paramilitary forces, expulsions, destruction of property and other forms of systemic abuse of political enemies, individual civilian or groups of civilian population. Truth commissions involve official investigations into past abuses.

Four primary elements of that define a truth commission was identified by Hayner.¹⁰ First, a truth commission is focused on the past. The events may have occurred in the recent past, but a truth commission is not an ongoing body akin to a human rights commission. Second, a truth commission does not deal with specific events but documents the greatest possible number of cases of human rights violations. In its mandate, the truth commission is given the parameters of its investigation both in terms of the time period covered and the type of human rights violations to be explored. Thirdly, a truth commission is a temporary body, usually operating over a period of six months to two years and completing its work by submitting a report. These parameters are established at the time of the commission's formation, but often an extension can be obtained to wrap things up. Fourth, truth commissions are officially sanctioned, authorized, or empowered by the state. This, in principle, allows the commission to have greater access to information, greater security, and increased assurance that its findings will be taken under

⁹ Hayner Priscilla 2000 Same species, different animal: How South Africa compares to truth commissions worldwide. In *Looking Back, reaching forwards* 35, London: Zen Books.

¹⁰ Ibid.

serious consideration. Official sanction from the government is crucial because it represents an acknowledgment of past wrongs and a commitment to address the issues and move on. Further, governments are more likely to enact recommended reforms if they have established the commission. Others characteristics of a truth commission is that they are temporary bodies usually in operation for one or two years. They are non-judicial bodies that enjoy a measure of *de jure* independence and complete their work with a submission of a final report that contains conclusions and recommendations.

1.5.2 International Criminal Justice and Truth Commissions

For a long time, the Truth Justice (TJ) literature has principally been the province of legal scholars, human rights activists and individuals who have served as judges, prosecutors or policy-makers in official capacities.¹¹ Most attention has been given to the moral-philosophical and jurisprudential aspects, and in particular to the institutional design and implementation of tribunals. International lawyers have extensively published on the development, capacities and legal procedures of international, hybrid or domestic courts dealing with gross human rights violations. Many studies focus on the international courts that have been established to prosecute war crimes, such as the Tribunals for the former Yugoslavia, Rwanda, Sierra Leone and Lebanon, and the International Criminal Court (ICC).¹²

The International Criminal Tribunal for the former Yugoslavia (ICTY) represents the first court implemented under the auspices of the United Nations (UN), much research has focused on its relevance for international law and legal procedures. Many authors consider the ICTY to be

¹¹ Fischer, I. (2000); Warring Sides in Burundi Get a Scolding From Mandela; New York Times; 17th January 2000.

¹² Ibid.

an innovative tool in the context of civilising international relations. Analysis of its impact on the societies in question is not abundant and very few empirical studies exist on these issues¹³. The question of whether the ICTY has contributed to the “restoration of peace and reconciliation”, as was stated in UN Resolution 1534 and promoted by high-ranking representatives of the tribunal, is still controversial.¹⁴ This illustrates the variety of opinions on the potential and limits of prosecution by international criminal courts and the difficulty of assessing the impact of tribunals on war-torn societies. Some scholars argue that the notion that the ICTY would contribute to reconciliation between former warring groups has proved unrealistic, and that expanding expectations beyond its legal mandate might “undermine the important contributions that international trials can make to post-conflict societies”.¹⁵ Moreover, it has become obvious that a final and comprehensive assessment can only be determined in the long run. As Pierre & Hazan has outlined, the Nuremberg trials after World War II were regarded as victors’ justice by part of the German population, and did not have an immediate effect in terms of initiating debates in the 1950s. But their archives became an important point of reference for the following generations 25 years later, and thus contributed to informing German society once initiatives for facing the past had begun to develop on a larger scale.¹⁶ The International Military Tribunal for the Far East was formed to try accused people in Japan itself.

¹³ Meernik, James, (2005), “Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia”, *Journal of Peace Research*. 42(3), 271-289.

¹⁴ Ibid.

¹⁵ Fletcher, Laurel E, Harvey A, Weinstein, and Jamie Rowen; (2009): Context, Timing and the Dynamics of Transitional Justice: Historical Perspective. *Human Rights Quarterly Journal*. 31: pg 163-220.

¹⁶ Hazan, Pierre 2006. Measuring the Impact of Punishment and Forgiveness. A Framework for Evaluating Transitional Justice, in: *International Review of the Red Cross* 88, 861, 19-47.

Until about the mid-1990s, research on the Tokyo Trial centred on exploring charges pertaining to crimes against peace, or the ‘crime of aggression’ as it is presently known in the Rome Statute of the International Criminal Court. The prosecution’s case on war crimes and crimes against humanity, by contrast, came under scrutiny only in the last decade or so. This type of bias in the existing scholarship has been conditioned partly by historians’ prejudgments about the nature of the Trial, but more fundamentally by the inherent structural constraints of the Tokyo Trial itself. In the months leading up to and after the Japanese acceptance of surrender in 1945, the Allied Powers developed the policy that the post-war international tribunals in Europe and in the Far East would focus on securing, above all, a ruling on individual criminal liability for crimes against peace: planning, preparing, initiating, and waging aggressive war, or participating in the conspiracy to accomplish actions thereof. The Allied Governments, and in particular the United States, pursued this policy as a concrete step toward instituting an international legal system for deterring future aggressors and preventing the kind of war devastation that the Axis aggression had caused. This US-inspired policy, first introduced at Nuremberg, was replicated and followed to the letter at Tokyo. The Tokyo Charter, indeed, required that the principal charges against the defendants be crimes against peace while deeming charges on war crimes and crimes against humanity as optional. Consequently, much of the court battles at Tokyo revolved around substantiating aggressive war charges, even though evidence of Japanese wartime atrocities was, in fact, also presented. The disproportionate emphasis that the Allied policy-makers placed on crimes against peace had far-reaching consequences: court sessions on crimes against peace came to define the Japanese remembrance of the Tokyo Trial while those on war crimes and crimes against humanity rarely inspired public debates or investigations for many decades crimes against humanity rarely inspired public debates or investigations for many decades.¹⁷

¹⁷ Yuma Totani; (2010); *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited*; Leiden, Boston.

A relevant part of the Truth Justice literature has centred on the dichotomy of peace vs. justice and truth vs. justice.¹⁸ In the peace vs. justice debate, advocates of the legalist approach have emphasized criminal justice as a means to deter future human rights violations and to support peace building. Another argument is that criminal justice will stigmatize the elites who perpetuate conflict, and help separate individual from collective guilt, breaking the cycle of violence.¹⁹ Skeptics doubt that criminal justice can achieve all of this. Some have criticized international criminal justice in particular and argued for domestic prosecutions based on the conviction that justice should follow rather than precede the consolidation of peace.²⁰ In earlier debates bargains and amnesties, rather than prosecutions, were often seen as the best ways to achieve peace because of the need to contain 'spoilers' in many post-conflict regions. Most advocates of transitional justice have rejected the idea of impunity and emphasize that amnesties, if applied at all, should be introduced as partial and conditional.²¹ The truth vs. justice debate has balanced the merits of trials against other accountability mechanisms. The 1990s in particular were marked by this dichotomy, due to the almost simultaneous creation of the South African Truth and Reconciliation Commission (TRC) and the ICTY, which became emblematic of this discussion.²² Truth commissions have been promoted as alternatives to prosecutions and as

¹⁸ Thoms Oskar N. T., Jmaes Ron and Roland Paris; (2010); State-Level Effects of Transitional Justice: What do we know? *In The International Journal of Transitional Justice*.

¹⁹ Minow Martha, (1998), *Between Vengeance and Forgiveness. Facing History after Genocide and Mass Violence*. Boston: Beacon Press.

²⁰ Ibid.

²¹ Hayner Priscilla 2000 Same species, different animal: How South Africa compares to truth commissions worldwide. In *Looking Back, reaching forwards* 35. London: Zen Books.

²² Hazan 2006,20

important mechanisms for counteracting cultures of denial. It has been argued that public and official exposure of truth provides redress for victims and may contribute to individual and social healing and reconciliation.²³ Divided societies in particular need truth-seeking and truth-telling mechanisms. Given that nationalist myth-making, based on historical distortion has fuelled both interstate and intrastate wars, efforts to prevent the instrumentalisation of facts and history are needed to prevent a return to violent conflict.²⁴ Furthermore “civil society produces a sense of public ownership in this process, so that this dialogue actually leads to something. Otherwise, a country has merely a nice history lesson, destined for the bookshelf”.²⁵ An important policy recommendation stems from these reflections, arguing that truth and reconciliation commissions should be established,

“only where [...] a robust civil society remains intact. Where such conditions do not exist, the commission’s mandate should be narrowly focused on documenting the truth along the lines of some earlier commissions rather than on the broader reconciliation goals established more recently. In a context that lacks a civil society altogether, a more top-down approach may be appropriate”.²⁶

However, research on truth commissions has also revealed enormous shortcomings and it has become clear that apart from a strong civil society, there is a need for reliable alliance partners in parliaments, governments and administrations who are willing to engage in institutional reforms and establish the rule of law. In the 1990s, high expectations were raised regarding the potential that truth commissions may have. Having seen the early truth

²³ Hayner Priscilla 2000 *Same species, different animal: How South Africa compares to truth commissions worldwide*. In *Looking Back, reaching forwards* 35, London: Zen Books.

²⁴ Mendeloff David; (2004); *Truth –Seeking, truth-Telling and Post conflict Peace building: Curb the Enthusiasm?* *International Studies Review* 6 (3)

²⁵ Kritz Neil; (1995); ‘*Transitional Justice: How emerging democracies reckon with former regimes.*’ P.229

²⁶ *Ibid*

commissions in Latin America as major advances in terms of accountability, the human rights community has meanwhile come to view these instruments much more skeptically.²⁷ An important aspect of this disillusionment was the “enormous chasm” between the commissions’ mandates to develop detailed recommendations on societal reforms and the non-implementation of these proposals by the governments that received them. It has therefore been recommended that international donors might think about strategies of tying aid to the implementation of truth commission recommendations.²⁸

Clear warnings have also been expressed that establishing truth commissions has become an almost routine and standard practice without analyzing the context. It seems that many countries in transition decide to have truth commissions without any clear understanding of what such endeavors are about, and these policy decisions are “usually based not on research but on instinct.”²⁹ Disillusionment about truth commissions has contributed to broadening the discourse and to overcoming the fixation on dichotomies between “truth vs. justice” or “justice vs. peace”³⁰

1.5.3 Truth, Justice and Reconciliation in Africa

Pardon rather than punishment, or pardon for the many alongside punishment of the few, has become a trend for transitional societies coming out of eras marked by intrastate conflict. Restorative justice, which favors reconciliation among former foes over the punishment of perpetrators of crimes, has been increasingly applied since 1974, with truth commissions

²⁷ Ibid.

²⁸ Kritiz Neil; (1995); ‘Transitional Justice: *How emerging democracies reckon with former regimes.*’ P.229.

²⁹ Ibid.

³⁰ Ibid.

implemented in approximately more than 30 countries around the world.³¹ Most prominent among these in Africa has been South Africa's Truth and Reconciliation Commission, but Rwanda, Sierra Leone, the Central African Republic, Ghana, Morocco and Nigeria have also embarked on "truth telling" processes that emphasize reconciliation. The Kenyan government announced that it would establish its own truth commission by the end of 2004, and peace agreements in Liberia and the Democratic Republic of the Congo have provided for the formation of truth commissions. These developments suggest that the idea of restorative justice is not just a fad but represents an innovative approach for citizens of many countries wrestling with the question of how to live with former enemies.

During the ongoing wave of democratic transformations, one can observe a "paradigm shift" in the means by which new leaders address their nations' violent past.³² There is a new commitment at both domestic and international levels to bring justice and healing to people who have experienced gross human rights atrocities perpetrated by ousted regimes or rebel groups. Political leaders and legal theorists have argued that learning the truth about past human rights violations and punishing those responsible for them are prerequisites for the establishment of democracy and respect for the rule of law.³³ Thus, they call for structures of transitional justice during an interim period to confront the crimes of the past in order to lay the foundations for legitimate judicial systems and democratic norms. Such structures have included the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda and truth commissions, hybrid UN-funded courts, and revived traditional judicial structures such as Rwanda's *gacaca*.

³¹ Fischer, I. (2000); Warring Sides in Burundi Get a Scolding From Mandela, New York Times. 17th January 2000.

³² Ibid.

³³ Ibid.

Transitional justice processes have inspired a growing field of study.³⁴ Legal scholars tackle theoretical and ethical issues surrounding transitional justice norms, participants and researchers have analyzed a number of transitional justice institutions, and a small number of scholars have published comparative studies. A survey of the literature reveals that a number of significant issues concerning transitional justice and its structures continue to bedevil practitioners attempting to implement it and scholars hoping to conceptualize or interpret it.³⁵ First, there is disagreement over whether political transitions genuinely require a unique type of justice one that emphasizes reconciliation as opposed to strict retributive justice or whether transitional justice results from a mere political compromise in which “justice becomes the casualty of a political calculation.” The question is whether processes of transitional justice have a consistent set of goals, with a related issue being the lack of clarity within the literature concerning the criteria for a successful transitional judicial process or specific structure. Third is the debate surrounding the oft-repeated assertion that truth commissions can heal individuals and nations, bringing reconciliation among former enemies.

Fourth and finally, there is a set of very practical concerns that require attention, including determination of the ideal balances between trials and truth commissions, domestic and international initiatives, efficiency and effectiveness. Scholars have not reached a consensus on whether the unique economic, social, and political features of transitional periods legitimately demand a response to past human rights crimes that favors reconciliation over retribution. Furthermore whether the granting of conditional amnesty to those who confess to crimes before a truth-seeking body, for example is a political expedient that significantly compromises justice.

³⁴ Hayner Priscilla: (2009) *Negotiating Justice: Guidance for Mediators*. Geneva: Humanitarian Dialogue Centre.

³⁵ *Ibid.*

Whether it is an appropriate policy within the context of the many challenges facing a society in political transformation.³⁶

Teitel, stresses the limited character of transitional justice and notes of the compromises to formal justice that it entails.³⁷ Some scholars emphasize that political compromises are necessary to determine the formation, mandates, and operations of courts and truth commissions, consequently limiting their effectiveness. Others do not see transitional structures like truth commissions as inferior to formal court systems. They emphasize that transitional societies face an array of challenges and therefore must ask different things of justice structures than those asked of formal courts in established democracies.³⁸ Transitioning societies may value peace and reconciliation more than retribution. Therefore, restorative structures may indeed be the best judicial option. Another difficulty concerns the goals transitional justice processes can be expected to achieve. If transitional justice is inherently different from justice in established democracies, the unique services it employs should be identifiable.³⁹ If this process is implemented during a finite period, the way in which transitional justice alters society should also be identifiable. Any evaluation of the success of such institutions must be done with a firm understanding of the goals of transitional justice, yet consensus on what these goals should be is largely missing from the academic literature.

³⁶ Ruti Teitel; (2000), *Transition Justice*. Oxford: Oxford University Press.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

Evenson identifies four general goals of transitional justice:

“Providing for individual criminal accountability, deterrence, and punishment, and establishing a common truth about the past which can carry the society forward in a process of healing and reconciliation.”⁴⁰

However, she notes that the individual context of each country will shape its specific goals. Likewise, Aukerman identifies five separate goals for any justice process: retribution, deterrence, rehabilitation, restoration, and condemnation/social solidarity among which political leaders choose based on their societies’ unique needs and characteristics.⁴¹ A careful evaluation of specific structures is needed in order to discover what these mechanisms actually achieve. Anyone seeking to evaluate mechanisms of transitional justice will soon discover few criteria against which to judge them. However, Hayner’s work is a notable exception.⁴² In her path-breaking comparison of truth commissions, she identified some of their basic requirements. According to Hayner, truth commissions should operate impartially free of political interference, have adequate resources and access to the information they deem necessary, be implemented as quickly as possible after the period they are expected to investigate, work for a limited specified period, and be empowered to make widely and expeditiously distributed recommendations for further action to governments with the expectation that those recommendations will be considered seriously.⁴³

⁴⁰ Hayner Priscilla: (2009) *Negotiating Justice: Guidance for Mediators*. Geneva: Humanitarian Dialogue Centre.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

Hayner proposes examining three distinct elements to evaluate the success of a truth commission: the commission's process, product, and eventual impact. The process is judged by;

“the degree to which it engages the public in understanding unknowns (or in admitting that they have been denied) . . . whether it gains full participation from all actors in the course of its investigations, including former perpetrators; and whether its work is positive and supportive to victims and survivors.” The commission's final written product should be evaluated according to “the extent of truth that is revealed, as well as its proposals for reparations and reform.”⁴⁴

Regarding its impact, Hayner notes that;

“the degree to which the commission's work contributes to long-term reconciliation, healing, and reform will be determined in large part by whether perpetrators or state officials acknowledge and apologize for wrongs, whether and how the commission's report is distributed and put to use, and whether its core recommendations are implemented.”⁴⁵

These guidelines pertain exclusively to truth commissions. There is no consensus concerning even a rudimentary set of criteria against which to measure the success of other transitional justice institutions, such as *ad hoc* international criminal tribunals or hybrid courts.⁴⁶ A third problem is that scholars and practitioners engage in assertions about what these structures can do but rarely test those assumptions.⁴⁷ Common wisdom asserts that truth commissions promote individual healing and reconciliation, which leads to national healing and reconciliation, which in turn provides a bedrock for democracy.⁴⁸ But, as Borer notes in this issue, no one has

⁴⁴ Hayner Priscilla: (2009) *Negotiating Justice: Guidance for Mediators*. Geneva: Humanitarian Dialogue Centre.

