

**UNIVERSITY OF NAIROBI**

**INSTITUTE OF DIPLOMACY AND INTERNATIONAL  
STUDIES (I.D.I.S.)**

**RECONCILIATION IN DIVIDED SOCIETIES: A CASE STUDY  
OF THE KENYAN TRUTH, JUSTICE AND RECONCILIATION  
COMMISSION**

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**DECLARATION**

I, Suto Joel Masika declare that this Research Project is my original work. It has never been presented to the University of Nairobi or any other University for examination purposes.

Signed.....

Date.....

**SUTO JOEL MASIKA**

This Research Project has been submitted for examination with my approval as University Supervisor;

Signed.....

Date.....

**DR. ANITA KIAMBA**

## **DEDICATION**

I dedicate this Research Project to my Late Father – Mr. Chrisantus Juma Suto – May the Lord rest his soul in peace. He instilled in me the virtues of hardwork, honesty and commitment, virtues that have helped me greatly in my life and especially in completing this Research Project.

I also wish to dedicate this Project to the souls of all those who perished during the 2007 / 2008 Post – Election Violence, their families and loved ones who still seek for justice for their losses and all those involved in the reconciliation efforts in Kenya.

To all those who seek justice, I can only say that, “Weeping may endure throughout the night, but joy will surely come in the morning.”

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When I started on this research project, I was in a maze full of concepts, theories and ideologies around the concept of conflict management and especially reconciliation. Through the dedicated guidance and mentorship of Dr. Anita Kiamba – my Research Supervisor – I was able to sift through all that and finally come up with a Research Project. She held my hand throughout the Research Project. Her reflections on this research project were a continuous source of intellectual inspiration that enriched my analysis. For this I will be forever grateful.

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## ABSTRACT

The violence witnessed in Kenya in the aftermath of the 2007 disputed presidential elections shook Kenyans into the realization that Kenya had remained a highly polarized nation since independence. Brother turned against brother resulting in the loss of than 1,300 lives and the displacement of more than 300,000 people. International agencies stepped in with the AU taking the lead in a bid to seek a cessation to the violence. An agreement was finally sealed on February 28, 2008 through the KNDRC process mediated by former UN Secretary General Kofi Annan. The agreement led to *inter alia* the cessation of violence and formation of a coalition government. However, the mediation efforts could have only done so much. There were long-term issues that needed specialized agencies to fully resolve. With this understanding the KNDRC agreed on a number of commissions to be formed to handle these issues.

The Commission of Inquiry into the Post-Election Violence (Waki Commission), the National Cohesion and Integration Commission – the only permanent commission – and finally the TJRC were among commissions formed to handle the long-term issues of the conflict. The Waki Commission in its report recommended the formation of a Special Tribunal for Kenya to try the people suspected to bore criminal responsibility for the PEV. However, the Special Tribunal of Kenya never saw the light of day. Consequently, the ICC stepped in and took up the cases after the then ICC Prosecutor Moreno Ocampo received the names of people suspected to bear criminal responsibility for the PEV from Kofi Annan. The TJRC was finally established in 2009 to among others promote justice, healing and reconciliation in Kenya. It was formed at a time when the ICC was in the process of confirming charges against six Kenyans in relation to the 2007 / 2008 PEV. At the time many Kenyans viewed the TJRC as a ploy by those in government to shield the merchants of impunity from criminal prosecution.

The TJRC problems were further compounded by the credibility crisis that faced its' chairperson – Ambassador Bethuel Kiplagat. The issues surrounding the chairperson threatened to tear the commission apart and derail the truth seeking process. The crisis led to the resignation of the then vice-chairperson – Ms. Betty Murungi. This left the TJRC with only seven commissioners when the chairperson finally stepped aside. Throughout its' work the commission was further plagued by financial challenges as well as lack of political will in the truth seeking process.

The TJRC worked for four years and finally handed in its' report in May 2013. The commissioners noted that reconciliation is not an event but a process. Consequently, the TJRC interpreted its mandate as being to initiate the process of reconciliation. The TJRC held a number of public hearings and reconciliation forums to aid in the initiation of reconciliation between and among the different Kenyan ethnic groups. The research concludes that despite the many challenges experienced by the TJRC, it did actually lay the foundation for reconciliation. It is imperative that the government endeavours to implement the commission's recommendations if reconciliation is to be fully realized in the country. It is equally important that the rule of law is observed so that the citizens can rest assured that justice and fairness will prevail.

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## **ABBREVIATIONS**

**ANC** – African National Congress

**CSOs** – Civil Society Organizations

**FBOs** – Faith-Based Organizations

**ICC** – International Criminal Court

**IFP** - Inkatha Freedom Party

**KANU** – Kenya African National Union

**KNCHR** - Kenya National Commission on Human Rights

**KNDRC** - Kenya National Dialogue and Reconciliation Committee

**LTRC** - Liberian Truth and Reconciliation Commission

**NARC** - National Alliance Rainbow Coalition

**NCIC** – National Cohesion and Integration Commission

**NGOs** – Non-Governmental Organizations

**NURC** - National Unity and Reconciliation Commission of Rwanda

**ODM** - Orange Democratic Movement

**PEV** - Post-Election Violence

**PNU** - Party of National Unity

**SATRC** - South African Truth and Reconciliation Commission

**SLTRC** - Sierra Leone Truth and Reconciliation Commission

**TJRC** - Truth, Justice and Reconciliation Commission

**TRCs** – Truth and Reconciliation Commissions

**UN** – United Nations

**UNIFEM** - United Nations Development Fund for Women

**UNMIL** - United Nations Mission in Liberia

## **BACKGROUND TO THE STUDY**

### **1.1 Introduction**

The violence that erupted in Kenya in late December 2007 and January 2008 following the disputed 2007 presidential election results was one of the most violent and destructive periods in the country's history. It is estimated that 1,300 lives were lost as a direct result of the violence and conservative figures estimate that 350,000 people were internally displaced. In addition, there are Kenyans still living outside the country as a direct result of the post-election violence (PEV). After these events, Kenya's fate as a country in transition was sealed. There was an urgent need to transform the nation hitherto viewed as a beacon of peace within the Horn of Africa region. Despite a President having been sworn in on the evening of December 30, 2007, the country was slowly but surely becoming ungovernable. There was need to safeguard democracy and establish lasting peace after the PEV and decades of systematic human rights abuses by state and non-state actors.

The events of the 2007 / 2008 Post-Election Violence remain inscribed in the minds of many Kenyans. The violence witnessed, threatened to tear the country apart. The joint and concerted efforts of both the Kenyans themselves and the international community saved the situation by ending the violence. However, pundits are of the opinion that the violence may have ended on the streets but the hatred remained in the hearts of men. A survey of the social media is a confirmation of this where ethnic sentiments and rhetoric is the order of the day.

When the Kenya National Dialogue and Reconciliation Committee (KNDRC) settled on a Truth, Justice and Reconciliation Commission (TJRC) as a transitional justice mechanism, it was seen to be a less controversial measure than criminal prosecutions. The Truth Justice and Reconciliation (TJR) Act<sup>1</sup> - a

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<sup>1</sup> Truth, Justice and Reconciliation, Act No 6 of 2008 of Laws of Kenya. [Hereinafter TJR Act].

product of the KNDRC deliberations - established a TJRC with a vast mandate: to investigate and establish a historical record of gross economic crimes and violations of human rights for the period between 12<sup>th</sup> December 1963 and 28<sup>th</sup> February 2008; to identify the victims of these violations and make appropriate recommendation for redress; to identify alleged perpetrators and recommend their prosecution; to inquire into the irregular and illegal acquisition of public land; to inquire into the causes of ethnic tensions; and to promote healing, reconciliation and co-existence among ethnic communities.<sup>2</sup> The commission came into operation on 17<sup>th</sup> March 2009 and the TJRC Commissioners were finally sworn in on 3<sup>rd</sup> August 2009.

Transitional justice has proved indispensable for countries emerging from past human rights violations and autocracies or conflict and which are struggling towards democracy. According to Roht and Javier transitional justice entails: “that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law”.<sup>3</sup> Proponents assert that transitional justice offers such benefits as fostering public accountability, promoting reconciliation and psychological healing, fostering respect for human right and rule of law, and helping establish conditions for peaceful and democratically governed country.<sup>4</sup> Different post conflict societies use different transitional justice mechanisms in a bid to confront and deal with their past. For instance, the Republic of South Africa, Chad, Sierra Leone, Nigeria, Ghana, Zimbabwe and Liberia specifically established Truth and Reconciliation Commissions (TRCs).

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<sup>2</sup> Secs 5 & 6, Truth, Justice and Reconciliation, Act No 6 of 2008 of Laws of Kenya.

<sup>3</sup> A. Roht, M & Javier (2006: 2). *Transitional Justice in the Twenty-First Century*, Cambridge, UK: Cambridge University Press.

<sup>4</sup> Oskar N. Thomas, James Ron and Ronald Paris (November 2010), “State-Level Effects of Transitional Justice: What Do we know?” in *The International Journal of Transitional Justice*, Vol. 4, Issue 3, 329-354; Oxford Journals (OUP)

The Republic of South Africa established the South African Truth and Reconciliation Commission (SATRC) in 1995. The SATRC was mandated to investigate human rights violations committed during South Africa's period of *apartheid* (South Africa's system of racial separation that lasted from 1948 to 1990); Chad established a Truth Commission on 29<sup>th</sup> December 1990 to investigate crimes committed during the eight year rule of Hissein Habre; Former President Olusegun Obasanjo of Nigeria established a Truth Commission on 4<sup>th</sup> June 1999 to investigate violations of human rights and abuses committed between 1<sup>st</sup> January 1994 and 29<sup>th</sup> May 1999; Ghana established a Truth Commission in 2002 to investigate human rights violations for the period from 6<sup>th</sup> March 1957 to 6<sup>th</sup> January 1993; The ZANU-PF government of Zimbabwe established a Truth Commission in 1985 to investigate the killings of an estimated 1,500 political dissidents and other civilians in Matabeleland in 1983; and President Ellen Johnson-Sirleaf of Liberia established a Truth Commission on 22<sup>nd</sup> June 2006 to investigate human rights abuses that occurred between 1979 and 2003.<sup>5</sup>

In addition, a few of these countries have undertaken prosecution – either through national courts, traditional mechanisms or hybrid tribunals – of alleged perpetrators.<sup>6</sup> Some countries, such as Liberia, Sudan, Mozambique and Angola, have dealt with the question of justice by deciding (expressly or otherwise) to avoid it, while others, such as the Democratic Republic of Congo (DRC) and Burundi, have introduced piecemeal transitional justice legislation or amnesty laws. Still, other states have had failed attempts at transitional justice.

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<sup>5</sup> Avruch, Kevin, and Beatriz Vejarano, (2002) “Truth and Reconciliation Commissions: A Review and Annotated Bibliography”, *OJPCR: The Online Journal of Peace and Conflict Resolution*, 4, 2, 2002: 37–76.

<sup>6</sup> Sierra Leone adopted the Special Court established by the Statute of the Special Court of 2002. In Rwanda the International Criminal Tribunal for Rwanda (ICTR) was established. This was complimented by *Gacaca* (traditional) tribunals, and national courts.

In the aftermath of the disputed December 27, 2007 General Elections and the consequent Post-Election Violence (PEV) Kenya through the Kenya National Dialogue and Reconciliation Committee (KNDRRC) negotiations agreed to put in place a number of transitional justice mechanisms including the formation of a Truth, Justice and Reconciliation Commission (TJRC). Former United Nations Secretary General Kofi Annan and a panel of other eminent African personalities including Benjamin Mkapa, Graca Machel and Jakaya Kikwete mediated the process. On 14<sup>th</sup> February 2008, the KNDRRC adopted a resolution establishing a TJRC as a measure to deal with the country's political crisis:<sup>7</sup>

*“We recognise that there is a serious crisis in the country, we agree a political settlement is necessary to promote national reconciliation and unity... such reform mechanisms will comprise ... a truth, justice and reconciliation commission.”*

Lederach posits that reconciliation includes at least four critical components – truth, justice, mercy, and peace. He defines reconciliation as being constituted by both “a focus and a locus (social space, location)”<sup>8</sup>. As a focus (perspective), it is built on and oriented towards the relational aspect of conflict. Reconciliation must be proactive in seeking to create an encounter where people can focus on their relationships and share their perceptions, feelings, and experiences with one another, with the goal of creating new perceptions and new shared experience. The focus of reconciliation is upon building new and better relationships between former enemies. According to Lederach, relationships are both the root cause and the long-term solution of conflicts. Thus, relationships must be the core focus in conflict management. As a locus (social phenomenon), Lederach argues, “reconciliation represents a space, a place or location of encounter, where parties to a conflict meet.” It is at this place that the traumas of the past and the hopes for the future must be formulated and brought together by discussing the issues of truth, forgiveness, justice, and peace.

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<sup>7</sup> ‘Agreement on agenda item three: How to resolve the political crisis’ KNDRRC (2008) 3.

<sup>8</sup> John Paul Lederach (1997), *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington, D.C.: United States Institute of Peace Press.), p 30.

Reconciliation can thus be seen as a societal process that involves mutual acknowledgment of past suffering and the changing of destructive attitudes and behaviour such as negative ethnicity and ethnic animosity into constructive relationships – characterized by mutual respect and understanding – toward sustainable peace. It is a process rather than an event. It refers to a large number of activities that help turn the temporary peace of an agreement which ends the fighting into a lasting end to the conflict itself. Through reconciliation and the related processes of restorative and/or transitional justice, parties to the dispute explore and overcome the pain brought on during the conflict and find ways to build trust and live cooperatively with each other. A truth commission provides the space for the encounter between the victims and the perpetrators or perceived perpetrators.

The Kenyan TJRC was a body whose mandate included making recommendations both for prosecutions of the perpetrators as well as reparations for the victims. However, right from the outset, serious allegations of human rights violations were made against the TJRC Chairperson, Ambassador Bethuel Kiplagat. Serious allegations of human rights violations surrounded Ambassador Kiplagat's reputation. A tribunal was established to investigate these allegations; however, having made no concrete findings, Ambassador Kiplagat was controversially reinstated.

Ambos argues that 'the role of the former elite(s) in the process of transition affects the ... [success of transitional justice] in that the possibilities of transitional justice increase with the decreasing influence of the former elite(s)'.<sup>9</sup> The Former Chairman – Ambassador Bethuel Kiplagat – was a civil servant during the repressive Kenya African National Union (KANU) era and President's Moi regime. Valid

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<sup>9</sup> K. Ambos (2009), 'The legal framework of transitional justice: A systematic study with a special focus on the role of the ICC' in K. Ambos *et al* (eds) *Building a future on peace and justice: Studies on transitional justice, peace and development*, 106.



questions were raised about his suitability (rather than qualifications). There was a possibility of the chairman being called as a witness before the TJRC to shed light on government policy matters during the time he served as a civil servant under President Moi's government. The widespread view was that the greater public good would be better served if the Chairman reconsidered his position. The chairman was challenged to step down but he was not ready to answer such a call. Some commissioners expressed their views publicly and stated their position on the matter while others kept quiet not knowing what to do or say. The differences and wrangles within the commission led to the former Vice – Chairperson to the commission - Ms. Betty Murungi resigning first as a Vice – Chairperson and then as a Commissioner.

The dubious political will for and commitment to the process also severely undermined the perceived legitimacy and overall effectiveness of the TJRC. The great majority of international development agencies and many civil society organizations operating in Kenya came to distance themselves from the TJRC process as it proceeded. This occurred despite such actors committing funding and technical assistance at the outset of the TJRC process and demonstrating significant goodwill for the process. Indeed, initially there was significant support for and optimism surrounding the TJRC.<sup>10</sup> However, as the process unfolded, many scholars and practitioners (including national and international civil society and international development agency representatives) came to seriously question whether the TJRC would be able to achieve its intended objectives, specifically, to 'promote peace, justice, national unity,

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<sup>10</sup> S. Robins (2011), "To live as other Kenyans do": A study of the reparative demands of Kenyan victims of human rights violations' International Centre for Transitional Justice <http://ictj.org/sites/default/files/ICTJ-Kenya-Reparations-Demands-2011-English.pdf> (accessed April 25, 2014)

healing, and reconciliation among the people of Kenya'.<sup>11</sup> This was particularly in light of ever-diminishing public confidence in the TJRC mechanism.<sup>12</sup>

The TJRC further delayed in releasing its final report. The considerable delays in completing and publishing the final report of the TJRC were widely denounced and actively opposed. The Civil Society Organizations (CSOs) labelled requests for extensions (and subsequent granting by cabinet) 'reprehensible', 'tantamount to a betrayal of the people's trust', and driven by 'personal interest' and 'self-preservation'.<sup>13</sup> The civil society groups labelled the delays also as 'reeking of political mischief'. The TJRC's failure to publish its findings prior to the Kenyan general elections of 2013 was aptly described as having 'undermined one of the main rationales of the Commission and denied the people of Kenya information to which they were entitled as they went to the polls'.<sup>14</sup> It is against this background that the study attempts an investigation into the extent to which the TJRC fulfilled its mandate – specifically in relation to promoting healing, reconciliation and peaceful co-existence among different Kenyan ethnic communities.

## 1.2 Statement of the research problem

Despite the progress achieved in terms of a new constitution, numerous institutional reforms and the recent peaceful general election, Kenya still remains a highly polarized nation. Kenyans still perceive and view each other along ethnic lines. More often than not tribal and ethnic sentiments dominate

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<sup>11</sup> Sec 5 Truth, Justice and Reconciliation Act 6 of 2008

<sup>12</sup> 'TJRC seeks six-month extension of tenure' (31 July 2012), *Nation TV Kenya*

<sup>13</sup> KPTJ (5 August 2012), 'Civil society says No! To further extension of TJRC mandate' <http://www.africog.org/content/civil-society-says-no-further-extension-tjrcmandate> (accessed April 25, 2014).

<sup>14</sup> ICTJ 'ICTJ welcomes Kenya's TJRC Report' (2013) [http://ictj.org/news/ictj-welcomes-kenyas-tjrc-report?utm\\_source=International+Center+for+Transitional+Justice+Newsletter&utm\\_campaign=b7ba70f50f-World+Report+Issue+23+May+2013&utm\\_medium=email&utm\\_term=0\\_2d90950d4d-b7ba70f50f-245955113](http://ictj.org/news/ictj-welcomes-kenyas-tjrc-report?utm_source=International+Center+for+Transitional+Justice+Newsletter&utm_campaign=b7ba70f50f-World+Report+Issue+23+May+2013&utm_medium=email&utm_term=0_2d90950d4d-b7ba70f50f-245955113) (accessed April 25, 2014).

conversations and debates in the public sphere. Many government decisions are analyzed from an ethnic perspective using an ethnic lens. The social media is today replete with ethnic diabolical pitting members of different ethnic groups on opposing forces. All this is happening despite the TJRC having gone around the country conducting healing and reconciliation forums. We are far from embracing each other as brothers and sisters in one family called Kenya. With the understanding that divided societies can easily slide back to conflict if the issues are not addressed and resolved then there is need for us to ask where the rain started beating us and try to correct the situation before the structural conflict escalates to violent conflict. Confronting this legacy of violence and injustice is necessary if a peaceful future is to be achieved. Peace is not necessarily the absence of a large – scale war. There is need to move beyond the TJRC and explore alternatives to the realization of sustainable reconciliation. We need to move beyond the culture of impunity, bribery and corruption to a culture of respect for the rule of law, justice and prosperity.

### **1.3 Research Questions**

- a) To what extent was the TJRC successful in promoting healing and reconciliation in Kenya?
- b) What challenges did the the TJRC face in its work of promoting reconciliation in Kenya?
- c) What other opportunities are still available for sustainable reconciliation in Kenya?

### **1.4 Study objectives**

The main objective of the study will be to critically appraise the work of the TJRC in promotion of healing and reconciliation in Kenya.

**The specific objectives of the study will be:**

- a) To evaluate the success of the TJRC in promoting reconciliation in Kenya.
- b) To identify the challenges faced by the TJRC in promoting reconciliation in Kenya.
- c) To identify the opportunities available for sustainable reconciliation in Kenya.

**1.5 Literature review**

This section will review literature on transitional justice, reconciliation, and truth commissions. The section will attempt an understanding of the concepts of transitional justice and reconciliation, what reconciliation entails and ask whether it is feasible in conflict resolution. It will further try to shed light on the idea of divided societies by looking at their characteristics. Finally truth commissions will be discussed as mechanisms for transitional justice.

**1.5.1 Transitional Justice**

According to Musila, transitional justice is the process by which 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.<sup>15</sup> This definition presumes a past characterized by human rights violations and focuses on the mechanisms that are put in place to redress them. The International Centre for Transitional Justice (ICTJ), views transitional justice as a response to systematic or widespread violations of human rights. It seeks recognition for the victims and promotion of possibilities for peace, reconciliation, and democracy. ICTJ posits that transitional justice is not a special form of justice but justice adapted to

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<sup>15</sup> Musila, G. M. (2009) ‘The Accountability Process in Kenya: Context, Themes and Mechanisms’, In: Judiciary Watch Report, Vol. 8 (2009), *Addressing Impunity and Options for Justice in Kenya: Mechanisms, Issues and debates*. 17-60. Nairobi The Kenyan Section of the International Commission of Jurists.

societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they may take place over many decades.<sup>16</sup>

Transitional justice can thus denote judicial and non-judicial measures geared to redress the legacies of massive human rights abuses. It seeks to address legacies of large-scale past abuses, and includes mechanisms such as acknowledgement and truth telling, criminal trials, reparations and guarantees of non-recurrence, memorialisation, and institutional reform. These mechanisms seek to confront the perpetrators before a judicial or non-judicial forum, address the needs of the victim and start a process of reconciliation. The anticipated outcome of such mechanisms is the creation of a platform where national healing, cohesion and reconciliation can begin. Reconciliation should not be taken as an isolated event but rather as a process which involves an integrated approach on the part of many actors – political leaders, civil society, faith-based institutions, communities and individuals – and extends over a significant period of time.

Mutua argues that transitional justice normally accomplishes two main aims. First, it acknowledges the temporary measures that must be taken to build confidence in the post despotic society. Secondly, by its own definition, transitional justice rejects a winner-take-all as a beachhead to the future. In other words, transitional justice calls for deep concessions on either side of the divide.<sup>17</sup> Jeffery adds by explaining that transitional justice normally seeks to achieve accountability for human rights violations'.<sup>18</sup>

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<sup>16</sup> International Centre for Transitional Justice 'What is transitional justice?' [http:// ictj.org/about/transitional-justice](http://ictj.org/about/transitional-justice) (accessed on August 15, 2014).

<sup>17</sup> Mutua, M. (2008): Human Rights and State Despotism in Kenya: Institutional Problems', *Africa Today*, Vol. 41, No. 4, Kenyan Politics: What role for Civil Society? (4th Qtr. 1994), 50-56, Indiana University Press.

<sup>18</sup> R Jeffery 'Enduring tensions: Transitional justice in the Solomon Islands' (2013) 26 *The Pacific Review* 156.

Transitional justice normally has a number of broad objectives: to establish truth, pursue accountability for the crimes and violations committed, make reparations for the victims and reconciliation of the parties. In this regard, basic approaches to transitional justice that can be deployed include criminal prosecutions, truth commissions, victim reparation programs, gender justice, sector reforms (dimensions of institutional reforms including constitutional and security sector reforms) and memorialisation effort. Effective transitional justice should include measures that complement each other and which are designed to strengthen peace and democracy

Reconciliation and transitional justice are interdependent. Reconciliation is perceived as one of the pillars of transitional justice, along with truth seeking, justice, reparations and guarantees of non-recurrence. Reconciliation is also the product of transitional justice interventions in a given society. Ultimately, at the core of the reconciliation process is the institutionalisation of a process of transitional justice.<sup>19</sup> In this sense, no matter the school of thought, implicit in transitional justice is the concept of reconciliation and the recognition that the practice of reconciliation is a process and not a once-off event in a country in transition.

### **1.5.2 The Concept of Reconciliation**

According to Brouneus, reconciliation is a social process that involves mutual acknowledgement of past suffering and the changing of destructive attitudes and behaviour into constructive relationships toward sustainable peace. He posits that reconciliation mainly focuses on remembering, changing, and continuing with life in peace. Reconciliation does not require forgetting, forgiving or loving one

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<sup>19</sup> Murithi, T. 2009. The Value of Reconciliation. In: T. Murithi, *The Ethics of Peacebuilding*. Edinburgh: Edinburgh University Press, 136.

another.<sup>20</sup> Lundwall views reconciliation as “the formation of lasting peace on both societal and individual levels...involving different processes but striving towards a common goal: to facilitate coexistence...not by forgetting or altruistic forgiveness, but by verbalizing and acknowledging a violent, conflictive past”.<sup>21</sup> Thus, acknowledgement becomes an integral part for reconciliation to be realized.

Post-conflict reconciliation can therefore be seen as an attempt by individuals and local communities, supported by the international community, to put the past behind them and bring erstwhile enemies or opponents together in a way that would heal the wounds resulting from long years of war, atrocities and impunity. Reconciliation is thus a societal process that involves mutual acknowledgment of past suffering and the changing of destructive attitudes and behavior into constructive relationships toward sustainable peace. It mainly focuses on remembering, changing, and continuing with life in peace. Lederach identifies truth, justice, mercy, and peace as the four critical components in reconciliation. The single greatest challenge of all conflicts, particularly those with a long history of violence and suffering is to create the social space where it is possible to hold together and interdependent, not separate and isolated, the impulses of these four (peace, justice, truth and mercy) social energies. Where they meet, are connected, and relate, we create the pathway leading toward reconciliation. Where they are ignored, isolated from one another, or chosen one over the other, we often are unable to create sustainable peace processes.

### **1.5.3 Truth**

Truth is the longing for acknowledgement of wrong and the validation of painful loss and experiences, but it is coupled with mercy, which articulates the need for acceptance, letting go, and a new

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<sup>20</sup> Swedish International Development Agency (2003), *Reconciliation – Theory and Practice for Development Cooperation*. Stockholm: Sida.

<sup>21</sup> Lundwall, Karen (2001), *Psychological Aspects of Collective Violence and Reconciliation: A Survey of Current Research*. Current Issues: Reports of the Centre for Multiethnic Research. Uppsala: Uppsala University.

beginning.<sup>22</sup> TRCs play a fundamental role in any transitional society undergoing democratic transformation. Not only do they lay bare the violations of the past, but they also give an opportunity to the government, citizens and perpetrators to acknowledge the wrongfulness of these actions.<sup>23</sup> Mutua argues that TRCs play a large role to cleanse the past and effect moral reconstruction and reconciliation after truth and justice.<sup>24</sup> TRCs should provide an avenue for non-retributive justice where victims and perpetrators share their pain and confess their guilt enabling them to chart a shared and interdependent future together.

The relationship between truth and reconciliation is extremely complicated. The South African Truth and Reconciliation Commission, for example, proclaimed “Truth: The Road to Reconciliation,” and insisted on the indispensability of truth as disinfectant of conflict-related wounds, a cathartic release, and heal balm.<sup>25</sup> Some scholars have however argued that the purpose of the truth component is, or should not be to heal in the first place, but to recognize, acknowledge and bring light to hidden parts of a society’s past. Important questions have also been raised that challenge the very theoretical foundations of TRCs. Shaw, for instance, notes that it cannot be assumed that “Truth telling is healing on a personal level: truth Commissions do not constitute therapy”.<sup>26</sup> Shaw even questioned the whole essence of telling the truth as a national healing process: The idea of healing a nation that is wounded or traumatized is primarily a nation building rhetoric... it derives from nineteenth century models of

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<sup>22</sup> Lederach, John Paul (1997), *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington, D.C.: United States Institute of Peace Press.), p 30.

<sup>23</sup> P. van Zyl ‘Promoting transitional justice in post-conflict societies’ 209 [http://www.dcaf.ch/\\_docs/Yearbook2005/Chapter10.pdf](http://www.dcaf.ch/_docs/Yearbook2005/Chapter10.pdf) (accessed April 25, 2014).

<sup>24</sup> M. Mutua (2007), ‘Beyond Juba: Does Uganda need a national truth and reconciliation process?’ *Buffalo Human Rights Law Review* 20, 13.

<sup>25</sup> Kader Asmal et al. (1996), *Reconciliation Through Truth: A Reckoning of Apartheid’s Criminal Governance*, (Cape Town: David Philip Publishers), 9-11.

<sup>26</sup> Shaw, Rosalind (2005) *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone*, United States Institute of Peace Special Report no.30, Washington DC



society as akin to an organism that can be healthy or sick. Such biological models for society have, however, long been discredited. While violence certainly disrupts and transforms social institutions and practices, it is not valid to conceptualize these changes in terms of a damaged collective national psyche that can be healed through a cathartic process of truth telling.<sup>27</sup> Even if truth is a precondition to reconciliation, the very definition of “truth” has yet to be determined. Is it merely the accumulation of forensically-proven facts or does truth represent a more complex and multi-faceted narrative? Ignatieff also queried the logic of Bishop Tutu’s assumption “...that a nation has a psyche, not many, that truth is one, not many, that truth is certain, not contestable; and that when it is known by all, it has capacity to heal and reconcile...” According to Hamber: ...it is a mistake to assume that story telling and giving testimony, either in public or private spaces, equates with healing. Truth alone will not lead to reconciliation nor will it guarantee that a human rights culture will permeate the society and that those who suffered in the past will be able to deal with their traumas.<sup>28</sup>

On the other hand human rights bodies like the Human Rights Watch have held repeatedly that victims, their families as well as the general public have a right to know the whole truth about past human rights violations. This right has been presented by the Inter-American Court on Human Rights as a free-standing remedy in itself (besides reparations and prosecutions of at least the most serious crimes). Additionally International law protects the right of victims and survivors to know about the circumstances of gross violations of their human rights, including who was responsible for the violations. This right may be afforded through the effective implementation of various truth-seeking initiatives, including freedom of information legislation; declassification of archives; investigations into

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<sup>27</sup> Ibid.

<sup>28</sup> Hartwell, Marcia Byrom (2000), “The Role of Forgiveness in Reconstructing Society after Conflict”, *Journal of Humanitarian Assistance*, June 3.

the missing and disappeared; and the establishment of non-judicial commissions of inquiry, including truth commissions.

The value of truth seeking rests in its contribution to the 'creation of a historical record' and, in so doing, preventing manipulation and the deliberate rewriting of history and a denial of atrocities by perpetrators. Truth seeking is also esteemed for its perceived ability to 'help victims find closure by learning more about the events they suffered, such as the fate of disappeared individuals, or why certain people were targeted for abuse'.<sup>29</sup> It entails information as to the causes, reasons, the condition and circumstances of the violations and the identification of the wrongdoers, and the whereabouts of loved ones who have disappeared.<sup>30</sup> This has multi-faceted goals. According to Tutu, the truth forms a basis for reconciliation.<sup>31</sup> It may also be used to sanction the wrongdoers for prosecution or for political and moral reconstruction of the state. On the other hand, it is possible that truth-seeking impedes reconciliation because the horror of the truth can harden attitudes thus rendering forgiveness and empathy all but impossible. And as Henken argues, truth may have a deterrent effect on the perpetrators.<sup>32</sup> Truth seeking also has the ability to confront the legacy of past 'horrors', in order to lay a solid foundation on which to build a new society. We should not bury our sins, as they will reemerge later'. We need to ask ourselves the extent to which truth seeking has contributed to achieving and realizing reconciliation in Kenya.

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<sup>29</sup> CIPEV (2008), 'Report of the Commission of Inquiry into Post-Election Violence' (Commission of Inquiry into Post-Election Violence).

<sup>30</sup> Art 32, Additional Protocol I to the 1949 Geneva Conventions.

<sup>31</sup> Truth and Reconciliation Report of South Africa (1999) 17.

<sup>32</sup> A. Henkin 'State crimes: Punishment or pardon' in N. J. Kritz (ed) *Transitional justice* (1995) 184-186, as cited by J. Sarkin & E. Daly 'Too many questions, too few answers: Reconciliation in transitional societies' (2003) 35 *Columbia Human Rights Law Review* 666-667.

The TJRC established that most of the adversely mentioned persons denied their involvement and knowledge of violations. They also trivialized the extent of the violations. For example when Benson Kaaria was questioned on the Wagalla massacre, he defended the security operation and stated that it was successful, and that is despite the fact that over fifty seven persons were killed and only four Guns recovered. Most of the adversely mentioned persons refused to apologize, stating categorically that they had nothing to apologize for. When acknowledgement of wrongdoing lacks, how can the victims move on? How can they chart a shared and interdependent future with the perpetrators?

#### **1.5.4 Mercy**

Mercy denotes the idea of grace. It entails forgiveness, acceptance, and a new start. Without mercy, relationships would not be possible. Without compassion and forgiveness, healing and restoration would be out of the question. Forgiveness and reconciliation require coming to terms with the past, not attempting to forget or repress it. Establishing a shared truth that documents the causes, nature and extent of severe and gross human rights abuses and / or collective violence under antecedent regimes, is a prerequisite for achieving accountability, meaningful reconciliation, and a foundation for a common future. Archbishop Desmond Tutu – former Chairman of the South African Truth and Reconciliation Commission posits that reconciliation is not about being cosy; it is not about pretending that things were other than they were. He opines that reconciliation based on falsehood, or not facing up to reality, is not true reconciliation and will not last.

Rigby argues that forgiveness is something offenders should earn, not something that victims should just give away.<sup>33</sup> He posits that forgiveness remains in the power of victims to give or withhold. A

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<sup>33</sup> Rigby, Andrew, 2001: *Justice and Reconciliation: After the Violence*. Boulder, CO, Lynne Rienner.

reconciliation process aims to make that forgiveness possible. But a fair reconciliation process should not achieve the bestowing of forgiveness through pressure on the victims. Reconciliation as a process works towards the (idealistic) goal of an end-state of reconciliation where forgiveness may happen at the discretion of victims; if it happens earlier during the process; it should be the prerogative of the unpressurised victim. Forgiveness must be a later-stage component of reconciliation that may come at a victim-defined point where coexistence is shifting towards a more positive emanation. Reconciliation should thus be conceptually independent of forgiveness.

