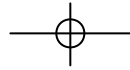


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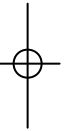
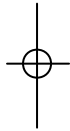
A TOOLKIT FOR TRAINING AND ENGAGEMENT



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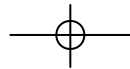
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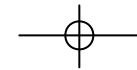


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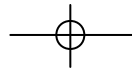
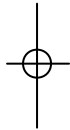
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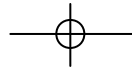
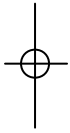
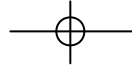




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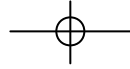
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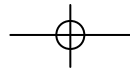
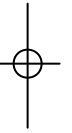


ACRONYMS AND ABBREVIATIONS

AfriCOG	Africa Centre for Open Governance
CBOs	Community-Based Organizations
CCE	Central and Eastern Europe
CEDMAC	Centre for the Empowerment and Development of Marginalized Communities
CMD	Centre for Multi-Party Democracy
COVAW	Coalition on Violence against Women
CRECO	Constitution Reform and Education Consortium
CREAW	Centre for Rights Education and Awareness
CSOs	Civil Society Organizations
FIDA-Kenya	Federation of Kenya Women Lawyers
FGM	Female Genital Mutilation
GEM	Gender Empowerment Measure
GIS	Governments Information System
CIPEV	Commission of Inquiry into Post Election Violence
GJLOS	Governance Justice Law and Order Sector
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ-KENYA	Kenyan Section of the International Commission of Jurists
ICPC	International Centre for Policy and Conflict
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IREC	Independent Review Electoral Commission
IDPs	Internally Displaced Persons
LGTF	Local Government Task Force
LRA	Lord Resistance Army
KANU	Kenya African National Union
KLA	Kenya Land Alliance
KHRC	Kenya Human Rights Commission
KPTJ	Kenyans for Peace with Truth and Justice
KTJN	Kenya Transitional Justice Network
NARC	National Rainbow Coalition
NGOs	Non Governmental Organizations
PBCR	Peace-Building and Conflict Programme



PIL	Public Interest Litigation
RBM	Results-Based Management
SGBV	Sexual and Gender Based Violence
TJ	Transitional Justice
TRC	Truth and Reconciliation Commission
TJRC	Truth Justice and Reconciliation Commission
TJWG	Transitional Justice Working Group
UAF-KENYA	Urgent Action Fund-Kenya
UN	United Nations
UNDP	United Nations Development Programme
USIP	United States Institute of Peace
4Cs	Citizens Coalition for Constitutional Change



PREFACE

The Kenya Human Rights Commission (KHRC), The Kenyan Section of the International Commission of Jurists (ICJ-K) and International Centre for Policy and Conflict (ICPC) are pleased to present the *Transitional Justice in Kenya: A Toolkit for Training and Engagement* (hereinafter referred to as The Toolkit). This Toolkit is both an information source on transitional justice as well as a training manual for engagement with the ongoing TJ processes in Kenya that were restarted in the aftermath of the 2007/8 post-election violence.

Soon after the signing and coming into force of the Kenya National Dialogue and Reconstruction Agreement (here after referred to as the Agreement), which is legally entrenched by the National Accord and Reconciliation Act, it was anticipated that the implementation of the TJ measures listed under Agenda Item 4 of the Agreement, and in particular the wide mandate of the Truth Justice and Reconciliation Commission (TJRC), would need the diligent support and oversight of the public and the civil society in general, if those measures were to be implemented effectively.


This Toolkit was prepared in order to empower the citizens to engage constructively and meaningfully with the Transitional Justice process in Kenya. This Toolkit is divided into four parts: **Part One** introduces the transitional justice discourse; **Part Two** covers the mechanisms of transitional justice; **Part Three** deals with the tools of engagement in transitional justice in Kenya; and finally, **Part Four** lays out conclusions and recommendations on how to foster engagements with the above mechanisms and tools.

We welcome you to read it, apply it in your transitional justice work and also provide comments.



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**International Centre for Policy
and Conflict**

ACKNOWLEDGEMENTS

This tool toolkit could not have been possible without the contribution of many individuals and organizations.

First we acknowledge all the references most of which formed the basis for this publication. This Toolkit is, to a certain extent, informed and inspired by some of the existing materials in the field of transitional justice.

Second, Davis Malombe (KHRC), Paul Mwaura (ICPC) and Christopher Gitari (ICJ-Kenya) provided the leadership that was instrumental in the conceptualization, authorship and publication of this Toolkit. Third, the technical input of Ndung'u Wainaina (ICPC) and George Morara (KHRC) enhanced the quality of the content of this Toolkit. Moreover, Stella Kibiro, James Mawira, Elias Wakhisi, Caleb Khisa, Wachira Waheire and Carol Chebet, also provided support in the extensive research of this Toolkit. Last but not least, we wish to thank Tom Kagwe and Cynthia Mugo (KHRC) and Zarina Patel (Awaaz Magazine) for the technical editing of this Toolkit.

We also wish to appreciate the support accorded by our colleagues within our organizations; from the victims and community networks, the civil society in general, as well as other partners. Finally we are grateful for the financial support from our development partners without which this project could not be a reality. The key partners are the Swiss Embassy (for KHRC); Swedish International Development Cooperation Agency (SIDA); the United Nations Development Programme (UNDP for ICJ-Kenya) and the Department of International Development (DFID-South Africa for ICPC).

OVERVIEW

Transitional Justice, as an evolving and contested concept and process, has become one of the major governance and reform projects for societies emerging from situations of oppressive rule and conflicts. It entails a number of mechanisms and tools, which must be applied within the specific contexts of the countries in question. This Toolkit captures a number of transitional justice mechanisms and tools relevant to Kenya.

This toolkit is organized into Seventeen Chapters. Whereas **Chapters 1-10** provide the critical information on the different transitional justice mechanisms. **Chapters 11-17** capture some of the specific tools which can be applied in the aforementioned mechanism in Kenya. Below is a summary: chapter by chapter.

Chapter One defines the concept and process of *transitional justice*, its historical perspectives in Kenya and the different mechanisms applied especially within the context of Agenda 4 that contains the broad reform issues of land, regional inequality, constitutional and institutional reforms among others.

Chapter Two deals with the *prosecutions* especially the types of and the guiding considerations of prosecutorial initiatives among others.

Chapter Three moves from the above-mentioned formal prosecutorial mechanisms to approaches that are both *informal and traditional*. That is, this chapter briefly looks into the efficacy of the traditional and informal justice systems in the transitional justice process.

Chapter Four is about *lustration*. This chapter describes 'lustration' and examines why it is a necessary process for a society attempting to break away from its troubled past.

Chapter Five captures the *policy, legal and institutional reform mechanisms* in Kenya. Framed with the Agreement, especially Agenda 4, this chapter highlights the long-term underlying issues which the government is meant to address so as to foster effective accountability, national healing and reconstruction.

Chapter Six highlights *truth commissions*. Key to this is the definition of the truth commissions, their general mandates, some case studies and challenges.

Chapter Seven focuses on *amnesty*. It captures the definitions, types, characteristics and conditions; and its distinction from pardon.

Chapter Eight focuses on *reparations*. the definition, relevance and application, the five basic mechanisms and possible challenges in transitional justice.

Chapter Nine is about *memorialization* especially its definition, standards and considerations in transitional justice, case studies and possible challenges in Kenya.

Chapter Ten deals with *reconciliation*. The chapter provides a broad introduction to reconciliation and its role and approaches in transitional justice. From reconciliation, the framework moves on to other tools which can help different actors to engage with the above mechanisms.

Chapter Eleven analyzes the legally-established *Truth, Justice and Reconciliation Commission* for Kenya. This begins with a background on the campaign for a TJRC in Kenya and details of the popular version of the TJRC Act (2008).

Chapter Twelve dwells on *Social and Economic Justice*. It defines social and economic aspects of development from the human rights perspective and its importance in transitional justice.

Chapter Thirteen provides guidelines on *victims and witness protection*. Critical to this, is the establishment and management of the victims and witnesses units within the TJRC, rules and evidence collection, rules and procedures of engagement with the TJRC among others.

Chapter Fourteen, which is related to the latter, provides detailed information and guidelines on the *documentation and presentation of information on gross human rights violations and economic crimes* within any transitional justice mechanism available in the society. This is basically about what, when, where, why and how the violations and crimes happened; who were/are responsible and actions taken or proposed in responding to the injustices.

Chapter Fifteen focuses on *media reporting on transitional justice*. This chapter explains why and how the media should cover transitional justice processes, the modes, guidelines and tools on media reporting and engagements, the journalist's checklist and the possible challenges.

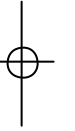
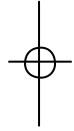
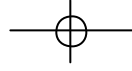
Chapter Sixteen deals with *gender justice*, which advances the discourses of gender justice, sexual violations, gender and truth commissions, reparations as a tool for gender empowerment and other considerations for engendering the transitional justice processes.

Chapter Seventeen provides the *conclusion and recommendations*.

Finally, the framework has two major appendages:

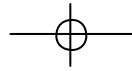
- *Capacity Building and Engagement Framework* on Transitional Justice in Kenya which provides guidance on how some of the mechanisms and tools in this publication can be applied for pro-citizens or victims'- centred transitional justice processes.
- *Structure and Strategy Framework for the Kenya Transitional Justice Network (KTJN)*. This appendix highlights the vision, programmes and organogram of the KTJN, which pursues the transitional justice agenda in Kenya.

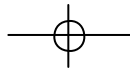
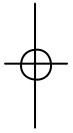
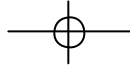
It is important to note that all the afore-mentioned mechanisms and tools are applied or pursued within an arrangement that enhances collaboration and complementarity in transitional justice. For although each is unique and critical, they all build on each other in order to attain comprehensive reforms in transitional societies.

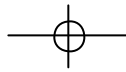


TRANSITIONAL JUSTICE

PART ONE







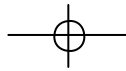
CHAPTER

1



Credit: The Daily Nation: Cartoonist - Gado

WHAT IS TRANSITIONAL JUSTICE ?



CHAPTER

1

*States have an obligation to respect, protect and fulfil the right of victims of human rights violations to an effective remedy. This obligation includes three elements: **Truth** - establishing the facts about violations of human rights that occurred in the past; **Justice** - investigating past violations and, if enough admissible evidence is gathered, prosecute the suspected perpetrators; and **Reparation** - providing full and effective reparation to the victims and their families, in its five forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.*¹

WHAT IS TRANSITIONAL JUSTICE?

Transitional justice is a contested and evolving process which emerged in the 1990s. It is defined as ‘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’.² Transitional justice, therefore, concerns the whole range of mechanisms or approaches applied by states or societies that seek to reform, heal and transit from illegitimate and repressive rule or situations of conflict to national reconstruction and good governance.³

The main aim of transitional justice, through its various mechanisms, is to end the culture of impunity and establish the rule of law in a context of democratic governance.⁴ Transitional justice processes should also reconcile people and communities, provide them with a sense that justice is being done and will continue to be done, as well as renew the citizens’ trust in the institutions of governance and public service.

In the aftermath of conflict or authoritarian rule, people who have been victimised often demand justice. The notion that there cannot be peace without justice emerges forcefully in many

communities. But justice can be based on *retribution* (punishment and corrective action for wrongdoings) or on *restoration* (emphasising the construction of relationships between the individuals and communities).⁵

Retributive justice is based on the principle that people who have committed human rights violations, or ordered others to do so, should be punished in courts of law or, at a minimum, must publicly confess and ask forgiveness. On the other hand, *restorative justice*, is a process through which all those affected by an offence – victims, perpetrators and by-standing communities – collectively deal with the consequences. It is a systematic means of addressing wrongdoings and emphasises the healing of wounds and rebuilding of relationships. Restorative justice does not focus on punishment for crimes, but on repairing the damage done and offering restitution.

The scope of transitional justice goes well beyond the changing of regimes or governments. Any state or society seeking to move away from a difficult and troubled past and start afresh must undertake significant reforms of its governance, public service, administrative and judicial structures. This means initiating measures that would promote far-reaching economic, social and political development aimed at constantly improving the well being of the citizens and the state.

Most societies that have been through conflict or illegitimate rule also endured gross violations of human rights and fundamental freedoms, impunity and corruption. Such societies must confront their troubled pasts and seek to provide the citizens with some form of redress for these injustices, as well as renew the citizens’ trust in the institutions of governance and public service.

1.1 Challenges of the Transitional Justice Discourse and Process

- First is the failure to have substantive transitions resulting to mere regime changes which tend to incorporate personnel and systems repugnant to justice and reforms from the previous regimes.

1. The right to an effective remedy for victims of human rights violations is enshrined in article 2 (3) of the International Covenant on Civil and Political Rights (ICCPR). It is also recognized in article 8 of the Universal Declaration of Human Rights.

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

3. These mechanisms largely include: legal policy and constitutional reforms, prosecutions, reparations, lustration measures, reconciliation and peace building measures, memorialization and truth commissions, among others which shall be discussed later in Part Two of this book.

4. Wikipedia, the free Encyclopedia, ‘Transitional Justice’, http://en.wikipedia.org/wiki/Transitional_justice, (11/10/2009).

5. Sanam Naraghi Anderlini, Camille Pampell Conway and Lisa Kays, *Inclusive Security, Sustainable Peace: A Toolkit for Advocacy and Action*.

- Second is the sequencing of the different mechanisms to ensure that foster progressive collaboration and complementarity at all levels in the society. This has been a major obstacle in the conceptualization and implementation of Kenya's Agenda No. Four(4) captured elsewhere in this Toolkit.
- Third, there are cases whereby the oppressive and conflict situations do not necessarily lead to total breakdown of law and order in the whole country. For instance, in the case of Kenya, there are arguments that a number of institutions are still operational and can be utilized to move the state forward; of course with other reform processes.
- Fourth, there are conceptual and operational tensions in balancing between peace and reconciliation versus justice and accountability in transitional societies. However, consensus is emerging that both outcomes have to be realized for sustainable national reconstruction and development.
- Finally, many people tend to confuse between transitional justice and democratic transformation/democratization. The latter relates to what Brandat refers to as the procedural and deliberate governance process of liberalizing the society in all dimensions. It is, as a fundamental transformation of the whole society and rebuilding of a developmental model with new relations between the economy and the state; the reinforcement of social integration and ensuring citizens' participation in, and satisfaction with, decision-making at local, regional and national levels⁶. Thus while transitional justice is the means (through the different mechanisms), democratic transformation plus national reconstruction and development mark the end results.

1.2 History of Transitional Justice in Kenya

In spite of the fact that, Kenya has been independent for over 45 years, it still suffers from a culture of impunity and disregard for basic human rights similar to countries still experiencing colonial or illegitimate rule. Indeed, both pre and post-colonial

governments in Kenya have been characterized by massive human rights violations and economic crimes.

a) *Impunity in the Colonial, Kenyatta and Moi regimes (1895-2002)*

The colonial regime that ruled Kenya between 1895 and 1963 designed oppressive legal, policy and institutional structures aimed at the appropriation and exploitation of the nation's resources at the time. After independence these structures remained largely unchanged with the power to administer them being vested in the Presidency of the new republic. The Kenyatta (1963-1978) and Moi (1978-2002) regimes did little to promote any reform agenda. They not only failed to address the injustices committed by their colonial predecessors but went on to commit crimes of more or less the same nature and magnitude. It is these violations and crimes that have entrenched impunity as a way of life in Kenya.

Furthermore, the Kenyatta and Moi regimes aggressively engaged in implementing measures geared towards suppressing dissent. Yet, it was this dissent that finally led to the popular removal of Moi's Kenya African National Union (KANU) regime in December 2002 in what was claimed then to be the third liberation in Kenya.⁷

b) *Impunity in the Kibaki regime (2003-2009)*

The first one year of the Kibaki regime (2003) saw the initiation of many reform measures. These include:

- The constitutional review process which had stalled in October 2002 was revived at the National Constitutional Conference at the Bomas of Kenya in April 2003. This process lost its momentum after the 2005 referendum vote until 2008
- A Task Force was formed to look into the conduct of the Judiciary in 2003 leading to a 'purge in the judiciary'⁸
- In April 2003, a Task Force on the establishment of a Truth Justice and Reconciliation Commission (TJRC), chaired by Prof. Makau Mutua, was formed to look into the practicability of such a Commission. Its report recommended the formation of a TJRC to deal with both the human rights violations and

6.This concept is also referred to as democratic transformation and/or democratic governance. See for instance Brabant Koeraad Van, Civil Society and Substantive Democracy: Governance and the State of Law in Belgium, Vol. 8, Number 4-1998.

7.The first liberation is considered to be the movement that led to independence in December 1963 whereas the second concerns the movement that brought an end to one party rule in November 1991. The third liberation is perceived to be the removal of KANU by NARC in December 2002.

8. The judges and magistrates mentioned in the Task Force report were either forced to resign or face a tribunal as required by law. However, no radical reforms to the judicial systems were realised as a result of absence of political will.

9. The Task Force comprised amongst others Professor Makau Mutua, Rev. (Dr.) Timothy Njoya, Rev. Mutava Musyimi, Bishop (Prof.) Zablon Nthamburi, Rev. Patrick Rukeya, Mr. John Githongo, Mr. Tirop Kitur, Mr. Julius Sunkuli and Ms Rachelle Omamo. It held its hearings in town halls and open theatres. On average the Task Force held public hearings in at least 3 districts in every province. It finally returned a positive verdict on 26 August 2003, which indicated 90% of Kenyans who appeared before the Task Force wanted such a commission.

10. While the Agenda One was about Stopping Violence and Restoring Fundamental Human Rights and Liberties; Agenda Two was on Taking Immediate Measures to Address Humanitarian Crisis, Promote Reconciliation and Healing; Agenda Three was on How to Overcome Political Violence (and possibly end the political crisis) and Agenda Four is about dealing with the Long Term Issues and Solutions. Against the four agendas was formation of the Independent Review Commission (IREC) into the disputed presidential elections chaired by Justice J Kriegler from South Africa. The Kriegler Commission proposed a wide range of electoral, police, judicial and other reforms. There was also a Commission of Inquiry into the Post Election Violence (CIPEV) chaired by Justice P Waki. The Waki Commission proposed a local tribunal with an alternative for pursuing the International Criminal Court process to investigate and try those responsible for the post-election violence.

economic crimes committed between December 1963 and December 2002, by June 2004⁹. This agenda was lost with the formation of the Government of National Unity in June 2004 which brought KANU on board. It only resurfaced after the Post-Election Violence (2007/8)

- October 2003 saw the government remove the ban put by the British government against the operations of the Mau Mau movement during the state of emergency in the 1950s. However, so far there has been no substantive support to Mau Mau veterans and their families
- At the same time, a Commission of Inquiry into Illegal and Irregular Allocation of Public Land and the Commission of Inquiry into the Goldenberg Scandal were put in place. Its recommendations are yet to be implemented
- A Court Inquest was held on the murder of Fr John Kaiser, a priest from the Mill Hill Mission who was killed in 2002 under politically controversial circumstances. The presiding magistrate ruled that she could not — on the basis of evidence tabled before her in the inquest — point out with certainty who the priest's killers were, and pointed to the need for further investigations. These investigations were never carried out.
- There was also the Parliamentary Committee formed to inquire into the death of Dr Robert Ouko, the then Foreign Affairs Minister who was killed and his body burnt beyond recognition in February 1990. The report of this commission was never made public. Nor was it acted upon
- It was also in 2003 when legislation creating the Kenya National Commission on Human Rights (2002) and the government's human rights watchdog, was operationalized. However the commission has, and continues to receive, little financial and operational support from the government
- Finally, a number of policy, institutional and legal reforms were designed with the intention of dealing with past injustices, some of which included the land policy, human rights policy and police reforms among others. By 2007, no such policy had been enacted let alone implemented.

Most of these processes lost momentum while others were dropped between 2005 and 2007, and by the time Kenya was heading into the 2007 General Elections, the state had totally lost

the national reform and transitional justice agenda it had initiated. This failure to soundly affect the transitional justice and reform measures ultimately manifested itself in the disputed presidential elections and the mayhem that ensued thereafter.

The violence and chaos following the 2007 elections led to the displacement of more than 600,000 people, the deaths of more than 1,200 citizens, the wanton destruction of property and ethnic polarization that is unprecedented in Kenyan history. This paved the way for the negotiations led by a team of Eminent African Personalities and chaired by H E Kofi Annan around the Four Agenda Items¹⁰, which negotiations resulted in the Kenya National Dialogue and Reconstruction Agreement to which the government bound itself to implement.

The last agenda item (Agenda item 4), which set out measures to deal with the *Underlying Long Term Issues*, can be said to constitute the transitional justice programme for Kenya. It is noteworthy that this agenda is but a replication of the reforms that had been initiated but which stalled at different points between 2003 and 2007.



Meeting between chief prosecutor of the International Criminal Court, L. Moreno Ocampo and the representatives from the human rights organizations from Kenya at The Hague in September 2009

MECHANISMS OF TRANSITIONAL JUSTICE

PART TWO

CHAPTER

2

INTRODUCTION

There are a variety of transitional justice mechanisms which can help affected societies start afresh. These are based on international human rights and humanitarian law in demanding that states halt, investigate, punish, repair, and prevent human rights abuses¹¹. Most of these approaches are interlinked, and are most effective when they are applied together. These approaches include prosecutions, informal and traditional justice mechanisms, lustration measures, legal policy and constitutional reforms, truth commissions, amnesty, reparations, memorialization and reconciliation.

Chapter 2 PROSECUTIONS

Prosecutions form one of the central elements of an integrated transitional justice strategy that is aimed at moving a society away from a culture of impunity and a legacy of human rights abuse. Preferably, prosecutions for human rights violations and economic crimes, should be carried out within the local or domestic justice systems. However there may be situations where it is not possible to act through the domestic legal system whether due to lack of capacity or political will. In these circumstances, international processes, for instance, through the creation of international or hybrid tribunals, become of particular concern in addressing impunity and violations of human rights.

2.1 Importance of Prosecutions

Whilst there are obvious challenges to mounting criminal prosecutions in post-conflict situations, including cost, quality of evidence, and the debates regarding its relationship to fragile peace processes, prosecutions have an important role to play through:

- i) Contribution to individualizing guilt so that it is not ascribed to an entire group (which can perpetuate divisions and fuel future conflict)
- ii) Discouraging individual acts of revenge by institutionalizing a legal and just response
- iii) Challenging impunity
- iv) Deterring such crimes in future
- v) Establishing the rule of law and asserting the rights of victims
- vi) Establishing the historical facts related to key events and/ or the nature of the conflict itself
- vii) Removing criminal elements from positions of public office and power
- viii) Developing and promoting a progressive human rights jurisprudence on justice matters
- ix) Fostering respect for the rule of law by the prompt and effective administration of justice.

2.2 Types of Prosecutorial Initiatives

Criminal prosecutions for mass violations of human rights can take a number of different forms – domestic and international tribunals.

a) Domestic Courts: As previously mentioned, prosecutions through the domestic judicial system is most preferable. This is due to the fact that they increase the opportunities for both local ownership and for greater involvement of intended beneficiaries. Their close proximity also allows the local population to see justice being done. Where the domestic judicial system has been compromised by the conflict or previous regime, local trials can help rebuild and restore credibility in these institutions and by doing so build up the credibility of the new dispensation more broadly. However, domestic trials, because of their proximity to the conflict and/or the previous political context, can further undermine credibility and worsen divisions if carried out in a politicized manner or by an un-reconstructed judicial system.

In instances where there is little or no political will to end injustices and inequities imposed by state agencies on its citizens,

11. The International Covenant on Civil and Political Rights in Article 2(3) provides that each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.
<http://www2.ohchr.org/english/law/cpr.htm> (12/11/09). Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

Public Interest Litigation (PIL) initiatives by CSOs and other interest groups have proven to be the avenue of choice, and is sometimes the only choice, toward getting the State to respect human rights and act according to the rule of law. Such PILs are instituted by the CSOs or special interest groups in question on behalf of a select group of individuals representing a much wider area of concern. Such litigations seek to urge the state to reform its position on vital human rights issues where it has been lax or unwilling to do so on its own volition.

b) *International Courts:* Although domestic Courts remain the most preferred forum to bring lasting change, most of such trials have been rare and repugnant to justice due to lack of political goodwill and weak institutional frameworks. In such instances, recourse to international systems of justice is sometimes necessary. The international justice systems include the International Criminal Court (ICC), improvised or ad-hoc international criminal tribunals, hybrid courts and the application of universal jurisdiction.

i) *Ad Hoc International Criminal Tribunals* These are Courts designed to deal with specific problems and crimes and cannot be generalized and adapted for other purposes. The Nuremberg Tribunal in Germany between 1945 and 1946 was the first trial for the major war criminals before the International Military Tribunal. It tried 22 of the most important captured leaders of the Nazi Germany. There are currently two major trials under *ad hoc* international criminal tribunals taking place. The first is the International Criminal Tribunal for the former Yugoslavia (ICTY); and the second is the International Criminal Tribunal for Rwanda (ICTR).

The ICTR is an international Court established in November 1994 by the United Nations Security Council in order to try those with the greatest responsibility for the Rwandan genocide and other serious violations of the international law performed in the territory of Rwanda between 1 January and 31 December 1994. This tribunal is based in Arusha, Tanzania since 1995. *Ad hoc* Tribunals have been criticized in some quarters for inefficiency, and for the length of trials.

12. Articles 12 & 13, the Rome Statute of the International Criminal Court. The ROME statute entered into force on 1st July 2002 <http://untreaty.un.org/cod/icc/index.html> (12/11/09).

ii) *The International Criminal Court (ICC):* the ICC is a permanent international tribunal that came into being on 1 July 2002 — the date its founding treaty, the Rome Statute of the International Criminal Court, entered into force. The ICC was set up to prosecute individuals for genocide, crimes against humanity, war crimes, and the crime of aggression (although it cannot currently exercise jurisdiction over the crime of aggression as the crime itself is yet to be defined under the Rome Statute). It is important to note that the ICC is not mandated to prosecute any crimes other than those stated above. Furthermore, the court is designed to complement existing national judicial systems: it can exercise its jurisdiction only when national courts are unwilling or unable to investigate or prosecute such crimes. Therefore, the primary responsibility to investigate and punish crimes is therefore left to individual states. The ICC can generally exercise jurisdiction only in cases where the accused is a national of a state party, the alleged crime took place on the territory of a state party, or a situation is referred to the court by the United Nations Security Council.¹²

The mandate of the ICC can be realised through three specific approaches: *Self-referral*, for instance, the Ugandan case where the ICC was invited to intervene over the alleged violations committed by the Lord Resistance Army (LRA) rebels within her territory; *United Nations Security Council reference*, as was the case in the in 2008 against the Sudanese President Omar al-Bashir on alleged war crimes and crimes against humanity committed by government forces in Darfur; and by *Motion of the ICC Prosecutor* to the ICC Pre-trial chambers, as is the case in Kenya owing to the non-prosecution of those responsible for the 2007/8 post-election violence.

iii) *Hybrid Prosecutions:* These are Courts of mixed composition and jurisdiction, having national and international aspects and operating within the jurisdiction where the crimes occurred. These tribunals are intended to fill in the gap in situations where there is a lack of capacity or resources at the national level and where there are fears of bias

or lack of independence of the domestic courts. They employ international personnel, and usually have jurisdiction to try international crimes. Hybrid courts are designed in a way that only a relatively small number of defendants accused, often those that initiated or spearheaded serious criminal offences, will come before the Court. The remaining majority of defendants are usually left to face justice before the domestic criminal justice system (that is, courts of law) which may not be functioning fairly or effectively enough to try the so called 'Big Fish'. For this reason, the Hybrid Courts devise strategies that maximize the impact of the mechanism and also develop policies and processes that help to ensure that the domestic justice system operates more effectively and efficiently, in a manner consistent with international human rights obligations and standards.