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ Boraine, Alexander, (2006), *Transitional Justice. A Holistic Interpretation: Journal of International Affairs*.

⁴⁸ Ibid

yet proven that truth commissions secure their supposed benefits, such as healing, truth, and national reconciliation⁴⁹. In fact, a few scholars are beginning to conclude that the evidence is decidedly mixed. Hamber and Wilson, for example, reject entirely the metaphor of national healing arguing,

“nations do not have collective psyches which can be healed, nor do whole nations suffer post-traumatic stress disorder and to assert otherwise is to psychologize an abstract entity which exists primarily in the minds of nation-building politicians.”⁵⁰

In an important study of South Africa, Gibson has tested the “truth leads to reconciliation” assertion head-on using extensive surveys and social science analysis. He concludes that the South African Truth and Reconciliation Commission did indeed succeed in convincing a majority of South Africans across the political spectrum that all sides were guilty of human rights violations and in turn suffered from violations⁵¹. This provided them with a common interpretation of the apartheid era, which is serving as a basis for reconciliation. However, the process is far from complete because political tolerance, one of Gibson’s measures of reconciliation, remains scarce in South African political culture.⁵²

Similar studies of other structures of transitional justice are needed to enhance our understanding of their merits.

⁴⁹ Ibid.

⁵⁰ Aukerman, Mirium J; (2002); *Extraordinary Evil, Ordinary Crime: A Framework for Understanding transitional Justice*, Harvard Human Rights Journal 15 (39-97).

⁵¹ Ibid.

⁵² Ibid.

1.6 Theoretical Framework

1.6.1 Peace Making Theory

For many legal scholars, the proper response to the perpetrators of human rights abuses, violence and ethnic cleansing or genocide must be criminal prosecutions by a court of law or some sort of tribunal.⁵³

The distinguished jurist, Antonio Cassese has argued that: (1) the rendering of justice, criminal accountability-better than the alternatives, including private vengeance, collective amnesia, or general unconditional amnesties for perpetrators; (2) international justice is preferable to national justice; (3) and international justice is not in conflict with peace.⁵⁴ This is why there was international pressure during the Lome peace negotiations for the setting up of a criminal court to try those responsible for the atrocities in order to break the culture of impunity.

Peace building specialists argue that if modern conflicts have social ties and relations, then reconciliation will be the most suitable response to serious human rights violations. Writers like Desmond Tutu explore alternative forms of conflict resolution such as transitional justice, restorative justice, or retroactive justice, which move away from criminal prosecutions towards truth seeking and reconciliation.⁵⁵

⁵³ Minow, Martha (1998) "Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence" Beacon Press, Boston; Antonio Cassese, (1998) Reflections on International Criminal Justice, 61 MOD. L. REV. 1; Rotberg, Robert, (2000) "Truth Commissions and the Provision of Truth, Justice, and Reconciliation in Truth v. Justice: The Morality of Truth Commissions" (Robert I. Rotberg and Dennis Thompson, eds.) Princeton University Press, Princeton, New Jersey.

⁵⁴ Antonio Cassese, (1998) Reflections on International Criminal Justice, 61 MOD. L. REV. 1.

⁵⁵ Sarkin, Jeremy, (1999), "Preconditions and processes for establishing a Truth and Reconciliation Commission in Rwanda-the possible interim role of Gacaca community courts", (2) 3 Law, Democracy and Development; Tutu Mpilo Desmond, (1999) No future without forgiveness, 1st ed., New York; Neil J. Kritz, (1996) Coming to terms with Atrocities: A review of Accountability Mechanisms for Mass violations of Human Rights 59 LAW & CONTEM. PROBS 127.

Bishop Tutu sees reconciliation and forgiveness as the way to achieving peace. He argues that reconciliation promotes healing and nurtures social relationships at the expense of exacting vengeance. Tutu adds that restorative justice reflects on African way of healing and nurturing confidence and rebuilding social relationships at the expense of exacting vengeance. African notions of justice and biblical teachings influence The basic idea is that the entire community that was affected by the crime must have a say in the delivery of justice. Reconciliation takes precedence over the legal rights of the conflicting parties. This approach was largely focused on reducing imbalances and encouraging harmony. Biblical teachings have been one of the frameworks for truth commission and inevitably Tutu's ideas. Biblical doctrine always focuses on confession and forgiveness. Inevitably, most of the commissions set up in, for example, South Africa, Ghana, Argentina, Chile, Guatemala and others have had some religious influence in their establishment. Montville, suggests that one must ask about the mechanism in which the truth telling is linked with peace and its subsequent reconciliation and the role of forgiveness, while Lederach and others considered the role of reconciliation in it large context as post-conflict peacemaking.⁵⁶

Montville argues that the knowledge of the individual and groups needed for recognition, acceptance, and respect does not feed into the international community's conduct of political relations and the individual identity and self-concept should be considered in international politics. Montville identifies three steps leading to reconciliation: joint analysis of the history of the conflict; recognition of injustices and resulting historic wound; and the acceptance of moral responsibility. Historical and comparative perspectives indicate that peace without justice is an

⁵⁶ Montville, Joseph V. (1995), "Complicated Mourning and Mobilization for Nationalism." in Brown, Jerome, (Ed.), *Social Pathology in Comparative Perspective: The Nature and Psychology of Civil Society*. Westport, CT: Praeger.

obstacle to attaining both truth and justice, especially when developing a reliable system of justice is essential.⁵⁷

It emphasizes that civil society is important in establishing accountability and truth in conflict situations. Mattarolo contends that truth commission reports, especially their conclusions and recommendations, have acted as a kind of milestone, signaling a society's decision to turn over a page in its history. Thus, the society in question has also shown its determination to move into a new phase in which the rule of law can prevail, democracy can be built and human rights can be respected, guaranteed and promoted. In fact, an important characteristic of truth commissions, which has been especially evident in their conclusions and recommendations, has been their clear desire to break with the past. This intention is often expressed in the form of an official act.⁵⁸ Some scholars have been more flexible in their approach to seeking solutions to past human rights violations. Kritz suggests that figuring out which approach or mechanism will be most helpful in the healing process for individual members of post conflict societies will vary from person to person and will be determined in part by the background and makeup of the particular individual as well as the nature of trauma endured.⁵⁹

In Sierra Leone, a TRC was set up after 11 years of mass atrocities on the premise that if amnesty is granted to wrongdoers, they would reveal the truth about their past.⁶⁰

⁵⁷ Lederach, John Paul. (1997), *Building Peace: Sustainable Reconciliation in Divided Societies*. Washington, DC: U. S. Institute of Peace Press.

⁵⁸ *Ibid.*

⁵⁹ Neil J. Kritz, (1996) *Coming to terms with Atrocities: A review of Accountability Mechanisms for Mass violations of Human Rights* 59 *LAW & CONTEM. PROBS* 127.

⁶⁰ Poole Jennifer, (2002) *Post-Conflict Justice in Sierra Leone in Post Conflict Justice* (M. Cherif Bassiouni ed.,) (Ardsley, N.Y Transnational Publishers).

1.7 Hypothesis of the Study

The Kenya Truth Justice and Reconciliation Commission achieved very little during its preparatory phase.

1.8 Methodology

1.8.1 Scope of the Study

The scope of this study is a case study on the Kenyan Truth Justice and Reconciliation Commission. The study will be limited to qualitative methods of investigation, which will mainly involve direct observation including participant and non-participant observation, ethnographic diaries, and more recently photography and video.

1.8.2 Significance of Study

This study will contribute to literature on Truth Justice and Reconciliation Commissions and transitional justice management. This study will contribute to literature on Truth and Reconciliation Commissions (TRC) and localize the Truth Justice and Reconciliation agenda.

1.8.3 Limitations of Research

This study will be limited to the commission's process and product. Thus, the impact of the commission will not be delved into as it requires the study to be conducted long after the final report of the commission has been submitted and/or published.

1.8.4 Study Design

The research methodology gives the direction to follow to get answers to issues that are of concern. Peil concurs stating that, research is usually designed to handle a problem, something

that needs describing, explaining or improving, or about which more information is needed so that future occurrences can be predicted and policy decided.⁶¹

This study is a qualitative research and therefore the study will include design, techniques and measures that do not produce discreet numerical data. One of the advantages of qualitative research according to Mugenda and Mugenda is that it allows the research to go beyond the statistical results usually reported in quantitative research.⁶² Using the case study research method, this researcher attempts to provide insights into the institutional and organizational orientation of transitional justice (TRC). The Kenyan TJRC has been chosen since it is newly established in Kenya and there is gap knowledge about the work of a truth and reconciliation commission in Kenya.

1.8.5 Data Gathering Instruments and Procedure

Data was gathered to meet the three objectives of this study, namely: To examine the establishment and operationalization of Truth Commissions with reference to the Kenyan TJRC as a case study, To identify operational lessons of TJRC and To examine the processes and reports (product) of the Truth Justice and Reconciliation Commission. Mostly, an un-obtrusive method of content analysis document analysis was employed. The specific published (materials) data needed to meet the study objectives was gathered by sampling the following materials the Truth Justice and Reconciliation Commission website, TJRC Act, TJRC progress reports, TJRC policy documents, TJRC newsletters and publications and TJRC training manuals, tracking

⁶¹ Gerald Piel; (1995); *The Elite Conspiracy* South Africa.

⁶² Mugenda Olive and Abel Mugenda; (2003) *Research Methods*; Acts Press, Kenya.

media reports, analysis of reports flowing from workshops and public forums organized by different human rights groups on the Truth Justice and Reconciliation Commission.

1.8.6 Data Analysis

According to Mugenda and Mugenda “Data analysis is the process of bringing order, structure and meaning to the mass of information collected”⁶³ The researcher used qualitative data collected to make general statements on how categories or themes of data are related. The main steps in the data analysis involved; data organization, creating (identifying) categories, themes and patterns, analyzing and interpreting information. Data analysis will be by use of Content and/or Document Analysis, through a review of literature and reports available in the Truth Justice and Reconciliation Commission’s offices and analysis of reports flowing from workshops and public forums organized by different human rights groups on TJRC, the researcher was able to explore processes and products (reports) of the Truth Justice and Reconciliation Commission and from these materials an assessment was done.

1.8.9 Sampling Design

The researcher used non-probability sampling procedure, in particular the purposive sampling procedure. The researcher has proposed non-probability sampling because in this study the focus is on in-depth information and not making inferences or generalizations.⁶⁴

1.8.11 Justification of Methodology

The researcher’s concern in using the above tools of data collection in this study is geared towards establishing deep and rich data that are inherent in any exemplary case study. By using

⁶³ Mugenda Olive and Abel Mugenda; (2003) *Research Methods*; Acts Press, Kenya.

⁶⁴ Ibid.

written material, this researcher assumes that TJRC has well documented its processes and products. Participant observation will be important because human affairs are different in essence and should be reported and interpreted through the eyes of specific interviewers and well-informed respondents who can provide insights into the situation. Direct observation is a major tool in this study and helped the researcher in checking the accuracy of the materials collected with the other methods.

1.8.10 Chapter Outline

Chapter One: Introduction to the Study

The thesis is divided into five main chapters. Chapter one makes up the introduction. Here, the researcher lays makes a conceptual framework of the issues to be addressed and particularly, what is to be investigated, why and how. Key components of this section are the problem statement, objectives, and justification for the study.

Chapter Two: Truth Commissions and Transition Justice

Chapter Three: Context for Truth Justice Reconciliation in Kenya

Chapter Four: The Operation of TJRC in Kenya and its Report

This chapter is the core of the study. It present the findings of the research while making key linkages between reviewed literature, the objectives of the study and the hypothetical positions taken by the researcher on the topic under study.

Chapter Five: Discussion, Conclusion and Recommendations

This chapter sums up the major findings in line with the objectives and hypotheses of the study. It acts as the final and ultimate verdict on the issues addressed in the research. It makes several key conclusions and important recommendations on the way forward.

CHAPTER TWO

TRUTH COMMISSIONS AND TRANSITION JUSTICE

2.0 Introduction

Transitional justice mechanisms seek to address past human rights violations while allowing countries and their people to move forward towards sustainable peace and reconciliation. In other words, through transitional justice, states seek to address the challenges that confront their societies as they move from an authoritarian or otherwise repressive regime to a more democratic one. These challenges include gross human rights violations; lack of rule of law, unaccountable government, historical injustices, disharmony (conflict) among various groups (examples ethnic, racial, religious) in the society. To address the variety of challenges, injustices of the past and chart forth a new future of a more open, democratic and accountable government, various mechanisms are used: criminal prosecutions and amnesties; truth seeking and telling commissions; reconciliation measures; reparations for victims; gender justice; Institutional reforms (including constitutional and security sector); Lustration and Legislative reforms. These processes for transitional justice should be all encompassing, transparent and safeguard themselves from any iota of political interference. This will in turn foster peace, justice and reconciliation.¹

Transitional justice has often been found in the form of truth commissions which in the past two decades have been established in more than 30 countries throughout the world.² Truth commissions are created as special institutional arrangements for a historical context in which

¹ Dimitrijevic Nenad, 2006, *Journal Of Conflict resolution Justice Beyond Blame : Moral Justification of Truth Commission*, Pg 50:38

² Ibid

the undesirable past is present than the desirable future. Thus, truth commissions are expected to help in providing answers that would be both morally correct and politically viable.³ Trials and truth commissions are some of the transitional justice processes that are employed in post conflict and post authoritarian societies.⁴ The case for transitional justice seems incontrovertible as the principles of fundamental justice require holding the individual accountable for the worst transgressions of human rights including war crimes, genocide and crimes against humanity.

Supporters of transitional justice assert that transitional justice has other benefits which include promoting human reconciliation and psychological healing, fostering respect for human rights and the rule of law and aiding in establishing conditions for a peaceful and democratically governed country. Proponents of transitional justice argue that truth commissions are useful because they make it difficult to deny gross violations of human rights and they signify official determination to avoid recurrence of violations.⁵

2.1 Reconciliation and Conflict Transformation

Together with transitional justice, the concept of reconciliation has become important among those who engage in post-war regeneration. Peace activists in particular see reconciliation as a necessary requirement for lasting peace. The concept is also extensively discussed in the academic literature on peace building and conflict transformation. It has been argued that reconciliation needs both the orchestration of top-down and bottom-up processes, and although the process may begin either with the leaders or at the grass-roots, to be effective it must always

³ Zalaquoe Jose. 1995. "Confronting Human Rights Violations Committed by Former Governments: *Principles Applicable and Political Constraints*" In *Transitional Justice: Vol 1*.

⁴ Thoms *et al* 2010, "State-Level Effects of Transitional Justice: What do we know?" *The International Journal of Transitional Justice*

⁵ *Ibid*

proceed in both dimensions simultaneously.⁶ Civil society actors have a special role to play in this regard.⁷

Most authors agree that reconciliation describes a process rather than an end state or outcome, aiming at building relationships between individuals, groups and societies.