Similarly Dwyer argues that any conception of reconciliation – at either the micro- or macro- level – that makes reconciliation dependent on forgiveness, or that emphasizes interpersonal harmony and positive fellow-feeling, will fail to be a realistic model of reconciliation. She points out that reconciliation should be advocated in terms that make it credible to the relevant parties.<sup>34</sup> Montville quotes one dissenting black South African's discomfort, indeed anger, with Tutu and the TRC:

*“What really makes me angry about the TRC and Tutu is that they are putting pressure on us to forgive... I don't know if I will ever be ready to forgive... they are trying to dictate my forgiveness.”*<sup>35</sup>

If we can detach forgiveness from reconciliation, we can begin to define a much more realistic process of reconciliation that does not depend on peace and love, or on forgiving. We are able to remove some of victims' most serious objections to it and move towards a much more pragmatic description of reconciliation as rebuilding the minimal working relations – social, political, and economic – that will permit a divided society to take the first steps towards a shared sustainable future.

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<sup>34</sup> Dwyer, Susan, 2003: “Reconciliation for Realists,” in: Carol AL Prager and Trudy Govier (eds.): *Dilemmas of Reconciliation: Cases and Concepts*. Waterloo, Ontario, Wilfrid Laurier University Press, pp. 91-110.

<sup>35</sup> Montville, Joseph V, 2001: “Justice and the Burdens of History,” in: Mohammed Abu- Nimer (ed.): *Reconciliation, Justice and Coexistence: Theory and Practice*. Lanham, MD, Lexington Books, pp. 129-143.

Lederach argues that reconciliation represents a place, a point of encounter where concerns about both the past and the future can meet. People need an opportunity and space to express to and with one another the trauma of loss and their grief at that loss, and the anger that accompanies the pain and memory of injustices experienced. Acknowledgement is decisive for the reconciliation dynamic. It is one thing to know, and a different social phenomenon to acknowledge. Acknowledgement through hearing one another's stories validates experience and feelings and represents the first step toward restoration of the person and the relationship.

Reconciliation-as-encounter suggests that space for the acknowledgement of the past and envisioning of the future as the necessary ingredient in reframing the present. People must find ways to encounter themselves and their enemies, their hopes and their fears to actualize this. Reconciliation requires that we look outside the mainstream of international political traditions, discourse, and operational modalities if we are to find innovation. It involves the creation of that social space where both truth and forgiveness are validated and joined together, rather than being forced into an encounter in which one must win out over the other or envisioned as fragmented and separated parts.

The TJRC established that victims had various ways of dealing with trauma and the suffering they had encountered. Some were willing to forgive, based on their religious beliefs, the lapse of time since the violations took place, helplessness and the desire to move on with their lives. Some victims showed sympathy for the perpetrators, acknowledging that they too were victims of a bad system. This calls to question whether any reconciliation had been realized in these cases. Without the ingredient of acknowledgement, then this just remains superficial and reconciliation based on falsehood which cannot last.

### 1.5.5 Justice

Justice entails creating equal opportunities, rectifying the wrong and restitution. Without justice the brokenness brought about by past sufferings and violations continues and festers. At the heart of justice is the need for restitution. A reconciliation process needs to give the victims a degree of social, political and economic power, in order for them to leave the situation of being “a victim,” and gain/regain a position from where the individual or group is able to make decisions both about one’s own situation and how to relate to the perpetrator, as an individual and/or group. From such a position of strength and independence the victims can meet and relate to the perpetrator.

UN guidelines require states to provide effective remedies, including reparations, to victims for acts or omissions which can be attributed to the state and which constitute gross violations of human rights or serious violations of international humanitarian law - this must be 'adequate, effective and prompt'.<sup>36</sup> Reparation for victims of past human rights violations have been categorized into five forms: restitution, compensation, rehabilitation, satisfaction and guarantee for non-repetition.<sup>37</sup> Restitution is the restoration of an individual to the position held before the human rights abuses. This is most effective where the wrongdoers who occasioned harm can be identified. The harm occasioned should, however, be capable of being quantified in monetary terms. In Kenya’s case, this would play at least two instrumental roles. Firstly, is in relation to the land question that has haunted Kenya since independence.

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<sup>36</sup> UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, adopted in 2005. Note that these guidelines stem from the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which are binding on states.

<sup>37</sup> AI, (11 June 2007), ‘*Truth, justice and reparation: Establishing an effective truth commission*’.

Secondly, is the restoration of properties that were destroyed, stolen or burnt during the 2007 post-election violence. Where the perpetrators cannot be identified, the government has a legal obligation to compensate the victims involved. This compensation should be proportionate to the harm suffered. Likewise, rehabilitative measures such as medical care, respect for and non-discrimination against victims must be guaranteed by the government.<sup>38</sup> According to Armstrong and Ntegeye, reparations can also include symbolic measures like apologies, monuments and days of commemorations.<sup>39</sup> An apology from responsible leaders could be a trigger towards an agreement, and a larger peace process, and thus serve an important purpose at an early stage of conflict resolution. Apology refers to the many cases of apologies expressed by heads of state, leaders of parties or international organizations, or churches, who apologize to victimized groups — for instance after civil wars or with regards to historically victimized groups, including indigenous peoples.

According to the TJRC, reparation was key to reconciliation. The reparations conditions demanded from perpetrators were confession and apologies, justice, compensation and the demand for a meeting with the alleged perpetrators in order to understand why they acted the way they did. Some victims demanded an apology from the government for its inability to protect them from violations, when they occurred.<sup>40</sup> Reconciliation does not replace justice: It is the result of justice. There exists a complex relationship between repentance, forgiveness and reconciliation. The offender must be genuinely sorry and therefore willing to offer a sincere apology while the victim must be willing to accept the apology and offer forgiveness.

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<sup>38</sup> Sec 25(7) TJR Act No. 6 of 2008.

<sup>39</sup> A. Armstrong & G. Ntegeye (2006) 'The devil is in the details: The challenges of transitional justice' 6 *African Human Rights Law Journal* 16.

<sup>40</sup> The Truth, Justice and Reconciliation Commission of Kenya, "The Final Report of the TJRC" (2013) [hereinafter TJRC Report], Vol. III, Chapter 3: Healing and Reconciliation, pp. 86 – 87.

To date, there has been no comprehensive reparations programme in Kenya for gross human rights violations suffered. Only some limited forms of assistance to victims have been afforded - this has not been accompanied by any measure of accountability. The Kenyan government has made some minimal payments to a minority of all people displaced during the post-election violence of KSh. 10,000 and KSh. 25,000 (approximately US \$117 and US \$293 respectively). These payments were to provide for basic needs and the reconstruction of homes. They have not been framed (or conceived of) in terms of reparations *per se*; rather, they have functioned as mere emergency assistance, and are far from comprehensive. Further, there have been allegations of 'non-uniformity of the compensation, which both victims themselves and the organizations working with them see as favouring some ethnic groups. This has fuelled 'confusion and tension'.<sup>41</sup> The lack of a comprehensive reparations programme functions to deprive victims of justice. At the international level, the International Criminal Court (ICC) may grant reparations to those victims of post-election violence who have applied for reparations through the ICC process. However, this would in no way absolve the Kenyan state of responsibility to furnish reparations; reparations ordered through the ICC would not reach the great majority of those adversely impacted by the post-election violence. True reconciliation cannot occur without accountability and justice about the past. The main task of the people, who have to mend the tissues of a society that has been completely torn, is to eradicate the culture of impunity, thus setting the path to social cohesion and future development of the country.

### **1.5.6 Peace**

Peace is not necessarily the absence of a full scale war. It entails harmony, unity and well-being. It is the feeling and prevalence of respect and security. Peace is not just for a few, and if it is preserved for the

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<sup>41</sup> Human Rights Watch interview with IDP Network Chairperson Patrick Githinji, Nakuru, 24 October 2011 in Human Rights Watch 79.



benefit of some and not others it represents a farce. Peace can be envisioned as the final fruits of a successful reconciliation process. When truth has been told and acknowledged, forgiveness extended to the wrongdoer and any forms of restitution or compensation made then the former adversaries are able to chart a shared and interdependent future. Reconciliation aims at promoting harmony between the victims and the wrongdoers as well as the public as a whole. It is a process of moral reconstruction in which a country takes stock of its morality in politics, governance, cultural values and revises its moral code.<sup>42</sup>

Reconciliation is the basis for a new beginning, a charting forward towards a shared and interdependent future. The state should create a conducive environment for an inclusive society in which there is peace, justice and reconciliation, which can liberate both the victim from being consumed by hatred and bitterness, and the perpetrator from guilt and fear of revenge. The TJRC was charged with the responsibility of providing victims, perpetrators, and the general public with a platform for non-retributive truth telling that charts a new moral vision and seeks to create a value based society for all Kenyans. In addition, it should seek to provide victims and perpetrators with a platform to be heard; restore their dignity and confess their actions as a way of bringing reconciliation. To achieve these objectives, it is important that any TRC is independent, impartial and effective.

### **1.5.7 Reconciliation in Kenya**

Hayner defines a truth commission as a temporary body officially sanctioned by the state to investigate a pattern of abuses and to issue a report.<sup>43</sup> She states that the goal of a truth commission is to promote reconciliation on a national level through speaking openly of a silenced and conflictive past in order to

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<sup>42</sup> M. Mutua (2007), 'Beyond Juba: Does Uganda need a national truth and reconciliation process?' 24 *Buffalo Human Rights Law Review* 20.

<sup>43</sup> Hayner P. B. (1994), 'Fifteen truth commissions - 1974 to 1994: A comparative study' *Human Rights Quarterly* 597, 16.

avoid latent conflicts and bitterness between opposing parties. However, Hayner argues that on an individual level, issues such as healing and reconciliation are deeply personal processes. There is no guarantee that knowledge of the whole truth will lead to a survivor's reconciliation with his or her perpetrator.<sup>44</sup> Olsen *et al* draws heavily on Hayner's definition, and sees a truth commission as 'a newly-established, temporary body, officially sanctioned by the state or an international governmental organization to investigate past human rights abuses'.<sup>45</sup>

The TJRC was created by Parliament through the TJR Act No. 6 of 2008. The main objective of the TJRC in Kenya as set out in the Act was to promote peace, justice, national unity, healing, and reconciliation among Kenyans by among others:

- a) Establishing an accurate, complete and historical record of violations of human rights and economic crimes by the State: that includes public institutions and public officers both serving and retired between 12<sup>th</sup> December, 1963 and 28<sup>th</sup> February, 2008.
- b) 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 victims' dignity.
- c) Compiling a comprehensive report about its findings and recommendations to address the identified violations and crimes.

The Commissioners were appointed vide Gazette Notice No. 8737 of 22<sup>nd</sup> July 2009 and pursuant to Section 10 of the TJR Act No. 6 of 2008. In total nine commissioners (six Kenyan commissioners and

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<sup>44</sup> Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, p 155.

<sup>45</sup> International Centre for Transitional Justice 'What is transitional justice?' [http:// ictj.org/about/transitional-justice](http://ictj.org/about/transitional-justice) (accessed April 25, 2014).

three international commissioners) including the chairman were appointed and they were finally sworn into office on 3<sup>rd</sup> August 2009.<sup>46</sup> Originally the commission had a mandate to work for two and a half years but after requesting for a number of extensions, they ended up working for four years.

The TJR Act No. 6 of 2008 provided the TJRC with the mandate of reconciliation under Section 5(g), Section 5(j), Section 6(s) and Section 6(j). The commissioners interpreted the commission's role towards reconciliation being to provide a platform for beginning the process of reconciliation, between individuals and communities. The commission recognized that meaningful reconciliation is a personal decision, and not an event, but rather a long process. They understood reconciliation to be both a goal and a process; it is experienced at different levels (inter-personal, community and national); it has links to redistribution, in terms of material reconstruction and the restoration of dignity; the commission further appreciated that there is no universal model of reconciliation that can be applied by all countries'.<sup>47</sup>

In accordance with Section 22 of the TJR Act, reconciliation activities were spearheaded at the commissioners' level and at the secretariat level by the department of Civic education and outreach. The TJRC also initiated working relationships with the National Cohesion and Integration Commission (NCIC) and the National Steering Committee on Peace Building and Conflict Management. Reconciliation activities took the form of countrywide reconciliation forums, workshops on trauma healing and strategy formulation, healing and truth telling forums. These forums sought to understand the meaning of reconciliation for different communities; specific issues in each region that bring about

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<sup>46</sup> The Truth, Justice and Reconciliation Commission of Kenya, "The Final Report of the TJRC" (2013) Vol. 1, Chapter 1: Background to the Commission, pp. 23 – 24.

<sup>47</sup> The Truth, Justice and Reconciliation Commission of Kenya, "The Final Report of the TJRC" (2013) Vol. 1, Chapter 3: Methodology and Process,

tension, hostility, hatred and conflict; forums gave communities the opportunity to suggest specific solutions to issues affecting them; to assess levels of healing and reconciliation; to identify local actors who could spearhead trauma healing and reconciliation; to explore local mechanisms for healing and reconciliation; and to provide victims, perpetrators and the general public with a platform for non-retributive truth telling.<sup>48</sup>

Having handed in their final report in May 2013, a number of issues require further interrogation. The specific solutions that communities came up with for issues affecting them need to be identified and evaluated for feasibility. The local actors who were identified to spearhead trauma healing and reconciliation need also to be identified and empowered on how to carry out their roles. The local mechanisms identified to bring about healing and reconciliation need also to be explored so that if feasible they can be operationalized. As the commission noted, reconciliation is not an event but rather a process and hence this process needs to be kept in constant motion.

The TJRC report notes that reconciliation efforts in Kenya are as old as the country's independence back in 1963. It further asserts that the commission was under no illusion that it could accomplish a task that had not been accomplished in almost half a century. This clearly indicates then that reconciliation was thus never really realized. We still have a long way to go as a nation if we are to realize real and sustainable reconciliation.

### **1.5.8 Summary of Literature Review**

From the foregoing literature it is evident that for any country undergoing a transition either from a repressive or an authoritarian regime to a democratic one or from a past marked by cases of human

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<sup>48</sup> Ibid.

rights violations and abuses among other atrocities it is imperative that it effectively deals with this past. Sufferings and hurts of the past cannot be easily forgotten and if not effectively dealt with they may come back to haunt the society and re-ignite a conflict that was never or not so effectively resolved. Many countries have attempted to deal with such a past employing different transitional justice mechanisms. At the heart of most of these efforts reconciliation has featured as a prominent mechanism. However, despite its growing popularity in international circles, the term reconciliation continues to engender resistance, especially among victim groups. They are suspicious of the process because of their suspicions about the end-state. In other words, they rightly suspect a process that might compel them into an end-state which they do not necessarily, or for now, want. They may be forced to make compromises and, in particular, to ‘forgive’ perpetrators without having first gained sufficient justice for their suffering. These objections usually relate to the idea of this end-state being one where all is harmony, where all are equals, and, in particular, where all is forgiven. It is to this last element that most resistance is mustered. When informed of a forthcoming reconciliation process, victims often jump to the conclusion that this will mean they must give up some claims, or accept imperfect justice, or be forced unilaterally to forgive those who made them suffer.

Dwyer argues that reconciliation is being urged upon people who have been bitter and murderous enemies, upon victims and perpetrators of terrible human rights abuses, upon groups and individuals whose very self-conceptions have been structured in terms of historical and often state-sanctioned relations of dominance and submission. She points out that reconciliation should not be touted as aiming at the happy and harmonious coexistence of former enemies. According to her, ‘it’s one thing to achieve some measure of narrative coherence in the face of atrocity but quite another to come to love one’s

torturer.’<sup>49</sup> Reconciliation should in contrast be “touted” as something less ambitious, less threatening and more prosaic. In essence scholars argue that countries should strive to achieve political reconciliation which is more realistic, pragmatic and achievable than the individual or personal reconciliation that comes with strong religious connotations. Villa-Vicencio et al. argue that political reconciliation is not dependent on the kind of intimacy that religions and some forms of individual reconciliation may demand. Rather, statecraft and politics just require peaceful coexistence. Political reconciliation does not require forgiveness or mutual love. It begins as grudging coexistence and, by gradually nurturing basic respect both for new institutions and for former enemies, aims to develop the habits of operating the shared processes and institutions of society and of politics. In political reconciliation we concentrate more on the political sphere and what realistically (pragmatically) can and must be done to build a working future. Forgiveness can come later after the creation of confidence and the building of trust.<sup>50</sup>

Individual processes of contriteness, forgiveness and that ideal end-state of harmony (heavily emphasized in the interpersonal sphere) seem too personal, too religious, indeed too private – and above all too ambitious – to serve as the basis for redesigning functional working relations between communities and their representatives after violence. Reconciliation relates to fundamental, existential, issues of meaning, trust, contradictions, and suffering in the midst of a violent political reality. Beyond the spiritual realm, reconciliation requires taking cognizance of the materialism of this ephemeral world, if it is to succeed. In the material and physical dominion, the expectations of victims are governed by hard political and economic calculations, opportunity costs and sometimes, even double speak, by

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<sup>49</sup> Dwyer, Susan, (2003): “Reconciliation for Realists,” in: Carol AL Prager and Trudy Govier (eds.): *Dilemmas of Reconciliation: Cases and Concepts*. Waterloo, Ontario, Wilfrid Laurier University Press, pp. 91-110.

<sup>50</sup> Villa-Vicencio, Charles, (2004): “Reconciliation,” in: Charles Villa-Vicencio and Erik Doxtader (eds.): *Pieces of the Puzzle*. Cape Town, IJR, pp. 3-10.

prominent political office holders that often do not reflect the reality of street conditions. This point was recognized by the then Interim President of Liberia, Gyude Bryant when he noted publicly, that "...it is difficult to talk about grace when you have no food and you are hungry and cannot feed your children and everything you have has been looted".<sup>51</sup>

Reconciliation, as a political process, gives space and provides incentives for the restoration of individual and group relations broken on the basis of political conflict. It aims at adding a "relational," "informational," and "reflectional" contribution to the political process and the security dimensions of a peace process. From a relational perspective, the relations that have been broken due to a political conflict are restored. By "informational" is meant that reconciliation encompasses telling one's own truth, recognizing that there is not one single truth or interpretation of an event. This truth telling is the basis for the acknowledgement of injustice, of suffering and of the restoration of human dignity. By "reflectional" is meant the necessary component of self-reflection and an expression of a new and different attitude on part of the perpetrator.

Reconciliation thus becomes a process of gradually rebuilding broad social relationships between communities alienated by sustained and widespread violence, so that over time they can negotiate the realities and compromises of a new, shared socio-political reality. In this regard reconciliation then encompasses a justice process that punishes past violence and deters future repetition; and justice reform that is built on human rights principles, democratic practice, and international legal norms, and that promises fairness in the future; a process of acknowledging experiences, uncovering unknown events, giving voice to the previously unheard, and addressing interpretations of history: often referred to as

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<sup>51</sup> Quoted by James Selheim in "Liberia Struggles toward an Uncertain Future", in Episcopal Church News, on [www.episcopalchurch.org/3577\\_19493\\_ENG\\_HTM.htm](http://www.episcopalchurch.org/3577_19493_ENG_HTM.htm) (accessed on April 25, 2014)

truth-seeking or truth-telling; a process of healing, whereby victims repair their lives by coming to terms with their suffering and a process of reparation, through real and/or symbolic compensation for loss. Montville sees justice as “the most fundamental element of peace,” since: “In its most general sense, justice implies order and morality... the basic rules governing right and wrong behaviour.”<sup>52</sup>

Political reconciliation appears to be something less deep, less personal, and more pragmatic, than the individual form. Moreover, it requires no such grandiose elements as forgiveness or harmonious end-states, but rather, in Villa-Vicencio’s words, “peaceful coexistence”. Reconciliation should not be seen as one instrument among several, including justice, healing, truth-telling and reparations. Rather, it should be viewed as the overall relationship-oriented process within which these diverse instruments are the constitutive parts. Consequently, to come to terms with the past and accepting future challenges should be much easier when the diverse physical and social needs of victims and perpetrators are effectively catered for. It is much easier to “heal” the wounds of victims of violence in coping with their situations if listening to the “truth” and accepting an apology based on the “truth” are also backed by “material justice”. Unfortunately, Truth Commissions and indeed, most post conflict governments, do not always make such cast-iron guarantees to victims.

## **1.6 Justification of the Study**

While the goals of reconciliation programs are indeed laudable, the specific policies and instrumentalities by which these goals are achieved remains case specific.<sup>53</sup> The introduction of reconciliation in transitional governments has been swift, with approximately twenty truth commissions

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<sup>52</sup> Montville, Joseph V, 2001: “Justice and the Burdens of History,” in: Mohammed Abu- Nimer (ed.): *Reconciliation, Justice and Coexistence: Theory and Practice*. Lanham, MD, Lexington Books, p. 129

<sup>53</sup> Erin Daly and Jeremy Sarkin (2007), *Reconciliation in Divided Societies: Finding Common Ground*, Pennsylvania, Pennsylvania University Press. On the meaning and construction of reconciliation in its various parts and at different layers of a society.



being conducted in the last thirty years.<sup>54</sup> This study endeavours to evaluate the success of such a mechanism in the realization of reconciliation.

Truth commissions should not substitute the judicial organs. The strength and effectiveness of a truth commission depends on how best a truth commission understands its operation environment and manipulates it to suit the country's justice and reconciliation needs. It has been argued that truth commissions are in themselves inadequate in addressing justice and reconciliation needs for post conflict societies, but they are more tenable where restorative justice is most preferred. However, they are prone to abuse and capable of being used to perpetuate impunity. It has also been shown that key perpetrators stay away from the TRCs, thereby denying the processes the restorative aspect of encounter. From 1974 to 2010 there have been forty truth commissions set up across the world. This proliferation of these commissions demonstrates the essential reason to study and understand them. While many scholars agree that these commissions can have a dramatic influence on the state of human rights, they have focused their studies primarily on the outcomes and effectiveness of truth commissions. Many of these scholars neglect to consider the variables that must be present to ensure the initial implementation of such commissions. While it is undoubtedly of great importance to study the outcome of truth commissions, we must first have a firm grasp on how a government initially chooses such a commission as its ideal transitional strategy. Because they have been employed so frequently, and seem likely to be implemented in the future, establishing such an understanding is crucial to the further study of truth commissions.

More importantly, these commissions should be studied because of the enormous influence they can have on the future of human rights in these nations and in human rights around the world. Their goal, to

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<sup>54</sup> Hayner, P. B. (1994), 'Fifteen truth commissions - 1974 to 1994: A comparative study' *Human Rights Quarterly* 597, 16.

be achieved through the telling of truth, is to foster tolerant communities which remember and forgive past rights violations. These commissions can have a cleansing effect, resulting in more rights conscious nations.

## **1.7 Conceptual Framework**

A conceptual framework can be defined as a systematic ordering of ideas about the phenomena being investigated or as a systematic account of the relations among a set of variables. It can also be seen as a structure of what has been learned to best explain the natural progression of a phenomenon that is being studied.

In any conflict there are normally three issues that have to be addressed if the conflict is to be fully resolved. There are the underlying issues which are the long term issues and real causes of the conflict. These are normally related to the history of the actors in the conflict. The actors carry their history into the conflict. There are also proximate issues which are normally midterm in nature. The proximate issues only serve to worsen the underlying issues and escalate the conflict. When the underlying issues raise suspicions among conflicting parties, the proximate issues serve to confirm these suspicions. Lastly there are the trigger issues in the conflict. The trigger issues act as the immediate causes of the violence. The trigger issues can be real or imagined. In essence in any conflict, the underlying issues are like dry logs of wood, the proximate issues are like fuel while the trigger issues are like the matchstick that finally lights the fire.

In order to fully manage and resolve a conflict, conflict managers must address all the three issues in the conflict failure to which the conflict is normally likely to recur. This calls for conflict mapping as the first step in managing and resolving the conflict. In conflict mapping the conflict manager must first of all define the conflict, identify all the actors and associated actors in the conflict and map them, identify

all the issues in the conflict and identify the relationships among the actors involved in the conflict. The conflict manager further needs to find answers to very fundamental questions including; what really happened; when did it happen; where did it happen; why did it happen; who did what; and why did he / she do it. These are fundamental questions which require a thorough understanding and investigation of the conflict. The answers to the question require in depth analysis of the whole situation and dealing with all the issues within the conflict including the underlying issues which are normally overlooked. Reconciliation represents an avenue where this undertaking can be successfully accomplished. This is normally preceded by inquiry which leads to the elucidation of facts and identification of issues. Reconciliation provides a place for truth and mercy to meet, where concerns for exposing what has happened and for letting go in favour of renewed relationships are validated and exposed. It recognizes the need to give time and place to both justice and peace, where redressing the wrong is held together with the envisioning of a common, connected future.

### **1.8 Hypotheses**

- a) Other organs and institutions in the country other than the TJRC led to the realization of reconciliation in Kenya.
- b) The work of the TJRC led to the realization of reconciliation in Kenya.
- c) The work of the TJRC led to more divisions, animosity and ethnic tensions rather than reconciliation in Kenya.

## **1.9 Methodology**

This section highlights the methodological issues for the study. The section covers the research design, sampling design, research tools, data collection procedures, scope (delimitation) and limitations of the study.

### **1.9.1 Research Design**

Research designs are plans and the procedures for research that span the decisions from broad assumptions to detailed methods of data collection and analysis. The study will use a Case Study research design employing the qualitative research paradigm. A case study research design enables the researcher to intensively examine a particular case and then conclude by comparing the case studied with other similar cases that have been studied in the past. The researcher will thus draw important lessons from other TRCs that have been established in the past especially the South African Truth and Reconciliation Commission to establish whether the Kenyan TJRC lived up to its mandate. The study will also rely heavily on content analysis of secondary data.

### **1.9.2 Sampling design**

Sampling is the process of selecting a number of study subjects from a defined study population (i.e. the population being investigated). A sampling design tells us how to obtain data and which people to obtain data from in the population under study. It is the approach used to select a number of study subjects from the study population into the sample. The study will utilize non-probability sampling in selecting the respondents to the interviews. Specifically the researcher will adopt purposeful sampling. This will enable the researcher to only select interviewees with relevant information regarding the work of the TJRC as far as reconciliation is concerned. These will include the people who actually participated in the process in one way or the other. The people who have suffered injustices that were within the scope of the TJRC to address, experts in conflict management and resolution strategies and the people who on

a daily basis are expected to carry on the reconciliation function in society. Purposeful sampling will be appropriate as it is informative and the researcher intends to interview people who can shed light on the subject under study.

### **1.9.3 Research Instruments and Tools**

Research tools and instruments are the methods that the researcher uses to collect data from the field. The study will utilize unstructured interviews in the collection of data. The interviews will be conducted using an interview schedule which will only be a guide as to the information to be collected. Unstructured interviews allow the interviewee to give all the information regarding the subject under study. They tell their story as it is and how best they understand it. This also allows the researcher to gather in depth information regarding the subject.

### **1.9.4 Data collection procedures**

The researcher will highly rely on secondary data. This secondary will include the Final Report of the Kenyan TJRC released in May 2013, review reports of the work of the TJRC as well other documents related to reconciliation work in the world in general and in Kenya in particular. The researcher will do a content analysis of the secondary data.

### **1.9.5 Data analysis procedures**

The secondary data will be analyzed for emerging themes and trends. . The themes will then be interpreted for discussion.

### **1.9.6 Delimitation and limitations of the study**

The study will specifically target those respondents who have suffered any form of injustice that was within the mandate of the TJRC to address. The key informants will be drawn from various spheres of life including but not limited to at least two former commissioners in the TJRC, at least three members

of the clergy with interest in conflict resolution (a Catholic, a Protestant and a Muslim), at least two representatives from CSOs involved in the reconciliation efforts, at least two academicians or scholars in the areas of conflict management and resolution, at least two administrative officers from the study sites and the researcher will also be very much interested to secure an interview with the former TJRC Vice – Chairperson Ms. Betty Murungi. She would be an important key informant when trying to draw a balance on the achievements of the commission having been a commissioner at the start of the process but left before the process was ended. The anticipated limitations and challenges include difficulty in recruitment of informants especially the key informants, and time constraints.

### **1.9.7 Chapter outline**

The chapter outline lays down the sequence in which the chapters of the whole research project will run.

Chapter One introduces the topic of our research study by first setting the broad context of the research study, the statement of the problem, study objectives, literature review, justification, conceptual framework, hypotheses and the methodology of the study.

Chapter Two “Conflict Resolution and Management” presents the main concepts that will form the basis for the research. Among the concepts to be discussed will be conflict, conflict management, reconciliation, and divided societies.

Chapter Three “Truth and Reconciliation Commissions: A Global Perspective” introduces the concept of TRCs. It uses case studies of TRCs that have been in existence within the last thirty years outlining their characteristics, their success and weaknesses as well as the challenges they have met with in their execution of their mandate. It uses these case studies to draw lessons for the Kenyan situation.

Chapter Four “The Kenyan Truth, Justice and Reconciliation Commission (TJRC)” presents the historical and contemporary injustices culminating in the 2007 / 2008 PEV leading to the formation of the TJRC in Kenya. It discusses the mandate, structure and operations of the TJRC throughout the four year period that the commission was in office. This will entail an appraisal of the TJRC functions and will heavily rely on content analysis.

Chapter Five “Conclusion and Recommendations” presents the summary and recommendations as far as justice and reconciliation is concerned. It identifies the missed opportunities and avenue that can be exploited if justice and reconciliation is to be achieved. This also relies on content analysis of other countries that have succeeded in their experimentation with transitional justice mechanisms.

## CHAPTER TWO

### CONFLICT RESOLUTION AND MANAGEMENT

#### 2.1 Introduction

This chapter addresses the main concepts of the research. It seeks to expound on the concepts that will be in use throughout the research. Among the concepts to be addressed include conflict, conflict resolution and management, reconciliation, divided societies and truth commissions. The chapter will seek to define a conflict and identify the causes of conflicts in divided societies. It will also seek to define divided societies and discuss their characteristics. It will further discuss methods through which conflicts can be resolved and / or managed. The chapter will then address reconciliation as a concept, expounding on what it entails and its' aspects and dimensions. The chapter will also seek to evaluate the feasibility of reconciliation among divided societies.

#### 2.2 Conflict as a Concept

According to Blalock conflict is “a situation of competition in which the parties are aware of the incompatibility of potential future positions and in which each party wishes to occupy a position that is incompatible with the wishes of the other.”<sup>55</sup> Conflict arises as a result of disparity over goals, values, motives, ideals and resources.<sup>56</sup> Consequently, conflict can be described as “a struggle over values and claims to scarce status, power and resources in which the aims of the opponents are to neutralize, injure or eliminate their rivals.”<sup>57</sup> A conflict can thus be seen as a state of disagreement between two or more

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<sup>55</sup> H. M. Blalock Jr. *Power and conflict: Toward a General Theory* (1989) 8-9 quoted in Khaled Mohammed Aman

<sup>56</sup> Khaled Mohammed Aman (2009). “Mediation: A Viable Solution to Africa’s Political Crisis-A Case Study of Kenya’s Post Election Crisis - 2008”

<sup>57</sup> Blalock Jr., H. M. (1989) *Power and conflict: Toward a General Theory* United states of America: SAGE Publications, INC



parties, over one or more issues. The disagreement can emerge as a result of the intrinsic incompatible nature of the parties and/or their goals, or otherwise as a result of some temporal position acquired by parties to satisfy their needs. Conflicts typically arise from deep-rooted differences between populations within a society. These differences can be ethnic, religious, and racial, among others. Ethnic hatred is regarded as the root cause of most civil conflict.<sup>58</sup> Ethnic civil wars are characterized by deeply rooted ethnic identities and strong religious overtones.<sup>59</sup> Much of the fighting is triggered by atrocities on both sides, and revenge tactics are the basis of much of the violence.

### **2.3 Conflict Resolution and Management**

Conflicts are inevitable in human society. As such mechanisms to address, resolve, manage or prevent conflicts have been developed over the years. Boutros-Boutros Ghali – former UN Secretary General defines conflict prevention as the “action to prevent disputes from arising between parties, to prevent existing disputes from escalating into violent conflicts and to limit the spread of the latter when they occur.”<sup>60</sup> This definition is cognizant of the fact that when structural conflicts are dealt with they normally escalate or evolve into violent conflicts and when violent conflicts are not prevented or resolved they can easily escalate or evolve into a full scale war.

Conflict resolution refers to a process aimed at providing a solution which is generally acceptable to parties to the conflict, which they themselves have taken part in.<sup>61</sup> On the other hand conflict management can be seen as the art of appropriate intervention to achieve political settlements,

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<sup>58</sup> Norris, Pippa. 2008. *Driving Democracy*. New York: Cambridge University Press.

<sup>59</sup> Sambanis, Nicholas. 2000. "Partition as a Solution to Ethnic War: An Empirical Critique of the Theoretical Literature." *World Politics*. 52. no. 4: 437-483.

<sup>60</sup> Boutros-Ghali, Boutros, (1992), *An agenda for peace* (New York: United Nations). Para. 20

<sup>61</sup> Khaled Mohammed Aman, (2009). “Mediation: A Viable Solution to Africa’s Political Crisis-A Case Study of Kenya’s Post Election Crisis - 2008” 5

particularly by those powerful actors having the power and resources to bring pressure on the conflicting parties in order to induce them to settle. It is also the art of designing appropriate institutions to guide the inevitable conflict into appropriate channels. In the words of Bloomfield and Reilly, conflict management is the positive and constructive handling of difference and divergence. Rather than advocating methods for removing conflict, it addresses the more realistic question of managing conflict: how to deal with it in a constructive way, how to bring opposing sides together in a cooperative process, how to design a practical, achievable, cooperative system for the constructive management of difference (Bloomfield and Reilly 1998, 18).