Hybrid tribunals have taken different forms. In cases where domestic capacity was lacking, such as in Timor-Leste and Kosovo, the United Nations placed legal institutions with internationalized criminal capacity within the domestic legal system (e.g., the international judges' and prosecutors' programme in Kosovo, and the Serious Crimes Unit and Special Panels in Timor-Leste). Similarly, in Sierra Leone and Cambodia, there was some political will but a limited capacity to prosecute. In these cases, the United Nations concluded special agreements with each respective Government. These agreements resulted in the establishment of the Special Court in Sierra Leone, which sits outside of the domestic legal system and is governed by its own Statute and Rules of Procedure and Evidence. And in the case of Cambodia, this agreement resulted in the design of 'Extraordinary Chambers,' which are governed by their own law and procedures.

The case of a special tribunal in Kenya

In the Kenyan context, the 'Special Tribunal' as proposed by the Waki Commission to deal with the perpetrators of the 2007-2008 post-election violence, is in essence a Hybrid tribunal. It is to be established by the enactment of a statute to be known as the 'Statute for the Special Tribunal' which statute shall be anchored in the constitution. The tribunal is to be composed of both local and international judges and staff, and shall have the mandate to

investigate, prosecute and adjudge persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 general elections in Kenya¹³.

iv) Extraterritorial or Universal Jurisdiction: Prosecutions can also take place within a third jurisdiction under the principle of 'universal jurisdiction'. The principle of universal jurisdiction holds that certain international crimes such as genocide and related crimes are prosecutable by a domestic court in any country no matter where the crime took place or the nationality of the victims or suspected perpetrators. This mechanism in some cases may be seen to forward the cause for accountability. However, it bears certain limitations for the transitional justice process. Firstly, there is usually a lack of connectedness or sense of participation of the population of victims where a trial is taking place in a foreign country. Secondly, this mechanism does little to restore the trust of the local population in their own judicial institutions and in the rule of law. Thirdly, this mechanism is highly susceptible to politicization with those opposed to extraterritorial prosecution usually arguing that it amounts to malicious meddling by a foreign country in domestic affairs.

2.3 Guidelines for Prosecutorial Initiatives ¹⁴

For any system of adjudication (whether domestic, hybrid or international) to act effectively, the following five guidelines should be applied to all prosecutorial initiatives:

a) Political Commitment. It is usually rare to find societies that have replaced regimes that occasioned human rights atrocities against its people, and who have also totally divorced themselves from all the political and administrative figures that were responsible for these violations. Indeed, a few of these individuals often remain as part of the new regime whether through defections, re-elections or by the carrying over of their terms of office. In these circumstances prosecutorial initiatives must be backed by a clear political commitment to accountability if they are to be successful. It is therefore important for any policymaker, whether domestic or international, to have an understanding of the political context or

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

14. Excerpts from the Office of the United Nations Commissioner for Human Rights (OHCHR), Rule-of-Law Tools for Post Conflict States: Prosecution Initiatives (2006).

circumstances within which these prosecutorial initiatives are to take place. This is because such prosecutions generally take place in a highly politicized environment; with the most common complaint from those who oppose them being that they are driven by motives of political revenge. Policy makers must therefore depoliticize the pursuit of justice by framing the reasoning behind prosecutions of massive human rights violations in a way that will be interpreted by the citizens as a show of the strong disapproval of such violations and support for certain democratic values as opposed to a mechanism for retribution.

Criminal justice should not be equated with revenge as this may be confused and manipulated by its opponents to suggest that the pursuit of criminal justice is a matter of vengeance and somehow a morally dubious pursuit. This concept degrades the dignity of victims as rights-bearing citizens and distorts the very essence of criminal justice, which is to avoid lawless vengeance and maintain the rule of law.

Prosecutorial efforts therefore require:

- i) A clear understanding of *system crimes*¹⁵ and how they should be investigated and prosecuted;
- ii) The design of processes that are likely to *inspire public confidence* in the institutions dealing with the criminal prosecutions and trials, both technically and substantively; and
- iii) An appreciation of *the role victims should play* in the judicial process and an emphasis on restoring victims' dignity as rights-bearing citizens.

Where the international community assumes a role in the process, it, too, must be clear about the objectives of such prosecutions.

b) Developing a clear strategy. Prosecutorial initiatives should have a *clear strategy* to address the challenges of a large volume of cases, many suspects, limited resources and competing demands. Even with an appropriate political commitment to support criminal accountability, a well developed, strategic plan is essential to the success of a prosecutorial effort. The main strategic challenges are:

- i) A large number of crimes will have been committed and it will be possible to investigate only a small number
- ii) Hundreds, if not thousands, of people may have been involved in the crimes and not all can be prosecuted.

The decisions on what crimes and which alleged perpetrators are likely to be investigated must be made clear in order to maintain the integrity of the process. Two steps are essential: first, a *mapping exercise* should be carried out before developing a detailed prosecutorial strategy, taking into account the vast number of suspects and victims; and secondly, provision should be made for *outreach* to explain the purposes of the prosecutorial policies and strategies.

c) The appropriate technical approach. Prosecutorial initiatives should be endowed with the *necessary capacity* and *technical ability* to investigate and prosecute the crimes in question, understanding their complexity and the need for specialized approaches. This is especially important when prosecuting systemic crimes (i.e. crimes either perpetrated by the State or crimes which are generally organised).¹⁶

Prosecuting these crimes is complicated by the fact that they are often (though not always) committed by official entities and frequently with the involvement of people who were, or may remain, politically powerful. The crimes usually affect large numbers of victims, and these issues of scale and context make investigations more logistically difficult. Therefore, it becomes vital that those with the responsibility to investigate and/or prosecute should include:

- i) Lawyers who are skilled in the particularities of system crimes to help guide investigations
- ii) Expert analysts in various fields, including historical, military and political analysis
- iii) Sufficient crime-scene investigators for the expected universe of cases
- iv) A liaison unit with NGOs and victim organizations to assist in victim preparation and awareness
- v) Experts to deal with the particular needs of women and children.

¹⁵Crimes implemented by entities of the state such as genocide, crimes against humanity and war crimes if committed on a large scale.

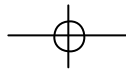
¹⁶System crimes are generally characterized by a division of labour between planners and those who execute those plans.

d) Respecting the victims' needs and rights: Initiatives should *pay particular attention to victims*, ensuring (as far as possible) their meaningful participation, and ensure adequate protection of witnesses. It is important that victims understand prosecutorial strategies and the reasons they have been selected as witnesses so that they do not feel that their views are being ignored or that they have not contributed meaningfully to the process.

Some basic guidelines can go a long way towards helping to make the pursuit of justice a much more meaningful experience for victims:

- i) *Managing expectations.* Those dealing with victims should manage victims' expectations. The risks of participating in trials, and the prospects for success, should be discussed honestly and should not be disguised.
- ii) *Regular communications.* Communication is central to a respectful relationship with victims. This in itself can be seen as part of the process of restoring their dignity.
- iii) *Education.* Many victims may have no real knowledge of what a legal process involves, so an educational programme is essential. Victim engagement teams, guided by legal personnel, can provide basic information as long as they too are adequately trained and properly briefed.
- iv) *Staff awareness training.* Many jurisdictions will benefit from some form of awareness training that deals with respectful treatment of sensitive gender or race issues. This presents special difficulties in domestic proceedings, especially where there is general denial about discrimination.
- v) *Information prior to trial.* Prior to trials, victims and witnesses should be familiar with the trial process and the courtroom itself. They should understand both the defence's right to challenge the prosecution's version of events and their own right to be treated with respect and dignity.

e) Applicable law, trial management and due process: Prosecution initiatives should be executed with a clear understanding of the *relevant law* and an appreciation of *trial management skills*, as well as a strong commitment to *due process*.



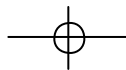
CHAPTER

3

A session of the Gacaca Court in Rwanda



INFORMAL JUSTICE AND TRADITIONAL JUSTICE MECHANISMS



CHAPTER

3

INFORMAL JUSTICE AND
TRADITIONAL JUSTICE
MECHANISMS.

Informal justice systems can be best understood *vis-a-vis* the formal justice systems. Informal justice systems are the dispute resolution mechanisms falling outside the scope of the formal justice system¹⁷. It refers to localized approaches by communities to attain justice. This differs from formal justice systems which involve civil and criminal justice and include formal state-based justice institutions and procedures, such as police, prosecution, courts (religious and secular) and custodial measures.¹⁸

Traditional justice is a component of the informal justice systems which is usually culture and community specific. Every society that forms an informal justice system does so in relation to their individual patterns of social ordering. This justice system relies on the negotiation and the mediation of disputes (and violations), leading to consensus and compromise. When the judicial process involves the people, they perceive it as accessible and legitimate, that their decisions are based on consensus, and seek to heal and restore relations among communities.

Arguments have been advanced that the informal justice systems should not be incorporated within the formal state judicial system. They should remain entirely voluntary and their decisions non-binding. Though physically coercive measures should be prohibited, the state should not interfere with the processes of these tribunals such as the appointment of informal 'arbitrators' within a community; the jurisdiction of the informal systems should not be heavily restricted nor should the question of legal representation before traditional and informal justice be required.¹⁹

3.1 Case Studies

a) Kenya: the use of elders and traditional norms and processes in resolving disputes or conflicts is common especially in the rural areas. However, the decisions that are made in these systems can be overturned by courts if they are deemed to be repugnant to justice, morality or any written law.²⁰

b) Congo: Traditional community courts have been used for generations in the Congo to compensate criminal actions and restore relations among communities.²¹ Congo formed the '*baraza intercommunautaire*', which was formally recognized in 2003 as a national strategy for reconciliation. The '*baraza*' provides a structure and a space for free expression where offended persons or victims go to share their grievances, have crimes adjudicated and violations of their rights redressed. The alleged perpetrators are invited to respond to the allegations so that the truth may be known and the reconciliation hopefully achieved.

c) Rwanda: Rwanda integrated both the international court prosecutorial accountability mechanism, as well as the Traditional Justice System. The traditional community-based *Gacaca* courts were established in 2001, which were to bring a sense of community participation in the sentencing and healing process. This ensures that the community has a sense of ownership and that the process is self driven, leading to great satisfaction and sustainable peace.²²

3.2 Challenges

- i) These systems are often subject to corruption and abuse
- ii) They are largely dominated by men and are often insensitive to gender
- iii) They are usually not well equipped to deal with modern or sophisticated crimes and violation
- iv) Informal justice systems have great difficulty dealing with disputes that are inter-communal
- v) Some countries or communities may have altogether abandoned their traditional or informal justice systems.

17. The above chapter on Prosecutions forms the basis of the formal justice system.

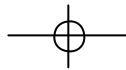
18. Ewa Wojkowska, (2006) Doing Justice: How Informal Justice Systems can Contribute, United Nation Development Programme; p. 9.

19. Penal Reform International, Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems (2001).

20. Section 3 (2) of the Judicature Act, Chapter 8 of the Laws of Kenya.

21. Charles Villa, Paul Nantulya, Tyrone Savage, Building Nations: Transitional Justice in the African Great Lakes Region

22. *ibid*



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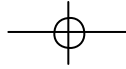
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Kenya Anti-Corruption Czar Justice Aaron Ringera resigns after intense public pressure.



Credit: Daily Nation: 1 October 2009.

LUSTRATION IN TRANSITIONAL JUSTICE



CHAPTER

4

LUSTRATION IN
TRANSITIONAL JUSTICE

Lustration' can be said to refer to the transitional-justice process in which individuals involved in gross human rights violations and economic crimes are prohibited from holding certain governmental and non-governmental posts for a specified amount of time. Disqualification or 'lustration' of agents of the secret police, of military personnel, judges and other functionaries is an alternative way to address the question of punishing those who are responsible for aggression and repression. Such non-judicial disciplinary measures are usually meted out by administrative agencies such as the electoral management body and civil service agencies.²³

It is also necessary to reform and screen those who hold office in the judiciary, law enforcement agencies and the government administration. 'Lustration' is an administrative measure used by post-totalitarian regimes to exclude from public institutions persons who worked for or collaborated with the former regime.

Lustration may be applied in various forms:

- political disqualification, for example, loss of suffrage
- barring high-ranking officials from public service in the police, the army and the state administration
- milder types of penalties for senior officials, such as forced early retirement or transfer to less strategic posts.

4.1 History of Lustration

One of the best early illustrations of the lustration process can be observed in the period after the World War II when the Allies began with the process of De-Nazification in the occupied parts of Germany and in other European countries where institutional reforms were being implemented after the fall of the Nazi regime.

In this program, public officials who were determined to be Nazis were no longer allowed to hold public offices.

The 1990s saw major developments in Lustration laws as many Central and Eastern European (CEE) countries broke away from communist rule and attempted to establish authentic democracies. Following the 1989 'democratic revolutions', there was an immediate, though not surprising, backlash against former communist regimes. Throughout Eastern Europe, it was widely perceived that former Communists could not be trusted to carry out democratic reforms. Indeed, many of the newly constituted governments, most prominently Poland, the Czech Republic and Hungary, reacted swiftly by outlawing the Party, prosecuting anyone deemed to have had connections to the Party or the Secret Police, or restricting those individuals from certain government and non-government posts.²⁴

Lustration laws became the mechanism of choice for screening and 'prosecuting' former Communist leaders, candidates for office, and selected public employees. These laws, which generally rely on information contained in Secret Police files, are used to determine whether suspected individuals collaborated with the former state security service and to thereby restrict them from holding certain government posts.

The latest major example of lustration as part of a broad institutional reforms initiative was observed in the process of de-Ba'athification carried out in Iraq after the US-led invasion in 2003. Under the new policy, Baath party members (the party that supported the deposed President) were removed from Iraqi government positions following the fall of Iraqi President Saddam Hussein.

4.2 Relationship between Vetting and Lustration

Vetting is a process through which the integrity and behaviour of officers targeted for employment by state and non-state institutions undergo screenings in order to evaluate their eligibility to work within these institutions and to establish their possible responsibility for crimes committed in the past. It is

23. Institute for Democracy and Electoral Assistance, *Reconciliation After Violent Conflict: A Handbook* (2003); pg 103. See also Brahm, Eric, 'Lustration' in <http://www.beyondintractability.org/essay/lustration/>

24. Ellis Mark, 'Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc', *Law and Contemporary Problems*, Volume 59 No. 4(1996), p 181.

therefore a way to remove individuals from state institutions who committed, aided, or were accomplices in crimes.

A vetting programme can cover either all the services within one or more institutions or only certain services within certain institutions for which there is reasonable suspicion that its members were involved in human rights violations. A vetting programme can represent a foundation for future criminal prosecutions of individuals responsible for human rights violations, but it should not substitute criminal prosecutions or truth-seeking and reparations programmes.

Both lustration and vetting initiatives are processes of disqualifying the actual and potential culprits (respectively) from being part of a regime in transition. If vetting is properly enforced, it narrows down the chances for impunity and therefore lustration.

4.3 Advantages of Lustration and Vetting

- i) It provides a necessary symbolical departure from the past totalitarian practices and those who were instrumental in their enforcement
- ii) An effective lustration and vetting mechanisms ensures that perpetrators of human rights violations and or economic crimes are not allowed to vie for or hold public office
- iii) Lustration and vetting also sets out to ensure that those who hold public office are persons of integrity
- iv) It would impose serious financial costs on the affected individuals, many of whom have spent most of their professional careers in government service and are simply biding their time until the next administration²⁵
- v) Lustration provides a close retributive fit between the punishment and the crime
- vi) Lustration and vetting would serve as an effective deterrent to future governmental misconduct. The potential financial costs would be one deterrent; another would be the stigma of the public shaming that lustration would involve
- vii) Lustration provides an opportunity for comprehensive institutional reform.

25. Herman Schwartz outlines elements of lustration in his article, 'Lustration in Eastern Europe.' It emerges that this concept gained prominence in the Former Soviet republics in the post-Cold War era as a decommunization program where ardent communists were barred from holding public offices.

4.4 Challenges Facing Lustration And Vetting

- i) Administrative difficulties: These concern primarily the issue of political will to implement the vetting process within the institutions; who should undergo screenings?; the sources and documents, laws and standards on which the behaviour of officers will be evaluated; whether or not society is financially capable of supporting what is often an expensive process, and the timelines of the process
- ii) Vetting may be used as a tool for revenge against political opponents, or result in human rights violations against those who are subject to a compromised vetting process
- iii) Also relevant is the fact that mass vetting within state institutions and the removal of a great number of officers can bring about a lack of personnel able to perform the most important functions and the collapse of already weak state institutions
- iv) The international community has criticized the law on grounds that it discriminates in employment and thereby violates human rights standards
- v) Lustration law can lead to numerous individuals being unfairly lustrated if the process is not properly handled or if it is subject to political manipulation
- vi) Those facing the lustration process will have the opportunity to challenge their lustration via some sort of formal hearing. Such individualized hearings consume a great deal of time and resources, because of the large numbers of potential suspects
- vii) The lustration law has in several quarters been criticized for weakening the principle of legal certainty. This is as lustration laws seem to create new legal standards that are to apply retrospectively
- viii) The ascertainment of violations that would make one subject to lustration law has to be through a procedure that complies with the requirement of procedural due process of law. This complicates the process where standard of proof are high or where institutional capacity to investigate is poor
- ix) Under lustration there may be the tendency for focus on individuals as opposed to governance systems.

4.5 Case Studies

a) Kenya

Since independence the Kenyan state has attempted to put in place policy, legal and institutional systems to deal with perpetrators of gross human rights violations and economic crimes. These include commissions of inquiry, anti-corruption and public integrity institutions.²⁶ However, the main challenge remains enforcement due to lack of political goodwill.

This form of accountability could be effective in Kenya especially where we have the different stakeholders (naming and shaming) and the reform initiatives (defined in Chapter 6), listing the names of those involved in the atrocities of the past regime. And further recommending that certain persons found to have possibly participated in the perpetration of gross human rights violations and or economic crimes be permanently barred from holding public office in the future or discharging duties linked to dealing with public funds whether in a contractual or administrative manner.

b) Iraq²⁷

The process of de-Ba'athification in Iraq provides a unique case study for lustration policies, which aimed at disbanding those who were associated with the abuses under the former regime. The Coalition Provisional Authority (CPA) embarked on the policy in order to purify the Iraqi administration and military by rooting out all former Ba'athists in 2003.

c) Czechoslovakia²⁸

Czechoslovakia was one of the first countries to adopt a stringent lustration code. Passed by the Czech and Slovak National Assembly on October 4, 1991, the Lustration Law barred former Party officials, members of the People's Militia and members of the National Security Corps - as well as suspected collaborators - from holding a range of elected and appointed positions in state-owned companies, academia, and the media for a period of five years (until January 30, 1996). Parliament later extended the law to the year 2000. The 1991 Lustration Law focused specifically on

individuals whose names appeared in the files of the former Czechoslovak Secret Police.

d) Poland²⁹

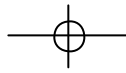
In May 1997, Poland passed a law which provided for the screening and vetting of people seeking public office to ensure they were not former collaborators with the Communist-era Secret Services. Top officials and candidates for office were also affected by the law. The Law created the Lustration Court to examine complicity with the Secret Police. The Lustration Court's mandate is to verify the declarations of top officials as to whether or not they served or collaborated with the Communist-era Secret Police.

26. The best example of this being the IREC which was formed to inquire into the conduct of the 2007 General Elections, led to the disbandment of the then Electoral Commission of Kenya. Other examples include the Anti-corruption and Economic Crimes Act (2003) and the Public Officers Ethics Act (2003).

27. Lessons Learned from Denazification and De-baathification (2007). http://www.iphils.uj.edu.pl/democracy/html/papers/Dariusz_Gryzlo.pdf. (12/11/09).

28. Ellis Mark, 'Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc', Law and Contemporary Problems, Volume 59 No. 4 (1996); p 182.

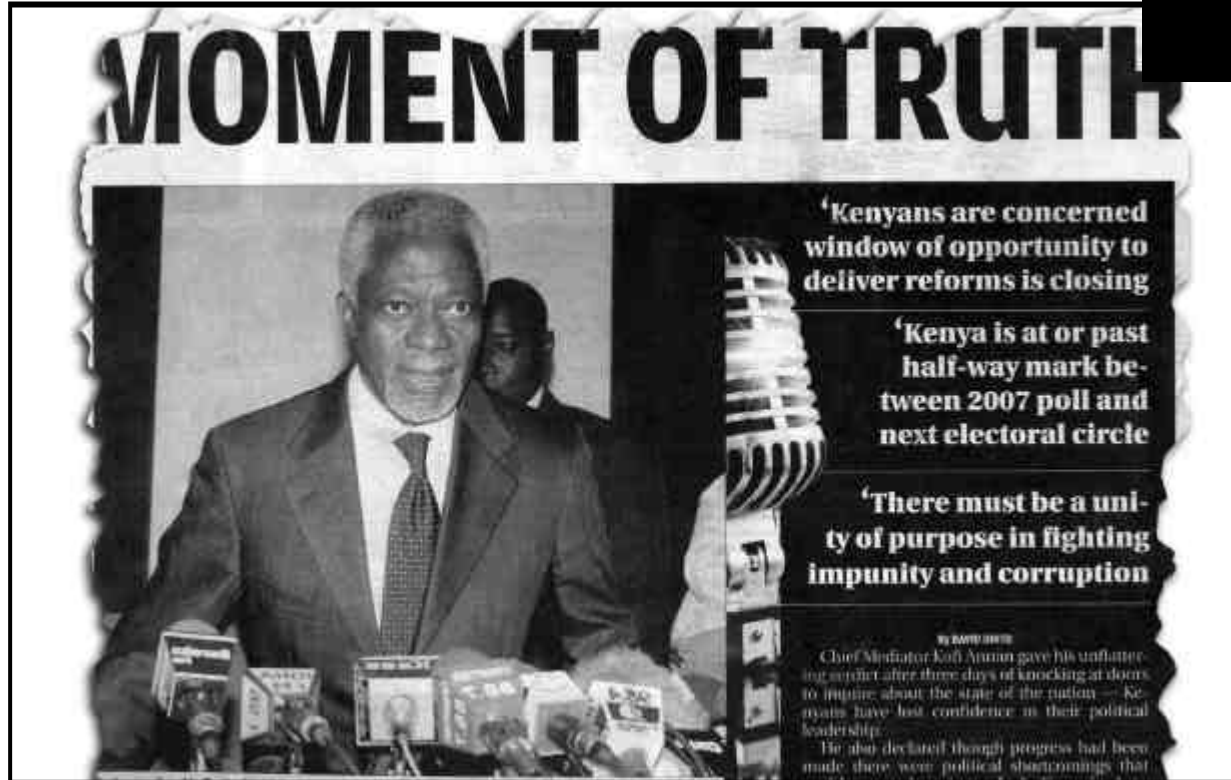
29. Ibid; p 193.



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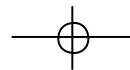
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Chief Mediator, Kofi Annan gives his assessment of the reform process in Kenya, 20 months after the post-election violence and the signing of the National Accord between the two rival parties PNU and ODM.



Credit: The Standard, 5 October 2009.

INSTITUTIONAL, POLICY, LEGAL AND CONSTITUTIONAL REFORMS



CHAPTER

5

30.The Kenya National Dialogue and Reconciliation agreement: Statement of Principles on Long-term issues and solutions. The preamble to the Agreement reaffirms that the final goal of the National Dialogue and Reconciliation is to achieve sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights in Kenya. It reminds the parties that, in the Annotated Agenda and Timetable for the National Dialogue and Reconciliation signed on 1st February, 2008, they recognized that poverty, the inequitable distribution of resources and perceptions of historical injustices and exclusion on the part of segments of the Kenyan society constituted the underlying causes of the prevailing social tensions, instability and cycles of violence. The Preamble also recalls the 14th February Agreement on Agenda Item 3 (How to resolve the political crisis) the parties reaffirmed their commitment to address the issue within Agenda Item 4 expeditiously and comprehensively. http://www.dialoguekenya.org/docs/14_Feb_08_TsavoAgreement.pdf (12/11/09). The Kenya National Dialogue and Reconciliation agreement: Agenda Item 4: Long Term Issues and Solutions - Matrix of Implementation Agenda (30/07/2008).

31.The Kenya National Dialogue and Reconciliation agreement: Agenda Item 4: Long Term Issues and Solutions - Matrix of Implementation Agenda (30/07/2008).

INSTITUTIONAL, POLICY, LEGAL AND CONSTITUTIONAL REFORMS

This takes the discourse of TJ beyond the individuals targeted for lustration and vetting in the previous chapter. The public institutions in most states experiencing authoritarian rule are characterized by deep-rooted corruption, a lack of accountability, inefficiency and or a legacy of human rights violations. These institutions need to be rehabilitated if there is to be a break-away from past practices towards a new order of good governance. The transformation and improvement of these institutions through wide reaching reforms therefore becomes one of the key cornerstones of an effective transitional justice process. As mentioned earlier in the last chapter, agenda item 4 of the Kenya National Dialogue and Reconstruction Agreement (here after referred to as the Agreement) makes up the current transitional justice programme for Kenya.

