

UNIVERSITY *of the* WESTERN CAPE



FACULTY OF LAW

**AN EVALUATION OF THE EFFECTIVENESS OF THE TRANSITIONAL JUSTICE PROCESS IN
KENYA SINCE THE 2007-2008 POST-ELECTION CONFLICT**



by

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Supervised

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DECLARATION

I, **Caroline Wairimu Kamau** declare that *An Evaluation of the Effectiveness of the Transitional Justice Process in Kenya since the 2007-2008 Post-Election Conflict* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references

Student: **Caroline Wairimu Kamau**

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DEDICATION

I dedicate this research to the victims of election related violence who continue to wait for the truth to be told, for justice to be done and reconciliation to be realized. To those who continue to push for the implementation of transitional justice in our great nation, I salute you.



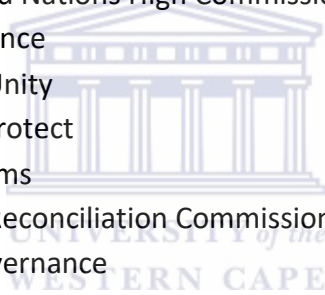
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ABBREVIATIONS AND ACRONYMS

CHE	Clarification Commission in Guatemala
CIPEV	Commission of Inquiry into the Post-Election Violence
ECA	United Nations Economic Commission for Africa
ECK	Electoral Commission of Kenya
ICC	International Criminal Court
ICTJ	International Centre of Transitional Justice
IEBC	Independent Electoral and Boundary Commission
IREC	Independent Review Commission
KADU	Kenya African Democratic Union
KANU	Kenya Africa National Union
KNDR	Kenya National Dialogue and Reconciliation
ODM	Orange Democratic Movement
ODPP	Office of the Director of Public Prosecutions
OHCHR	Office of the United Nations High Commission for Human Rights
PEV	Post-Election Violence
PNU	Party of National Unity
R2P	Responsibility to Protect
TFV	Trust Fund of Victims
TJRC	Truth Justice and Reconciliation Commission
TSG	Territorial Self-Governance
UN	United Nations



KEY WORDS

Transition

Justice

Kenya

Success

Failures

Truth Commissions

Criminal Prosecutions

Institutional Reforms

Reparations

International Criminal Court



CHAPTER ONE

1.1 INTRODUCTION

“My Brothers and Sisters, to move forward as one nation, I stand before you today on my own behalf, that of my government and all past governments, to offer the sincere apology of the government of the Republic of Kenya to all our compatriots for all past wrongs”

H.E President Uhuru Kenyatta during the State of the Nation address on the 26th of March, 2015

The concept of transitional justice dates back to the First World War¹ but it has evolved as conflicts moved from being international between states to internal conflicts. After the First and Second World Wars, transitional justice presented itself in the form of prosecutions of those who were believed to have borne the greatest responsibility for the atrocities committed during that period, as well as compensation to the victims, for example, under the Treaty of Versailles.² Thereafter, transitional justice manifested itself in the form of prosecutions of the Greek and Portuguese military officers of repressive regimes who were associated with serious human rights violations against their respective citizenries.³ This marked a turning point because now transitional justice was being applied in the context of a domestic conflict. Subsequently, transitional justice became developed and structured to fit certain circumstances and this began with Latin American countries dealing with the wrongs of past regimes. The transitional justice idea spread to Africa with the demise of Apartheid and the overthrow of some dictatorships.⁴

1 Teitel R.G. *Transitional Justice* (2000:39).

2 Teitel R. G. (2000:39).

3 Teitel R.G. (2000:40).

4 Teitel R.G (2000:40).

One could argue that from World War I to the end of the 20th Century, retributive justice was easier to dispense for the wrongs done since there were mechanisms already in place, whereas the more difficult issue that faced the leaders was how to move their nations forward. The answer to this issue marked the birth of transitional justice.

What then is Transitional Justice? The International Centre of Transitional Justice (ICTJ) has attempted a definition that states the following:

‘Transitional Justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparation programs and various kinds of institutional reforms’.⁵

The common themes in the various definitions of transitional justice include the following: It is a concept of justice that uses certain mechanisms; it is applied after internal conflicts and/or political change; and it is used as a means of dealing with a country’s history of human rights violations.⁶ Therefore, from the foregoing, it is clear that this concept can only be applied in the context of an emerging democracy following an internal conflict or a predecessor autocratic and repressive regime. Some scholars view the foregoing definition as being problematic because it prescribes a ‘one size fits all’ approach.⁷ It therefore means that whenever there is an internal conflict of whatever nature within a nation, transitional justice is seen as the solution, although the circumstances of each conflict may vary.

5 International Centre of Transitional Justice website <https://www.ictj.org/about/transitional-justice> (accessed 20 March 2016).

6 Generally See Roht-Arriaza N. ‘The new landscape of Transitional Justice’ in Roht Arriaza N. and Marie-Currena J. (eds.) *Transitional Justice in the Twenty First Century: Beyond Truth versus Justice* (2006).

7 See generally Kent L. *The Dynamics of Transitional Justice; International Models and Local Realities in East Timor* (2012).

As pointed out in the ICTJ's definition, transitional justice utilizes several mechanisms, including criminal prosecutions⁸, truth commissions⁹, reparations programs¹⁰ and various kinds of institutional reforms.¹¹ This list of mechanisms is, however, not exhaustive. Some countries have, based on the nature of the conflict that afflicted them, opted to use other mechanisms, such as renaming public spaces, setting up museums, and holding commemoration ceremonies amongst others.¹²

Consequently, the mechanism employed by a nation rests firmly on the circumstances peculiar to that nation because all the mechanisms may not be appropriate. In the case of Kenya, following the 2007-2008 Post-Election Violence (PEV) that rocked the nation, all of the four mechanisms outlined above were used.¹³ It was hoped that using transitional justice mechanisms similar to those applied by other conflict-prone nations, Kenya would move towards consolidating democracy, promoting the rule of law and nurturing a culture of respect for human rights, which are some of the main objectives of transitional justice.¹⁴



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- 8 "To hold accountable those perpetrators considered as being most responsible for human right violations". International Centre for Transitional Justice website <http://www.ictj.org> (accessed 25 March 2016).
- 9 "This is utilized as a means of investigating and reporting on systematic patterns of abuse, recommend changes and help understand the underlying causes of serious human rights violations" International Centre for Transitional Justice website <http://www.ictj.org> (accessed 25 March 2016).
- 10 "This involves the government recognizing and taking steps to address the harm suffered. Such reparation initiatives include cash payments, health services, public apologies or commemoration". International Centre for Transitional Justice website <http://www.ictj.org> (accessed 25 March 2016).
- 11 "This involves dismantling using appropriate means the structural machinery of abuses in state institutions like armed forces, judiciary and police so as to prevent recurrence of serious human rights abuses". International Centre for Transitional Justice website <http://www.ictj.org> (accessed 25 March 2016).
- 12 International Centre for Transitional Justice website <http://www.ictj.org> (accessed 25 March 2016).
- 13 International Centre for Transitional Justice website <https://www.ictj.org/our-work/regions-and-countries/kenya> (accessed 25 March 2016).
- 14 Kent L. (2012:5).

1.2 BACKGROUND OF THE STUDY

Kenya has traditionally had a history of hotly contested general elections about which very little has been said prior to the '2007-2008 post-election violence'.¹⁵ However, the magnitude of the crimes committed during the 2007-2008 period had hitherto not been witnessed in Kenya. The crimes ranged from sporadic outbursts of ethnic violence to destruction of property in both rural and urban areas.¹⁶ Due to the wide coverage of the violence in 2007-2008 by both local and international media, the international community took notice of the atrocities.¹⁷

The violence erupted following the pronouncement of the presidential election results by the chairman of the Electoral Commission of Kenya (ECK) when he said that Mwai Kibaki, the leader of the Party of National Unity (PNU), had won although 'he could not say for sure if Kibaki had won fairly'.¹⁸ The result was that the opposition, led by Raila Odinga, the leader of the Orange Democratic Movement (ODM), decried the electoral process as being flawed and objected to Mwai Kibaki being sworn in as President. The swearing in ceremony proceeded despite the objections.¹⁹ Subsequently, the opposition rejected calls to refer the issue of the disputed election results to the domestic courts for adjudication because they lacked confidence in the judicial system. Instead, the opposition called for mass action which resulted in violence.²⁰ Ultimately, the international community intervened through various eminent African and international leaders, in particular, the former United Nations (UN)

15 Kenya Human Rights Commission, 'Recurrent Ethnic Violence and Claims of Communities Arming Ahead of 2012 General Elections' (2011) http://www.khrc.or.ke/resources/publications/doc_download/53-recurrent-ethnic-violence-and-claims-of-communities-arming-ahead-of-the-2012-general-elections.html (accessed 25 March 2016).

16 Kenya Human Rights Commission (2011).

17 Materu S. *The Post-Election Violence in Kenya: Domestic and International Legal Responses* (2015: 47-56).

18 Materu S. (2015: 49).

19 Rice X. 'Kenyans riot as Kibaki declared poll winner' (*the Guardian*, 31 December 2007) <http://www.theguardian.com/world/2007/dec/31/kenya.topstories3> (accessed 20 July 2016).

20 Materu S. (2015: 50).

Secretary General, Kofi Annan, with the view to bringing the warring parties to agree to dialogue and eventually reach a peace settlement.²¹

The talks between the two opposing political sides were held under the banner of Kenya National Dialogue and Reconciliation (KNDR), which had four main aims, namely, to stop the violence immediately and restore fundamental rights and liberties; take immediate measures to address the humanitarian crisis; promote national reconciliation, healing and restoration; agree on how to overcome the then existing political crisis; and come up with long-term measures or solutions aimed at constitutional and institutional reforms; land reform; poverty relief; the elimination of inequity; the alleviation of unemployment, particularly among the youth; consolidating national cohesion and unity, transparency, accountability; and to address the issue of impunity.²²

Having held several talks on the four main points, on 28 February 2008, Mwai Kibaki and Raila Odinga signed an agreement which stopped the violence.²³ Both PNU and ODM agreed to form a coalition government with power being shared equally. Furthermore, the parties agreed to the creation of the office of prime minister and two deputy prime ministers, the re-organisation of the cabinet in which both sides would be represented, and the enactment of laws to give effect to the specific terms of all the agreements.²⁴

Shortly thereafter, parliament enacted several statutes, including the National Accord and Reconciliation Act, 2008, the National Cohesion and Integration Act, 2008 and most notably,

21 Associated Press "Kofi Annan Takes over Kenya Mediation", (CBS News 10 January 2008) <http://www.cbsnews.com> (accessed 25 March 2016).

22 Kenya Law Reform Commission 'National Accord and Agenda Four Commissions' <http://www.klrc.go.ke/index.php/our-work/national-accord-and-agenda-four-commissions> (accessed 27 March 2016).

23 Materu S. (2015: 56).

24 South Consulting Ltd. 'The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project; Project Context and Summary Findings (February, 2009) <http://www.katibainstitute.org/Archives/images/Monitoring%20and%20Evaluation%20Report%20on%20the%20National%20Accord.pdf> (accessed on 27 March 2016).

the Truth Justice and Reconciliation Commission Act, 2008, which marked the beginning of the transitional justice process.²⁵

In the meantime, the Commission of Inquiry into the Post-Election Violence (also referred to as CIPEV or the Waki Commission) was constituted with the mandate to prepare a report on the post-election violence.²⁶ Within a few months, CIPEV handed its first report to the coalition government. Subsequently, CIPEV prepared second report containing a list of the alleged suspects who (in the commission's opinion) bore the greatest responsibility for the post-election violence. This second report was handed over to the former prosecutor of the International Criminal Court (ICC), Louis Moreno Ocampo, through Kofi Annan.²⁷ The aim was to invoke the ICC jurisdiction to try the alleged perpetrators bearing the greatest responsibility for the 2007-2008 PEV, in case Kenya failed to set up a suitable trial mechanism locally.²⁸

It is therefore arguable that the handing over of these two reports in fact set the transitional justice ball rolling.