### **2.3.1 Peaceful Settlement of Disputes**

Article 33 (1) of the United Nations Charter obliges the parties to a dispute, the continuance of which is likely to endanger the maintenance of international peace and security, to settle such a dispute by any of the enumerated peaceful means therein, or by any peaceful means of their choice. It states that: The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.<sup>62</sup> By this article states are obliged to ensure that conflicts within their territories do not escalate to such magnitudes and scale as to harm the peace and tranquility at the international scene. The methods of peaceful settlement of disputes can be classified either as diplomatic, adjudicative, or institutional methods. Diplomatic methods involve attempts to settle disputes either by the parties themselves or with the help of other entities. Adjudicative methods involve the settlement of disputes

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<sup>62</sup> J. Collier and V. Lowe, (1998): *The Settlement of Disputes in International Law*, Cambridge (1999); J.G. Merrills, *International Dispute Settlement*, 3<sup>rd</sup> ed., Cambridge

by tribunals, either judicial or arbitral. Institutional methods involve the resort to either the United Nations or regional organizations for settlement of disputes.

### **2.3.2 Arbitration**

Arbitration is an amicable or peaceful—but always adjudicative—method of resolution of a dispute by an authority (the arbitrator[s]) that derives its decisional power from the agreement of both parties. The Parties to the dispute exert significant influence on the arbitrator’s scope of authority and sometimes also on arbitration proceedings, which may nonetheless be at the arbitrator’s discretion.<sup>63</sup>

Arbitration is an adversarial system featuring a “plaintiff” and “defendant” and an arbitrator who decides “who is wrong” and “who is right” based on relevant facts and applicable rules of law.<sup>64</sup> However, arbitration is more flexible than judicial settlement in that it gives the parties to a dispute the choices to appoint the arbitrators, to designate the seat of the tribunal, and to specify the procedures to be followed and the law to be applied by the tribunal. An arbitration ruling is generally based on law, though the arbitrator may sometimes decide in equity. The arbitration ruling is of a binding nature and the Parties are required to implement the arbitration ruling in good faith.

Arbitration is considered the most effective and equitable means of dispute settlement since it combines elements of both diplomatic and judicial procedures. The terms of arbitration are agreed on in advance either through an *ad hoc* agreement (a *compromise*) or a treaty (a compromissory clause). In both cases the parties agree to the jurisdiction of the arbitrators, the method of selecting the arbitrators, a definition

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<sup>63</sup>Mangoldt, Hans von, (1974): “Arbitration and Conciliation,” in *Judicial Settlement of International Disputes: International Court of Justice, Other Courts and Tribunals*, Springer Verlag Berlin Heidelberg, New York, 1974, pp. 417–552,

<sup>64</sup> Schwartz, Eric A., “International Conciliation and the ICC,” *ICSID Review Foreign Investment Law Journal*, Volume 16, Number 2, Fall 2001, pp. 98–119, p. 112.

of the dispute, the procedure to be followed, and sometimes the applicable law. The arbitrator acts as a neutral and impartial judge without any political authority per se. He or she is also rather passive and does not actively investigate or uncover facts. The arbitrator uses the information presented by both Parties during the adversarial arbitration proceedings and makes a decision based on relevant facts and applicable rules of law, nothing more.

### **2.3.3 Adjudication (Judicial Settlement)**

Judicial settlement is a settlement of dispute between States by an international tribunal in accordance with the rules of International Law. A judicial decision is binding on the parties and must be carried out in good faith.<sup>65</sup> The International Court of Justice (ICJ) is the most important international tribunal, because of its prestige and jurisdiction. It is the principal judicial organ of the United Nations and all members of the United Nations are *ipso facto* parties to the Statute of the Court. The judges of the ICJ are appointed by the United Nations, not by the parties to a dispute. The ICJ has to apply the rules and principles of International Law, which are enumerated in Article 38 of the Statute of the Court; the parties have no choice in specifying the rules to be applied by the Court.

### **2.3.4 Negotiation**

Negotiation is recognized by a majority of treaties of pacific settlement as the first step towards the settlement of international disputes. Negotiation consists of discussions between the concerned parties with a view to understand the opposing positions and opinions and reconcile the differences. It is very suited to the clarification and elucidation of the opposing contentions.<sup>66</sup> Negotiation "...is a diplomatic procedure whereby representatives of states or disputant parties engage in discussing matters...between

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<sup>65</sup> Merrills, J. G. (2005): *International Dispute Settlement*, (4<sup>th</sup> ed.), Cambridge,

<sup>66</sup> De Waart, P. J. (1973): *The Element of Negotiation in the Pacific Settlement of Dispute between States*, The Hague

them...to clarify and reconcile their divergent positions and resolve the dispute.”<sup>67</sup> It is the most satisfactory means to settle disputes since it is a voluntary bilateral and self-help means; the parties are directly engaged in the process in the absence of a third party. Negotiations, however, do not always succeed in reaching solutions to disputes or differences between the parties. Thus, third parties interventions are needed to help the parties in reaching a settlement to their disputes and differences.

### **2.3.5 Good Offices**

Good Offices is like mediation except that the third-party does not participate actively in the negotiations. S/he merely effects communication between the parties saving them the difficulties of personal contact. It is useful in dispute resolution when the parties to a dispute reach the point of not being able to solve it by negotiation, or the point where they have broken off diplomatic relations, but are convinced that a settlement is important to them. Good offices can only be utilized with the agreement or the consent of both disputants.

The third party (profferer of good offices) attempts to bring the disputants together in order to make it possible for them to find an appropriate settlement to their differences through their negotiations. In this regard, the third party acts as a go-between, transmitting messages and suggestions in an effort to create or restore a suitable atmosphere for the parties to agree to negotiate or resume negotiation. When the negotiations start, the functions of the good offices come to an end. However, the profferer of good offices may be invited by the parties to be present during the negotiations.

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<sup>67</sup> Boleslaw A. Boczek, *International Law: A Dictionary* 379 (Scarecrow Press, *Dictionaries of International Law*, No. 2, 2005)

The procedure of good offices, in contrast to mediation, has a limited function which is simply bringing the disputants together. In contrast to mediation or conciliation, the profferer of good offices does not meet with the disputants jointly but separately with each of them. Seldom, if ever, the profferer attends joint meetings between the parties to a dispute. As in case of mediation, an offer of good offices may be rejected by either or both parties to a dispute.

### **2.3.6 Mediation**

According to Mangoldt, mediation can be seen as the assistance provided by a state or international organization, which exercises its political authority as a third party to the dispute in proposing a solution. Mediation can be set in motion by one of the Parties or even by the mediator him or herself.<sup>68</sup> It is necessary that the intervention be acceptable to the parties to the conflict who have to co-operate with the party intervening. Mediation mitigates conflict through the presence and support of an intermediary who is not party to it and who enjoys the trust of the disputants. The mediator's goal is to help the disputants forge agreements which they find acceptable and to serve as a bridge between the parties in conflict, helping them to address, in a co-operative manner, the substantive issues in dispute.<sup>69</sup>

The third party offers his assistance to the parties to a dispute. In mediation a third-party, acceptable to both parties to the dispute, effects communication between the parties and participates actively in the process of negotiation by offering proposals for settlement. However, his proposals represent nothing more than recommendations. They have no binding force on either disputant. The parties to a dispute are free to accept or reject his proposals. Mediation is very suitable for dealing with difficult conflicts

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<sup>68</sup> Mangoldt, Hans von, (1974): "Arbitration and Conciliation," in *Judicial Settlement of International Disputes: International Court of Justice, Other Courts and Tribunals*, Springer Verlag Berlin Heidelberg, New York, 1974, pp. 417–552,

<sup>69</sup> Laurie Nathan "‘*When push comes to shove*’ The Failure of International Mediation in African Civil Wars" (1999) 2

since it leaves the ultimate decision on any outcome to the parties themselves.<sup>70</sup> The mediator's personality, value, authority, tact, and experience, as well as the confidence he or she inspires and his or her ability to influence or exert political pressure on the Parties are crucial to successful mediation.

Mediation is useful in cases where the parties to the dispute are unable to resolve it by negotiation. The presence of the third party helps produce an acceptable solution. The mediator is actively involved in the process and can advance his own proposals informally on the basis of information given by the parties as well as transmit one party's proposals to the other party. It cannot be forced on the parties who are opposing each other.<sup>71</sup> The agreement that results from the mediation is crucial. Nathan is of the opinion that even where mediation is successful, the content of the peace settlement has a major bearing – for better or worse – on justice, security, the distribution of power and respect for human rights in the post-war society.<sup>72</sup> Mediation can be used only as a short term measure to lessen the immediate violence and there is therefore need for more to be done in terms of redefining the dispute itself so as to open a space for cooperation and achieve long term peace.

### **2.3.7 Enquiry**

Negotiations normally fail in resolving disputes due to the difficulty of ascertaining the facts which have given rise to the differences between the disputants. Most international disputes involve an inability or unwillingness of the parties to agree on points of facts. Enquiry also called inquiry or fact-finding helps in the elucidation of facts. Enquiry may be used as an independent procedure or as a preliminary part of

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<sup>70</sup>Jacob Bercovitch “International Mediation and Intractable Conflict” (2004) [http://www.beyondintractability.org/essay/med\\_intractable\\_conflict/](http://www.beyondintractability.org/essay/med_intractable_conflict/) (accessed August 15, 2014)

<sup>71</sup> Merrills, J. G. (2005): *International Dispute Settlement*, (4<sup>th</sup> ed.), Cambridge,

<sup>72</sup> Laurie Nathan (Crisis States Research Centre) “Towards a New Era in International Mediation” (2010) 1

other methods of peaceful dispute settlement. It can and, in a few cases, it has led to settlements by exposing the truth of a situation to the parties involved.<sup>73</sup>

An inquiry is normally conducted by a commission. The task of a commission of inquiry is to facilitate the solution of disputes by elucidating the facts by means of an impartial and conscientious investigation. The report of a commission is normally limited to fact-finding and is not expected to include any proposal for the settlement of the dispute in question. Since the establishment of the League of Nations, inquiry and conciliation have been viewed as integral parts of a single process for bringing about a pacific settlement to a dispute.<sup>74</sup> Enquiry is normally used as part of other methods of dispute settlement. Enquiry's main purpose is to produce an impartial finding of disputed facts and thus prepare the way for settlement of dispute by other peaceful methods. The parties are not obliged to accept the findings of the enquiry; however, they normally accept them.

### **2.3.8 Conciliation**

Boczek defines conciliation as "...a diplomatic method of third-party peaceful settlement..., whereby a dispute is referred by the parties, with their consent, to a permanent or *ad hoc* commission, ...whose task is impartially to examine the dispute and to prepare a report with the suggestion of a concrete proposal."<sup>75</sup> Conciliation can thus be seen as a process of settling a dispute by referring it to a specially constituted organ whose task is to elucidate the facts and suggest proposals for a settlement to the parties concerned. It is an intervention to resolve an international dispute by a body without political authority that has the trust of the parties involved and is responsible for examining all aspects of the dispute and

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<sup>73</sup> Merrills, J. G. (2005): *International Dispute Settlement*, (4<sup>th</sup> ed.), Cambridge, chapter 3,

<sup>74</sup> L. Goodrich and A. Simons, *The United Nations and the Maintenance of International Peace and Security*, p. 173 (1955).

<sup>75</sup> Boleslaw A. Boczek, *International Law: A Dictionary* 379 (Scarecrow Press, Dictionaries of International Law, No. 2, 2005)



propose a solution that is not binding for the Parties. It is vital that the conciliation body enjoys the trust of the parties to the dispute. Without this trust, its involvement will be in vain. The conciliation body must also be neutral and impartial. In addition, in its examination of all aspects of the dispute, it must identify the facts of the case. It can take into account not only applicable rules of law but also all non-legal aspects of the case. Its proposals can be based in whole or in part on the law. However, legal considerations are normally secondary and may even be absent altogether. For the conciliation body's dispute resolution proposal to be successful, its' underlying reasoning—arrived at by an in-depth examination of all aspects of the case—must be sufficiently persuasive to convince the Parties that it is a good solution to their dispute and lead them to resolve their issues accordingly.

The procedures of conciliation are generally instituted by the parties who agree to refer their dispute to an already established organ, commission or a single conciliator, which is set up on a permanent basis or *ad hoc* basis; third parties cannot take the initiative on their own. The conciliators are appointed by the parties to a dispute. They can be appointed on the basis of their official functions or as individuals in their personal capacity.

Conciliation is normally a combination of enquiry and mediation. The conciliator investigates the facts of the dispute and suggests the terms of the settlement. However, just like in mediation, the proposals of conciliation have no binding force on the parties who are free to accept or reject them. Conciliation differs from enquiry in that the main objective of the latter is the elucidation of the facts in order to enable the parties through their own accord to settle their dispute; whereas the main objective of conciliation is to propose a solution to a dispute and to win the acceptance of the parties to such solution. Conciliation also differs from mediation in that it is more formal and less flexible than mediation; if a

mediator's proposal is not accepted, he can present new proposals, whereas a conciliator usually presents a single report. Conciliation allows legal as well as economic, political, and social factors to be taken into account and proposes a forward thinking solution that does not seek to declare a winner but rather help the Parties reach an agreement. This approach is particularly well suited to the cultural sector, where interaction encourages cultural expressions to flourish.

## **2.4 Reconciliation**

Bar-Tal, defines reconciliation as “a psychological process for the formation of lasting peace”. He argues that in the process, past rivals come to mutual recognition and acceptance, have invested interests and goals in developing peaceful relations, feel mutual trust, positive attitudes as well as sensitivity and consideration of the other party's needs and interests.<sup>76</sup> The transformation of beliefs, attitudes and emotions regarding one's own group, the others and the relationship between them is a long term process. Bar-Tal argues that reconciliation is not needed in all societies but only in those that have been subjected to protracted, intractable conflict; i.e. conflicts “...in which the societies involved evolve a widely shared psychological repertoire that supports the adherence to the conflictive goals, maintain the conflict, delegitimize the opponent and thus negate the possibility of a peaceful resolution of the conflict and prevent the development of peaceful relations.”

Van der Merwe views reconciliation as “all initiatives which bring together, or engage, both sides in a pursuit of changing identity, values regarding interaction, attitudes, and patterns of interaction that move

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<sup>76</sup> Daniel Bar-Tal (2002), speech held at the “Stockholm International Forum: Truth, Justice and Reconciliation”, April 23–24, 2002.

them to a more cooperative relationship.”<sup>77</sup> He looks at reconciliation from three dimensions: the spheres of relationships (concerning identity, values, attitudes and behaviour), the substantive components of reconciliation (justice, truth, healing and security), and the social levels of reconciliation (national, community and individual). He argues that reconciliation is a significant component in the peace-building process.

Long proposes that reconciliation is “mutually conciliatory accommodation between former antagonists” and part of the process of forgiveness.<sup>78</sup> He argues that maintaining social relations despite aggression and violence is fundamental for our survival and well-being. In his model reconciliation is seen as a problem-solving mechanism, an emotional process the mind has evolved, adapting to the fact that conflict is part of human relations.

Hayner opines that reconciliation implies building or rebuilding relationships today that are not haunted by the conflicts and hatreds of yesterday.”<sup>79</sup> She suggests three areas that can be observed to ascertain whether the reconciliation process is under way in a post-conflict society. We need to observe how the past is integrated and spoken about between former enemies; if relationships are based on the present or past; and if contradictory versions of the past have been reconciled – not into one truth of the past but to versions not based on lies and denial.

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<sup>77</sup> Hugo van der Merwe (1999), “The Truth and Reconciliation Commission and Community Reconciliation: An Analysis of Competing Strategies and Conceptualizations” (George Mason University)

<sup>78</sup> William J. Long and Peter Brecke (2003), *War and Reconciliation: Reason and Emotion in Conflict Resolution* (Cambridge, Mass.: MIT Press).

<sup>79</sup> Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, p 161.

The International Institute for Democracy and Electoral Assistance (IDEA, Stockholm) defines reconciliation as “a process through which a society moves from a divided past to a shared future.”<sup>80</sup> According to IDEA, there is need to develop democratic norms in the post-war society for the success of the process. Structural injustice creates the basis for new conflict. In the process of reconciliation, peaceful coexistence, trust and empathy evolve within the framework of democracy for sustainable peace.

Lederach defines reconciliation as being constituted by both “a focus and a locus.”<sup>81</sup> The focus of reconciliation is upon building new and better relationships between former enemies. According to Lederach relationships are both the root cause and the long-term solution of conflict. They therefore must be the core focus. Lederach argues that, “reconciliation as a locus represents a space, a place or location of encounter, where parties to a conflict meet.” In this place, the traumas of the past and the hopes for the future must be formulated and brought together by discussing the issues of truth, forgiveness, justice, and peace.

Some of the definitions focus on the dimensions of equality and prevention, others on forgiveness, attitudes and beliefs, or relationships, time and space. However, all the definitions emphasize that reconciliation involves mutual acknowledgment of past suffering (between former enemies), it involves the changing of destructive patterns of interaction between former enemies into constructive relationships, in attitudes and behavior and is process toward sustainable peace

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<sup>80</sup> David Bloomfield (2003), “Reconciliation: An Introduction,” in *Reconciliation after Violent Conflict: A Handbook*, ed. David Bloomfield (Stockholm: International IDEA), p 4.

<sup>81</sup> John Paul Lederach (1997), *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington, D.C.: United States Institute of Peace Press), p 30.

Thus reconciliation can be seen as a societal process that involves mutual acknowledgment of past suffering and the changing of destructive attitudes and behavior into constructive relationships toward sustainable peace. Simply put reconciliation focuses on remembering, changing, and continuing with life in peace. It does not require forgetting, forgiving, or loving one another.

Reconciliation is the process of repairing damaged relationships.<sup>82</sup> It is often thought to originate in religious discourse and around the notions of forgiveness and mercy, but reconciliation now transcends such discourse into other components of and disciplines in society. A state in transition (one that is shifting from periods of gross human rights violations, mass violence or protracted armed conflict towards a peaceful, democratic future characterized by respect for the rule of law) must engage in issues of reconciliation – at the very least in the political and social domain – to promote national healing and avert the resurgence of violence and gross human rights violations in the future. A state in transition that hopes to build reconciliation must move away from a concern with the resolution of issues and towards a frame of reference that provides a focus on the restoration and rebuilding of relationships.<sup>83</sup>

## **2.5 Aspects of Reconciliation**

Reconciliation can be viewed from different aspects. These include religious, socio-cultural, psychological, economic, political and juridical.

### **2.5.1 Religious Aspects of Reconciliation**

The term reconciliation has strong religious connotations. From a justice oriented perspective reconciliation is viewed as an interpersonal process which focuses in particular on the issues of

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<sup>82</sup> Roth, J. (2004). Unless Experience: Its significance for reconciliation after Auschwitz. In: D. Patterson & J.K. Roth, (Eds.). *After Words: Post holocaust struggles with forgiveness, reconciliation, justice*. Seattle: University of Washington Press, 86;

<sup>83</sup> Lederach, J.P. (2002). *Building Peace: Sustainable reconciliation in divided societies*. Washington, D.C.: United States Institute of Peace Press, xvi.

compassion, mercy and forgiveness.<sup>84</sup> Justice can never achieve full retribution for the victims, especially not for the dead, but the theologian hope is that victims will be vindicated after death. Reconciliation is from this point of view seen as the “ultimate fulfillment of justice”, requiring forgiveness. To forgive is to recognise that repentance is sincere and a new relationship can be built in the future. This position gives priority to the victim and not to the wrongdoers. According to Augsburger, forgiveness requires an extraordinary self-control of anger and denial. He argues that forgiveness “turns anger towards breaking down walls rather than erecting them and it reverses denial into acceptance of pain and the pursuit of creating change and growth”.<sup>85</sup>

According to Kenneth Kaunda - Zambian first president - “forgiveness is not of course a substitute for justice... it is a gift, not something we earn, but to know the reality of forgiveness we must be prepared to turn our backs to the things we have done which required us to seek forgiveness in the first place.”<sup>86</sup>

In Africa, forgiveness rituals have a powerful healing effect that marks the beginning of a new relationship. In Augsburger’s study of African cultures he reports that prayers were offered by the elders and a profound curse pronounced on anyone who would cross the fence to bring harm to either side”<sup>87</sup>. Among the African cultures it is believed that the compelling factor why perpetrators committed the wrongdoing was due to the person’s possession of the evil spirit in their body. Once rituals of expiation or purification are over, the perpetrator is liberated from his possession and fully integrated and accepted

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<sup>84</sup> Biggar, “Making Peace or Doing Justice: Must We Choose?,” p 17.

<sup>85</sup> David W. Augsburger (1992) – Conflict Mediation Across Cultures – Pathways and Patterns, Westminster/ John Knox Press, Louisville, Kentucky. P. 264

<sup>86</sup> Kenneth Kaunda in Augsburger, David W. (1992) – Conflict Mediation Across Cultures – Pathways and Patterns, Westminster/ John Knox Press, Louisville, Kentucky, p. 277.

<sup>87</sup> David W. Augsburger (1992) – Conflict Mediation Across Cultures – Pathways and Patterns, Westminster/ John Knox Press, Louisville, Kentucky. P. 276.

within the local community. Consequently, forgiveness seems to be surprisingly easy in these communities, whose supreme powers and rituals play a crucial role in the community healing.

### **2.5.2 Socio – Cultural Aspects of Reconciliation**

Culture is the rich and complex blend of beliefs, attitudes, and behaviour regarding everything from food to art to politics and religion in a certain society. It shapes how we perceive ourselves and others. Violence, fear and hatred during war result in the modernization of old myths<sup>88</sup> and stereotypes to explain one's own or some other group's gruesome behaviour – and thereby justify whatever atrocities are committed. The societal and cultural fabric is normally drenched with these beliefs after the war. In order to live in peace, these beliefs must be questioned and transformed. After conflict the search for sustainable peace in a society must begin from its own roots, importing from outside whatever can be of use, but basing that society's transformation on its own unique set of traditions and cultural heritage.

In the South African Truth and Reconciliation Commission (SATRC), the African notion of *ubuntu* held important meaning. Ubuntu means that humanity is intertwined, a person is a person through other people, we are human because we *belong*. Using this concept, Desmond Tutu argued that “even the supporters of apartheid were victims” and “the oppressor was dehumanised as much as, if not more than, the oppressed.”<sup>89</sup> The misconduct of one person reduces everyone's ubuntu while good deeds increase the ubuntu and well-being of all. Thus, reconciliation was part of restoring ubuntu in both victims and former perpetrators, for everyone is linked together. Consequently the SATRC brought together its mission for national reconciliation, which often used Christian vocabulary, with the traditional African cultural heritage in the attempt to pave the way for reconciliation.

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<sup>88</sup> Stuart J. Kaufman (2001), *Modern Hatreds: The Symbolic Politics of Ethnic War*, Cornell Studies in Security Affairs (New York: Cornell University Press).

<sup>89</sup> Tutu, D. (1999): *No Future without Forgiveness*, New York: Random House, Inc, p. 153

### 2.5.3 Economic Aspects of Reconciliation

Studies show that post-civil war societies are significantly more likely to experience civil war again than societies with no prior experience of war. Barbara Walter points out two factors for the recurrence of this vicious cycle. Firstly, people feel that continuing life in the current condition is worse than the possibility of death in war. Secondly, there is a closed political system that does not permit change (except by use of violence).<sup>90</sup> Walter's study of civil wars suggests that improvement in economic well being together with increased political openness significantly decreases the risk of experiencing war anew. Walter states that, "Conflict begets conflict not because violence makes poor countries poorer or undemocratic governments more autocratic, but because individuals in these countries fail to experience any improvement over time."

In the same vein, Collier and Hoeffler argue that negative economic growth rates are the primary source of civil war.<sup>91</sup> Studies show that war greatly strains the economy, "so that there is the potential for a trap – a cycle of economic deterioration and repeat conflict." There is also the risk of spillover effects in neighbouring countries, leading to instability in the region and the risk of expanded conflict.

Economic development is essential for peace, and peace is essential for reconciliation. More specifically, in the work of truth commissions around the world the importance of economic compensation has become unmistakable. Alex Boraine<sup>92</sup> argues that reconciliation must go hand in hand with economic justice. Survivors of atrocity and injustice have often been denied access to for example education, jobs, housing, and medical care. When the time comes for building a new and peaceful

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<sup>90</sup> Barbara F. Walter (2002), "Does Conflict Beget Conflict? Explaining Recurring Civil War,"

<sup>91</sup> Collier and Sambanis, "Understanding Civil War – a New Agenda," p 8.

<sup>92</sup> Alex Boraine was deputy chair of the South African Truth and Reconciliation Commission 1995–1998. The quote is from his introductory speech at the "Stockholm International Forum: Truth, Justice and Reconciliation", April 23–24, 2002.



society, the gaps are vast between former perpetrators and survivors regarding all areas. As Robert I Rotberg writes: “Reparations and compensation strengthen the rule of law, reconciliation, and the overall process of institutional reform.”<sup>93</sup>

Money can never compensate the death of loved ones but can help a surviving family build a better life as well as serve as “...an official, symbolic apology.”<sup>94</sup> The truth commissions in Argentina and Chile have had the most substantial economic reparations for victims. Other commissions have recommended financial compensation for victims but the governments have failed to provide resources and expedite this crucial step in the work for reconciliation. For example, in South Africa testifiers had been promised economic compensation for witnessing in the TRC but the monetary help was seldom handed over to the victim.

#### **2.5.4 Psychological Aspects of Reconciliation**

Traumatic experiences do not disappear through silence. Hamber argues that “...psychologically, sleeping dogs do not lie; past traumas do not simply pass or disappear with the passage of time.”<sup>95</sup> Psychological trauma research shows that it is important to heal traumatic wounds in order for life to continue without the trauma becoming cemented in physical and/or mental disorder. Victims of torture and other human rights violations often have a feeling that no-one would believe them if they told their story – just as they often have been told by their perpetrators.<sup>96</sup> In working with individual traumatic experience official acknowledgement of past atrocity and injustice is important because it validates past

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<sup>93</sup> Robert I. Rotberg (2000), “Truth Commissions and the Provision of Truth, Justice, and Reconciliation,” in *Truth V Justice: The Morality of Truth Commissions*, ed. Robert I. Rotberg and Dennis Thompson (Princeton, N.J.: Princeton University Press), p 12.

<sup>94</sup> Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, p 170.

<sup>95</sup> Hamber, “Remembering to Forget: Issues to Consider When Establishing Structures for Dealing with the Past,” p 57.

<sup>96</sup> Lone & Montgomery Jakobsen, Edith (1998), “Treatment of Victims of Torture,” in *An End to Torture: Strategies for Its Eradication*, ed. Bertil Dunér (New York: Zed Books).

experiences and helps restore dignity and self-esteem. Telling one's story to someone who listens is of greater importance. However, to speak of traumatic wounds, which often have left feelings of deep humiliation, shame, and guilt, is difficult and painful. Therefore it is of great importance how the talking and listening is done<sup>97</sup> and that the victim is aware that revealing does not lead to instant healing.

During truth commission hearings, victims must recall and relive traumatic experiences in a public environment, most often having only one opportunity to testify and most likely not meeting the commissioners he/she is speaking to again. In South Africa, the TRC had the objective of uncovering past atrocities in order to achieve healing and reconciliation in the nation. Psychologists debated the objective of healing in South Africa.<sup>98</sup> Some supported the idea while others were sceptical, and some considered it to be more harmful than beneficial. Allan warns of the belief that witnessing in a commission would be healing. He refers to studies showing that some individuals, both victims who testified and staff members who listened to the testimonies, were further traumatised by the experience of participating in the TRC.<sup>99</sup> He argues that even though some individuals experienced giving testimony as cathartic, this does not necessarily imply that it was therapeutic. He states that the question remains "whether the process brought about an enduring change for the better, or merely a short-term symptomatic relief." Similarly, Swartz and Drennan argue that it is not clear today if emotional self-exposure, even in a clinical setting, automatically has a positive effect on mental health.<sup>100</sup> Allan warns that this "myth" – that testifying in a TRC is a healing process – can involve risks, for example:

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<sup>97</sup> Daniel J. Christie, Richard V. Wagner, and Deborah Du Nann Winter (2001), *Peace, Conflict, and Violence: Peace Psychology for the 21st Century* (Upper Saddle River, N.J.: Prentice Hall).

<sup>98</sup> Cheryl de la Rey and Ingrid Owens (1998), "Perceptions of Psychosocial Healing and the Truth and Reconciliation Commission in South Africa," *Peace and Conflict: Journal of Peace Psychology* 4, no. 3.

<sup>99</sup> Alfred Allan (2000). "Truth and Reconciliation: A Psycholegal Perspective," *Ethnicity and Health* 5, no. 3–4.

<sup>100</sup> Leslie Swartz and Gerard Drennan (2000), "The Cultural Construction of Healing in the Truth and Reconciliation Commission: Implications for Mental Health Practice," *Ethnicity and Health* 5, no. 3–4.

survivors may be misled to testify in the belief that it will be good for them; the risk that governments believe in the myth and will fail to arrange for treatment needs; and that the belief may deprive people in grave need of treatment from adequate help, as the needs are not appreciated.<sup>101</sup> Allan and Allan claim that “it is inevitable that, for some of the testifiers, psychological dysfunction and emotional pain will follow.”<sup>102</sup> The authors point to the fact that the aim of truth commissions usually is to focus on collective rather than individual experiences. They state that this is antitherapeutic.

However, Hayner argues that “the central aim of a truth commission is not therapy.”<sup>103</sup> Many truth commissions do nevertheless aspire to function as a therapeutic tool for society. In this process it is important to remember the individual suffering behind the stories, and ensure that appropriate care is given. Some sort of psychological support programme for victims, perpetrators, as well as staff is crucial during and after truth commissions in order to avoid further suffering and achieve the best circumstances for reconciliation.

### **2.5.5 Political Aspects of Reconciliation**

Ash argues “...the reconciliation of all with all is a deeply illiberal idea.”<sup>104</sup> If reconciliation is seen as demanding no conflict, no differences, and only love, harmony, and unity – then reconciliation becomes both an illiberal and impossible idea. Reconciliation neither implies lack of conflict nor total harmony. Rather, it refers to a state that after atrocity and injustice builds a future on remembering the past, handling conflict without violence, and respecting the rights of all its members. A political reconciliation

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<sup>101</sup> Allan, “Truth and Reconciliation: A Psycholegal Perspective.”

<sup>102</sup> Allan and Allan, “The South African Truth and Reconciliation Commission as a Therapeutic Tool.”

<sup>103</sup> Hayner (2002), *Unspeakable Truths: Confronting State Terror and Atrocity*, p 139. (Malden, MA: Polity Press, Blackwell Publishers Inc.), p 6.

<sup>104</sup> Peter Digeser (2001), *Political Forgiveness* (Ithaca, NY: Cornell University Press), p 14.

process has a societal dimension to it, which is different from inter-personal reconciliation. It differs from reconciliation on a general level. First, “political” reconciliation is a process dealing with injustice due to political conflict. Secondly, since it takes place on the political level, it has to be cognizant and respectful of its limitations when it comes to integrity and respect for the individual dimension in reconciliation processes. Political reconciliation focuses on the characteristically impersonal relations among members of a political society.<sup>105</sup>

In a systematic attempt to study reconciliation on a national, political level, Long and Brecke have examined the presence or absence of ‘reconciliation events’ after civil conflict and subsequent relations between former adversaries.<sup>106</sup> They conclude that in societies where a reconciliation event was undertaken there were less chances of the conflict recurring than in societies where a reconciliation event was not undertaken. A reconciliation event is defined as including a meeting between senior representatives of the former opposing factions; a public ceremony, covered by national media; and ritualistic or symbolic behaviour that indicates peace.

### **2.5.6 Juridical Aspects of Reconciliation**

Mani states that there are three dimensions of justice that must be considered in peacebuilding: The rule of law, rectificatory justice and distributive justice. The justice system apparatus must be restored as it has usually broken down and lost all legitimacy during the war. This serves as an indication to combatants and civilians in war-torn societies of a return to security, order, and stability. The injustice and pain that has been suffered by people during conflict must be addressed. In international law countries are bound to prosecute past abuses; politically it is needed to establish legitimacy and stabilize

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<sup>105</sup> Murphy, C. 2010. Political Reconciliation and International Criminal Trials. In: L. May & Z. Hoskins, (eds). *International Criminal Law and Philosophy*. New York: Cambridge University Press, 224.

<sup>106</sup> Long and Brecke, War and Reconciliation: Reason and Emotion in Conflict Resolution.

peace; and psychosocially it aids to understand and heal trauma. The underlying causes of conflict, which often lie in real or perceived socio-economic, political or cultural injustice, must be addressed in order to prevent further violence.<sup>107</sup>

In building a new justice system, a country must decide in what way it shall deal with the crimes of the past. The question should be on the justice mechanism to be employed. Bar-Tal argues, “Justice is indispensable for reconciliation.”<sup>108</sup> Retributive justice (criminal, procedural, or legalistic justice), focuses on crime as the violation of law. In this approach crime is a matter between the perpetrator and the state. Punishment, and suitable compensation to the victim, is decided upon by the criminal justice system, transferring “the individuals’ desire for revenge to the state or official body.”<sup>109</sup> Retributive justice is a fairly recent idea historically, with roots in the Middle Ages.<sup>110</sup>

On the other hand restorative justice also referred to as transitional or reparative justice focuses on crime as a conflict between individuals as well as on the injuries crime inflicts on all parties: the victim, the perpetrator and the society.<sup>111</sup> The interest of the justice system is to reconcile and heal conflictive relationships in order to end the vicious circle of crime, revenge, and recurring crime. This is done *inter alia* by official acknowledgment of the past, publicizing the names of perpetrators (seen as a form of

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<sup>107</sup> Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge, UK)

<sup>108</sup> Daniel Bar-Tal (2002), professor of psychology at Tel Aviv University, speech held at the “Stockholm International Forum: Truth, Justice and Reconciliation”, April 23–24.