5.1 The Agenda Item 4 and its Implementation Matrix ³⁰

The Agreement sets out a scheduled framework³¹ for initiating and implementing the requisite constitutional, legal, policy and institutional reforms under Agenda Item 4 as follows:

Issue	Actions	Timeframe	Focal point
Constitutional reform	<p>As described in Agreement signed on 4 March, 2008:</p> <ul style="list-style-type: none"> -Consultation with stakeholders -Parliament to enact Constitutional Review Statute, including a timetable -Parliament to enact Referendum Law -Draft Constitution prepared in consultative process, with expert assistance. -Parliament to approve -People to enact through a referendum 	<p>Consultations launched and review statute enacted by end of August</p> <p>Constitutional reform to be completed in 12 months from the date of enactment of statute</p>	<p>Ministry of Justice, National Cohesion and Constitutional Affairs</p>

ISSUE	ACTIONS	TIMEFRAME	FOCAL POINT
Institutional reform: The Judiciary	a) Constitutional review to anchor judicial reform measures including: i) Financial independence ii) Transparent and merit-based appointment, discipline and removal of judges iii) Strong commitment to human rights and gender equity iv) Reconstitution of the Judicial Service Commission to include other stakeholders and enhance independence and autonomy of the Commission b) Enact Judicial Service Commission Act with provision for: -Peer review mechanisms -Performance contracting c) Streamline the functioning of legal and judicial institutions by adopting a sector-wide approach to increase recruitment, training, planning, management and implementation of programmes and activities in the justice sector	Constitution to be adopted in 12 months Judicial Services Bill passed to implement the constitutional provisions within three months	Ministry of Justice, National Cohesion and Constitutional Affairs
Institutional reform: The Police	a) Constitutional review to establish an independent Police Commission b) Review and define the role of the Administration Police c) Review laws and issues related to security and policing(including the Independent Complaints Commission, citizen oversight of police services, enhanced information disclosures, human resource management and capacity building) to make them consistent with modern democratic norms.	Constitution to be adopted in 12 months. Review process to be completed within 6 months. Recruitment and training to be completed by 2012	Ministry of Justice, National Cohesion and Constitutional affairs Office of the President Ministry of Internal Security

ISSUE	ACTIONS	TIMEFRAME	FOCAL POINT
	<p>d) Finalisation and rollout of the National Security Policy to enable relevant sectors to develop their specific sectoral policies</p> <p>e) Recruit and train more police officers to raise the police to population ratio to the U N Standard</p>		
<p>Institutional reform: The Civil Service</p>	<p>a) Parliament to pass bill incorporating civil service reform measures from past proposed draft constitutions</p> <p>b) Continue with on-going administrative and financial reforms</p> <p>c) Results-Based Management (RBM) and Performance Contracting to cover all persons paid from public funds</p> <p>d) Review the Anti-Corruption and Economic Crimes Act 2003 and the Public Officer Ethics Act 2003</p> <p>e) Review the legal framework for declaration of incomes, assets and liabilities with a view to establishing an efficient and devolved administrative, compliance and analysis institutional framework</p> <p>f) Appropriate constitutional and legal reforms will be undertaken to facilitate parliamentary vetting of senior public appointments</p> <p>g) New legislation on whistle-blower protection, freedom of information, and operationalisation of the Witness Protection Act 2006</p> <p>h) Review recruitment legislation to institutionalise national character in the public service</p> <p>i) Review Standing Orders to ensure parliamentary oversight over membership of committees is based on competency and integrity (There is a need to link this with item (a) below).</p>	<p>Bill to be passed by Parliament within 12 months of the coming into force of the new Constitution</p> <p>RBM and Performance Contracting to be entrenched in the new Constitution</p> <p>The various legislations to be adopted by Parliament within 6-8 months of promulgation of the new Constitution.</p>	<p>Ministry of State for Public Service/ Public Service Commission</p> <p>Ministry of Justice, National Cohesion and Constitutional Affairs.</p>

ISSUE	ACTIONS	TIMEFRAME	FOCAL POINT
INSTITUTIONAL REFORM: THE PARLIAMENT	a) Comprehensive review of Parliamentary Standing Orders and procedures to enrich quality and output of Parliamentary debates and strengthen multi-party democracy b) Parliament's Research Centre to be strengthened c) Live coverage and electronic voting to be introduced d) Enhanced oversight role of Parliament over the national budget e) Review Standing Orders to create a Monitoring and Implementation Committee f) Introduce stricter and timelier deliberations on reports by institutions such as the Kenya Anti-Corruption Commission, Kenya National Audit Office, State Law Office, and Kenya National Commission on Human Rights g) Strengthen organs of Parliament such as Parliamentary Accounts Committee and Parliamentary Investments Committee to promote transparency and accountability in the utilisation of public resources h) Improve transparency of MPs by creating a register of interests and opening up Parliamentary Committee work to the public	Review to be completed within 6 months	Parliament

ISSUE	ACTIONS	TIMEFRAME	FOCAL POINT
LAND REFORM	<ul style="list-style-type: none"> a) Constitutional review to address fundamental issues of land tenure and land use b) The development and implementation of land policies should take into account the linkages between land use, environmental conservation, forestry and water resources c) Finalisation of the draft National Land use policy and enactment of attendant legislations d) Land laws to be harmonised into one statute to reduce multiple allocations of title deeds e) Establishment of a transparent, decentralised, affordable and efficient Government Information system (GIS-based) land Information Management System and a GIS-based Land Registry at the Ministry of Lands including all local authorities f) Land Ownership Document Replacement for owners affected by post-election violence g) Development of a National Land use Master plan, taking into account environmental considerations h) Land Reform Transformation Unit in the Ministry of Lands to facilitate the implementation of the land reform programme as outlined in the National land use policy i) Strengthen local-level mechanisms for sustainable land rights administration and management j) Finalise the Land Dispute Tribunal Act 	Land reform process to be factored in the constitutional review process within 12 months	Ministry of Lands

ISSUE	ACTIONS	TIMEFRAME	FOCAL POINT
POVERTY, INEQUALITY AND REGIONAL IMBALANCES	<p>a) Ensure equity and balance are attained in development across all regions including in job creation, poverty reduction, improved income distribution and gender equity</p> <p>b) Increase community empowerment through devolved public funds for both social and income programmes, and develop local capacity to manage devolved funds</p> <p>c) Implementation of policies and programmes that minimise the differences in income opportunities and access to social services across Kenya, with special attention to the most disadvantaged communities in the Arid and Semi-Arid Districts, urban informal settlements and pockets of poverty in high potential areas</p> <p>d) Improve wealth creating opportunities for disadvantaged groups and regions through increased infrastructure spending in roads, water, sewerage, communications, electricity targeting poor communities and regions.</p> <p>e) Increase availability of affordable and accessible credit, savings programmes and appropriate technologies to create an enabling environment for poor communities to take part in wealth creation</p> <p>f) Develop an Affirmative Action policy and enhance the Women's Enterprise Fund</p> <p>g) Improve health infrastructure in underserved areas of the country through construction or rehabilitation of community health centres.</p>	Implementation of measures to be reviewed within 2-3 years	Ministry of Planning, National Development and Vision 2030.

ISSUE	ACTIONS	TIMEFRAME	FOCAL POINT
UNEMPLOYMENT, PARTICULARLY AMONG THE YOUTH	<p>a) Generate an average of 740,000 new jobs each year from 2008-2012</p> <p>b) Youth polytechnics to be revitalised and expanded in all districts to facilitate the training of young people in technical, vocational and entrepreneurial skills to equip them with relevant skills to participate fully in productive activities</p> <p>c) Youth Empowerment Centres to be rehabilitated or established in all constituencies</p> <p>d) Upgrade existing National youth Service institutions and establish three new ones</p> <p>e) Development and enactment of a National Youth Council Bill</p> <p>f) Establish Youth Enterprise and employment programmes to promote Small and Medium size enterprises (SMEs) and self-employment among the youth</p> <p>g) Youth Enterprise Development Fund to be increased and mechanisms put in place for easier access to credit and collateral</p> <p>h) Some 5,000 youths to be recruited to the National Youth Service to be employed in labour intensive road projects, tree planting programmes and other productive activities</p>	12 months	Ministries of Roads, Public Works, Youth, Special Services and Gender

ISSUE	ACTIONS	TIMEFRAME	FOCAL POINT
<p>CONSOLIDATING NATIONAL COHESION AND UNITY</p>	<p>a) Finalise and support enactment of the Ethnic and Race Relations Bill by Parliament</p> <p>b) Parliament and the Executive to initiate and sustain advocacy role on ethnic and racial harmony</p> <p>c) Establish and operationalise a policy and institutional framework for a Peace-Building and Conflict Resolution Programme (PBCR) and early warning mechanisms on social conflict, including a PBCR monitoring and evaluation system and a restructured Secretariat, and enactment of the Alternative Dispute Resolution Bill</p> <p>d) Extend District Peace Committee framework to entire country and link it to District Security Committees</p> <p>e) Finalise the Hate Speech Bill and review the Media Act to control incitement attempts</p> <p>f) Undertake civic education on ethnic relations</p> <p>g) Inculcate a civic culture, which tolerates diversity and encourages inter-ethnic cooperation, through the school curriculum</p> <p>h) Operationalisation of the Truth, Justice and Reconciliation Commission</p>	<p>Ethnic Relations Bills to be passed by Parliament within 3 months</p> <p>Review progress in implementation of the various measures within 12 months</p>	<p>Ministry of Justice, National Cohesion and Constitutional Affairs</p> <p>Office of the President</p> <p>Ministries of Education and Information</p>

ISSUE	ACTIONS	TIMEFRAME	FOCAL POINT
<p>TRANSPARENCY, ACCOUNTABILITY AND IMPUNITY</p>	<p>a) Strengthen the policy, legal and institutional framework for increased public transparency and accountability, anti-corruption, ethics and integrity, including through the development of a national anti-corruption policy, enactment of necessary legislation, and systems and capacity enhancements to strengthen the national Audit Office</p> <p>b) Undertake programmes to support improved prosecution and adjudication of corruption and economic crimes, and improved oversight and consideration of anti-corruption and audit reports by Parliament</p> <p>c) Enhance capacity and performance in the Investigation and Asset Tracing Programme, the Civil Litigation and Asset Recovery Programme, the National Anti-Corruption Awareness Campaign and District Anti-Corruption Civilian Oversight Committees</p> <p>d) Continuous monitoring of the Public Officer Ethics Act</p> <p>e) Revitalise Public Financial Management including the management of devolved funds such as the Constituency Development Fund (CDF), Local Government Task Force (LGTf) and Road Maintenance Levy</p> <p>f) Expand capacity of District Anti-Corruption Civilian Oversight Committees to monitor management of devolved funds and stigmatise corruption</p> <p>g) Review the effectiveness of the Public Procurement Authority</p> <p>h) Undertake structural reforms focusing on prevention, investigation and recovery of corruptly acquired assets</p> <p>i) Review the effectiveness of the Privatisation Commission</p> <p>j) Full operationalisation and capacity-building of the Public Complaints Standing Committee (the Ombudsman)</p> <p>k) Finalise and operationalise the GJLOS policy framework and establish a comprehensive GJLOS policy review and update process</p> <p>l) Sustain the APRM process by ensuring assessment of government (executive, legislative and judiciary) performance and accountability</p>	<p>Review progress in implementation of various measures within 12 months</p>	<p>Ministry of Justice, National Cohesion and Constitutional Affairs</p> <p>Ministry of Finance</p> <p>Attorney-General's Office</p> <p>Kenya Anti Corruption Commission (KACC)</p> <p>Judiciary</p>

5.2 Progress on Implementation of Agenda 4 Items

In a written submission to the National Dialogue and Reconciliation team, the Kenyans for Peace with Truth and Justice (KPTJ) set out its findings on the progress made on the by the Kenyan government on the Agenda 4 reform measures by October 2009 as follows:

In respect of decisions reached under Agenda Item 4: Long Standing Issues and Solutions³²

- i) Of the long-term issues, only Constitutional and institutional reforms have received attention, the latter unsatisfactorily so
- ii) With regards to the Committee of Experts, we have seen much movement through teambuilding exercises and seminars, but very little substantive motion towards reform
- iii) While the Committee of Experts has, in the main, committed to delivering a harmonized draft, the polarisation and tensions between and within parties to the Grand Coalition Government make the prospects of coming to a referendum in agreement slim, with boycotts from various members within the Committee.
- iv) With respect to electoral reforms, no voters roll is in place six months to the referendum (exercise usually takes up to two years), and the gaps in the electoral system at the presidential, parliamentary and civil levels have not been addressed
- v) Land, the existence of legitimate yet overlapping claims to land and illegal land allocations are yet to be dealt with comprehensively
- vi) The Cabinet has prepared a National Land policy, however disunity within Parliament, as demonstrated by the lack of resolution on the issue of the Mau Forest, may undermine the passing of a comprehensive land policy
- vii) Cases of grand corruption continue to spiral and the fight against corruption has not been proactive with no real efforts to address the prosecutions gap between the Kenya Anti-Corruption Commission and the offices of the Attorney General and Director of Public Prosecutions
- viii) A lack of sufficient leadership within the judiciary continues to plague this institution, greatly hampering reform efforts.

32. Kenyans for Peace with Truth and Justice, Submissions to the National Dialogue and Reconciliation Team (2009).

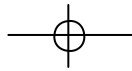
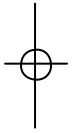
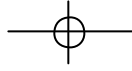
One major criticism that could be levelled at the Taskforce on Judicial Reform was its failure to address the same, instead administrative and financial issues were given greater priority

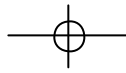
- ix) The establishment of a National Youth Fund is not an adequate response to the demographic challenge of the youth bulge.

5.3 Challenges

- i) Lack of political will to implement the reforms listed in Agenda 4 after the post-election crisis was averted
- ii) There is little if any co-ordination in the implementation of the various agenda four initiatives which need to be synchronised

The items listed in Agenda 4 leave out some important reforms needed or being undertaken such as the disaster management policy, national mining policy, national human rights policy among others.

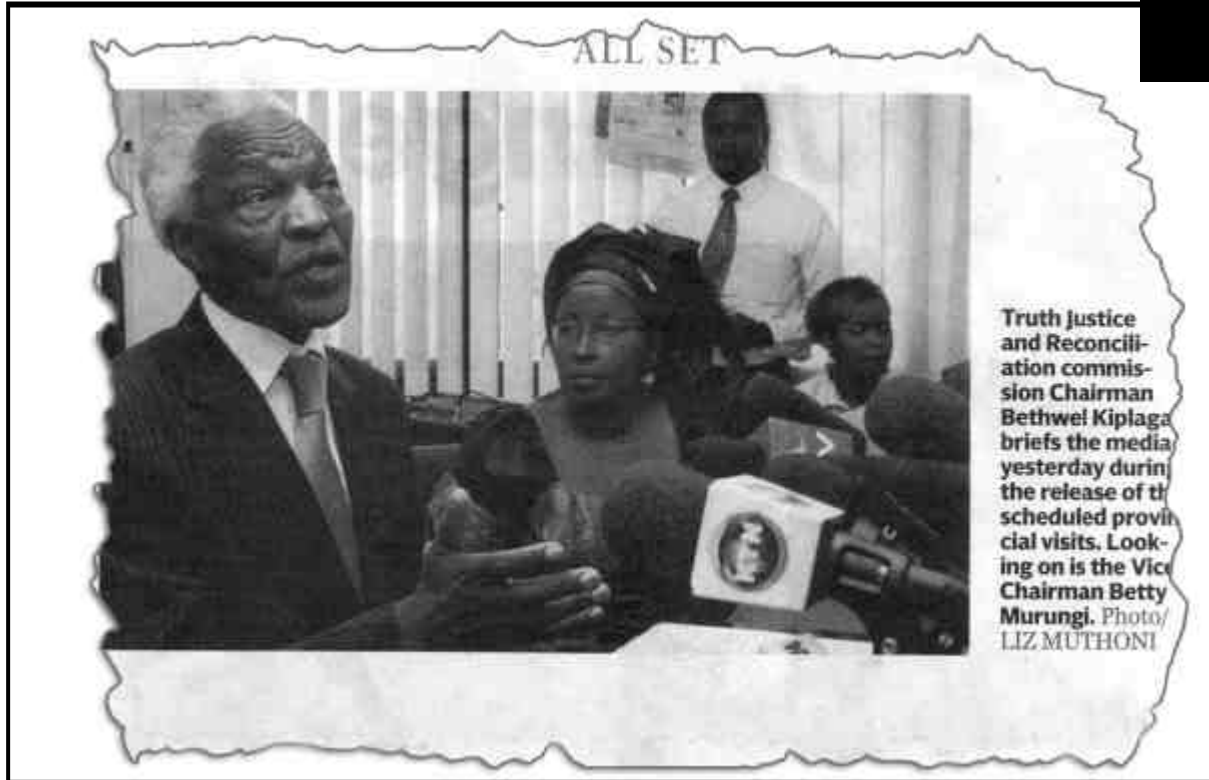




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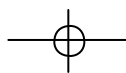
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Chairman Bethwel Kiplagat briefs the media. Looking on is Vice Chair Betty Murungi



Credit: Daily Nation, 22 January 2010: Photo - Liz Muthoni

TRUTH COMMISSIONS



CHAPTER

6

TRUTH COMMISSIONS

Truth commissions offer one of the best mechanisms for transitional justice and state reconstruction in the world. Truth commissions are defined as 'official, temporary, non-judicial, fact finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a period of time.³³ They are officially sanctioned, temporary, non-judicial investigative bodies that have been granted a relatively short period of time for statement taking, investigations, research and public hearings, before completing their work with a final public report.³⁴ A truth commission can therefore be described as a non-judicial investigative body that has been given some form of official powers by the state but empowered to operate as independently as possible from any state organs.

The following are some of the important characteristics of truth commissions:

- i) They are temporary bodies, usually in operations for one or two years
- ii) They are officially sanctioned, authorised or empowered by the state
- iii) They are non-judicial bodies that enjoy a measure of legal independence
- iv) They are usually created at a time of change from conflict to a state of peace and democratic governance [political transition]
- v) They focus on the past atrocities and crimes
- vi) They investigate patterns of abuse over a period of time, not just a specific event
- vii) They complete their work with the submission of a final report that contains conclusions and recommendations.³⁵

6.1 Guiding Principles for Establishment Of Truth Commissions³⁶

In setting up an effective truth commission, certain core principles and guidelines regarding its functions, powers and working methods should be adhered to. These principles include:

a) Identity: the truth commission must convey legitimacy, credibility, capacity and motivation.

b) Mandate: truth commissions should be given a sufficiently expansive mandate. However, a balance must be struck to ensure that it does not take on too broad a mission to accomplish over a fairly limited time period. The Commission mission should be flexible enough to allow new information to inform the direction of their investigations or activities.

c) Independence: Ideally, should be institutionally independent and sufficiently funded.

d) Powers: to facilitate proper investigations, truth commissions should be given significant authority such as, the power to subpoena witnesses and documents; power to protect witnesses and information; and any other authority that may aid its mandate to seek the truth.

e) Selection: the truth commission should be composed of non-partisan commissioners appointed through an open and transparent process. The commissioners should be respectable and fair-minded individuals of high moral standing. The selection process should allow for a range of groups to propose/nominate commissioners who would be vetted on integrity and respect for the rule of law, not their partisanship. The composition of a truth commission must reflect a balance between men and women.

f) Safeguards: Safeguards are required to protect national security-related information, but not to cover up politically embarrassing facts or other information about wrongful conduct that pose no national security risk. Truth commissions should have the ability to review information and hold hearings privately where strictly necessary to protect the security of individuals and to avoid real national security risks.

g) Cooperation: Government agencies must be encouraged and, where necessary, pressed into cooperating with the truth commissions. This requires political will at the highest level of government.

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

34. Office of the High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States: Truth Commissions (2006); p 1.

35. Molly Andrews, "Grand National Narratives and the Project of Truth Commissions: A Comparative Analysis" in Media, Culture and Society, London, Thousand Oaks and New Delhi Publications, Vol 25: 45 - 46 p 124

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

h) Public engagement, comprehensive and accessible report: Through public hearings, outreach efforts, and ultimately, an accessible report, truth commissions must aim to spark public interest and debate. It should provide a well-documented basis for its findings and recommendations for any further investigations, reforms, preventive and remedial measures. This will allow an informed public, and informed public officials to engage the issues in a new light and to use the report as a valuable tool for education, making policy and drawing lessons for the future.

i) Relationship to other accountability policies: Truth commissions are meant to compliment and NOT to substitute other transitional justice mechanisms such as prosecutions or reparations. Truth commissions that are initiated as a means to sidestep accountability rather than to deepen it will fail on many levels, but perhaps most importantly will result in increased scepticism about government capacity and commitment to hold institutions and individuals accountable in the future.

These guidelines should be embedded in the statute that creates the commission in a way that renders them legally enforceable by stake-holders, civil society, victims and members of the public where there appears to be a detrimental infringement of the guidelines.

6.2 Mandate and Conditions for Effective Truth Commissions

When properly constructed, truth commissions have the legal powers and institutional capacity to:

- i) Interrogate the truth from all angles by investigating and establishing a factual record for human rights violations and abuses
- ii) Promote justice by ensuring effective reparations to victims and accountability to perpetrators of human rights violations and abuses
- iii) Promote healing, reconciliation, recovery and reconstruction at all levels in the society
- iv) Efficiently carry out its activities. A truth commission by its

conduct would have two phases - the truth phase and the justice phase. The truth phase involves the collection of evidence and data and ascertainment of the reality of historic injustices. The justice phase may either involve, recommending the prosecution of perpetrators of violence, reparation of victims and amnesty, and or making their findings public about abuses of human rights and State obligation

- v) Heighten human rights education. The conduct of a truth commission should involve a heightened public awareness of the hearings and as such public education on human rights. The conduct of open hearing should result in inculcating in society a human rights culture. Moreover, the output of the truth commission would be accompanied by sustained and institutionalized efforts in educating the broader public of the commission's findings and the human rights that underpins those findings.

Truth commissions are effective only if established within the following contexts and conditions:

- i) In a political environment that is focused on providing justice and accountability
- ii) Where the process of formation and operations of the commission has been consultative and inclusive
- iii) Where there is clear definition of the mandate of the commission
- iv) Where there are proper mechanisms for protection of victims, witnesses and survivors
- v) Where effective mechanisms and institutions to implement the recommendations of the commission have been set in place.

6.3 Case Studies Of Truth Commissions

At least 33 truth commissions have been established in 28 countries between 1974 and 2007 - all with differing degrees of success. In this section we focus on two truth commissions: The Chilean and the South African truth commissions.

a) *The Chilean Truth Commission* ³⁷

After then-Chilean President Augusto Pinochet unexpectedly

37. For details see Brahm Eric (2005) "The Chilean Truth and Reconciliation Commission" in http://www.beyondintractability.org/ase_studies/Chilean_Truth_Commission.jsp?nid=5221. See also Hayner, Priscilla B (1995). 'Truth Commissions: A Schematic Overview.' International Review of the Red Cross 88, no. 862 (2006): 295-310 and Kritz, Neil J, ed. Transitional Justice: How Emerging Democracies Reckon with Former Regimes. 3 Vols Washington, DC: United States Institute of Peace.

lost a referendum on his government's performance in 1988, it triggered democratic elections that brought Patricio Aylwin to the presidency in 1990. Aylwin's election platform centered on truth, justice, addressing political prisoners, and reparations. In part responding to public pressure, the government created a truth commission only a month after Aylwin assumed power. Despite having lost the referendum, Pinochet retained significant support during and after the transition, which allowed him to influence the transition's course and to retain significant powers under the new democratic government. Commonly known as the Rettig Commission after its chairman, the truth commission was composed of an even split of representatives from Pinochet supporters and opponents.

The mandate of the commission over the course of nine months was mainly to establish as complete a picture as possible of the gross human rights violations that had occurred under the Pinochet regime; gather evidence to allow for victims to be identified; and make recommendations on reparations and on the legal and administrative measures that would prevent a repetition of the past abuses.

The Rettig Commission was aided in its work by a staff of sixty. It also got assistance from NGOs that provided information. It had freedom to move about to gather information and testimony. In total, the commission investigated 3,400 cases of death and reached definitive conclusions on all but 641. While the commission did not name perpetrators, provisions were made that they would be made public in 2016. The commission was not able to determine the fate of individuals many who had disappeared, largely due to the lack of cooperation from the military.

The Commission completed its work by submitting the findings in its final report to the government. President Aylwin made an impassioned nationally televised address introducing the report and apologizing on behalf of society to victims. The report called on the State and all of society to acknowledge and accept responsibility for past crimes and offer moral and material reparations meant to restore the dignity of victims. The

recommendations centred on reparations, education, legal reform, and taking steps to further clarify the fate of the disappeared.

b) The South African Truth and Reconciliation Commission

South Africa's Truth and Reconciliation Commission (TRC) is arguably the continent's best known example of restorative justice. Established in 1995, the TRC was charged with investigating gross human rights abuses that occurred between 1960 and 1994 so as to create as complete an account as possible of the injustices of that period. Perpetrators were offered amnesty in exchange for full disclosure about their past crimes. To a significant degree, this was part of a political compromise between the African National Congress and the outgoing apartheid government led by the National Party that was deemed necessary for a peaceful transition to democracy. South Africa's version of restorative justice emphasized reconciliation between perpetrators and victims built ideally on a perpetrator's repentance and a victim's forgiveness. Eventually, it was hoped, the South African nation as a whole would likewise become healed and reconciled.

Although the TRC's task was not officially framed in religious terms, the dominant role of Chair Archbishop Desmond Tutu meant that his theological view of reconciliation often triumphed over other views. This view was supported by the large number of commissioners who also shared similar religious dispositions. It has been argued that two features of South Africa's religious culture supported the TRC's emphasis of forgiveness over punishment: Christianity and the traditional concept of *Ubuntu*.³⁸

The Christian admonition to forgive one's enemies and embrace the sinner within the family of God was widely accepted among the largely Christian South African population. Due in part to the considerable role many church organizations played in protests against apartheid, the teachings of the church retained relevance for many South Africans. The traditional concept of *Ubuntu* was also

38. Battle, Michael J (1997) *Reconciliation: The Ubuntu Theology of Desmond Tutu*. Cleveland: The Pilgrim Press.

used to legitimize the TRC's call for reconciliation. It originates from a common Xhosa expression that states, *'Umuntu ngumuntu ngabantu'*, which translates as 'people are people through other people.' Though difficult to describe precisely, *Ubuntu* encompasses the notion of 'humaneness' or 'humanness.' It emphasizes community over the individual.

At the Human Rights Violations Committee hearings of the South African TRC, a select group of victims testified publicly about how they had suffered. About one tenth of the 20,000 deponents testified – a very small number out of a national population of 43 million. Still, anecdotal evidence suggests that for many who addressed the commission, the value of telling one's story before a supportive audience was significant. Referring to the psychological value of testifying, one witness said: 'When the officer tortured me at that time in John Vorster Square, he laughed at me: "You can scream your head off, nobody will ever hear you!" He was wrong. Today there are people who will hear me.'

A second committee, the Amnesty Committee, held hearings for those who admitted having committed crimes. Approximately 7,000 applicants applied for amnesty. Nearly half of the applicants were from the African National Congress. However, many others were common criminals hoping to convince the commissioners that they had political - not criminal - motives, and only a few were top leaders of the apartheid system. In the end, amnesty was granted to approximately 16% of the applicants. There was also a Reparations and Rehabilitation Committee that was responsible for the development of comprehensive recommendations to the Government on a reparations policy and how to implement it.

c) The Kenyan TJRC
Refer to Chapter Eleven.