Reconciliation has also been defined as a process,

“through which a society moves from a divided past to a shared future”; looking at the past in a way that allows people to see it in terms of “shared suffering and collective responsibility” may help to restore confidence.⁸

The need for reconciliation is emphasized in particular for societies that have gone through a process of ethno political conflict, as these are marked by a loss of trust, intergenerational transmission of trauma and grievances, negative interdependence (as the assertion of each group’s identity is seen as requiring the negation of the other group’s identity) and polarization.⁹ Given that antagonists live in close proximity, not addressing these legacies means risking that they will form the causes of new spirals of violence. Reconciliation is regarded as being necessary to prevent the desire for revenge. The concept has also been

⁶ Bar-Tal, D., & Bennink, G. H. (2004), The Nature Of Reconciliation As An Outcome And As A Process. In Y. Bar-Siman-Tov (ed.). From Conflict Resolution To Reconciliation. Oxford: Oxford University Press (also published in *Politika*, 2002, Issue 9, pp.9-34 in Hebrew). (pp.11-38).

⁷ Assefa, Hizkias. 2005, “Reconciliation, Challenges, Respite and the Role of Civil Society”, Paul van Tongeren et al. (edS.). *People Building Peace 2: Successful Stories of Civil Society*. London: Lynne Rienner, pp 637-645.

⁸ Bloomfield, David; (2003); *The Context of Reconciliation. In Reconciliation After Conflict; A Handbook*, International Institute of Democracy and Electoral Assistance.

⁹ Heyner, Priscilla 2009. *Negotiating Justice: Guidance for Mediators*. Geneva: Humanitarian Dialogue Centre. Available at www.dcdntre.org/files/negotiating-justice20reort.pdf.

¹⁰ Lederach, John Paul; (1995), *Preparing for Peace. Conflict Transformation Across Cultures*. Syracuse, NY: Syracuse University Press.

discussed in the context of acknowledgement, contrition, mercy and forgiveness. The Truth and Reconciliation Commission of South Africa (1998) and some scholars have placed great emphasis on this nexus.¹⁰ Others have argued that reconciliation processes will not necessarily lead to forgiveness, as this is considered to be a power held only by those victimised and cannot be claimed by others.¹¹ Linking both concepts puts any reconciliation process in danger of failing:

“the right not to reconcile is a key issue in understanding some of the resistance victims feel to reconciliation, and one often forgotten by international actors as they blithely design post-conflict reconciliation processes in the abstract.”¹²

Some hence argue for more modest approaches such as “coexistence” or “social reconstruction.”¹³ Others have warned against overemphasizing the “religious emotive concept” inherent in the term reconciliation and suggested focusing instead on trust-building on different levels of society. Like Bar-On, Kriesberg emphasizes the need to overcome power asymmetries. Apart from this he also sees a need to address imbalances in suffering: often both sides have suffered injuries at the hand of the other, although not in equal measure, and reconciliatory actions often are ineffective because they fail to reflect the given symmetries and asymmetries.¹⁴ Moreover, reconciliation can only take place if it entails significant complementary

¹⁰ Lederach, John Paul; (1995), *Preparing for Peace. Conflict Transformation Across Cultures*. Syracuse, NY: Syracuse University Press.

¹¹ Minow, Mábtha 1998, *Between Vengeance and Forgiveness. Facing History after Genocide and Mass Violence*. Boston° Bdacon Press.

¹² Bell, Christine and Catherine O’Roerke 2007* Does Fe-inism Need a Theory of Transitional Justice?” *International Journal of Transitional Justice* 1, 1, pq 23-44.

¹³ Stover, Eric and Harvey M. Weinstein (eds.) 2004, *My Neighbour. My Enemy. Justice and Community in the Aftermath of Mass Atrocity*. Cambridge, UK: Cambridge University Press.

¹⁴ Ibid.

reciprocation. If members of one side assert truths that are ignored or denigrated by the other, their assertion is hardly a mark of reconciliation, as the truths need to be shared or at least acknowledged to indicate some degree of reconciliation on that dimension.

Expressions of regret or apology and acts of contrition must be recognised and in a sense accepted by the other side, if reconciliation is to progress. Similarly, terms that only one side deems just and the other regards as unjust do not indicate a significant level of reconciliation. Kriesberg therefore identifies four dimensions of reconciliation as being essential for conflict transformation and peace building in post-war societies: shared truth, justice, regard and security.¹⁵ Truth is important as societies divided after mass crime tend to deny what members of the other side have experienced and thus need to openly recognise that they have different views of reality. At a higher level, they might develop a shared truth, supported by official investigations, judicial proceedings and literary and mass media reporting in order to acknowledge abuses. Justice is needed as those who have suffered oppression or atrocities seek redress, which may take the form of restitution or compensation, but also punishment of those who committed injustices. Justice may furthermore be exhibited in politics that offer protection against future harm and discrimination. Expression of regard by members of each community towards the other entails recognising the humanity of the others and their human rights. Security, in the sense of personal or collective safety and well-being, is a constitutive part of

¹⁵ Kriesberg, Louis 2007, "External Contributions to Post-Mass-Crime Rehabilitation" Beatrice Pouligny, Simon Chesterman and Albrecht Schnabel (eds.). *After Mass Crime. Rebuilding States and Communities*. New York: United Nations University, pp 243-271.

reconciliation. Security exists as the adversaries feel a minimum of trust and “have reason to believe they can look forward to living together without one side threatening the other.”¹⁶

All these different dimensions of reconciliation, according to Kriesberg, cannot be fully realised simultaneously, but are often contradictory at a given time: while leaders, small groups or even general practice demonstrate steps of reconciliation, many other people on one or both sides may remain un-reconciled, and some of the latter may passively resist the new relationship or even seek to subvert it. Still others may reject this and try to continue the fight or undermine the implementation of peace agreements. Conflict transformation theory has outlined that overcoming ethno political conflicts in particular requires more than the reframing of positions. It is necessary to alter the various manifestations of conflict by addressing the root causes, and to focus on structural, behavioural and attitudinal aspects. According to Galtung it is necessary to transform the relationships, interests, discourses and the very constitution of society.¹⁷ Miall believes that the meaning of a conflict depends largely on the context from which it arises, and that the attitudes the parties have towards one another are shaped by previous relationships: their behaviour is based on their memory of what has happened in the past and expectations of what may happen in the future.¹⁸ The context includes the divided society with its culture, governance arrangements, institutions, social roles, norms, the rules and codes in place and the society’s own path of development. In conflicts involving ethnicity, minorities or challenges to state structures, the very existence of the state is at issue. In addition to this, most conflicts are influenced by wider economic and political developments on the regional and international level. Relationships

¹⁶ Ibid.

¹⁷ Galtung, Johan 1996, *Peace by Peaceful Means*. London: Sage.

¹⁸ Miall, Hugh 2004, “Conflict Transformation: A Multi-Dimensional Task” Alex Austin, Martina Fischer and Norbert Ropers (eds.). *Transforming Ethnopolitical Conflict*. The Berghof Handbook.

involve “the whole fabric of interaction” within the divided and beyond, that is with other societies.¹⁹ Poor relationships between groups are all too often a trigger for conflict, and remain a critical hindrance to peace building efforts in post-war settings.

Memories are part of each party’s socially constructed understanding of the situation, shaped by culture and learning, discourse and belief. The way groups remember and construct their past is often central to the mobilisation for conflict, and, thus, a crucial matter to address in reconciliation and cultural traditions work. In many societies affected by ethnopolitical violence, relationships and memories are also marked by selective remembrance, which – together with denial and the tendency to remain locked in a notion of victimhood – may form a serious obstacle to conflict transformation.²⁰

2.2 Call for Holistic Interpretation of Justice

Alexander Boraine (former member of the South African TRC and founder of the International Center for Transitional Justice, ICTJ) has made an important contribution to this discussion by suggesting that retributive justice should be complemented with restorative justice. He strongly advocates a holistic interpretation based on five key pillars; accountability, truth recovery, reparations, institutional reform and reconciliation.²¹ Accountability derives from the fact that no society can claim to be free or democratic without strict adherence to the rule of law; there are mass atrocities and crimes that have been so devastating that civilisation cannot tolerate their being ignored. Yet in cases of large-scale human rights violations such as in the former

¹⁹ Ibid.

²⁰ Enns, Diane 2007. *Identity and Victimhood: Questions for Conflict Management Practice*. Bergh Occasional Paper No 28. Berlin: Bergh of Research Center.

²¹ Boraine, Alexander 2006. “Transitional Justice. A Holistic Interpretation”. *Journal of International Affairs*

Yugoslavia, Rwanda or Sierra Leone, it is impossible to prosecute everyone.²² Given the limits to the law and prosecution, and although criminal justice is important, additional activities are needed that focus on documenting the truth about the past. Within truth recovery, four different notions are covered: objective or forensic truth (evidence and facts about human rights violations and missing persons), narrative truth (storytelling by victims and perpetrators and communicating personal truths and multi-layered experiences to a wider public), social or dialogical truth (truth of experience that is established by interaction, discussion and debate) and healing or restorative truth (documentation of facts and acknowledgement to give dignity to the victims and survivors). Reparations play an important role, as they belong to the few efforts undertaken directly on behalf of the victims. Nevertheless, reparations need to be closely connected to other processes aiming at documenting and acknowledging truth; otherwise they could be interpreted as being insincere. Institutional reforms are a prerequisite for truth and reconciliation. There has been criticism that in many cases truth commissions have chosen to focus almost entirely on individual hearings. Instead, Boraine argues, they need to focus on institutional settings in order to call to account those institutions directly responsible for the breakdown of a state, repression or human rights violations.²³

Reconciliation must be accompanied by acknowledgement of the past, the acceptance of responsibility and steps towards (re-)building trust. It is a long-term process and identifying suitable starting points depends on the specific situation in a society. Although the concept is ambivalent (and regarded with scepticism, due to its Christian connotation), Boraine sees a need

²² Ibid.

²³ Boraine, Alexander 2006. "Transitional Justice. A Holistic Interpretation". *Journal of International Affairs* 60, 1, pp 17-27.

to achieve “at least a measure of reconciliation” in a deeply divided society by creating a “common memory that can be acknowledged by those who created and implemented an unjust system, those who fought against it, and the many more who were in the middle and claimed not to know what was happening in their country.”²⁴

Combining retributive and restorative elements is convincing. However, developing a holistic approach requires also applying a “gender lens”. The ICTJ, therefore, added gender justice to its agenda, alongside criminal prosecutions, truth commissions, reparations programmes, security system reform and memorialisation efforts. Given the experience of the systematic rape of women as part of warfare in the Balkans and other regions, researchers and women’s rights activists have documented gender-specific violence and pushed forward the debate on gender-specific war crimes.²⁵ Researchers, human rights and peace activists have argued that a better understanding of gender, culture and power structures is needed to appropriately analyse the causes, dynamics and consequences of conflict and violence.²⁶ Feminist research has also increasingly focused on transitional justice and revealed that, as a consequence of campaigns to end impunity for violence against women, legal standards have been modified. Gender-based violence in armed conflict has been recognised as a war crime in international law and prosecutions have been secured. Furthermore, courtroom procedures have been reformed in order to ensure that victims of sexual violence are not re-traumatised by adversarial legal processes. The ICTY, for instance, has introduced changes to the procedures of

²⁴ Ibid.

²⁵ Stiglmayer, Alexandra (ed.) 1992. *Mass Rape. The War Against Women in Bosnia-Herzegovina*. Lincoln: University of Nebraska Press.

²⁶ Slapsak, Svetlana 2000. *Women’s Discourse / War Discourse. Essays and Case Studies from Yugoslavia and Russia*. Ljubljana: Topas & Graduate School of Humanities Ljubljana.

investigation and to the rules regarding evidence, limiting the extent to which consent can be presented as a defence for sexual assault and prohibiting the use of evidence of a victim's past sexual conduct.²⁷ Following criticism of gaps in ICTY practice, women's organisations' appeals to respect the rights, needs and inclusion of victims were taken into account when the International Tribunal for Lebanon and the International Criminal Court were set up, and these courts have introduced procedural law for victims. There is now also greater representation of women on the staff of the international tribunals. However, in feminist debates several scholars have questioned whether punitive justice in the form of tribunals is an appropriate means of dealing with gender-based violence at all, due to the negative experiences of adversarial processes.²⁸ The feminist discourse has argued that truth commissions offer space "to move beyond the rather masculine discourse of crime and punishment towards a notion of repairing relationships."²⁹ According to Turner, truth commissions might also be a better alternative to trials as they give space to individual narratives, can address needs for public acknowledgement and seem to be more accessible to women due to the greater flexibility of their processes.³⁰ Some commissions, indeed, have also responded to the need to find appropriate ways of addressing gender-based violence. In Haiti, Sierra Leone and East Timor, gender or sexual violence was explicitly incorporated into the mandates and other commissions have held gender hearings

²⁷ Bell, Christine and Catherine O'Rourke 2007. Does Feminism Need a Theory of Transitional Justice? *International Journal of Transitional Justice* 1, 1, 23-44.

²⁸ Mertus, Julie 2004, *Women's Participation in the International Criminal Tribunal for the Former Yugoslavia (ICTY). Transitional Justice for Bosnia and Herzegovina*. Cambridge, MA: Women Waging Peace Policy Commission.

²⁹ Bell Christine and Catherine O'Rourke, (2007), "Does Feminism Need a Theory of Transitional Justice?" *International Journal of Transitional Justice* 1, 1, 23-44.

³⁰ Ni Aolain, Fionnuala and Catherine Turner 2007, "Gender, Truth and Transition". *UCLA Women's Law Journal* 16, 229-279.

(South Africa) or established gender units (Peru). However, it has also been argued that emphasizing post-conflict restoration or calls for reconciliation without challenging uneven gender power relations can contribute to women losing equality gains that they made through the war and subordinating them in unjust relationships. Bell and O'Rourke have therefore suggested analysing the gender implications of TJ mechanisms and discussing these in terms of their value for a larger political project of securing substantial material gains for women in transitional processes.³¹

The International Center for Transitional Justice (ICTJ) calls for increased consultation of women in the design of TJ mechanisms, in order to make sure that these mechanisms strengthen women in independent roles and to enable them to participate in the political transformation process. It makes a strong case for structuring post-war societal programmes, especially programmes of compensation, in a gender-sensitive way. The British NGO International Alert has also adopted the term gender justice in its "Women Building Peace" campaign, begun in 2004. Some international peace and human rights organisations insist that development cooperation measures must recognize gender justice as being an integral part of social justice³². They argue that reconstruction programmes should be geared more towards the specific needs of women, and that demobilisation and reintegration initiatives for former combatants require particular attention to gender perspectives. Measures must be implemented together with local communities, including women, to avoid injustices and prevent those guilty of war crimes from

³¹ Bell Christine and Catherine O'Rourke; (2007); Does Feminism Need a Theory of Transitional Justice? *International Journal of Transitional Justice* 1, 1, 23-44.

³² Barth, Elise Fredrikke, Karen Hostens and Inger Skjelsbæk 2004. *Gender Aspects of Conflict Interventions: Intended and Unintended Consequences*. Report to the Ministry of Foreign Affairs, Oslo.

going unpunished or otherwise benefiting from the situation.³³ For this not only runs counter to the principle of justice, but is also making processes of reconciliation more difficult.

2.3 Arguments for and Against Truth Commissions

Criminal trials are a highly formalized process to determine the culpability of particular accused persons: they are not appropriate to deal with the greater context or root cause of a conflict or repressive regime.³⁴ There are certain arguments for the establishment of truth commissions worldwide.

2.3.1 Arguments for Truth Commissions

One argument is commissions can help establish truth about the past - Some argue that truth commissions build a comprehensive record of events, patterns and causes and that they provide meaningful societal acknowledgement. They can establish a past record that is accurate, detailed, impartial and official. Such a record can serve to counter the fictitious or exaggerated accounts of the past propagated by previous regimes. Further commissions can locate the whereabouts of missing victims who may have been forced to disappear or buried clandestinely.

A second argument is that truth commissions can promote the accountability of perpetrators of human rights violations. They complement the work of criminal prosecutions by gathering, organizing and preserving evidence that can be used in prosecutions. They can also build a case for and recommend forms of accountability such as civil liability, removal from office or restitution.

³³ Farr, Vanessa 2003. The Importance of a Gender Perspective to Successful Disarmament, Demobilization and Reintegration Processes, in: Disarmament Forum, 4/2003, 25-36.

³⁴ Goldstone Richard 1996, "Justice as a Tool for Peacemaking: Truth Commissions and International Tribunals", New York University Journal of International Law and Politics 28 (3).