<sup>109</sup> Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, p 26.

<sup>110</sup> Mica Estrada-Hollenbeck, “The Attainment of Justice through Restoration, Not Litigation: The Subjective Road to Reconciliation,” in *Reconciliation, Justice and Coexistence: Theory and Practice*, ed. Mohammed Abu-Nimer (Lanham, MD: Lexington Books, 2001), p 67.

<sup>111</sup> Howard Zehr (2001), “Restorative Justice,” in *Peacebuilding: A Field Guide*, ed. Luc Reyhler and Thania Paffenholz (Boulder: Lynne Rienner Publishers). And Estrada-Hollenbeck, “The Attainment of Justice through Restoration, Not Litigation: The Subjective Road to Reconciliation,” p 74.

punishment in itself), formalized apologies, and compensation to victims.<sup>112</sup> Restorative justice systems can be traced back several thousands of years. The dilemma for a country in the transition from conflict to peace is to find a balance between the moral desire for restoration, which inherently involves compromise regarding justice, and the legal desire for retribution, which innately carries the risk of silencing the past (as war criminals will seek to avoid punishment by withholding certain truths). The country should aim at accommodating “individual criminal responsibility and national reconciliation.”<sup>113</sup>

Assefa opines that reconciliation implies a willingness to forgive and forget, to accept compromise not through weakness but because doing so is considered worthy. Moreover, reconciliation implies that one does not necessarily expect the quid pro quo expected in hard bargaining, it is essentially a voluntary process where the intended transformation should be internal and personal. It is a process that relies in the honest dialogue between the parties.<sup>114</sup> According to Joseph Montville reconciliation implies a liberating sense of healing which must go through a process of contrition and forgiveness between the perpetrators and the victims in order to establish a new relationship based on respect and reasonable trust. Therefore, reconciliation aims at a profound rebuilding of human relationships, grounded on the power of healing and forgiveness.<sup>115</sup> However, the process is full of paradoxes. Firstly, while reconciliation focuses on the re-establishment of future relations, past hurts are haunting shadows. Secondly, while it symbolises the encounter between mercy and truth, there is a latent tension between

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<sup>112</sup> Alex Boraine, introductory speech at the “Stockholm International Forum: Truth, Justice and Reconciliation”, April 23–24, Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, p 23.

<sup>113</sup> Carsten Stahn (2001), “Accommodating Individual Criminal Responsibility and National Reconciliation: The U.N. Truth Commission for East Timor,” *American Journal of International Law* 95, no. 4.

<sup>114</sup> Hizkias Assefa (1999), “The Meaning of Reconciliation,” in *People Building Peace: 35 Inspiring Stories from around the World*, ed. Paul van Tongeren (Utrecht: European Centre for Conflict Prevention).

<sup>115</sup> Joseph V. Montville – “*The healing function in political conflict resolution*” – in Sandole, Dennis J. and Hugo van der Merwe eds – *Conflict Resolution Theory and Practice: Integration and Application*, 1999, Manchester University Press, p. 123.

exposing what has happened and the sense of compassion for the sake of a future relation. Thirdly, reconciliation as justice, addressing past wrongs, may undermine peace in the short term. Reconciliation affects individuals in their social relationships and psychological and religious well-being; it affects a nation in its struggles and efforts to reconstruct itself after a violent conflict; and affects the international community because for such a process to be successful needs to have a favourable context and support to do so.

## **2.6 Divided Societies**

A “divided society” is a society that features an antagonistic and politically salient segmentation along acquired or attributed identity lines. Such identities can include ethnic, religious, linguistic, and other cultural traits, as well as gender, age, ideology, or a group’s political or socioeconomic status. While theoretically distinct, these identities can overlap in reality. When these identities are combined, political salience and antagonism can increase.<sup>116</sup> It is a society where violence or the threat of violence keeps it divided. It is distinguished from fragmented one in its’ inability to agree on a common process for decision-making, making peace and reconciliation difficult, if not impossible to achieve. Divided societies can also be seen as those in which there is an ethnic difference among the people in a state. Additionally, these ethnic differences must determine politics and political parties.

Divided societies have a greater chance of ethnic conflict than just multiethnic states. It has been proven that ethnic differences have led to the most long-lasting and violent forms of intrastate conflict.<sup>117</sup> Many divided societies with significant ethnic tension will experience large-scale violence when one or both

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<sup>116</sup> Gubler, Joshua R., and Joel S. Selway (2012), Horizontal Inequality, Crosscutting Cleavages, and Civil War, in: *Journal of Conflict Resolution*, 56, 2, 206–232.

<sup>117</sup> Kaufmann, Chaim D. (1998). “When All Else Fails: Ethnic Population Transfers and Partitions in the Twentieth Century.” *International Security*. 23 (2): 120-156.

sides of the conflict feel that there is no alternative strategy. The large-scale violence is preceded by the mobilization of the populace along ethnic lines. Hechter and Levi (1979) posit that successful ethnic mobilization occurs if the government allows political and cultural opposition groups, an ethnically based civil society already exists and the opposition group is able to organize.

Divided societies are widely assumed to face challenges in holding democratic elections, maintaining political stability, and accommodating rival communities. Therefore, it is harder to build lasting and high quality democracy in divided post conflict societies. It is one thing to settle a conflict but quite another to consolidate democracy afterwards. Conflict resolutions should establish pathways for divided societies to develop into liberal democracies. Integration is necessary to reach the compromise necessary for peace, reconciliation, and democracy in deeply divided societies. However, these societies are faced with complex decisions in accomplishing this while honoring multiculturalism.

## **2.7 Conclusion**

From the foregoing discussion, it is imperative that any state emerging from a protracted conflict must employ the necessary mechanisms to restore peace and stability. This is an obligation vested in each and every state who is a member of the United Nations. There are a number of methods that can be employed in the resolution and management of conflicts as outlined by the UN Charter. Disputing parties can choose one or a number of methods in their attempt to resolve their conflict. The Kenyan case is a classic example of a country that utilized a number of the approaches in its endeavour to finally resolve the conflict.

There is no one single recipe for the successful resolution of conflicts. It is upon the disputing to evaluate the approach that would serve them best. The best approach should always be the most economical and one that will produce the most amicable solution to the conflict. In essence, diplomatic



methods have been seen as some of the best methods since they give the disputants an opportunity to participate in the crafting of the final solution to the conflict.

## CHAPTER THREE

### TRUTH AND RECONCILIATION COMMISSIONS: A GLOBAL PERSPECTIVE

#### 3.1 Introduction

Truth Commissions have become important vehicles for transitional justice where many countries emerging from conflicts are shy of pursuing retributive justice as it has been often viewed as too adversarial. Consequently, quite a number of truth commissions have been formed since the early 1970s. However, opinion is divided on whether the truth commissions actually deliver on their objectives. Some scholars argue that the mere fact of telling the truth in a public setting is not equivalent to justice being served especially for the victims of past human rights abuses and violations. Others have argued that those in power just use truth commissions to propagate their impunity especially where the truth commissions have been charged with the responsibility of recommending or actually granting amnesty to perpetrators once they have confessed and asked for forgiveness. However, there are those who are of the opinion that the mere public narration of the atrocities suffered at the hands of oppressive regimes and perpetrators is a form of healing for the victims on its own.

#### 3.2 Truth Commissions

According to Buergenthal, Truth commissions are fact-finding bodies set up for the specific purpose of investigating serious violations of human rights and humanitarian law committed in a country during a specific period of time, usually during an armed conflict or a particularly repressive regime.<sup>118</sup> Similarly, Hayner perceives truth commissions as bodies set up to investigate a past history of violations of human rights in a particular country, which can include violations by the military or other government forces or

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<sup>118</sup> Buergenthal T (2006), "Truth Commissions: Functions and Due Process" in Dupuy *et al*, *Festschrift für Tomuschat* 103-113.

by armed opposition forces.<sup>119</sup> Therefore truth commissions can be seen as bodies charged with the task of finding out the nature of human rights violations during a certain period, causes and extent of such abuses and the antecedent factors. Truth Commissions are normally set up by states in transition to democracy or those emerging from periods of protracted conflicts, internal unrest, or civil war in order to reckon with the past which is necessary to enable former opponents to look towards a peaceful shared future. The overall objective of truth commissions has been to come to terms with the past and acknowledge what happened so as to forge towards a shared future.

A truth commission is normally tasked with discovering and revealing past wrongdoing by a government or non-state actors. They are ‘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.’<sup>120</sup> Towards this, Truth Commissions are expected to bear certain attributes or features, both in their formation and operations. These include; Clarity of focus and mandate and timeframe in which tasks will be accomplished; Soundness of the legal framework establishing and supporting the Commission; Political will from the government to allow and encourage a serious enquiry into past; Support from the victims, civil society and international community; Capacity to be independent and effective (both financially and operationally); Possess mechanisms to support victims and witnesses; Absence of ongoing conflict, other security threats and repressive acts; and there should be a level of or potential to implement the recommendations of the Commission’s report<sup>121</sup>. While Truth Commissions had been used numerous times prior to South Africa, the South African Truth and Reconciliation Commission has

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<sup>119</sup> Hayner, P. (1994) “Fifteen Truth Commissions-1974-9994: A Comparative Study” 16 *Human Rights Quarterly*, 597-655.

<sup>120</sup> 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 February2005, Definitions, page 6

<sup>121</sup> Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Truth Commissions* (2006).

become the world's foremost example of restorative justice, and is arguably the best developed example of the model.

From the mandate of truth commissions, their main goals include seeking to contribute to transitional peace by creating an authoritative record of what happened; providing a platform for the victims to tell their stories and obtain some form of redress; recommending legislative, structural or other changes to avoid a repetition of past abuses; and establishing who was responsible and providing a measure of accountability for the perpetrators. To this end TRCs are allowed to work with prosecution mechanisms or to recommend for further investigation and prosecution those adversely mentioned people as perpetrators.<sup>122</sup> The international human rights community advocates for truth commissions as an important part of the healing process and they have been suggested as part of the peace process of virtually every international or communal conflict. The advocacy of Truth and Reconciliation Commissions around the world marks the beginning of a shift from retribution and war tribunals to reconciliation and restorative justice.

Truth Commissions establish effective national mechanisms to establish a historical account about atrocities committed by both the state and non-state actors thus; most Commissions conclude their work with a final report containing findings and recommendations. Truth Commissions normally ensure that all victims of gross human rights violations and economic crimes realize their right to truth and justice. The protection and promotion of these rights in this context is critical for a number of reasons. Firstly,

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<sup>122</sup> DeMinck, Ashley, "The Origins of Truth and Reconciliation Commissions: South Africa, Sierra Leone, and Peru" (2007). *Honors Projects*. Paper 8. [http://digitalcommons.macalester.edu/soci\\_honors/8](http://digitalcommons.macalester.edu/soci_honors/8) (Accessed on August 15, 2014)

the protection enables the direct victims to get a better understanding of the violations suffered, the reasons behind it, as well as the public acknowledgement and preservation of the same. Secondly, it helps to correct any false accusations made against them in the course of the violations or crimes. Thirdly, it enables the family members, particularly of those killed or disappeared, to find out what exactly happened to their loved-ones and to establish their whereabouts. Finally, it enables the affected society to know the circumstances surrounding and reasons that led to violations and crimes being committed and to ensure a guarantee of non-repetition and effective remedies for the harm or damage suffered.

However, there are those who have argued that Truth Commissions do nothing more than dancing to the whims of those in power by covering up their past wrongdoings. For example, in Chad, it became apparent that the truth commission was used to discredit the old regime and legitimize the new one. Moreover, the mandate of the truth commissions is normally limited to coming up with a report as their final product and making of recommendations. These recommendations are left at the mercy of the government of the day or other implementing agencies to implement.<sup>123</sup> Studies of truth commissions indicate that their recommendations are seldom fully implemented forcing us to question them as vehicles of transitional justice.

### **3.2.1 Characteristics of Truth Commissions**

Hayner sees truth commissions as a process, encompassing public engagement, with full participation of stakeholders and supportive of the victims and survivors. She also sees them as a product, through their public hearings and written reports evaluated in terms of the quality and nature of the product, the extent of truth revealed, proposals and recommendations for reform and accountability; and finally, as an

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<sup>123</sup> Hayner, P. (1994) "Fifteen Truth Commissions-1974-9994: A Comparative Study" 16 *Human Rights Quarterly*, 597-655.

impact, where she focuses on truth commissions' contributions to long-term healing, reconciliation and reform. She outlines the characteristics of truth commissions.<sup>124</sup> According to Hayner, truth commissions share four distinct characteristics; they focus on the past and investigate the pattern of abuses over a period of time, not a particular event; they are a temporary body that completes its work with an official report; they are officially sanctioned, in order to assure the accessibility of information; and their recommendations are taken seriously.

Firstly, they focus on the past and investigate a pattern of abuse over a set period of time rather than a specific event. In its mandate, the truth commission is given the parameters of its investigation both in terms of the time period covered as well as the type of human rights violations to be explored. The Liberian Truth and Reconciliation Commission (LTRC) was established in 2005 to look into crimes and violations of human rights that had taken place in Liberia between January 1979 and October 2003. From 1979 until 2003, the Liberian people suffered a coup d'état, military rule and two civil wars that resulted in archaic violations of human rights and mass displacement. The Liberian Truth and Reconciliation Commission (LTRC) was established to 'promote national peace, security, unity and reconciliation,' and to make it possible to hold perpetrators accountable for gross violations of human rights and humanitarian law that occurred in Liberia between January 1979 and October 2003 during the civil war. The country also experienced a number of coups and political instability. Within parameters very firmly set by the enabling legislation, the South African Truth and Reconciliation Commission (SATRC) embarked on a 'daunting and formidable' task of establishing as complete a picture as possible of the nature, causes and extent of the gross human rights violations which were committed between March 1, 1960 to December 5, 1993, including the antecedents, circumstances, factors and context of

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<sup>124</sup> Hayner, Priscilla (2002) *Unspeakable truths: Facing the challenges of truth commissions*, New York, Rutledge., pp. 2 – 14.

such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations'<sup>125</sup>. The commission was tasked with investigating human rights abuses committed from 1960 to 1993, including the circumstances, factors, and context of such violations; allowing victims the opportunity to tell their story; granting amnesty; constructing an impartial historical record of the past; and drafting a reparations policy.

On the other hand, the Sierra Leone Truth and Reconciliation Commission (SLTRC) was mandated: “to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone from the beginning of the conflict in 1991 to the signing of the Lome Peace Agreement on July 7, 1999; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.” The Commission would also investigate and report on the causes, nature and extent of the violations and abuses... work at restoring the human dignity of victims and promote reconciliation by providing an opportunity for victims to give an account of the violations and abuses suffered and for the perpetrators to relate their experiences, and create a climate which fosters constructive interchange between victims and perpetrators, giving special attention to the subject of sexual abuses and to the experiences of children within the armed conflict...<sup>126</sup>

The SLTRC was to expose atrocities committed during the war and the suffering of the victims was to be acknowledged and, in deserving cases, reparations were to be made to the victims. The main purpose of the SLTRC was to heal the wounds of the nation. Thus, far from being faultfinding and punitive, it

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<sup>125</sup> South Africa Truth and Reconciliation Commission (SATRC) *Report (2009)*, Vol. 1 ch. 4 para. 31 (a).

<sup>126</sup> Truth and Reconciliation Act, Supplement to the Sierra Leone Gazette, Vol. CXXXI, No. 9, Freetown, February 10, 2000, p.4

was to serve as the most legitimate and credible forum for victims to reclaim their human worth, and a channel for the perpetrators of atrocities to expiate their guilt and chasten their conscience. The process was likened to a national catharsis, involving truth telling, respectful listening and above all, compensation for victims in deserving cases...<sup>127</sup> It has been variously argued that true justice, healing and reconciliation can only be achieved if there is some form of compensation for the victims. Consequently a number of TRCs come up with a reparations framework in their final reports. From the foregoing discussion it can be discerned that in addition to the investigations of human rights abuses and violations among other atrocities committed all the TRCs were charged with the responsibility of fostering and promoting healing and reconciliation in their respective quarters. This chapter will thus examine the extent to which this mandate was realized.

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. The commission's mandate should also allow it only to investigate human rights abuses and violations committed over a reasonable period to avoid overloading the commission. On the one hand, one must acknowledge an element of legitimacy in the strict limitation of time allotted to a truth commission. A time frame extending more than three years would eventually create boredom and make the citizenry lose interest and support in the commissions' work. This happened with the Ugandan commission which was set up

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<sup>127</sup> "Addressing Impunity Using Diverse Approaches: The Truth and Reconciliation Commission and the Special Court", Chapter III, in *Truth and Reconciliation in Sierra Leone*, Freetown: UNAMSIL, 2001.



in 1986 and took nine years and also with the South African Commission which was in place for 5 years.<sup>128</sup>

The appropriate preparatory period of the commission depends on the political culture and circumstances of the country under consideration. The SATRC spent eighteen months designing its work. This preparatory time was crucial to developing the commissions' complex empowering legislation.<sup>129</sup> The legislation establishing the SATRC gave a period of two years for the SATRC to complete its work. The commission asked for an extension and finished its work in five years. Although the lifespan of the SATRC was extended by a few months, there was little sympathy for the idea of a more substantial extension beyond the two years within which it was originally expected to complete its work. However, as the Chairman of the SATRC, Archbishop notes that that task was enormous even to be completed in the two and half years that it took to complete its work. Underscoring the enormity of this undertaking, Archbishop Tutu's Foreword to the report stresses, therefore, that the report...offers a road map to those who wish to travel into our past. It is not and cannot be the whole story, but it provides a perspective on the truth about a past that is more extensive and more complex than any one commission could, within two and a half years, have hoped to capture<sup>130</sup>.

The Guatemalan Commission which was to cover a period of thirty four years took two years to complete its work. The German Truth Commission which covered a period of forty years, took three years.<sup>131</sup> In line with the TJRC Agreement, the TJR Act required the Kenyan TJRC to operate for a

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<sup>128</sup> Hayner, P. (2002) *Unspeakable truths: Facing the challenges of truth commissions*, New York, Rutledge. Pp. 218 – 223

<sup>129</sup> Hayner P. (1994) "Fifteen Truth Commissions-1974-9994: A Comparative Study" 16 *Human Rights Quarterly*, 597

<sup>130</sup> South Africa Truth and Reconciliation Commission (SATRC) *Report (2009)*, Vol. I chapter 1, para 5

<sup>131</sup> Hayner, P. (2002) *Unspeakable truths: Facing the challenges of truth commissions*, New York, Rutledge. 223

period of two years,<sup>132</sup> preceded by a three-month establishment phase.<sup>133</sup> The two-year operational period granted to the Commission was ambitious even in the best of circumstances, considering the breadth and complexity of the Commission's mandate. The Commission's material mandate was by far the broadest of any truth commission ever established, encompassing inquiry into violations of civil and political rights as well as socio-economic rights. Its temporal mandate was similarly wide, spanning 12 December 1963 to 28 February 2008, a period of just less than forty five years. The TJRC requested for numerous extensions and completed its work in four years.

The period in which a Truth Commission makes an inquiry and conducts investigations may in the long run overburden the truth commission and prevent it from discharging its' mandate in a thorough manner. This was the dilemma facing the Commission in Guatemala which was supposed to investigate all the human rights violations committed during a period of thirty four years. In the end, it reflected at length on the dilemma created by its terms of reference and identified itself with similar difficulties experienced by other truth commissions in particular the Chilean and the El Salvadoran commissions. Accordingly, it determined that it had to give priority to attacks on life and personal integrity, in particular extrajudicial executions, forced disappearances and sexual violations.<sup>134</sup> Finally, 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 receive serious consideration. Official sanction from the government is crucial as it represents an acknowledgment of past wrongs and a commitment to address the issues and move on.

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<sup>132</sup> Sec 20(1) of TJR Act No.6 of 2008

<sup>133</sup> Sec 20(2) of TJR Act No.6 of 2008

<sup>134</sup> *Guatemala: Memory of Silence, Report of the Commission for Historical Clarification* (2002)

Furthermore, governments may be more likely to enact recommended reforms if they have established the commission.

The Liberian Truth and Reconciliation Commission (LTRC) was negotiated and agreed upon in the August 2003 Accra Comprehensive Peace Agreement and was enacted into law by the National Transitional Legislative Assembly in 2005.<sup>135</sup> The National Unity and Reconciliation Commission of Rwanda was established by the Law No. 3/99 of March 12, 1999. This Law provides that the commission is entrusted with "preparing and conducting, at national level, debates intended to promote unity and reconciliation among Rwandans."<sup>136</sup> The Kenyan TJRC was established vide the TJR Act No. 6 of 2008 and as a result of deliberations, negotiations and final TJRC Agreement of the KNDR Negotiations of 2008.

### **3.2.2 Establishment and Composition of a Truth Commission**

Comparative experience has shown that truth commissions are effective when established as soon as a regime change occurs. Studies suggest that where a truth commission is not formed soon after regime change, the possibility that a government in office will consolidate power and revert to practices that had in the first place warranted the creation of a truth commission is high. Witnesses and evidence are also more difficult to find over time.

The success of a truth commission is normally dependent on the people appointed to the commission. It is also normally more effective to have the legislature create the body because it is seen as a more democratic body, but this has been extremely rare. Over the years, truth commissions have been

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<sup>135</sup> Republic of Liberia, Truth and Reconciliation Commission, Volume II, *Consolidated Final Report*, June 30, 2009.

<sup>136</sup> Uvin Peter and Mironko C. (2003): "Western and Local Approaches to Justice in Rwanda." *Global Governance*, Vol. 9, No. 2, pp. 219 – 231.

appointed either by the executive arm of the government as happened in Panama, or the executive arm, together with the legislative arm, as was the case in South Africa, or by the legislative arm alone, as was the case in Germany and Chile, or by the monarchy, as happened in Morocco.<sup>137</sup> Commissioners may also be appointed by, or in coordination with or by a mix of international and national authorities as was the case in Sierra Leone. Sometimes the Commission selection is preceded by a formal and independent nomination and selection process, as was the case in Timor-Leste. At times Commissioners are selected in accordance with explicit criteria and procedures set out in the Truth Commission mandate as was the case in Ghana. The composition of a commission may vary greatly in terms of nationalities, profession and gender. For instance the commissioners may all be nationals as the case of South Africa, Uganda, Chile and Argentina or all foreigners like was in El Salvador or a mixture of both nationals and foreigners as was the case in Guatemala and Sierra Leone.<sup>138</sup> In some extreme cases, governments have sought foreigners to form the commission. For example, in El Salvador, the violence was seen as so polarizing that no Salvadoran could fairly assess what had happened. The UN secretary-general, with the agreement of the parties to the peace accords, selected a former Colombian president, a former Venezuelan foreign minister, and a former president of the Inter-American Court of Human Rights to conduct the truth commission.

What has become a common method is to appoint well-respected members of society to commissions. These are perceived as being above politics making them an ideal choice, though they need not be strictly impartial. It would be difficult to remain so after living through such an experience. The key lesson from past experience is that a commission will tend to enjoy greater public and international

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<sup>137</sup> Freeman, M. (2006) *Truth Commissions and Procedural Fairness*, Cambridge University Press. P. 27

<sup>138</sup> Ibid.

support where its members are selected through a broad process of consultation aimed at ensuring wide representation of ethnic, religious groups and gender.<sup>139</sup> Crucial for the success of the SATRC was the choice of the commissioners. The selection procedure was democratic and transparent, as the South African people were allowed to suggest candidates.

### **3.2.3 The Operation and Mandate of Truth Commissions**

On being established, a truth commission is given a specific mandate by the authority that created it. The mandate covers among others the commission's length of operation, the time period open to investigation by the commission, and what crimes are open to investigation. The mandate of a commission also defines its purpose, powers, and limitation. This is included in the commissions' terms of reference which define a commission's investigatory powers; the time scope of the commission's investigation and its life. The mandate also states when and to whom the final report must be submitted.<sup>140</sup> Truth commissions are obliged to fulfill their terms of reference. The terms of reference of a commission can either limit or strengthen its investigative reach. The mandate of some truth commissions have been explicit about what kind of abuses they were to investigate and document. For instance a number of the commissions have been mandated to look only into disappearances such as those in Argentina, Uruguay, Chile and Sri Lanka. In Chile, for example, the commission was only permitted to investigate "disappearances after arrest, executions, and torture leading to death committed by government agents or people in their service, as well as kidnappings and attempts on the life of persons carried out by private citizens for political reasons."<sup>141</sup> The Chilean Commission's mandate

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<sup>139</sup> Tomuschat C. (2001) "Clarification Commission in Guatemala", 23 *Human Rights Quarterly*, 233-258.

<sup>140</sup> Buergenthal T. (2006), "Truth Commissions: Functions and Due Process" in Dupuy *et al*, *Festschrift für Tomuschat* 103-113.

<sup>141</sup> Report of the Chilean National Commission on Truth and Reconciliation (Rettig Commission Report, 1991)

prevented it from investigating incidents of torture that did not result in death. Those who survived were not categorized as victims by the truth commission. This has been criticized by international human rights observers.<sup>142</sup>

Notably, such specific terms of reference make a commission exclude a significant portion of the truth. For instance, the Uruguayan Commission<sup>143</sup> failed in achieving its objectives of auditing the past since the majority of the human rights violations that had taken place during the military regime, such as illegal detention and torture, which constituted a bulk of violations, were ignored. Ideally, the commission's mandate should allow it to explore a broad range of activities in order to provide a more complete picture of the past.

However, there have been others which provide only general guidance about the kind of abuses to be investigated.<sup>144</sup> The SATRC, a court like body, was established by the new South African government in 1995 to help heal the country and bring about a reconciliation of its people by uncovering the truth about human rights violations that had occurred during the period of apartheid. Its emphasis was on gathering evidence and uncovering information—from both victims and perpetrators. The SATRC was granted powers of subpoena, search and seizure. These were formidable, 'much stronger powers than those of other truth commissions'<sup>145</sup>. In theory, the Commission had unlimited access to archival materials otherwise wholly unavailable to scholars of the past. The Commission also had a budget and staff

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<sup>142</sup> Hayner, P. (2002) *Unspeakable truths: Facing the challenges of truth commissions*, New York, Rutledge. 115

<sup>143</sup> *Report of the Uruguayan Investigative Commission on the situation of Disappeared people and its causes*. 1985.

<sup>144</sup> Hayner, P. (2002) *Unspeakable truths: Facing the challenges of truth commissions*, New York, Rutledge. 217

<sup>145</sup> *Truth and Reconciliation Commission of South Africa Report (1998)*, vol. I ch 4 para 26.

significantly larger than previous state commissions in South Africa, and well in excess of other truth commissions elsewhere in the world<sup>146</sup>. This included a sizeable research department.

The commissions which have had a more flexible mandate have been able to achieve their terms of reference. The El Salvadoran Commission had its mandate fairly open; indicating that the commission should report on serious acts of violence, whose impact on society the public ought to know the truth.<sup>147</sup> The commission was thus not limited and it summarized the overall patterns of violence and reported fully on the abuses that took place over the twelve years of civil war.<sup>148</sup> This was a great achievement for the El Salvadoran Truth Commission.<sup>149</sup>

However, even with a flexible mandate, a commission may fail to document certain widely experienced abuses, especially those suffered by women, such as sexual abuse.<sup>150</sup> In South Africa for example, a very small number of cases of sexual abuse were brought to the commission, compared to the widespread practices of rape that were known to have taken place.<sup>151</sup> However this underreporting was attributed to a number of factors. In many cultures, rape carries a huge social stigma, embarrassment and shame for the victim, and women are understandably uncomfortable giving testimony in public hearings and even

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<sup>146</sup> *Truth and Reconciliation Commission of South Africa Report (1998)*, vol. 1 ch 4 para 30

<sup>147</sup> *From Madness to Hope: Report of the Commission on the Truth for El Salvador*, 18.

<sup>148</sup> Tomuschat C. (2001) "Clarification Commission in Guatemala", 23 *Human Rights Quarterly*, 239

<sup>149</sup> Buergenthal T. (2006), "Truth Commissions: Functions and Due Process" in Dupuy *et al*, *Festschrift für Tomuschat* 106

<sup>150</sup> Hayner, Priscilla (2002) *Unspeakable truths: Facing the challenges of truth commissions*, New York, Rutledge., p. 12

<sup>151</sup> Padarath (1998:64), where she writes that "while the sexual nature of prison torture is the focus of much attention, the sexual brutalization of women believed to be the supporters of opposing political parties has received very little emphasis or even acknowledgement".

in private hearings if the details would be published in a public report.<sup>152</sup> Nevertheless, some commissions have written effectively on this subject. The Guatemalan report included a chapter that described testimonies of witnesses, incidents of gang rape and other widespread practices of extreme sexual violence against women.<sup>153</sup> The El Salvadoran Commission chose not to mention in its report cases of rape, though the commission concluded that rape had taken place.<sup>154</sup> The Sierra Leonean Commission paid special attention to the subject of sexual abuse. It devoted considerable attention to issues concerning women in the conflict. Many women gave statements to the commission and testified during its hearings. Their statements were taken in closed sessions in the presence of women members and staff of the commission. But in the end the commission made no findings or recommendations on this point,<sup>155</sup> except to urge the Sierra Leone government to ratify the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.<sup>156</sup>

### 3.2.4 Resources

Truth commissions must be granted sufficient resources. Full funding for a commission should be committed and must be available at the start of its work. This is particularly important if the commission is fully or largely funded by the state.<sup>157</sup> However, this is normally not easy for transitional states, many of which are poor to begin with and face tremendous rebuilding costs after restoring relative peace. Most

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<sup>152</sup> The South African Commission describes this phenomenon in its report. Vol. 4, chap.10, sec.36-43, 293 - 294.

<sup>153</sup> *Guatemala: Memory of Silence, Report of the Commission for Historical Clarification (2002)*, vol. 3, chap.2, par.49.

<sup>154</sup> The *Report of Commission on the Truth for El Salvador* lists many incidents of rape in its appendix, which documents all victims who provided testimony and the violations that they suffered. These rape victims clearly were considered to fall within the commission's mandate. The Commission never explained this discrepancy in its policy.

<sup>155</sup> Schabas W. (2006) "The Sierra Leone Truth and Reconciliation Commission", in R. Mariezcurrena, *Transitional Justice in the Twenty-First Century*, Cambridge University Press. 24

<sup>156</sup> Article 5 (b) of the African Charter on Human and People's Rights on the Rights of Women in Africa requires the prohibition "through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalization and Para-medicalization of female genital mutilation and all other practices in order to eradicate them.

<sup>157</sup> Hayner, P. (2002) *Unspeakable truths: Facing the challenges of truth commissions*, New York, Rutledge. 134



truth commissions find themselves short of the resources necessary to conduct a full investigation. The commission needs to hire staff to conduct interviews and collect data. Some of the TRCs in the past have gotten the requisite support needed to run their affairs. However, the majority of TRCs have operated under very tight budgets. Only Chilean commission had sufficient resources for the task and the government was willing to provide funding for it to complete its work successful.<sup>158</sup> By contrast, due to lack of office space, Chad's truth commission was forced to set up its headquarters within the former secret detention center of the security forces.

It has been common for truth commissions in the past to run short of funds and to struggle under a tight budget. For instance, the SATRC which had a budget of US\$18 million a year complained of insufficient funds. The Guatemalan and El Salvadoran Commissions also had inadequate funds. The Haitian commission ran into serious problems as well. The source of the funding has also been seen to dictate the direction the TRC takes in its work. International organizations were the sole financial supporter in Peru, and therefore had ultimate control over the specific operations of the TRC. The Peruvian government signed an agreement with the United Nations Development Program in which the United Nations agreed to donate funds to Peru for the Truth and Reconciliation Commission, provided the UNDP had control over the allocation of the funds.<sup>159</sup> This funding was essential to the commission, as it enabled the commission to do extensive work to ensure the creation of the most useful and detailed final report possible.

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<sup>158</sup> Ibid, 216

<sup>159</sup> Lama, Abraham. "Peru: Truth Commission Running Low on Funds". *IPS-Inter Press Service*. March 14, 2002. [www.lexisnexis.com](http://www.lexisnexis.com). (Accessed on August 15, 2014)

### **3.3 Truth vs. Justice**

Truth commissions do not have the power to punish. In contrast to the courts, truth commissions do not have the same standards of proof or evidence. Where the rule of law is so eroded, courts may not be functioning. The sheer number of cases may also overwhelm the system. The process of seeking truth serves the greater number of people. Where the court system is functioning, it may be heavily tainted by the abusive regime and not trusted by the population to administer justice. However, the truth commissions' reports can be used in trials and in issuing warrants.

TRCs are normally faced with the challenge of what should be the relationship between them and criminal prosecutions. A debate always ranges on whether truth commissions' search for truth is incompatible with bringing human rights violators to justice. Their main goal is normally to establish what happened in the past but they do not have the power to prosecute. They can only make recommendations for prosecution. They usually do not even "name names". Often, when a truth commission has been established, the perpetrators of the abuses have been granted amnesty. This may appear to be a conflict between finding the truth and administering justice. As such, the truth commissions are sometimes criticized for allowing crimes to go unpunished and creating impunity for serious human rights abuses.

On justice, Avruch and Vejarano argue that truth commissions cannot by their nature deliver on justice involving criminal proceedings against perpetrators of violence. They also cannot establish the correct facts on a matter or render verdicts or punishment. The problem of truth, on the other hand, arises from "the complexity and multiplicity of truth" since different sides have their own versions of the history and

truth of what really happened.<sup>160</sup> Consequently, the notions underlying truth commissions are still heavily contested.