6.4 Shortcomings and Challenges facing Truth Commissions

In terms of implementation and overall effect, truth commissions often face the following challenges:

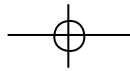
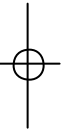
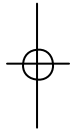
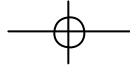
- i) In many countries truth commissions are offered as whole

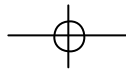
sale solutions to the governance problems they have been facing. As a result, they are established without due regard to the other TJ mechanisms. This approach often serves as a white-wash measure where governments attempt to sweep the past injustices under the rug while appearing to be advancing the aims of transitional justice

- ii) Most truth commissions fail to realize the 3 components of transitional justice- i.e. truth, justice and reconciliation- in a comprehensive and sustainable manner. Some are strong in exposing the truth but end up failing in addressing the justice and reconciliation needs of the society. Such truth commissions ultimately frustrate the quest for justice and reconstruction for victims and the society
- iii) There are times where the capacities of truth commissions are too limited or their mandates too wide to effectively realize the expected goals of transitional justice
- iv) Often times, truth commissions lack clearly defined goals and terms. It has been said that truth commissions in Africa 'have shielded away from offering clear definitions of the terms they use in a manner that could indicate the goals sought and what the public should expect'.³⁹ This lack of clarity means that the concepts of 'truth', 'justice' and 'reconciliation' are being referred to inaccurately and thereby making them subject to scepticism
- v) Finally, there are times where truth commissions do not provide opportunities and frameworks for dealing with very 'distinctive' victims and violations such as sexual and gender based violence (SGBV), and thereby fail to address the human rights violations suffered by significantly large segments of society.⁴⁰

39. See George Wachira and Prisca Kamungi, Background Paper: Truth and Reconciliation Commissions and Transitional Justice in Africa- Lessons and Implications to Kenya; NPI-Africa, April 2008.

40. Abrams, Jason S, and Priscilla B Hayner, 2002. Documenting, Acknowledging and Publicizing the Truth. In Post-conflict Justice, edited by M C Bassiouni. Ardsley, NY: Transnational Publishers. Also see Bronkhorst, Daan, 1995. Truth and Reconciliation, Obstacles and Opportunities for Human Rights. Amsterdam: Amnesty International Dutch Section. And finally Internet, on 'South African Truth and Reconciliation Commission www.doj.gov.za/trc/index.





CHAPTER

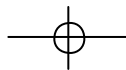
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The Kenyan Government announces amnesty for pastoral communities in Northern Kenya to surrender their arms.



Credit: Daily Nation, 21 January 2010.

AMNESTY



CHAPTER

7

AMNESTY

Amnesty refers to those 'legal measures which have the impact of prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of prior criminal conduct; or retroactively nullifying legal liability previously established.'⁴¹

The main aim of amnesty is to ensure truth is told, the violators are punished and the victim of the violations given justice, no matter how much that justice is 'delayed'.⁴² This term is used to refer to the legal reprieve or what we may term 'political' forgiveness and or exemptions from prosecution to those who committed crimes against humanity. Indeed, the need for truth, justice and reconciliation should be informed by the need to '...determine individual and collective responsibility and provide a full account of the truth to the victims, their relatives and society'⁴³ as a whole.

7.1 Amnesty versus Pardon

Amnesty differs from pardon which has been taken to refer to the

AMNESTY	PARDON
Aims at effacing and causing to forget	Seeks to exempt punishments to those judged guilty from completing their jail term
It is the abolition and forgetfulness	It is all about forgiveness
Given to one who may have been guilty	Given to one who is certainly guilty of a crime
Has an effect of destroying the criminal act in public	Has an effect of remission of the whole or part of a punishment awarded by the laws
May be granted before or after judgment	Given to individuals after judgment

exemptions given to a convict from completing his or her jail term. In this regard, pardon is provided for by law as a discretion given to the President in the form of powers of clemency (see table below). Amnesty also differs from the official amnesties given under the provisions of International Law to the Heads of State and the diplomatic corps.

The term amnesty is related to impunity. While impunity refers to total disregard of the (rule of) law, amnesty regards the law but exempts the violators of that law with an aim of forgetting. Thus this term has been perceived ⁴⁴ as a general remission of punishment, penalty, retribution, or disfavour to a whole group or class; it may imply a promise to forget.

7.2 Conditional versus Blanket Amnesty

Amnesties are conditional if they are only granted after the violator meeting the demands of the authority granting it. For instance, it is conditional amnesty if granted to the rebels only after ceasing the rebellion. Such an amnesty has been employed as a tool for conflict resolution, and as an incentive to peaceful negotiations. Another case can be where amnesty is given only when the violator says the whole truth (and nothing but the truth).

On the other hand, blanket amnesty is granted *enmasse* to a group or class of violators without any terms being given to the violators. They 'exempt broad categories of serious human rights offenders from prosecution and/or civil liability without the beneficiaries having to satisfy preconditions, including those aimed at ensuring full disclosure of what they know about crimes covered by the amnesty, on an individual basis'.⁴⁵ The cause for blanket amnesty can be as a result of an ineffective justice system, whether formal or informal to guarantee due process of prosecutions.

7.3 Characteristics and Grounds for Amnesty

- They are limited to a specific period and involve a specified event or circumstance, for example a civil war
- They specify a category or categories of beneficiaries, such as

41. See Office of the UN High Commissioner for Human Rights (2009). *Amnesties: Rule of Law Tool for Post Conflict States*. New York & Geneva: UN.

42. In Martin Luther King Jr The Letter from Birmingham Jail www.africa.upenn.edu/Articles.../Letter_Birmingham.html

43. Henry J Steiner and Phillip Alston. *International Human Rights in Context: Law, Politics, Morals*. Oxford: Ocford University Press, 1996: 1088

44. See Lectrix Law Library's Legal Lexigon on 'Amnesty' <http://www.lectlaw.com/def/a050.htm> 11/9/2009.

45. UNCHR, op cit, 11.

- members of the rebel armies
- Amnesties as shown hereunder, are exempted to all the crimes under the international law
- They come into effect either through a presidential decree or through a parliamentary enactment
- They also come into being in pursuance of a peaceful agreement.

According to the international legal instruments, **Amnesty is not permissible** on such grounds if it:

- Prevents prosecution of individuals who may be criminally responsible for war crimes, genocide crimes against humanity or gross violations of human rights, including gender specific violations
- Interferes with the rights of victims to an effective remedy , including reparations
- Restricts victims' and societies' right to know the truth about violations of human rights and humanitarian law
- Restricts the rights restored or in some respects perpetuates the original violations.⁴⁶

7.4 Amnesties Inconsistent with International Law

The following are the crimes and/or human rights violations upon which the amnesty law does not apply as per the provisions of various treaties and such related instruments:

- Genocide: An amnesty for genocide would violate the genocide convention and customary international law
- Crimes against Humanity: An amnesty for crimes against humanity would be inconsistent with States' obligations under several treaties and may be inconsistent with States' obligations under customary international law. These crimes include murder, extermination, enslavement, deportation, torture and rape among others
- War crimes: Amnesties that prevent prosecution of war crimes whether committed during international or non-international armed conflicts, are inconsistent with States' obligations under the widely ratified Geneva Conventions of 1949 and their 1977 protocols, and may also violate customary international law.

- Other violations of Human Rights: States may not grant amnesty for gross human rights violations, which include torture and enforced disappearance among others.⁴⁷

It is perhaps in this regard that Farid S B V ⁴⁸ has held that international legal instruments 'converge on the idea that grave crimes need to be punished and that state policies are constrained with regards to the scope of amnesties that can be offered to perpetrators of gross human rights violations'.

7.5 Amnesty Conditions in South Africa's TRC

The Amnesty Committee of the TRC was critical in this process. The quasi-judicial nature of amnesty process required an amnesty committee, chaired by a judge to preside over proceedings (i.e. testimony and cross-examination) and evaluate whether specific criteria had been fulfilled. Each specific amnesty condition provoked some measure of controversy.

The period under review - the interim constitution stipulated that the amnesty process would have a cut-off date after 8 October 1990, but before 6 December 1993. The TRC's legislation designated the period from 1 March 1960, the immediate period before the Sharpeville Massacre to 5 December 1993, the date on which the Interim Constitution came into effect. This excluded a significant number of violent political incidents that occurred after this date. Intensive lobbying from a range of groups including political parties as diverse as the Pan Africanist Congress and the Freedom Front, and supported by the Commission, persuaded the government to extend the cut-off date to 10 May 1994, the date of President Mandela's inauguration. Even then, there were a number of violent political incidents, especially in Kwa Zulu Natal, that were excluded because they occurred after this date. Many of these incidents remain an integral part of the 'unfinished business' of South Africa's past conflicts.

Violations with political objectives – the TRC legislation stipulated that amnesty could only be granted for acts associated

⁴⁶. Ibid, 8

⁴⁷. Ibid, 12-20

⁴⁸. Farid S. B. Vanegas. The Columbian Transitional Justice Model: No Transition and No Justice. An Oxford Transitional Justice Working Paper Series, 11 March, 2009:2.

with a political objective. Although detailed criteria detailing what would constitute 'political objective' were outlined in the Act, there remained concerns that this restricted an appreciation of the interface between crime and politics that permeated all sides of the conflict. A more detailed evaluation of refusals to grant amnesty on the basis that this criteria was not fulfilled, remains outstanding. This situation is further compounded by the lack of public disclosure surrounding the bulk of cases that were refused on the basis that the political objective criterion was not satisfied. The extent to which the Amnesty Committee has contributed to the presentation of a 'sanitized' past, where politics and crime is neatly delineated remains moot.

a) Full disclosure – this remains one of the most controversial and subjective aspects of the amnesty process, and the basis upon which many victims and survivors opposed the granting of amnesty – claiming that applicants had not revealed the full story. Full disclosure related only to the specific matter(s) for which the individual was applying for amnesty, thereby entitling the applicant to disclose selectively. Not surprisingly this has limited the extent of disclosures made and frustrated the TRC's ability to fulfill its mandate to 'establish as complete a picture as possible.'

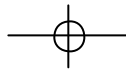
b) Proportionality – Determining the relationship between the act and the political objective pursued, and 'in particular the directness and proximity of the relationship and proportionality of the act . . . to the objective pursued', was another site of considerable controversy, and it was frequently unclear how and whether this criterion was employed. It is evident that in some cases it was not, although a more detailed assessment of how this and other criteria was ostensibly utilized and addressed remains outstanding.

In total, 7116 applications were received before the cut-off date for receipt of applications. There is some speculation about how many more perpetrators would have come forward if there had been a greater strategic synergy with HRV investigative processes, as it is evident that some of these investigations did prompt perpetrators to come forward. What is evident, however, is that there was only a limited correlation between the 22,000 cases

submitted to the HRV Committee and the cases subjected to the amnesty process. In other words, there were potentially thousands more applicants.

7.6 Amnesty in Kenya's TJRC

Refer to Chapter Eleven on the Kenyan TJRC



CHAPTER

8

The Mau Mau of Kenya in the UK files a suit against the British Government for Torture and Human Rights Abuses during the Colonial Era.

Five decades after the Mau Mau uprising, the battle for compensation for British atrocities comes to court

Kenyan's 4,000-mile journey for justice

By Robert Verelst
AN OBIT

THE FIVE elderly Kenyans who stood on the steps of the Royal Courts of Justice last, until yesterday, never set foot outside of Africa.

They had travelled 4,000 miles to London to secure an apology – and compensation – from the British Government over the lifelong torture and abuse they say was suffered by thousands of Mau Mau fighters during the 1950s and 60s.

For Njiru Mutua, born in 1922 in Kiangari village in the Meru district of Kenya, it is a last chance to have justice to compensate the role of the

British. In that room Mr Mutua was finally reunited with pillars. Despite the pain he managed to escape with three other men who had also been captured. He was lucky and survived his ordeal after receiving medical treatment in secret from the local hospital. The three colleagues all died from their injuries.

Mr Mutua, who never married, said yesterday: "I live with the physical and mental scars of what happened to me. Not a day goes by when I do not think of those terrible events. At last I can tell my story and at last I can hope for justice from the British courts."

The story is among the best cases filed yesterday at the High Court in a legal action that could bring compensa-



The veterans who have brought a legal action against the British Government outside the High Court in London yesterday

Rights Commission has now documented more than 40 cases of extortion, severe sexual abuse and unlawful detentions. In all the documented cases it is alleged that the acts of torture were carried out directly by officers of the British colonial government.

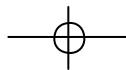
Mr Mutua, a senior officer at Leish and Co, said: "My

France in just 35 minutes



The Independent, UK, 24 June 2009.

REPARATIONS



CHAPTER

8

REPARATIONS ⁴⁹

While prosecutions and vetting processes seek to sanction perpetrators of these violations, and truth-seeking and institutional reform aim to benefit society as a whole, reparations are explicitly and primarily carried out on behalf of victims. Hence, in terms of potential direct impact on victims, they occupy a special place among redress measures.

Reparations have been broadly defined as compensation for injuries or international torts (breaches of international obligations).⁵⁰ The aim of reparations is to eradicate the consequences of the illegal act or to, as far as possible, put the injured person in the position he would have been had the violation or injury not been suffered.

Reparations can be conceptualized as a relationship between three terms, namely, victims, beneficiaries and benefits. A reparations programme aims to guarantee that every victim will receive at least some sort of benefit from it, thereby becoming a beneficiary. Whatever benefits a reparations programme ends up distributing and for whatever violations, its aim is to ensure that every victim actually receives the benefits, although not necessarily at the same level or of the same kind. If this is achieved, the programme is *complete*. Completeness refers to the ability of a programme to reach every victim, i.e. turn every victim into a beneficiary.

The obligations assumed by a State under international human rights and humanitarian law prescribe for legal consequences not only between States but also with respect to individuals and groups of persons who are under the jurisdiction of the State in question. The Universal Declaration of Human Rights provides for a right to remedy for violations of rights protected 'by the constitution or by law'.⁵¹

The U N Human Rights Committee, which monitors adherence to the ICCPR, interpreted this provision as affirming the State's obligation to provide reparations where it stated that:

Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without [such reparation]. . . the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. . . . The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.⁵²

It is generally understood that the right to reparation has two dimensions under international law:

- i) A substantive dimension that entails the duty to provide redress for harm suffered in the form of restitution, compensation, rehabilitation, satisfaction and, as the case may be, guarantees of non-repetition
- ii) A procedural dimension that provides for a system through which substantive redress can be secured. This procedural dimension can be said to be part of the duty to provide 'effective domestic remedies' and which is expressly set out in most major human rights instruments.

8.1 The Five Basic Categories of Reparations

The United Nations instrument referred to as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law⁵³ and Serious Violations of International Humanitarian Law offers a broad categorization of reparations measures that include:

a) Restitution which refers to measures which 'restore the victim to the original situation before the gross violations of international human rights law and serious violations of international humanitarian law occurred' - for example, restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

b) Compensation for any damages that can be economically

49. Excerpts from the Office of the United Nations High Commissioner for Human Rights publication; Rule of Law Tools for Post Conflict States: Reparations Programmes. 50. Oxford Dictionary of Law (2003) p. 426.

51. Article 8, Universal Declaration of Human Rights, General Assembly Resolution 217A (III), December 10, 1948.

52. UN Human Rights Committee, General Comment No. 31 on Article 2 of the ICCPR: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6 (2004), para. 16.

53. United Nations General Assembly Resolution 60/147 of 16 December 2005, annex, paras. 19-23.

assessed such as lost opportunities, loss of earnings and moral damage. Compensation should be as appropriate and proportional as possible to the gravity of the violation and the resulting circumstances or effects of the violations as are peculiar to each case.

c) Rehabilitation which should include medical and psychological care as well as legal and social services.

d) Satisfaction refers to a broad category of measures, ranging from those aiming at a cessation of violations, to truth-seeking, the search for the disappeared, the recovery and reburial of remains, public apologies, judicial and administrative sanctions, commemoration and memorialization, and human rights training.

e) Guarantee of non-repetition which is another broad category that includes institutional reforms tending towards civilian control of military and security forces, strengthening judicial independence, the protection of human rights workers, human rights training, the promotion of international human rights standards in public service, law enforcement, the media, industry, and psychological and social services.

8.2 Reparations and the Transitional Justice Process

The goal of any transitional justice process is to end the cycles that perpetuate violence and human rights abuses. In the aftermath of conflict or illegitimate rule, people who have been victimized often demand justice. The notion that there cannot be peace without justice emerges forcefully in many communities. But justice can be based on *retribution* (punishment and corrective action for wrongdoings) or on *restoration* (emphasizing the construction of relationships between the individuals and communities).⁵⁴

Retributive justice is based on the principle that people who have committed human rights violations, or ordered others to do so, should be punished in courts of law or, at a minimum, must publicly confess, apologise and ask forgiveness. A vital part of retributive justice is reparations which generally take the form of financial payments made to the victims either by the offender or by the state as a means of restitution. Both retribution and reparations have symbolic value, as they are concerned with

‘righting an imbalance.’ This symbolic value is essential if reparations are to provide recognition to victims not only *as victims* but also *as citizens* and *as rights holders* more generally.

Indeed, compensation is important but, if reparations are to be considered as a justice measure, they work best when seen as part of a comprehensive justice policy, rather than as an isolated effort. Reparatory measures should be designed in such a way as to be closely linked with other transitional justice or redress initiatives, for example, criminal justice, truth telling and institutional reform. Truth telling without reparations efforts can be seen by victims as an empty gesture. Similarly, efforts to repair without truth-telling could be seen by beneficiaries as the State’s attempt to buy the silence or acquiescence of victims and their families.

The same two way relationship may be observed between reparations and institutional reform. Democratic reform without reparative efforts to restore the dignity of citizens who were victimized will have a questionable legacy, especially in the eyes of the victims. By the same token, reparations without institutional reform to diminish the probability of the violations being repeated again in the future are a truly futile waste of resources.

Two considerations are therefore important; first, the positive consequences of a well-designed reparations programme which goes well beyond just the victims. Second, there can be no legal or moral justification for governments to emphasize one form of justice measure over another. The victims should not be asked to trade-off between different justice mechanisms. Thus, Governments should not, for instance, try to buy impunity for perpetrators by offering victims ‘generous’ reparations.

8.3 Reparations in Kenya

The following mechanisms have been attempted with varying degrees of success:

- Public Interest Litigation by victims, for instance, Nyayo House Torture survivors
- Symbolic reparations through memorialization as captured

54. Sanam Naraghi Anderlini, Camille Pampell Conaway and Lisa Kays; Transitional Justice and Reparation.

- in Chapter Nine
- Policy and Administrative actions for instance, through the resettlement of the landless and internally displaced.

8.4 Reparations through Truth Commissions

Not all reparation efforts stem from the recommendations of truth commissions. Some countries have established self-standing reparations commissions or procedures (e.g. Brazil, Malawi, Morocco and Guatemala). Others have established their reparations efforts as a result of ordinary legislative initiatives with no particular institution being in charge of their overarching supervision (e.g. Argentina). However, self-standing reparations commissions or procedures naturally find it harder to establish significant links between whatever benefits they distribute and other justice measures.

Truth commissions offer several advantages towards giving the greatest degree of satisfaction to the victims of serious and gross human rights violations over and above purely remedial measures;

- In the course of their work, truth commissions can compile information about the victims which may be important in the design and implementation of reparations programmes information which may otherwise be missing.
- Truth commissions normally enjoy a very high degree of moral capital, and this might have a positive impact on how their recommendations on reparations are perceived. At least initially, it makes sense to think that recommendations stemming from a truth commission will be more credible than a plan developed solely by Government authorities. This is because, given their membership (most commissions include civil society representatives) but also their general purpose, it is easier for truth commissions than for ordinary Government institutions to establish participatory processes leading to the design of reparations programmes.
- It is easier to create both the reality and the perception of significant links between a reparations programme and other justice initiatives, including truth-seeking, if the responsibility for designing the former is primarily given to

the entity in charge of designing a comprehensive transitional justice strategy.

8.5 Challenges ⁵⁵

The establishment of a complete, successful and comprehensive reparations programme faces a number of challenges. These include:

a) *The politics of resources.* Establishing a reparations programme requires mobilizing large public resources and this is always, at least in part, a political struggle. This is because while, under international law, gross violations of human rights and serious violations of international humanitarian law give rise to a right to reparation for victims, implying a duty on the State to make reparations, implementing this right and corresponding duty is in essence a matter of domestic law and policy. Claims by the state of insufficient resources and the unbinding nature of the recommendations of most truth commissions make it possible for the state to justify inaction on the recommendations on reparations. Those who are interested in reparations must be prepared, at some point, to deal with the politics on this issue.

b) *Insufficient information.* There may be little or no accurate information about the victims. There may be a lack of absolutely basic information, such as the numbers of victims to be served by the programme, or of more detailed yet important data, such as the victims' socio-economic profile - age, gender, family structure, links of dependence, level of education and income, type of work, as well as violations suffered and a brief account of their consequences.

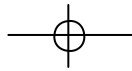
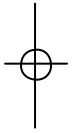
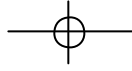
c) *Participation.* Even a well-designed reparations mechanism will fail to distribute benefits to every potential beneficiary if it is not accompanied by effective outreach efforts once it is set in place and easy access for participants throughout its operations. A task made far more difficult in countries with high levels of illiteracy, difficult transport and deep social divisions (ethnic, linguistic, religious, class or regional differences), and little or no faith in the institutional mechanisms of government. The

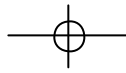
55. Excerpts from the Office of the United Nations High Commissioner for Human Rights publication; Rule of Law tools for Post-Conflict States: Reparations Programmes. [http://www.reliefweb.int/rw/lib.nsf/db900sid/PANA-7DDHAY/\\$file/ohchr_apr2008.pdf?openement\(12/11/09\).](http://www.reliefweb.int/rw/lib.nsf/db900sid/PANA-7DDHAY/$file/ohchr_apr2008.pdf?openement(12/11/09).)

outreach required should have been particularly intensive not only in terms of dissemination of information about the existence of the reparations programme, but also in terms of assisting those going through the process.

d) Evidentiary standards. In any judicial process, certain evidentiary standards need to be set to avoid false or frivolous claims. However the requirements that would qualify one to be beneficiary should be sensitive to the *needs* of victims (for respect, avoiding double victimization, sparing them cumbersome, complicated, lengthy or expensive procedures). The more demanding the evidentiary requirements, the more false claims will be excluded; but so will perfectly legitimate claims.

e) Possibility of exclusion. Usually, the decisions about which types of violations will be redressed are taken before the reparations mechanisms are set up, often when the mandate of a truth commission is determined under the establishing statute. The violations that are consequently excluded may raise several concerns. Firstly, there is a question of justice, of unequal treatment that could undermine the programme's legitimacy. Secondly, such exclusions merely guarantee that the issue of reparations will remain on the political agenda, which may threaten the stability of the initiative as a whole. Some commissions have found themselves preferring to interpret their mandates liberally, so as to include violations that, strictly speaking, were not covered, but that could not reasonably be excluded. This was the case in Morocco and in Brazil.





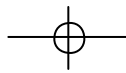
CHAPTER

9

Dedan Kimathi's statue on Kimathi Street, Nairobi, Kenya.



MEMORIALIZATION



CHAPTER

9

MEMORIALIZATION⁵⁶

Memorialization refers to the process of creating a memorial for purposes of perpetuating the memory of a person, group of persons, incident, event or era. Given that memory is significantly linked to the writing of history, lineage and group identity, memory is often contested and can be itself a source of conflict. Memory, as perpetuated through processes such as memorialization seen in national monuments and commemorative celebrations can assist divided societies to re-write the narratives of the past; recognize and assist survivors of human rights violations, through symbolic reparations, to begin the process of healing; and assist the previously divided society in processes of reconciliation.

The purposes of memorialization initiatives include truth-telling; seeking justice; building a culture of democracy; commemorating previously marginalized histories and heritage; and recognizing victims and survivors of human rights violations. It is also significant to note that memorialization can take a variety of forms, both permanent and temporary and may include the re-naming of public facilities, plaques, exhibitions, museums and monuments.

Memorialization is sometimes categorized within the transitional justice discourse as forming a subcomponent within the area of reparations (i.e. symbolic reparations). The danger with this approach is that symbolic reparations are often used or can be used by the state as a substitute for financial reparations or community rehabilitation. Therefore, the reports of truth commissions should be careful to highlight specifically that no one form of reparation can substitute for another. The recommendations of such a commission should be formulated to emphasize that memorialization, though a reparatory measure, is of a category separate from other forms of financial compensation. They serve overlapping but fundamentally different purposes.

56. Excerpts from the Center for the Study of Violence and Reconciliation (CSVSR) Research brief by Ereshnee Naidu, *The Ties That Bind: Strengthening the Links between Memorialization and Transitional Justice* (2006). The study is based on documentary and field research as well as discussions held at a working group hosted by the CSVSR. The working group brought together experts working in the fields of transitional justice; memory and history. In addition to the above-mentioned research, the paper also consolidates some of CSVSR's research around Memorialization which included the feasibility study on the Constitution Hill project; the feasibility study on the Kliptown Heritage Precinct; research around symbolic reparations and intervention processes facilitated with survivors of gross human rights violations.

9.1 Memorialization and Transitional Justice

The increased recognition of memorialization within the transitional justice field is exemplified by recommendations of various truth commission reports. The recommendations of the Chilean National Truth and Reconciliation Commission endorsed the idea of **symbolic reparations** in the form of memorials, sites of memory and other artistic/cultural endeavours. The Commission urged government officials 'to invite the most representative social sectors to design projects that both have artistic value and are intended to help make social reparation.' Similarly, the South African TRC also suggested that the government support a series of symbolic reparations in order to 'restore human and civil dignity' and allow survivors to come to terms with the past.

In addition to state-level support for memorialization, survivor groups have also initiated and participated in various memory projects which included designing and sustaining memorials and sites of memory, including former torture centres, recording names and details of those who died or were victimized during a conflict, and organizing events on key historical dates. The fact that survivors, states and truth commissions recognize the significance of memorialization further highlights the positive potential of memorialization within post-conflict societies.

9.2 Standards and Considerations

Memorialization is a complex process that has the potential to make a significant contribution to transitional justice processes. While the success or failure of initiatives is primarily contextual and can be affected by a variety of factors, the following best practice guidelines can contribute to the success of memorialization initiatives:

- a) Memorialization should be highlighted as a separate category in its own right in truth commission reports so as to minimize the misinterpretation that memorialization can substitute for other forms of financial compensation.
- b) The form of a memorialization should be determined by the

- context and needs of the major stakeholders.
- c) There should be consultation processes that focus on community empowerment strategies that seek to assist in developing the community. Any new initiative should aim to enhance and support local capacities and initiatives by facilitating a process that results in a shared vision.
 - d) To avoid the harmful politicization of memorialization initiatives, independent funding agencies and civil society should support local initiatives that aim to provide the varied, critical narratives of the past.
 - e) Expectations need to be clarified and managed during all phases of development of an initiative. This can be done through a communications strategy that covers the entire scope of the project.
 - f) Timing and sequencing of memorialization initiatives are significant in determining the success or the failure of an initiative.
 - g) Memorialization projects need to be flexible and adaptable in meeting the continually evolving social-political needs of its environment. Ongoing reflection and evaluation will ensure that memorials engage different generations thereby contributing to learning from the past and non-repetition of mistakes.
 - h) There need to be long term evaluation of the impact of the memorialization initiative. Funding agencies should provide resources for this type of evaluation as well as for re-directing programmes, advocacy, and policy and practice recommendations where they are seen to be necessary to sustain the viability of the initiative.

9.3 Challenges

There are several challenges to the effective implementation of memorialization initiatives. These include:

Inadequate information. The lack of empirical information on and around memorialization as a process within transitional justice has resulted in ad-hoc, often uncoordinated and unmonitored memorialization efforts that serve only the needs of specific groups, often rendering memorials as nothing more than political mechanisms of the state that are unable to achieve their

full potential as a peace-building mechanism. Furthermore, symbolic reparation through memorialization initiatives is perceived by many as a non-essential recommendation - a mechanism that diverts attention from what is perceived as more significant forms of reparation such as financial reparations or land restitution.