It has been argued that the commissions can provide a public platform for victims - they give voice to the victims, by center on the victim's perspective.³⁵ They put victims- long ignored and forgotten by the public- at the forefront and centre of the transition process. This can help to make the victims whole again, individually and as a group, and give them personal vindication.

There are further arguments that commissions can inform and catalyse public debate can help stimulate public deliberation on the complex array of moral, political and legal issues that are addressed during a transition process. Others argue that commissions can recommend necessary legal and institutional reforms. Others argue that truth commissions may advance democracy and promote the rule of law, even if they do not explicitly subscribe to judicial procedures, by encouraging reformation of judicial institutions. Such reforms may include the establishment of an independent and well financed prosecutor's office, new appointment, tenure and disciplinary rules for the judiciary, redesign of political and electoral system and land reforms.

Others argue that commissions can promote reconciliation, it has been taken largely that truth commissions promote reconciliation.³⁶ While others argue that commissions can help to consolidate a democratic transition - truth commissions also help to establish accountability, build a human rights culture and restore social trust.³⁷

³⁵ Hayner 2001 *Unspeakable Truths: Facing the challenges of Truth Commissions*. New York Routledge.

³⁶ *Ibid.*

³⁷ Mendeloff 2004 *Truth -Seeking, truth-Telling and Post conflict Peace building: Curb the Enthusiasm?* *International Studies Review* 6 (3).

2.3.2 Arguments against Truth Commissions

Some of the arguments against Truth Commissions are that they are in conflict with the pursuit of justice as it discourages accountability and perversion of the rule of law. They are not guaranteed to deter future violations. They encourage impunity and spare the perpetrators from punishment. Truth commissions may create deeper resentments and exacerbate old issues that have been dug a new. The establishment of painful “truths” in divided societies can further provoke tensions, inflaming volatile situations and providing new grievances to be exploited by cynical elite³⁸. Truth commissions may provide perpetrators with “public relations smoke screens” to deflect attention from continuing abuses³⁹. This study will seek to explore whether the Kenyan TJRC will meet its objectives or whether it was just a public relations exercise.

2.4 Achilles’ Heels of Truth Commissions

Truth commissions have been supported as an alternative mechanism, to compensate for the failings or weaknesses of trials. Truth commissions are gaining popularity with every passing year. However, the chinks in the armor are beginning to be revealed through enquiry by researchers. Hayner who is a leading scholar of truth commissions is their most candid critic. She asserts that if certain critical pre-conditions are not met, a truth commission will be unable to fulfill its mandate and the high expectation it elicits. A poorly executed truth commission may be worse than no truth commission at all as the opportunity for justice will be lost and is unlikely to be repeated. These pre-conditions include a broad and clear mandate; political support during and after the enquiry, including, political will and a commitment to carry through reforms and

³⁸ Synder *et al* (2003) *Trials and Errors: Principle and Pragmatism in Strategies of International Justice: International Security* 28 (3).

³⁹ *Ibid.*

recommendations; sufficient resources; and full access.⁴⁰ The most valuable and vaunted asset of truth commissions is their purported contribution to reconciliation. The reason offered is that truth is seen to be a central and fundamental component of reconciliation. But this is open to dispute. Firstly, it is debatable whether TRC version of truth will be acceptable to all sections of the society.⁴¹

Secondly, it is debatable whether the truth does promote reconciliation as it depends on many factors. The desire to forgive and reconcile with one's enemy or wrongdoer cannot be preached or imposed. Thus the reconciliatory effect of truth commissions cannot be either predicted or presumed.⁴² Even if truth would be considered to be reconciliatory, this would depend on the extent to which both the process of accumulating and distilling the truth and the process of dissemination and consumption of the truth, through the report are broad, inclusive and have participation of the wider society, especially the victims. Some commissions like South Africa's TRC were broad in their reach during inquiries and dissemination; this has not been true of many commissions. Haiti's commission lacked the funds to conduct outreach, Guatemala's TRC lacked a restricted mandate and El Salvador's reported had limited dissemination.⁴³

The desire to know the full truth is not and cannot be presumed to be ubiquitous. For instance, in Mozambique, there was not this desire to remember. The greater public was urged to forgive and move on. In Rwanda, despite the huge emphasis on retributive through trials, there

⁴⁰ Hayner, Priscilla 2001. *Unspeakable Truths*, Confronting State Terror and Atrocity. New York/London: Routledge.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

has not been a deep desire, on the part of victimized Tutsi population, to make a faithful and full account of historical truth. It has been noted that history has not been taught in Rwanda since 1994. “Truth” was not the commodity sought in Rwanda despite the heavy emphasis on political discourse about national reconciliation.⁴⁴ In some instances TRC’s have been victims of their own success by generating such huge and unrealistic expectations. This was the Achilles’ heel of the TRC in South Africa, which was expected to deliver the miracle of reconciliation at all levels for everyone. Though it is the most significant and “successful” experiment so far, the definition of success is being debated and there is huge divergence among different South Africans on its outcome and reconciliatory impact. Therefore, a linear correlation between truth and reconciliation cannot be simply presumed.⁴⁵

2.5 Mandate of Truth Commissions

Truth is a vital component of truth commissions: For the direct victims to know the whole truth about the crimes they suffered and the reasons behind it, and have their suffering publicly acknowledged. Moreover, truth is necessary to correct any false accusations made against them in the course of the crime. For family members, particularly of those killed or disappeared, to find out what happened to their loved-one and to establish their whereabouts; For the affected society to know the circumstances surrounding and reasons that led to violations being committed to ensure that they will not be committed again, and to have their shared experiences acknowledged and preserved.⁴⁶ From 1974 to 2007, at least 32 truth commissions were

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Truth Commissions at www.amnesty.org/en/international-justice/issues/truth-commissions.

established in 28 countries. Among the Commissions that have been established in the past are; Argentina (National Commission on the Disappearance of Persons, 1983), Ghana (National Reconciliation Commission, 2002), Democratic Republic of Congo (Truth and Reconciliation Commission, 2003), Liberia (Truth and Reconciliation Commission, 2005), Peru (Truth and Reconciliation Commission, 2000), Sierra Leone (Truth and Reconciliation Commission, 2002), South Africa (Truth and Reconciliation Commission, 1995), Morocco (Equity and Reconciliation Commission, 2004), Yugoslavia (Truth and Reconciliation Commission, 2001) and Uganda (Commission of Inquiry into the Disappearance of people in Uganda, 1974 and Commission of inquiry into Violations of Human Rights, 1986).⁴⁷ Truth Commissions all over have unique elements meant to enable them to deliver on their mandate which are temporal, outreach, statement-taking, research and investigation, data processing, public hearings, emotional support, naming of names and due process and final reports.⁴⁸

The specific span of time that the truth commission is to inquire into should be and in most cases is usually set out in the mandate. Some commissions have examined violations that took place over a 35-year period or longer, while others have examined a much shorter period. This should be based on those periods in the country's history when the worst or the greatest number of violations took place. To avoid the appearance of bias, the time period should usually be consecutive rather than broken up to focus on only selected periods in a nation's history. No key periods should be left out in a way that might make the Commission appear politically partial in its scope. For the Kenyan Truth Justice and Reconciliation Commission, its mandate

⁴⁷ Priscilla B. Hayner, *Unspeakable Truths* New York:Routledge, 2001 p.4 in 'Truth Commissions' by Eric Brahm.

⁴⁸ Office of the United Nations High Commissioner for Human Rights, 'Rule of Law tools for Post-Conflict States; Truth Commissions' (2006) p. 8 available at www.ohchr.org/documents/publications/ruleoflawTruthcommission

covers the period from 12th December 1963 to 28th February 2008. However, the time within which the Commission is expected to investigate the violations that have occurred during this wide span of time is limited. In some cases its usually useful to allow some flexibility in the precise start or end dates, for example indicating that the Commission should investigate events 'since the beginning of the conflict' if there is no agreement on the exact date that the relevant conflict began. The date can then be determined by the Commission's investigations. As a rule, a Truth Commission should not be tasked with investigating abuses or events that take place after the Commission itself begins work. Such events are more appropriately covered by a national human rights Commission or, alternatively, by the Office of the Public Prosecutor. However in some instances the Commission may have to investigate abuses that are continuing or as a result of the abuses that occurred during the period under its mandate. For example the Kenyan Truth Justice and Reconciliation Commission has had to deal with abuses that occur after it has been formed but which are systematic-have a connection to historical injustices.⁴⁹

Public Outreach by a Truth Commission is very important. The extent of a commission's outreach efforts will greatly affect its access to information, its effectiveness in addressing the needs of victims, its ability to manage public expectations and its general reputation in the eyes of the public. For outreach commissions may hold public information meetings, publication and dissemination of pamphlets and/or videos. The commissions can also achieve its outreach goals by engagement with and effective use of (Non-governmental Organization) NGO's, (Community Based Organizations) CBO's and the media.⁵⁰

⁴⁹ Vasuki Nesiah, 'Truth Commissions and Gender Principles, Policies and Procedures' (2006) p.17 available at www.ictj.org/static/Gender/GendItandbook.eng.pdf

⁵⁰ Ibid.

A truth commission usually begins its operations by taking statements from individuals. The vast majority of work lies in recording the actual stories; generally, only 10 percent or fewer actually proceed to public hearings. Statement taking occurs either at Commission offices or through commission staff-including internationals that go into the field. It is particularly important that Truth Commissions are sensitive to patterns that might emerge from these statements, especially gendered hierarchies, or patterns of abuses against women. In Timor-Leste, South Africa, Peru, Guatemala and a range of other countries, although many women submitted statements, the majority testified about abuses committed against a male family member-typically a son or a husband rather than harm they had suffered directly. In Sierra Leone for example one activist explained that some women and girls were afraid to inform the Truth and Reconciliation Commission (TRC) about their experiences for a number of reasons. They are afraid that the perpetrator will hurt them. The activist went on to explain that, 'we have a culture of silence, you are brought up not to talk, to keep quiet, you have to only talk when you are asked to, so if you go on talking then you are only going to create more problems.'⁵¹ Encouraging underrepresented voices and issues requires special training for encouraging underrepresented voices and issues requires special training for statement takers so that they are sensitized to these concerns. It is important that those who take testimonies are properly trained in a range of interview techniques and the breadth of women's human rights experiences so that they can look for cues to patterns of abuse. Many truth commissions collect most of their information through private closed-door meetings, preferably by commission staff taking testimony from individual victims in one-to-one encounters. Statement taking has two goals- it furthers the goal of establishing the truth about the

⁵¹ Vasuki Nesiah, 'Truth Commissions and Gender Principles, Policies and Procedures' (2006) p.17 available at www.ictj.org/static/Gender/Gendltandbook.eng.pdf

past; and it provides an opportunity for victims to come forward and recount their experiences in a sympathetic and safe environment.⁵²

One focus of Truth Commissions is investigations. This is done after statement taking to determine what actually happened, especially to people who may have just "disappeared."⁵³ There is also the challenge of determining who was responsible and assigning appropriate punishment. This requires one to consider the forces that led people to commit such crimes. In the most serious cases the crimes are attributable to absolutely indefensible behavior by people who knew what they were doing and had the power to stop it. In other cases, crimes may have been perpetuated by lower ranking officials who were, in fact, being forced to do what they did by people in higher authority. Still, other crimes may have resulted from the terrible effects of violent escalation which can lead to the kind of emotional hysteria which causes people to do things that they would otherwise consider absolutely unthinkable. This results in a situation in which both sides are committing atrocities to avenge and retaliate for atrocities committed by the other side.⁵⁴

Police-like investigation unit and research units are increasingly becoming a part of the structure of truth commissions. However, such units tend to form only part of commissions with

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Conflict Research Consortium, University of Colorado, USA "Truth Commissions" available at www.colorado.edu/conflict/peace/treatment/truth_com.htm

large budgets and robust mandates, for instance the TRC in South Africa. Many commissions combine research and investigation into one department.⁵⁵

For data processing, truth commissions have to deal with enormous volumes of information which must be organized and systemized. This requires an effective database for the storage, organization and retrieval of data and records. Generally commissions which do rigorous data collection and analysis are better placed to defend their findings on scientific grounds. A strong data management system will help arrive at a “big picture” analysis of historical patterns that can show, for instance, the exact ratio of violations committed by one side to those committed by the other.⁵⁶ Normally a commission hires a programmer to write and maintain the basic software and to extract the data in formats appropriate for analysis or for the analysts. Commissions also need professional statisticians to review the data before it is published and a team of data processors to input all the information received by the commission.

With reference to public hearings, many past commissions have not held public hearings and there is an increasing trend to give commissions a mandate to do this. Commissions in Sierra Leone, Peru and now Kenya have had public hearings.⁵⁷ There are reasons for a commission to hold public hearings. By giving victims and survivors a chance to tell their story before a public audience-particularly where the hearings are aired on television or the radio a commission can formally acknowledge past wrongs, encourage public understanding and sympathy for the victims, reduce the likelihood of certain sectors of society continuing to deny the truth, and

⁵⁵ Vasuki Nesiiah, ‘Overcoming tensions between family and judicial procedures.’p.833 available at www.icrc.org/eng/assets/files/other/irrc_848_nesiiah.pdf

⁵⁶ Office of the United Nations High Commissioner for Human Rights, ‘Rule of Law tools for Post-Conflict States; Truth Commissions’ (2006) p. 8 available at www.ohchr.org/documents/publications/rule_of_lawTruthcommission

⁵⁷ Ibid.

enhance the transparency of its work. Hearings are normally done either thematically or individually. They could also be public or in-camera depending on the nature of the issues involved. Public hearings tend to make the truth-seeking process more social, more of a dialogue, contributing not only to the truth commission's finding but also to the broader conversation in the public sphere. This gives victims a platform to make known their experiences, interests and demands, helps to highlight information that has been marginalized in official narratives, and enables victims themselves to have more say in the Truth Commission's information gathering process. In most cases, Commission will (and should) provide victims the option of in-camera hearings that address witnesses' legitimate concerns of confidentiality.

Truth commissions seem to satisfy a need on the part of some victims to tell their stories, be listened to and be healed in some way. For others, the process can lead to traumatization, which may be severe. Some commissions for example the TRC in South Africa hired four mental health professionals, provided training in trauma counseling for staff and hired "briefers" who had the job of providing constant support to those giving testimony at the public hearings. Commission staff may also be traumatized by the process and require emotional support.⁵⁸ Naming Names and Due Process - Many truth commissions have had the power to publicly name those individuals found to be responsible for human rights crimes. These include El Salvador, Chad and South Africa. Other commissions have been creative in finding indirect ways of naming individuals. For example, some commissions have identified individual perpetrators by printing (unchallenged) direct quotations of witnesses or victims that mention the perpetrators' names.⁵⁹ In other cases there have been deliberate or unintentional press leaks by the

⁵⁸ Kritz Neil; (1995); "Transitional Justice: *How emerging democracies reckon with former regimes.*" P.229.

⁵⁹ Ibid.

commission. If a commission decides to name perpetrators, it should at least be required to set out its reasons for not doing so, and these reasons must be politically, morally and legally defensible. Where a commission decides to name names, it must clearly state its findings do not amount to a finding of legal and criminal guilt. As to the due process entitlements that should apply, it seems that persons who might be named should be (a) informed without undue delay of the allegations against them and of the intention to name them in a public report, and (b) given the opportunity to respond to the evidence against them and offer a defence. Additional due process entitlements, such as the right to counsel or the right to cross-examine witnesses should be offered only in very exceptional circumstances.⁶⁰ As a general rule, it is both unnecessary and undesirable to burden truth commissions with due process requirements equivalent to those of a court.

The defining moment for a truth commission is the completion and publication of its final report. Final reports have constituted the enduring legacy of commissions and have also been used as a resource for human rights education or for subsequent prosecutions. Final reports can serve as critical guard against revisionism if such reports are well documented and methodologically sound.⁶¹ A Truth Commission's final report is vital not only as a measure of the Commission's investigative work but also as a determinant of the future activity from government and civil society. Truth Commission's reports provide an important moral and historical frame for debates about periods of violence and state repression. Understanding realities of the victims, most truth commissions make strong recommendations in their final

⁶⁰ Mark Freeman, 'Whose Truth? Truth Commissions may not be a panacea. But they often do serve the Public Interest' (2005) available at www.thirdworldtraveler.com/Truth_Commissions/Whos_Truth.html.