1.3 PROBLEM STATEMENT

As of 2016, transitional justice has been operational in Kenya for eight years. It is however debatable at which stage it is presently due to the many challenges it has faced. The stakeholders involved in formulating Kenya's transitional justice process did not specify its duration by providing an evaluation mechanism against which to benchmark the milestones of the process. Apart from this, no monitoring mechanism was established to oversee the full

25 Kenya Law Reform Commission 'National Accord and Agenda Four Commissions' <http://www.klrc.go.ke/index.php/our-work/national-accord-and-agenda-four-commissions> (accessed 27 March 2016).

26 Kenya Gazette, Gazette Notice No. 4473 Vol. CX-No.41 dated 23rd May, 2008 http://kenyalaw.org/kenya_gazette/gazette/notice/107758 (accessed 27 March 2016). See also Materu S. (2015: 181).

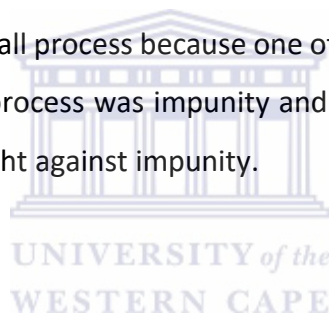
27 Mugonyi D. and Namunane B. "Hague: We are ready to act on the Waki Report" Daily Nation (11 November, 2008) <http://www.nation.co.ke/news/-/1056/489828/-/view/.../-/index.html> (accessed 27 March 2016).

28 Materu S. (2015: 181).

implementation of each of the transitional justice mechanisms. Such a monitoring mechanism would ensure the realisation of the objectives of transitional justice.

Another challenge was the failure to link the four main aims of the KNDR talks to the overall transitional justice process, which left a loophole in the whole system. An example is Agenda Four, which concerns impunity. In 2010, well after the commencement of the transitional justice process, the World Justice Project placed Kenya at the bottom of the world ranking of the countries that 'suffered from a rule of law deficit'.²⁹ In 2015, again, the World Justice Project ranked Kenya at the bottom of the global ranking for nations that are considered to have a less transparent government³⁰ and which have failed to entrench and promote the rule of law.³¹ Instead, Kenya has become synonymous with the word 'impunity', with wrongdoers often escaping any serious form of accountability for their deeds.³² So dire is impunity in Kenya that one author has described it as being so deeply rooted that it is a way of life.³³

This shows the lacuna in the overall process because one of the long-term issues to be solved through the transitional justice process was impunity and yet eight years later, the country seems to have stagnated in its fight against impunity.



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- 29 World Justice Project 'Rule of Law Index, 2010' <http://www.worldjusticeproject.org> (accessed 26 March 2016).
- 30 World Justice Project 'Open Government Index 2015 Report' <http://www.worldjusticeproject.org> (accessed 26 March 2016) In the Open Government Index, Kenya was ranked position 79 out of 102. From the report, Kenya scored 0.46 out of 1. The areas considered to arrive at the score were publicised laws and government data, right to information, civic participation and complaints mechanism. Having considered all the four dimensions Kenya's government was found to be amongst the less open governments.
- 31 World Justice Project 'Rule of Law Index, 2015 Report' <http://www.worldjusticeproject.org> (accessed 26 March 2016) In the Rule of Law Index, Kenya was ranked position 84 out of 102. Here the indicators that were being considered included constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil and criminal justice. Overall Kenya scored 0.45 out of 1.
- 32 Amnesty International 'Disappearances and Political Killings: Human Rights Crisis of the 1990's: A Manual for Action' (1994: 118) <https://www.amnesty.org/en/documents/act33/001/1994/en/> (accessed 26 March 2016).
- 33 Macharia K. 'Everyday Kenyan life is built on impunity' The East Africa Standard <http://www.theeastafrican.co.ke/news/-/2558/516026/-/view/printversion/-/e1100y/-/index.html> (accessed 26 March 2016).

Hence the question, have there been any tangible and measurable successes on the transitional justice front? At present, there are still calls for the current government to ensure that the transitional justice mechanisms are implemented and brought to conclusion. However, such calls are few and far between and they lack political clout, which means that they hardly influence the pace of the transitional justice process.³⁴

Moreover, on 5 April 2016, the ICC delivered its ruling, vacating the charges against *William Samoei Ruto and Joshua arap Sang*³⁵ who were the only remaining accused persons (out of the six suspects who were indicted) in relation to Kenya's 2007-2008 PEV. Many scholars have argued that the ICC cases were the driving force behind Kenya's transitional justice process.³⁶ Ultimately, with the last case being withdrawn, where does this leave Kenya's transitional justice process?

1.4 SIGNIFICANCE OF THE RESEARCH

This study seeks to identify measures that can be put in place by the legislature and crucial stakeholders to ensure that transitional justice in Kenya is realised. Very little has been written on the success or failure of transitional justice in Kenya since it was first implemented eight years ago. Considering that Kenya will hold another general election in 2017, the study will focus on Kenya's transitional justice process against the backdrop of the ICC having terminated the last case in relation to the 2007-2008 PEV.

34 International Centre for Transitional Justice 'Kenya TJRC Final Report Deserves Serious Analysis and Action' (2014) <https://www.ictj.org/news/ictj-kenya-tjrc-final-report-deserves-serious-analysis-and-action> See also Wanjala D. 'House committee pushes for implementation of TJRC report' (17 Feb 2016) The Sun Weekly <http://www.thesunweekly.co.ke/index.php/news/national-news/item/485-house-committee-pushes-for-implementation-of-tjrc-report> (accessed 16 April 2016).

35 The Prosecutor v. William Samoei Ruto and others ICC-01/09-01/11 https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1205.aspx (accessed 6 April 2016).

36 Hansen T.O. 'Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns' (2012) <http://ssrn.com/abstract=1898101> (accessed 6 April 2016).

1.5 RESEARCH QUESTION

The study will seek to answer the following question: To what extent has transitional justice succeeded or failed in Kenya?

1.6 LITERATURE REVIEW

There is no settled or globally acceptable meaning of transitional justice, though many associate it with truth and justice.³⁷ Nevertheless, transitional justice mechanisms such as trials and truth commissions have become core components of the UN ‘tool kit’ for successful post-conflict recovery.³⁸ The debate on what constitutes failure or success of transitional justice no longer depends on whether the goal of transitional justice is truth or justice, for the debate has moved to the point where both concepts are not seen as mutually exclusive, but as complementing each other, because focusing on one may be detrimental to the other.³⁹

Boraine discusses the four mechanisms of transitional justice used in the Kenyan situation and is of the view that all these mechanisms must be utilised together in any given situation, with limited exceptions. He further opines that in doing so, a country is likely to ensure sustainable peace and also encourage social and economic developments which are the main aims.⁴⁰ There is no empirical data that supports or negates Boraine’s view and, in fact, there is no data published of the determining factors of success or failure of transitional justice. In his essay, Dunaiski attempts to use a detailed qualitative analysis in his evaluation of the Kenyan situation. He concludes that the efforts by the ICC to hold persons accountable, has had a positive impact on Kenya’s inter-ethnic relations. However, he warns that his analysis

37 Roht-Arriaza N. (2006: 2).

38 Kent L. (2012: 2).

39 Boraine A.L. ‘Transitional Justice: A Holistic Interpretation’ (2006: 17-27)
http://www.jstor.org/stable/24358011?seq=3#page_scan_tab_contents (accessed 6 April 2016).

40 Boraine A.L. (2006: 26-27).

of Kenya if used for other countries, may not have the same results and one would require a more organised comparative impact assessment study.⁴¹

Asaala and Dicker⁴² point out that in Kenya's case one would not be able to determine the success or failure of transitional justice because very little time passed between the post-election violence and the commencement of the transitional justice process. They state that one of the successes of transitional justice in Kenya was the indictment of the six Kenyans who were seen as bearing the greatest responsibility for the violence. In their view, the completion of those trials before the ICC would elevate the success of the transitional justice process overall.

These sentiments are echoed by Hansen⁴³ who agrees that the ICC process as of 2012 was thought to have promoted the transitional justice process, since there was no violence following the 2013 general elections. His opinion must be viewed in the context that after the transitional justice process began in 2008, the next general elections were held in 2013 and though the presidential election results were disputed, both sides of the dispute submitted themselves to the jurisdiction of the domestic courts to resolve the dispute.⁴⁴

Sakawa⁴⁵ also lends his voice to those who view the success of Kenya's transitional justice process as being marked by the ICC trials. In his opinion, Kenya's transitional justice process can achieve overall success if it can tackle the demand for justice and at the same time, peace.

41 Dunaiski M. Accountability vs. Stability? Assessing the ICC's Intervention in Kenya' (2014) <http://www.e-ir.infor/2014/01/09/accountability-vs-stability-assessing-the-icc-s-intervention-in-kenya/> (accessed 6 April 2016).

42 Asaala E. and Dicker N. 'Transitional Justice in Kenya and the UN Special Rapporteur on Truth and Justice; Where to from here?' (2013) <http://www.saflii.org/za/journals/AHRLJ/2013/15.html> (accessed 6 April 2016).

43 Hansen O. (2012).

44 Crisis Group, 'Kenya after the Election; Africa Briefing No. 94' (2013) <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/kenya/bo94-kenya-after-the-elections.aspx> (accessed 6 April 2016).

45 Sakawa M. 'Kenya: The Transitional Justice Process in Kenya- Unfinished Business?' (2014) <http://www.allafrica.com/stories/201411241944.html> (accessed 6 April 2016).

In contrast, there are those who argue that transitional justice is now impossible because Kenyans elected two ICC suspects (Kenyatta and Ruto) in the 2013 general elections. In their view, the two are openly opposed to the ICC process and thus are likely to weaken the transitional justice process. They state the following:

‘Since 2013 elections, the Kenyan state has gone to some trouble to ensure absolute impunity of its leaders. All institutions must comply with this categorical imperative. This creates the ideal conditions for establishing, in a lasting way, an authoritarian democracy’.⁴⁶

1.7 RESEARCH METHODOLOGY

This research will be a desk-based study, based on primary sources consisting of Kenya’s national laws and on the cases that were before the ICC. The secondary sources will include books, journals and online sources on this topic. Furthermore, the study will proceed by way of evaluating the different accountability mechanisms that were brought into play after the 2007-2008 PEV. Of critical importance was the truth commission. It will be analysed against the background of international guidelines for the setting up of truth commissions and the way they are supposed to carry out their function. Whilst it is not a comparative study, reference will be made here and there to transitional justice processes that have taken place in other countries that have experienced similar internal conflict as Kenya.

46 See generally Fouere et al. Kenya’s Past as Prologue: Voters, Violence and the 2013 General Elections (2014).

CHAPTER TWO: KENYA, A NATION IN TRANSITION?

2.1 THE CONCEPT OF TRANSITIONAL JUSTICE

In March 1992, participants from 21 countries met in Austria to discuss how their respective countries were coping with their past, which had been characterised by brutal and repressive regimes and from which they had now been liberated. During this conference, the main topic of discussion was how Central and Eastern European countries and the states that formed part of the former Soviet Union, which were undergoing transition to democracy, could benefit from the lessons of Latin American transitions of the 1980s and early 1990s.⁴⁷

Latin American states had set precedents which influenced the course of transitions elsewhere. For instance, in the case of Guatemala, transitional justice was implemented after the civil war.⁴⁸ Brazil and Chile moved from authoritarian regimes to democratic ones and in both cases, the armed forces had under the dictatorships been mainly responsible for the acts of repression against the general populace.⁴⁹

Against this backdrop, the question to ask is: what is transitional justice? Ruti Teitel, who is regarded by most scholars as having coined the term transitional justice,⁵⁰ has defined it as

‘The conception of justice associated with periods of political change characterised by legal responses to confront the wrongdoings of the repressive predecessor regimes’.⁵¹

47 Kritz N ‘The Dilemmas of Transitional Justice’ in Kritz N. (ed.) *Transitional Justice: How Emerging Democracies Reckon With Former Regimes* (1995).