### 3.4 Reparations

According to Peterson sustainable reconciliation should be a “context-specific, home-grown and long-term” process “made up of a number of ingredients, including “truth”, “justice” and reparations to victims.”<sup>161</sup> International law establishes an obligation on the part of the state to provide redress for human right abuses.<sup>162</sup> Truth commissions normally help in designing a reparation program for victims of human rights violations. This may take many forms that go beyond the payments of cash to the injured. Reparation is a general term encompassing different types of redress including restitution, compensation, rehabilitation, satisfaction and guarantee of non repetition.<sup>163</sup> Truth commissions also make recommendations for reparations to be given to victims of state terror and human rights violations. It is impossible to put a price tag on the suffering that victims have endured, but reparations are just a sign of the government's commitment to healing old wounds.

Reparations may take the form of cash payments or pensions. It may also include free access to health care and psychiatric treatment. Due to resource constraints, however, these more direct payments are rarely adequate. Symbolic reparations, through public memorials or national remembrance days, are often part of commission recommendations. Reparation is seen as an important aspect of truth

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<sup>160</sup> Avruch, Kevin, and Beatriz Vejarano, (2002) “Truth and Reconciliation Commissions: A Review and Annotated Bibliography”, *OJPCR: The Online Journal of Peace and Conflict Resolution*, 4, 2, 2002: 37–76.

<sup>161</sup> Pettersson, Björn, “Post-Conflict Reconciliation in Sierra Leone: Lessons Learned”, in IDEA (2005) pp. 8 – 9.

<sup>162</sup> *United Nations Commission on Human Rights: Study concerning the Right to Restitution, Compensation and Rehabilitation for victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report*, UN Doc. E/CN.4/EC.4/Sub.2,1993, 8 July, 1993.

<sup>163</sup> Hayner, P. (2002) *Unspeakable truths: Facing the challenges of truth commissions*, New York, Routledge. 12

commissions as it helps in alleviating some of the pain and suffering of the victims and survivors. However, despite many TRCs coming up with a Reparations Framework in their Final Report, these are seldom implemented. This is a dangerous precedent as the anger and suffering maybe used in future to visit violence and other atrocities on perceived and real perpetrators in future. It has also been argued that there mere aspect of truth telling does need address the substantive and long-term needs in a post-conflict situation.

Given the present position of the victims of war-time crimes, especially those identified in the Final Report of the LTRC as having special needs, it may not be out of place to conclude that truth-telling as a means of healing the wounds of the past and coping with the future, without socio-economic empowerment is ephemeral; a mere short-term palliative that does not address substantive and long-term needs in the post conflict dispensation. This cynicism is also shared by the Final Report of the Sierra Leone TRC: Truth-telling without reparations could be perceived by the victims as an incomplete process in which they revealed their pain and suffering without any mechanism in place to deal with the consequences of that pain or to substantially alter the material circumstances of their lives. In that regard, the Commission concurs with the view expressed by the SATRC that without adequate reparation and rehabilitation measures, there can be no healing or reconciliation.<sup>164</sup> The pent up anger of the victims and the danger that poses to long-term reconciliation came out clearly during the testimonies of victims, during the proceedings of the Sierra Leone TRC.

*We the amputees, how are we in this world now? I am not speaking for myself here. The government should not leave our case behind. It is not for us, it is for our children. If my child grows up and asks me who chopped off my hand, I will say these people did it to me. That will*

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<sup>164</sup> *The Final Report of the Truth and Reconciliation Commission of Sierra Leone* (hereafter simply SLTRC Report), Volume 2: Chapter 4: Reparations, on official website of the SLTRC, [www.trcsierraleone.org/drwebsite/publish/index.html](http://www.trcsierraleone.org/drwebsite/publish/index.html) (Accessed August 15, 2014)

*bring the war again. If you say peace should come, we the amputees should bring the peace. I can't be struggling and say that I am living in peace. That is why our case should be pushed forward. If our problem is left behind, [the] war will not end. We the amputees we all have children... we have no hands. We should be assisted. If we are assisted we will have peace of mind. All our children can think for themselves now. They ask us who chopped off our hands and feet. We have to make our children reconcile their minds. (Adama Koroma, a female victim, testimony to the Commission and answering the Chairman's questions.)<sup>165</sup>*

Asked by the SLTRC Chairman what his recommendations to the Commission would be, a male victim replied thus:

*The first thing I want to recommend is that most of us are willing to forgive, but to sustain this forgiveness, you can all see that we have lost our dignity because we used to be fit to fend for ourselves but this is not so anymore. That has caused most of us to become beggars in the streets...So I will recommend to the Commission that they should put mechanisms in place, which will ensure that there are provisions for us, which will be sustainable and not something that we can eat in a single day, something that will be sustainable maybe for as long we are alive and even our children...<sup>166</sup>*

In the case of Sierra Leone, “the public discourse was more about individual forgiveness than about justice and reparations”; two critical ingredients underlying the success of such exercises. Reviewing the Sierra Leone Truth and Reconciliation Commission (SLTRC), Petterson identified several of its shortcomings. For one, although it had a mandate “to respond to the needs of the victims”, it could not cope with the deluge of requests for material benefits (p. 10). In addition, the Commission was too “process-oriented”, focusing as it were, on public truth-telling that was expected to lead to forgiveness, while overlooking the need to prioritize the issues of reparations as an important step towards true reconciliation. Moreover the Commission focused too much on the pursuit of individual and community reconciliation communicated in an imposed fashion, and failed to effectively mobilize the public.

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<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

The Chilean Commission recommended financial benefits to the victims, such as scholarships for the children of victims and survivors, medical insurance and monthly stipends to cover the cost of living and school supplies.<sup>167</sup> The South African Commission recommended detailed reparations program including financial, symbolic and community-based reparations.<sup>168</sup> The SLTRC report was categorical on the precarious nature of the post hostilities peace building and reconstruction efforts if victims are not well catered for. “Some are faced almost continuously with those who have harmed them in their own communities, their presence serving as a constant reminder of the violation suffered. Moving beyond this state is impossible given the economic and social conditions that victims find themselves in and their dependence on handouts. The humiliation of being dependent on the charity of others and often having to beg in order to live re-victimizes victims, leaving lasting scars and wounds that may fester thoughts of bitterness and anger. This may constitute the seeds of future violence. A reparations program has the potential to restore the dignity of victims whose lives have been most devastated to move beyond the position they are in as a consequence of the war. The restoration of the dignity of victims can help to create the conditions necessary for reconciliation.”

### **3.5 Collection of evidence**

Once the TRC has been established it is normally at the discretion of the commissioners to decide on the ways, means and methods that will be adopted to collect the evidence. In other instances the legislation and terms of reference guide the commission on how to approach the task. The legislation also bestows powers upon the commission to enable it execute its mandate. The Commission can interview any individual at its discretion. It can also compel a person to attend its session or hearing. Further, it can request information from the relevant authorities of a foreign country and gather information from

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<sup>167</sup> Details of the Chilean reparations program, and the total costs, are reported in *Corporation Nacional de Reparacion Reconciliation*, 1996, 595-602.

<sup>168</sup> Hayner, P. (2002) *Unspeakable truths: Facing the challenges of truth commissions*, New York, Rutledge. 217

victims, witnesses, government officials and others in foreign countries. In addition, it can issue summonses as it deems necessary in fulfilment of its mandate and request and receive police assistance as needed in the enforcement of its powers. These subpoena powers of a TRC are similar to those vested with a court and are very vital for fulfilling its mandate. They are useful in a number of situations. For example a person with relevant information is summoned and compelled to disclose. To date, the truth commissions in Uganda, Chad, South Africa, Sierra Leone and Timor-Leste<sup>169</sup> have had subpoena powers.

The LTRC adopted specific mechanisms and procedures to address the experiences of women and children, paying particular attention to gender-based violations and to the issue of child soldiers, providing opportunities for them to relate their experiences, addressing their concerns and recommending measures for their rehabilitation. It established a Committee on Gender, including the United Nations Mission in Liberia (UNMIL), the United Nations Development Fund for Women (UNIFEM), women's NGOs and the Ministry of Gender. Gender issues were included in the training for statement-takers. The LTRC did a series of nationwide "zonal" workshops and fifteen town hall meetings, intended to discuss women's participation in the LTRC process.

### **3.5.1 Public Hearings**

Proceedings of a truth commission may be confidential or public. Making the commission proceedings' public risks security and unchecked accusations. However, public proceedings also lend the commission greater public legitimacy. The public can see how the commission is operating and there is less opportunity to suppress the commission's findings. It has also been argued that public proceedings

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<sup>169</sup> Freeman M. (2006) *Truth Commissions and Procedural Fairness*, Cambridge University Press. 189

safeguard impartiality.<sup>170</sup> Early truth commissions had little public testimony due to the fear of retribution. The SATRC was the first big departure from this trend. At the outset, the SATRC issued an open invitation to all South Africans to tell their stories of gross human rights violations, in the knowledge that in the period spanned by the commission, there were many thousands of previously untold stories to tell". The enabling legislation required that the Commission accept statements from all South Africans who wished to make them, and committed the TRC to documenting these narratives in a report providing as comprehensive an account as possible of the activities and findings of the Commission..."<sup>171</sup>. The Sierra Leonean Commission also held public proceedings while the Guatemalan and the El Salvadoran Commissions held their hearings privately.

### **3.6 Findings: The Truth Commission Report**

The ultimate product of a TRC is normally its Final Report. The commission's report provides recommendations for rebuilding society. It is normally the commission's legacy. One of the key aspects of the report is the highlighting of the institutional factors that facilitated the abuse of human rights. Recommendations often center on judicial, military, and police reform. Reforms are often debated for years, may require legislation or a constitutional amendment, and may become overshadowed by other issues as time goes on. In order to have maximum impact on society, the report should be widely disseminated. It seems unlikely a truth commission can be considered a success if its findings are not made public. It is important that the entire population has access to the findings to better understand the trauma they have experienced. If a report is kept out of public view, it raises suspicions about the government's role in the violence.

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<sup>170</sup> Hayner, P. (2002) *Unspeakable truths: Facing the challenges of truth commissions*, New York, Rutledge. 229

<sup>171</sup> *Truth and Reconciliation Commission of South Africa Report (1998)*, vol. I ch 4 para 133.



The SATRC's report was presented as 'a comprehensive report...based on factual and objective evidence collected or received by the Commission or placed at its disposal'<sup>172</sup>. The Report presents itself as the work of a team of observers' on the past, who collated and assembled a series of facts about gross human rights violations, to produce the objective, authorized version of the country's recent past. But a closer reading reveals a different process of knowledge production. The report contains a version of the past which has been actively crafted according to particular strategies of inclusion and exclusion, borne of the complexities of the SATRC's mandate. The SATRC's 'truth' about the past is neither 'complex' nor particularly 'extensive' (despite its length). With little explanatory and analytical power, the report reads less as a history and more as a moral narrative about the fact of moral wrongdoing across the political spectrum, spawned by the overriding evil of the apartheid system. In so doing, the SATRC Report achieves some notable successes that go a long way towards fulfilling some parts of the Commission's mandate - but to the exclusion of others.

Prior to the SATRC, the majority of white South Africans focused on the violations committed by the ANC in their bombing campaigns, while Africans had focused on the atrocities committed by the Apartheid government. The SATRC, by calling before it for testimony, violators from both sides made it more strikingly clear that both sides had committed gross violations, and in doing so arguably furthered its goal of reconciliation by forcing people to realize the horrible pain and suffering that had been caused by both sides.

In its recommendations, the LTRC called for the establishment of a National Palava Hut Forum as a complementary tool for justice and national reconciliation. The Palava Hut process is a dispute resolution mechanism that has traditionally been used in Liberia in the case of conflict between two

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<sup>172</sup> *Truth and Reconciliation Commission of South Africa Report (1998)*, vol. I ch 6 para I (e)

groups. The LTRC suggested that reparations shall apply to communities and individuals and that general amnesty should be granted for children. Others may be recommended not to be prosecuted if they admit their wrongs and express remorse. Further recommendations concern institutional reform which the LTRC thinks must be implemented to promote “good governance” and human rights. When countries are attempting to overcome a violent past, it is better to deal with the past through thorough and elaborate investigations, in-depth truth recovery, justice, and total support for victims and survivors of violence than to ignore it. The Report of the SLTRC was to contain ... recommendation concerning the reforms and other measures, whether legal, political, administrative or otherwise needed to achieve the object of the commission, namely the object of providing impartial historical record, preventing the repetition of the violations or abuses suffered, addressing the impunity, responding to the needs of the victims and promoting healing and reconciliation.<sup>173</sup>

### **3.6.1 Assignment of individual responsibility**

The mandate of a Commission can expressly empower it to name persons responsible for gross violations of human rights. Naming the perpetrators has been one of the most controversial issues facing truth commission. Some commissions such as, the Guatemalan and Chilean Commissions were not authorized to name individuals, while others, such as, the Rwandan, El-Salvadoran and the Chadian Commissions named the perpetrators.<sup>174</sup> The El Salvadorian report included names of the alleged perpetrators and the Commission was empowered to remove members of the military who were named in the report. The report was also critical of the military, paramilitary, intelligence and security forces, and those who allowed the abuses or covered them up, including the judiciary. The commission also

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<sup>173</sup> Truth and Reconciliation Act, Supplement to the Sierra Leone Gazette, Vol. CXXXI, No. 9, Freetown, February 10, 2000, p .4

<sup>174</sup> Hayner, P. (2002) *Unspeakable truths: Facing the challenges of truth commissions*, New York, Rutledge. 216

recommended the removal of Supreme Court justices because they were considered to be corrupt and inefficient

### **3.7 Criticisms of TRCs**

Despite the important role played by the truth and reconciliation commissions they have not gone without criticisms. Of concern is normally the amnesty provision within the mandate of some of some truth commissions. Critics argue that the granting of amnesty to perpetrators in exchange for full confession is a miscarriage of justice. They argue that if anyone is to grant amnesty to a perpetrator it should be the victim him / herself. The issue of conflict of interest has also risen in a number of truth commissions. Critics go on to argue that a truth cannot be fully impartial since it may be forced to investigate matters that may not be popular with the regime in power at the time. The case of South Africa was an interesting one where the ANC did not want atrocities propagated by ANC members investigated. The ANC government felt that it was justified to use all means available to fight apartheid.

#### **3.7.1 Amnesty**

Amnesty has been defined as, “a sovereign act of oblivion for past acts, granted by a government to all persons ...guilty of a crime ...and often conditioned upon their return to obedience and duty within a prescribed period”.<sup>175</sup> States grant amnesty to achieve peace and reconciliation.<sup>176</sup> It is the pardon granted to a perpetrator by the state once the perpetrator confesses, shows remorse for his / her actions and asks for forgiveness from the victims of his / her acts. There should also be guarantee of non-repetition of such acts in future.

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<sup>175</sup> Black’s Law Dictionary (2007:82-83).

<sup>176</sup> *Azania Peoples’ Org. V. President of the Republic of South Africa*, 1996(4) Salr 671, 690,692(CC) (*AZAPO case*) and *Dumbuya* (2006:45).

The largest criticism of the SATRC was the amnesty process, which resulted in perpetrators of severe crimes being allowed to walk free, while their victims and their families would never be the same. *The Sowetan* wrote “Reconciliation that is not based on justice can never work” Gutmann and Thompson noted that “The paper was expressing not only a widely shared doubt about this particular commission, but also the most commonly voiced objection to truth commissions in general.” Gutmann and Thompson went on to voice the largest criticism of the SATRC, that it was not a legitimate form of justice at all. They stated “Justice is not achieved when a murderer or rapist publicly acknowledges his crimes but is not brought to trial and suffers no further punishment.”<sup>177</sup> These charges strike at the very heart of the TRC’s mission, setup, and conduct, and threaten it as a system of justice in itself. Many international organizations were unsupportive of the blanket amnesty offered by the South African committee and therefore strongly backed the creation of a court which would serve to try the most egregious human rights offenders.

### **3.7.2 Conflict of Interest**

As the SATRC’s work progressed, it became apparent quickly that there would be a political clash between the current ANC government and the SATRC over the investigations into ANC sponsored violations. There was no question that there were those who suffered horrendously at the hands of the ANC in their attempt to destroy Apartheid. As Archbishop Tutu stated “In the 1980s the ANC embarked on a bombing campaign against targets it claimed were connected to security force personnel, targets such as police stations or military installations. Contrary to the ANC’s declared intentions, however, most of those who were killed in such explosions were in fact civilians and not security force personnel.”<sup>178</sup> The ANC had clearly been responsible for violations in its battle against Apartheid, and in order to ensure that justice was fair, and to protect the legitimacy of the SATRC as being fair,

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<sup>177</sup> Gutmann and Thompson, “The Moral Foundations of Truth Commissions” in *Truth v. Justice*,

<sup>178</sup> Tutu, Desmond. (1999): *No Future Without Forgiveness*. New York: Random House, Inc., 153.

Archbishop Tutu and his Commission had to hear from people who had suffered at the hands of the ANC, as well as seek the truth from the ANC leadership.

This necessity on the part of the SATRC unfortunately led to conflict between the Commission and the South African government. While the ANC endorsed the SATRC, and showed its support by, among other things, filing many amnesty applications themselves and giving testimony to the Commission, the ANC became increasingly concerned, and arguably even opposed to the SATRC's conclusions on ANC induced atrocities. In fact, the ANC tried to block SATRC's release of its final report over concerns about "the findings on the ANC."<sup>179</sup> Despite the best intentions of the ANC, and its commitment and support of the SATRC, the Commission was undoubtedly a product of politics in South Africa, and despite its relative independence, it was nevertheless subject to political pressures within South Africa. For example, the official platform of the ANC, put forward by Thabo Mbeki, was that "whatever went wrong was in the context of a just war against a racist dispensation and should be treated as such. On the basis of the Geneva conventions and protocols, the ANC rejected the finding of the SATRC that it was guilty of gross violations of human rights." Furthermore, it was made known during the Commission's hearings that, due to the attempts by the ANC to form a working alliance with the Inkatha Freedom Party (IFP) that "criticism by the SATRC" of the IFP was "unwelcome".<sup>180</sup> It is hard to judge how much actual effect this knowledge had on the SATRC, however, it is clear that the more involved in politics a system of justice is, the more vulnerable it is to outside influence that threatens the fairness of the judicial process. The SATRC, unfortunately, despite its independence, was tied into politics with its

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<sup>179</sup> Krog, Antjie (1998). *Country of My Skull: Guilt, Sorrow, And The Limits of Forgiveness In The New South Africa*. New York: Three Rivers Press, p. 368.

<sup>180</sup> Ibid.

involvement in questioning political parties (although it is impossible to completely remove politics from any system of justice).

### **3.8 Conclusion**

Truth commissions normally represent a signal by the new government to domestic and international audiences that they intend to make a break with the history of impunity. Truth commission advocates argue that calling perpetrators to account, even in a weaker venue like a truth commission, reveals the vulnerability of those once in power and knowing these acts have been firmly denounced is empowering to the general public. The logic of truth commissions is that exposing the factors that allowed these crimes to occur goes a long way toward preventing their recurrence.

The process of coming to terms with the past can have great psychological benefit for those seeking trauma healing. The official acknowledgement of past crimes helps restore dignity to victims. The description of the terrible details can bring peace. A truth commission offers victims a chance to finally tell what happened to them: "The chance to tell one's story and be heard without interruption or skepticism is crucial to the healing process."<sup>181</sup> In many cases, being able to tell their story is tremendously therapeutic for victims of violence. Truth commissions can assist in the healing process by the fact that the listener has official status.

While telling one's story and hearing details of loved ones' fates are sometimes beneficial, for other victims, these experiences may have different effects, bringing back old anger and triggering post-

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<sup>181</sup> Minow, Martha (1998). *Between vengeance and forgiveness: Facing history after genocide and mass violence*. Boston, Beacon Press.

traumatic stress. For instance, a survey conducted in South Africa revealed that two-thirds of the respondents felt that the truth commission process had harmed race relations and made people angrier.<sup>182</sup>

Truth commissions have sometimes served merely as a means of legitimizing new governments. The 1986 Ugandan commission and the case of Chad are emblematic of truth commissions being used mainly as a tool to discredit the previous regime. In other cases, such as Uganda's 1974 commission, it seemed to be a flimsy effort to placate international pressure. In Bolivia and Ecuador, commissions were disbanded before completing their work because the investigations became too politically sensitive.

Too much is often expected from truth commissions. However, seldom do they deliver on all the expectations. First, they may have an impossible mission. The needs of victims may be incompatible with the needs of society. Second, it is argued they do not go far enough to deal with the past or generate reconciliation. They do not have the power to punish and have no authority to implement reforms. Third, wiping the slate clean benefits those who have committed human rights violations. This damages victims' self-esteem and denies them justice. Finally, erasing history is difficult. At minimum, truth commissions pursue different types of truth. They investigate the details of specific events while at the same time attempting to explain the factors and circumstances behind the gross human rights violations the state experienced. In short, truth commissions often seem asked to do too much with too little.

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<sup>182</sup> Hayner (2001); Tepperman, Jonathan D. (2002). "Truth and Consequences." *Foreign Affairs* 81(2): 128-145.

## CHAPTER FOUR

### THE KENYAN TRUTH, JUSTICE AND RECONCILIATION COMMISSION (TJRC)

#### 4.1 Introduction

Kenya as a nation has been in need of reconciliation since its independence from the British colonialists in 1963. During colonialism the British perfected the art of “divide and rule” where they pitted different ethnic groups in Kenya against each other. There was also discrimination and marginalization of some ethnic groups in Kenya depending on where they were located in the country. Unfortunately, these practices were propagated by the newly formed independent Kenyan government. The two successive governments perfected the art with little care. Systemic violations of the rights and dignity of Kenyans continued to be perpetuated by the governments and by state and non-state actors alike. Many communities were marginalized as a result of being on the periphery of the governance structures. This, coupled with ethnicized politics greatly fragmented the nation creating a highly polarized and divided society.

The PEV of 2007 was the culmination of years of tensions in Kenya around access to state power and the control of national resources – primarily land. Kenya failed to develop political and institutional arrangements capable of promoting togetherness and co-operation among a divided people after its independence in 1963. What emerged after the fall of colonialism were political and institutional arrangements that fostered patterns of domination and exclusion.<sup>183</sup> In late December 2007 to January 2008 violence erupted to a scale and magnitude hitherto unknown in Kenya’s history. Brother turned against brother as the country went up in flames. About 1300 people were killed and thousands were

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<sup>183</sup> S. A. Dersso ‘The 2007 Post-election Crisis in Kenya as a Crisis of State Institutions’ (2008) Vol.5 Nos.3-4 *African Renaissance* 24



injured. Some areas suffered massive destruction of property, resulting in more than 300,000 people being displaced from their homes. Some 322 women and girls sought hospital treatment for sexual assaults during this period despite a general reluctance on their part to report these to the police and also because too many victims were displaced.<sup>184</sup>

It was against this backdrop that there were renewed efforts at reconciliation in the country. This culminated in the formation of a Truth, Justice and Reconciliation Commission to *inter alia* pursue healing and reconciliation in the country. This chapter traces the historical development of Kenya as a nation. It goes further to explore the probable causes of the violence that erupted after the 2007 disputed presidential elections. The chapter will then trace an historical background of the TJRC. It will examine in detail the Kenyan TJRC in terms of its establishment, its composition, its mandate and its operations as it executed the mandate with special focus on promoting healing and reconciliation in the country. The chapter will also examine the challenges, weaknesses and the successes of the TJRC as an independent commission in Kenya. At the heart of the discussion will be the need to understand whether the TJRC succeeded in achieving its objective, specifically whether it was able to foster and promote healing and reconciliation in Kenya as a nation.

## **4.2 Brief Kenyan History**

Kenya as a republic has had its share of political developments that culminating in the formation of a coalition government in 2008 after the disputed 2007 presidential elections. This section traces the history starting with the one party rule immediately after independence in 1963, the clamour for

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<sup>184</sup> United Nations High Commission for Human Rights Report (OHCHR) Fact Finding Mission to Kenya, 6 to 28 February 2008

multiparty democracy, the 2007 / 2008 PEV and final establishment of the Truth, Justice and Reconciliation Commission.

#### **4.2.1 One Party Rule**

Kenya's political history has been marked by violent uprisings and repression since its independence in 1963. When Kenya African National Union (KANU) won the 1963 elections, the country became a *de facto* one-party state, with President Kenyatta banning attempts to create any opposition party.<sup>185</sup> When President Moi took office in 1978, he pursued policies of political repression which included excessive use of force, torture, indefinite detention, and other measures against his political opponents.<sup>186</sup>

#### **4.2.2 Multi-Party Democracy**

In 1991, in response to local and international pressure prompted by the end of the Cold War, President Moi yielded to demands for a multi-party state. He agreed to the constitutional amendment that ushered Kenya into a multi-party democracy and the first multi-party elections were held in 1992. However, political and ethnic violence, reportedly orchestrated by the state became integral to multi-party elections held in 1992 and 1997. The first multi-party elections were characterized by threats, harassments and the occurrence of violent clashes between supporters of different parties, leading to a loss of 1,500 Kenyan lives and displacement of more than 300,000 people.<sup>187</sup> President Moi managed to maintain power in the elections and continued to repress political opposition.<sup>188</sup> Ethnicity was used as a political tool for accessing power and state resources and for fuelling violence.

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<sup>185</sup> Obel, T. (2009), *Political violence in Kenya. A study of causes, responses and a framework for discussing preventive Action*. Available at: <http://www.iss.co.za>. [Accessed on August 15, 2014].

<sup>186</sup> *Report of the Commission of Inquiry into Post-Election Violence*, (hereafter Waki Report), (2008:24)

<sup>187</sup> Human Rights Watch (2002:27).

<sup>188</sup> "Kenya timeline: A timeline overview of big and small events in the history of Kenya

### 4.2.3 Peaceful Transition

In 2002, President Moi was constitutionally barred from running for presidency. He nominated Uhuru Kenyatta (Mzee Jomo Kenyatta's son) as KANU's candidate. Mwai Kibaki ran for the Presidency under the opposition coalition, The "National Rainbow Coalition" (NARC), and he won the elections. The 2002 general election, unlike preceding multi-party elections in 1992 and 1997, was not characterized by any form of political violence and were judged free and fair by both local and international observers, marking a turning point in Kenya's democratic evolution.<sup>189</sup>

Significantly, President Moi did not contest the transfer of power to President Elect, Mwai Kibaki. NARC came to power on a platform that promised to curb and ultimately eliminate the political transgressions and human rights violations that had been regularized during the 39 years of KANU's rule. NARC also pledged to address and rectify historical injustices. In his inaugural speech to the country on the day he was sworn in as the third president of the Republic of Kenya, Mwai Kibaki spelt out the vision of the new government - a vision that embodied the pursuit of transitional justice:

*"One would have preferred to overlook some of the all too obvious human errors and forge ahead, but it would be unfair to Kenyans not to raise questions about deliberate actions or policies of the past that continue to have grave consequences on the present [...] We want to bring back the culture of due process, accountability and transparency in public office. The era of 'anything goes' is gone forever. Government will no longer be run on the whims of individuals. The era of roadside policy declarations is gone. My government's decisions will be guided by teamwork and consultations. The authority of Parliament and the independence of the Judiciary will be restored and enhanced as part of the democratic process and culture [...] Corruption will now cease to be a way of life in Kenya, and I call upon all those members of my government and public officers accustomed to corrupt practices to know and clearly understand that there will be no sacred cows under my government."*<sup>190</sup>

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<sup>189</sup> Anderson, D. M. (2003) "Kenya's Elections 2002 - The Dawning of a New Era?" 102 (407) *African Affairs*, 331-342.

<sup>190</sup> The Truth, Justice and Reconciliation Commission of Kenya, "The Final Report of the TJRC" (2013) [hereinafter TJRC Report], [www.tjrkenya.org/index.php?option=com\\_content&view=article&id=573&Itemid=238](http://www.tjrkenya.org/index.php?option=com_content&view=article&id=573&Itemid=238) (Accessed August 15, 2014)

True to his promise a Task Force on the Establishment of a Truth, Justice and Reconciliation Commission was formed in April 2003. The Task Force, chaired by Professor Makau Mutua, was mandated to recommend to the Minister for Justice, National Cohesion and Constitutional Affairs whether the establishment of a truth, justice and reconciliation commission was necessary for Kenya. In the initial stages of NARC's leadership, there seemed to be efforts to deal with the past that was riddled with instances and cases of injustices, human rights abuses and violations, institutionalized corruption, nepotism, marginalization *inter alia*. However, these efforts and enthusiasm were short-lived. As time passed, it became clear that the promise of change and the fanfare around it were not to be. It did not take long for observers and analysts to begin to point out that a number of old practices had started to slowly but steadily become part of the NARC government. Writing shortly after NARC came to power, Professor Crispin Odhiambo-Mbai (who would later be assassinated) warned that autocratic tendencies had begun to emerge in the Kibaki regime. He indicated that 'a cabal of shadowy behind-the-scenes operating self-seekers' were already building around Kibaki to promote narrow and regional interests and if this group were to succeed in its mission, then it would most likely 'promote patronage and intrigue politics, which are some of the key characteristics of an autocratic state'. He proceeded to predict that:<sup>191</sup>

*"The emergence of this cabal around the president is already creating intense power rivalry and division in the Kibaki government. If the bickering and divisions continue, the government will obviously fail to fulfil countless campaign pledges it made to the electorate and, therefore, the high expectations that the majority of Kenyans invested in the NARC government. This is bound to create discontent among the population who would react by challenging the government in various ways. To counter the challenges, the government may be tempted to result to repressive tendencies – another characteristic of an autocratic state."*

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<sup>191</sup> C Odhiambo-Mbai 'The rise and fall of the autocratic state in Kenya' in W Oyugi et al *The politics of transition in Kenya* (2003) 51, 93-94

It therefore did not come as a surprise that June 2004 – the deadline that the Makau Mutua Task Force had set for the establishment of a truth commission – passed without the establishment of such a commission. It appeared the government was gradually retrogressing to past practices. In this particular case, the new government fell back on an old practice perfected under the previous regime: the government of President Moi had consistently and deliberately failed to implement recommendations of many task forces and commissions of inquiry in the past or even make their findings public.<sup>192</sup>

#### **4.2.4 Constitutional Review**

In its first year in office, the government reconvened the National Constitutional Conference at Bomas of Kenya, Nairobi, for purposes of discussing, debating, amending and adopting a draft constitution. It had been elected on a platform to deliver a new constitution within 100 days in office. Despite delays and many challenges that threatened to scuttle the renewed constitutional review process, including the assassination of one of the delegates, Prof. Odhiambo-Mbai, the National Constitutional Conference adopted the Draft Constitution of Kenya (popularly known as the ‘Bomas Draft’) on 23<sup>rd</sup> March 2004. However, the government altered the contents of Bomas Draft, and pushed through Parliament a revised draft (popularly known as the ‘Wako Draft’ - in reference to the then Attorney-General Amos Wako, who crafted it). In contrast to the Bomas Draft, the Wako Draft watered down legislative powers and retained most of the presidential powers that many had hoped would be shared out to other arms of government. It also diluted the devolution framework that had been proposed in the Bomas Draft.

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<sup>192</sup> Gichaba, (2008:9) Where he states that; The Kiliku Commission of inquiry into the land clashes of 1991/2 through 1997, more than 10 years later, Mr. Kiliku’s findings are still on government shelves. The Elijah Mwangale Commission of inquiry investigated the murder of J.M Kariuki, and more than three commissions of inquiry have investigated the assassination of Dr. Robert Ouko. On the other hand, in non-murder cases, the best example would be the Goldenberg Commission of inquiry and the Commission of Inquiry into the Illegal and Irregular allocation of Land, commonly known as Ndungu Commission.

The revision and dilution of the Bomas Draft led to a split of opinion in the government, necessitating a referendum. Seven Cabinet members joined the opposition in rallying the country to reject the Wako Draft. The members of government supporting the adoption of the watered down draft campaigned vigorously for the ratification of the Wako Draft. The campaign was filled with distortions and ethnic-based incitements. Long standing political grievances were revived during the referendum campaigns for or against the Draft. At the National Referendum held on 21<sup>st</sup> November 2005, 57 percent of Kenyans rejected the Wako Draft. While the outcome of the referendum was accepted, the referendum process had effectively exacerbated ethnic divisions in the country. Following the conclusion of the referendum, the Kenya National Commission on Human Rights (KNCHR) issued a report in which it concluded that:

*The referendum was about a new constitutional dispensation only in name. Rather, it was a moment to settle various political scores, up-end different political players, and assert political superiority. And in this zero-sum game between politicians, ethnicity, patronage and incitement became the preferred tools of the trade, with the people of the country bearing the brunt of their antics.*<sup>193</sup>

The rejection of the Wako Draft dealt the last blow to the government's agenda of pursuing reforms. However, many critics had viewed these efforts as mere pretensions. President Kibaki dissolved his Cabinet immediately after the referendum vote and formed a government of national unity which incorporated prominent members of the previous KANU government. The NARC members who had opposed the proposed Constitution were dropped from Cabinet. They subsequently formed the Orange Democratic Movement (ODM), while politicians and political parties allied to the government, and President Kibaki in particular, formed the Party of National Unity (PNU). The two parties, under the

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<sup>193</sup> Kenya National Commission on Human Rights *Behaving badly: Referendum report* (2006) 5.

leadership of Raila Odinga and President Mwai Kibaki respectively, would later be at the centre of the disputed 2007 Presidential election.