⁶¹ Ibid.

reports for the creation of reparation programmes. The design of such programmes can be complex, and it will be necessary for the commission to dedicate time and expertise working out a plan.⁶²

The impact of a final report may depend less on its content than on a variety of surrounding factors, including when and how the report is publicized, how it is widely distributed, how much coverage it receives in the media and whether there are both traditional and alternative presentations of the findings.⁶³ Final reports usually contain a section on findings and a section on recommendations. The findings section will identify the causes and patterns of past violations, as well as victims of those violations. Individual and /or institutional responsibility for violations may also be reported.⁶⁴

Truth commissions usually make recommendations, aimed at variously providing assistance or redress to victims, making necessary constitutional, legal and institutional reforms in order to prevent future relapse into war or authoritarian rule, and facilitating the consolidation of democracy and the rule of law⁶⁵. The recommendations of a truth commission are ultimately intended to advance whatever reforms may be necessary, to change the institutions that allowed or carried out abuses in the past. The more realistic a commission can be in these recommendations, the more likely they will be implemented. But after a Commission submits its report it will fall to civil society groups or perhaps key officials in the government who are

⁶² Office of the United Nations High Commissioner for Human Rights, 'Rule of Law tools for Post-Conflict States; Truth Commissions' (2006) p. 8 available at www.ohchr.org/documents/publications/rule_of_lawTruthcommission

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

sympathetic to their needs to push this agenda forward. International actors can also play a critical role in pressuring for the needed reforms.⁶⁶

2.6 Crisis of Legitimacy for Truth Commissions

An important issue that arises is the impact on the legitimacy of a truth commission if its recommendations are not followed through, given that recommendations usually are do with institutional reform and reparation? A number of truth commissions have had this experience over the past 5 years.⁶⁷ There has been failure to implement the recommendations of the commissions in South Africa, Guatemala, Ghana, Peru and East Timor. The negative consequences attached to the failure to implement are significantly particularly in terms of intended impact of these truth commissions .Such negative consequences include: A failure to implement reparations which is a further violations of victim's rights, A failure to address the underlying causes of the conflict by failing to address institutional reforms, A feeling of deep betrayal at the behaviour of political elites, A lack of recognition of victims that may cause further trauma, The persistence of inequalities and The contribution to a new impunity.

It is not good enough that the commission's work has gone well. If the final aspect is not implemented, it leads to the perception that the process itself must be flawed and thus the legitimacy of the whole process is called into question.⁶⁸ In post-conflict countries, victims are normally told by the successor government to move on. Consequently they find themselves left

⁶⁶ Yasmin Sooka (2006) International Review of The red Cross Vol 88 No. 862.

⁶⁷ Ibid.

⁶⁸ Yasmin Sooka (2006) International Review of The red Cross Vol 88 No. 862.

out of the current political dispensation and are out of sync with the new political rhetoric. The problem for most victims is that they cannot move on, because they are often at the bottom of the pile in society. Their realities have not changed.⁶⁹

Contrary to those who argue that truth commissions have not made situations worse, some see truth commissions as dangerous. At the individual level, there is anecdotal evidence that truth can rekindle anger and trigger posttraumatic stress among victims. At the aggregate, truth commissions may generate resentment and insecurity. For victims, lack of punishment may seem a travesty of justice and for perpetrators the proceedings may be threatening to reputations and social position, thereby leading both sides potentially to extra-constitutional tactics in support of their interests. After all, “truth” has been the cause of much violence historically. There is skepticism that a truth commission can put to rest the competition over writing history between different sides of the conflict, between victim and perpetrator.

“While truth commissions play an important fact-finding role in national reconciliation processes, current evidence suggests that the ability of truth commissions to put the past to rest by making it a matter of public record is illusory. Indicative of the fact that truth commissions by themselves have been unable to bring closure is that . . . a rash of new trials addressing government-sponsored criminality has recently broken out.” For victims, too little has been done and for perpetrators, and perhaps bystanders, too much. In such a situation, neither may be prepared to back down.⁷⁰

When it comes to the victims and human rights activists, truth commissions may be objectionable in that they fault the rule of law and are unfair. If society is to open a new era, constructing the rule of law is often an important component. However, what kind of start is it if perpetrators are let free? By foregoing punishment, it may reinforce the notion that some people

⁶⁹ Ibid

⁷⁰ Snyder, Jack L., and Leslie Vinjamuri. (2003) *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*. *International Security* 28:5–44.

are above the law and reduce the incentives for others to play by the rules. For perpetrators, even the limited accountability offered by truth commissions may be too much and they are often in a position of power to act upon their insecurities. Some commissions have “named names” of suspected perpetrators in their final report. Although there has rarely been any direct consequence of this, incidences of vigilante justice have not been unheard of. As an alternative, therefore, some argue for amnesia based on the argument that it facilitates democratization and the rule of law by removing the incentive for the powerful to obstruct the process. Whereas political observers tend to view amnesia as sometimes appropriate, political philosophers and human rights activists rarely accept this suggestion. Still, amnesties have been a common means to reduce the threat felt by perpetrators during transitional periods. Some argue that it is a result of these amnesties rather than the truth commission per se that is responsible for the apparent success of truth commissions.⁷¹

Addressing the question of how successful was the TRC, Antjie Krog reflects that while the South Africa TRC established the factual truth of what happened and bore witness to the suffering of victims, it was less successful in convincing South Africans of the moral truth, in answering the question “who was responsible?” In this vein, few believe the TRC process achieved reconciliation in a deep moral sense. Indeed, some critics, like Wilson, whose *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* offers a trenchant critique of the TRC, argue that the invocation of human rights embodied in the TRC process and its calculated, even duplicitous, incantation of the African concept of ubuntu sacrificed even a moderate notion of justice as retribution to the ANC’s goal of nation-building and state-formation. Wilson argues that the truth commission was part of a general and long-term

⁷¹ Ibid.

orientation within state institutions that asserted the state's ability to rein in and control the informal adjudicative and policing structures in civil society.⁷²

The way in which transitional justice measures can do this is the following: criminal justice can be interpreted as an attempt to provide *recognition* to victims by denying the implicit claim of superiority made by criminals through their behavior. This is done through a sentence, a punishment, which is meant to reaffirm the importance of norms that grant equal rights to all.⁷³

Truth-telling provides recognition in ways that are perfectly familiar, and which are still probably best articulated by the old difference proposed by Thomas Nagel between knowledge and acknowledgment, when he argued that although truth commissions rarely disclose facts that were previously unknown, they still make an indispensable contribution in acknowledging these facts. In light of the difficulties and deficiencies that normally accompany prosecutions, as well as the potential charge that truth-telling is "cheap talk," reparations buttress efforts aimed at recognition not only by demonstrating a sufficiently serious commitment so as to invest resources but, more important, if the program is well crafted, by giving beneficiaries the sense that the state has taken their interests to heart.⁷⁴

Finally, institutional reform, with vetting as a starting point, in excluding official employees who abused their positions of authority, is guided by the ideal of guaranteeing the conditions under which citizens can relate to one another and to the authorities as equals. Summarizing, then, each transitional justice measure may be said to have an immediate aim or

⁷² Wilson, Richard A. 2001. *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*. Cambridge: Cambridge University Press.

⁷³ Jon Elster, "Introduction," in *Retribution and Reparation in the Transition to Democracy*, ed. Jon Elster (Cambridge: Cambridge University Press, 2006).

⁷⁴ *Ibid.*

aims of its own. At a higher level of abstraction, however, all of them can be thought to pursue the goal of providing recognition to victims as individuals and as victims, but also, and primarily, as bearers of rights.⁷⁵

The overarching goal of transitional justice is to confront legacies of abuse in a broad manner, the purpose of ensuring accountability for past crimes and preventing new ones from recurring. The objectives of transitional justice include addressing and attempting to heal divisions in society that arise as a result of human rights violations; closing and healing the wounds of individuals and the society of the past; providing legal redress for victims and holding perpetrators accountable; creating an accurate historical record for society; restoring the rule of law; reforming institutions to promote democratization human rights; ensuring that human rights violations are not repeated; and promoting coexistence and sustainable peace.⁷⁶

A truth commission, as a mechanism of transitional justice, form the core pillar of this agenda of the addressing the legacies of the past.⁷⁷

The success and failure of truth commission anywhere in the world is evaluated under three parameters: the credibility and integrity of process leading and during its formation and operations; the solidness of the product; and the impact of both the process and the product. Each situation of establishing a truth commission must factor in its own historical circumstances and the nature of the transition.⁷⁸

⁷⁵ Ibid.

⁷⁶ A summary from Transitional Justice in Kenya: A tool Kit for Training and engagement by ICPC, KHRC, ICJ, (2010).

⁷⁷ Ibid.

⁷⁸ Ibid.

The real problems behind the TJRC process in Kenya originate from lack of proper understanding of the purpose of the TJRC and contextualizing the political conditions under which the TJRC was being established. Kenya is not in a transition moment but rather on continuity. Kenya is establishing a truth commission under the same repressive constitutional and legal regime; the entire infrastructure of impunity responsible for the human rights violations and corruption is still intact; lack of understand of the significance of timing and sequencing of the processes and the purpose of the TJRC. The government of Kenya fails to acknowledge that TJRC is not a standalone process. TJRC lacks clarity on its relationship with other transitional justice processes. Yet it is so central.⁷⁹

⁷⁹ Ibid.

CHAPTER THREE

CONTEXT FOR TRUTH JUSTICE RECONCILIATION IN KENYA

3.0 Introduction

In December 2002 Kenya witnessed a regime change. In one of the most peaceful regime changes in Africa, Kenyans voted out the Kenya African National Union (KANU), the party that had ruled the country since independence from the British in 1963. This was the first fundamental change in the ideology, rationale, and philosophy of the Kenyan state since 1963. By 1978, the first President of Kenya, Kenyatta had crafted a state symbolized by personal rule, a culture of nepotism, public theft, and gross violations of human rights. President Daniel arap Moi, then followed in Kenyatta's footsteps and heightened repression and perfected the corrupted state left enshrined by his predecessor. Thus, the Kenyatta-Moi regimes were marked by shameless graft, abominable human rights violations, impunity and national decay. The appointment in April 2003 by the Minister of Justice and Constitutional Affairs of the Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission was a milestone in the country's quest for a transitional justice agenda. The Kenyan state was for the first time in its history formally committed to transitional justice, the rule of law, and democracy.

On April 17, 2003, the Republic of Kenya appointed the Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission. Its mandate was to find out if a truth commission was necessary for Kenya, and, if so, to make recommendations on the type of truth commission that ought to be established. The Task Force drew its conclusions and recommendations from a comprehensive and open process of fact-finding, research, public hearings, written submissions, data collection, interviews, consultations, a national and an international conference.

The task force reported on 26th August 2003 that Kenyans wanted a truth, justice, and reconciliation commission established immediately. According to its report, Kenyans wanted a state founded on the rule of law and respect for the human rights of every individual who resides in Kenya. The task force noted in its report that a truth commission is an *ad hoc*, temporary institution and an instrument that should only be necessary once in the lifetime of nation. The report recommended that the government should establish an effective and credible truth commission, one that would address past abuses, recreate the state, banish impunity, and set Kenya on an irreversible trajectory to democracy and respect for basic freedoms. The Task Force further recommended that the truth commission be established soon but not later than June 2004. This recommendation has informed by the fact that truth commissions are most effective when established within the first two years of political transitions or regime change, otherwise governments consolidate their power and retrogress to past practices.

This recommendation was disregarded by the government until after Post-Election Violence (PEV) when President Kibaki signed with Hon. Raila Odinga the National Accord and Reconciliation Agreement in February 2008 which ended PEV and provided for an immediate establishment of a TJRC through an Act of Parliament.

Thus, the post-election violence in 2007-2008 set the pace for the on-going transitional justice processes in Kenya. Kenya's reform agenda was set out in Agenda 4 of the Kenya National Dialogue and Reconciliation.. The focus of this agenda item is to address the underlying causes of conflict that was evidenced in December 2007 - February 2008. These include institutional reform (police, judiciary), constitutional reform and the establishment of the Truth Justice and Reconciliation Commission to address historical injustices and gross violations of human rights. Achievements include the promulgation of the constitution in August 2010. Kenya

is now working towards its implementation. The 2010 constitution has been celebrated as having a robust bill of rights. Reform of the police and judiciary has commenced. The electoral system has to a large extent been successfully reviewed. The Truth, Justice and Reconciliation Commission (TJRC) “the commission”) was set up under the Truth Justice and Reconciliation Act as a non judicial mechanism. Its mandate and objectives were spelt out under sections 5 & 6 of the Act. The commission was tasked with: truth telling and reconciliation; reparations for victims; gender justice and elements of institutional reforms. It was also to recommend prosecutions of those found responsible for gross violations of human rights.

3.2 The Truth Justice and Reconciliation Commission in Kenya

The Truth Justice and Reconciliation Act (TJR Act) No. 6 of 2008 was enacted into law on 23rd October 2008 and received presidential assent on 28th November 2008. The Truth Justice and Reconciliation Act came into force on 17th March 2009 and was amended on 23rd July 2009. The Act created the Truth Justice and Reconciliation Commission. The Truth Justice and Reconciliation Commission came into operation in August 2009. Nine (9) members of the commission were appointed by the President on 22nd July 2009 and were sworn in on 3rd August 2009. According to the terms of the TJR Act, the commission was given a three-month establishment phase which ran from August - October 2009. Thus, the Commission began work in November 2009.

3.3 Composition, Objectives and Functions of the Truth Justice and Reconciliation Commission

The TJR Act created a commission composed of (9) commissioners: 6 Kenyans appointed through a national consultative process; and non-citizens selected by the African Union Panel of Eminent Personalities. The Act further requires gender equity and geographic balance for the Kenyan citizens in selection of the commissioners. The president by a Gazette Notice dated 22nd July 2009 appointed the following individuals as Commissioners: Bethwel Kiplaga, Betty Murungi, Tecla Namacha Wanjala, Margaret Shava, Ahmed Sheikh Farah, Getrude Chawatama, Berhanu Dinka, Tom Ojienda and Ronald Slye.

The objectives of TJRC are spelt out in Section 5 of the TJR Act which is to promote peace, justice, national unity, healing and reconciliation of the people of Kenya by¹;

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.

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.

¹ Kenyan Truth, Justice and Reconciliation Act (2008).

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.

Recommending the prosecution of the perpetrators of gross human rights violations; determining ways and means of redress for victims of gross human rights violations; 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;

Providing a platform to the public for non-retributive truth; providing victims of human rights abuses to be heard and restore their dignity; providing repentant perpetrators of gross human rights violations with a forum to confess their actions as a way of bringing reconciliation; compiling an accurate report of its findings and proceedings.

Functions of the TJRC are listed under section 6 of the TJR Act which are: 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.

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, identify and specify the victims of the violations and abuses, investigate and determine whether or not the violations and abuses were deliberately planned and executed by the State or people involved.

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; identify any persons who should be prosecuted for being responsible or involved in human rights and economic rights violations and abuses; investigate economic crimes; investigate and provide redress in respect of crimes of a sexual nature against female victims; 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; Consider the reports of previous and relevant commissions of inquiry.

Investigate economic crimes including grand corruption and exploitation of natural/public resources and the action if any taken in respect thereof. Inquire into irregular and illegal acquisition of public land and make recommendations for the repossession of the same.

Inquire into perceived marginalization of some communities and make recommendations for redress. Inquire into the misuse of public institutions for political objectives. Inquire into acts of state repression including torture, cruelty and degrading treatment for political objectives.

Inquire into the causes of ethnic tensions and make recommendations for the healing, reconciliations and co-existence of ethnic communities. Investigate the whereabouts of victims and restore the human and civil dignity of such persons by granting such victims an opportunity to relate their experiences.

3.3 Powers of the Truth Justice and Reconciliation

The TJRC is empowered under section 7 of the Act to²;

Gather by appropriate means any information it considers relevant, including requisition of reports, documents or any information from any source including Government Authorities and compel the production of such information if necessary. Visit any place/establishment without prior notice for purpose of fulfillment of its mandate. However, protected areas under the Protected Areas Act (Cap 204) of the Laws of Kenya remain outside the jurisdiction of the TJRC.

Interview any individual, group or members of organizations or institutions at its discretion. Call upon any person subject to adequate provision being made for expenses to attend its session or hearing and compel the attendance any person who fails to respond to its request to attend. This power is supported by criminal sanctions. Take statements under oath and administer such oath.