48 Kauffman C. ‘Transitional Justice in Guatemala: Linking the Past and the Future’ (A paper presented at the ISA – South Conference, Florida, 2005)
https://umshare.miami.edu/web/wda/maia/ISAS05/papers/Craig_Kauffman.pdf (accessed 2 July 2016)

49 See generally O’Donnell G. and Schmitter P.C. *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (2013).

50 Amariles D. R. ‘Reassessing the Boundaries of Transitional Justice: An Inquiry on Political Transitions, Armed Conflicts and Human Rights Violations’ in Israel L. and Mouralis G. (eds.) *Dealing with Wars and Dictatorships: Legal Concepts and Categories in Action* (2013:211).

51 Teitel R. (2003:69).

Fisher and Steward on the other hand, in relation to the Arab Spring, view transitional justice as a term that came into use in the mid-1980s not to refer to any particular approach to justice but rather to refer to a strategy, a way of thinking about justice after a period of dictatorship.⁵² They reiterate Boraine's view that transitional justice is a 'convenient way of describing the search for a just society in the wake of undemocratic often oppressive and even violent system, that offers, a deeper, richer and even broader vision of justice which seeks to confront perpetrators, address the needs of victims and assist in the start of a process of reconciliation and transformation'.⁵³

In the foregoing context, it appears that transitional justice can be applied only where there is a repressive regime or authoritarian rule or where there have been instances of mass human rights violations committed by those in power. It is, therefore, necessary at this point to look into the meaning of these phrases that are associated with transitional justice.

To begin with, a repressive regime is one which is associated with oppression and the inhibition or restraining of personal freedoms.⁵⁴ Authoritarian rule is a political system that concentrates power in the hands of a leader or a small elite that is not constitutionally responsible to the people. The leader exercises power capriciously and without any regard for the law, and though elections may be held under this regime, the citizenry is not free to elect the leader of their choice. Even the freedom to create an opposition party or other group to challenge the ruling class is limited.⁵⁵

In Kenya, at the time of the 2007-2008 PEV, unlike in Guatemala, Brazil or Chile, the government of Mwai Kibaki (which was the predecessor government) was not considered to be a repressive or authoritarian regime as discussed above. In fact, if one were to examine Kenya's history, the regime that fits the definition of a repressive or authoritarian regime with high incidents of gross human rights violation, is that of former President Daniel Arap Moi,

52 Fisher K.J. and Steward R. (eds.) 'After the Arab Spring a new wave of transitional justice?' in *Transitional Justice and the Arab Spring* (2014:1).

53 Boraine A. L. (2006:18).

54 Oxford Advanced Learner's Dictionary 6th Ed. (2000:997).

55 Encyclopaedia Britannica <http://www.global.britannica.com/topic/authoritarianism> (accessed 29 September 2016).

who was in power from 1978 to 2002 when he handed over power to Mwai Kibaki.⁵⁶ Thus, if Kenya had to reconcile itself with its past, it would have to refer to the period of Moi's rule. Though there were calls to establish a truth commission following Moi's rule, this did not happen.⁵⁷ This can be attributed to the fact that the political system in Kenya did not change that much from the time of Moi. According to the Bertelsmann Transformation Index, though Mwai Kibaki took over power in 2002, he was unable to exercise full authority over the government system because the said government system that had existed during Moi's rule remained in place despite the change in leadership.⁵⁸ What did, however, mark the difference between the Moi and Kibaki period were the political affiliations of the ruling elite, that is, those who opposed Moi's regime joined Kibaki's government and those who supported Moi's regime formed the opposition.⁵⁹

According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), gross human rights violations viewed in the context of a repressive regime or an authoritarian rule refers to 'practices that include: genocide, slavery, slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detentions, and systematic discrimination'.⁶⁰ According to OHCHR, the violation of economic, social and cultural rights can also be referred to as gross human rights violation, so long as the violation is systematic and is of such gravity as to affect a large section of the population.⁶¹

56 Adar K.G. and Munyae I.M. 'Human Rights Abuse in Kenya under Daniel Arap Moi 1978-2001' <https://www.csbsju.edu/Documents/Peace%20Studies/pdf/Human%20Rights%20Abuse%20in%20Kenya%20Under%20Moi.pdf> (accessed 2 July 2016).

57 International Centre for Transitional Justice 'A Truth Commission for Kenya? Incorporating International Standards and Best Practice' (2008) <http://www.ictj.org/sites/default/files/ICTJ-Kenya-Truth-Commission-2008-English.pdf> (accessed 2 July 2016).

58 Bertelsmann Stiftung 'Country Report 2006' <http://www.bti2006.bertelsmann-transformation-index.de/73.0.html?L=1> (accessed 19 September 2016).

59 Blanchard L.P. 'U.S.-Kenya Relations: Current Political and Security Issues' (2013) www.file:///w7server/dfs/homedir/Desktop/R42967.pdf (accessed 3 July 2016).

60 Office of the United Nations High Commission for Human Rights (OHCHR) 'The Corporate Responsibility to Respect Human Rights: An Interpretative Guide' (2012:6) http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf (accessed 29 September 2016).

61 OHCHR (2012:6).

This definition given by the OHCHR is unlike the more general definition by Medina Quiroga. According to her, gross human rights violations are 'the violations which are instrumental in the achievement of governmental policies perpetrated in such a quantity and in such a manner as to create a situation in which the right to life, to personal integrity or to personal liberty of the population as a whole or of one or more sections of the population of a country are continuously being infringed'.⁶²

It is not in dispute that human rights were violated during the 2007-2008 PEV, however, it is difficult to determine which definition of gross human rights violations best describes the situation in Kenya at that time. Though the right to life, personal integrity or personal liberty of one section of the population of the country was continuously being infringed, it was not in furtherance of a governmental policy. To this extent, Medina Quiroga's definition is not adequate. On the other hand, only some of the practices outlined in the OHCHR's definition are evident in Kenya's conflict such as arbitrary executions, torture, enforced disappearances, economic and social rights violations.⁶³ The absence of a repressive or authoritarian regime, combined with some human rights violations, strays from the traditional context of a transitioning society. Therefore, a better understanding of the 2007-2008 PEV is necessary to determine what the pre-requisite elements of a transitioning state Kenya had at the material time, if any.

2.2 THE 2007-2008 POST-ELECTION VIOLENCE ANALYSED

It is necessary to look at the 2007-2008 conflict in Kenya in order to determine if it fits into the precedents of transitional justice discussed earlier. In this regard, Grombri opines that 'indeed, Kenya has had a long history of human and economic rights abuses going back to the days of independence and closely related to the principal political institutions'.⁶⁴ In his view,

62 Quiroga C. M. *The Battle of Human Rights: Gross, Systematic Violation and the Inter-American System* (1988:16).

63 See generally Report of the Truth Justice and Reconciliation Commission (2013) <http://www.jfjustice.net/downloads/1460970274.pdf> (accessed 7 October 2016).

64 Grombri F. 'Transitional Justice and Democratisation in the Post-Accord Kenya, 2008-2012' (LLM thesis, University of Leeds 2012)

the 2007-2008 conflict was different from other African conflicts in that it was 'relatively small-scale.' In addition, he found that the continual lack of accountability in Kenya did not allow for a meaningful democratic function of state institutions.⁶⁵

Grombri opines that the 2007-2008 PEV was not any different from what Kenya had faced previously therefore, the country needed accountability mechanisms which he acknowledges had been lacking, as opposed to transitional justice.

On the other hand, Abdalla Bujra of the United Nations Economic Commission for Africa (ECA) looks at different conflicts taking place in Africa.⁶⁶ He distinguishes between civil wars *strictu sensu* and other types of low-profile conflicts and finds that what transpired in Kenya was urban violence and not civil war⁶⁷ proper. According to Bujra urban violence

'takes the form of ethnic conflict, sometimes religious conflict, and sometimes they are class-based – the poor of many ethnic groups attacking government properties and installations, or attacking shops and houses of the rich and middle classes. Urban violence, however, tends to be intermittent rather than continuous. Urban violence is not a new phenomenon but has been taking place since the colonial period. While urban violence and conflicts last only for a few days, a specific incident or situation often triggers them. In the past such violence was focused against the colonial authorities for deplorable living conditions and colonial control

[http://www.academia.edu/2582071/Transitional Justice and Democratisation in the Post-Accord Kenya 2008-2012](http://www.academia.edu/2582071/Transitional_Justice_and_Democratisation_in_the_Post-Accord_Kenya_2008-2012) (accessed 3 July 2016).

65 Grombri F. 'Transitional Justice and Democratisation in the Post-Accord Kenya, 2008-2012' (LLM thesis, University of Leeds 2012)

[http://www.academia.edu/2582071/Transitional Justice and Democratisation in the Post-Accord Kenya 2008-2012](http://www.academia.edu/2582071/Transitional_Justice_and_Democratisation_in_the_Post-Accord_Kenya_2008-2012) (accessed 3 July 2016).

66 Bujra A. 'African Conflicts: Their Causes and Their Political and Social Environment' (A Paper presented to the Ad Hoc Experts Group Meeting on the Economics of Civil Conflicts in Africa, Addis Ababa, Ethiopia, 7-8 April 2000)

<http://www.citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.678.4533&rep=rep1&type=pdf> (accessed 3 July 2016).

67 The United Nations Economic Commission for Africa (ECA) requires at least 1,000 battle related deaths of civilians per year and significant military action in order for a conflict to be categorised as a dimension of a civil war. See Bujra A. (2002: 2).

system. However, recently urban violence has taken the form of reacting to poverty and to struggles between supporters of political parties – parties which are often ethnically based'.⁶⁸

Bujra views the 2007-2008 conflict as ethnic-based political violence. His assessment of the violence in Kenya is similar to Bossis' analysis of the conflict in the Balkan region. She argues that

'at the root of the problems are ethno-national elites, who are interested in their own power seeking ends, and they exploit and hyperbolise ethnic division in order to achieve their goals...The group of people who feel deprived from the participation in the decision making process or even from material gains, eventually become marginalised and thus grow a sense of ghettoization. This alienation process takes a number of years to accumulate, while economic deprivation causes divisions based on ethno-nationalistic lines'.⁶⁹

The foregoing analysis of conflict suggests that, unlike the civil wars and genocide previously witnessed on the African continent, the violence in Kenya in 2007-2008 was largely ethnic-based, hence temporary in nature and not long-lasting because the state forces (both military and police officers) did not participate actively in it. From the viewpoint expressed by Bujra and Bossis, it would appear that the 2007-2008 PEV did not warrant the classical transitional justice measures that followed the demise of the Latin American dictatorships and the downfall of other authoritarian regimes, such as Apartheid.

Conversely, other authors like Mara Roberts, are of the view that despite Kenya having a long history of violence, the 2007-2008 PEV had a larger dimension as regards the victims. A total of 1 500 people died, 3 000 women were raped and over 600 000 people were displaced.⁷⁰ According to Bujra's analysis of conflicts in Africa, the above-mentioned statistics are indicative of one dimension of civil war,⁷¹ but only in terms of the requirement for a specific

68 Bujra A. (2002: 3-4).

69 Bossis M. 'Societies in Transition and Conflict' (A Paper published by the Ministry of Foreign Affairs, Greece, Winter 1998-1999) <http://www.hri.org/MFA/thesis/winter99/transition.html> (accessed 4 July 2016).

70 Roberts M. 'Conflict Analysis of the 2007 Post-election Violence in Kenya' (2009) http://www.ndpmetrics.com/papers/Kenya_Conflict_2007.pdf (accessed 4 July 2016).