Little or no consultation. For any memorialization initiative to achieve its potential as a peace-building mechanism there needs to be some level of consultation by the initiators or sponsors of the project with the community that they seek to empower through the project. However, most initiators or sponsors of memorialization initiatives adopt a top-down approach to their projects through which they 'rubber-stamp' their own pre-determined agendas. Such approaches result in a lack of local ownership of the initiative as well as potentially undermining peace building and reconciliation efforts.

Politicization of Memorialization. It is significant to note that many memorialization initiatives are government funded and often become tools to further political agendas and consolidate the power of the ruling faction. The effect is usually a memorial that is distasteful or offensive. A good example of this are those memorials put up by dictators to serve their own purposes e.g. Moi day.⁵⁷

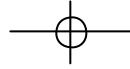
Redundancy. Given that most initiatives are built with an aim of ensuring permanence and spanning generations, memorialization often run the risk of becoming irrelevant to future generations which may not understand or appreciate its context and value. This is especially the case where there are no educational programmes aimed at reinforcing the significance of the memorials to future *generations*.

9.4 Case Studies in Kenya

There are several examples of memorialization initiatives in Kenya.

- **Memorials.** The Dedan Kimathi memorial at the Junction of Kimathi street and Mama Ngina Street
- **Commemorative days.** Days like Kenyatta Day on 20 October, in commemoration of the day when freedom fighters were arrested by the British colonial government

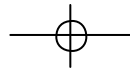
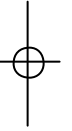
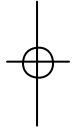
57. This day is named after Daniel T arap Moi, a former President and dictator of the republic of Kenya. He set aside the 10th of October as a public holiday to commemorate his rule and named the day after himself. Though he is no longer in power, the public holiday remains unchanged and serves only to remind Kenyans of his dictatorial rule, and offends the many victims of his oppressive regime.

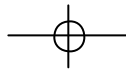


during the state of emergency declared in 1952. Currently, there is public pressure to rename the day to 'Mashujaa (S/heroes)' Day

- Naming of streets and highways, e.g. Muindi Mbingu Street, Tom Mboya Street and Waiyaki Way. Moreover, Pio Gama Pinto Road has just been named linking Waiyaki Way to Ring Road in Westlands.
- Naming of public institutions or public buildings, for instance, Kimathi, Masinde and Muliro Universities.

For memorialization programmes to be sustainable there is need for consistent re-education of the public regarding the memorials' significance if they are to remain relevant to future generations.





CHAPTER

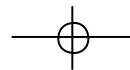
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Members of the Grand Coalition team of PNU and ODM at a press conference after consultations on the draft constitution.



Credit: The Daily Nation, 16 December 2009.

RECONCILIATION



CHAPTER

10

RECONCILIATION⁵⁸

Reconciliation is a term that has a variety of different meanings due to the different points of view on the concept that arises from questions regarding how one measures reconciliation or how one determines that a society is reconciled. However, it is largely agreed that the main aim of any reconciliation process is to address the conflicting and fractured relationships between different groups of peoples and this includes a range of different activities.

Reconciliation cannot be handled merely as an independent case in a transitional justice programme. If it is to be enduring, reconciliation must necessarily be facilitated by the effective implementation of the various other mechanisms of transitional justice. In short, there can be no lasting reconciliation if the institutions that facilitated or ignored the conflict are not reformed, if the perpetrators of the conflict are not brought to justice, if the victims of the conflict are not compensated, if the true causes and effects of the conflict remain hidden or are left to be forgotten.

There are three main assumptions guiding the use of reconciliation in the transitional justice process:

- i) That truth telling (a full accounting of the past, including the identities of both victims and perpetrators) is necessary for reconciliation
- ii) That justice (as defined by holding someone accountable either through legal processes or more restorative measures) promotes reconciliation
- iii) That comprehensive reform will lead to the transformation of the society and therefore improve the citizen-state relations and obligations.

10.1 Roles and Elements of Reconciliation

Efforts towards the reconciliation of a divided society should necessarily involve the following:

a) Developing a shared vision of an interdependent and fair society. This involves the development and acceptance of a vision of a shared future requiring the involvement of the society as a whole, at all levels. Although individuals may have different opinions or political beliefs, the articulation of a common vision of an interdependent, just, equitable, open and diverse society is a critical part of any reconciliation process.

b) Acknowledging and dealing with the past. This means acknowledging the truths (hurts, losses, and suffering) of the past, as well as providing the mechanisms for justice, healing, restitution or reparation, and restoration (including apologies if necessary and steps aimed at redress). To build reconciliation, individuals and institutions need to acknowledge their own role in the conflicts of the past, accepting and learning from it in a constructive way so as to guarantee non-repetition.

c) Building positive relationships. Relationship building or renewal following violent conflict, addressing issues of trust, prejudice and intolerance in this process, resulting in accepting commonalities and differences, and embracing and engaging with those who are different to us are all vital process to achieving lasting reconciliation.⁵⁹

d) Significant cultural and attitudinal change. There needs to be significant changes in how people relate to, and direct their attitudes towards, one another. The culture of suspicion, fear, mistrust and violence need to be broken down and opportunities and space opened up in which people can hear and be heard. A culture of respect for human rights and human difference is developed by creating a context where each citizen becomes an active participant in society and feels a sense of belonging.

e) Substantial social, economic and political change. The social, economic and political structures which gave rise to the conflict and estrangement must be identified, reconstructed or addressed, and transformed.

58. For details see the review of USIP Working Group Paper on Social Reconstruction and Reconciliation, Defining Terms: Reconciliation, Transitional Justice, Social Reconstruction and also the 'A working definition of reconciliation', Hamber B & Grainne K.

59. See also Lederach, John Paul. *The Journey Toward Reconciliation*. Scottsdale, PA, and Waterloo, Ontario: Herald Press, (1999).

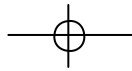
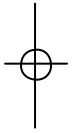
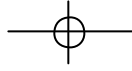
- f) The design and implementation of national policies and interventions aimed at reshaping relationships among ethnic, racial, economic and political communities.⁶⁰
- g) Social reconstruction and reclamation through the development of a wide range of social, political and economic programs that may, in fact, foster reconciliation among groups.
- h) The integration of various processes — legal, social, political and economic— which work toward achieving the fullest measure of reconciliation. This invariably includes programmes, institutions and policies that promote democracy, rule of law and justice.
- i) The presence of measures that appreciate the long term nature of reconciliation processes and that facilitate firstly, the peaceful management and eventual elimination of conflict.
- j) The creation of new national identities and, in some cases, new philosophies that will guide the unity of the nation. As such, the proper creation and promotion of memorials is a pivotal component of reconciliation as this is the terrain in which divisive identities and myths are created, contested and destroyed.

10.2 Approaches to Reconciliation

Reconciliation necessarily involves the following approaches:-

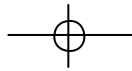
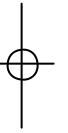
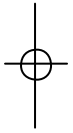
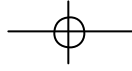
- a) A religious ideology** that emphasizes the re-discovering of a new conscience in individuals and society through moral reflection, repentance, confession and rebirth.
- b) A human rights approach** where reconciliation is seen as a process only achieved by regulating social interaction through the rule of law and preventing certain forms of violations of rights from happening again.
- c) An inter-communal understanding** through which the process of reconciliation is viewed as being concerned with bridging the divides between different cultures and identity groups.

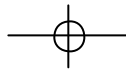
60. Chapman, Audrey R
'Approaches to Studying Reconciliation' in Assessing the impact of Transitional Justice: Challenges for Empirical Research. Hugo van der Merwe, Victoria Baxter and Audrey Chapman (forthcoming).



TOOLS FOR ENGAGEMENT WITH
THE TRANSITIONAL JUSTICE
PROCESS IN KENYA

PART THREE



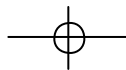


CHAPTER

11



THE KENYAN TRUTH JUSTICE AND RECONCILIATION COMMISSION



CHAPTER

11

THE KENYAN TRUTH JUSTICE AND RECONCILIATION COMMISSION

11.1 Background in the Campaign for a TJRC in Kenya

The campaign for the Truth, Justice and Reconciliation Commission in Kenya goes back to the struggles against the KANU dictatorship in the 1990s. However, it was the entry of the National Rainbow Coalition (NARC) in December 2002 that brought the greatest expectations for national reforms - including the establishment of comprehensive transitional justice processes and a truth commission.

Following the interventions by victims and human rights organizations, a Task Force was formed in April 2003 to look into the viability of a TJRC. Its report recommended the formation of a TJRC through a presidential decree by June 2004 to deal with almost all the past human rights violations and economic crimes between December 12, 1963, to December 12, 2002.

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

Following the post election violence which occurred between December 2007 and February 2008, the TJRC emerged as one of the major outputs from the subsequent National Dialogue process. Several versions of the Truth Justice and Reconciliation Bill were produced between March-October 2008 primarily by the Ministry of Justice, National Cohesion and Constitutional Affairs.

The Multi-Sectoral Taskforce⁶¹ on Truth Justice and Reconciliation was at the fore front for pushing for the formation of a victim-centred commission by way of legislation instead of presidential decree. It made representations both in public and before relevant duty bearers such as the Parliamentary Departmental Committee on Administration of Justice and Legal Affairs. A good part of its representations were taken on board. The Truth, Justice and Reconciliation (TJR) Act, was passed by Parliament on October 23, 2008, and received the presidential assent on November 28, 2008. The Act was gazetted for enforcement in March 17, 2009, and the Commissioners were appointed on July 22, 2009, and sworn in on August 3, 2009, respectively.

11.2 The Simplified Version of the TJR Act-2008 (Key Provisions)

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

PREAMBLE

The preamble mainly captures the desire for our nation to achieve full potential in social, economic and political development by dealing with the gross human rights violations, abuse of power and misuse of public office among other transgressions against our country and people which have taken place since independence and culminated with the polarization of the country after the contested presidential elections results in December 2007. Finally, it notes the procedural limitations among other hindrances of addressing these atrocities via our judicial institutions and expresses the need to resolve these through the TJRC so as to achieve lasting peace and harmonious co-existence; justice and building of a democratic society based on the rule of law.⁶²

DEFINITIONS OF TERMS

61. On the passage of the Act the Multi-Sectoral Taskforce metamorphosed into the Kenyan Transitional Justice Working Group which is now the steering committee of the Kenyan Transitional Justice Network

62. TJR Act, p 6.

'Crimes Against Humanity' means any of the following acts: murder, enslavement, extermination, deportation, or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, enforced disappearance of persons among other human acts of a similar character intentionally causing great suffering or serious injury to the body or to mental or physical health.

'Enforced disappearance of persons' means the arrest, detention, abduction or any other form of deprivation of liberty of persons by, or with the authorization or support of agents of the state.

'Genocide' means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group such as; killing members of the group, causing serious bodily harm, mental harm, imposing measures intended to prevent births within the group, forcibly transferring children of the group from one place to another.

'Gross human rights violations' means violations of fundamental human rights through torture; killing; abduction and severe ill-treatment of any person; imprisonment or other severe deprivation of physical liberty; rape; any form of sexual violence; enforced disappearance of persons; and persecution of any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender among other grounds impeachable under the international law.

'Reparation' means dignifying the victims by measures that will alleviate their suffering compensate their social, moral and material losses.

'Victims' includes any person or group of persons that, with the occasion or because of the human rights violation, has suffered any individual or collective harm, loss or damage by acts or omissions that violate the rights established in the Constitution or any written law in Kenya, International Human Rights Law and International Criminal Law.

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

64. Section 6 of the TJRC Act, pp 43-46.

ESTABLISHMENT, POWERS AND FUNCTIONS OF THE COMMISSION

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

OBJECTIVES OF THE COMMISSION⁶³

The main objectives of the TJRC in Kenya are *to promote peace, justice, national unity, healing, and reconciliation among Kenyans by, among others:-*

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

FUNCTIONS OF THE COMMISSION⁶⁴

The main functions of the Commission are to investigate or inquire into among others:

- Human rights violations and abuses and identify its victims and perpetrators
- Economic crimes and inquire into the irregular and illegal acquisition of public land and make recommendations on the repossession of such land Crimes of a sexual nature against

female victims Misuse of public institutions for political objectives Causes of ethnic tensions and make recommendations on the promotion of healing, reconciliation and coexistence among ethnic communities Perceived economic marginalisation Irregular exploitation of national and natural resources Any other matter that it considers to require investigation in order to promote and achieve national reconciliation.

The Commission is also expected to educate and engage the public so as to encourage them to contribute positively to the achievement of its objectives. The Commission is expected to make recommendations with regard to:

- Policy that should be taken in granting of reparation and restitution
- Prosecution of responsible persons
- Creation of institutions conducive to a stable and fair society
- The institutional, administrative and legislative measures that should be taken to guarantee non-repetition.

POWERS OF THE COMMISSION⁶⁵

The Commission has wide powers to gather information in the course of its investigations. These include the power to:

- Visit any establishment or place, land or premise
- Interview or call upon any actor to attend its sessions or hearings
- Require that statements be given under oath or affirmation and to administer such oath or affirmation
- Request information from the relevant authorities of a foreign country
- Summon any serving or retired public officer to appear in person before it
- Request and receive police assistance as needed in the enforcement of its powers.

THE APPOINTMENT OF COMMISSIONERS

The Minister for Justice and Constitutional Affairs shall constitute a Selection Panel consisting of:

- Two people jointly nominated by a joint forum of religious organizations comprising the Kenya Episcopal Conference, the National Council of Churches of Kenya, the evangelical Alliance of Kenya, the Hindu Council of Kenya, the Seventh Day Adventist Church and the Supreme Council of Kenya Muslims.
- One person representing each of the following organizations: The Law Society of Kenya; Federation of Kenya Women Lawyers; The Central Organization of Trade Unions/ Kenya National Union of Teachers(jointly); The Association of Professional Societies of East Africa; The Kenya National Commission on Human Rights; Kenya Medical Association; and The Kenya Private Sector Alliance/ Federation of Kenya Employers(Jointly).
- The Panel shall nominate the Kenyans eligible for appointment as commissioners; consider an application for removal of the chairperson or a commissioner; elect a chairperson and vice-chairperson of the Selection Panel from amongst their Members.
- The chairperson and vice-chairperson elected shall be persons of opposite gender. The Selection Panel shall determine its own rules and procedures.
- The Commission shall consist of nine commissioners of whom three shall be non-citizens, at least one of whom shall be of opposite gender selected by the Panel of Eminent African Personalities; six shall be citizens of Kenya selected by the Selection Panel.
- The Selection Panel shall select and forward fifteen names to the National Assembly. The National Assembly shall nominate nine (out of the fifteen) persons and transmit their names through the Minister of Justice and Constitutional Affairs to the President for the final appointment of the six expected to be Kenyans.
- Three of the commissioners shall have knowledge of and at least fifteen years' experience in matters relating to human rights law; Four shall have knowledge of and experience in forensic audit, investigations, psycho-sociology, anthropology and social relations, conflict management, religion or gender issues.
- They shall be persons of good character and integrity

⁶⁵ Sections 7-8 of the TJR Act, pp 46-49.

implying that the candidate should be a person who has not been involved, implicated or linked with human rights violations of any kind.

- The Chairperson shall be appointed by the President from amongst the commissioners. His /her functions shall include, but not be limited to, supervising and directing the work of the commission; presiding over all meetings and being the spokesperson of the commission.
- Within seven days of the appointment of the Commissioners, the chair shall convene the first meeting of the Commission where the Commissioners shall elect their Vice-chairperson from amongst the Commissioners. In the absence of the chairperson, the Vice-chairperson shall perform the functions of the Chairperson.
- The Secretary shall be the chief executive of the commission. S/he shall be responsible for the day-to-day administration and management of the affairs of the Commission.

The Commission shall be representative of the Kenyan society. Upon appointment, a Commissioner shall cease active participation in the affairs of any political party or other organization. Their tenure shall commence from the date of appointment and shall, unless the office falls vacant earlier, terminate on dissolution of the Commission.

REMOVAL OF COMMISSIONERS

The Chairperson or a commissioner may be removed from the office by the President,

- For misconduct
- If convicted of an offence involving moral turpitude
- If unable to discharge the functions of his/her office by reason of physical or mental infirmity
- If absent from three consecutive meetings of the Commission without cause.

Prior to the removal of a commissioner from office on any of the grounds mentioned above, the Chief Justice shall appoint a Tribunal of three persons who hold, or have held, office as judges of the High Court to investigate into and make

recommendations as to the removal of the commissioner in question. The Chief Justice shall communicate the recommendation, for instance, for status quo, suspension or removal to the President. The President shall replace the national and international commissioners from the list of the Selection Panel or list of persons recommended by the Panel of Eminent African Personalities respectively.

OPERATIONS OF THE COMMISSION

The Commission shall not be subject to the control or direction of any person or authority. Each Commissioner and member or staff member shall serve in their individual capacity, independent of any political party, Government or other organizational interests. A commissioner or the secretary shall not be liable to any civil action or suit for, or in respect of, any matter or thing done or omitted to be done in good faith; arrest under civil process while proceeding to, participating in, or returning from any meeting of the commission.

The Commission may establish such committees as it considers necessary for the better performance of its functions. The hearings of the Commission shall be open to the public. However, *in camera* hearings shall be held if the security of the perpetrators, victims or witnesses is threatened and in the interest of justice; and also when there is a likelihood that harm may ensue to any person as a result of proceedings being open to the public.

When dealing with victims, the Commission shall ensure that:

- Victims are treated with compassion and respect
- Victims are treated equally, regardless to race, ethnicity, religion, language, sex or nationality
- Sufficient measures will be taken to allow victims to communicate in the language of their choice
- Establishment of special units to address the experiences of the children, women, persons with disabilities and other vulnerable groups
- Persons implicated in, and/ or concerned with, any matter shall be entitled to legal representation in the proceedings of the inquiry.

The funds of the Commission shall consist of monies appropriated by Parliament; monies that may accrue to the Commission in the course of the exercise of its Powers and functions and monies from any other sources provided for, donated, or lent to the commission. There shall be the Truth, Justice and Reconciliation Fund which will be administered by the Commission's Secretary. Such monies may be appropriated out of the Consolidated Fund and any grants, gifts, donations or requests received.

The Commission shall keep proper books and records of account of the income, expenditure, assets and liabilities of the commission. The Minister for Finance may prescribe any book required for this purpose. Within a period of three months after the end of each financial year, the Commission shall submit to the Controller and Auditor-General its accounts in respect of that year together with a statement of income and expenditure; the assets and liabilities. The accounts of the Commission shall be audited and reported upon by the Controller and Auditor-General.

APPLICATIONS FOR AMNESTY AND REPARATIONS

- No amnesty shall be granted for crimes against humanity or in respect of gross violation of human rights including, extrajudicial execution, enforced disappearance, sexual assault, rape and torture
- Application for amnesty shall be done within one month from the date of an announcement of amnesty by the Commission or such extended period as may be described. Submission of such application to the Commission should be in a prescribed form
- The Commission shall give priority to persons in custody upon consultations
- Upon receipt of an application for amnesty, the Commission may give directions in respect of the completion and submission of the application or request the applicant to provide further particulars as it may consider necessary
- During the hearing for amnesty, the victim or person implicated or having an interest in the application will be

notified to attend, hear and testify. After investigation and inquiries, the Commission may inform the applicant that the application does not qualify, afford the applicant the opportunity to make a further submission or reject the application and inform the applicant accordingly

- If the Commission has refused any application for amnesty, it shall as soon as practicable notify its decision in writing, giving reasons to the applicant and any person who, in relation to the act, omission or offence concerned, is a victim. Where amnesty is recommended, the Commission may recommend reparation to rehabilitation of that person [victim]
- Any person who is of opinion that s/he has suffered harm as a result of a gross violation of human rights will be expected to apply to the Commission for reparation in the prescribed form. Recommendations shall be made in this regard if there is sufficient evidence of the harm. The Commission may recommend the basis and conditions upon which reparation may be granted, the authority responsible for reparation and measures that should be taken to grant urgent interim reparations to victims.

THE COMMISSION'S REPORT

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

- Summarize the findings of the Commission and make recommendations concerning reforms in various sectors
- Make recommendations for prosecution and reparations for the victims
- Recommend the mechanisms and framework for the implementation of its recommendations.

Upon submitting the report to the President, the Commission shall publish the report in the Gazette and make copies of the report and summary widely available to the public in at least three local newspapers with wide circulation.

The Minister for Justice and Constitutional Affairs shall, after the publication of the report, form an implementation committee to facilitate and monitor the implementation of the recommendations of the Commission. The Implementation

Committee shall publish the reports of the Government in the appropriate form and submit its own quarterly reports to the public evaluating the progress made. The Minister shall report to the National Assembly within three months of receipt of the report of the commission, and after that twice a year, on the implementation of the recommendations. The National Assembly shall also require the Minister to furnish it with the reasons for non-implementation.

MISCELLANEOUS PROVISIONS

Application of the Official Secrets Act and Dissolution of the Commission

The provisions of the Official Secrets Act shall not apply to any matter that is the subject of inquiry by the Commission under this Act. The Commission shall stand dissolved three months after submission of its report to the President.

11.3 Estimated Calendar of the Commission's Work

Note: Although the Commission has three months to institutionalize itself from the date the commissioners are sworn in (August 3, 2009,); and two years for actual work (with a possibility of six months extension), this may take longer for in August 7, 2009, the Campaign Against Impunity Network got court orders to stop the work of the TJRC on the ground of formation and composition.

11.4 Challenges and Opportunities

The major challenges facing the TJRC in the accomplishment of its mandate include:

- i) The definition of reparations, which is limited to compensation and restitution, overlooks the considerations for satisfaction, rehabilitation and guarantee for non-repetition
- ii) The Act fails to define who perpetrators are and what entails economic and international crimes. Moreover, the

Phases	Timelines	Milestones	Opportunities for the Civil Society
1	August 3-October 30, 2009, (3 months).	Recruitment/ Establishment of the Commission and public outreach.	Setting up the transitional justice tools of engagement
2	November 2, 2009, -October 31, 2011, (2 years).	Hearings and finalizations of Commission's report	Engaging with and monitoring the work of the Commission
3	May 1, 2012, onwards (six months after the submission of the report).	Implementation of recommendations	Engaging with and monitoring the implementation of Commission's recommendations

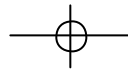
- perpetrators are limited to public institutions and officers thus neglecting violations committed by non-state actors
- iii) There are divergent definitions and attempts to sexualize and feminize gender based injustices which may make it difficult for the victims to be heard and the Commission to take up the critical gender based violations into consideration
 - iv) The TJRC is extremely overloaded with its mandate to deal with almost all the past human rights violations and economic crimes between December 12, 1963, to February 28, 2008, within not more than two and half years and with a paltry nine commissioners
 - v) A discretionary requirement for the TJRC to hold regional meetings means the Commission is under no obligation to travel and reach most of the country
 - vi) A requirement for victims to apply for reparations may close

- opportunities for marginalized communities with no continuous access of the TJRC
- viii) The Act lacks proper mechanisms for ensuring witnesses protection before and after their submissions to the TJRC
 - viii) The Act does not have any substantive provisions on how to enhance national reconciliation
 - ix) There were limited consultations with victims and civil society organizations in the formulation of the TJR Act
 - x) The operations of the Commission are likely to overlap with other national reform processes under Agenda four. For instance, the tribunal into the post election violence and the investigations and actions into the illegal and irregular allocation of public land being undertaken under the Lands Ministry
 - xi) Finally, and based on the above timelines, the implementation of the Commission's report may be affected by campaigns towards the 2012 General Elections.

However, there are various opportunities and strategies for engagement with the TJRC. CSOs, CBOs, victims, and other stakeholders, can actively engage the Commission in the following ways:

- i) Ensure the composition of the Commission has committed and qualified commissioners and staff members
- ii) Create public awareness to the general citizenry about the work of the TJRC and the related national reform processes under Agenda No. 4; and organize them to research, document and present their stories and testimonies to the TJRC among other processes
- iii) Map out and assist the Commission to hold forums and have strategic engagements with the victims
- iv) Undertake community based and national monitoring; engagement and production of periodical, final and alternative reports
- v) Ensure follow-up interventions after the work of the Commission such as archiving and preservation of information and implementation of the commission's recommendations.

Note that TJRCs provide opportunities for inspiring the country towards national healing, reflection and reconstruction.



CHAPTER

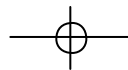
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Social Exclusion in Kenya.

Credit: The Standard, 31 December 2009. Social Exclusion in Kenya.

SOCIAL AND ECONOMIC JUSTICE



CHAPTER

12

SOCIAL AND ECONOMIC JUSTICE

The clamour for resources is often at the heart of most situations of internal conflict. Authoritarian regimes usually characterized by overt corruption and rampant misappropriation of state resources by those in authority, create situations of vast social inequality and economic marginalization of significantly large segments of the population. These injustices, combined with the loss of faith in the rule of law and state mechanisms of justice, feed into the overall frustrations of society at large and make it possible for citizens to be provoked to take up arms in a bid to reclaim what they perceive to have been stolen or denied them.

Economic Justice entails the moral principles which guide us in designing our economic institutions. These institutions determine how each person earns a living, enters into contracts, exchanges goods and services with others and otherwise produces an independent material foundation for his or her economic sustenance.

Social Justice is the overall concept which encompasses economic justice. It describes the virtues which should guide societies in creating those organized human interactions we call institutions. The concept of social justice imposes on each individual a personal responsibility to work with others to design and continually perfect governance institutions as tools for personal and social development.

12.1 State-Obligation in Granting Social Justice

The UN 1986 Declaration on the Right to Development recognized that development was a comprehensive economic, social, cultural and political process, which aimed at the constant improvement of the well-being of the entire population. It further

prescribes that States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. And further, that effective measures should be undertaken to ensure that women have an active role in the development process. Therefore, it becomes vital that appropriate economic and social reforms should be carried out with a view to eradicating all forms of social and economic injustice.

12.2 Importance of Social Justice in the Transitional Justice Process

- a) Great value is added to the Transitional Justice process by addressing economic crimes. By exposing the *extent of corruption or the scale of economic crimes*, these mechanisms would reveal that the depth of the damage caused by perpetrators goes beyond violence directed against their opponents or against citizens targeted by repressive measures.
- b) One of the key objectives of Transitional Justice is to build a solid foundation for the future through establishment of institutions based on the rule of law. For this to be accomplished, it becomes imperative for states to address the often deep-seated *social and economic inequalities*. A powerful starting point is to aim at anchoring economic, social and cultural rights into the domestic legal system through the *constitution*.
- c) Often, judicial resistance or incapacity at the onset makes it difficult to offer appropriate judicial redress for massive violations of economic social and cultural rights. However, a certain measure of justice can be achieved through the TJ processes of truth telling and the establishment of protective constitutional, legislative and institutional measures put in place to ensure that these violations will not be perpetuated in the future.
- d) For societies in transition, Transitional Justice processes present unique opportunities for countries to equip themselves appropriately to be more respectful of human

- rights and human dignity in the future. These processes could and should also be used to anchor economic, social and cultural rights in the political, legal and social construct of societies.
- e) By going beyond its criminal law-rooted mechanisms and pursuing social justice, transitional justice would contribute the expanding of the traditionally restricted understanding of 'justice' by rendering it its full meaning.