Request relevant information from authorities of foreign countries. 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. Disobedience to summons issued by the TJRC constitutes a criminal offence. Issue summaries in fulfillment of its mandate. Request and receive police assistance as it may need to enforce its powers. The TJRC is also empowered to receive and consider petitions for amnesty for any matter or act the subject of its investigation. It is empowered to recommend amnesty except for perpetrators of genocide,

² Kenyan Truth, Justice and Reconciliation Act (2008).

crimes against humanity, and gross violations of human rights including extra judicial executions, enforced disappearances, sexual assault, rape and torture.

3.4 Immunity for Witnesses and Proceedings of Truth Justice and Reconciliation

Section 24(3) of the Act gives immunity to witnesses against criminal and civil proceedings in respect of their evidence to the Commission. Hearing of TJRC shall be open to the public. The Commission may however take evidence in camera if; The security of perpetrators or victims is threatened. It is in the interest of justice and there is likelihood that harm may ensue to any person as a result of proceedings being open to public.³

3.5 Truth Justice and Reconciliation in A New Constitutional Order

The Act sets out TJRC's temporal mandate. It provides that the inquiry relates to human rights violations between 12th December 1963 and 28 February 2008 [section 5(a) TJRC Act]. In the wake of a new constitutional dispensation, the work of TJRC is crucial to the people of Kenya. First, the TJRC provides an opportunity to demonstrate concern to victims of torture and other gross violations. It provides an opportunity to listen and to record the stories of their suffering and to identify practical ways of healing the festering wounds of hurt and neglect. Thus was unburdening them and allow them to walk across that bridge towards the new land of promise. In practical terms, a new constitution does not erase the violations of the past, although it promises that these may never be repeated.⁴

³ Kenyan Truth, Justice and Reconciliation Act (2008).

⁴ Kenyan Truth, Justice and Reconciliation Act (2008).

A new constitution does not expunge the conflicts of the past and the sentiments of discord (largely ethnic but also religious) that continue to fester among the people. The TJRC provides an opportunity for inter-person and inter-group dialogue. The nation can begin to build reconciliation. The ideal situation is that all Kenyans walk across that bridge hand in hand. This function converges in part with the National Cohesion and Integration Commission.

Although institutional reforms have generally been proposed by truth commissions across the world, in Kenya, broad reforms are happening alongside, and before the TJRC completes its work. The passing of the constitution is one. The TJRC will propose additional structural reforms in ways that strengthen the broad outline provided by the constitution.

The TJRC enables the country to have a collective visualization of its future thus establishing a collective national narrative of our history and to decide collectively the heroes are honored. It will lead the process of memorialization that is acknowledging, remembering and honoring through public monuments, those who have suffered and served the national cause. The result is the Country marches across that bridge with a greater sense of dignity and national purpose.

3.6 The Truth Justice and Reconciliation Process Viz-A-Viz the International Criminal Court Process

The TJRC as encapsulated above was born out of the TJR Act and was hence a national process. The ICC on the other hand is an international process borne out of the Rome Statute and applicable to those states that have ratified it. The ICC is a judicial process unlike the TJRC which is as already pointed out is a non-judicial process. Another significant difference between the two processes is that the TJRC process is retrospective in nature in the sense that it looks at

past injustices or gross violations committed between 12th December 1963 to 28th February 2008. This was before the Act on which the process is premised was passed into law. The ICC process is not retrospective and only deals with crimes committed after a state has ratified it. The scope of crimes for the two processes as much as they complement each other significantly differs. The ICC process deals strictly with crimes against humanity, war crimes and genocide. The TJR process deals with a wider scope of crimes to include gross human rights violations, economic crimes etc over and above those subject of the ICC process. That said the processes are complementary of each other as both seek to address components of transitional justice. It is therefore not a question of either or. In the Kenyan context one can soundly argue that the country is in need of both processes.⁵

3.7 Success Potentials of Truth Commissions

According to Hayner, it certainly is not assured that truth commissions will make the repetition of similar human rights abuses less likely in the future.⁶ But the expressed intent of most commissions is to lessen the likelihood of human rights atrocities reoccurring in the future. This is stated in many commission reports or even written into commissions' operating mandates. A commission can help reduce the likelihood of future abuses simply by publishing an accurate record of the violence, with the hope that a more knowledgeable citizenry will recognize and resist any sign of return to repressive rule. There is disagreement as to whether truth commissions help to promote national reconciliation, or whether as some argue, they create deeper resentments and exacerbate old issues that have been dug a new. Hayner argues that no

⁵ Kenyan Truth, Justice and Reconciliation Act (2008).

⁶ Hayner Priscilla; (2001); *Unspeakable Truth: Confronting State Terror and Atrocity*. Newyork: Routledge

truth commission to date has caused a situation to become worse. Even with an unexpectedly explicit and strongly-worded report, the overall impact of each Truth Commission has generally been positive, often reducing tension and increasing national reconciliation, and perhaps increasing the understanding of and respect for human rights issues by the general public and political leaders alike.⁷

Freeman highlights the successes of truth commissions by stating that hearings can stimulate important public debates while helping to restore the dignity of victims⁸. In Peru, the truth commission's hearings put the pain of the past on full display for city dwellers who knew little about the bloodshed in the countryside. Truth commissions that broadcast public hearings on radio and television, where victims recount their stories before the eyes and ears of a nation, can also have a profound impact on public consciousness. By taking statements from victims and witnesses and by conducting intensive research, truth commissions invariably uncover new and important facts. Many Truth Commissions have been able to provide reliable estimates of the total number of victims, highlight institutional or individual responsibility for violations, provide sophisticated analyses of trends and patterns of violence and debunk false accounts of the past. The truth commission in Chile, for example, is often credited with proving definitively that disappearances did occur under the Pinochet regime.⁹ Given their limited lifespan and the vast scope of their investigations, truth commissions can nor reveal the full and complicated truth

⁷ Ibid.

⁸ Mark Freeman, 'Whose Truth? Truth Commissions may not be a panacea. But they often do serve the Public Interest' (2005) available at www.thirdworldtraveler.com/Truth_Commissions/Whos_Truth.html

⁹ Priscilla B. Hayner, 'Fifteen Truth Commissions-1974 to 1994: A comparative study' in Neil J. Kritz, 'Transitional Justice: How emerging democracies reckon with former regimes.' P.229 (Book Preview) available at <http://books.google.co.ke/books?id=EVD6BOZdGEC&pg>

about the past. But they can be a critical tool in the fight against impunity. And they can learn from each other. Tomorrow's truth commissions have the chance to apply important lessons from other countries about the importance of an independent and credible selection process for commissioners; strong civil society engagement and support; and adequate financial and human resources. As the UN Secretary-General's 2004 report on 'The Rule of Law and Transitional Justice affirms, these are lessons that new truth commissions ignore at their own peril.¹⁰

Described as a chair with four legs, the transitional justice process ideally involves investigation and acknowledgment (truth commissions); prosecution and the achievement of justice (trials); reparations and compensation; and steps to purge and rebuild the security and police apparatus. This optimal is highly unlikely in most transitional circumstances. Compromise is frequently central to political transitions unless the losing side is weakened to an extent that it can exert no influence over the shape of the new political landscape. As a result, in any given transition, each of these four 'legs' is developed to varying degrees. In fact, countries often utilize only one of these, if any. Therefore, it is reasonable to undertake at least a preliminary investigation of the consequences for pursuing one of these components, namely the investigation and acknowledgment provided by truth commissions.¹¹

Given the variations in commission structure and powers, the environment in which they operate, and the nature of the crimes they are to investigate, some assert the success of each truth commission should be judged on its own terms. On one level, this is true. It is a difficult to disentangle the truth commission from the political environment into which it is born. What is more, each has a slightly different set of tasks based on past and present circumstances. Yet, the

¹⁰ Ibid.

¹¹ Mendez, Juan E. 1997. Accountability for past abuses. *Human Rights Quarterly* 19 (2):255-282.

truth commission literature has long outlined a series of albeit diverse purposes for which truth commissions are created. One can distinguish between what one might call the commission's "deliverables," in other words what the commission produces as a result of its investigation like its report, and the broader use to which these deliverables are meant to be put.

This is the distinction made between measures of success and those of impact. With respect to the former, on a basic level, truth commissions are often viewed as a success simply by virtue of completing their work. In itself, this is no small feat. Bolivia and the Philippines, for example, closed down early having been either stifled by lack of funds or the commissioners having resigned in disgust at the lack of cooperation they were receiving. Even if the commission completes its investigation, the final report is then put in the hands of the government. Although it has become much less common as truth commissions have attracted more attention, examples such as Haiti and Uganda (1986) illustrate that there is no guarantee the report will be given a wide release. At the same time, some observers see that instances such as these can also be seen as a success in that the commission's mere existence focuses domestic and international attention on the cause of human rights.¹²

Any claims about the impact of truth commission impact are further complicated by the fact that they are relatively limited institutions that rely on other actors and circumstances to see most of these goals realized. Some critics have unfairly judged truth commissions based in part on developments beyond the commission's scope or which occurred after it completed its work. Hayner concludes that although "this is a fair, indeed an important, means of evaluation, political realities and outside actors should be recognized for the failure or success of a commission's

¹² Chapman, A. R., and P. Ball. 2001. The truth of truth commissions: Comparative lessons from Haiti, South Africa, and Guatemala. *Human Rights Quarterly* 23 (1):1-43.

long-term impact, as much as the work of the commission itself". This section takes a preliminary look at some steps to address this.¹³

In general, the purposes put forward for truth commissions are related to restoring accountability and as promoting reconciliation and the protection of human rights. But the momentum in these areas is often already picking up steam as a result of the transition itself. This momentum is in fact part of the reason why the truth commission is created in the first place and, therefore, has consequences for distinguishing a truth commission's success. Governments theoretically are more likely to enact recommended reforms if they have established the commission. The problem of isolating commission effects is also evident in evaluating the truth commission's outputs. Particularly when created as part of a broader peace agreement, parties sometimes agree that the commission's recommendations will be mandatory. However, there is often little to compel the new government to live up to these commitments. Follow-up bodies have been created in some instances at the behest of the commission to oversee such things as reform enactment, reparations distribution or continued investigations, but the commission itself is not around to see its recommendations put into place. As a result, the impact of the commission is largely contingent on its ability to carve out a legacy through its report (and hearings in those cases where they were publicly conducted) to serve as an authoritative moral voice and as focal point for continued pressure from domestic and international actors to achieve a more peaceful, democratic society. Identifying a truth commission's impact on society is problematic for a number of reasons.¹⁴

¹³ Ash, Timothy Garton. 1997. True Confessions. *The New York review of books* 44 (12):33-38.

¹⁴ *Ibid.*

Another set of complications arises from the intrinsic difficulty of measuring truth commission impact. Critics rightly warn against confounding other causal processes with the independent impact of truth commissions. It makes intuitive sense to expect improvements in human rights conduct and democratic governance during and after the truth commission process in great part because truth commissions are likely to be established during democratic transitions, and when the human rights situation has already improved, at least to the extent that transitional justice becomes a viable possibility. The reverse case, when the truth commission process is followed by increasing levels of violence and instability, does not offer much analytical leverage, either: countries that have undergone civil wars are more likely to suffer from violent conflict in the future, but truth commissions' role in provoking such conflict is unclear. Therefore, the variety of factors that might lead to democratic strengthening and non-violence (which in turn makes the creation of a truth commission possible), or renewed conflict, should not be conflated with the independent effect of truth commissions.¹⁵

Several accounts argue that a truth commission might improve a country's human rights record by drawing attention to past violations. Domestic and international actors, most notably human rights organizations and victims' associations, build sufficient pressure on politicians and state functionaries to reform human rights policy and behave in conformity with a truth commission's recommendations. What distinguishes indirect from immediate political impact is that decision-makers adopt truth commission recommendations and related human rights

¹⁵ Brahm, Eric. 2006. *Truth and Consequences: The Impact of Truth Commissions in Transitional Societies*. PhD Dissertation, Department of Political Science, University of Colorado at Boulder.

initiatives only as a result of civil society pressure. Thus, implementation is typically delayed, rather than immediate.¹⁶

The passage of the TJRC Act (2008) failed to factor in all these core issues. These are key issues civil society kept raising. This explains why the TJRC that has been set up have fundamental flaws that needed to be treated to ensure that the Commission met internationally acceptable standards for a credible, competent and impartial commission. Currently, The TJRC is rocked by credibility questions apart from the technical process, product and impact concerns that arise from the fact that witness protection is tenuous, mandate overload, limited capacity and poor definitions of “perpetrators”, “reparations”, and other decisive terms all make the TJRC journey too risky to take without properly fixing the faults that threaten the process.¹⁷

A culture of impunity, the context in which atrocious crimes flourish, arises from systemic, cumulative and specific failures. The challenge before hand is that the current truth justice and reconciliation stands a very little chance of tackling the pernicious effects of impunity. While it is a positive step to set up a truth commission to address the past crimes, such an initiative must provide the prerequisite basic code of protection of human rights comprising effective measures for assuring the rights to justice, truth, and reparations, as well as other guarantees of non-recurrence of human rights violations.¹⁸

The purpose of the TJRC is to produce an accurate and fair historical record of the civil war and to foster national reconciliation and healing. It will do so by gathering information on

¹⁶ Wiebelhaus-Brahm, Eric. 2010. *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy*. New York: Routledge..

¹⁷ ICPC statement of April 2009 calling for an open and transparent selection process of the TJRC Commissioners.

¹⁸ Ibid.

the violations of human rights. The TRC will analyze the information it gathers from victims, perpetrators, and others, and will also do its own research. It will use all of this information to write a report that explains what happened. The report will indicate the causes, nature, and extent of abuses of human rights; the circumstances in which they occurred; and whether they were part of a plan or policy by the government, or any other group. The report may also make recommendations about how to prevent the recurrence.¹⁹ From a glance, participants articulated their concerns regarding the major historical injustices in the region. It was evident that in all meetings there were two groups: *the political elite and the victims*; this was illustrated by the arising differences in views presented in the meetings. Majority of the participants were ignorant of TJRC mandate and its operational processes and equated it to the usual Commissions of Inquiry formed by the president. Regrettably, the withdrawal of the CSOs from engagement with the TJRC process had a huge impact. Very few written submissions were given to the commission. This is attributable to the short notice as well as lack of clarity in addressing the Commission as there lacked defined Rules of Procedure from the commission communicated well in advance. These visits presented a useful opportunity to test the effectiveness' and applicability of the TJRC rules of procedure. The TJRC did not have such rules or the workplan.²⁰

The participants were fairly representative of both genders and the moderator allowed views in three categories; men, women and the youth each presenting in turn. Curiously missing attendants were young ladies and every time there was a chance for the youth, it was dominated by the men who basically focused on the unemployment, lack of opportunities and victimization

¹⁹ Ibid.

²⁰ Kenya Transitional Justice Network members material on transitional justice and Truth Commission (2009).

by the securities agencies. It was only in Mombasa during the CSOs forum that a group of young ladies sought to make a submission to the commission as regards vulnerability of young ladies to early marriages as well as prostitution due to social - economical strains in the region.²¹

It was evident that women are left to tend their families solely after demise of their husbands arising from wildlife/human conflicts or execution by security agencies with little or no compensations. The few representatives of women groups felt that Sexual Offences Act was inadequate in terms of addressing defilement and rape cases or else it was not enforced with vigour. There were feelings of despair amongst the women due to the high level of dispossession.²²

²¹ Ibid.

²² Ibid.

CHAPTER FOUR

THE OPERATION OF TJRC IN KENYA AND ITS REPORT

40 Introduction

This chapter presents the findings of the research while making key linkages between reviewed literatures, the objectives of the study and the hypothetical positions taken by the researcher on the topic under study.

4.1 Truth Justice and Reconciliation Commission Inception in Kenya

Truth commissions offer one of the best mechanisms for transitional justice and state reconstruction in the world. Truth commissions are defined as ‘official, temporary, non-judicial, fact finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a period of time.’¹ They are officially sanctioned, temporary, non-judicial investigative bodies that have been granted a relatively short period of time for statement taking, investigations, research and public hearings, before completing their work with a final public report. A truth commission can therefore be described as a non-judicial investigative body that has been given some form of official powers by the state but empowered to operate as independently as possible from any state organs.²

The campaign for the Truth, Justice and Reconciliation Commission in Kenya goes back to the struggles against the KANU dictatorship in the 1990s. However, it was the entry of the National Rainbow Coalition (NARC) in December 2002 that brought the greatest expectations

¹ Diane Orentlicher, Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Addendum to the Report of the Independent Expert to update the Set of Principles to Combat Impunity UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Definitions, p 6.