71 See Bujra A. (2002: 2).

minimum number of battle-related deaths. Mara Roberts opines that Kenya's conflict was based on ethnicity, though there were other factors that contributed to the violence, such as grievances over land and youth unemployment, to name only two.⁷² This line of argument suggests that it is not necessary that a country be ruled by an authoritarian regime that commits gross human rights violations for it to qualify for the implementation of transitional justice. As such, the existence of gross human rights violations alone would suffice.

The idea of the existence of gross human rights violations alone in the absence of an authoritarian regime in the context of Kenya poses a challenge because prior to 2007, there are no available statistics on previous conflict. Therefore, one cannot conclude that 2007-2008 PEV was the worst of its kind. This would be crucial for this study because on the one hand, there is the precedent which is the template for transitioning states. On the other hand, there are states like Kenya, where the situation does not follow the precedent. With such disparities, how then do stakeholders determine if transitional justice is the most appropriate mechanism for dealing with a situation?

In the case of Kenya, accountability in the absence of transitional justice mechanisms as suggested by Grombri would have been appropriate because at the time there was no change in regimes. Moreover, though the number of casualties was substantive, it did not measure up to the standard of the precedents, that is, the violations are widespread across the state. Hence, the question: What drove stakeholders to adopt transitional justice for Kenya after the 2007-2008 PEV, yet in 2002 calls for a truth commission were ignored?

Langer is of the view that the international community played a key role in the resolution of Kenya's crisis to the extent that for the first time, the international community, through the UN Secretary General, invoked the Responsibility to Protect (R2P) principle in order to put an end to the violence.⁷³ Here the UN Secretary General stressed the fact that the responsibility

72 Roberts M. (2009).

73 Langer J. 'The Responsibility to Protect: Kenya's Post-Electoral Crisis (2011)
<https://www.american.edu/sis/jis/upload/1LangerF11.pdf> (accessed 18 August 2016).

for the atrocities lay with the political leaders if they did not bring to an end the violence.⁷⁴ The international community was represented by the former UN Secretary General, Kofi Annan, United States Secretary of State, Condoleezza Rice,⁷⁵ and UN Secretary General Ban Ki-moon,⁷⁶ not to mention all other Heads of State, special envoys and the Panel of Eminent African Personalities, all of whom shared one goal; to bring the conflict to an end. For political expediency, the political class accepted transitional justice as recommended by the international community; it was not a home-grown solution.

2.3 WHAT WAS THE TRANSITION?

The Oxford dictionary defines transition as ‘the process or a period of change from one state or condition to another’.⁷⁷ In this instance, it is necessary to determine the change and when it happened in Kenya.

Most of the literature on transitional justice focuses mainly on the mechanisms of transitional justice that have been put in place in societies emerging from repressive regimes and seeking to deal with the past wrongs. Joanna Quinn instead interrogates the meaning of transition as utilised in transitional justice and is of the opinion that it is necessary to identify the transition in order to determine the appropriate measures to address the human rights violations or wrongs of the past regime.⁷⁸ It is noteworthy that most transitional justice scholars are of the view that there must be a change, that is, from an oppressive or authoritarian or repressive

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- 74 ‘The United Nations and Kenya Briefing Note’ 7 February 2008
<http://responsibilitytoprotect.org/Feb%202008%20Kenya%20UN%20briefing%20note.pdf> (accessed 7 October 2016).
- 75 ‘Bush to send Rice to Kenya to demand a halt to violence’ (*The Guardian*, 14 February 2008)
<https://www.theguardian.com/world/2008/feb/14/kenya.usa> (accessed 7 October 2016).
- 76 ‘Ban Ki-moon to visit strife-torn Kenya’ (*United Nations News Centre*, 31 January 2008)
<http://www.un.org/apps/news/story.asp?NewsID=25464#.WAYhz-h97IU> (accessed 7 October 2016).
- 77 Oxford Advanced Learner’s Dictionary 6th Ed. (2000:1274).
- 78 Quinn J. ‘Whither the “Transition” of Transitional Justice’ (Annual Meeting of Canadian Political Science Association, Canada, May 2011)
https://www.politicalscience.uwo.ca/research/docs/Joanna_quinn/WhithertheTransitionofTransitionalJustice2012.pdf (accessed 17 July 2016).

regime to a democracy, like in Latin American countries, or from civil war or genocide to peace, like in Rwanda. By so doing, nations like Kenya which do not fit into one of the scenarios above seem not to be addressed.

Quinn comes up with an assessment of the different transitioning societies and concludes that there is a broadening of the meaning of transition within the context of transitional justice to include cases such as Canada and Australia, which are developed nations and which have enjoyed peace but still have put in place measures to address the injustices suffered by a certain section of their respective populations.⁷⁹

In her study, Quinn has come up with three different types of transitions namely:-

- a) The clear-cut transition which most transitional justice scholars identify. In Chile, General Augusto Pinochet overthrew the government of President Allende and thereafter established a repressive regime marred by human rights abuses, murder and disappearances of the population and especially those opposed to Pinochet's rule. Pinochet was thereafter ousted and Chileans democratically elected President Aylwin whose main campaign was centred on returning the country to democracy and in the course of that, deal with the wrongs of Pinochet's regime.⁸⁰

The transition, in the case of Chile, was characterised by the creation of a truth commission, prosecutions and the granting of reparations to the victims of the predecessor regime.⁸¹ Chile's case is thus regarded as a straightforward transition from autocracy to democracy.⁸²

- b) The second type of transition is the pre-transitional one, which is evidenced by the fact there is no definitive transition from one regime to another nor any move from conflict to peace.⁸³ It is often expected in such states that the transition will bring

79 Quinn J. (2011).

80 Quinn J. (2011:10).

81 Quinn J. (2011:4).

82 United States Department of State "Chile: Country Reports on Human Rights Practices, 2010 <http://www.state.gov/g/drl/rls/hrrpt/2010/wha/15449.htm> (accessed 17 July 2016).

83 Quinn J. (2011:12).

peace and security and transitional justice mechanisms may even be implemented on a temporary basis.⁸⁴ Uganda has been identified as an example of such a state because under both Idi Amin's rule and Milton Obote's rule, mass atrocities were committed and it was hoped that after President Museveni, the current President, took over power in 1986, the country would undergo a transformation. After President Museveni took over, he set up truth commissions to investigate the atrocities of the previous regimes. However, during his presidency, there has been a continuation of the violence, especially in Northern Uganda, due to the conflict between the government forces and the Lord's Resistance Army. In addition, President Museveni's rule has been termed by many as being oppressive instead of moving the nation towards democracy and peace. It is opined that despite Museveni's, seemingly genuine, implementation of transitional justice mechanisms, he continues to govern Uganda in a similar fashion to the previous regimes, hence narrowing the democratic space.⁸⁵

In this instance, despite the implementation of transitional justice, there has been no significant change in terms of the political regime or the human rights violations.

- c) The third category of transitions occur in non-transitional states where there is democracy and peace like in Canada.⁸⁶ In this case, the children of the Aborigines were removed from their community and forced to attend Indian residential schools that destroyed all links they had to their culture and values and replaced that with what was considered as the habits and thoughts of white men.⁸⁷ Despite the Canadian government's implementation of transitional justice mechanisms, such as the truth

84 Quinn J. (2011:12-16).

85 Quinn J. (2011:13-16).

86 Quinn J. (2011: 16).

87 Report of the Truth and Reconciliation Commission of Canada (2015:1-6) http://nctr.ca/assets/reports/Final%20Reports/Executive_Summary_English_Web.pdf (accessed 8 October 2016).

commission and reparations,⁸⁸ one cannot clearly identify the transition. Nonetheless, the government has begun a process of enacting laws and policies aimed at ensuring there is justice for the past wrongs.⁸⁹

This last category is misplaced since it does not conform to the dominant script upon which the idea of transitional justice is based, even if one seeks to expand the context of transitional justice. Where then does Kenya fit in this categorisation?

As previously stated in the background section of this research, Kenya has had a long history of violence, especially during periods when elections were held. These instances of violence often have been rooted in ethnic differences. Under the 2010 Constitution, Kenya was demarcated into 47 counties.⁹⁰ These county demarcations can be traced back to the colonial period when the then government drew the boundaries on the basis of ethnic tribes that inhabited the particular areas.⁹¹ Some writers are of the view that in the absence of a change in the regime, the only identifiable marker for Kenya was the move from the immediate state of violence witnessed after the presidential election results were announced to peace after the signing of the peace accord on 28 February 2008.⁹²

Kenya was not transitioning from an authoritarian or repressive regime, like in the case of Chile. In addition, Kenya does not neatly fit in the box labelled 'pre-transitional states' because unlike Uganda, in 2013, Kenya held peaceful elections and there has been no continued violation of human rights as witnessed during the 2007-2008 period. Bearing in mind what transpired between 30 December 2007 and 28 February 2008, some scholars

88 International Center for Transitional Justice (ICTJ) 'Transitional Justice for Indigenous People in a Non-transitional Society' (2009:1) <https://www.ictj.org/sites/default/files/ICTJ-Identities-NonTransitionalSocieties-ResearchBrief-2009-English.pdf> (accessed 8 October 2016).

89 Quinn J. (2011:16-20).

90 Article 6 (1) as read together with the First Schedule of the Constitution of Kenya.

91 Elder C. *et al.* 'Election and Violent Conflict in Kenya: Making Prevention Stick' (2014:17) <https://www.usip.org/sites/default/files/PW101-Elections-and-Violent-Conflict-in-Kenya-Making-Prevention-Stick.pdf> (accessed 18 July 2016).

92 Langer J. (2011:10-11).

argue that the transition was the signing of the Peace Accord on 28 February 2008.⁹³ This view is supported by examining the first three agendas of the Kenya National Dialogue and Reconciliation (KNDR) talks already referred to in chapter one of this paper.

The three agendas included, to stop the violence immediately and restore fundamental rights and liberties; take immediate measures to address the humanitarian crisis, promote reconciliation, healing and restoration; and agree on how to overcome the then existing political crisis.⁹⁴ Though most transitional justice scholars associate this with Kenya's transitional justice process, this perception is wrong. The violence was triggered by negative ethnic tensions which had been building up and which politicians had exploited in order to gain political mileage. The negative ethnic tensions stem from the mistaken belief by the citizenry that the president, being from a particular ethnic tribe, would guarantee that tribe certain advantages to the exclusion of all other ethnic groups.⁹⁵ To many, elections are a do or die affair, hence the constant flare up of conflict during election periods.

Moreover, ethnic based violence has continued to be experienced in Kenya. In 2014, ethnic-related political violence claimed the lives of 67 people in the coastal region of Kenya.⁹⁶ In 2015, over 300 people were killed in ethnic-related violence and over 215 000 people were internally displaced in Kenya.⁹⁷ Charterjee and Kaparo opine that, with the continued rampant ethnic-related violence being witnessed in Kenya, it can only be hoped that the 2017

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- 93 Kenya Human Rights Commission et al 'Transitional Justice in Kenya: A Toolkit for Training and Engagement' (2010:7) <http://www.khrc.or.ke/publications/36-transitional-justice-in-kenya-a-toolkit-for-training-and-engagement/file.html> accessed 8 October 2016).
- 94 Kenya Law Reform Commission 'National Accord and Agenda Four Commissions' <http://www.klrc.go.ke/index.php/our-work/national-accord-and-agenda-four-commissions> (accessed 27 March 2016).
- 95 Mohamed O. O. 'Election Violence in Kenya: A Case Study of Nakuru 1992-2008' (Master of Arts Thesis, Kenyatta University) (2015:81) <http://webcache.googleusercontent.com/search?q=cache:YP3JKXv92CcJ:ir-library.ku.ac.ke/bitstream/handle/123456789/14317/Election%2520violence.....pdf%3Fsequence%3D1%26isAllowed%3Dy+%3d=3&hl=en&ct=clnk&gl=ke> (accessed 10 October 2016).
- 96 BBC News 'Kenya Profile' <https://www.bbc.com/news/world-africa-13682176> (accessed 18 July 2016).
- 97 'Over 300 people killed in Kenya's ethnic clashed in 2015' (News24, 5 August 2015) <https://www.news24.com/Africa/News/Over-300-people-killed-in-Kenya-s-ethnic-clashed-in-2015-20150805> (accessed 18 July 2016).

general elections will not degenerate into the usual widespread ethnic violence and destruction of property that is witnessed with every cycle of elections.⁹⁸

The number of victims in 2014 and 2015 shows that despite transitional justice having been implemented in Kenya since 2008, there has been no change in terms of ethnic tensions. As such, the signing of the peace accord only resolved the political tension and not the underlying ethnic tension. This means that stakeholders ought to have addressed their minds to solutions for ethnic tensions as opposed to transitional justice mechanisms, in the absence of a transition.