Socio-economic justice/social justice has the following components:

- a) Compensation** which should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as lost opportunities, loss of earnings and moral damage.
- b) Restitution** which is vital in realizing economic social and cultural rights as it focuses on the restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

12.3 A Case Study of Kenya

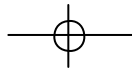
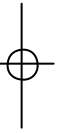
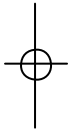
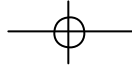
The following are the major manifestations of social and economic injustices in Kenya which require State intervention:

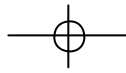
- a) Historical land injustices as manifested by the presence of IDPs, the poor, hunter-gatherers, forest dwellers, squatters and the youth, among others.
- b) Regional development disparities pitting the 'high potential' against the 'low potential' areas especially the pastoral and semi arid parts of the country.
- c) Gender and generational inequalities characterised by skewed allocation of opportunities and resources at the expense of women and youth.
- d) The ever widening gap between the rich and the poor.
- e) Discrimination on the basis of disability and old age.
- There are ongoing measures to deal with the above issues.

Examples of these include:

- i) The establishment of women and youth funds
 ii) Creation of the Ministry of Northern Kenya
 iii) Formulation of the Land, Disability and Youth policies, among others
 iv) Attempts on affirmative action on the aforementioned issues.

It is noteworthy that most of these policies have not been fully formulated. Furthermore, they need to be backed by political goodwill if they are to be sustained and enforced.

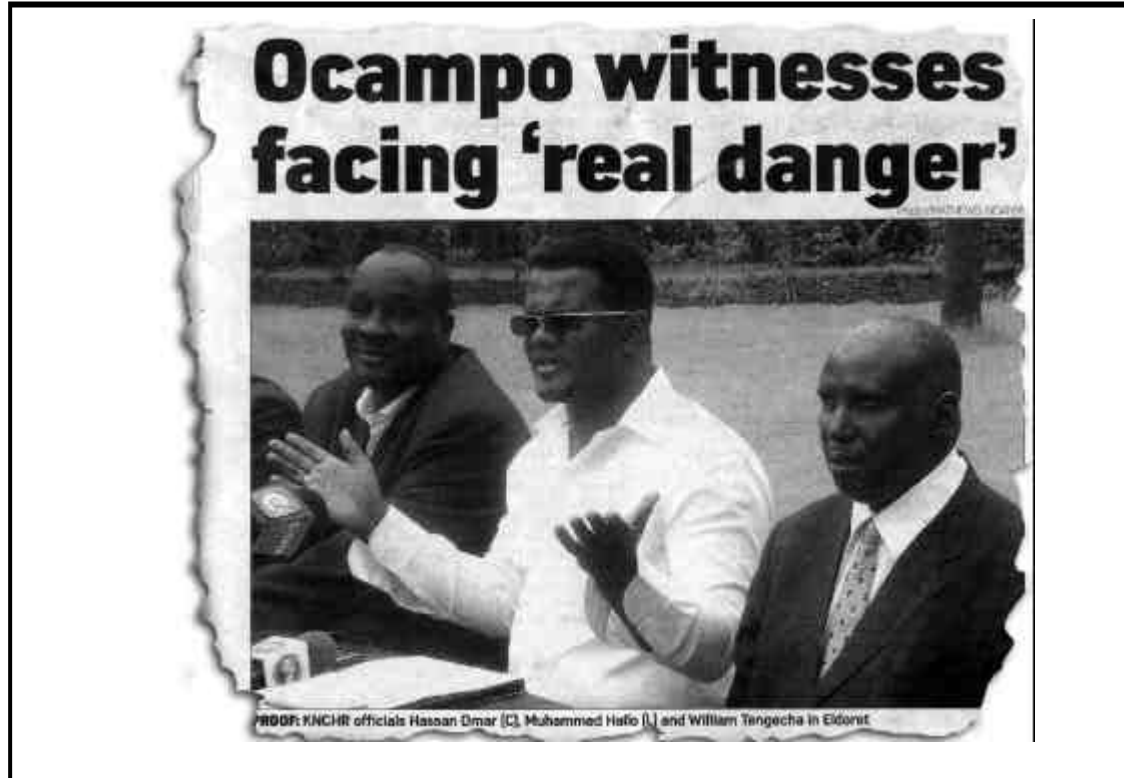




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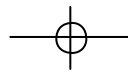
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Kenya National Commission on Human Rights (KNCHR) officials Hassan Omar (centre), Muhammad Hallo (left) and William Tegecha (right) address the Press in Eldoret on the threat to witnesses of the post-election violence in the Rift – Valley, Kenya.



Credit: The Star, 12 January 2010.

VICTIMS AND WITNESS PROTECTION IN THE KENYAN TJRC PROCESS



CHAPTER

13

VICTIMS AND WITNESS
PROTECTION IN THE
KENYAN TJRC PROCESS

66. The Rome Statute and the Rules of Procedure and Evidence of the ICC grant victims an independent role in proceedings unlike the International Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR). See FIDH Victim's Right Before Court Chapter I and IV.

67. See definition of a witness as per the Witness Protection Act 2006 and the Kenyan Truth, Justice and Reconciliation Act (2008)- definitions section.

68. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34, annex) adopted by the General Assembly in 1985, recognizes that the victims of crimes and often their families, witnesses and others who aid them, experience additional hardship where they assist in the prosecution of offenders. In order to ensure that they do not suffer unnecessary harm if they cooperate in proceedings, the Declaration outlines 21 principles for victim support and assistance <http://www2.ohchr.org/english/law/victims.htm> (12/11/09).

69. Rule 86(1) & 89 (1) of the Rome Statute 1998 requires victims to submit written applications to the Registry bearing similar requirements.

70. Institute for Democracy and Electoral Assistance Reconciliation After Violent Conflict; A Handbook p 67 edited by David Bloomfield, Teresa Barnes and Luc Huyse - understanding offenders and hierarchies of offenders.

The KHRC, ICPC and ICJ-Kenya propose that special measures be taken in order to secure the meaningful participation and protection of witnesses to the TJRC. These proposals relate to:

13.1 Identification of Victims and Witnesses

a) *Victims (Victim Witnesses and Victim participant)*⁶⁶

A 'victim' includes any person or group of persons, who, with the occasion or because of the human rights violation, has suffered any individual or collective harm, loss or damage by those acts or omissions which violate the rights granted under the Constitution or any written law in Kenya,⁶⁷ International Human Rights Law and International Criminal Law.⁶⁸

The Kenyan Witness Protection Act 2006, which is applicable, defines a witness as one who;

- a) Has given or agreed to give evidence on behalf of the State
- b) Has made a statement to the Police or any law enforcement agency in relation to an offence committed in Kenya
- c) Is required to give evidence before a court or tribunal outside Kenya
- d) For any other reason may require protection under the Act.

A *Victim Witness* is one who intends to give testimony to the TJRC as a witness whereas a *Victim Participant* is one who does not wish to testify but wishes to participate in the TJRC process. Both sets of witnesses should be required to put in an application containing the following details:⁶⁹

- i) The identity and address of the victim, or the address to which the victim requests all communications to be sent
- ii) A description of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court. If the victim is an organization or an institution, the description should be of any direct harm
- iii) A description of the incident, including its location and date and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the harm
- iv) Any relevant supporting documentation, including names and addresses of witnesses
- v) Information as to why the personal interests of the victim are affected
- vi) Information on the stage of the proceedings in which the victim wishes to participate
- vii) If applicable, the relief sought
- viii) Names and addresses of legal representatives, if any
- ix) Victims can also request assistance in finding a legal representative and, where necessary, assistance to finance legal representation
- x) It is expressly provided that persons or organizations can submit applications on behalf of a victim; who is a child or, when necessary, a victim who is disabled. In such cases, evidence of the situation of the victim must be presented either in writing or 'in audio, video or other electronic form'.

The victims should thereafter submit their applications for participation to the Registry before the start of the stage of the proceedings in which they want to participate.

Witness Offenders (Primary offenders and Indirect offenders)⁷⁰

These are persons who were either directly or indirectly responsible for human rights abuse as per the TJRC Act and wish to participate in the TJRC process. They shall be accorded the status of witnesses and will be handled in a similar fashion to victims so far as protection is concerned.

Before witnesses take the stand, they should have submitted their testimony to the Commission. The Commission will refer the testimony to the Research and Investigations Unit which corroborates or challenges the said testimony through précis paper. The précis paper shall contain a set of questions that can be utilized by the Commission to put direct and clear questions to the witness.

The Commission needs to agree on a mode of questioning the witness; it is proposed that the Commissioner chairing the session take the lead and direct the process. The public should be informed that complete silence during public hearing is paramount; reactions are not useful or needed for the process.

The major categories of victims and survivors of gross human rights violations among other injustices in Kenya to date include the victims of:

- i) Internal displacement (IDPs)
- ii) Unlawful detentions, torture, degrading and inhuman treatments
- iii) Gender based injustices
- iv) Massacres and political assassinations
- v) Historical land injustices
- vi) Irregular exploitation of natural and national resources
- vii) Economic marginalization of certain regions and communities
- viii) Colonial repression such as the Mau Mau
- ix) Extra-judicial killings, civil strife and general insecurity
- x) Structural inequalities, economic crimes and general acts of impunity.

13.2 Establishment of a Victims and Witnesses Unit⁷¹.

Ideally, the Victims and Witnesses Unit should consist of the following sections:

a) The Support Section that is to provide social, psychological support and other assistance to witnesses and is to be composed of psychologists and social workers who have knowledge of working with victims of violent crime.

b) The Operations Section which is the administrative

component of the Unit, providing all logistical support enabling witnesses to travel to the Commission and providing appropriate accommodation

c) The Protection Section which will be responsible for the safety and security of witnesses, and should be composed of staff members who have police backgrounds and witness protection experience in their domestic systems. Protection officers make security arrangements for witnesses and implement protective measures ordered by the court. Their principal responsibility is to independently carry out threat assessments and organize security.

This Unit can be designed to provide victims and witnesses with counselling and assistance to ensure the safety and security needs of witnesses are adequately met. It will also recommend to the Commission measures and actions that should be put in place to protect witnesses who have or will be heard by the Commission.

It can also inform them of the proceedings and their rights and make travel, accommodation, financial, and other logistical and administrative arrangements for witnesses and accompanying persons. It will also maintain close contact with the trial teams regarding all aspects of the witnesses' appearance before the Commission.

The Victims and Witnesses Unit could be composed of staff with expertise in the following areas:

- i) Witness protection and security
- ii) Humanitarian law
- iii) Criminal law
- iv) Psychology and trauma in criminal proceedings
- v) Gender and cultural diversity
- vi) Children [particularly those traumatized]
- vii) Elderly
- viii) Persons with disabilities
- ix) Social workers and anthropologist
- x) Health care
- xi) Interpretation and translation.

71. See the Victims and Witnesses Section (VWS) of the International Tribunal for Yugoslavia established pursuant to Article 22 of the Tribunal's Statute and Rule 34 of the Tribunal's Rules of Procedure and Evidence. The International Tribunal for the former Yugoslavia (ICTY) was established, under Chapter VII of the United Nations Charter, by Resolution 827 of the UN Security Council on 25 May, 1993. The Tribunal has been mandated by the UN Security Council to prosecute 'persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991'.

72. Freeman M (2006) Truth Commission: Procedural Fairness Cambridge and New York; Cambridge University Press.

73. Ibid.

74. Meaning the non-disclosure of their identities to the accused and his or her legal representatives - See FIDH Victim's Right Before Court Chapter VII p 17.

75. See FIDH Victim's Right Before Court Chapter VII p 12. Further under Rule 68 and Regulation (RR) 143 of the Rome Statute 1998 the Trial Chamber can permit the introduction of 'previously recorded audio or video testimony, or the transcript or other documented evidence of such testimony', subject to the condition that the Prosecutor and Defence have the opportunity to question the witness. If the witness who gave the testimony is not present before the Trial Chamber, the Prosecutor and the Defence must have had the opportunity to question him or her during the recording.

76. The VWU of the ICC and likewise here can be the main body responsible for ensuring the implementation and co-ordination of measures of protection, support and assistance to benefit victims and witnesses and other persons at risk, at all stages of the proceedings and after their conclusion, both within and outside the Court - see FIDH Victim's Right Before Court Chapter VII p 20 and Rome Statute 1998 Article 43(6), Rule 17(2) (a) (i) and Regulation (RR) 92.

77. See Rule 75 of the Tribunal's Rules of Procedure and Evidence.

78. Amicus curiae usually refers to Counsel who assists the court by putting arguments in support of an interest that might not be adequately represented by the parties to the proceedings (such as the public interest) or by arguing on behalf of a party who is otherwise unrepresented.

Witness Protection Act, 2006 allows the Attorney General to take the following protective measures:

- i) Make arrangements to allow the witness establish a new identity
- ii) Relocate the witness
- iii) Provide accommodation for the witness
- iv) Provide transport for the property of the witness
- v) Provide reasonable financial assistance to the witness
- vi) Provide counselling and vocational training services.

13.3 Evidence and Information Collection

Statement Taking.⁷² The Commission should train its Statement Takers in the mode of asking questions and collecting the same as evidence. Their mode of operation should have consistencies to ensure a consistent conclusion is reached. To ensure that the process of statement taking is effective and comprehensive, the Commission must set up mechanisms for:

- i) Publicity and Outreach; TJRC Outreach office should engage the public consistently and constantly
- ii) Accessibility of Commission and Statement Takers; Statement Takers should be accessible to the public. There should be at least a balance between local and international staff
- iii) Receipt and preservation of confidential and anonymous statements
- iv) Support and referrals; there should be referrals of victims who qualify by Statement Takers to the TJRC in the event there is need for witness testimony and need for reparations.

b) Public Hearings.⁷³ The process of public hearings involves the following considerations:

- i) Selection and preparation of those who will appear
- ii) Notification to implicated persons: timing, method, and content
- iii) Nature and scope of the right of reply
- iv) Oaths and affirmations
- v) Right to legal representation
- vi) Admissible evidence
- vii) Privileges based on contexts and relationships of

- confidentiality
- vii) Immunity and the privilege against self-incrimination
- ix) Protective measures – which include anonymous witnesses,
 - 74 prior recording before the public hearing, omission of names in the main report, testimony is presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular video-conferencing⁷⁵
- x) Victims' emotional and psychological support.

13.4 The Rules & Procedures for the TJRC Process⁷⁶

Protection measures for victims and witnesses⁷⁷

The Commission may, whether *proprio motu* (i.e. of its own motion) or at the request of the victim or witness concerned, or of the Victims and Witnesses Unit, or of a party amicus curiae⁷⁸ (i.e. friend of the court or disinterested advisor), order appropriate measures for the privacy and protection of victims and witnesses be put in place, provided that the measures are consistent with the rights of the accused.

When making such an order, the Commission should state in that order whether the transcript of the proceedings, regarding the evidence of the witness for whom the order was given, shall be made available for use in other proceedings before it. The Victims and Witnesses Unit should ensure that the witness has been informed before giving evidence, that his or her testimony and his or her identity may be disclosed at a later date in another case.

The Commission may hold proceedings in camera (i.e. closed to the public and the media) to determine whether or not to take measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness. Such measures may include:

- i) Expunging names and identifying information from the Commission's public records
- ii) Non-disclosure to the public of any records identifying the victim

- iii) Giving of testimony through image - or voice - altering devices or closed circuit television
- iv) Assignment of a pseudonym
- v) Closed sessions
- vi) Appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

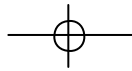
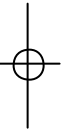
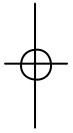
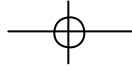
Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Commission, such protective measures should continue to have effect before the Commission unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule.⁷⁹

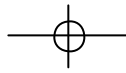
The Commission may, whenever necessary, control the manner of questioning to ensure a therapeutic environment in the TJRC proceedings. The Commission can also liaise with the National Legal Aid Steering Committee to ensure that victims and witnesses get legal aid in an adequate and proficient manner.

b) Participation of victims in the proceedings

Where the personal interests of the victims are affected, the Commission shall permit their views and concerns to be presented and considered at stages of the TJRC proceedings and in a manner which is not prejudicial to or inconsistent with the rights to a fair and impartial hearing of anyone adversely mentioned. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

⁷⁹ The Rome Statute and the Rules of Procedure and Evidence of the ICC.

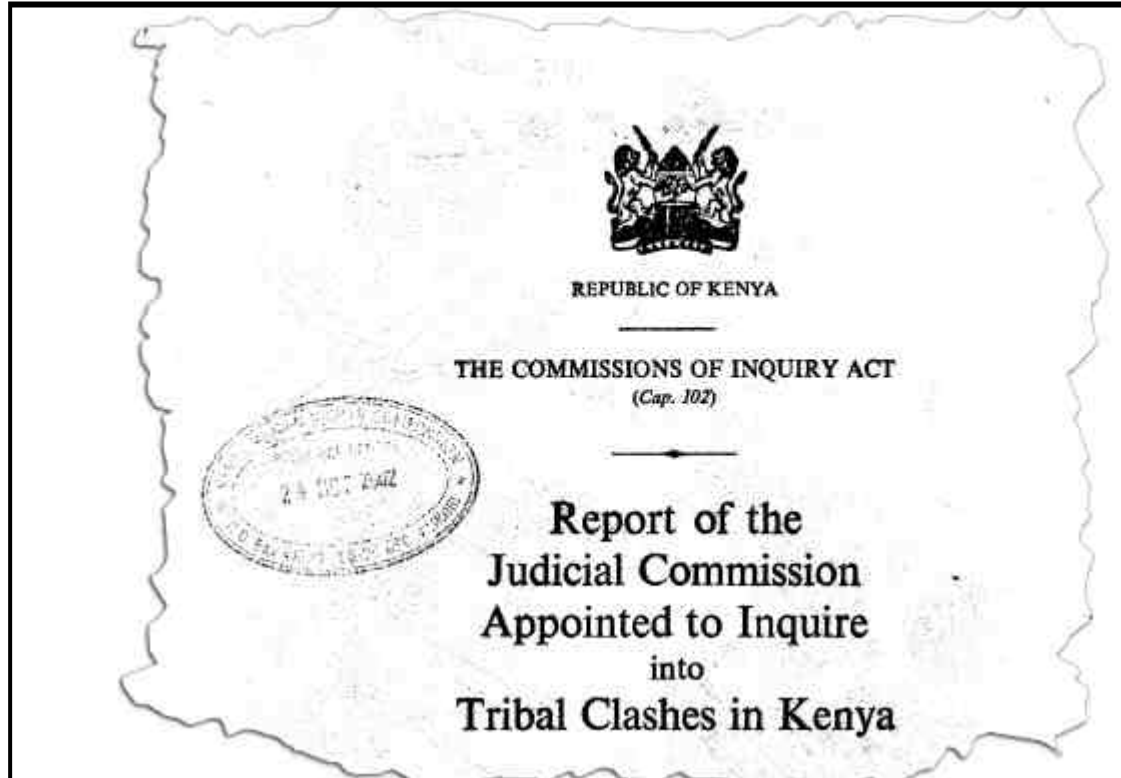




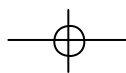
CHAPTER

14

Report of the Akiwumi Commission set up in the 1999



REPORTING AND DOCUMENTING HUMAN RIGHTS VIOLATIONS AND ECONOMIC CRIMES



CHAPTER

14

REPORTING AND
DOCUMENTING HUMAN
RIGHTS VIOLATIONS AND
ECONOMIC CRIMES⁸⁰

14.1 Considerations in Reporting and Documentation

The following steps are crucial in reporting/documenting Human Rights work:

a) Contact building. Build up a network of reliable people who will provide information about a specific case/incident.

b) Fact finding. This is done mainly through interviews and is aimed at gathering information about specific cases of human rights violations.

c) Documenting. Here the aim is to cross-check all information and write it down in a systematic manner in order to find out: WHO DID WHAT TO WHOM? WHEN, WHERE, WHY AND HOW WAS IT DONE?

d) Reporting. The aim here is to report specific cases or incidents of human rights violations to the TJRC for further action.

e) Record keeping. The aim is to establish certain patterns of human rights violations. When reporting and documenting human rights violations, it is important to map out the following:

- i) Note the number and kinds of sources of information used
- ii) Provide names and contact details of sources where consent to do so has been granted
- iii) Explain if you were able to confirm the information or (parts of it) and how you did so.

Let us briefly look into each of the foregoing steps.

14.2 Contact Building

This refers to the process of developing a network of relationships with people living in the region of investigation so that you have a steady source of information flow. These contacts are crucial in providing a variety of information on local issues/ incidents and developments and possibly make it easy to identify threats in the cause of conducting human rights investigations.

a) Why is it important? This network can;

- i) Help you to get important and reliable information within a short period of time
- ii) Act as a safety net in that contact may be able to warn you/help you if you are in danger through your human rights actions
- iii) Help you carry out checks and balances by conveying any information on violations as well as help you to confirm information from different sources.

b) Who to build contact with. One should avoid discrimination when building contacts in that the contacts should as far as possible represent the different segments and interests in each community such as; different ethnic, political and religious backgrounds, men and women; young and elderly. The wider the representation of contacts in your network, the better.

c) How to build and to keep contacts. It is important to initiate and establish a relationship based on mutual trust, confidentiality and respect. To achieve this one can begin by;

- i) Stating clearly in the beginning what you expect of your contact person(s) and what they should expect from you. This will help to avoid false expectations and misunderstandings
- ii) Caring about the well-being of your contact persons (put them first rather than the information you want from them)
- iii) Nurturing the relationship by keeping in regular contact.

14.3 Fact-Finding: Investigating Human Right Violations.

Fact finding basically involves investigating specific

80. This training Toolkit has been adapted from Amnesty International. Monitoring and Reporting Human Rights Violations in Africa: A Handbook for Community Activists, Great Britain (2002) and Kate Thompson and Camille Giffard, Reporting Killings as Human Rights Violations, Human Rights Centre, University of Essex, UK.

incidents/allegations of human rights violations. The focus is to gather hard facts in order to ascertain whether or not the wrongs or violations in question actually took place, and how they occurred. The process usually requires one to obtain information from a cross-section of people and sources.

When you are investigating human rights violations, you want to find out:

- i) What kind of violation took place?
- ii) What were the circumstances surrounding the violation?
- iii) Information about the victim(s)
- iv) Information about the alleged perpetrator(s), or doer(s) of the act
- v) Possible causes of violation
- vi) Possible consequences of the violation(s) (legal, political, economical and social).

Possible Sources of Information. Information can be obtained from;

i) *Individual and/groups:* this group of sources includes:

- Eyewitnesses of the violations
- Relatives, friends, neighbours
- Community leaders
- Religious leaders
- Medical personnel
- Lawyers/journalists
- Members of the police, security forces, army, or armed opposition groups.

ii) *Material Evidence:* This is usually evidence that is documented in some permanent form such as;

- Records from hospitals or medical clinics
- Police reports (though this may be difficult to get)
- Official reports - if any - on the alleged violations
- Weapons or types of ammunition used.

14.4 Interviewing

Interviewing is one of the most practical and effective means of

obtaining information when fact-finding. It is important to write down words as accurately as possible. Also be aware of body language and the tone of voice, as this could add to the quality of the information.

Some general suggestions for conducting interviews:

- i) Prepare a checklist of information you need to gather for a specific case
- ii) Start, conduct and end the interview correctly (see useful tips below)
- iii) Be aware of different cultural ways of framing questions and answers
- iv) Be aware of social and cultural sensitivities: some deeds maybe considered as acceptable (e.g. wife beating); other issues may not be talked about openly. This may be particularly important when interviewing women about sexual violence
- v) It is recommended that you ask the victim whether she or he would prefer to speak to a woman or a man (if you have the choice)
- vi) Be aware that victims may be confused and therefore could give inaccurate or contradictory facts
- vii) Victims and survivors may also exaggerate to 'make it sound truer'. Some may twist the truth because they have a political agenda
- viii) Show respect for the interviewee
- ix) Conduct the interview in a safe environment to enable the person you are interviewing to speak freely.

Some useful tips when conducting interviews:

- i) Introduce yourself, the organization or group you work for, and the purpose of the interview
- ii) Stress the issue of confidentiality. Explain what you intend to do with the information
- iii) Ask the interviewee whether or not her/his name could be used in the report
- iv) Ask permission to take notes and/or to use a recorder
- v) When interviewing, look at the person and make eye contact. Don't keep your eyes on what you are writing all the time. **(It is helpful for two persons to conduct an interview;**

one asking questions, the other writing. However, be very careful that an interview is never threatening or resembles the violation situation)

- vi) Start with an open-ended question and allow the interviewee to tell his/her own story. Then go back over the interviewee's account and ask precise and simple questions in a logical order
- vii) Don't use 'leading questions' to avoid suggestive responses. Go into as much detail as possible, but beware of asking too many leading questions. To get more details it could help to ask many times: how do you know? Or: How do you remember? **(For example: the interviewee says that two members of the police, Mr X and Mr Y, assaulted him. You could ask: how do you know?).**
- viii) At the end of the interview: ask whether s/he has anything to add or has any questions. Make sure that s/he understands what you intend to do with the information and how you intend to keep the victim informed about possible next steps.

Don't make promises you can't keep

Thank the interviewee at the end of the interview

Generally speaking, when interviewing victims:

- x) Be mindful that the victims (especially victims of torture and sexual abuse) may be distressed or traumatized. Try to avoid anything that could increase feelings of distress
- xi) Allow the victims to tell their own stories even if parts seem less relevant to you
- xii) Don't make an interview too long
- xiii) Conduct the interview in a place where the victim feels comfortable. Don't create an atmosphere of interrogation
- xiv) Tell the victim where they can get counselling, medical care or other help
- xv) You may get distressed yourself because of the terrible things the victims tell you. Organize a debriefing (for instance with a colleague) after the interview when you can tell your story.

Information you should always ask for. When conducting an interview one should be sure to obtain;

Interviewee's personal details: these include his/her:

- Full name
- Age/date of birth

- Sex
- Address, telephone number
- Occupation/ employment, name of employer
- Family status
- Nationality
- Religion
- Ethnic group
- ii) *Date and time of the violation:* One should try and ascertain, as far as possible, the day, month, year and hour that the events in question took place
- iii) *Place:* Where exactly did the violation take place? Do you know of any witnesses?
- iv) *Preceding events:* What were you doing before the violation? Where were you coming from or going to? Why were you there at that place?
- v) *Surrounding events:* What else was happening around you? What other actions took place?
- vi) *Details of the event:* What happened, in what way, how long, how many times? How do you remember the event took place? How many people were victims? Give exact numbers if possible
- vii) *Identification of the persons/forces conducting the violation:*
 - Do you know the violators? Did you see them, would you recognise them if you saw them again?
 - Which forces did they belong to? How do you know?
 - Try obtaining full details of how many people were involved, age, sex, height, plain clothes/ uniforms, ranks, names if known
 - What weapons were they carrying, if any? How do you know?
 - What type of vehicle (brand, colour, number plate) were they using?
 - What was the reason or motive for the violation?
- viii) *Witnesses:* Did any other members of the community or outsiders see the violation(s)? How do you know? Who were they? (Collect full details, names and addresses)
- ix) *Injuries and damage:* did the victim(s) go to a doctor, medical clinic or hospital? Collect full name and position of doctor. Is there any medical report?