### **4.3 The Kenya Truth, Justice and Reconciliation Commission**

The road to establishing a truth commission in Kenya was bumpy, long and marked by several false starts. Advocacy for a truth commission initially emerged as part of the campaigns for a multi-party system of governance. With the reintroduction of a multi-party state in 1991, the campaign for a mechanism to address past injustices was integrated into the wider campaign for a new constitution. It was, however, only after KANU's fall from power in 2002 and the ascendancy to power of the NARC government that the official quest for a national transitional justice agenda began to take root. On ascending to power in 2002, the NARC government established a task force to inquire, investigate and recommend to the Minister for Justice, National Cohesion and Constitutional Affairs whether the establishment of a truth, justice and reconciliation commission was necessary for Kenya. If so to recommend: How and when such a commission should be established; the membership of such a commission; the terms of reference of such a commission; the powers or privileges to be conferred upon the commission in execution of its mandate; and the historical period to be covered by the commission's investigations. The task force was established in April 2003 and was chaired by Professor Makau Mutua.<sup>194</sup>

#### **4.3.1 The Task Force on Establishment of a Truth, Justice and Reconciliation Commission**

The Task Force was officially launched in May 2003. Soon thereafter it began to conduct public hearings to solicit views that would form the basis of its findings and recommendations. The Task Force commissioned research papers from individuals who had studied truth commissions to inform its work.

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<sup>194</sup> Report of the Truth, Justice and Reconciliation Commission (2013), *Vol. I*, Chapter One: Background to The Commission

In addition, it convened an international conference where experiences of truth commissions from around the world were shared and explored. After a period of collecting and collating the views of Kenyans from across the country, the Task Force concluded that a truth commission was necessary. It recommended that a commission to be referred to as the ‘Truth, Justice and Reconciliation Commission’, with specific powers, functions and mandate be established no later than June 2004.<sup>195</sup> It summarized the views of Kenyans thus:

*The people of Kenya have spoken, and the Task Force is privileged to report that Kenyans want a truth, justice, and reconciliation commission established immediately. The overwhelming majority of Kenyans, over 90 per cent of those who submitted their views to the Task Force, want the government to establish an effective truth commission, a vehicle that will reveal the truth about past atrocities, name perpetrators, provide redress for victims, and promote national healing and reconciliation. Kenyans believe that a truth commission will renew the country’s morality in politics, law, in the economy, and throughout the society. They want a state founded on the rule of law and respect for the human rights of every individual who resides in Kenya. In other words, Kenyans want a human rights state.<sup>196</sup>*

The recommendation by the Task Force that a truth commission be established not later than June 2004 was informed by comparative experience that had shown that truth commissions are effective when established within the first two years of regime change. Studies suggest that where a truth commission is not formed soon after regime change, the possibility that a government in office will consolidate power and revert to practices that had in the first place warranted the creation of a truth commission is high. Evidence may also be hard to come by if a lot of time is allowed to elapse. Unfortunately, this turned out to be the case in Kenya. The recommendations of the Task Force were ignored as the ruling elite became

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<sup>195</sup> Government of Kenya (2003): *Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission*, 9 [The Makau Mutua Report]

<sup>196</sup> Ibid.



more entrenched in acts of impunity. They were shelved and never implemented by the then Government.<sup>197</sup>

#### **4.3.2 The 2007 / 2008 Post-Election Violence**

Public debate on transitional justice resurfaced in the period running up to the 2007 general election. On 7<sup>th</sup> December 2007, Kituo cha Katiba organized a workshop in Nairobi on the theme '*Revisiting Transitional Justice: A non-partisan and non-governmental engagement*'. The objective of the workshop was to make truth and justice 'an election issue Kenyans could vote on during the December 2007 elections and to pressure politicians to state their stand on the issue'.<sup>198</sup> Instead, political campaigns leading up to the general election were dominated by corruption, hate speech and negative ethnicity. In December 2007, the KNCHR published a periodic report entitled '*Still Behaving Badly*'.<sup>199</sup> The Report documented blatant violations of the electoral code, including misuse and misappropriation of public resources, the participation of public officers in political campaigns and incitement to and incidences of violence.

The general elections of 27<sup>th</sup> December, 2007 were conducted in a volatile environment in which violence had been normalized and ethnic relations had become poisoned. In effect, fertile ground had been prepared for the eruption of violence. Therefore, when the results of the presidential election were disputed, and both PNU and ODM claimed victory, violence erupted. Candidates on both sides of the political divide claimed victory and allegations of electoral fraud ensued. Tensions erupted into riots, fighting, acts of rape and assault, and bloodshed. The scale of the post-election violence (PEV) was

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<sup>197</sup> "Memorandum on the proposed amendments to the TJRC Bill 2008."

<sup>198</sup> Kituo cha Katiba *Report of the convening on transitional justice in Kenya*, Nairobi, 7 December 2007.

<sup>199</sup> Kenya National Commission on Human Rights *Still behaving badly: Second periodic report of the Election-Monitoring Project* (2007).

unprecedented. It lasted for a period of two months and affected all but two provinces in the country.<sup>200</sup> It is estimated that 1,133 people succumbed to the violence while approximately 350,000, were displaced from their homes<sup>201</sup> and property worth billions of shillings destroyed through arson and other forms of attacks. It was the darkest episode in Kenya's post-independence history.

The violence, bloodshed and destruction of the Post-Election Violence (PEV) shocked Kenyans into the realization that their nation, long considered an island of peace and tranquility, remained deeply divided since independence. It prompted a fresh opportunity for the country to examine the negative practices of the past four and half decades that contributed to a state that still holds sway in Kenya: normalization and institutionalization of gross violation of human rights, abuse of power and misuse of public office. However, it would be incorrect to peg Kenya's transition and the resulting attempts to deal with the past injustices solely on the events following the 2007 general election. What the 2007 / 2008 PEV exposed, not only to Kenyans but also to the international community at large, were the tragic consequences of deep-rooted ethnic intolerance, corruption and inefficient governance structures. These issues have significantly contributed to ethnic polarization and physical, emotional and economic scars to the country and its people. The Kenyan society has yet to fully address the scars of its history.

#### **4.3.3 The Kenya National Dialogue and Reconciliation (KNDR) Process**

News of the PEV quickly spread across the world. Shocking images of a nation engulfed by violence were splashed on local and international media outlets. The protagonists at the centre of the disputed

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<sup>200</sup> Republic of Kenya (2008), *Report of the Commission of Inquiry into Post-Election Violence, (hereafter Waki Report)*,

<sup>201</sup> *Report of the Commission of Inquiry into Post-Election Violence, (hereafter Waki Report)*, 2008, pp. 346 - 352

presidential election, President Mwai Kibaki of PNU and Raila Odinga of ODM (hereinafter referred to as the Principals), took hard-line positions, each insisting they had won.<sup>202</sup>

The international community, with the African Union (AU) taking a lead, responded almost instantly, with all efforts channeled towards unlocking the political gridlock and bringing to cessation the violence that was steadily pushing the country towards disintegration. Several high-ranking individuals came into the country to attempt a resolution and an end to the crisis facing the country. These included former Presidents Ahmad Tejan Kabbah of Sierra Leone, Benjamin Mkapa of Tanzania, Ketumile Masire of Botswana and Kenneth Kaunda of Zambia. Others included Archbishop Desmond Tutu of South Africa and the then US Assistant Secretary of State for Africa, Jendayi Fraser. From 8<sup>th</sup> to 10<sup>th</sup> January 2008, then AU Chairman, His Excellency John Agyekum Kufuor, President of Ghana, visited the country and initiated a mediation process between the Principals.<sup>203</sup> After he left, and with the blessings of the two Principals, the mediation process was taken over by a three-member Panel of Eminent African Personalities (hereinafter referred to as the Panel) composed of three African icons: former United Nations (UN) Secretary-General Kofi Annan, former Mozambican Minister and First Lady Graça Machel and former President of the United Republic of Tanzania Benjamin Mkapa.

The Panel, chaired by Kofi Annan, arrived in Kenya on 22<sup>nd</sup> January 2008 and immediately proceeded to hold meetings with relevant stakeholders. Two days later, on 24<sup>th</sup> January 2008, the Panel managed to convene a meeting between the two Principals. A few days later, on 29<sup>th</sup> January 2008, the Kenya

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<sup>202</sup> Crummen, S. M. "Incumbent Declared Winner in Kenya's Disputed Election", *The Washington Post*, December 31, 2007, available at [www.washingtonpost.com](http://www.washingtonpost.com), [accessed on August 15, 2014].

<sup>203</sup> Kanina, W. and Miriri, D. "African Union head meets Kenya's feuding parties," *Reuters*, 9 January 2008, available at [www.reuters.com](http://www.reuters.com) (accessed on August 15, 2014)

National Dialogue and Reconciliation (KNDR) Process was formally launched by the Principals in the presence of the Panel. This would be the process that will see to the cessation of the violence and the eventual formation of a Coalition Government.<sup>204</sup>

The Kenya National Dialogue and Reconciliation (KNDR) process resulted in the adoption of among others, the Agreement on the Principles of Partnership of the Coalition Government (Coalition Agreement) on the basis of which, the National Assembly enacted the National Accord and Reconciliation Act on 18<sup>th</sup> March 2008. The National Accord paved the way for the establishment of a coalition government with a President (H.E. Mwai Kibaki), Prime Minister (Rt. Hon. Raila Odinga) and two Deputy Prime Ministers. It also led to an agreement to establish a Truth, Justice and Reconciliation Commission (TJRC Agreement). The TJRC Agreement spelt out the general parameters, guiding principles and the broad rules that would govern the creation and operation of the TJRC. The agreement was endorsed by Parliament and led to the enactment of the Truth, Justice and Reconciliation Act (TJR Act), which created an official body to inquire into historical injustices and to propose sustainable solutions, like redress for victims.<sup>205</sup> In terms of the TJR Act, the Commission was inaugurated on August 3, 2009. The broad mandate of the Commission was to inquire into gross violation of human rights and historical injustices that occurred in Kenya from 12<sup>th</sup> December 1963 when Kenya became independent to 28<sup>th</sup> February 2008 when the Coalition Agreement was signed.

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<sup>204</sup> Patrick Wachira 'Finally The Peace Deal' *The East African Standard* 29/02/2008 quoted in Khaled Mohammed Aman

<sup>205</sup> The agreement was adopted by Parliament and led to the passage and enactment of the Truth Justice and Reconciliation Act (TJR Act). The Act received Presidential Assent on November 28, 2008, and came into operation on March 17, 2009. The Commission was gazetted on July 22, 2009 (Gazette Notice No. 8737). [www.dialoguekenya.org/index.php/agreements.html](http://www.dialoguekenya.org/index.php/agreements.html) and [http://kenyalaw.org/KenyaGazette/view\\_gazette.php?title=3224](http://kenyalaw.org/KenyaGazette/view_gazette.php?title=3224) (Accessed August 15, 2014)

#### **4.4 Establishing the Kenyan Truth, Justice and Reconciliation Commission**

Under the agenda item number 4, the Kenya National Dialogue and Reconciliation Team agreed to set up among others, a TJRC to examine among other things, historical injustices that may have precipitated the post-election violence. Parliament enacted the *Truth Justice and Reconciliation Act 2008* in October 2008 (Act no. 6 of 2008) which, among other things, provided for investigation of violations committed in Kenya during the period between 12<sup>th</sup> December, 1963 and 28<sup>th</sup> February 2008. The TJRC was established by an Act of Parliament – Act No. 6 of 2008 – which came into force on 9<sup>th</sup> March 2009.<sup>206</sup>

##### **4.4.1 Selection and Appointment of Commissioners**

The TJRC Agreement stated that the members of the Commission were to be persons of high moral integrity, well regarded by the Kenyan population, and to possess a range of skills, backgrounds, and professional expertise. As a whole, the Commission was to be perceived as impartial and no member was to be seen to represent a specific political group. At least two and not more than five of the nine commissioners were to be lawyers. The TJR Act provided for the appointment of nine Commissioners; six Kenyan citizens appointed through a national consultative process and three non-citizens selected by the African Union Panel of Eminent African Personalities. The Act required gender equity (and geographical balance in the case of Kenyan citizens) in the selection of the Commissioners.<sup>207</sup> In keeping with international best practices and to ensure broad public trust in and ownership of the process of seeking the truth, the selection of the Kenyan Commissioners was done through a broadly consultative process that involved civil society and Parliament. However, others viewed it as devoid of

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<sup>206</sup> Sec. 4(1) of the TJR Act No. 6 of 2008

<sup>207</sup> Sec 10 of the TJR Act No. 6 of 2008

public participation and characterized by limited input or scrutiny from civil society and victims' groups.<sup>208</sup>

The process began with the creation of a Selection Panel composed of nine individuals nominated by various religious and professional organizations in the following proportion: Two individuals nominated by a joint forum of religious organizations; One person nominated by the Law Society of Kenya (LSK); One person nominated by the Federation of Women Lawyers (FIDA Kenya); One person jointly nominated by the Central Organization of Trade Unions (COTU) and the Kenya National Union of Teachers (KNUT); One person nominated by the Association of Professional Societies of East Africa; One person nominated by the Kenya National Commission on Human Rights (KNCHR); One person jointly nominated by the Kenya Private Sector Alliance and the Federation of Kenya Employers (FKE); and One person nominated by the Kenya Medical Association (KMA).<sup>209</sup>

The selection of Commissioners began in April 2009. The Selection Panel sub-contracted a human resources firm to conduct short-listing of applicants on its behalf. After conducting interviews, 15 names were forwarded to the National Assembly for consideration. The National Assembly deliberated the suitability of the 15 individuals and narrowed the number of candidates to nine. The National Assembly forwarded nine (9) names to the President from whom he was required to appoint six as commissioners. The Panel of Eminent African Personalities forwarded three names to the National Assembly, which in turn forwarded those names together with those of the nine Kenyans to the President. By Gazette Notice

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<sup>208</sup> C. Alai 'Truth, Justice and Reconciliation Commission' in L Mute & L Young (eds.) *Transitional justice in Kenya: Looking forward, reflecting on the past* (2011) 111, 120

<sup>209</sup> Sec 9 of the TJR Act No. 6 of 2008

dated 22<sup>nd</sup> July 2009, and in line with the TJR Act the President appointed the following nine individuals: Bethuel Kiplagat (Kenya); Kaari Betty Murungi (Kenya); Tecla Namachanja Wanjala (Kenya); Gertrude Chawatama (Zambia); Berhanu Dinka (Ethiopia); Ahmed Sheikh Farah (Kenya); Tom Ojienda (Kenya); Margaret Shava (Kenya); and Ronald Slye (United States) to serve as members of the Commission.<sup>210</sup> The President also appointed Ambassador Bethuel Kiplagat, a former diplomat and permanent secretary, as the Commission's Chairperson. The Commissioners were sworn in 3<sup>rd</sup> August 2009. The Commission was granted 3 months for setting up and was therefore expected to start rolling out its mandates as from 3<sup>rd</sup> November 2009. The commission would be hit by a credibility crisis on the part of the Chairperson (on the basis of his complicity in TJR related issues) that saw it malfunction for a long time. In the process, the Vice-chairperson Ms Betty Kaari Murungi resigned on 19<sup>th</sup> April 2010<sup>211</sup>.

Ambassador Bethuel Kiplagat is a career diplomat with vast experience having served as ambassador to France and later to United Kingdom. He is also an experienced peace builder and a renowned peace negotiator. He has expertise in conflict management and served as Kenya's Special Envoy for Somalia National Reconciliation Conference. Tecla Namachanja is a peace builder and community social worker experienced in conflict management, transformation and peace building across the region. She is one of the three women recognized as Pillars of Peace for intervening in the Kenya's 1991-92 and 1997 ethnic clashes. She has engaged in conflict resolution processes nationally as well as in Sudan, Rwanda and Ethiopia and has conducted numerous regional training workshops. Ms. Betty Murungi is an expert in international human rights and transitional justice and has worked for the International Criminal Court,

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<sup>210</sup> Kenya Gazette Notice No 8737, Vol. 70 of 14 August 2009 and Vol. 77 of 31 August 2009.

<sup>211</sup> Commissioner Ronald Slye followed suit but rescinded the resignation upon the stepping aside of the then chairperson.

the Truth and Reconciliation Commission of Sierra Leone, and the Kenya Human Rights Commission. Commissioner Margaret Shava is a lawyer and a peace builder. She has over 17 years experience working in law, management and peacebuilding. With her experience in the economic sectors as well as the UN and national & international NGOs specializing in human rights, governance and international refugee law, she brings a very special set of skills to her task as Commissioner. Ahmed Sheikh Farah is a retired Military Officer. He is widely travelled and has a very clear picture of the regional and international security environment. He is well versed in conflict prevention, management and resolutions at the regional level as well as UN peace support operations in the international arena. Tom Ojienda, a former Chair of the Law Society of Kenya and the former East Africa Law Society president. Ojienda is a seasoned lawyer and land expert and consulted for the Njonjo and the Ndung'u Land Commissions.<sup>212</sup>

Prof. Ron Slye from Seattle University – School of Law served as a legal consultant to the SATRC from 1996 to 2000. He specializes in International criminal law focusing on legal responses to genocide and other mass atrocities especially tribunals and truth and reconciliation commissions. Judge Gertrude Chawatama from Zambia is a High Court judge and served on a special commission of inquiry into torture claims in 1997. She is a trained judicial educator, mediator and trainer of mediators; and Ambassador Berhanu Dinka is a diplomat with 27 years in the Ethiopian Foreign Service and an illustrious career in the United Nations and international peace-keeping. He served as U.N. Special Representative for Burundi and was the Secretary-General's Special Representative and Regional Humanitarian Adviser for the Great Lakes Region.<sup>213</sup>

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<sup>212</sup> Report of the Truth, Justice and Reconciliation Commission (TJRC, 2013), *Volume I*, Appendix 1A: Personal Profiles of the Commissioners.

<sup>213</sup> Ibid.



Having foreign members was an advantage as the foreign commissioners brought in foreign expertise. Furthermore, the national commissioners possessed an understanding of history, social and political background of the country. This was commendable as it would have enhanced the legitimacy and credibility of the commission. However, the TJRC faced a confidence crisis as the credibility of the commission's chair was questioned by the citizenry and the international community.<sup>214</sup>

#### **4.4.2 Operation and Mandate of the TJRC**

The TJRC was initially given a two-year mandate, which was extended three times. Section 20 (1) of the TJR Act provided that the commission shall be inaugurated within 21 days of the appointment of its members and shall operate for two years. Within the two years the commission was to collect and organize documentation, receive and process testimony from thousands of victims, complete investigations and compile a final report. A study of some of the commissions that had existed raised doubts on the possibility of the Kenya TJRC completing its work within the stipulated time of two years, given the period (45 years) it had to cover. Subject to subsection 2 of that section, the commission shall have a preparatory period of three months to undertake all tasks to ensure that it is able to work effectively from the commencement of its operations. The TJRC took four months for its preparatory work and started working in January 2010. The Commission ended up working over a period of four years.

Pursuant to Section 5 of the TJR Act,<sup>215</sup> the Kenyan commission was mandated to: - establish a record of abuses, nature and causes of human rights violations and economic rights inflicted on persons by the

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<sup>214</sup>Ongeyo J. "TJRC Faces Confidence Crisis" *The Standard*, 25 February 2010, available at [www.standardmedia.co.ke](http://www.standardmedia.co.ke) [accessed last on August 15, 2014].

<sup>215</sup> Act No. 6 of 2008.

state, public institutions and holders of public office, between December 12, 1963 and February 28, 2008. It was also supposed to investigate violations of international human rights law and determine those responsible. In addition, it was empowered to investigate economic crimes and inquire into illegal and irregular acquisition of land. Further, it was to inquire into the causes of political violence before and after elections and make recommendations on how to prevent future occurrences of such violence. It was also to recommend prosecutions of the perpetrators of gross human rights violations as well as determine ways and means of redressing those violations. Moreover, it was to facilitate the granting of conditional amnesty to persons who made full disclosure of all the relevant acts associated with gross human rights violations and economic crimes. Finally, it was to compile a comprehensive report of its findings with recommendations on how to prevent future human rights violations.<sup>216</sup>

The Commission was to 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 determined to advance national or community reconciliation. The Commission was permitted to offer confidentiality to persons upon request, in order to protect individual privacy or security, or for other reasons.

The commission had quite a broad mandate. It was the first commission charged with the mandate of investigating economic crimes such as grand corruption and the exploitation of natural or public resources for private enrichment. It was also the first to inquire into irregular and illegal acquisition of public land with a purpose of making recommendations of repossessing such land. The commission was also well mandated to investigate broadly on human rights violations and violations of international

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<sup>216</sup> Section 5 of the TJR Act No. 6 of 2008

human rights law and abuses such as massacres, sexual violations, murder, extra-judicial killings, torture, political assassinations and disappearances and to include their causes, nature, antecedents, and perspective of victims and motives of persons responsible.

This was a strength because for a truth commission to be effective, in providing the truth it is important that the most prevalent types of human rights violations be opened up for investigations. Furthermore, states have a duty to prosecute grave crimes against the life, physical integrity and freedom of human beings if such crimes have been committed in their respective territories.<sup>217</sup> Moreover States have an obligation to find and make public, the truth about human rights abuse. International human rights law obliges states to investigate and punish gross violators of human rights in most circumstances. This means that the citizen has a right to know the results of such investigations.<sup>218</sup> This was reaffirmed by The Inter-American Court of Human Rights in the 1988 case of *Velasquez Rodriguez*.<sup>219</sup>

#### **4.4.3 Resources**

The Government of Kenya was expected to provide a significant portion of the Commission's budget. However, other funding could be obtained by the Commission from donors, foundations, or other independent sources. The TJRC experienced financial problems throughout its four years of operations. In fact the final report notes that much more could have been done but was constrained by resources especially financial. It points out lack of sufficient funds as one of the challenges faced thus:

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<sup>217</sup> Rome Statute, Preamble (4) and (6).

<sup>218</sup> Article 19 of the Universal Declaration of Human Rights which stipulates that there is indeed "a right to know the truth" which is contained within the right to seek, receive and impart information'. Article 9 of the African Charter on Human and Peoples' Rights, provides for the right to receive information.

<sup>219</sup> The Inter-American Court of Human Rights in the *Velasquez Rodriguez* Case, Judgment of 29 July 1988; [Inter-Am.Ct.HR.(Ser.C) No.4(1988)]. 34

*“The second great challenge that the Commission faced from inception was the lack of sufficient funds and resources to efficiently and effectively conduct its operations. Although Parties to KNDR encouraged ‘strong financial support to the Commission’<sup>220</sup> the Commission operated on a paltry budget throughout its life. The financial situation was so dire that at times it had to seek loans from Commissioners. Ironically, those same Commissioners who so generously reached into their own pockets to ensure the Commission could continue with its work were later falsely accused in the media of stealing such money from the Commission. The preliminary cost of fulfilling the Commission’s mandate effectively and efficiently was estimated to be approximately Ksh. 2.2 billion for the two-year operational period. This amount is comparable, when adjusted for inflation, to the amount expended on the Peruvian Truth and Reconciliation Commission and significantly less than that spent on the South African Truth and Reconciliation Commission.”<sup>221</sup>*

According to a brief released by the TJRC Communications Consultant, the request for the two-year operational budget was submitted in December 2009 but there was no official response from the Ministry of Justice and Constitutional Affairs. Commissioner Slye once stated in a press conference that TJRC had not received official communication as to what amount it is supposed to be getting and added that the commission was limited and was trying to seek funding from donors.<sup>222</sup> The commission’s financial problems exacerbated when the commission’s chair faced credibility crisis. The Chairperson’s refusal to resign led to the loss of important stakeholders to the work of the Commission. Donor organizations equally refused to fund the Commission, and those that had initially committed to fund the Commission withdrew their offers. The general public, CSOs, FBOs, CBOs, the media and other relevant stakeholders adopted a policy of ‘non-cooperation’ with the Commission. Some of these organizations took robust steps to paralyse the work of the Commission. They called on funders not to support the Commission. Kiplangat’s return in January 2012 threatened to erase all the gains that the Commission had made during his absence. Donors who had expressed a willingness to support the

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<sup>220</sup> Kenya National Dialogue and Reconciliation “Truth Justice and Reconciliation Commission” (2008)

<sup>221</sup> The Truth, Justice and Reconciliation Commission of Kenya, “The Final Report of the TJRC” (2013) [hereinafter TJRC Report], [www.tjrkenya.org/index.php?option=com\\_content&view=article&id=573&Itemid=238](http://www.tjrkenya.org/index.php?option=com_content&view=article&id=573&Itemid=238) (Accessed August 15, 2014)

<sup>222</sup> Amran A. (2010). “TJRC accuses ministry of denying it funds”, *The Standard*, 25 April 2010, available at [www.standardmedia.com](http://www.standardmedia.com) [accessed on August 15, 2014].

process now withdrew their commitments of support. It was, for all intents and purposes, a return to square one.

#### **4.4.4 Reparations**

Reparations refer to the obligation of a wrongdoing party to redress the damage caused to an injured party. Reparations may take the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>223</sup> The TJR Act required the Commission to make recommendations with regard to the policy that should be followed or measures that should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims. Section 42 provides that “Any person who is of the opinion that he has suffered harm as a result of a gross violation of human rights may apply to the Commission for reparation in the prescribed form”. Subsection 2 of that section provides that where the Commission is of the opinion that the applicant is a victim, it shall make recommendations in an endeavour to restore the human and civil dignity of that victim. Further, Section 41 of the TJR Act provides that, if amnesty is recommended for any person in respect of any act, the Commission may recommend reparation and rehabilitation for the victim of that Act.<sup>224</sup> However, the Act does not expressly state what form of reparation should be recommended.

In this regard, the Commission recommended the establishment of a reparation fund that shall be used to compensate victims of gross violation of human rights and historical injustices. The Reparation Framework recommended by the Commission sets out the categories of victims who would access the

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<sup>223</sup> McClain, L. & Ngari, A. (2011). *Pay Us so We can Forget: Reparations for victims and affected communities in Northern Uganda*. JRP-IJR Policy Brief No. 2, August 2011.

<sup>224</sup> Sec. 41 of the TJR Act No. 6 of 2008

fund and the criteria for such access. The report provides a clear conceptualization of reparations and related state obligations. It mentions demands for redress expressed by victims in the testimony-taking process. Victims preferred legal and institutional reparations.<sup>225</sup> It specifically recommends apologies from the state as a first step toward the acknowledgement of victims' sufferings. The commission recommended reparations for families, including an apology from the president and heads of security forces for recorded incidents of gross human rights violations. The TJRC report also makes follow-up on reparations for victims a possibility. The commission recommended that the National Assembly should issue reparation regulations that would mirror and actualize its proposed Reparation Policy Framework.<sup>226</sup>

However, it does not sufficiently develop the operative institutional framework to execute such a program, including the mode of financing. A detailed plan requires not only substantial funds, but also institutional, managerial, and technical skills on the part of staff. While it is important to have a comprehensive plan related to the nature and amount of wrongdoings and harms suffered by victims, Kenyan authorities will need to identify the capabilities of the Kenyan state and possible international commitments to support a reparations plan.

Reparations and compensation of victims is to a large extent interpreted as justice being served on the part of the victims. Experience with truth commissions show that in the absence of any form of reparations, victims are still left with the old scars of the sufferings that they underwent. This in essence

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<sup>225</sup> TJRC Report, Volume IV, Chapter 3, Reparations Framework, 100–1.

<sup>226</sup> TJRC Report, Volume IV Chapter 3, Reparation Framework, 102.

precludes any efforts directed towards healing and reconciliation from achieving any fruit. For there to be reconciliation, the human and civil dignity of the victims must be restored.

#### **4.5 Collection of Evidence**

The commission had powers to gather, by any means it deems appropriate, any information it considered relevant to its cause. To this end it had powers to search, enter any place without prior notice and take any property or documents which were of assistance to the commission.<sup>227</sup> The Commission could interview any individual at its discretion. It could also compel a person to attend its session or hearing. Further, it could request information from the relevant authorities of a foreign country and gather information from victims, witnesses, government officials and others in foreign countries. In addition, it could issue summonses as it deemed necessary in fulfilment of its mandate and request and receive police assistance as needed in the enforcement of its powers. The Kenyan TJRC was the first one in the history of truth commissions which had powers to request for information from foreign authorities and gather information from victims, witnesses and government officials in other countries. The TJRC adopted four methods in its collection of evidence. These included Statement Taking, Hearings which included Individual Hearings, Women's Hearings and Thematic Hearings, Research and Investigations. The TJRC was greatly hampered in its collection of evidence especially where it required support from the government. The state authorities were not ready or willing to share the findings of other Commissions of Inquiry whose work fell under the mandate of the TJRC. The Final Report of the TJRC notes thus:

*“...despite multiple requests, the state refused to hand over to the Commission relevant documents pertaining to its mandate, including the reports of previous commissions of inquiry that the Commission was obligated to review and evaluate. Because of this consistent lack of*

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<sup>227</sup> Sec. 7 of the TJR Act No. 6 of 2008.

*cooperation, the Commission was forced to acquire many relevant documents, including the reports of previous commissions of inquiry, through unofficial and informal means.”<sup>228</sup>*

#### **4.5.1 Statement Taking Process**

Statement taking was the pre-hearing phase of TJRC which began on September, 2010 and ended three months later. It was a process that was expected to be open, transparent and all involving. This together with investigations, research and other data collection tools helped to identify systemic atrocities, process and prepare ‘window’ cases for the hearings. By January 2011, the Commission had collected 29,900 statements and received 300 memoranda nationally.<sup>229</sup>

Statement takers were quite few and did not therefore reach out to all the affected areas in the country. There are many places, violations and crimes which were not covered in statement taking. There are cases whereby women and children did not participate effectively because it was assumed that if a husband or father is involved, he would represent issues affecting the entire family. The Commission did not have adequate mechanisms for witness protection and psycho-social support to victims during this process. Its dependence on the provincial administration is seen to have demobilized victims or publics who still viewed it as part of instruments and purveyors of impunity in Kenya. Statement taking was also a rushed process. Given the short period against the gaps and big number of statements collected, it is not possible to explain or justify how the Commission managed to strike a balance between the quality and quantity of the same.

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<sup>228</sup> TJRC Report, Volume I, Chapter 4: Challenges in the Execution of Mandate, 151

<sup>229</sup> TJRC Report, Volume I, Chapter 3: Methodology and Process, pp. 83 – 87.



#### 4.5.2 Public Hearings

The TJR Act provided that the proceedings of the commission shall be public but the Commission may direct the proceedings to be held privately where; The security of perpetrators, victims or witnesses is threatened; It would be in the interest of justice or there is a likelihood that harm may ensue to any person as a result of proceedings being open to the public; and a victim, perpetrator or witness may apply to the Commission for proceedings to be held in *camera*. Where the Commission directed the proceedings to be private the information relating to those proceedings was also private. The Act has provisions ensuring that the dignity of the victims is up-held, for example, the victims' privacy and safety and that of their families shall be protected. Victims shall also communicate in a language of their choice.<sup>230</sup> Despite these provisions, the measures included in the Act were insufficient to take into account the needs and rights of victims. The experiences of other truth commissions such as the Sierra Leonean and the South African Truth Commissions show that victims and witnesses, especially women, fear participating in the process that would put them at risk of reprisal, and need the truth commission to provide them with comprehensive and effective protection.<sup>231</sup> The TJRC had a vaguely worded power to ensure that "appropriate measures" were taken for the victims' safety and *in camera* hearings. The Act did not include any provisions establishing comprehensive, long-term and effective protection measures for victims and witnesses.

Pursuant to Section 5 of the Act constituting it, the Commission failed to among others: provide repentant perpetrators or participants in gross human rights violations with a forum to confess their actions as a way of bringing reconciliation; provide victims, perpetrators and the public with a platform

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<sup>230</sup> Section 25 of the TJRC Act No. 6 of 2008

<sup>231</sup> Dumbuya L. (2003), "The Truth and Reconciliation Commission in Post Conflict Sierra Leone;" A dissertation submitted to faculty of Law, University of Pretoria. Available at [www.up.ac.za](http://www.up.ac.za), 37[accessed on August 15, 2014].

for non-retributive truth telling; and facilitate the granting of conditional amnesty and providing victims of human rights abuses and corruption with a forum to be heard and restore their dignity. The Commission failed to create the expected platforms for both the victims and suspected perpetrators to directly engage each other for non-retributive truth telling. Thus, many perpetrators failed to confess and show remorse for their egregious actions.

#### **4.6 Findings: Final Report of the TJRC**

Section 48 of the TJR Act provides that, the Commission shall submit a report of its work to the President at the end of its operations. The report was to be made public within fourteen (14) days before being tabled in Parliament. The report shall summarize the findings of the Commission and make recommendations concerning reforms which could be legal, political, or administrative. The report shall also recommend prosecution and reparations for the victims. In addition the report shall make recommendations on the mechanism and framework for the implementation of its recommendations.<sup>232</sup>

The TJRC was the first truth commission to have powers of providing a clear framework of ensuring the implementation of its report. The TJR Act at sections 48 to 50 includes provisions to guarantee the implementation of the Commission's recommendations. Such provisions are particularly important in light of the experience of previous judicial and non-judicial commissions of inquiry in Kenya, whose recommendations have not been implemented. Therefore, efforts to address this broader problem of ensuring the implementation of the Commission's recommendations were laudable.

The final report of the TJRC was not handed over to the president until May 21, 2013; three weeks after its operations had officially ended. Allegedly, the report had been altered before it was publicly presented, raising issues about the integrity of both the report and the conduct of some commissioners.

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<sup>232</sup> Section 48 of the TJR Act No. 6 of 2008.

In addition, the National Assembly recently amended the Truth, Justice and Reconciliation Act, which created the TJRC, to give itself powers to “consider” the report and oversee the implementation of the recommendations it contains.<sup>233</sup> It would be regrettable if the National Assembly were to alter the report in any way—as well as a breach of the Constitution and the TJR Act, a violation of the integrity of the report, and a unique occurrence in the history of truth commissions.<sup>234</sup> Yet, given the potentially incriminatory information contained in the report, it is not surprising that some powerful actors would want to tamper with the report or have it rejected entirely.