This chapter was an attempt at establishing what is required in order to determine if a country is in transition, thus in need of transitional justice mechanisms. In the case of Kenya, it was necessary to show that in the absence of a repressive or authoritarian regime, human rights violations alone would not suffice in qualifying Kenya as a state in transition. The 2007-2008 PEV paled in comparison to other conflicts, for example in Latin America or Rwanda, in terms of magnitude, and to a large extent, it was considered to be ethnic-based political violence. This in itself put Kenya outside the ambit of traditional cases where transitional justice is applied.

Having categorised Kenya, the next chapter will delve into the issue of the transitional justice mechanisms that were implemented in Kenya to determine whether or not they have had an impact despite this categorisation.

98 Chatterjee S. and Kaparo F. 'Political contests must not push Kenya over the precipice again' (*The World Post*, 16 June 2016) https://www.huffingtonpost.com/siddharth-chatterjee/political-contests-must-n_b_10499208.html (accessed 18 July 2016).

CHAPTER 3: AN ANALYSIS OF KENYA'S TRANSITIONAL JUSTICE PROCESS

3.1 INTRODUCTION

The peace accord between the two factions that was signed on 28 February 2008 set in motion Kenya's transitional justice process. On 4 March 2008, both sides agreed to form two commissions; the Independent Review Commission (IREC) and the Commission of Inquiry into the Post-Election Violence (CIPEV).⁹⁹ Both commissions were tasked with investigating and reporting on different aspects of the 2007-2008 PEV, namely, the electoral process and the circumstances leading to the violence.¹⁰⁰ In order to implement the agreement between the two parties, Parliament on 20 March 2008, enacted the National Accord and Reconciliation Act.¹⁰¹ This Act was geared towards fostering national unity and reconciliation, to provide for the formation of a coalition government and the creation of various offices within the Executive arm of government, such as the office of the Prime Minister.¹⁰²

On 20 March 2008, the IREC Commission was sworn in and it began looking into the electoral process that led to the disputed presidential election results.¹⁰³ Its specific mandate was to:

- a) 'Look at the weaknesses or inconsistencies in the existing legislative and constitutional framework;
- b) Look into the capacity and capability of the ECK to carry out or oversee the elections; how the tallying was done and the overall planning and organisation of the elections by ECK in order to assess whether they discharged their duties; and

99 Konrad-Adenauer-Stiftung *Kriegler and Waki Reports on 2007 Elections* (2009: viii) <http://www.kas.de/wf/doc/kas-16094-1522-2-30.pdf> (accessed 5 October 2016).

100 Konrad-Adenauer-Stiftung (2009: viii).

101 Act No. 4 of 2008 which came into force on 20 March 2008.

102 Preamble of Act No. 4 of 2008.

103 Konrad-Adenauer-Stiftung (2009: 1).

- c) Lastly, look at the environment under which elections happened, that is, the role of the political parties, civil society, observers etc. and make recommendations for reform if need be'.¹⁰⁴

On 17 September 2008, the IREC Commission handed over its report to the grand coalition government. In its report, the commission stated that it had established that malpractices were so vast that it was impossible to establish the real results of the presidential and parliamentary elections.¹⁰⁵ The commission recommended the overhaul of the ECK through the constitution of an Independent Electoral and Boundary Commission (IEBC) which would help demarcate boundaries in Kenya so as to establish the population in each constituency.¹⁰⁶ In order to oversee future elections effectively, Kenya's electoral commission needed to ascertain the exact number of registered voters in a given constituency. This would avoid a repeat of the 2007 general elections results where the ECK could not ascertain the number of registered voters in a particular constituency, thus leading to results that showed a voter turnout in excess of 100% in some areas.¹⁰⁷

In the meantime, the CIPEV began its work on 23 May 2008 under the leadership of Justice Philip Waki.¹⁰⁸ The commission's primary mandate was to investigate the post-election violence; state security agencies actions and omissions during the violence; and to recommend measures they would deem necessary to bring those responsible for the violence to book as well as measures aimed at reconciliation.¹⁰⁹

104 Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 (Hereinafter referred to as "IREC Report") (2008:3)
<http://www.fidakenya.org/dr7/sites/default/files/kriegler-report.pdf> (accessed 5 October 2016).

105 Mugonyi D. et al. 'Kriegler's verdict on elections' (*Daily Nation*, 17 September 2008)
<http://www.nation.co.ke/News/-/1056/472140/-/tktpxm/-/index.html> (accessed 5 October 2016).

106 Mugonyi D. et al. 'Kriegler's verdict on elections' (*Daily Nation*, 17 September 2008)
<http://www.nation.co.ke/News/-/1056/472140/-/tktpxm/-/index.html> (accessed 5 October 2016).

107 IREC Report (2008:117).

108 Konrad-Adenauer-Stiftung (2009: 47).

109 Report of the Commission of Inquiry on Post-Election Violence (hereinafter referred to as the "CIPEV Report") (2008:21)

Interestingly, this commission having conducted public hearings throughout the country was meant to make suggestions and recommendations to the Truth Justice and Reconciliation Commission (TJRC).¹¹⁰ This was the first attempt to try to link the two commissions' work since they were both looking into the 2007-2008 PEV. The CIPEV completed its work and handed over its report to the grand coalition government in October 2008.¹¹¹ In its report, the commission recommended the setting up of a special tribunal to deal with the PEV cases; legislative and policy reforms to deal with gender based violence, witness protection, and the internally displaced persons; and institutional reforms particularly of the Kenyan police, who were amongst the state security agencies who committed some atrocities like extra-judicial killings during the conflict.¹¹²

In addition, under its wide mandate, the commission decided to name names of those who allegedly bore the greatest responsibility for the violence, and by so doing, it came up with a 'secret envelope'.¹¹³ The envelope, which contained the names of the alleged suspects who orchestrated the PEV and supporting evidence, was placed in the custody of the Panel of African Eminent Personalities led by Koffi Annan pending the establishment of the special tribunal.¹¹⁴ Remarkably, the CIPEV had the power to name names – an attribute of a truth commission¹¹⁵ – yet it was not a truth commission but a commission of inquiry into a specific event, which was a first. Moreover, for the first time, a commission of inquiry had a self-executing recommendation to the effect that if the government failed to create a special tribunal, the 'secret envelope' would find its way to the Prosecutor of the ICC in order to

http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf (accessed 5 October 2016).

110 CIPEV Report (2008: 22).

111 'Waki Report to be handed over' (*Daily Nation*, 14 October 2008) <http://www.nation.co.ke/news/politics/-/1064/480490/-/view/printversion/-/reli5x2/-/index.html> (accessed 5 October 2016).

112 See generally CIPEV Report (2008).

113 CIPEV Report (2008: 15-18).

114 CIPEV Report (2008:18).

115 Pasternak W. 'A Discussion about Truth Commissions' (2010: 32-34) <https://www.icc-cpi.int/NR/rdonlyres/91E38B82-35DB-4F1C-9F7B8D2155165631/282340/TruthCommissionsPasternakcolorslides.pdf> (accessed 5 October 2016).

trigger the court's jurisdiction.¹¹⁶ Even though the CIPEV was just a prelude to the transitional justice process in Kenya, on all accounts it remains, by far, the most effective commission of its kind.

During this 2008 period, the legislature was in the process of debating other bills proposed to bring into effect the recommendations of the two commissions as well as the four agendas discussed during the Kenya National Dialogue and Reconciliation (KNDR) talks. This culminated in the enactment of the Truth Justice and Reconciliation Commission Act,¹¹⁷ which served as the main transitional justice mechanism whence all other mechanisms would flow from.

3.2 A CRITICAL ANALYSIS OF KENYA'S TRUTH COMMISSION

3.2.1 Overview of the Truth Justice and Reconciliation Commission Act (hereinafter referred to as the "TJRC Act")

The Act is divided into seven parts, beginning with the preamble which gives the context and circumstances that gave rise to the Act. The preamble talks of the ethnic-based political violence following the announcement of the presidential election results in 2007 and the need for justice as the basis for the Act. It is important to note part II of the Act gives the objectives of the commission¹¹⁸ which can be used as the yardstick to determine the success or failure of the commission upon completion of its work. Part III deals with amnesty mechanisms and procedures and from the onset, it states that no amnesty may be granted for any of the core crimes under international law.¹¹⁹ Amnesty under this part is only allowed in respect of offences under the laws of Kenya committed between 12 December 1963 and 28 February

116 CIPEV Report (2008:18).

117 Act No. 6 of 2008 which came into force on 9 March 2009.

118 Section 5 of the TJRC Act.

119 Section 34 (1) of the TJRC Act.

2008.¹²⁰ Part IV deals with reparations and rehabilitation and part VI deals with the report of the commission and the reports implementation.

Having given a brief overview of the Act, the next part of the study will analyse the specific provisions in respect of the different transitional justice mechanisms.

3.2.2 The Commission

The commission (TJRC) was established under Section 3 of the Act as a body corporate. Even though its headquarters were in Nairobi, the commission had the authority to hold its sittings anywhere in the country¹²¹ in order to enable it to reach people everywhere in the country. TJRC began its work first through civic education and outreach and thereafter, it began collecting statements from people all over the country.¹²²

In respect of the name of the commission, Katherine Woody contends that ‘truth and reconciliation commissions’ are a new concept and the use of the term ‘reconciliation’ assumes that after the truth is established there will be a reconciliation of the parties.¹²³ Bearing in mind the situation in Kenya during the 2007-2008 PEV, the use of the terms truth, justice and reconciliation as the name of the commission as opposed to just truth commission symbolises the overall objective of the commission, that is, to establish the truth as to what happened, ensure justice for all the victims and hope for reconciliation of the warring parties.¹²⁴

120 Section 34 (2) and 34 (3) of the TJRC Act.

121 Section 4 (1) and 4 (2) of the TJRC Act.

122 Kenya Transitional Justice Network (KTJN) ‘Summary of the Truth, Justice and Reconciliation Commission Report’ (2013:2) <http://www.acordinternational.org/silo/files/kenya-tjrc-summary-report-aug-2013.pdf> (accessed 5 October 2016).

123 Woody K. ‘Truth and Justice: the Role of Truth Commissions in Post-Conflict Societies’ (2009) http://www.kentlaw.edu/perritt/courses/seminar/Nationbuilding%20Seminar%20Paper_Katherine%20Woody.htm (accessed 5 October 2016).

124 See Preamble of the TJRC Act.

In order to determine whether these broad objectives were achieved it is necessary to interrogate the mandate, operations and the report of the commission.