In case of an arrest/detention:

- Was force used while the victim was arrested?
- Did they give a reason for the arrest? Did they show a warrant?
- Was the victim taken away? How? What vehicle? How many people? Where? How do you know?
- Is the victim still in custody? How many days? Where? Please state details: name and location of police station, prison or military base
- Was the victim transferred from one place of detention to another? How? When? Reason? How do you know?
- Ask the victim details about detention conditions
- Description of the room: size, shape, any light and ventilation?
- Were other people held in the same room? How many? Who were they?
- What were the sanitation conditions like? Was there a toilet?
- Were food and drinks provided?
- Did the victim have access to medical facilities? To a lawyer?
- Were relatives or others allowed to visit?
- xi) *Responses to the incidents*; In addition to interviews with victim(s) and witnesses, you could try to find out responses to the incident:
 - Did the family of the victim approach the authorities to seek information?
 - Was the victim formally charged before being placed in custody?
 - Did any human rights organization or lawyer act on behalf of the victim?
 - Did the authorities make any public statement about the incident?

14.5 Documenting and Reporting

a) What is documenting and why is it important?

Documenting can be described as the process of assessing and logically ordering and recording information about specific cases of human rights violations that have been collected through the fact-finding process. It aims at collecting facts to support a specific allegation with evidence. When documenting, you want to

find out exactly what happened: **WHO did WHAT to WHOM? WHEN, WHERE and HOW was it done?** Additionally, documenting helps the local monitor to write a useful report of a specific case and to identify patterns.

Documenting starts during fact-finding: while you interview people, you are already ordering the questions and answers in one-way or another.

b) Questions to guide your analysis of fact-finding data;

- i) *Is the allegation or the incident a real human rights abuse?* Does the incident violate international human rights standards, humanitarian conventions and/ or the national constitution or laws? You could also carry a copy of the Kenyan constitution for your reference
- ii) *Do you have all the facts needed to show that a human rights violation took place?* What is missing?
- iii) *How do you know if the information is true?* You have to assess the information gathered in interviews and crosscheck all the facts. Are all the testimonies similar or are there any contradictions? Do the allegations 'fit' with what you already know about similar violations?

What do you do to ascertain the veracity of a case or incident?

- i) Crosscheck all the answers and other information to each question. You want to know if all the answers to a question are the same or if there are contradictions. For instance, do all the answers indicate the same number of perpetrators?
- ii) Write down all consistent information but also the contradictions. These should also be included in your report. For example, if one victim mentioned 4 perpetrators and another one thinks it was 5, then you state '4 to 5'
- iii) Add information that may provide evidence to the case, such as:
 - Written statement(s) by the victim(s)
 - Written statements by witnesses
 - Medical evidence, medical reports
 - Statement issued by police or security forces.

Some useful tips when documenting:

- i) Take your time when comparing the information and do it as accurately as possible
- ii) Don't judge; let the facts speak for themselves.

14.6 Writing a Report on a Specific Case or Incident

There are several ways to write a report about a specific violation. You should always comply with two ground rules:

1. The report should be as detailed as possible (but keep focused on the violation(s) you want to report)
2. The information should be systematically categorized.

For Example:

- **The Act: Killings**
YEAR: 2005,
REPORTED CASES: 700,
TYPE OF VIOLATION: Extra-Judicial Killings
NAME OF PLACE OF VIOLATION: Ngong Forest.

The Victim(s). Provide as much relevant details as you can—their names, sex, age, region of origin, ethnicity, occupation, next of kin, religion if known, political affiliation if known etc.

The Perpetrator(s). Provide details of the person(s) who committed the act. These could be state actors, name of the individual(s) if known, name the state agency and/or unit s/he belongs to, their rank, where stationed, etc. Or non-state actors, in which case you should provide their names, sex, age, region of origin, ethnicity, occupation, next of kin, religion if known, political affiliation if known, etc.

In general a report should include three parts:

- a) **The act:** *what* was done, *when*, *how*, *where*.
- b) **The victim(s):** the individual(s) *against whom* the act is committed.
- c) **The perpetrator(s):** the person(s) *who* committed the act. All the information you gathered during fact-finding should be included within the above given three categories.

Optional: You could also add information on the historical, political, economic or social context or circumstances in which the violation(s) took place (See section below on how to do this).

In terms of the **language** to be used in the report, you should;

- a) Be concise and clear
- b) Avoid insulting words
- c) Avoid politically loaded words that may demonstrate a lack of impartiality
- d) Avoid being personally or emotionally involved.

14.7 Record Keeping**a) The main goal of record keeping – identifying patterns.**

Record keeping is useful since it can help in identifying specific patterns in human rights violations. Human rights violations can be once-only incidents. Unfortunately, in many countries and in many situations, they are not isolated but part of a pattern of violations. Patterns may be observed in the kind of violations, location of the violations, identity of the victims and perpetrators, etc. Identifying patterns could help you to improve your reports and build up a case, for instance, against a specific unit of the security forces, a vigilante group or other armed (opposition) group or against the chief of a specific police station.

b) How does one identify patterns?

In seeking to identify a trend or pattern of violations one may consider;

- i) *Identity of the victims* in terms of: religion, ethnic group, social or political group, gender, profession, age-group, etc.
- ii) *Location* of the violation: a specific village or neighbourhood, prison, police station, military bases, secret detention centre, checkpoint, etc.
- iii) *Methods:* perpetrators often use similar methods or forms to commit killings, torture, arrests, etc.
- iv) *Circumstances* surrounding the violations may be quite similar: before, during or after elections, political gatherings, demonstrations, riots, curfew, etc.
- v) *Identity of the alleged perpetrators:* do they belong to a

specific unit of the security forces, vigilante group or other armed (opposition) group, assigned to a specific checkpoint, do they have specific ranks etc?

- vi) *Responses of the local authorities or leaders of opposition groups:* including statements, (lack of) investigation, nature of investigation, etc.

NB: The best way to identify patterns is by keeping records of all alleged cases in a systematic and accurate way. At regular intervals you could analyze the information about specific cases to identify the patterns listed above. You could add the findings to your situation report.

14.8 Basic Principles in Reporting and Documenting

There are four main guiding principles that a human rights investigator should always keep in mind when documenting and recording human rights violations. These are: **accuracy, confidentiality, impartiality and gender sensitivity.**

a) Accuracy

i) What is accuracy and why is it important?

Accuracy can be described as the factual certainty that what you are reporting actually took place. Try as much as possible to make a clear distinction between the facts, allegations, hearsay, rumours and your own or other people's opinions. Accuracy is important if our participation in the TJRC process is to be credible both to the Commission and the public.

ii) How do you achieve accuracy?

In collecting and documenting data, it is important that you ask yourself: How reliable are my sources of information? And then, in response to this question;

- Try to retrace the origin of the allegation
- Interview the survivor(s) of the violation as well as witnesses
- Cross-check every piece of information you have gathered with other sources
- Assess the information and establish if certain evidence is missing

- Gather additional information or evidence
- Back your findings with evidence that is easy to interpret. This could include photos, police and medical reports. Compare the alleged violation with similar cases to see if it is part of a pattern.

iii) Some factors that could make your report inaccurate, for instance:

- Starting your investigation late could lead to: Evidence getting lost or misplaced; Survivor(s) could die or move to another place; Witnesses could forget important information. Biases of your contact(s): witnesses or survivors could present false information, or under or overstate the facts for personal reasons or political affiliation.
- Your own biases: your personal or political reasons, coupled with your emotions or prejudice may affect the credibility of the report.
- You may not be able to verify an alleged violation due to the security situation in a particular area. Do not give a report based on rumours without enough evidence.

b) Confidentiality

Confidentiality is a kind of contract between you as the human rights monitor and your contacts. It is an agreement not to make the name of the contact public, unless the contact person has given permission. This may also apply to sensitive information provided by your contact.

i) Why is confidentiality important?

- It protects your contacts from harm or endangering their life as a result of passing on vital information. This is just as important for victims or witnesses, and for contact persons within the government, police or security forces
- It is a way of building a relationship of trust with your contacts
- It helps to ensure a constant flow of vital and crucial information.

ii) How to guarantee confidentiality?

- Always ask your contact or witness for permission to use a name or a piece of information. Explain what the organization (in

this case the TJRC) that you are going to give the information to intends to do with it (i.e. as per the TJRC mandate) and that you will pass on any request for confidentiality. Include in your report to the TJRC whether or not a victim or witness has agreed to use their name

- Even if the contact agrees to use a name, you may decide that it could be too risky and include this advice in your report
- Make use of fake names in your reports (but mention it is a fake name) in case your contacts have asked for confidentiality.

e) Impartiality

Impartiality is one of the major guiding principles in monitoring, fact-finding and documenting human rights violations. It can be interpreted differently by different organizations in different circumstances, but for purposes of this training, it means:

- Not being discriminatory and treating all victims equally. Seek the truth at all times irrespective of the victim's or perpetrator's political affiliation, nationality, religion, gender, ethnic group or class
- Being balanced: commend the local authorities when they are protecting human rights but state the facts when they are involved in human rights violations
- Making a clear distinction between your monitoring work and the activities of opposition groups
- Not applying bias to any particular organization or group. For instance, do not report only on human rights violations by government authorities while leaving out human rights abuses by opposition groups (if relevant) and other non-state actors e.g. religious or traditional bodies.

Remember the following tips when reporting and documenting Human Rights Violations:

- Don't accuse, don't judge, but state the facts
- Avoid using stereotyping and stigmatizing language
- Try to identify the background of your source. This may help you to get a good balance in sources (e.g. not all from the same party or same ethnic community). This will also help you to identify whether there may be a certain bias in a testimony.

Gender Sensitivity

The rights of women and the different abuses they experience have long been ignored or neglected by the family, the community and society at large. In many societies (including ours) women are regarded as inferior to men and continue to suffer discrimination. This is a myth, developed and supported by a male-dominated culture and society. Discriminatory laws and practices can be found in:

- Laws and constitutions
- The beliefs and cultural practices of a community (inheritance rights, lack of proper education, rape, domestic violence, forced marriage, etc.)
- Little access to economic resources
- Sexist language and behaviour
- Family relationships.

As a result of the foregoing discriminatory systems/structures, the abuses against women and girls have been under-documented for a long time. For instance, rape during armed conflict was never considered as a war crime until quite recently. Female genital mutilation (FGM) has long been considered as an unavoidable cultural practice; in many communities it is now increasingly criticized as a violation of girls' and women's rights. Local human rights monitors can contribute to achieving equal rights for women and men by giving particular attention to abuses of women's rights.

How can you make reporting/documenting of Human Rights Violations more gender-sensitive?

- Build a gender-sensitive contact network. Make an effort to build relationships with local women's organizations and individuals. Think of nurses, midwives, security officers, teachers, development workers, etc.
- **Include women in the team if you plan to investigate a certain case, especially when investigating abuses against women or girls.**

Considerations when investigating alleged abuses against

women:

- Be sensitive to the social and cultural attitudes and behaviours in the community with regard to women, sexual violence, rape and sex
- Identify influential women in the community who are advocating women's rights and work with them
- Do not anger the men and community leaders; explain why you need to speak to some of the women in the community.
- Do not give up too easily if the men are reluctant
- Use non-sexist language. Use generic terms like people, human beings, men and women, society or chairperson, rather than: man, men, mankind or chairman
- Avoid any suggestion of 'intimacy'.

14.9 Some Useful Tips

You should be aware of the limitations of not being a professional human rights investigator. Hence:

- Don't feel ashamed to ask for assistance from specialist workers, especially if medical, forensic or legal skills are needed
- Ask a competent partner NGO to further investigate a case when it turns out to be complicated
- Ask for professional help when you encounter traumatized victims
- Be modest in your performance as a human rights monitor: you are not a police investigator or detective
- Show respect for the traditional authorities without losing track of your mission.

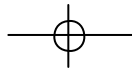
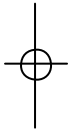
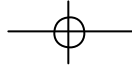
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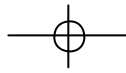
Those responsible for human rights violations usually do not appreciate investigations into their acts. Human rights investigators have often been threatened, tortured and even killed. As a monitor at local level you may be particularly vulnerable because you are far away from places where other human rights defenders and the media could come to your help. Apart from your own security you should also consider the safety of your family and of your contacts. You should therefore operate

very cautiously.

Some Useful Security Tips:

- i) Keep quiet about your monitoring activities; be prudent in all your activities
- ii) Be careful with the words you utter, how you say them and where you say them
- iii) Only use contacts you fully trust
- iv) Inform the organization you belong to or you are in touch with when investigating a particular case. If possible, consult your contact in the human rights organization beforehand and conduct a risk assessment together with them. Emphasize their responsibility for your security
- v) If possible, ask security officials who you can fully trust to warn you if they hear about the possibility of arrest or other threats. Consider the security risks of such relations very thoroughly
- vi) Change movements and plans where necessary
- vii) Don't take risks that could put your life or that of your family or contacts in danger. Investigating one violation is not worth another one.





CHAPTER

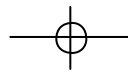
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Nation Cartoonist caricatures the Kenyan Government's attempts to gag the media once again in the revised version of the Media published in 2010.



Credit: Daily Nation, 12 January 2010.

MEDIA REPORTING ON TRANSITIONAL JUSTICE MECHANISMS



CHAPTER

15

MEDIA REPORTING ON
TRANSITIONAL JUSTICE
MECHANISMS⁸¹

Transitional justice is a rewarding and exciting field for journalists because of its tremendous potential to impact individuals, societies, and the development of international law. Also, it is a new emerging and constantly developing field that often generates controversy, something journalists tend to thrive on!

The media are the eyes and ears of the public; this is more relevant when covering transitional justice. If peace, democracy and the rule of law are to work, then the mechanisms and institutions created in their name should themselves be under close scrutiny. Journalists, therefore, have a vital role to play in helping the public to understand and engage in TJ processes. They can raise the concerns of victims and help bring them into the debate around TJ issues. Through balanced and informed reporting, the media can also help to ensure fair trials and hearings for alleged perpetrators of human rights abuses.

15.1 Modes of Media Engagement with the TJ Process

The media can engage in the TJ process through the following strategies:

- a) Providing accurate information and facilitating deeper understanding in order to ensure effective and broad public participation
- b) Raising the concerns of victims and helping to bring them into the debate around TJ issues
- c) Through a balanced and informed reporting the media can also help to ensure fair trials and hearings for alleged perpetrators of human rights abuses. The media have a role to play in fighting impunity

⁸¹ Excerpts from the publication by BBC World Service Trust and International Center for Transitional Justice, *Reporting Transitional Justice: a Handbook for Journalists* (2007)

- d) The media can investigate and verify the facts before airing the story on a matter that is the subject of TJ
- e) The journalists can become the first port of call for information by providing transcripts of statements, video and audio recordings and other additional information when called upon
- f) The media can keep people reasonably informed before and while the actual TJ mechanisms are being implemented. And these processes that are usually complex can be broken down for their audiences. It will involve substantial research, consulting historical and media records, conducting background or follow-up interviews with concerned parties and being careful to present all sides of an argument
- g) The media can tell the stories of the victims, unearth the patterns of historical abuse and injustice, show the sacrifices and triumphs of survivors, relate stories of our heroes/heroines and find some new champions of the cause with the view to helping to push the TJ process forward
- h) The media can expose the concerns of special groups like women and children by deliberately covering their issues and ensuring that they are given the opportunity to participate in post-conflict truth, reconciliation, and justice-seeking processes.

15.2 Guidelines for Good Reporting on TJ

In their coverage of the Transitional Justice process, the media should:

- a) Make sure they are familiar with the mandate and powers of the commission. This information may be obtained on the Internet, or through contacting the TJRC's press and information office
- b) Be familiar with the rules of procedure. This will aid them to know, for instance, whether statements will be made public before hearings, or what information they will have access to in a closed hearing
- c) Know that although truth commissions are not courts of law, the same guidelines as for court reporting will apply
- d) Be careful not add their own opinion to stories. They should cover the facts, interview the victims and stakeholders with a

- view to being as objective as possible
- e) Build relationships with perpetrators, survivors, and victims' families, and be mindful of their rights
- f) Maintain balance and fairness to victims when covering perpetrators, who may still enjoy the overwhelming attention of the public
- g) Avoid intimidating the victims during interviews or when they are giving testimony by being sensitive to how they set up and use their equipment
- h) Ensure that the integrity of the hearings is observed through the required silence and respect it deserves. This can be achieved through the set up of an external media room from where the journalists can work
- i) Report the hearings in news bulletins and even in more comprehensive programs.

The challenge is to tell the story of these abuses, but not to let the primacy of the victim get lost; that is, not to let the reporting be just about the power of the perpetrator.

15.3 Checklists for Journalists - Key Stages of Criminal Trials before Domestic Courts

Initial Appearance: This is when the suspect first appears in court. At the *ad hoc* tribunals, a court official reads the charges as laid out in the indictment, and the accused is asked to plead guilty or not guilty to each charge. At the ICC, the Court confirms that the accused knows the charges against him or her, and sets a date for a Confirmation of Charges Hearing, at which the charges in the arrest warrant may be confirmed or modified.

Opening Statements: After the prosecution and defence have prepared their cases, and all the legal and procedural issues have been resolved, a case will finally come to trial. The preparation process can take some time. The prosecutor opens the trial by outlining the case against the accused, explaining what evidence and witnesses s/he plans to bring, and highlighting the individual responsibility of the accused. The defence can choose to reply at that stage or wait until the prosecution has presented its case. The defence may, for example, argue that the accused was not

responsible, or deny that the events charged in the indictment constituted a crime. In some cases, the defence may also challenge the legitimacy of the court itself. Prosecution and defence opening statements can contain a lot of useful information about the strategies of the parties and the evidence they plan to bring.

Witnesses and Cross-examination: The main way that lawyers from each side try to prove their case is by presenting evidence, either through witnesses, documents, forensic evidence or videos. Sometimes witnesses appear in person to give their testimony, or they may submit a written statement, or sometimes both. There are different types of witnesses:

Expert witnesses: these are witnesses brought before the court to provide their insight on information or facts on which they have specialized knowledge based on their extensive experience or educational background. They usually were not personally involved or affected by the crimes alleged to have been committed by the defendants on trial.

Protected witnesses: these are witnesses who provide the court with accounts detailing their personal involvement. They are often worried about possible retaliation and do not want their identities known. Courts can offer a range of measures to help protect them, including giving them a pseudonym, concealing their face, disguising their voice, or allowing them to testify behind closed doors. Protective measures instituted by the court have to be respected. Journalists have been charged with contempt for revealing the identities of protected witnesses.

In most Tribunals to date, the prosecution begins the case by presenting its evidence and its witnesses. A prosecutor will lead each witness in his/her testimony by asking questions (examination). The defence will then be given the opportunity to challenge the witness by asking their own questions (cross-examination). When the prosecution closes its case, the defence mounts its case, and the roles are reversed. The lawyers will have met their own witnesses to talk through the questions and prepare them for their testimony in advance of the court

proceedings. They will also have tried to anticipate the questions the other side will ask.

An **'examination'** is when one side questions its own witnesses. A **'cross-examination'** is when one side questions the other side's witnesses. Both processes help the judges to decide whether a witness is reliable or not.

Closing Arguments: Once all the evidence has been presented and the prosecution and the defence have made their cases, the two sides will again tell the judges why the defendant is guilty or innocent of the charges. Each lawyer will sum up the most telling points they have made and will try to destroy their opponent's case through their closing statements.

Judgment: The judges normally announce in advance when they will deliver a judgment, which can take many months to prepare. A judgment has three main elements:

Analysis of the case, including the judges' reasons for their conclusion

The verdict on whether the person is guilty or not guilty of all or any of the counts against them

If found guilty, what sentence the convicted person should serve. Verdicts and sentences are not always 'handed down' (delivered) at the same time.

Appeal: Once sentenced, the convicted person has the right to appeal to a higher court. The Appeals Court is made up of different judges from the ones who heard the original case. The prosecution or defence can appeal against a verdict or sentence on the grounds that the trial judge misdirected himself on a matter of law or on a matter of fact. The appeals judges will hear the arguments of both sides and decide whether to confirm or change a verdict or sentence. Further appeals may be brought where there are higher appellate courts. However, the judgment of the highest appellate court is usually final.

15.4 Golden Rules of Court Reporting

The three golden rules essential for court reporting are **Accuracy, Balance, and Clarity.**

Accuracy: Both the prosecution and defence have a right to expect that their arguments will be accurately reported. The best way to do this is to take good notes of the arguments made by both sides during the hearings. This can effectively be done by the use of, shorthand, or some form of speedwriting, especially in cases where the court has disallowed the taping or recording of the proceedings. If you think you have missed, or failed to understand, something important, cross-check with contacts or experts to try to come up with a meaning that is as accurate as possible.

Balance: This can be problematic for reporters. Court reporting is unusual in that newsworthiness is not the only criterion. There is an obligation to be objective and present each side of the case. This means that you may have to be willing to include passages that are not quite as interesting as others, but which will help clarify the case being made by each of the parties. In addition, journalists must be careful not to express feelings of sympathy for victims or contempt for the accused. Reporting of court cases must be objective and fact based, and journalists must always bear in mind that every accused has the right to be presumed innocent until proven guilty.

If a case lasts for a long time - as it often does in international courts - you will not be able to write a 'balanced' report every day, because days or weeks may be taken up by the presentation of the case of only one of the parties or one of the issues in the case. In those circumstances, you must aim for an overall balance in your reports of the case.

Clarity: This requires you to learn about court proceedings and the language of the law or legal jargon, and translate them into terms that your audience can understand. That sounds very challenging, but most legal terms have an accepted meaning that you will become familiar with as you continue to cover court proceedings and read its documents.

15.5 Challenges in Reporting on Transitional Justice Issues

Transitional justice can be challenging to cover. As we know, it can encompass a broad range of international and/or local mechanisms, from courts and truth commissions to memorials, gender specific initiatives and traditional justice ceremonies. Each poses its own challenges for journalists, and yet many of these challenges will be similar. For example:

- i) Most TJ mechanisms deal with sensitive and /or conflict-related issues. As a journalist, you must be especially careful not to inflame tensions. You will have to put your personal views and experiences aside, while remaining sensitive to issues of trauma and security, especially for witnesses and survivors
- ii) TJ issues and processes are often very complex. You will need to break them down and put them in a simplified context for your audience. This will probably entail substantial research, including consulting historical and media records, and conducting background or follow-up interviews with concerned parties, being careful to present all sides of an argument
- iii) Particularly with courts and truth commissions, proceedings may be dense and lengthy. You will need to hone your news sense and knowledge of the issues so that you can help your audience understand what is most important and how it concerns them
- iv) Journalists covering truth commissions may themselves have been victims/survivors of human rights abuses, or they may have had a long history covering the case in question. As reporters, they might have information that the commission or the victims themselves may not have
- v) The journalists may suffer from post traumatic stress disorder especially those journalists covering the process on a full time basis with no alternative work. While this is true, it would be necessary for TJRC to have in place therapeutic or counselling sessions for the journalists covering TJR process
- vi) Severe burn outs are expected; hence team work will play a key role as a support system for the journalists

- vii) It may be challenging for reporters to maintain a balanced coverage especially of victims who may be dead and are only represented by their family. This is because the firsthand accounts of surviving victims are usually preferred over the secondary accounts of deceased victims by their family and kin
- viii) The process may be expensive to the media houses, for sustainability in covering, the media houses may think about seeking funding to support the programs and the entire process
- ix) The main challenge to the daily printed media is the limited available editorial space which may affect comprehensive coverage. This calls for the need to break down the information so that it adequately captures the outcomes of the hearings
- x) Considerable amount of organization and technical equipment is necessary for effective coverage
- xi) There may be a conflict of interest at work where the media is required to convey the message of the TJRC and still remain independent of any expressed government agenda.

15.6 Tools for Reporting Human Rights Abuses

When reporting human rights abuses, make sure to keep these following ideas in mind:

- a) Your audience will often be unaware about the idea of human rights and what it means. When reporting about a story related to human rights, take a sentence or two to convey what the right at stake is and how people can protect themselves from abuses
- b) If the government takes actions that contravene constitutional protections of human rights, the government is acting against the Constitution - which is unacceptable. Remind your audience of the government's constitutional responsibilities
- c) Human rights are part of the law. Anyone abusing the rights of others are acting against the law. Such actions should be exposed in the press
- d) To make unsubstantiated claims that someone is committing human rights violations is an action that goes against the spirit of human rights. When reporting on human rights issues make sure that you have collected hard, indisputable facts before reporting

- on any abuses
- e) It is important to compare the actions taken by individuals, organizations and the government and the respective obligations set out in the Constitution, international human rights treaties ratified by Kenya's Parliament and the African Human Rights Charter. When you see a conflict, investigate the story
- f) Remember that you, as journalists, are the watchdogs of society. Respect for human rights is a central component to that society. If abuses are being committed and ignored, or the authorities are not dealing with human rights abuses properly, it is your professional duty to investigate and expose the infringement
- g) Always report human rights stories with the concept of 'Human Rights' at the forefront of the story - people best learn about their rights and the rights of others from the media.

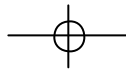
15.7 Importance of Reporting on Human Rights

Human rights are not only supported in domestic and international law, they are essential to the continued development of Kenya as a country. A strong track record showing the observation and respect for human rights is necessary if Kenya is to gain the reputation around the world as being a strong and vibrant democracy. Increasing coverage in the media about human rights will ensure that people are better informed about their rights and the rights of others. This will benefit Kenyans today, and generations to come. Any state that fosters the protection and respect for, and protection of, human rights ensures three major accomplishments:

- i) Human security:* Fewer gross human rights abuses and more social cohesiveness will occur. Lives will be saved
- ii) Good governance:* A sound democracy that rests on the respect for the rule of law and the inalienable rights of each individual
- iii) Economic development:* Human rights are increasingly recognized as a pre-condition for economic development. Moreover, where economic rights are fortified, development is greatly assisted as they provide a nurturing environment for investment and economic growth.

The media can greatly assist the State to develop a culture of

human rights respect and protection by merely choosing to focus on the Human Rights implications of the actions, inactions, statements and silences of those in positions of authority, both in the public and private sphere. The media should take up its role of being the watchdog for society and engage much more aggressively in the endeavour to ensure that governance practices at all levels are both fair and just. Investigative and in-depth coverage of historical injustices is by far the best starting point for those in the media to achieve effective implementation of the transitional justice processes in this country.



CHAPTER

16

Emeka- Mayaka and Njeri Rugene throw the spot light on Gender Equality politics in Kenya.

16 | SPECIAL REPORT

2010  The Outlook

Will the fair sex maintain its salvo in the House?