² *Ibidi.*

for national reforms, including the establishment of comprehensive transitional justice processes and a truth commission. Following the interventions by victims and human rights organizations, a Task Force was formed in April 2003 to look into the viability of a TJRC. Its report recommended the formation of a TJRC through a presidential decree by June 2004 to deal with almost all the past human rights violations and economic crimes between December 12, 1963, to December 12, 2002.³

The agenda for TJRC was lost following the formation of the Government of National Unity on June 30, 2004, through which the government embraced and brought on board some of the KANU leaders expected to be investigated by the TJRC. From then, the struggle for TJRC was left to public actions through forums, litigations, protests and petitions to the three arms of the government. Women and human rights organizations resolved, and sustained the campaign, to make the TJRC and transitional justice the major agendas towards the 2007 General Elections.⁴

In spite of the fact that, Kenya has been independent for over 45 years, it still suffers from a culture of impunity and disregard for basic human rights similar to countries still experiencing colonial or illegitimate rule. Indeed, both pre and post-colonial governments in Kenya have been characterized by massive human rights violations and economic crimes. In the Kenyan context, the 'Special Tribunal' as proposed by the Waki Commission to deal with the perpetrators of the 2007-2008 post-election violence, is in essence a Hybrid tribunal. It is to be established by the enactment of a statute to be known as the 'Statute for the Special Tribunal'

³ On the passage of the Act the Multi-Sectoral Taskforce metamorphosed into the Kenyan Transitional Justice Working Group which is now the steering committee of the Kenyan Transitional Justice Network 62. TJR Act, p 6.

⁴ Ibid.

which statute shall be anchored in the constitution. The tribunal is to be composed of both local and international judges and staff, and shall have the mandate to investigate, prosecute and adjudge persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 general elections in Kenya.⁵

On April 17, 2003, the Republic of Kenya appointed the Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission. Its mandate was to find out if a truth commission was necessary for Kenya, and, if so, to make recommendations on the type of truth commission that ought to be established. The Task Force has drawn its conclusions and recommendations from a comprehensive and open process of fact-finding, research, public hearings, written submissions, data collection, interviews, consultations, a national conference, an international conference addressed by, among others, Archbishop Desmond Tutu, Professor Ali A. Mazrui, Professor Henry Steiner, and Justice Albie Sachs, and deep deliberations and reflections among its members. The process and methodology adopted by the Task Force put the sovereign will of the Kenyan people at the centre of its activities. Above all, the Task Force has been guided at all times by Kenya's national interests and the unequivocal belief that Kenya must become a human rights state so that all those who live in it can realize their full potential as human being.⁶

⁵ Phillip Waki J, *The Report of the Commission of Inquiry into Post-Election Violence* (2008); pp 472-473.

⁶ International Center for Policy and Conflict (ICPC), *Policy Brief: Working Toward an Effective Truth and Justice Commission* (2009).

4.2 Working of Truth Justice and Reconciliation Commission in Kenya

The Truth Justice and Reconciliation (TJR) Act of 2008 establishes the TJRC and sets out its mandate. Though it is more detailed, the TJR Act can basically be said to provide as follows:

*The preamble mainly captures the desire for our nation to achieve full potential in social, economic and political development by dealing with the gross human rights violations, abuse of power and misuse of public office among other transgressions against our country and people which have taken place since independence and culminated with the polarization of the country after the contested presidential elections results in December 2007. Finally, it notes the procedural limitations among other hindrances of addressing these atrocities via our judicial institutions and expresses the need to resolve these through the TJRC so as to achieve lasting peace and harmonious co-existence; justice and building of a democratic society based on the rule of law.*⁷

4.2.1 Organization of Truth Justice and Reconciliation

The Commission shall be a corporate body with perpetual succession, common seal and capable of suing and being sued; taking, acquiring, holding, charging or disposing of property; borrowing money; and doing or performing all other things for the furtherance of its lawful mandate. The headquarters of the Commission shall be in Nairobi.⁸

⁷ TJR Act, p 6.

⁸ *Ibidi*.

The main objectives of the TJRC in Kenya are *to promote peace, justice, national unity, healing, and reconciliation among Kenyans by, among other*: Establishing an accurate, complete and historical record of violations of human rights and economic rights [economic crimes] inflicted on victims by the State [public institutions and public officers] both serving and retired between 12 December, 1963, and 28 February, 2008; including motives of the perpetrators. Providing a platform for repentant perpetrators or participants to confess their actions as a way of bringing reconciliation; a forum for perpetrators and public for non-retributive truth telling; and also ensure restoration of victim's dignity. Compiling a comprehensive report about its findings and recommendations to address the identified violations and crimes.⁹

4.2.2 Functions of the Commission

According to the TJRC Act 2008,

“The Commission will inquire into human rights violations, including those committed by the state, groups, or individuals. These include, but are not limited to, politically motivated violence, assassinations, community displacements, settlements and evictions. The Commission will also inquire into major economic crimes, in particular grand corruption, historical land injustices, and the illegal or irregular acquisition of land, especially as these relate to conflict or violence. Other historical injustices shall also be investigated.”¹⁰

While the Act confines the work of the Commission to events taking place between December 12, 1963 and February 28, 2008, it also acknowledges the need to look at antecedents

⁹ Section 5 of the TJRC Act, pp 41-43.

¹⁰ Kenya Human Rights Commission *et al* (2010) *Transitional Justice in Kenya: A Toolkit for Training and Engagement*. Nairobi: Zand Graphics.

to this date in order to understand the nature, root causes and context that led to various violations, violence, and crimes.¹¹

The main functions of the commission are set out as follows: to investigate or inquire into, among others things, human rights violations including sexual crimes, economic crimes as well as any other matter that it considers requires investigation in order to promote and achieve national reconciliation.¹²

The commission is also expected to make recommendations with regard to granting reparations and restitution, prosecution and the creation of institutional, administrative, legislative, and other mechanisms to guarantee non- repetition.¹³

As to the mode of collecting information, the Act further elaborates that, “The Commission shall receive statements from victims, witnesses, communities, interest groups, persons directly or indirectly involved in events, or any other group or individual; undertake investigations and research; hold hearings; and engage in activities as it determines to advance national or community reconciliations.¹⁴

¹¹ Ibid.

¹² Kenya Human Rights Commission *et al* (2010) *Transitional Justice in Kenya: A Toolkit for Training and Engagement*. Nairobi: Zand Graphics.

¹³ Ibid.

¹⁴ Ibid.

The Commission may offer confidentiality to persons upon request, in order to protect individual privacy or security, or for other reasons. The Commission shall solely determine whether its hearings shall be held in public or in camera.¹⁵

The Act further points out that no blanket amnesty will be provided for past crimes.¹⁶

4.2.3 Processes and Operations of the Truth Justice and Reconciliation

The Commission shall not be subject to the control or direction of any person or authority. Each Commissioner and member or staff member shall serve in their individual capacity, independent of any political party, Government or other organizational interests. 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; arrest under civil process while proceeding to, participating in, or returning from any meeting of the commission. The Commission may establish such committees as it considers necessary for the better performance of its functions.

The hearings of the Commission shall be open to the public. However, *in camera* hearing shall be held if the security of the perpetrators, victims is threatened and in the interest of justice; and also when the person likelihood that harm may ensue to any person as a result of proceedings being open to the public.

The Truth Justice and Reconciliation Commission is one of the outcomes of the Kenya National Dialogue and Reconciliation (KNDR). Since its inception there has been acrimony on its ability to rewrite the Kenyan history in terms of documenting the true status of the country since independence in 1963.

¹⁵ Ibid.

¹⁶ Ibid.

4.2.4 Public Hearings

The Truth Justice and Reconciliation Commission has completely failed to conduct any meaningful and purposeful public outreach and awareness to the victims and generally the public in order to cause an understanding of the real intention, purpose and focus of the TJRC. It has operated without rules of procedure publicly debated, adopted and gazetted. There are no victims and witnesses support and protection mechanisms that have been established jeopardizing the exercise and those engaging with it. Further no prior statement taking and analysis to identify the window cases and prioritize the public hearings based on these crucial window cases, and no public known and promulgated operational work-plan.

4.2.5 Setting of Rules

The TJRC was to examine what happened during the period proposed in the agreement and the context in which it occurred. It will reach out to victims, perpetrators, and witnesses of human rights violations and try to understand all of their points of view. It will take statements from them, hold public hearings, and produce a report on the atrocities and violations of human rights and recommend ways to deal with their effects and prevent them from recurring. This monitoring report has concretely observed and concluded that while formation of a TJRC is a necessary precondition to break with the past, it is going to be very difficult for the current TJRC to execute its mandate and achieve its intended objectives. TJRC has completely failed to conduct any meaningful and purposeful public outreach and awareness to the victims and generally the public in order to cause an understanding of the real intention, purpose and focus of the TJRC.

4.2.6 Procedures

Reconciliation is an over-arching process which includes the search for truth, justice, forgiveness, healing and so on. At its simplest, it means finding a way to live alongside former enemies - not necessarily to love them, or forgive them, or forget the past in any way, but to coexist with them, to develop the degree of cooperation necessary to share our society with them, so that we all have better lives together than we have had separately. Politics is a process to deal with the issues that have divided us in the past. Reconciliation is a parallel process that redesigns the relationship between us. This is an immense challenge, and no one should think that it is quick or easy. But the effort carries a great reward: effective reconciliation is the best guarantee that the violence of the past will not return. If we can build a new relationship between us that is built on respect and a real understanding of each other's needs, fears and aspirations, the habits and patterns of cooperation that we then develop are the best safeguard against a return to violent division.

4.3 The Truth Justice and Reconciliation Achievements during its Preparatory Phase

The Act provides that the commission would have a grace period of three months to carry outreach activities as well as setting up of the secretariat before commencement of the two year statutory term to finalize and submit its report to the president. This has been more theoretical than factual.

It is only in January, 2010 that various vacancies for the secretariat were advertised as well as the first advert on provincial public outreach was published on 27th January, 2010 for the Coast Province. These months were also envisaged to allow familiarization with the mandate as well as preparation of rules of procedure, evidence and regulations thereof and the strategic plan of the Commission which are yet to be made public. Impliedly the commission finds itself in a crash programme to live to its mandate. There have been allegations that have been neither

denied nor confirmed by the Commission or the government that the commission lacks adequate funds to undertake its mandate, a matter that that was raised with the chief mediator H.E. Koffi Annan during his December, 2009 visit to Kenya. This negates the spirit of one of the 4th March, 2008 agreement which sought to caution the commission from financial crisis.

The preparatory phase was meant to begin on November 2009. There is little evidence to prove that this task was actually carried out. Its first attempt sessions at the Coast province were marred by protests and walkouts. Thereafter the Commission became dormant.

4.4 Principal Activities of the Truth Justice and Reconciliation

The Truth, Justice, and Reconciliation Commission of Kenya has the ability to investigate, analyse, and report on what happened between 1963 and 2008 in regards to gross violations of human rights, economic crimes, illegal acquisition of public land, marginalisation of communities, ethnic violence, the context in which the crimes occurred, and educate the public about its work. The TJRC does not, however, have the power to prosecute. They can recommend prosecutions, reparations for victims, institutional changes, and amnesty in exchange for truth for perpetrators who did not commit gross human rights violations.

The TJRC investigates, analyses, and reports on human rights abuses, economic crimes, illegal acquisition of land, marginalization of communities, and ethnic violence. In terms of justice, lack of retributive justice has been a source of concern for many Kenyans. Though the commission can recommend prosecutions, there has been a long standing culture of impunity in the country, which threatens to keep political leaders safe from prosecution. However, the

commission has focused on justice in terms of recognition and distribution. The commission has sought to give victims and perpetrators equal voice in hearings, and have included hearings where children may share their stories, with guidance from counselors. Recommendations for redistribution of power and resources has been a focus of the mandate, as major conflicts have arisen due to imbalances in power, land, and resources between ethnic groups. Additionally, the commission has focused on educating the country about the history of violence, and emphasizes promoting reconciliation through revealing of truth.

The public is invited and encouraged to participate to fulfill the goal of educating the public. Members of the public may attend the public hearings, and can volunteer to assist the TJRC in fulfilling its mandate. They may also make submissions to the commission regarding the TJRC mandate. Victims may apply for reparations if they qualify.

CHAPTER FIVE

DISCUSSION, CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This chapter attempted to give summary; conclusion and recommendations related to the study findings on transition justice.

5.0.1 Discussion

In regards to the objective to examine the establishment and operationalization of Truth Commissions with reference to the Kenyan Truth Justice and Reconciliation Commissions as a case study. The study was able to reveal that most commissions usually adopt their processes from the standard United Nations commission's procedure – therefore Kenya is not an exception to the sections indicated below.

5.1 Truth Commission's Operational Process

5.1.1 Statement-taking

Truth commissions collect much of their primary information through statements taken directly from victims, witnesses and survivors of past violations, generally during a one-on-one private meeting with a staff statement-taker. These statement-takers may be placed in regional offices of the commission in addition to the headquarters or may travel in mobile teams to different villages around the country. Statement-taking should be designed to allow victims to recount their experiences in a supportive and safe environment.

Statement-taking is generally one of a truth commission's first major activities and usually lasts for at least several months and perhaps up to a year, depending on the length of the commission's mandate. Training will likely be necessary for statement-takers. They will need to

know how to properly take statements from victims who may have fading or confused memories and who may also show signs of deep trauma, even many years after an event. In addition, they will need to understand the specific technical aspects of the forms and procedures used for receiving statements. The staff statement-taker will be the only direct contact that most victims and witnesses have with the commission, so it is important the information they impart is clear and their approach supportive and fair. Typically, a truth commission receives between 7,000 and 20,000 statements, from victims, witnesses or even perpetrators who wish to report on their own or others' involvement in activities.

5.1.2 Database

To assist in processing this enormous amount of information, a truth commission should consider establishing a database for storing, organizing and analysing the statements that it receives. Such information management systems allow a level of analysis and a type and precision of conclusions that would otherwise be impossible. However, the significant time requirements and costs associated with such a system—both in staffing and in physical hardware and software needs—should be clearly recognized in advance. In addition to a senior systems manager and analysts, the commission would require teams of coders and data-entry technicians to process the statements, and would see a significant amount of the commission's overall staff time dedicated to the coding, entry and analysis of this information. The outcome would point to important patterns and trends, would produce charts showing these patterns, and may allow the commission to estimate the total numbers of victims accurately.

5.1.3 Research and investigations

Research and investigations are often most efficiently combined into one department, allowing a natural link between case investigations and thematic research. Since a truth commission will not have time to investigate every case in depth, it will typically select a number of representative cases for investigation. These may include violence against specific individuals or larger events such as massacres. Meanwhile, the commission may wish to undertake thematic research into the causes and consequences of the violence or repression, such as how certain communities were particularly affected or what groups were seen to hold the greatest responsibility. Some truth commissions have selected a number of specific towns or communities to explore the history of the repression in one particular place in depth.

Understanding the full context of historical events may also require an evaluation of the international role in the conflict. This involvement may have included funding or providing arms to belligerent parties in a civil war, or even directly taking part by offering troops or military training, or could have taken the form of maintaining political support to an abusive Government while failing to criticize ongoing abuses. A commission should consider these questions within its investigations.

5.1.4 Public hearings

By giving victims and survivors a chance to tell their story before a public audience-particularly where the hearings are aired on the television or the radio-a commission can formally and publicly acknowledge past wrongs, allow victims the chance to be heard, reduce the likelihood of continued denial of the truth and make its work more transparent. Public hearings help to engage the public as audience, encouraging press coverage of the issues over a longer period and stimulating a national discussion about the past.

Some hearings may focus on listening to victims; others may focus on specific themes, special events, such as key moments in the violence, or specific institutions (for example, the role of the armed forces in the repression or the role of the religious institutions in responding to the violence). The decision to hold public hearings will be based in part on concerns for the security situation in the country, as well as the time and resources the commission has to complete its task. However, public hearings have proven to be a very powerful and effective way to bring the commission's work to the public, and should at least be considered by all truth commissions. Finally, there are interesting examples of community-based sessions rooted in local community involvement. In some cases, community members are able to put questions directly to admitted low-level perpetrators, such as in the community reconciliation procedures in Timor-Leste described above. Sierra Leone also incorporated local traditional leaders into some of its hearings. These kinds of modified and locally rooted hearing processes may be appropriate for other.