3.2.2.1 The Mandate of the Commission

The mandate of the commission was set out thus

(a) establishing an accurate, complete and historical record of violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office, both serving and retired, between 12th December, 1963 and 28th February 2008, including the—

- (i) antecedents, circumstances, factors and context of such violations;
- (ii) perspectives of the victims; and
- (iii) motives and perspectives of the persons responsible for commission of the violations, by conducting investigations and holding hearings;

(b) establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights and economic rights which were committed during the period between the 12th December, 1963 and the 28th February 2008, including the—

- (i) antecedents, circumstances, factors and context of such violations;
- (ii) perspectives of the victims and the motives; and
- (iii) perspectives of the persons responsible for commission of the violations, by conducting investigations and holding hearings;

(c) investigating gross human rights violations and violations of international human rights law and abuses which occurred, including massacres, sexual violations, murder and extrajudicial killings and determining those responsible for the commission of the violations and abuses;

(d) recommending the prosecution of the perpetrators of gross human rights violations;

(e) determining ways and means of redress for victims of gross human rights violations;

(f) facilitating the granting of conditional amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with gross human rights violations and economic crimes and complying with the requirements of this Act;

(g) providing victims, perpetrators and the general public with a platform for non-retributive truth telling that charts a new moral vision and seeks to create a value-based society for all Kenyans;

(h) providing victims of human rights abuses and corruption with a forum to be heard and restore their dignity;

(i) providing repentant perpetrators or participants in gross human rights violations with a forum to confess their actions as a way of bringing reconciliation;

(j) compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission under paragraphs (a), (b), and (f), with recommendations on measures to prevent the future occurrence of such violations'.¹²⁵

Looking at this section, one could be overwhelmed by the complexity of the mandate of the commission, not to mention the extent of its breadth. It is thus necessary to look at the mandate from two aspects: the period under investigation and the subject matter of the investigation.



3.2.2.1.1 The Time Period under Investigation

It is necessary to take a two pronged approach on this issue and look at the specific period under investigation as well as the time limit within which the commission was to complete its work since the two are inextricable.

The ICTJ prepared a memorandum for the Kenyan government and other stakeholders on transitional justice mechanisms.¹²⁶ The memorandum had incorporated international standards and best practices that could be used as a guide for Kenya. In respect of the mandate, the ICTJ noted that

‘The terms of reference should provide guidance on the parameters for a truth commission’s inquiry. It is important that the time period to be covered—as well as the specific events

125 Section 5 (1) of the TJRC Act.

126 International Centre for Transitional Justice (ICTJ) ‘A Truth Commission for Kenya? Incorporating International Standards and Best Practices’ (2008:2) <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Truth-Commission-2008-English.pdf> (accessed 5 October 2016).

included within the commission's mandate—is not perceived as politically motivated or otherwise biased. Any such inappropriate exclusion of key events, periods of time, or specific types of abuse may cause the process to be rejected by certain communities and thus prevent it from serving the aim of national reconciliation'.¹²⁷

On the other hand, the OHCHR advises states that in respect of the period under investigation, the commission should look into the period when the worst atrocities were committed and preferably, the time period should be continuous and not broken up.¹²⁸

In respect of Kenya, the TJRC was looking into events that spanned over 45 years (from 12 December 1963 to 28 February 2008), as referred to under Section 5 (1) of the Act. The 45-year period under inquiry did not match the OHCHR context, in that the stakeholders failed to establish the specific events which were the worst, as well as select a continuous timeframe for such events. Instead, stakeholders settled for an easy time frame covering the period from independence to the most recent violence.

Moreover, by failing to select only the worst events, stakeholders settled on the 45-year period, which was too long, taking into account that the commission had only two years within which to complete its work,¹²⁹ notwithstanding the number of victims and the number of violations that required investigation.¹³⁰ It is therefore no surprise that the TJRC requested an extension of term¹³¹ because it could not complete its work within the two-year period stipulated in the Act. This was partly because of its broad mandate in terms of the period under inquiry, and partly because the credibility of the chairperson was being challenged on account of allegations that he had been involved in some of the human rights violations under

127 ICTJ (2008:2).

128 Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Rule of Law Tools for Post-Conflict States: Truth Commission' (2006: 8) <http://www.ohchr.org/Documents/Publications/RuleofLawTruthCommissionen.pdf> (accessed 5 October 2016).

129 Section 20 of the TJRC Act.

130 KTJN (2013:1).

131 Section 20 (3) and 20 (4) of the TJRC Act.

investigation. Hence, court cases were filed seeking his removal from office. This resulted in the loss of one year during which the commission did no work.¹³²

Even without considering the one year that was lost, Waheire Wachira opines that two years to investigate violations spanning over 45 years and covering three regimes was not sufficient to allow for a focused investigation by TJRC.¹³³ The Clarification Commission in Guatemala (CHE) faced a similar problem where CHE was investigating “all” human rights violations and acts of violence in the country and it only had six months to complete its work.¹³⁴ Professor Christian Tomuschat (former Co-ordinator of CHE) was of the view that even the most perfect organisation could not have been in a position to discharge its duties to the satisfaction of its clients at such speed. It took the CHE two years to complete its work.¹³⁵

Going by the international standards and best practices as well as Guatemala’s experience, one cannot help but conclude that Kenya’s TJRC was rushed and perhaps, more time ought to have been allocated to the commission to ensure that it conducted focused and complete investigations into the events spanning 45 years.

3.2.2.1.2 The Subject Matter under Investigation

Looking at Section 5 (1) of the Act again, one can distil the subject matter that TJRC was investigating into the following areas:-

- a) Human rights and economic rights violation by the state, public institutions and holders of public office between 1963 to 2008 in order to give a proper account of events, establish the nature, cause and extent of those violations;

132 Materu S. (2015:147-150).

133 Wachira W. ‘The Victims’ Rights to Truth in Post Conflict Situations: The Kenyan Experience’ (A Paper presented to Avocats Sans Frontières, Entebbe, Uganda 31 July 2012) <http://www.asf.be/wp-content/uploads/2012/10/Lessons-from-the-Kenya-Truth-Justice-and-Reconciliation-Commission.pdf> (accessed 5 October 2016).

134 Tomuschat C. ‘Clarification Commission of Guatemala’ (2001:239-241).

135 Tomuschat C. (2001:241).

- b) Gross human rights violations and violations of International Human Rights law and abuses that included massacres, sexual violations, murder, extra-judicial killings and naming names.

An overview of the subject matter under investigation by TJRC shows there was an overlap between its work and that of CIPEV as well as the ICC, to the extent that all three investigated the 2007-2008 PEV. The first issue here is the overlap which could be a problem if all three bodies do not draw the same conclusions on the 2007-2008 PEV, and if this happens, the credibility of the process is likely to be questioned. As mentioned earlier, the CIPEV investigations resulted in the naming of the six persons who were alleged to have borne the greatest responsibility for the 2007-2008 PEV. The findings of the CIPEV contained in the 'secret envelope' served as the basis upon which the ICC began its investigations into the situation in Kenya.¹³⁶ In contrast, the TJRC's findings were silent on the issue of the perpetrators who bore the greatest responsibility for the 2007-2008 PEV. It would therefore have been prudent to limit the subject matter of TJRC so as to exclude the 2007-2008 PEV. In the alternative, noting that 2007-2008 PEV led up to the creation of TJRC, more attention and focus should have been devoted to its investigation.

Secondly, the subject matter for investigation by the TJRC is in line with the ICTJ's memorandum in terms of the types of abuses to be investigated.¹³⁷ However, OHCHR's tool kit gives a more detailed guide on the considerations to be had by stakeholders in deciding the subject matter of an investigation. The OHCHR advises states to structure the language describing the subject matter of investigation in such a way as to allow the commission flexibility.¹³⁸ This is deemed as necessary in order to provide for a situation where the commission may investigate other violations linked to the main violations under inquiry.

136 'International Criminal Court receives materials on Kenyan post-election violence' (UN News Centre, 9 July 2009) <http://www.un.org/apps/news/story.asp?NewsID=31424#.WA4keuh97IU> (accessed 5 October 2016).

137 "Understanding the root causes of the conflict or abuses should be a main objective of the commission, which in some contexts may require the commission to address economic crimes, inequalities, or governance issues." ICTJ (2008:2).

138 OHCHR (2006: 8-9).

This was achieved in Kenya's case because the Act provided that the TJRC was to investigate human rights violations committed by the state, state institutions and public officer between 1963 and 2008. This allowed TJRC to examine not only the specific violations enumerated under Section 5 (1) of the Act, but also any act or conduct that could be considered a violation of human rights, provided that it was committed by the state, a state institution or a public officer between 1963 and 2008. In this regard, the TJRC looked into human rights violations during the colonial period (1895-1963) in order to gain a better understanding of the root causes of ethnic related violence in Kenya.¹³⁹ This was the first commission to investigate the history that far back. However, by expanding the subject matter under investigation, the TJRC opened up its work to cover "all" violations just like CHE, with the result that no purposeful objective was served.¹⁴⁰ Moreover, some of the human rights violations to be investigated were superfluous, bearing in mind that previous commissions of inquiry and other investigations had looked into those matters, which included the deaths of Robert Ouko, Pio Gama Pinto, Tom Mboya, J.M Kariuki and the Wagalla massacre, to name just a few.¹⁴¹ With such a broad subject matter jurisdiction it is unlikely that TJRC gave each specific violation the attention it required.

Thirdly, the OHCHR discusses the issue of including economic crimes as one of the mandates of a truth commission.¹⁴² In this regard, OHCHR advises that this should be done where there is a link between gross human rights violations and economic crimes, for example, as seen in the case of Sierra Leone's Truth and Reconciliation Commission. The OHCHR, however, warns that investigating economic crimes would require a different methodology and time frame from that used in investigating human rights violations.¹⁴³ Widening the scope of a truth commission's mandate to include economic rights violations without proper regard as to time

139 The Final Report of the Truth Justice and Reconciliation Commission of Kenya (hereinafter referred to as the "TJRC Report") Vol. IV (2013:7-12) <http://www.ifjustice.net/downloads/1460970274.pdf> (accessed 5 October 2016).

140 Tomuschat C. (2001:239).

141 See generally African Centre for Open Governance (AfriCOG) 'A study of Commissions of Inquiries in Kenya' (2007) <https://www.africog.org/reports/Commissionsofinquiryreport.pdf> (accessed 5 October 2016).

142 OHCHR (2006:9).

143 OHCHR (2006:9).

and methodology required guarantees that the truth commission will not complete its task, or in the alternative, the investigation of the economic rights violations will be inadequate.

Kenya is amongst the few nations where the truth commission looked into economic rights violations. Was this a wise decision? No. As Waheire Wachira put it, Kenya's TJRC was given an impossible task to investigate economic crimes spanning over 45 years, but without the necessary financial and human resource capacity to conduct its investigations adequately.¹⁴⁴ Furthermore, extending the mandate of TJRC to include economic rights violations strayed from the need for transitional justice, which was the 2007-2008 PEV. TJRC's mandate should have been limited to human rights violations because there had been numerous investigations of economic crimes and especially grand corruption cases between 1963 and 2008,¹⁴⁵ such that the commission would not have adequately investigated those incidents given its resources and time constraints.¹⁴⁶

This belief is confirmed by the findings of the TJRC, which focused more on policy issues as opposed to identifying the specific economic rights violations and those who were responsible.¹⁴⁷ This is despite the fact that the commission found former Presidents Moi and Kibaki's governments culpable for various human rights violations that included economic crimes and grand corruption.¹⁴⁸ Unfortunately, in regard to these two regimes, the TJRC did not provide a direct link between the government's involvement in the economic crimes that led to the violation of human rights and thus their findings in this respect remain conjecture.

One could argue that the commission's work in respect of human rights violations was more successful than for economic crimes, going by the number of persons it recommended for

144 Wachira W. 'The Victims' Rights to Truth in Post Conflict Situations: The Kenyan Experience' (A Paper presented to Avocats Sans Frontières, Entebbe, Uganda 31 July 2012) <http://www.asf.be/wp-content/uploads/2012/10/Lessons-from-the-Kenya-Truth-Justice-and-Reconciliation-Commission.pdf> (accessed 5 October 2016).