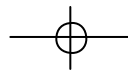
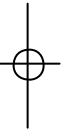
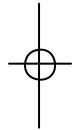
Despite men's dominance in Parliament, women have carved a huge stake in the Legislature and, as EMEKA-MAYAKA GEKARA and NJERI RUGENE write, things are shaping up for equality in politics

One can accurately guess that Charity Ngilu and Martha Karua, Kenya's seasoned female politicians, no longer feel lonely on the benches of Parliament.



Credit: Special Report: Daily Nation, 6 January 2010.

GENDER JUSTICE



CHAPTER

16

GENDER JUSTICE

Gender can be broadly defined to include male and female roles in society, whether they are those of women, men, boys or girls. However, the gender element in transitional justice aims to deal with the female experience in situations of conflict or illegitimate rule. When one considers the atrocities and human rights violations of past dictatorships or times of conflict; it becomes apparent that the experience of females is to some extent different from that of males. This is largely due to the different roles they are forced to play and the treatment they experience by virtue of their status as female beings, as well as the social biases and attitudes surrounding the female gender in most societies.

Situations of conflict can have an enormous and devastating impact on women's lives, for instance where there is systemic sexual violence and exploitation of the female members of society; or where women are left to fend for their families against the effects of the humanitarian crisis that results from conflict. But they can also open new spaces and opportunities for transformation of gender roles and attitudes.

Situations of conflict or human rights abuse inevitably impact upon gender and social gender power relations in the sense that, those periods of conflict and post-conflict reconstruction destabilize gender identities and assumptions. For example, during conflict, women often assume positions that would have been unacceptable pre-conflict, either by joining one of the fighting parties, assuming the position of head of a household, or occupying positions in the public sphere or other spaces that were previously the exclusive domain of men.

As conflict is brought to an end and peace agreements negotiated, societies are faced with the task of reconstructing not only their physical infrastructure, but social infrastructure – including relationships to each other, and between citizens and the state. It is during this moment of change that transitional justice mechanisms are negotiated and established, with the express

mandate to deal with past violations and contribute towards a blueprint for a new society based on principles of justice and equitable relations; and in doing so, ensure that the atrocities of the past will 'never again' occur. Much has been made in feminist literature of the importance of this post-war moment for transforming unequal power relations and furthering gender justice.

16.1 Gender Justice

Gender justice can be defined as the protection and promotion of civil, political, economic and social rights on the basis of gender equality. The concept of gender justice requires one to take a gender perspective on human rights as well as assess the levels, access and obstacles to the enjoyment of these rights for women, men, girls and boys, in order to adopt gender-sensitive strategies for protecting and promoting them.

The incorporation of gender justice into the accountability mechanisms of transitional justice requires policy makers to:

a) *Address gender bias and sexual violence*

Most instances of rampant and systemic sexual violence during conflict are usually preceded by situations of negative social attitudes and stereotypes toward the female members of society prior to the conflict. In many societies members of the female gender (women and girls) are perceived as being of less significance or holding positions of secondary importance to those of their male counterparts. This devaluation of their social status, coupled with the objectification of their sexuality, are but some of the factors that set the framework for the dehumanization, and subsequent sexual violations, in times of conflict.

It therefore becomes important for any transitional justice programme to purposefully acknowledge and seek accountability for crimes against women as this will, to some extent, confront the negative attitudes and biases toward the female members of society. To fail to do so would seriously undermine the credibility of governing institutions of the new regime and keep alive the

biases and attitudes that discriminated and ultimately led to the gross human rights violations faced by the female members of that society.

b) Treat sexual violence as a war crime

The Rome Statute which established the International Criminal Court recognizes sexual crimes, as well as persecution, on the grounds of gender. In cases before the ICTY and ICTR, rape has been confirmed as both a crime against humanity as well as an act of genocide. Other notable initiatives at an international level include Security Council Resolution 1325 which deals specifically with justice for women's experiences of violence during conflict and the 2004 Report of the Secretary General on 'The rule of law and transitional justice in conflict and post-conflict societies' – which confirms the need for women to be included in all initiatives which seek redress for past violations as well as assurances that these interventions will not exclude marginalized and at risk groups, in particular women who have been victims of sexual violence.

c) Enhance Gender Balance

Women's participation in all spheres of decision-making and policy formulation is both a form of justice and redress and a necessary element of real democratization. No policy process or institution can be credible which fails to incorporate the participation of a majority of the population; and this holds equally true for forums which determine and implement transitional justice policies.

Moreover, marginalization and exclusion are often at the heart of the conflict being addressed, and transitional justice mechanisms are intended to both address these causes as well as contribute to the creation of a new society. Creating mechanisms which incorporate the voices of women and women's experiences begins to address old patterns of exclusion and actively lays down new patterns of engagement for the state, with the aim being to achieve a harmonious gender balance in society and in all areas of policy creation and implementation.

16.2 Social and Economic Components of Gender Justice

Even though increasing women's representation in existing transitional justice processes and addressing experiences of sexual violence are of greater importance; neither can achieve in isolation the transformative justice required for sustainable peace and reconciliation. There are other important issues that need to be looked into:

- i) The examination of gender justice not just in relation to sexual crimes, but also in the context of socio-economic and political marginalization
- ii) Approaches that will seek to end the discrimination, marginalization and violation of the basic human rights of the female members of society - this includes socio-economic, civil and political rights.
- iii) The factors that lead to the use of sexual violence during both peace and war-time.

16.3 Gender and Truth Commissions

Truth commissions have over the past two decades expanded from their limited institutional origins - where they were seen to be just a step beyond commissions of inquiry - to bodies that today are expected to deliver a range of social goods not just for victims, but for post-conflict societies as a whole; documenting history, encouraging reconciliation, providing public acknowledgment for victims, social sanction for perpetrators and more. Most recently, truth commission reports have gained importance as foundational documents of the new society; recording not just past history but providing a blueprint for legislation, policy and practice which address the root causes of the conflict and give a society the momentum to transition towards democracy and good governance.

Truth commissions have valuable potential for transforming gender relations in post conflict societies. A gender perspective in a truth commission's report can help bring about changes in existing laws and patterns of behaviour that have contributed to inequality and discrimination. Incorporating gender-sensitive approaches into the work of the truth commission not only aids in

making effective reparations, but also helps prevent future injustices by addressing and confronting their causes.

Early concerns with gender and truth commissions were very much focused on increasing the number of women commissioners, encouraging the employment of women statement-takers and providing a safe space for women to tell their stories of sexual violence. Given the history of silence which shrouds women's experiences of sexual violence and crimes of discrimination, as well as the lack of accountability or justice with which these crimes have been treated; creating spaces to hear, record and acknowledge these crimes is no small contribution.

The need to have a gender perspective throughout the running of the TJRC's mandate - from statement taking, interviews, investigations, etc. - is crucial. The International Centre for Transitional Justice refers to this as making gender a cross cutting issue throughout the TJRC process. They contend that gender is [or should be] a running thread in discussions about political history, institutional hearings, individual human rights abuse, and patterns of human rights abuse, as well as in recommendations for reparations and reform. They go on to say:

' . . . there is value in . . . treating gender as a crosscutting theme as well as a specific-focus area. It is a difficult approach to maintain in the everyday functioning of a commission and requires broad political support among commissioners and staff, as well as focused expertise on gender issues that will allow the application of this philosophy in the various operational areas of a commission's mandate.'⁸²

16.4 Reparations as a Tool for Gender Empowerment

Reparations programmes have enormous potential to empower women, address social and economic inequalities linked to gender and contribute to a broad social justice agenda. The use of reparations can provide a positive vehicle towards redress for past injuries; not only with regards to the specific violations suffered

but also with regard to the overall context of oppression and violation of basic rights. What is more, reparations can contribute towards furthering gender equality, empowerment and gender sensitive development.

16.5 Gender and Memorialization

Memorialization has to come from the people and be for the people and therefore women should actively participate in the memorialization process so that their stories are adequately represented. There is therefore a call for women and women organisations to source the various stories of past atrocities and narrow them down to the specific themes that should be represented in a memorial. The form of memorial should also promote gender justice and encourage women empowerment in the attempt to forge ahead and break traditional stereotypes on gender.

On top of this, the memorial should not only represent past experiences and an end to past violations against women, but should always be a reminder to end gender violence even in peace time.

The memorial should also call for an end to gender based violence, not only at the national level, but also at the basic family unit where violence against women is rampant.

16.6 Gender and Prosecutions

As stated earlier, gender-based crimes in this paper does not only refer to sexual violence against women, but encompasses the targeting of women, men, girls and boys based on their gender roles within that particular society. There are various ways in which individuals are targeted in times of conflict. For example, men and women being forced to join militia groups, girls and women being forced to cook for men who have gone to fight, or forced to loot houses, while both groups can be victims of sexual violence.

A study by Mazurana et al (2005) also indicates that women and

82. Vasuki Nesiiah et al (2006) Truth Commissions and Gender: Principles, policies and procedures International Center for Transitional Justice p 4.

girls are not only victims of armed conflict, but play vital roles in supporting and perpetuating violence. In their study, the scholars indicate that women and girls play crucial roles as combatants, spies, messengers, porters, 'wives', etc. During the Post Election Violence in Kenya, women in most parts of the country engaged in the traditional role of cooking for the men as they went to war, while at other times they were forced to loot houses and stores. Prosecutions for gender-based violence should therefore be looked at from an all round perspective to include women as victims and perpetrators, and also men as victims of sexual violence.

16.7 Other Considerations for Mainstreaming Gender in the Transitional Justice Process

a) Learning lessons from other fields

Lessons learned from policies and practices in other fields that aimed at mainstreaming gender issues should be assessed for their application and use in the field of transitional justice. For example, reparations policies in the past have failed to take into consideration the gendered hierarchies of individual families and the implications for how resources are provided, who benefits and what impact these programs have.

b) Use of existing resources

In planning transitional justice mechanisms, policy makers should draw upon and make use of relevant existing information which would allow them to understand the overall context with regards to gender relations. For example, *the Gender Empowerment Measure (GEM)* used by the United Nations Development Programme (UNDP) measures the relative empowerment of men and women and examines whether women and men are able to participate in economic and political life and take part in decision-making. Such information is vital to creating policy which is applicable to the context.

c) Increased representation of women.

There is need for a balanced representation of both men and women in all the institutions that will be responsible for implementing the various transitional justice mechanisms. This

will greatly assist the movement towards mainstreaming gender concerns throughout the process.

d) Support for local women's organizations

Intervention, funding and technical support should be provided to women operating at a grass-roots level to bridge the post-conflict divide and forge reconciliation based on shared needs and concrete projects.

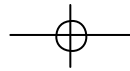
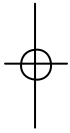
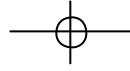
e) The role of local mechanisms

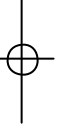
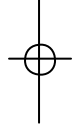
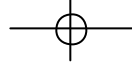
Local or traditional rituals can play a strong and positive role in community reintegration of victims and combatants as well as for healing and reconciliation as they are likely to resonate with the local population. However there should be caution in adopting this approach as some of these practices may perpetuate inequality or undermine the rights of women and girls – such as the practice in some communities of exchanging a girl of marriageable age as 'compensation' for a life taken or a crime committed.

f) Sustained and long term funding for a range of initiatives

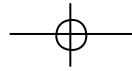
Psycho-social support for example requires long term investment and is not a one off event. Dealing with trauma is integral to halting the cycle of violence and implementing sustainable reconciliation, but victims of gender based violence in particular may not be ready to access psycho-social assistance until there has been some space and time from the actual conflict, and until immediate issues of security are addressed.

Underscore the gender perspectives of men and women both as victims, perpetrators and duty-bearers in transitional justice mechanisms.





CONCLUSION



PART FOUR

CHAPTER

17

CONCLUSION AND
RECOMMENDATION

In spite of Kenya existing as an independent nation state for over 45 years, successive regimes have failed to implement measures that would significantly move the country from a situation of oppressive rule and conflict to people-centred governance. Each regime, since Kenya attained independence in 1963, has been autocratic; and has systematically applied governance policies similar to those of the past colonial regime. This failure has ultimately culminated in the culture of impunity, and widespread corruption that is prevalent in virtually every administrative and public service institution in the country. The disputed outcomes of the 2007 General Elections and the chaos that ensued, demonstrated the depth to which the state had lost its democratic compass, and brought the nation to the brink of anarchy.

The intervention of the international community, through the panel of Eminent Personalities led by Kofi Annan, mitigated the chaos and began the process of Peace Building and Reconciliation. The outcome of this initiative was the Kenya National Dialogue and Reconstruction Agreement (commonly referred to as the National Accord) that established the 'grand coalition' government. The Accord proposed amongst other things, a comprehensive TJ process that is designed to deal with the underlying causes of impunity, inequality and systemic human rights abuse.

The effectual implementation of the various transitional justice mechanisms mentioned here offer the best hope of ending the culture of impunity that plagues the nation and its people today. Impunity exists where the rule of law is neither respected nor observed; where there is consistent failure of the systems that are meant to protect the public from incidences of intentional or inadvertent maladministration of the authority entrusted to public servants (whether elected or appointed). It is these

systems that need reform; some through repair most by a complete overhaul.

The grand coalition government, has so far initiated piece-meal TJ processes, the main ones being the ongoing Constitutional Review process, Boundaries Commission, establishment of a Task Force on Police Reforms and the Truth Justice and Reconciliation Commission. However, the implementation of these TJ mechanisms, are facing significant hurdles, ranging from lack of political will, to lack of legitimacy, and public interest.

The above hurdles exist, and will continue to exist, should the people fail to aggressively and deliberately reclaim and own the TJ processes. And continue to hope that those vested with political and administrative authority will benevolently opt to change a system that has for decades served their exploitative ambitions so richly. The foxes must not continue to take charge over the affairs of the chicken coup. There must be a changing of the guard.

For this country to achieve lasting peace, end the culture of impunity and foster democratic governance. There is need for strategic partnership, between the public, Civil Society, the Media, the political class, and other stakeholders that is geared toward the successful execution of all the transitional justice initiatives set out under Agenda Item 4 of the Kenya National Dialogue and Reconciliation Agreement. It is the hope of the KHRC, ICPC and ICJ- Kenya that we shall all pull together in the effort to provide this country with the healing and new direction that it has been calling for desperately for almost half a century.

The citizens of this country are the true sovereigns of this great nation. Their moment to exert that sovereignty is now. The change this nation needs has been long overdue.

A & B

APPENDICES

APPENDICES -A

A: Capacity Building and Engagement FRAMEWORK on Transitional Justice in Kenya

Overview

This capacity building framework is basically the application of the mechanisms captured in the Toolkit.

Objective of the Capacity Building and Engagements

Build the capacity of, and mobilize victims, partners, communities and CSOs to engage strategically and continuously with the TJRC and other transitional justice processes in Kenya.

Mode of Training

This should be done around the four sessions captured below.

It is recommended that the capacity building on transitional justice using the above Toolkit take two full days as follows:

- Sessions 1 and 2 can be covered during the morning and afternoon hours of Day 1.
- Sessions 3 and 4 can be covered during the morning and afternoon hours of Day 2 respectively

Mode of Delivery

Presenting the content issues complimented with illustrations, exercises, liberation/inspirational songs, comments/questions and answers, role plays and documentaries among others. The 4 Sessions are mutually reinforcing.

Engagement Process

This entails documenting, analyzing and using the data, information, opportunities and networks available to inform and

engage (as above) the transitional justice process at all levels in the society.

SESSION 1: INTRODUCTION TO TRANSITIONAL JUSTICE (TJ).

Session Objectives: Enable participants to understand what transitional justice entails. The following topics will be covered:

- i) Defining the TJ, its main goals, objectives and challenges
- ii) Providing a brief background and context of TJ and its mechanisms in Kenya
- iii) Explaining the common mechanisms applied in transitional justice

Explanatory Tasks and Assignments:

Task 1: Ask participants to illustrate/their understanding and interactions with the diverse transitional justice mechanisms in Kenya within Agenda No. 4.

Task 2 Ask participants to identify the transitional justice mechanisms applicable to their situations and violations.

Task 3: Ask participants to critique the conceptualization and implementation of the perceived Kenyan transitional justice roadmap under Agenda No. 4 in the context of their concerns and struggles.

Key Reference/Training aids for this Session:

- Chapter 1 on Transitional Justice - Introduction and History
- Chapters 2-10, 12, 13 and 16 on the mechanisms of Transitional Justice relevant to Kenya: Prosecutions; Informal and Traditional Justice; Lustration; Legal, Policy and Institutional Reforms and Agenda No. 4. Matrix; Truth Commissions; Amnesty; Reparations; Memorialization; Reconciliation; Social and Economic Justice and Development; Gender Justice
- Relevant documentary to be identified and aired.

SESSION 2: TRUTH COMMISSIONS AND PROVISIONS OF THE TJRC IN KENYA

Session Objective: Ensure that participants have a deeper understanding of what truth commissions are; and the mandate and possible limitations of Kenya's truth commission.

The following topics will be covered:

- i) Truth Commissions-its definition, functions, guiding principles, case studies, challenges and limitations
- ii) Background of the campaign for a TJRC in Kenya, provisions of the simplified version of the TJRC Act, calendar of TJRC, challenges and opportunities for engagement with the TJRC in Kenya.

Explanatory Tasks and Assignments:

Task: Trainer to share with participants some case studies in truth commissions.

Key Reference/Training aids for this Session:

- a) Chapter 6 above on Truth Commissions (Recap for it is addressed above).
- b) Chapter 11 on the Kenyan Truth, Justice and Reconciliation Commission.
- c) Other literature on truth commissions.
- d) Relevant documentary to be identified and aired.

SESSION 3: DOCUMENTING AND MAPPING OUT THE ISSUES FOR ENGAGEMENT WITH THE TJRC AND OTHER TJ PROCESSES IN KENYA

Session Objective: Enable participants to map out the violations, victims, witnesses, perpetrators, stakeholders and sources of information for engagement with the TJRC and other TJ processes. Also enable the media to enhance informed reporting to TJRC and TJ processes.

Explanatory Tasks and Assignments:

Task: Group Work.

- Trainer to divide participants on thematic, geographical or administrative lines depending on the violations
- Ask participants to identify the violations within their context and the mandate of the TJRC and other processes under Agenda No. 4, which they can engage with.
- Participants to map out the areas and communities affected by these violations and the stakeholders partnering with them.
- Participants to map out the perpetrators suspected to be responsible for the violations and crimes.
- Participants to identify the actions taken in relation to the violations and crimes and the available information (official and otherwise).

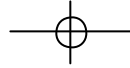
Key Reference/ Training aids for this Session:

- i) Chapter 14 on Reporting and Documenting Human Rights Violations and Economic Crimes. This can be summarised into what, where, when, why and how issues matrix.
- ii) Chapter 15 on Media Reporting on Transitional Justice.
- iii) Community Documentation Form and Guideline which was developed by the KHRC, FIDA-Kenya and Kenya Land Alliance.
- iv) Existing documentaries, reports and information from official and unofficial sources.

SESSION 4: DEVELOPING THE STRATEGIES OF ENGAGEMENT

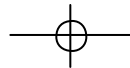
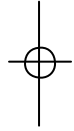
Session Objective: Enable the participants to develop the strategies and activities for engagement with truth commission and other TJ processes.

Explanatory Tasks and Assignments: Take participants through the tools below and divide them into groups to develop the plan of action based on *What they plan to do? When? How? Where? and with Whom at all levels?*



Key Reference/Training aids for this Session:

- Chapter 5 on the policy, legal and institutional reforms and Agenda 4.
- Chapter 13 on Victims and Witness Protection Guidelines
- Appendix B on the Kenya Transitional Justice Network – Membership and Structure
- The Documentation and Reporting Tools above.
- TJRC Activity Schedule (captured in Chapter 11 of the Toolkit; and media advertisement by TJRC dated December 17, 2009)
- Others: Relevant case studies and documentaries.



APPENDICE - B

B: STRUCTURE AND STRATEGY FRAMEWORK FOR THE KENYA TRANSITIONAL JUSTICE NETWORK

THE KENYA TRANSITIONAL JUSTICE NETWORK [KTJN]

1. Vision

National accountability, equity and unity

2. Mission

To collaborate towards the realization of transitional justice programmes (components) in Kenya comprising Truth-telling, Criminal Justice, Constitutional Changes, Administrative Changes, Public Capital, Public Land, Gender Justice, Historical Injustices and Victims' Coalition.

- a) In regard to Truth-telling, the accountings of the gross human rights violations that link the past to the present will be undertaken through the TJRC and any other judicial, public inquiries and historical narration and documentation process. Specifically, the TJRC is expected to:-
- Adequately investigate and establish the facts so that the truth be known and made part of the nation's history
 - Respond to the demands for justice for the victims
 - Provide the reparations needed for national reconciliation
 - Provide the lustration measures needed to bar the perpetrators and conspirators from holding public office
 - Advance transitional justice jurisprudence in Kenya.

In regard to **Criminal Justice**: to seek retribution and punishment of individuals for gross violations of human rights by themselves or by following 'orders from above', and breaking the law with impunity. Specifically:-

- Uphold legalistic values and the criminal justice system, by prosecution on behalf of the victims of the individual perpetrators
- Ensure prosecution of perpetrators and conspirators in regards to crimes related to the plunder of public capital and public land
- Advance transitional justice jurisprudence in Kenya.

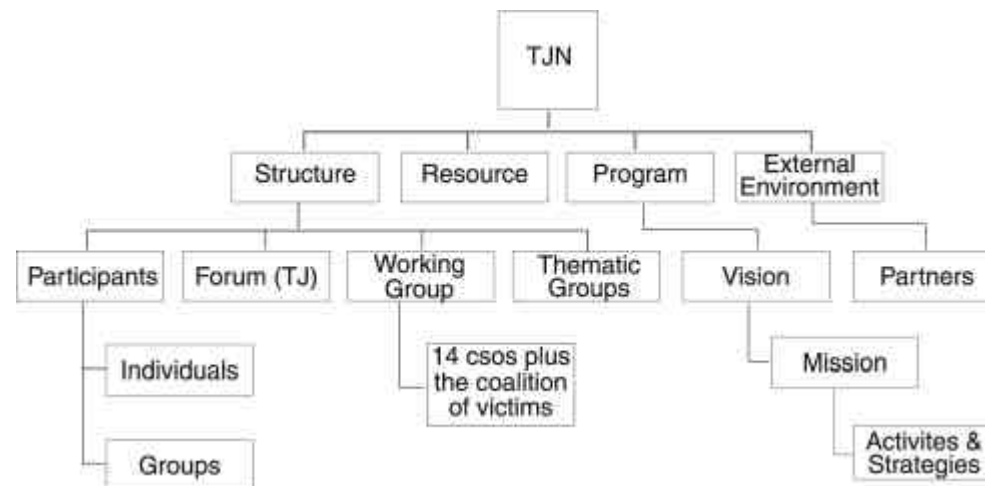
b) In regard to Constitutional Change: build consensus on the new constitution as the foundation of an entirely new democratic order, with a people-driven focus.

c) In regard to Administrative Change: to move the society toward a more democratic political system through popular participation in national and local governance, on the widest possible scale. Specifically:-

- Advance the new public regulatory measures, and the core constitutional norms which all public officials must now uphold as a condition of office
- Advance regulatory measures towards accountable governance of public institutions and affairs
- Institute lustration to:
 - (a) purify the public service by removal from employment of officials for gross abuse of power and complicity in the violations of human rights, plunder of public capital and public land
 - (b) name and shame, and bar the perpetrators and conspirators from holding any public office, and ensure the vetting of all new public office appointees
 - (c) invoke disciplinary action against errant professionals.
- Fully implement the Commission of Inquiry into Post Election (CIPEV) Report: IDP Policy, Special Tribunal for Kenya, Justice and Security Sectors reforms, Sexual and Gender-Based Violence, National Security Police and Civilian Oversight Mechanisms.

- e) In regard to the plunder of **Public Capital**: to redress the gross, abusive violation of the public good, resulting in the deterioration of public services, infrastructure, and human and economic development of the people and the nation. Specifically:-
- f) In regard to the plunder of **Public Land**: to have grabbed public land returned and restored, and press for a process of land reform in the interest of all the peoples of Kenya, and not merely a small inheriting elite. Specifically:-
- Advance historical accounting, knowledge, official acknowledgement and resolution concerning the dispossession of the individual or communal and public lands of the peoples of Kenya during the colonial and post-colonial periods
 - Implement fully the report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land in Kenya
 - Adopt and implement the National Land Policy
 - Deal with land components in the constitutional review process.
- g) In regard to **Gender Justice**: to ensure comprehensive redress to gender-based injustices cross cutting all the components of transitional justice.
- h) In regard to **Historical Injustice**: pertaining to land and the underprivileged - to capture the inequities in the distribution and enjoyment of the national resources in time and across regions, ethnicity, class, race, gender and generations.
- i) In regard to **Victims' Coalition**: to ensure that victims of historical injustices are fully supported and strengthened to organize and engage around their issues within the above mentioned components and processes of transitional justice in Kenya.

THE KTJN ORGANIZATIONAL STRUCTURE



Explanatory Notes:

- a) KTJN is the Transitional Justice Network for Kenya.
- b) Individuals and groups [general, working and thematic] form the membership of the KTJN.
- c) The criterion for general membership is pegged on subscription to the mission and vision of the KTJN.
- d) The working group forms the executive committee steering or coordinating the network to realize the above vision, mission and the programmes. This committee is made up of the following members - KHRC, ICPC, FIDA-Kenya, COVAW, CREAM, KLA, ICJ-Kenya, Mazingira Institute, UAF-Africa, CMD and yet to be included CRECO, 4Cs, AfriCOG and CEDMAC.
- e) The programmes or components of the TJ network are truth-telling, criminal justice, constitutional changes, administrative changes, public capital, public land, gender justice and historical injustices.
- f) Each of these will be the programmes to be coordinated by the thematic working groups as follows: Truth Telling (KHRC), Criminal Justice [ICJ], Historical Injustices [CEDMAC], Constitutional Changes [CRECO and 4Cs], Administrative Changes [ICPC], Gender Justice(FIDA-Kenya), Public Land(KLA) and Public Capital(AFRICOG).
- g) The terms of reference for each of the thematic groups will include organizing the respective victims and organizations in pursuit of truth, justice and reconciliation. This can be tailored on the following:
 - i) *Truth-based activity.* These are activities geared towards establishing the truth about gross human rights violations; produce relevant information answering the key question of ‘What happened, how did it happen and why?’
 - ii) *Justice-based activity.* This is an activity for seeking transitional justice in response to gross human rights violations and produce relevant information. This activity

seeks to answer the question ‘What should be done, how should it be done and why?’

- iii) *Reconciliation-based activities.* This is an activity that seeks to address conflictual and fractured relationships and includes a range of different activities that develop a shared vision of an interdependent and fair society, build positive relationships, promote significant cultural and attitudinal change and *substantial social, economic and political change.*
- h) The final activities and strategies are captured in the plan of action designed by the working and the thematic groups.
- i) Partners include the relevant government institutions such as the Ministry for Justice, National Cohesion and Constitutional Affairs; Kenya National Commission on Human Rights and Kenya National Archives. Others are the Parliamentary Committee on Legal Affairs and Administration of Justice, the Media, Development Partners, and International NGOs among others.
- j) The national conveners are the KHRC, ICPC and ICJ.

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