5.1.5 Public outreach and communications

The nature and the extent of a commission's outreach efforts will help to determine its impact. The commission should make an effort to introduce and explain its work to the public, to invite victims or others with relevant information to its offices to give statements, and to be sure that its mission and goals are understood. This will help to keep the expectations of the public within reason. An outreach strategy may include the distribution of pamphlets about the role and mandate of the commission, public meetings and extensive contact with the media. Civil society and religious groups can also be very helpful in getting out the information about the commission's work.

While a strong outreach strategy and a general attitude of transparency are important, this should not suggest that the commission must operate openly in all of its work. Many of its investigations, meetings and collected information must rightly be kept confidential, certainly until the report is published. It is not unusual for the commissioners and staff to sign a pledge of confidentiality and to set up internal systems to approve what information can be released to the public prior to the report.

5.1.6 Report and recommendations

The commission's final report, summarizing its findings and recommendations, will serve as its most enduring legacy. To ensure that its thematic investigations are well suited to the final report, a commission would do well to project an approximate outline or table of contents early on in its work.

5.2 Conclusion

Hayner proposes examining three distinct elements to evaluate the success of a truth commission: the commission's process, product, and eventual impact. The process is judged by

“the degree to which it engages the public in understanding unknowns (or in admitting that they have been denied) . . . whether it gains full participation from all actors in the course of its investigations, including former perpetrators; and whether its work is positive and supportive to victims and survivors.” The commission's final written product should be evaluated according to “the extent of truth that is revealed, as well as its proposals for reparations and reform.”

Regarding its impact, Hayner notes that “the degree to which the commission's work contributes to long-term reconciliation, healing, and reform will be determined in large part by whether perpetrators or state officials acknowledge and apologize for wrongs, whether and how the commission's report is distributed and put to use, and whether its core recommendations are implemented.” These guidelines pertain exclusively to truth commissions. There is no consensus concerning even a rudimentary set of criteria against which to measure the success of other transitional justice institutions, such as ad hoc international criminal tribunals or hybrid courts.

The whole concept of truth, justice and reconciliation in Kenya was mis-conceptualized right from the start leading to very limited understanding of the actual purpose of a Truth Commission. The ill-advised timing, sequencing, composition and limited victims' and civil society consultations have seen the legitimacy and credibility of the TJRC featuring prominently.

The Truth, Justice and Reconciliation Commission is established under section 3(1) of the Truth, Justice and Reconciliation Act No. 6 of 2008 with the objective of promoting peace, justice, national unity, healing, reconciliation and dignity among the people of Kenya.

The Commission suffers numerous setbacks in the sense it lacks unreserved support with some cases pending in court challenging its composition. The national healing and reconciliation is hardly non-existent, disarray, and disjointed. Failure to implement the Waki Commission Report recommendations diminished the support of the Truth Commission. Further the Truth Justice and Reconciliation Commission and National Cohesion and Integration Commission (NCIC) are simply discordant couples.

The existence of transitional justice mechanism, and in particular the Kenyan Truth, Justice and Reconciliation Commission does not imply in any way that there is a disregard of prosecutorial mechanisms. Neither does it imply competing interests in the mechanisms of addressing human rights violations. Accountability through the KTJRC must therefore be seen as a complementary aspect in the journey of national healing and Reconciliation. Further, the provisions that touch on amnesty do not in any way hamper the possible prosecution of people who were involved in crimes within the substantive mandate of the ICC since in any case the ICC is seeking to prosecute with regard to the international crimes that exist under its substantive mandate. It is also important to notice the difference of temporal mandate in the ICC only has powers to address violations that took place after entry into force of the Rome Statute (2002), while the TJRC addresses historical injustices that go back to 1963.

The Truth, Justice and Reconciliation Commission mandated to inquire into and investigate historical injustices and gross human rights violations, including violation of socioeconomic rights that occurred between 12 December 1963 and 28 February 2008. The

Commission was initially established to operate for a period of two years, which would have expired in November 2011. However, in June 2011, the Commission assessed, on the one hand, the progress it had made that far in executing its mandate and, on the other, its outstanding workload vis-à-vis its capacity. It came to the considered conclusion that it would be unable to finalize its work within the two years statutory limit.

On 24 June 2011, the Commission forwarded a request to the National Assembly invoking section 20(1) of the TJR Act under which it could request for the extension of its lifetime beyond the two years statutory limit. The National Assembly considered the request on 18 August 2011 and unanimously voted to extend the Commission's time frame for six months. Thus the life of the Commission was extended to 3 August 2012. Within the extended period the Commission was able to finalise its schedule for public hearings and thematic hearings and commence report writing in February 2012. As it became evident that it would not be possible to hand over its final report by 3 May 2012 the Commission sought an amendment of the Act to enable it seeks a further extension of its life.

Kenya, has featured in the debates of whether to form a Truth Commission even before 2003 when through a Gazette notice, the Minister for Justice and Constitutional Affairs established the National Task force on the Establishment of a Truth, Justice and Reconciliation Commission. This was dubbed the Makau Mutua Task force. The recommendations did not kick off until in one way or the other, a transitional moment flickered during the post-election violence. Truth Commissions embrace a bigger concept of justice and offer alternatives to the traditional ways of dealing with crimes and injustices. However does not mean that they do not offer opportunity for retributive justice. Neither does it mean that they do not complement the

ideals of the kind of Justice that is offered by International Institutions such as the International Criminal Court.

Justice can be restorative or retributive. Restorative Justice refers to all the collective efforts that are focused on repairing the harm done with actions that place the community and its individuals in the same position that they were prior to the occurrence of the harm, hence the derivative 'restore'. Reconciliation refers to all activities that can be done with the purpose of understanding, bringing together, reuniting, bringing a compromise or squaring off. In the discourse of justice, reconciliation falls more under the agenda of restorative justice as it seeks to look into the interests of the entire society in ensuring a society's sustenance through harmonization and unification. The processes involved in reconciliation resonates the objectives of transitional justice in the sense that transitional justice is a mechanism that focuses on a society or a community as a whole and seeks to restore it to a positive state. This kind of justice seeks the common good of the society and transcends the culpability of a single individual.

The actualization of reconciliation in various forms has been and will be embraced by various activities of TJRC such as statement taking, community dialogues, the preparation of the final report, hearings and the possible granting of conditional amnesty in exchange for truth telling and restitution of illegally gotten gains. One of the major steps that the Commission has taken in the efforts towards reconciliation is to form partnerships with various stake-holders in the peace-building and conflict resolution field in order to see how to work together for an effective and enhanced reconciliatory mechanism which will last beyond the temporal mandate of the TJRC. It is hence imperative to have a wholesome appreciation of justice and see the existing mechanisms, especially those that are government instituted, as embracing a

complementary role towards the uncovering of our beloved country's past truths, promoting restorative justice and national healing.

The TJTC Chairman was alleged to have been involved in some earlier human rights, it is alleged that the chairperson in fact has been involved, implicated, linked or associated with at least three human rights violations that are to be investigated under the Act. It has also been alleged that his connection to those violations, and his repeated denial of any wrongdoing, creates an appearance of partiality and has in fact harmed the credibility and integrity of the Commission, in violation of Section 21(2) of the Act. Those violations, and the allegations related to them, examples Ndungu land report and the Wagalla massacre.

Political leaders and legal theorists have argued that learning the truth about past human rights violations and punishing those responsible for them are prerequisites for the establishment of democracy and respect for the rule of law. Thus, they call for structures of transitional justice during an interim period to confront the crimes of the past in order to lay the foundations for legitimate judicial systems and democratic norms. Such structures have included the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda as well as truth commissions, hybrid UN-funded courts, and revived traditional judicial structures such as Rwanda's *gacaca*. Transitional justice processes have inspired a growing field of study.

Implementation of Truth Justice and Reconciliation Commission remains an important step towards ensuring accountability for the past human rights violations, land injustices economic crimes and corruption and guarantees that the victims of those violations know the truth obtain justice and are provided with full reparation. Soon after the composition of TJRC, the commission was met with different reactions from Kenyans. More questions were being raised on both the law and the composition of the commissioners. Most Kenyans felt that Amb.

Bethuel Kiplagat credibility was not beyond reproach and that he had a human rights record to defend.

On 19th January, Religious leaders asked the government to disband TJRC if it has no intentions of making its findings public. Kenya Muslim National Advisory Council (Kenmac) said it would be a waste of public funds for TJRC to gather evidence from victims of historical injustices only for its work to be stored in government offices.

Most significantly, although the interim secretariat produced ad hoc operational plan with indications of staff and logistic requirements, as well as a timetable for collecting statements, holding hearings and writing the final report, no overall strategy was developed.

The TJRC has been slow in disseminating information about its operations to victims, the population and to development partners. There has been little discussion of how the objectives of each stage will be achieved, and this communication gap has created the disconnection. Public view of the current TJRC is an idle and incoherent outfit of insignificant impact. The researcher revealed a problem in the truth commission literature, in that there is no agreement as to whether truth commissions are beneficial for societies in transition. While most consider them positive, truth commissions have been criticized as both ineffectual and as disruptive with respect to delicate political processes. None, however, have marshaled overwhelming evidence and much seems driven by normative conviction.

Contrary to those who argue that truth commissions have not made situations worse, some see truth commissions as dangerous. At the individual level, there is anecdotal evidence that truth can rekindle anger and trigger posttraumatic stress among victims. At the aggregate, truth commissions may generate resentment and insecurity. For victims, lack of punishment may seem a travesty of justice and for perpetrators the proceedings may be threatening to reputations

and social position, thereby leading both sides potentially to extra-constitutional tactics in support of their interests. After all, “truth” has been the cause of much violence historically.

There is skepticism that a truth commission can put to rest the competition over writing history between different sides of the conflict, between victim and perpetrator. “While truth commissions play an important fact-finding role in national reconciliation processes, current evidence suggests that the ability of truth commissions to put the past to rest by making it a matter of public record is illusory. Indicative of the fact that truth commissions by themselves have been unable to bring closure is that . . . a rash of new trials addressing government-sponsored criminality has recently broken out.” For victims, too little has been done and for perpetrators, and perhaps bystanders, too much. In such a situation, neither may be prepared to back down.¹

When it comes to the victims and human rights activists, truth commissions may be objectionable in that they do fault to the rule of law and are unfair. If society is to open a new era, constructing the rule of law is often an important component. However, what kind of start is it if perpetrators are let free? By foregoing punishment, it may reinforce the notion that some people are above the law and reduce the incentives for others to play by the rules. For perpetrators, even the limited accountability offered by truth commissions may be too much and they are often in a position of power to act upon their insecurities. Some commissions have “named names” of suspected perpetrators in their final report. Although there has rarely been any direct consequence of this, incidences of vigilante justice have not been unheard of. As an alternative, therefore, some argue for amnesia based on the argument that it facilitates democratization and the rule of law by removing the incentive for the powerful to obstruct the

¹ Snyder, Jack L., and Leslie Vinjamuri. (2003) *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*. *International Security* 28:5–44.

process. Whereas political observers tend to view amnesia as sometimes appropriate, political philosophers and human rights activists rarely accept this suggestion. Still, amnesties have been a common means to reduce the threat felt by perpetrators during transitional periods. Some argue that it is a result of these amnesties rather than the truth commission per se that is responsible for the apparent success of truth commissions.²

² Ibid.

5.3 Recommendations

Based on the findings, the study recommends;

- That any truth commission is not appropriate for every country or every transition, and that the decision to have a commission must always be debated widely, preferably at a national level. This decision should be based on a broad consultative process to seek especially the views of both victims and survivors, and make clear the functions, strengths and limitations of truth commissions. In addition, international actors should provide comparative information and expertise, but should recognize from the start that a country may choose, for very legitimate reasons, not to have a truth commission or at least not to have one immediately upon transition. National views on this matter should be respected.
- Based on the findings, the researcher would also strongly recommend that, truth commissions hold great intuitive appeal. While truth commissions provide no legal punishment for perpetrators and often are unable to examine each case thoroughly, they represent some form of accountability for human rights abuses when historically this has been rare the world over. The alternative to truth commissions is often not conducting trials, but doing nothing at all. The information uncovered may be used in future trials.
- Since TJRC recommendations were purely recommendations rather than obligations, their implementation has dependent on political will.
- The study revealed that a truth commission can ultimately have a significant political impact, in a context where, typically, some of the individuals or political entities that still hold power (or wish to gain power) may be the subject of inquiry. Where elections are planned to take place during the course of a commission's work, or even shortly after a

commission is due to conclude, the political consequences of its work can become very clear, and there may be pressure on a commission to halt, postpone or modify its schedule of hearings or the release of its final report. In some cases, it may be important for a commission to take these factors into account in planning its own calendar, while not altering the depth or focus of its investigations in any substantive way.

5.4 Areas for Further Studies

Based on the current findings of this study, the researcher would recommend further studies in;

- To thoroughly review the TJRC proceedings
- To thoroughly scrutinize the findings of the latest TJRC report, against the evidence gathered so as to establish the absolute truth and make recommendations

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List of Candidates Interviewed

Dannes Wamalwa	-	TJRC Assistant
Evans Limo	-	TJRC Employee
Jayson Mukwanan	-	TJRC Interviewee
John Okumu	-	TJRC Interviewee
Mary Mwikali	-	TJRC Interviewee
Michael Owuor	-	TJRC Interviewee
Mwende Mutinda	-	Advocate
Salma Manzo	-	TJRC Interviewee
Sammy Mwangi	-	Journalism

APPENDICES

Appendix 1: Letter for Data Collection

Telephone: 254-2-3884036
Fax: 254-2-3884036
E-Mail: info@ndc.go.ke



National Defence College
71 Warai North Road
P.O Box 24381
Karen – Nairobi
Kenya

When replying please quote

Ref: NDC/G/209

27 March, 2013

TO WHOM IT MAY CONCERN

Dear Sir/Madam,

RE: ACADEMIC RESEARCH STUDY MR. KENNETH OKOKI DINDI

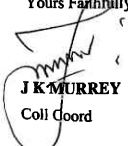
The above named is a Masters student at National Defense College undertaking a course in the Institute of Diplomacy and International studies by the University of Nairobi. He is currently conducting an academic search study entitled

Truth Justice and Reconciliation Commission: A case study of Kenya.

Any information obtained in the course of this study will be used for academic purpose only and will be treated with utmost privacy and confidentiality.

Please provide the necessary assistance.

Yours Faithfully,


J K MURREY
Coll Coord

Appendix 2: Consent Form

This research aims to establish Transitional Justice: A Case Study of Kenya's Truth Justice and Reconciliation Commission.

II am currently a student at University Nairobi Campus pursuing a Masters Degree course at Institute of Diplomacy And International Studies. I am doing a research to examine the establishment and operationalization of Truth Commissions with reference to the Kenyan Truth Justice and Reconciliation Commissions as a case study. To identify operational lessons of the Kenya Truth Justice and Reconciliation Commission and to examine the processes and product of the Kenya Truth Justice and Reconciliation Commission.

All the investigations done will remain confidential and will only be shared to the relevant authority.

Sign.....

Date.....

Appendix 3: Focus Group Discussion

Serial No.....

The questionnaire is meant to collect information so as to establish Transitional Justice: A Case Study of Kenya's Truth Justice and Reconciliation Commission. Kindly answer the questions by writing a brief statement or ticking in the boxes provided as will be applicable. This research is intended for an academic purpose only.

1. Age of respondent in years.....

2. Name of your organization?.....

3. Occupation of the respondent?.....

4. Education level?.....

5. Are you familiar with transitional justice?.....

a. Yes []

b. No []

6. Have you ever been interviewed by TJRC?.....

a. Yes []

b. No []

7. To what extent do you agree that TJRC will establish the different perspectives of truth about the past including institutional failure. This way, official denials by governments about past violations can be uncovered?

8. To what extent do you agree that TJRC will produce comprehensive reports that become a part of a country's history?

9. To what extent do agree that TJRC will help societal reconciliation especially in divided or politically unstable societies where they are seen as a good compromise between impunity and risky prosecution?

10. To what extent do you believe that TJRC will recommend necessarily legal and institutional reforms as well as sanctions against perpetrators and reparations for victims?

11. Are you familiar with the operational lessons of the Kenya Truth Justice and Reconciliation Commission?

12. Are you familiar with the processes and product of the Kenya Truth Justice and Reconciliation Commission?