145 TJRC Report (2013:5-8).

146 Kisiangani E. 'The formation of Kenya's Truth, Justice and Reconciliation Commission held great promise, but the end product is likely to deliver much less' (2013) <http://www.issafrika.org/iss-today/can-kenyas-truth-justice-deliver> (accessed 5 October 2016).

147 TJRC Report (2013:5-6).

148 TJRC Report (2013:7-8).

further investigations and prosecutions.¹⁴⁹ But even so, this premise must be further interrogated, bearing in mind the actual number of successful prosecutions that resulted from the commission's recommendations. This is an issue that is discussed in detail later on in this chapter.

3.2.2.2 The Work of the Commission

The paper now turns to examine how the TJRC carried out its work vis-à-vis the international standards and best practices. According to the ICTJ, it is necessary to set up certain structures and procedures to be utilised by a truth commission that will ensure it carries out its work independently.¹⁵⁰ The ICTJ stressed the issue of the commission being deemed as independent for it to carry out its mandate well, otherwise with the commission receiving funding and assistance from the government and even foreign stakeholders, there could be a perception that it is prone to manipulation.¹⁵¹ This could then call into question the legitimacy of the work of the commission. Further, according to the ICTJ, the truth commission must be given certain powers that will enable it to carry out its work effectively and these powers include, among others, the power to subpoena, to search and seize of information necessary for its investigations.¹⁵² All of this is possible only if the government is able to give such a commission full access to information, provide the commission with finances to carry out its mandate, as well as any other assistance deemed necessary.¹⁵³ Whereas the OHCHR's tool kit for setting up truth commissions is exactly like that of the ICTJ, there are some differences. The OHCHR tool kit contends that truth commissions should also be given the power to offer witness protection to those who appear before it.¹⁵⁴ In addition, and to ensure compliance, the commission ought also to be given the power to impose penalties and fines on persons

149 TJRC Report (2013: Appendix 1 and 2).

150 ICTJ (2008:2).

151 ICTJ (2008:2).

152 ICTJ (2008:2).

153 ICTJ (2008:2).

154 OHCHR (2006: 10).

who perjure themselves, violate subpoenas or interfere with witnesses.¹⁵⁵ To this extent, Sections 7 and 8 of the TJRC Act surpassed the minimum standards enunciated by ICTJ and the OHCHR tool kit above. The two sections provide as follows:

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

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

(a) gather, by any means it deems appropriate, any information it considers relevant, including requisition of reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information as and when necessary;

(b) visit any establishment or place without giving prior notice, and to enter upon any land or premises for any purpose which is material to the fulfilment of the Commission's mandate and in particular, for the purpose of obtaining information or inspecting any property or taking copies of any documents which may be of assistance to the Commission, and for safeguarding any such property or document;

(c) interview any individual, group or members of organizations or institutions and, at the Commission's discretion, to conduct such interviews, in private;

(d) call upon any person, subject to adequate provision being made to meet his expenses, to meet with the Commission or its staff, or to attend a session or hearing of the Commission, and to compel the attendance of any person who fails to respond to a request of the Commission to appear and to answer questions relevant to the subject matter of the session or hearing;

(e) require that statements be given under oath or affirmation and to administer such oath or affirmation;

(f) request information from the relevant authorities of a foreign country and to gather information from victims, witnesses, government officials and others in foreign countries;

155 OHCHR (2006: 10-11).

(g) summon any serving or retired public officer to appear in person before it to produce any document, thing or information that may be considered relevant to the function of the Commission;

(h) issue summonses as it deems necessary in fulfillment of its mandate;

(i) request and receive police assistance as needed in the enforcement of its powers.

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

(4) The provisions of subsection (2) shall apply subject to the Protected Areas Act.

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

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

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

8. Without prejudice to the provisions of Section 7, the Commission shall have power to—

(a) may enter into association with such other bodies or organizations within or outside Kenya as it may consider desirable or appropriate and in furtherance of the purpose for which the Commission is established'

On paper, Section 7 (1) of the TJRC Act was enough to ensure the autonomy of TJRC in its work. However, in reality this was not the case as there were allegations of political interference by the President's office.¹⁵⁶ As a result of this alleged interference, it is rumoured that some commissioners changed some sections of the final report that was handed over to

156 Seils P. 'Integrity of Kenya's Truth Commission Report must be restored' (*Aljazeera* 9 June 2013) <http://www.aljazeera.com/indepth/opinion/2013/06/201369114316134587.html> (accessed 6 October 2016).

the President.¹⁵⁷ This negates the supposition that TJRC acted independently as mandated by the law and calls into question the authenticity of the final TJRC report in its entirety. It is said that truth commissions that have strong authority and are independent are able to participate more in shaping the national agenda as far as the peace process is concerned.¹⁵⁸ This cannot be said in the case of Kenya's TJRC.

Another interesting aspect of the work of the commission is the fact that TJRC was given such wide and far-reaching investigative powers¹⁵⁹ as well as mutual legal assistance¹⁶⁰ in order to ensure that it carried out its mandate properly. Within Kenya, the TJRC conducted hearings throughout the country for a period of one year and took statements from some 44 293 people.¹⁶¹ In Kenya, the process was successful, to the extent that all those persons who came forward were given a chance to be heard, whether orally or through a written statement.¹⁶² This is important for truth commissions, as Professor Tomuschat notes that, at the end of the day, the voices of the victims must be heard and this should also be reflected in the report.¹⁶³

In contrast, when it came to the government providing the commission with assistance, such as access to information, the government was not so forthcoming despite what was provided for in the law.¹⁶⁴ This same challenge was faced by the Guatemalan truth commission where the government was also not forthcoming with information.¹⁶⁵ As a result of the

157 Seils P. 'Integrity of Kenya's Truth Commission Report must be restored' (Aljazeera 9 June 2013) <http://www.aljazeera.com/indepth/opinion/2013/06/201369114316134587.html> (accessed 6 October 2016).

158 International Centre for Transitional Justice (ICTJ) 'Challenging the Conventional Can Truth Commissions Strengthen Peace Processes?' (Symposium organized by the ICTJ and the Kofi Annan Foundation in November 2013) <https://www.ictj.org/challenging-conventional-truth-commissions-peace/docs/ICTJ-Report-KAF-TruthCommPeace-2014.pdf> (accessed 6 October 2016).

159 Section 7 (2) (a-i) and Section 7 (3) of the TJRC Act.

160 Section 7 (2) (f) and Section 8 (a) of the TJRC Act.

161 See generally TJRC Report.

162 See generally TJRC report.

163 Tomuschat C. 'Clarification Commission of Guatemala' (2001:247).

164 See generally the TJRC report.

165 Tomuschat C. (2001:249-251).

government's unsupportiveness, the truth commission could not give an accurate account of the history of specific events in the absence of all of the facts. In this regard, the TJRC findings, for example, on the gross human rights violations committed during the colonial period, several massacres and political assassinations are incomplete and inconclusive.

Interestingly, with all the power with which the commission was vested in order to carry out its investigations effectively, the drafters failed to provide for witness protection. Witness protection has been accepted as being a central feature in ensuring that the right to truth is protected.¹⁶⁶ This failure to provide for witness protection was counterproductive to the work of the commission because some witnesses failed to give their testimony before the commission out of fear of retaliation.¹⁶⁷ The TJRC report acknowledged that without a functional witness protection programme, thorough and credible investigations into some of the sensitive cases could not be achieved.¹⁶⁸

Regarding mutual legal assistance, there is no indication in the report of the TJRC that it sought assistance from foreign governments in undertaking its mandate. This is especially unfortunate because the commission was tasked with investigating economic crimes and they concentrated on the cases of grand corruption in the country.¹⁶⁹ There have been several commissions of inquiry into different grand corruption incidents in Kenya, and most of them, if not all, have amounted to nought.¹⁷⁰ It is a trite fact that in most of the grand corruption scandals, foreign entities were involved. The TJRC could have used their far-reaching powers to gather information and evidence that would be useful in prosecuting those who were

166 'Guidance Note of the Secretary General: United Nations Approach to Transitional Justice' (2010) https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (accessed 6 October 2016).

167 'Witnesses doubt TJRC protection programme' (*Daily Nation*, 19 October 2010) <http://www.nation.co.ke/News/Witnesses%20doubt%20TJRC%20protection%20programme/-/1056/1036106/-/ye5vj2/-/index.html> (accessed 6 October 2016).

168 TJRC Report (2013: 24).

169 TJRC Report (2013: 7, 8, 56-57).

170 Matchel K.J. 'Justice has no price: Towards exorcising corruption and economic crimes' http://www.ipsos.co.ke/NEWBASE_EXPORTS/Governance/150824_THE%20NAIROBI%20LAW%20MONTHLY_50,51,52,53_9fc01.pdf (accessed 6 October 2016).

culpable. In this regard, the TJRC lost an important opportunity to participate in the national agenda as regards combating corruption.

3.2.2.3 The Report of the Commission

At the end of four years, having traversed the width and breath of Kenya, the TJRC handed over its final report to President Uhuru Kenyatta on 21 May 2013.¹⁷¹ Part VI of the TJRC Act deals with the report of the commission and stipulates that the commission in its findings shall recommend prosecutions, amnesty, reparations to victims as well as any other reforms that it would deem necessary.¹⁷² This part of the Act is instructive since it creates a direct link between the truth commission's work and the other mechanisms of transitional justice.

3.2.2.3.1 Prosecutions

According to the *United Nations Guidance Note on Transitional Justice*, prosecutions 'ensure that those responsible for committing crimes, including serious violations of international humanitarian law and gross violations of international human rights law, are tried in accordance with international standards of fair trial and, where appropriate, punished'.¹⁷³ This is a key aspect of transitional justice for any society that seeks to deal with its past. It must be noted that not all societies emerging from conflict will opt for prosecutions as a mechanism of transitional justice. Some states are unable or unwilling to investigate or prosecute offences committed within their territory, and when this happens, the

171 Momanyi B. 'TJRC report indicts Kenya's top leaders' (*Capital News*, 22 May 2013) <http://www.capitalfm.co.ke/news/2013/05/tjrc-report-indicts-kenyas-top-leaders/> (accessed 6 October 2016).

172 Section 48 (2) (a-e) of the TJRC Act.

173 'Guidance Note of the Secretary General: United Nations Approach to Transitional Justice' (2010) https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (accessed 6 October 2016).

international tribunals step in and exercise jurisdiction.¹⁷⁴ Ultimately, this was the case in Kenya.

3.2.2.3.1.1 Domestic Prosecutions

To start with, the TJRC recommended the prosecution of hundreds of persons alleged to have perpetrated various human rights violations between 1963 and 2008.¹⁷⁵ To date there has been no local prosecution arising from the TJRC recommendation. This recommendation to prosecute ran parallel with what the police had already been investigating in respect of the 2007-2008 PEV. During the 2007-2008 PEV the Kenyan police had arrested persons alleged to have committed offences such as murder, assault, rape and other heinous acts.¹⁷⁶ Of those persons who were arrested, very few were prosecuted and convicted,¹⁷⁷ and of those who were prosecuted, many if not all, ended up being acquitted because of poor investigations and insufficient evidence.¹⁷⁸ Kenya's justice system, thus failed the victims.

There were about 4 576 PEV cases that were awaiting determination by the Office of Director of Public Prosecutions (ODPP) on whether they could proceed to court.¹⁷⁹ Previously, in 2014, the police informed the ODPP that the remaining cases were not prosecutable, but the ODPP still returned the files to the police for further investigations. Perhaps the ODPP fears being

174 'Guidance Note of the Secretary General: United Nations Approach to Transitional Justice' (2010) https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (accessed 6 October 2016).

175 See generally TJRC Report findings.

176 Nichols L. *The International Criminal Court and the End of Impunity in Kenya* (2015:93-101).

177 According to a report given by the Attorney General in February 2009, only 84 PEV cases had been concluded and of those, only 45 cases resulted in convictions. Furthermore, there were 69 case that were pending in court at the time the report was given. See Nichols L. (2015: 93-98).