The TJRC Report is in some ways a fair reflection of the mandate and the commission itself. It has many imperfections but also some positive points. It stands as an official record of the state’s complicity in serial human rights violations, a state whose institutions are frequently exposed as corrupt and in callous disregard of the fundamental human rights of citizens. Given this, it is incumbent on all of those engaged in promoting the truth and the rule of law in Kenya to read it carefully. There are many lessons to be learned from Kenya’s difficult experience of truth seeking. Among the commission’s positive achievements is the treatment of children as both a special group of victims and as participants in the TJRC process. The commission also paid specific attention to sexual and gender-based violence and its impact on women, making some excellent analysis of particularly notorious violations of human rights.

Direct testimony and public hearings also added a human dimension to accounts of violations.

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<sup>233</sup> “No.6 of 2008,” Kenya Law (2008), <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TruthJusticeandReconciliationCommissionAct.pdf>, (Accessed on August 15, 2014), “Kenya Gazette Supplement No. 178 (Acts No. 44),” Kenya Law (2013) [http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2013/TruthJusticeandReconciliation\\_Amendment\\_Act2013.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2013/TruthJusticeandReconciliation_Amendment_Act2013.pdf), (Accessed on August 15, 2014), The act of “considering the report” is now being taken to mean that the National Assembly will have the power to amend the report and/or alter its contents.

<sup>234</sup> National Assembly debate on its role in considering the report and amending it, [www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-5th-december-2013-at-2.30pm?searchterm=TJRC,98-100](http://www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-5th-december-2013-at-2.30pm?searchterm=TJRC,98-100), [www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-28th-november-2013-at-9.00a.m](http://www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-28th-november-2013-at-9.00a.m) (Accessed on August 15, 2014)

The effectiveness of the TJRC’s outreach operation has been called into question. One poll indicated that 67% of Kenyans did not know about the contents of the TJRC Report or the controversy surrounding the alleged alteration of the land chapter. Nevertheless a majority of Kenyans (approximately 54%) support the release of the report and call for the implementation of the recommendations.<sup>235</sup> While it is difficult to extrapolate too much from limited polling numbers conducted using different methods, the lack of outreach may be understandable given the commission’s over-ambitious mandate, which seemed to have given little thought to the body’s capability to investigate and address such a lengthy period of time (nearly 45 years) with relatively few resources under conditions of high political tension.

#### **4.6.1 Controversy Regarding the Land Chapter**

Soon after the commission handed over its Final Report, three international commissioners—the late Ambassador Berhanu Dinka, Justice Gertrude Chawatama, and Prof. Ronald Slye—protested in an unofficial dissenting opinion, charging that government officials from the Office of the President had meddled in the commission’s affairs.<sup>236</sup> They stated that the Kenyan commissioners had been coerced into giving an advance copy to the president and were required to alter paragraphs in Volume IIB, the Land Chapter, to diminish allegations of illegal conduct against former President Jomo Kenyatta and his family. Because the alleged alterations took place after the legal tenure of the TJRC had ended and without the consent of all of the commissioners, they breached the TJRC mandate and eroded the

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<sup>235</sup> Ipsos Synovate Kenya, “Political Barometer Survey” (7/10/2013), [www.ipsos.co.ke/spr/downloads/downloads.php?dir=polls&file=Ipsos%20Synovate%20Polls SPEC Barometer July 2013.pdf](http://www.ipsos.co.ke/spr/downloads/downloads.php?dir=polls&file=Ipsos%20Synovate%20Polls%20SPEC%20Barometer%20July%202013.pdf), (Accessed on August 15, 2014), South Consulting Political context for Implementation of the TJRC Report presented at ICTJ’s Open Forum on the Implementation of the TJRC Report, July 5, 2013, Serena Hotel.

<sup>236</sup> Nzau Musau, “How TJRC Land Chapter was Censored,” *The Star*, June 4, 2013, [www.the-star.co.ke/news/article-122777/how-tjrcland-chapter-was-censored](http://www.the-star.co.ke/news/article-122777/how-tjrcland-chapter-was-censored), (Accessed on August 15, 2014)

credibility of the full report.<sup>237</sup> The Kenyan commissioners denied that they were forced to alter parts of the report. They explained that such alterations were undertaken in the day-to-day writing of the report, a position not shared by the international commissioners. Land has been a sensitive and thorny issue in Kenyan politics and was also seen as a cause of ethnic tensions in the country. Therefore, the suspicion that the findings on land (specifically illegal and irregular acquisition of land) could have been altered diminishes the credibility of the report either in part or in its entirety.

#### **4.6.2 Assignment of Individual Responsibility**

The mandate of the TJRC empowered it to name those responsible for the commission of the violations and abuses with an aim of prosecution.<sup>238</sup> This is laudable as it grants the named individuals an opportunity to acknowledge their deeds and ask for forgiveness. Acknowledgement implies that the perpetrators have admitted their misdeeds and have recognized that they were wrong.<sup>239</sup> Citizens also have the right to know the truth. Those who are meant to forgive must know what and whom they are forgiving. Truth has precedence over punishment. Punishment can be negotiated. The truth cannot. “There can be no reconciliation without the truth”.<sup>240</sup> This was the approach adopted by the South Africa Commission. The truth promotes forgiveness which enables reconciliation thus healing of the nation.

The report names senior military personnel as being involved in gross human rights violations and in some instances rank-and-file officers who were involved in atrocities. Direct identification of an alleged perpetrator is an exception, rather than a rule. The commission made a good attempt to uncover the

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<sup>237</sup> International Commission of Jurists Kenya, “KTJN press release on the TJRC report and dissenting opinion,” June 13, 2013, [www.icj-kenya.org/index.php/media-centre/press-releases/20-press-statement/532-ktjn-press-release-on-the-tjrc-report-and-dissenting-opinion](http://www.icj-kenya.org/index.php/media-centre/press-releases/20-press-statement/532-ktjn-press-release-on-the-tjrc-report-and-dissenting-opinion), (Accessed on August 15, 2014)

<sup>238</sup> Sec. 5 of the TJRC Act No. 6 of 2008.

<sup>239</sup> Neier A. (1990), *What should be done about the Guilty?* The New York Rev of Books. 31

<sup>240</sup> Werle G. (1996), “Without Truth, No Reconciliation: The South African *Rechtsstaat* and the Apartheid Past,” 29 *Verfassung und Recht in Uebersee*, 58-72.

command structure of military and police formations accused of various atrocities, yet it failed to consistently uncover the entire command structure during a number of conflicts and atrocities that are documented in the report. In fact, during a debate in the National Assembly on amendments to the TJRC Act, an adversely mentioned person, Hon. Joseph Nkaissery, faulted the commission for naming him as a possible perpetrator in the Lotirir Massacre without naming his superiors.<sup>241</sup> Nkaissery alludes to the fact that because he could not have undertaken the operation on his own, his superiors should have been named as well.<sup>242</sup> This begs the question of truth as presented in the report. Many would just like Hon. Nkaissery did, question the selective naming of some people and deliberately leaving out names of others. Truth cannot be relative. It has to be the whole truth or nothing.

As expected and true to the Kenyan culture, instead of acknowledging their wrongdoings and asking for forgiveness, many of those adversely mentioned in the report have sought to clear their names by having areas of the report where they are adversely mentioned expunged from the report. Others are seeking orders from the Court to quash the TJRC Report entirely. Most of the cases seek orders from the High Court to expunge aspects of the report, in particular where petitioners have been adversely mentioned, to bar the Attorney General from tabling the report before Parliament, or to block implementation all together.<sup>243</sup>

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<sup>241</sup> TJRC Report, Volume IV, Chapter 3 Reparations Framework, 131, and Volume IIA, Chapter 4, Unlawful Killings and Enforced Disappearances, 427.

<sup>242</sup> Hon. Major General Nkaissery, National Assembly, Parliamentary Debate, November 28, 2013, [www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-28th-november-2013-at-9.00a.m](http://www.parliament.go.ke/plone/national-assembly/business/hansard/thursday-28th-november-2013-at-9.00a.m), (Accessed on August 15, 1985)

<sup>243</sup> Gideon Keter and Maryanne Karanu, "OP accused of blocking TJRC report," *The Star*, June 22, 2009, [www.the-star.co.ke/news/article-125256/op-accused-blocking-tjrc-report](http://www.the-star.co.ke/news/article-125256/op-accused-blocking-tjrc-report), The following cases have been filed against the Report:

- a) Njenga Mwangi & Anor v TJRC & Or (Commission Petition Number 286 of 2013)
- b) Kiriro wa Ngugi & or v TJRC & Or (Miscellaneous Civil Application No.192 of 2013)

### 4.6.3 Truth, Justice and Reconciliation

The commission was mandated to “inquire into the causes of ethnic tensions and make recommendations on the promotion of healing, reconciliation and co-existence among ethnic communities.”<sup>244</sup> The report derives much of its understanding from a wide variety of historical injustices committed during the period under investigation, which it combines with a discussion of ethnicity and ethnic tension, national unity, and reconciliation. This report attempts to document causes and effects of ethnic tensions in Kenya including their drivers and root causes, and the government policies that have undermined national cohesion and unity (for example, stereotyping and excluding certain groups from the political affairs of the state). It seeks to make a causal link between heightened ethnicity and politics, land, and violence.

The commission found that, during the Colonial period, the British Colonial government pursued a policy of “divide and rule” in order to consolidate their hold on the country and lessen the possibility of the African population resisting colonial rule. Second, it created ethnically defined administrative boundaries and set them with little consideration for historical interethnic interactions and relations. Third, the Colonial Government focused on developing infrastructure and social services in “productive” areas of the country at the expense of the rest of the country.

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- c) Kiriro wa Ngugi & or v TJRC & Or (Miscellaneous Civil Case Number 213 of 2013, Judicial Review)
  - d) George Ngero Gichuru & 23 Others v TJRC (Constitutional Petition No.29 of 2013, Nakuru)
  - e) Hon Basil Criticos v AG & Or (Petition Civil Suit No 576 of 2012, High Court at Nairobi)
  - f) Ngengi Muigai v TJRC & Anor (Miscellaneous Civil Application Number 277 of 2013, Nairobi)
  - g) Beth Wambui Mugo v TJRC & Anor ( Judicial Review No. 284 of 2013, Nairobi)

<sup>244</sup> Section 6 (s) of the TJR Act, “No. 6 of 2008,”

According to the TJRC Report, colonial land policies resulted in displacement and inequality that remained largely unaddressed in the policies and practices of independent Kenya.<sup>245</sup> The ruling elite in independent Kenya did not have the political will or commitment to create a truly democratic and prosperous Kenya for all of its citizens. The report identifies the causes of ethnicity, which include Colonialism and policies in Kenya that continue to have a far-reaching effect on how communities interact. These include administrative, economic, and land policies that have bred a sense of division and hatred among Kenyan communities. It also identifies successive regimes as not only maintaining policies that ingrained ethnic division, but exploiting them, further resulting in “insider-outsider” dynamics. The report asserts that ethnic tension and violence occur when communities assert a superior claim over a territory at the expense of or to the exclusion of others.<sup>246</sup> Such superior claims are based on the assumption that ownership or occupation at some point in the past created an exclusive claim for such ownership or occupation in the present. Such exclusive claims to territory inevitably create classes of ‘insiders’ and ‘outsiders’. This perception of people as outsiders as opposed to fellow citizens often leads to increased tension based on ethnicity which, in turn, creates the potential for ethnic violence. For a long time, this has been the issue in the greater part of the Rift Valley.

For decades, Kenya has remained a nation in which communities stand divided along ethnic and regional lines suspicious and distrustful of one another. Over the decades feelings of inter-communities distrust and hatred have festered mainly because a myriad of issues which are at the core of nation building have largely remained unresolved. These issues include conflicts over land, inequality and

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<sup>245</sup> Report of the Truth, Justice and Reconciliation Commission (2013), *Vol. IIB*, Chapter Two: Land and Conflict, para. 103

<sup>246</sup> Report of the Truth, Justice and Reconciliation Commission (2013), *Vol. IIB*, Chapter Two: Land and Conflict, paras. 207 – 211.



regional imbalances, and impunity combined with a lack of transparency and accountability. These issues have eroded a sense of belonging, nationhood, and public trust in political and governance institutions. Since independence, successive governments have employed silence, denial and selective amnesia whenever individuals and agencies have raised the need to address these fundamental issues. Painful memories have been passed from one generation to another and as a consequence, present generations continue to hold grudges for violations and historical injustices meted against their forefathers and mothers. Until now, the scale and impact of human rights violations and historical injustices have neither been fully acknowledged nor sufficiently addressed.

In its work, the Commission recognized that meaningful reconciliation is not an event, but rather a long process. At the individual level, the decision to reconcile is a personal one, aimed at setting the stage and establishing the basis for the beginning of a reconciliation process.<sup>247</sup> Accordingly, the Commission worked towards ensuring that its activities in the course of its life and the result of its work would substantially contribute to the process of reconciliation. The Commission conducted reconciliation workshops across the country. It also conducted Workshops on Trauma Healing and Strategy Formulation in selected places in the country.

On the one hand, the Commission found that the views of victims on reconciliation are varied. There were those who willingly forgave their perpetrators and did not even need to meet them. There were those who simply wanted to know why atrocities were committed against them. But there were also those who were unwilling to forgive and wanted to see their perpetrators prosecuted for the wrongs they

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<sup>247</sup> Report of the Truth, Justice and Reconciliation Commission (2013), *Vol. III*, Chapter Three: Healing and Reconciliation, para. 6

committed.<sup>248</sup> On the other hand, adversely mentioned persons, were largely unwilling to acknowledge any responsibility for events that resulted in unspeakable atrocities. Acknowledgement of wrongdoing and an expression of remorse are vital ingredients in the road to reconciliation. The refusal by adversely mentioned persons to acknowledge and own up to their actions point to a nation that is very far from being reconciled. The situation is made worse when the perceived perpetrators of untold human rights violations go a step farther to challenge the validity of the information as presented by the victims. By all means, a victim is both an eye and a key witness when it comes to a violation. We cannot rule out distortions in the information given but at the same time they could not all have been wrong.

To achieve healing and restorative truth, there must be a consideration of the personal or narrative truth (personal versions of truth by witnesses, including victims and perpetrators), the factual or forensic truth (the product of investigations, verification and corroboration), and the social truth (the product of dialogue, interaction, discussion and debate. All versions must corroborate to ascertain a thread. On the one hand, a relationship exists between truth and reconciliation. While closure for victims and the ability to address past violations and prevent repetition begins with knowing the truth about past events, truth-telling may open wounds in ways that slow or impede reconciliation and healing especially at a personal level. The challenge is to engage with both without negating either. The dignity of the victim must be taken into consideration. On the other hand, there exists both conceptual and practical links between reconciliation and the notion of justice. Justice includes redistributive, retributive and reparative justice. Reconciliation is fostered when those who have suffered are restored and repaired, those who were

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<sup>248</sup> Report of the Truth, Justice and Reconciliation Commission (2013), *Vol. III*, Chapter Three: Healing and Reconciliation, paras 22 – 32.

previously excluded are included in meaningful ways, and those in dire want as a result of marginalization are materially enabled to move forward. To achieve reconciliation emphasis should be put on facilitating dialogue and creating space for constructive exchange by and around individuals, communities and institutions.

For Kenya to foster reconciliation and healing, it is essential that the truth of the past be officially established. As Werle observes, there can be no reconciliation without truth.<sup>249</sup> The TJRC was fundamental in creating a proper record of the past while stating this truth which has been elusive in Kenya for a long time. This in itself is a form of reparation to the victims and survivors of human rights violations who have desired to know the official truth for a long time. Kenyans should analyze and use the findings and recommendations of TJRC to demand new and more effective mechanisms for truth telling, if at all justice and reconciliation is to be attained. It is the right of the citizen to know the truth. Normally, the citizenry know what abuses happened and who did what, thus the TJRC would have served as a way of acknowledging the evasive truth officially. The TJRC process should have served as an avenue of healing and reconciliation which is needed in a fractured Kenyan society. The government and civil society should create a conducive environment for the perpetrators to show remorse and seek forgiveness in public for purposes of achieving reconciliation. Perpetrators who fail this test should face the full force of the law. The TJRC report should also be used together with other official and unofficial sources – like findings from other commissions of inquiry – as the basis for furthering the agenda for truth, justice and reconciliation in Kenya.

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<sup>249</sup> Werle G. (1996). “Without Truth, No Reconciliation: The South African *Rechtsstaat* and the Apartheid Past,” 29 *Verfassung und Recht in Uebersee*, 72.

The commission makes no tangible, actionable, or concrete recommendations on the issue of ethnicity in Kenya or how to deal with ethnic tension. Some probable recommendations for resolving ethnic tensions implied in the TJRC Report, and explicit in the new constitution,<sup>250</sup> include ethnic inclusion in public offices at the national and county level, fostering civic engagement and dialogue among ethnic groups at the national and county level, and equitable distribution of resources among various regions. The presidency, county government, political parties, the Public Service, and Parliament are specific organs of the state identified by the constitution as capable of playing a key role in managing ethnic tension and fostering national cohesion. The national values and principles of governance in the Constitution provide the necessary legislative and social framework to embark on social cohesion and reconciliation of the Kenyan people.<sup>251</sup>

#### **4.7 Implementation of the TJRC Final Recommendations**

The Final Report of the TJRC recommends that legislation be passed to establish a special implementation committee (Committee for the Implementation of the Recommendations of the Truth, Justice and Reconciliation Commission Act) to work with relevant stakeholders in order to facilitate and monitor implementation of the recommendations and administer a reparations fund. The proposal is based on the challenges faced by other truth commissions in seeing their findings implemented. The committee would also play a limited role in implementing parts of the report, more specifically, the administration of the reparations fund; mapping, registering, and processing victim claims using the TJRC database; and facilitating recommendations on memorialization. However, the description of the

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<sup>250</sup> NCIC Study on Ethnic composition of Public Service in Kenya, Volume III, Appendix 1, Article 232 on principles of public service, Article 201 on principles of public finance which includes equitable development and Article 131 on the role of the President in fostering national cohesion, Article 174 on the role of devolution in fostering cohesion, Article 91 and the role of political parties in promoting cohesion.

<sup>251</sup> *Constitution of Kenya 2010*, Article 10.

mechanism does not differentiate sufficiently between the reparation process and other processes, such as memorialization, preservation of the information gathered, raising public awareness, and managing or monitoring funds. These are very different complex functions that would benefit from a clearly defined structure. It is now more than one year since the TJRC handed in its final report to the President, yet there are no plans or attempts to implement its recommendation let alone make the report public.

#### **4.8 Challenges Faced by the TJRC**

Like many other truth commissions before it, the Kenyan TJRC had its share of challenges. In their final report, the commission alludes that most of the challenges faced were closely linked to lack of political will on the part of the government and state officials towards the work of the commission. The challenges faced by commission started right with the appointment of commissioners. Many felt the chairman was not fit and suited to head such a commission. These allegations would persist stalling the commission for some time. There were also issues of conflict of interest on the part of the chairman as well as financial crisis faced by the commission. Bottom-line the lack of political will would see the commission struggling in its operations right from day one. The allegations surrounding the chairman would see the commission lose its vice-chairperson after she resigned and would consequently see the commission operating with only seven commissioners after the chairman bowed to pressure and stepped aside.

##### **4.8.1 Credibility of the Commission's Chairman**

Protest against the TJRC Chairman erupted even before the Commissioners were sworn in. The Chairman was even constrained to go on television before being sworn in to defend himself of the accusations. The general mood in the country was that no sensible Kenyan was likely to believe in the truth, justice or reconciliation process delivered by such a Truth Commission headed by a retired public

officer, whose career apex coincided with the height of gross human rights violations, and who spent part of his career publicly denying that such violations were occurring. The Kenyan Human Rights Commission, a body charged with spearheading human rights, threatened to call for mass action if the TJRC Chairman, Ambassador Bethuel Kiplagat, would not resign for allegedly being answerable to historical injustices.<sup>252</sup> The first sessions of the Truth Commission were disrupted on two occasions by Civil Society Organizations, NGO's and Human Rights activists.<sup>253</sup> Victims also vowed not to appear before the Truth Commission as it was presently constituted.<sup>254</sup> Others even went to court to seek orders to bar Kiplagat from carrying out the affairs of the Commission.

Criticism of Kiplagat's aptitude for the position included calls to step down, the request for court orders barring him from entering the commission's offices, and allegations and counter-allegations leading to considerable embarrassment for the TJRC. The International Centre for Transitional Justice (ICTJ) asked Kiplagat to resign over what it called, "his endangering the TJRC's ability to deliver truth, justice and accountability for past injustices and gross human rights violations."<sup>255</sup> The Law Society of Kenya also asked Mr. Kiplagat to resign saying that the resignation was about his moral integrity and dignity.<sup>256</sup> Furthermore, former chairpersons and commissioners of truth commissions from around the world, also

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<sup>252</sup> Ongeyo J. (2010), "TJRC Faces Confidence Crisis" *The Standard*, 25 February 2010, available at [www.standardmedia.co.ke](http://www.standardmedia.co.ke) [accessed on August 15, 2014].

<sup>253</sup> Turay (2010). Turay M. 'Civil Activists Condemn TJRC Appointee', available at [www.thepatriotic.vanguard.com](http://www.thepatriotic.vanguard.com) [accessed on August 15, 2014].

<sup>254</sup> Ongeyo J. "TJRC Faces Confidence Crisis" *The Standard*, 25 February 2010, available at [www.standardmedia.co.ke](http://www.standardmedia.co.ke) [accessed last on August 15, 2014].

<sup>255</sup> Mutua M. and P. Orengo, (2010), "House Summons TJRC over Crisis", *The Standard*, 19 February 2010, available at [www.standardmedia.co.ke](http://www.standardmedia.co.ke) [accessed on August 15, 2014].

<sup>256</sup> Ngirahu J. (2010), "Kiplagat's Time at the Commission is up, says LSK", *The Daily Nation*, available at [www.nation.co.ke](http://www.nation.co.ke), [accessed on August 15, 2014].

called upon Mr. Kiplagat, to step down from his positions as Chairperson and Commissioner of the TJRC saying that they were deeply troubled by the serious allegations of bias and misconduct made against the Chairperson. These included Archbishop Desmond Tutu, former chairperson of the SATRC; Bishop Joseph Christian Humper, former chairperson of the Truth and Reconciliation Commission for Sierra Leone; and Salomon Lerner Febres, former chairperson of the Peruvian Truth and Reconciliation Commission.<sup>257</sup>

The Civil Society Organizations (CSOs) even filed a case in court seeking for orders of prohibition to prohibit Bethuel Kiplagat from running the affairs of TJRC and from participating in activities of TJRC and for orders of certiorari to quash the oath of office of Chairman and Commissioner Kiplagat in August 2009.<sup>258</sup> Subsequently, the Justice and Constitutional Affairs Minister under whose portfolio the TJRC fell asked Parliament to disband the TJRC. The Minister expressed concerns that a year since its inception, the TJRC had not covered any ground and had thus failed in executing its mandate. Shortly thereafter, the vice-chairperson of the commission resigned, stating that her stay was becoming untenable.<sup>259</sup> Despite all the criticisms and allegations leveled against him, Kiplagat stipulated that he would only quit if the due legal process was followed.<sup>260</sup>

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<sup>257</sup> International Center for Policy and Conflict: Monitoring Report of the Truth Justice and Reconciliation Commission, “A Case of Concealing Truth to Reward Impunity” 2011

<sup>258</sup> Republic of Kenya v TJRC & Others, Ex-parte Augustine Njeru Kathangu and Others; Miscellaneous Application No. 470 of 2009.

<sup>259</sup> Kariuki A. (2010). “Murungi leaves Kenya Truth Body,” *The Standard*, 19 April 2010, available at [www.standardmedia.co.ke](http://www.standardmedia.co.ke) [accessed on August 15, 2014].

<sup>260</sup> Leftie P. and Namunane B. (2010). “Kiplagat now an isolated man”, *The Daily Nation*, 13 April 2010, available at [www.dailynation.co.ke](http://www.dailynation.co.ke) [accessed on August 15, 2014].

#### **4.8.2 Conflict of Interest on the Part of the Chairman**

Questions were raised about the Chairman's ability to lead the TJRC since he was in government when a number of atrocities that the commission was supposed to investigate were committed. Allegations of bias and misconduct were made against him. The allegations about his role in the former President Moi government generated a widely-held perception that he was in a conflict of interest situation and that he was unable to bring an impartial mind to bear on his important duties as TJRC Chairperson. A statutory Commission of Inquiry as well as a Parliamentary Committee of Inquiry into the murder of Dr. Robert Ouko, a foreign affairs minister, made disturbing findings against Kiplagat on matters that fell squarely within the TJRC's mandate. The Report of the Commission of Inquiry into Illegal and Irregular Allocation of Public Land (released in 2004) made references to instances of the illegal acquisition of public land on the part of Kiplagat. The Report of the Parliamentary Committee of Inquiry into the Wagalla Massacre included a report from an investigation team which concluded that Mr. Kiplagat was untruthful in his submissions.<sup>261</sup> While Mr. Kiplagat disputed the references to him in these reports, they nonetheless had a direct and serious impact on public perceptions in relation to his suitability to hold the high office in the Commission.

As a result of these allegations, all nine Commissioners, including Ambassador Kiplagat, wrote to the Minister of Justice on 12<sup>th</sup> April 2010 asking that a formal request be sent to the Chief Justice to establish a tribunal pursuant to Section 17 of the Act to enquire into the conflicts of interest raised by the presence of Ambassador Kiplagat in the Commission and look into his suitability as a Chairperson. Following advice from the Ministry of Justice and Constitutional Affairs on 15<sup>th</sup> April 2010, all eight

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<sup>261</sup> Minya M. and Kalekye M. (2010) "The Kenya Human Rights Commission has issued a 7 day ultimatum to the truth, justice and reconciliation commission to quit or face mass action", available at [www.kbc.co.ke](http://www.kbc.co.ke) [accessed on August 15, 2014].



Commissioners, with the express consent and approval of Kiplagat, filed a petition with the Chief Justice requesting a tribunal to be formed under Section 17 to determine whether Ambassador Kiplagat had engaged in ‘misbehaviour or misconduct’ under Section 17 (1) (a) of the Act. This amounted to bad faith on his part because he brought the TJRC to a standstill at one point. While it is impossible for the TJRC to please everyone, the language of reconciliation demands that the TJRC’s office-holders be held up to the same standards that the people it is created to serve deem appropriate.<sup>262</sup> Kiplagat bowed to public pressure and stepped aside in November 2010. He later went to court and challenged the capacity of the tribunal to investigate him. Through a court ruling, he was cleared of any wrong doing in March 2012, a verdict that the other commissioners vehemently opposed.

Ambassador Bethuel Kiplagat finally found his way back as chairman of the Commission after newly appointed Justice Minister, Hon. Eugene Wamalwa brokered a deal with commissioners. In this deal, an agreement was reached in principle to involve Ambassador Kiplagat in the remaining work of the Commission in a way that preserved the integrity of the process. In particular it was agreed that: Kiplagat would not be involved in the writing of the final report (in part because he had been absent during the period when the vast majority of the work of the Commission was done); and he would be allowed to review the final report at the same time and in the same manner as the other Commissioners, except that Kiplagat would not be allowed to review those sections of the report in which he had a conflict of interest.<sup>263</sup> This move was questionable to members of the public as it was a crucial time

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<sup>262</sup> Bosire L. (2010), “When Truth Seeking Efforts Face Challenges of Credibility” available at [www.africanarguments.org](http://www.africanarguments.org) [accessed August 15, 2014].

<sup>263</sup> Report of the Truth, Justice and Reconciliation Commission (2013), *Vol. I*, Chapter Four: Challenges in the Execution of Mandate, paras. 70 – 72.

when the commission was writing its report and it was perceived to be a move to tamper with the findings. This indeed was a major impediment to scoring the set objectives and his return was seen by many as evidence of the wider scheme by the forces of impunity to scuttle the transitional justice agenda in Kenya.

#### **4.8.3 Lack of Political Will**

For a truth seeking to be successful in any state the political class must be in full support of the process. This was especially imperative in Kenya where politics had contributed to ethnic tensions to start with. However, throughout its operations, the TJRC complained of being frustrated from time to time in their efforts to accomplish their mandate. Pundits have it that the merchants of impunity were busy frustrating the commission to ensure that the truth seeking process would not see the light of the day. The lack of sufficient political will on the part of the state to give the Commission the support it needed and to commit to pursue the objectives for which the Commission was established was a great stumbling block.

The state's lack of political will to support the work of the Commission was manifested in many diverse ways. Firstly, in spite of the express and mandatory provisions of the TJR Act, the President failed to fill the position of Commissioner Kaari Betty Murungi when it fell vacant in April 2010. This forced the Commission to operate with eight Commissioners, and later when Ambassador Kiplagat stepped aside, with only seven commissioners.<sup>264</sup> Secondly, the state failed to support adequately the Commission's reconciliation work. The Commission's mandate of promoting national unity and reconciliation demanded strong political support. By their stature and position in society, political leaders, especially

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<sup>264</sup> Report of the Truth, Justice and Reconciliation Commission (2013), *Vol. I*, Chapter Four: Challenges in the Execution of Mandate, paras. 107

the President and the Prime Minister, had key roles to play in steering the nation towards national unity and reconciliation. However, their support for this particular work was *ad hoc* and inconsistent. Only a few political leaders publicly spoke of national unity and reconciliation within the framework of the TJRC Act. Political leaders, more often than not, took steps that undermined national unity and reconciliation. Many other political leaders through their inaction and lack of support contributed to this atmosphere and thus lessened the ability of the Commission to perform its functions. Some made inflammatory statements that spurred ethnic tension.

This lack of political will on the part of the political elite may partly have stemmed from the absence of a clean break with the past. It could also be attributed to the fact that many state and public officials who served under previous repressive and corrupt regimes were also serving in the Coalition Government. They had either participated in or oversaw acts of repression and corruption during periods that were squarely within the mandate of the Commission. Many of these individuals had an interest in maintaining the *status quo* and a complete break with the past could potentially or actually injure their vested interests.

#### **4.9 Conclusion**

The findings from the study lead to the rejection of the first and third hypotheses and a confirmation of the second hypothesis. The research concludes that as much as other organs and institutions like the NCIC have helped in the realization of reconciliation in the country, the TJRC equally played an important role in the realization of the same. Reconciliation is not and cannot be a once off event. It is a process that the TJRC laid the foundation for. The difficulties surrounding the TJRC process and its final report reflect the reluctance of the political leadership to account for the country's dark past.

Political neglect, the selfish and irresponsible behavior of its chairperson, and financial troubles compounded the challenges inherent in implementing an unwieldy and over-ambitious legal mandate.

The establishment of the TJRC was supposed to provide the country and the people with an opportunity to come to terms with a past that was haunted and filled with stories of human rights abuses, violations among other atrocities. Unfortunately some of these were sponsored by the state and visited upon its own citizens. As such, not everyone was happy and supported the idea of digging out the truth from the past. As the report notes, the road to the formation of a TJRC was long and marked with numerous false starts. Many would have wanted the status quo to remain.

The participation of witnesses and victims in the truth seeking process benefits victims in their own individual healing and contributes to the process of personal reconciliation as well as forgiveness. However, caution must be exercised with regard to forgiveness. Given that victims have experienced unimaginable pain and suffering, it is unreasonable to put the burden of forgiveness upon them in an explicit way. This process is deeply personal and must be voluntary. Where a community decides to engage in forgiveness, it is important that access to psycho-social support services is available to reinforce the longevity of reconciliation. For the nation to be reconciled, the reconciliation process must include personal reconciliation. There is no greater healing than a personal process where one comes to terms with the events of the past and willingly chooses to move forward in a peaceful manner.

More than a year after the report was handed over to the president and no one seems to be in a hurry to implement the recommendations or even to make it public. A majority of Kenyans are yet to get acquainted with the contents of the report. This means that even if the National Assembly was to alter

the report few would know. This will negate the entire process of seeking the truth in the first place. This precludes any efforts towards reconciliation from bearing fruit. This is a worrying trend because if as a nation we are not ready to deal and break away from the past then it will most likely come to haunt us either in the present or in the future. Some critics attribute some tensions experienced in Northern Kenya and other parts of the country to the Commission's work. However, this is just an indication that when we fail to acknowledge our wrongdoings, we are just fuelling a vicious cycle of violence.

Although the TJRC worked under very hard and very trying conditions, unfortunately, it failed to accomplish the overall mandate to promote peace, justice, national unity, healing, and reconciliation among Kenyans. The final make up of a truth Commission affects the appearance and reality of its independence and also that of the person serving as Commission's president because he often becomes the public face of the Commission.<sup>265</sup> The refusal by the TJRC Chairman to resign greatly damaged the reputation of the commission. Many felt that his presence in the commission hampered it from executing its mandate fully. Kiplagat's performance throughout long parts of the commission's mandate turned the process into a farce. Indeed, one part of the TJRC Report reads:

*“When the Commissioners paid a courtesy visit to the Kenya Defence Forces (KDF) a presentation [on the Wagalla Massacre] had been prepared for us. Ambassador Bethuel Kiplagat (the TJRC Chairman), then left the room with the officer in charge to have a private conversation, after which the presentation was cancelled.”<sup>266</sup>*

There are those who feel that the TJRC was established not to promote healing and reconciliation in Kenya but instead to shield perpetrators of the PEV and other human rights violations from prosecution. Therefore, to a number of Kenyans the TJRC was just another vehicle for the furtherance of impunity.

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<sup>265</sup> Tomuschat C. (2001) “Clarification Commission in Guatemala”, 23 *Human Rights Quarterly*, 226 - 258.

<sup>266</sup> TJRC Report, Volume IIA, 317, [www.tjrckeny.org/images/documents/TJRC\\_report\\_Volume\\_2A.pdf](http://www.tjrckeny.org/images/documents/TJRC_report_Volume_2A.pdf) (Accessed August 15, 2014)

Their fears were confirmed by the Cabinet's decision shortly after the formation of the TJRC. Shortly after the members of the Commission were appointed, the Cabinet issued a statement indicating that instead of establishing a special tribunal to try those who were allegedly responsible for the 2007/2008 Post Election Violence, it would be seeking an expansion of the Commission's to include dealing with these cases. This decision was highly criticized by a broad sector of Kenyan society and would later have an impact on the work of the Commission although the decision never saw the light of day. Firstly, the decision created the impression that the government was inclined to using the Commission as a shield against those who were alleged to bear responsibility for the PEV. Secondly, a section of CSOs and donors resolved not to work with or fund the Commission until the Cabinet's decision was reversed. Kenya's adoption of the Truth, Justice and Reconciliation Commission mechanism to investigate historical injustices as well as past human rights violations including those committed during the 2007 / 2008 Post-Election Violence (PEV) was strongly criticized for the fact that it fosters a culture of impunity.

The TJRC's operations were carried out in a highly charged political atmosphere. While the commissioners were writing their final report, Kenyans were debating a new draft constitution (passed in 2010),<sup>267</sup> and engaging in electoral campaigns ahead of the general elections held in March 2013. The state of wrangling within the commission; the refusal of its discredited chairperson, Ambassador Bethuel Kiplagat, to resign; and indictments of senior government officials and politicians by the International Criminal Court all meant that the truth-seeking process would be significantly ignored in the national discourse. The TJRC's refusal to release its final report prior to the 2013 elections cast further doubts on

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<sup>267</sup> Committee of Experts, Draft Constitution (2010), [www.kenyaconsulatela.com/2-0/constitution.pdf](http://www.kenyaconsulatela.com/2-0/constitution.pdf) (Accessed on August 15, 2014)

its credibility and that of the overall truth-seeking endeavor. Indeed, by the time it was handing in its final report, few were interested in it as it was felt that they had denied Kenyans the which would have formed the basis of the elections in March 2013. It had been hoped that those adversely mentioned in the report would have been barred from running for election in 2013 until they had cleared themselves.

Commissioners appointed to a truth commission are required to be highly credible persons and are often seen as representing the seriousness of the efforts of investigating the past which was characterized by human rights abuses and violations.<sup>268</sup> Thus the commissioners should not be persons already in a position with a high political profile.<sup>269</sup> Kiplagat did profound damage by denying an important national truth-seeking process a fundamental ingredient for its success: credibility. While experience indicates that there is no magic recipe for a successful truth commission, the reputable composition and unimpeachable conduct of commissioners are necessary conditions sine qua non. It is impossible to divorce the report from the commissioners themselves. The impact and the credibility of the report were severely undermined by the conduct of Kiplagat personally and the behavior of other commissioners regarding the TJRC report. However, while the TJRC Report reflects many of the weaknesses of the country's truth-seeking process, it provides an important foundation for examining Kenya's past, and most importantly, it makes recommendations that, if heeded, could help to create a stronger republic, with rule of law and respect for citizens' rights.

Currently, the TJRC Report faces several serious challenges, including the government's reluctance to publish it as well as several court cases. A serious challenge to the report is the intention of the National

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<sup>268</sup> Hayner, P. (2002) *Unspeakable truths: Facing the challenges of truth commissions*, New York, Rutledge. 216

<sup>269</sup> Dumbuya, L. (2003), "The Truth and Reconciliation Commission in Post Conflict Sierra Leone;"- A dissertation submitted to faculty of Law, University of Pretoria. 20, Available at [www.up.ac.za](http://www.up.ac.za), [accessed on August 15, 2014]

Assembly, presently vested with the document, to make alterations to it. In December 2013, the House debated and passed an amendment to the TJR Act, giving the National Assembly the power to determine how the commission's recommendations would be implemented. The TJR Act initially gave the commission the power to determine the mechanism or framework for implementing its substantive recommendations and obligated the government to follow. The amendment opened the door for several other amendment proposals, including altering sections 49 and 50 to effectively allow the National Assembly to "consider the report." If the National Assembly were to succeed in amending the report, Kenya will hold the unfortunate distinction of being the first country to alter an official truth report after its public issuance. It is feared that these amendments are motivated by intentions to alter the report so as to expunge the names of adversely mentioned persons.<sup>270</sup> It is now up to civil society organizations (CSOs) and organized groups to engage with the National Assembly in a bid to discuss and agree on an effective and accountable implementation process. Further, CSOs will also need to engage with the Attorney General to ensure that the monitoring of the report's implementation is just as effective.

The time frame set for the TJRC to complete its task as stipulated in its mandate was herculean from the outset. Coupled with public concern regarding the selection and integrity of the Chair of the Commission, the TJRC faced a measure of paralysis in effectively carrying out its mandate. Despite the challenges, the TJRC collected statements from Kenyans from all walks of life and every region of the country – the largest collection undertaken by any truth commission to date. In addition, the TJRC

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<sup>270</sup> Institute for War and Peace Reporting "Concerns Over Bid to Amend Kenya Rights Report," August 16, 2013, available at <http://iwpr.net/report-news/concerns-over-bid-amend-kenya-rights-report>, *Daily Nation*, "MPs can now change Truth Commission report," December 16, 2013, <http://mobile.nation.co.ke/news/MPs-can-now-change-Truth-commissionreport/-/1950946/2101712/-/format/xhtml/-/346nh4z/-/index.html>, (Accessed on August 15, 2014), Emeka Mayaka-Gekara, "Jubilee leaders plot to clear their names from TJRC report," *Daily Nation*, editorial, <http://mobile.nation.co.ke/News/Jubilee+leaders+plot+to+clear+their+names+from++TJRC+report+/-/1950946/1958078/-/format/xhtml/-/5vdaov/-/index.htm>, (Accessed on August 15, 2014)



extended its work to neighbouring countries where Kenyan refugees resided in camps after fleeing the violence. The TJRC made and continues to make positive and progressive contributions to the reconciliation process in Kenya. Its report and recommendations are important as a foundation for the continuing healing and reconciliation process in the country.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Introduction

From the foregoing chapters, it is evident that conflicts are endemic, their causes diverse. They cannot be avoided. We can only manage and resolve them once they arise. Care and precaution must be taken in the choice of method taken to resolve conflicts. At times a mixed method approach has to be undertaken. The Kenyan case is a good example where mediation and negotiation were used to resolve the short term issues in the conflict. However, the long term issues and causes of the conflict could not be effectively addressed and resolved using these means. They called for thorough and deeper investigations. They called for a deeper enquiry and an understanding of the country's history. They called on the nation to be truthful to itself and its citizenry so that justice could be served. As a result, a number of Commissions were formed to address the long term issues and causes of the conflict.

The Commission of Inquiry into the Post-Election Violence (Waki Commission), the Independent Review Commission (Kriegler Commission), the National Cohesion and Integration Commission (the only permanent commission), and ultimately the Truth, Justice and Reconciliation Commission (TJRC) were formed to address the long term issues and causes of the conflict that reached its climax in the aftermath of the 2007 disputed presidential elections. The TJRC was established through an Act of Parliament and mandated to *inter alia* promote unity, healing and reconciliation in Kenya. In its final report the TJRC notes that reconciliation is not an event but a process.

## 5.2 Steps in the Reconciliation Process

In her study of Cuba, Ackerman identified six steps in the reconciliation process.<sup>271</sup> First, she sees reconciliation as a journey. She argues that reconciliation starts with a single step, “divided factions literally meet and sit together for the first time in an effort to begin to exchange views and initiate a process of accommodation on past differences...” In step two, reconciliation involves the “dissolution of conflicting identities”, a process that can be likened to the situation in South Africa, where apartheid was dismantled in the 1990s with the hope for a “new” South Africa in which skin colour would not be the basis of interpersonal relationships and access to opportunities. However, Ackerman notes that in “order to achieve this desired social conversion, individuals and institutions must recognize their past mistakes, and set out on a new path”. The third step on the reconciliation road is facilitating “mutual coexistence among distinct groups”. This involves “building respect for differences, communicating across differences and celebrating unique ways of being”. As one witness noted during the TJRC hearings we must appreciate and celebrate our diversity as beauty that contributes to a common goal but not separating us. The witness posited that Kenya is a garment of many colours, which is beautiful because each colour is present. “We cannot be one colour because we would be dull. Some colours cannot run over others because we would be ugly. We must all stay in place and be bright. That is an ideal situation of where Kenya ought to be.” He concluded.

The fourth phase is “reconciliation as individual moral evolution”, and it “involves confession, repentance, atonement and forgiveness...it is a model of reconciliation based on individual

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<sup>271</sup> Ackerman, Holly (1999), ‘National Reconciliation in the Case of Cuba: Definition and Analysis’, in Pérez-Lopéz, J.F. and J.F. Alonso (eds.), *Cuba in Transition: Vol. 9. Papers and Proceedings of the Ninth Annual Meeting of the Association for the Study of the Cuban Economy*. Silver Spring: ASCE. <http://lanic.utexas.edu/la/cb/cuba/asce/cuba9/ackerman.pdf> (Accessed August 15, 2014).

transformation”. Acknowledgment of the harm caused to society for mass violence and gross violations of human rights stands as a key component of reconciliation. In an ideal situation, acknowledgment of harm is closely followed by remorse on the part of the perpetrator. Perpetrators must acknowledge the harm that they have caused to their victims. The perpetrator should then ask for forgiveness from the victim-survivor, who in turn can choose to forgive or not. However, forgiveness should not be used as a conduit for impunity. This ensures that reconciliation between the two parties has a real and long-term meaning. Similarly, institutional acknowledgment of wrongdoing must accompany efforts towards national healing and reconciliation. State and other political entities’ acknowledgment of violations to its people is germane to the reconciliation process.

In the fifth stage, reconciliation is effected through the instrumentality of the “rule of law via effective guarantees of human rights”. The main concern in this phase is establishing the “truth of past human rights violations and ...installing a more effective rule of law to protect the restored balance”. Finally, reconciliation can be conceived of as “community building”, the centrepiece of which is “interdependence”. The nation has been divided because significant numbers of citizens have ceased to see that collective well-being depends upon mutual respect”. However for this process to succeed, “there must be truth telling as well as a sense of community among the citizens who would resolve to bury their differences in the interest of building a united nation”. The targets of reunion should de-emphasize all those things that tend to divide them and to accentuate those that unite them in the interest of national peace and peaceful co-existence. As a nation we must be ready and willing to move forward as members of one big family. We must echo and believe in the words of the Late Nelson Mandela:

*“From the moment the results were in and it was apparent that the ANC was to form the government, I saw my mission as one of reaching reconciliation, of binding the wounds of the*

*country, of engendering trust and confidence... I said all South Africans must now unite and join hands and say we are one country, one nation, one people, marching together into the future.”<sup>272</sup>*

Some activities that contribute to the possible resurgence of violence include the aversion towards group or ethnic affirmations on the part of political leaders, as well as the use of inflammatory language by politicians and their affiliates. Such activities have the capacity – if not the intent – of undermining efforts towards reconciliation in the country and contribute to violence and ethnic polarization. Ethnicity has for a long time been used as a basis for divisions in Kenya. As a nation we must be ready to see ourselves as one nation and not on the basis of our different identities. Reconciliation remains key to securing a peaceful future in Kenya and in preventing the use of past injustices as the seed for renewed conflict.<sup>273</sup> A reconciled society has the dual function of breaking the cycle of violence and gross violations of human rights, and promoting peaceful co-existence among its members. This is because unless conflicts are faced as a part of a complete reality, sooner or later memories are acted upon. As the Final Report of the South African Truth Reconciliation Commission (TRC) points out,

*‘Reconciliation is a process which is never-ending, costly, and often painful. For the process to develop, it is imperative that democracy and a human rights culture be consolidated. Reconciliation is centered on the call for a more decent, more caring, and more just society. It is therefore, a responsibility of each one of us in the society to respond by committing ourselves to concrete ways of easing the burden of the oppressed and empowering the poor to play their rightful part in society.’<sup>274</sup>*

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<sup>272</sup> Nelson Mandela (1994). *Long Walk to Freedom: The Autobiography of Nelson Mandela*. (New York: Little, Brown and Company), 619-620.

<sup>273</sup> Bloomfield, D., Barnes, T. & Huyse, L. (eds.). 2003. *Reconciliation After Violent Conflict*. International Institute for Democracy and Electoral Assistance (IDEA), 19. Available from: <http://www.idea.int/publications/reconciliation/index.cfm> [Accessed August 15, 2014].

<sup>274</sup> Final Report of the South Africa Truth and Reconciliation Commission (SATRC) (2008),

### 5.3 Role of Truth Commissions

Lax, a one time member of the SATRC, perceives reconciliation as a journey and not an event. He argues that Truth Commissions help nations to set out on the journey from a proper footing.”<sup>275</sup> He further contends that TRCs like that in South Africa, and in Sierra Leone, do not provide “quick fixes” to the legacies of punitive actions or to the challenges of reconciliation in post conflict societies. Rather, they act as “first aid” kits, “guides” or “signposts” on the long road to national settlement and post conflict peace building. It is believed that the transition from war to peace and national reconciliation will be long and tortuous, but necessary and expedient if stability and sustainable long-term peace are to be accomplished.

Mattarollo argues that, in countries where they have had the greatest impact, truth commission reports, and especially their conclusions and recommendations, have acted as a kind of foundation stone, signaling a society’s decision to turn over a new page in its history. In this way, the society in question has also shown 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...has been their clear desire to break with the past.<sup>276</sup> Truth commissions must be seen as initiators of dialogues within fragmented societies. Their objective is to provide safe spaces for genuine remorse, and for creating narratives for a collective truth that does not suppress the contributions of certain communities to nation building. They should be able to grant amnesty where appropriate within the ambit of internationally accepted standards, and they provide

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<sup>275</sup> Lax, Ilan (2001) “Strategies and Methodologies for Finding the Truth”, paper presented at a Seminar on *Operational and Managerial Questions related to the Sierra Leone Truth and Reconciliation Commission*, Freetown, May 29–June 1.

<sup>276</sup> Mattarollo, Rodolfo (2002), “What to Expect from a Truth Commission”, in UNAMSIL, *Truth and Reconciliation in Sierra Leone*. 19

platforms for a continued healing process.<sup>277</sup> The SATRC, globally hailed as a model for truth-seeking mechanisms, did not heal all the wounds left behind by apartheid in South Africa. Archbishop Desmond Tutu, who chaired the SATRC, was quick to point this out, and noted that, while the process contributed to the reconciliation process in that country, more work was required beyond the life of the SATRC in reconciling that nation. In the same vein, the TJRC process only served to initiate the reconciliation process. More needs to be done especially based on the recommendations of the commission.

It is important for the government to endorse and implement the recommendations of the TJRC. It is equally important that civil society remain engaged in the process as it is pivotal to establishing a collective truth. This will be key as the country engages in further reconciliatory dialogues between different government structures, government structures and the people, and among the people as one nation. A key opportunity for sustainable reconciliation rests on continued dialogue centered on building trust. There is a strong case for coordinating transitional justice initiatives in Kenya to contribute to national cohesion and reconciliation

#### **5.4 Towards a National Reconciliation Agenda for Kenya**

Reconciliation as a mutual process, means coming to terms with one's old adversaries and creating a new partnership based on just relationships, thereby restoring humanity for persons on both sides of the conflict.<sup>278</sup> This has to be accompanied by deep and lasting reparations which can only be a result of dialogue between the aggrieved and the State as well as truth telling through which everyone who needs to, can understand the causes, motives and perspectives of those responsible for their suffering and

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<sup>277</sup> Assefa, H. (2001). Reconciliation. In: L. Reyhler & T. Paffenholz (eds). *Peacebuilding: A field guide*. Boulder, CO: Lynne Rienner.

<sup>278</sup> Ibid.

thereby begin to bring closure to their trauma.<sup>279</sup> Although elections are not synonymous with democracy, they are a central component of a functioning democratic system.<sup>280</sup> There is an urgent need to reassert the fundamental democratic rights of citizenship being accessible to all Kenyans, including the right to change government through free and fair elections.<sup>281</sup> The state needs to cultivate faith in the citizens of the electoral systems. People need to be guaranteed that their vote will be respected no matter which side of the political divide they vote for. They need to be assured that there won't be any negative consequences as a result of voting for a particular political party. If this is achieved then elections will be respected as the desired processes to bring change in an operational democracy.

The most promising mechanism for resolving ethnic strife in Kenya maybe to restructure the basic ground rules of the political game. Given the prominence of ethnicity in African politics, democratization across the continent requires more than expanding the political and economic rights of individuals. Accommodation of group rights must be part of the equation. Kenya, like many other African countries, is guilty of undermining democracy and human rights by deliberately defining citizenship within narrow parameters of ethnic belonging. There is need to redefine citizenship from a national rather than an ethnic perspective so as to allow democratic ideals, values and institutions to thrive. For democracy itself to thrive, the Kenyan population needs to appreciate and embrace diversity

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<sup>279</sup> Charles Villa-Vicencio "Transitional Justice and Human Rights in Africa" in A Bosl & J Diescho *Human Rights in Africa Legal Perspectives on their Protection and Promotion* eds. (2009) 38

<sup>280</sup> Ndulo, M. & Lulo, S. (2010). 'Free and Fair Elections, Violence and Conflict' Volume 51 –July 5 *Harvard International Law Journal*, 157

<sup>281</sup> Kagwanja P. & R Southall (2009), 'Introduction: Kenya - A democracy in retreat?' 27: 3 *Journal of Contemporary African Studies* 276



and live as brothers and sisters, giving way to national healing and reconciliation which is followed by lasting peace.<sup>282</sup>

#### **5.4.1 Justice and the Rule of Law**

The retributive theory of justice has the objective of punishing for past crimes and the deterrence of future crimes. The trial of individuals accused of committing gross human rights violations can contribute to reconciliation. Depending on how they are managed, international and locally owned justice processes may either foster or impede national reconciliation. Whereas the International Criminal Court (ICC) process has enjoyed wide public support as a vehicle for fighting impunity in Kenya, there is scepticism about the ability of the ICC interventions to promote reconciliation in the country. There has been a fair amount of politicization around the timing and subjects of ICC trials, which does not contribute to an effective dialogue on reconciliation. In the recent past, there have been resolutions from ethnic formations in Kenya that create ideologies of ethnic victimization, in their attempts to address the accusations leveled against the political leaders facing charges at the ICC. It is, however, possible for international criminal trials to contribute to political reconciliation by fostering the social conditions required for the rule of law. International criminal trials also contribute to reconciliation by cultivating legal decency and good judgment among officials, and encouraging faith in the law among citizens.<sup>283</sup> Political leaders and individuals seeking public office should refrain from the politics of ethnic formations, and those responsible for spurring ethnic tension by using inflammatory language should be prosecuted in accordance with the law.

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<sup>282</sup> Morris Kiwinda Mbondenyei “The Curse of Ethnic Belonging: An Analysis of Kenya’s 2007 Post-Elections Conflicts in the Light of Democracy and Human Rights” 8 retrieved from [http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=morris\\_mbondenyei](http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=morris_mbondenyei), (Accessed on August 15, 2014)

<sup>283</sup> Murphy, C. (2010). Political Reconciliation and International Criminal Trials. In: L. May & Z. Hoskins, (eds). *International Criminal Law and Philosophy*. New York: Cambridge University Press, 224.

The treatment of alleged perpetrators of crimes at international criminal tribunals also provides a model for national criminal jurisdictions. From the presumption of innocence, and the conducting of fair trials, to the humane treatment of those accused (no torture or degrading treatment to obtain confessions or information in the investigative stages of a trial). These are practices which can be adopted by national criminal processes. It is preferable, however, for Kenya itself to initiate investigations and prosecutions of individuals suspected of being responsible for the PEV, in a manner that is complementary to the work of the ICC. The Constitution provides the necessary framework and there is existing legislation to embark procedurally on such initiatives. The obstacle in the way of a local criminal accountability system is the lack of political will to genuinely undertake such an activity to the exclusion of political maneuvering.

Locally owned criminal justice processes have the benefit of restoring confidence and faith in the law and the capacity of legal institutions to provide justice. With the substantive reforms in the Kenyan judiciary, the legal and investigative officers have an opportunity to engage in and invoke reconciliatory language and concepts in the administration of justice. Knowing that arrest does not entail torture, that conviction does not entail death, and that cooperation does not risk death, increases the likelihood that individuals will cooperate with the national criminal justice system. Norms of international law enforced at the national level in this way, and a clear demonstration to the citizenry that officials can be and are held accountable for failing to respect the constraints that law imposes, can restore confidence among citizens that the law will be enforced.

Justice should extend beyond retribution and must involve restorative aspects. Stakeholders affected by the injustice should have an opportunity to discuss how they have been affected by the injustice and to

decide what should be done to repair the harm'.<sup>284</sup> Restorative justice may take the form of consultations with victims and affected communities in the formulation of policies around reconciliation. Engagement of representatives of civil society as drivers of national consultations around policies with regard to reconciliation issues builds an inclusive process and increases ownership of the policies by the beneficiaries of these policies. When restorative justice processes are entrenched in government activities, there will be a transformation from business as usual – which revolves around state patronage along ethnic lines and relegating some ethnic groups to the periphery – to including the previously marginalized communities in the management of state affairs and public life. It is important for government to carry out periodic audits that give an indication of the inclusivity of all groups in the management of state resources and equal participation in public life in Kenya.

#### **5.4.2 Reparations and Guarantees of Non-Recurrence**

The nexus between reparations and guarantees of non-recurrence on the one hand, and reconciliation on the other, is the recognition that for any society whose members have experienced harm as a result of mass violence or violations of human rights, there is an urgent need to redress the harm caused – by capacitating the members of society to participate meaningfully in the healing process of the nation, thereby averting both the risk of reprisals within society and the cycle of violence. Experience of TRCs shows that many victims have always equated reparations with justice. Many have been incapacitated hence may not be in a position to even feed for themselves or their families. Therefore, the availability of a reparations framework enables them to live normal or albeit normal lives not clouded with the hurting emotions and scars of the past violations. This reduces the risks of the recurrence of the cycle of violence.

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<sup>284</sup> Braithwaite, J. (2004). Restorative Justice and De-professionalization. *The Good Society*, 13(1): 28–31.

There is a need for a reparations policy in Kenya to redress the injustices committed in the past. The reparation framework as envisioned by the TJRC should serve as a blueprint for such a policy. The international standards of what reparation programs should entail can also be considered.<sup>285</sup> A carefully developed, managed and implemented reparations program has the potential to give legitimacy to other processes under the truth-seeking and justice rubrics. Reparations acknowledge and validate the events of the past, provide victims with the capacity to cope with the harm they have suffered, and contribute to the deterrence of future crimes.

### **5.4.3 Engaging the Diaspora**

There exist a number of Kenyans who have left the country involuntarily. These conflict-generated Diasporants should be included in the national healing and reconciliation process. In the early days of the National Rainbow Coalition (NARC) party dispensation, following the 2002 general elections, Kenyans forced into exile in the preceding years were urged to return and help build the country. Some returned – but there remain others still hurting from the injustices and fear that they and their families experienced. In addition, there are those who have left Kenya of their own free will and who constitute a pool of able individuals who could potentially contribute to national cohesion and reconciliation in the country.

Coordinated efforts should be made to include the Diaspora in initiatives aimed at reconciling Kenya, with avenues created for Diaspora contributions. Further, Kenyans in the Diaspora must engage with the issues in the country in a responsible manner; for example, avoiding undermining national healing and reconciliation through hate speech via social media. Kenyans in the Diaspora should be warned that their

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<sup>285</sup> Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, from the Office of the United Nations High Commissioner for Human Rights, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. Available from: <http://www2.ohchr.org/english/law/remedy.htm> [Accessed August 15, 2014].

distance from the territory does not bar criminal liability for hate speech and other divisive conduct. The possibility of dual citizenship under the new Constitution could contribute to instilling a sense of responsibility within the Diaspora. The government should engage Kenyans in the Diaspora positioned in strategic locations in their host countries to raise awareness of reconciliation in Kenya. With the proliferation of social media and the ease of connecting globally via the internet, the Diaspora should be encouraged to support and positively contribute to transitional justice processes in Kenya. In addition, it is necessary for constructive dialogue to be facilitated by the state through proper channels, in order to receive input from Diasporants on existing or future reconciliation processes.

#### **5.4.4 Reconciliation at the Grassroots**

Ultimately, effective reconciliation in Kenya, as in many other states in transition, will take more than one generation and must include all the country's people. Practical steps towards reconciliation initiatives will involve institutions such as the NCIC working with civil society. The government should recognize and promote community-level truth-telling processes. In this context, government should promote inter-community dialogues on truth with the assistance of civil society organizations and with the provision of psycho-social support for truth telling. The state should symbolically apologize for the harm caused by past and current governments, as a basis for supporting national healing, recognizing abuses by state and non-state actors and initiating reconciliation dialogues. It should further fully implement the TJRC report recommendations as well as other unimplemented recommendations from commissions of inquiry relating to reconciliation. The benefits of truth-seeking and truth-telling exercises should percolate to the grassroots of any society. Conversations around 'the truth' should be promoted. These conversations exist in every community and should now extend between communities. Kenyan authorities must discuss the recommendations and do their utmost to implement them, while explaining in detail their reasons for any failure to do so. Well-meaning public officers and non-state

actors would do well to read the report and lift those findings and recommendations that can be implemented and support a discourse on those recommendations that appear complex and politically unpopular.

## **5.5 Conclusion**

Reconciliation is a very subjective matter. TRCs hearings' records as well as numerous secondary writings and documentaries attest to this fact. In essence, the TRCs have found that there are many people who were ready and willing to find closure, acceptance, and move forward, while many more simply could not bring themselves to forgive, or reconcile with those who had been responsible for terrible atrocities. It would be difficult to expect all people to reconcile at the same time. The extent to which a person is ready and willing to forgive highly depends on the degree to which he / she suffered. There are some people who are normally ready to forgive a violation even without meeting the perpetrator of the violation. There are those who just want to understand why they were subjected to such atrocities and violations so that they can forgive. Others are just not ready to forgive at all and believe that the only way justice can be served is by the prosecution of the perpetrators. The effectiveness of the TRC at fostering reconciliation and building a more unified nation at the individual level is highly varied, and dependent on the individual person who has to forgive, or ask for forgiveness for their actions. While this is an essential and important understanding in order to comprehend the limits of the TRC and the restorative model, it is also necessary to take a wider look at the views of Kenyans towards the TJRC.

Proponents of TRCs have argued that despite the commissions not fully achieving the objective of reconciling all the parties they have often served as spaces for reconciliation especially for the victim.

They contend that the mere narration of atrocities and violations suffered by victims in public is enough for them to experience a sense of healing. Archbishop Tutu, reported that the commission served those who had suffered, in ways beyond just reparations, “We found that many who came to the commission attested afterward to the fact that they had found relief, and experienced healing, just through the process of telling their story.”<sup>286</sup> Scholars of transitional justice have also reached a similar conclusion, as Gutmann and Thompson in “The Moral Foundations of Truth Commissions” said “Another common defense of truth commissions adopts the perspective of the victims. Some proponents follow a therapeutic approach, pointing to the psychological benefits of offering public testimony and receiving public confirmation of injustice.”<sup>287</sup>

The work of the TJRC was multifaceted. The mandate and scope of work was quite huge and it could only have done so much in a period of four years. There were flaws, challenges and weaknesses. However, these should not be used as a basis for discrediting the commission or writing off their findings. Their findings form an integral and important basis for process of reconciliation. Just like the SATRC’s the TJRC’s mandate was also deeply moral. The TJRC was to access the truth so as to lay the foundation for a more humane, just social order, passing resolute moral judgment on the past but in ways which reconciled a previously divided society to a common future rooted in 'respect for human rights'. The 'reconciliation' dimension was itself variegated, inspired by a cluster of meanings of the idea. The TJRC was to initiate the processes of individual, interpersonal and collective 'healing', through the catharsis of finally expunging the truth about gross human rights violations previously hidden. In the words of the SATRC’s Report, reconciliation at this point was to be an affirmation of 'ubuntu',

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<sup>286</sup> Desmond Tutu, *No Future Without Forgiveness*, (New York: Random House, 1999), 165.

<sup>287</sup> Amy Gutmann and Dennis Thompson, “The Moral Foundations of Truth Commissions” in *Truth v. Justice: The Morality of Truth Commissions*, (Princeton, New Jersey: Princeton University Press, 2000), 29.

‘recognition of the humanity of the other’<sup>288</sup>. The idea of reconciliation was also explicitly tied to the project of nation-building, ‘imagining’ a new form of national community based on a ‘collective memory’, a ‘shared’ history. Exposure to truth was to lay the basis for a national consensus about the past and how to overcome its legacy in the future. Reconciliation was also understood as an act of compromise, borne of the country’s negotiated transition. As itself the product of a political compromise, the TJRC was seen as a crucial vehicle in attempts to stabilize and reproduce the politics of transitional justice.

The TJRC’s mandate was also quite vast. Investigating a period of 45 years was difficult for the commission, as some of the witnesses, victims and survivors of gross violations of human rights could be dead or evidence may have been destroyed or memories could have faded. Further it amounted to overburdening the TJRC and preventing it from discharging the mandate in a thorough manner. The enormity of the task handed to the Commission was well illustrated by the testimony of a witness who, speaking of only a single event, the Wagalla Massacre, observed that:

*“If all the water is turned into ink with which to write, all the trees are turned into pens with which to write, and all the land is turned into paper on which to write, the history of Wagalla cannot be covered”*.<sup>289</sup>

In the establishment and operations of the Commission, Kenyans failed to learn lessons and avoid mistakes committed by former Commissions of Inquiry in Kenya and truth commissions in the world. Pundits hold that this could have been part of the machinations by agents of impunity to ensure that just like in other transitional justice efforts, truth, justice and reconciliation remains elusive in Kenya. The

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<sup>288</sup> Truth and Reconciliation Commission of South Africa Report (2008), Vol. I, Ch. 5 paras. 10 – 28.

<sup>289</sup> TJRC/Hansard/Public hearing/Wajir/18 April 2011/ p. 20.



TJRC also faced a myriad of challenges. In its final report the commission states categorically that all the challenges could be attributed to the lack of political will on the part of the state. The commission felt that non-reformists in the government were slowly but surely orchestrating their downfall. The lack of sufficient funds, the never resolved issue of the Chairman's credibility crisis, the failure to replace the vice-chairperson after the resignation of Ms. Kaari Murungi were some issues pointed which could be attributed to lack of political will. The situation became worse when non-state actors also adopted the policy of non-cooperation. To the TJRC, the non-state actors had a right to take the actions they took. However, they were directly playing into the ploy of the non-reformists agenda to derail the TJRC. Civil Society Organizations (CSOs) under the banner of Kenya Transitional Justice Network and Kenyans Against Impunity, planned to engage the Commission 'in as many legal battles as possible' and 'decimate or exhaust' its capacities to move on with its activities. The commissioners saw all these as aiding the merchants of impunity to ensure that the truth seeking journey did not materialize thus:

*"The Commission does not question the good faith of many CSOs which acted against it, perhaps premised on the idea of seeking a credible truth-seeking, justice and reconciliation process. The Commission, however, notes that their strategy inadvertently fitted well into the wishes of actors, both political and otherwise, who saw the Commission and its work as a threat to the status quo and their vested interests. By disengaging from the Commission and taking steps to paralyse its work, these CSOs consciously or unconsciously advanced the interests of non-reformists."*<sup>290</sup>

Despite the numerous challenges and hurdles that the TJRC had to deal with, it did finally hand in a report on May 21, 2013. It is now more than one and the report is yet to be made public. The suspicion that the National Assembly may alter the report before it is finally made public negates the whole truth seeking process. While it did not fully help the country realize healing and reconciliation as evidenced

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<sup>290</sup> Report of the Truth, Justice and Reconciliation Commission (2013), *Vol. I*, Chapter Four: Challenges in the Execution of Mandate, para. 78

by the fighting and killings that continue to be witnessed in different parts of the country (such as Mandera and Tana River) the TJRC did a commendable job in shedding light into the country's history that has remained hidden for decades. It is imperative that the government takes up from where the TJRC left so as to further the reconciliation process. At best, the TJRC process could only act as guide or signpost on the long road to reconciliation. However painful the experience, the wounds of the past must not be allowed to fester. They must be opened. They must be cleansed. And balm must be poured on them so that they can heal. This is not to be obsessed with the past. It is to take care that the past is properly dealt with for the sake of the future. Amnesia cannot do for the past refuses to lie down quietly. It has an uncanny habit of returning to haunt one. "Those who forget the past are doomed to repeat it".

The fact that the state continued to behave in much the same way as it did in the past, coupled with the fact that the structures of governance were dominated by holdovers from the previous regimes, had a negative impact both on the operations of the Commission and the public perception of its work. Many people were often doubtful and still are whether the recommendations of the Commission would be implemented. It would be disastrous for the government to shelf the recommendations. The absence of a full scale war does not necessarily mean that there is peace. People are still hurting. A survey of the social media points to the fact that Kenya is still a fragmented and divided society that needs to be unified and healed. Institutional corruption still remains rife in the public sector. Nepotism is still the norm in the appointment of public officers. Marginalization and exclusion of some ethnicities and some areas continues unabated.

Unfortunately, the effectiveness of the TJRC's mission of reconciliation remains uncertain at the present time, with academics divided on whether the exercise was beneficial or not. There is evidence, from

survey data, interviews with individuals, as well as theoretical concepts and academic writings that support the idea that the TJRC was successful in reconciling these various ethnic groups. Others argue that it did little to reconcile the general populace but more to shield the merchants of impunity from prosecution. Ultimately, the intense emotions that people carried with them about ethnicity helped to determine to what extent people saw the TJRC as a success. It should also be noted that only a small number of Kenyans have read the report. Its impact would be greatly enhanced if an abridged version that is written in accessible language is produced and disseminated throughout the country. The Kenyan society as a whole needs to discuss these recommendations and use them as a platform to build a stronger society.

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