178 Macharia W. 'Man named by witness was freed on murder charge' (*Daily Nation*, 17 September, 2013) <http://www.nation.co.ke/news/politics/Man+named+by++witness+was+freed++on+murder+charge+/-/1064/1997166/-/dlp1c6z/-/index.html> (accessed 6 October 2016) See also Kenya Law Reports Criminal Case 40 of 2008 <http://www.kenyalaw.org/caselaw/cases/view/90612> (accessed 6 October, 2016) See also Nichols L. (2015:93-98).

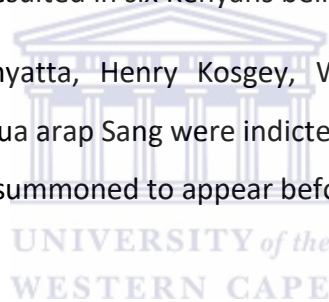
179 Ombati C. 'Police: Why Post-Election Violence cases cannot be prosecuted in Kenya' (*Standard Newspaper*, 7 April 2016) <http://www.standardmedia.co.ke/article/2000197439/police-why-post-election-violence-cases-cannot-be-prosecuted-in-kenya/?pageNo=1> (accessed 6 October 2016).

blamed for failing to prosecute the remaining cases, but this notwithstanding, and in lieu of the time that has passed, it is prudent to consider those cases as good as closed.

3.2.2.3.1.2 International Prosecutions

As discussed in Chapter One, the Waki Commission set in motion the referral of the Kenyan situation to the ICC. On 31 March 2010, the former ICC prosecutor, Louis Moreno Ocampo, made an application to commence investigations *proprio motu* before the ICC Pre-Trial Chamber II¹⁸⁰ based on the Waki Commission's report he was given containing a list of six individuals who allegedly bore the greatest responsibility in the post-election violence.¹⁸¹ The Court authorised the investigation into the Kenyan situation since Kenya was deemed as unwilling or unable to deal with the situation of crimes domestically, hence the need for an international investigation that resulted in six Kenyans being indicted.¹⁸²

The six individuals, Uhuru Kenyatta, Henry Kosgey, William Ruto, Francis Muthaura, Mohammed Hussein Ali and Joshua arap Sang were indicted by the ICC's Pre-Trial Chamber II on 8 March 2011 and thereafter summoned to appear before the Court.¹⁸³



180 Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, No. ICC-01/09-19-Corr <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf> (accessed 6 October 2016).

181 Kariuki A. and Mathenge O. 'Ocampo names Kenya chaos suspects' (*Daily Nation*, 15 December 2010) <http://www.nation.co.ke/News/politics/Ocampo+names+Kenya+chaos+suspects/-/1064/1072864/-/qe0wetz/-/index.html> (accessed 6 October 2016).

182 Pre-Trial Chamber II Decision No. ICC-01/09-19-Corr <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf> (accessed 6 October 2016).

183 International Criminal Court 'Decision on the Prosecutor's Application for Summonses to appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali' (8 March, 2011) <http://www.icc-cpi.int/iccdocs/doc/doc1037044.pdf> and International Criminal Court 'Decision on the Prosecutor's Application for Summonses to appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua arap Sang' (8 March, 2011) <http://www.icc-cpi.int/iccdocs/doc/doc1037044.pdf> (accessed 6 October 2016).

They were charged in the cases of *The Prosecutor v. William Samoei Ruto and others*¹⁸⁴ and *The Prosecutor v. Uhuru Muigai Kenyatta and others*.¹⁸⁵ These two cases, on the regional front, re-ignited the push for African nations to withdraw from the Rome Statute on account of the ICC targeting African nations only and disregarding the immunity that should be granted to sitting Heads of State.¹⁸⁶

On the domestic front, the two cases represented the fight against impunity because before then no high-ranking Kenyan political leader had been tried by a court of law. Nichols's research revealed that 'Kenyans agreed with the OTP that ending impunity meant not only prosecuting the leaders of the violence, but also the direct perpetrators'.¹⁸⁷ As such the prosecution of the six individuals was a matter of greater public interest and shaped the manner in which people viewed accountability for one's actions. Going from such high expectations of accountability to the two cases being terminated without anyone being held accountable, dealt a huge blow to the expectations of Kenyans as well as the rule of law. The ICC's intervention into the Kenyan situation was viewed by some as a catalyst that would bring about rule of law reforms and act as a deterrent to commission of future crimes.¹⁸⁸

As such, the termination of the last case before the ICC shows that the transitional justice process has come to an end. This conclusion is based on the fact that many transitional justice scholars saw the ICC cases, and a possibility of a conviction, as the main driving factor behind the transitional justice process in Kenya.¹⁸⁹ As it stands, there are fears throughout the

184 ICC-01/09-01/11 on 5 April 2016 the ICC rendered its decision vacating the charges against William Samoei Ruto and Joshua arap Sang who were the remaining accused persons in this case. https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1205.aspx (accessed 6 October 2016).

185 ICC-01/09-02/11 the three accused (Kenyatta, Muthaura and Amin) had been charged with five counts of crimes against humanity but the charges were subsequently withdrawn by the Prosecutor on diverse dates and the cases were terminated by Trial Chamber V (B) on 13 March 2015. <http://www.icc-cpi.int/iccdocs/PIDS/publications/KenyattaEng.pdf> (accessed 6 October 2016).

186 Werle G. and Jessberger F. *Principles of International Criminal Law* (2014:24).

187 Nichols L. (2015: 14).

188 Nichols L. (2015: 14).

189 Asaala E. and Dicker N. 'Transitional Justice in Kenya and the UN Special Rapporteur on Truth and Justice; Where to from here?' (2013) <http://www.saflii.org/za/journals/AHRLJ/2013/15.html> (accessed 6 April 2016).

country that violence will erupt in 2017 if the opposition leader, Raila Odinga, does not win the elections.¹⁹⁰ The situation is further exacerbated by fears of the Independent Electoral and Boundaries Commission (IEBC), the body charged with overseeing elections, having been compromised, hence the need to change its commissioners before the 2017 elections.¹⁹¹ Without the ICC looming over Kenya like it did in 2013, to coerce good behaviour and ensure non-repetition of violence, there is nothing to stop Kenyans from falling back to the cycle of election violence.

3.2.2.3.2 Amnesty

Amnesty has been defined by some scholars as a concept that

(a) Prospectively bars criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption; or

(b) Retroactively nullifying legal liability previously established'.¹⁹²

Amnesty has become a UN recovery tool for states that are transitioning from conflict and searching for ways to deal with the wrongs of the previous regime.¹⁹³ It comes as no surprise that amnesty featured in Kenya's transitional justice process.

Part 3 of the TJRC Act¹⁹⁴ set out an elaborate amnesty mechanism and the requisite procedures to be utilised by the commission. The TJRC's power to grant amnesty can be likened only to that of the Truth and Reconciliation Commission in South Africa, with the only

190 Blair E. 'Kenyan political unrest raises fears of new flare-up in 2017 vote' (*Reuters*, 9 June 2016) <http://www.reuters.com/article/us-kenya-politics-idUSKCN0YV1B1> (accessed 6 October 2016).

191 Blair E. 'Kenyan political unrest raises fears of new flare-up in 2017 vote' (*Reuters*, 9 June 2016) <http://www.reuters.com/article/us-kenya-politics-idUSKCN0YV1B1> (accessed 6 October 2016).

192 Orentlicher D. F. 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991: 2543) <https://www.jstor.org/stable/pdf/796903.pdf> (accessed 8 October 2016).

193 Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Rule of Law Tools for Post-Conflict States: Amnesties' (2009) http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf (accessed 8 October 2016).

194 Sections 34 to 41 of the TJRC Act.

exception being that Kenya's TJRC could not grant amnesty in respect of 'genocide, crimes against humanity, gross violation of human rights or an act, omission or offence constituting a gross violation of human right including extrajudicial execution, enforced disappearance, sexual assault, rape and torture'.¹⁹⁵ One could argue that the rationale behind limiting the amnesty powers of the TJRC was that the excluded crimes are egregious and cannot, therefore, go unpunished. The truth commission had the power to grant amnesty to perpetrators of all other crimes committed between 1963 and 2008 so long as they gave a full and factual account of the act or omission in respect of which they sought amnesty.¹⁹⁶ Furthermore, the perpetrator had to show that the crime was politically motivated and/or there was a political objective to be achieved.¹⁹⁷ Upon receipt of the application for amnesty, the TJRC would then investigate the matter and determine whether or not to grant amnesty.¹⁹⁸

Unfortunately, not a single perpetrator applied for amnesty hence the provisions under this part of the Act were never utilised in any case.¹⁹⁹ In South Africa, unlike in Kenya, there was a real risk that perpetrators who failed to come forward could be prosecuted if and when their actions were discovered.²⁰⁰ In that event, they would not qualify to apply for amnesty. On the other hand, in Kenya, perpetrators did not fear being discovered because the circumstances surrounding the 2007-2008 PEV were such that many victims could not identify the perpetrators as most attacks happened at night and in many instances involved many perpetrators as opposed to individual perpetrators.²⁰¹ More importantly, perpetrators were assured 'amnesty' because there was no likelihood of fellow ethnic tribesmen betraying one

195 Section 34 (3) of the TJRC Act.

196 Section 38 (3) (c) of the TJRC Act.

197 Section 38 (3) (d), (e) and (f) of the TJRC Act.

198 Section 36 of the TJRC Act.

199 TJRC Report (2013: 4).

200 Werle G. 'Without Truth, No Reconciliation: The South African *Rechtsstaat* and the Apartheid Past' (1995:71) <https://www.jstor.org/stable/pdf/43110597.pdf> (accessed 8 October 2016).

201 Ombati C. 'Police: Why Post-Election Violence cases cannot be prosecuted in Kenya' (Standard Newspaper, 7 April 2016) <http://www.standardmedia.co.ke/article/2000197439/police-why-post-election-violence-cases-cannot-be-prosecuted-in-kenya/?pageNo=1> (accessed 6 October 2016).

of their own for purposes of prosecution. Tribalism is so deeply rooted in Kenya that it often blurs the lines between right and wrong.

Bearing in mind these circumstances in which Kenya found itself, it is not surprising that none of the perpetrators came forth. There being no risk of perpetrators being discovered after the lapse of the amnesty window period meant that there was no incentive to come forward.

3.2.2.3.2 Reparations

Louise Arbour (former United Nations High Commissioner for Human Rights) stated that reparations are crucial to the dispensing of justice to victims of human rights abuses.²⁰² Accordingly, the UN includes reparations as part of its recovery tools for states emerging from conflict or from an authoritarian regime though the concept of reparations goes back to the *Chorzow Factory* case.²⁰³ In the context of transitional justice, as opposed to international law, reparations have been understood as 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'.²⁰⁴

In respect of Kenya, Part IV of the TJRC Act deals with reparations and rehabilitation and it allowed the TJRC to hear any application from any person who was harmed through the violation of their human rights.²⁰⁵ The TJRC was further empowered to make regulations that specifically dealt with the issue of reparations.²⁰⁶ To this end, Chapter Three of the TJRC Report is dedicated to the issue of reparations and it provides for an elaborate reparations scheme, including guidelines pertaining to the victim reparation fund. This chapter was guided by the UN's Basic Principles on the Right to a Remedy and Reparation which resulted

202 Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Rule of Law Tools for Post-Conflict States: Reparations Programmes' (2008: v) <http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf> (accessed 8 October 2016).

203 OHCHR (2008: 5).

204 OHCHR (2008:6).

205 Section 42 of the TJRC Act.

206 Section 42 (4) of the TJRC Act.

in TJRC coming up with reparations that included: compensation of victims, both individually and communally; rehabilitation of victims by providing medical and psychosocial assistance; memorialization; and exhumation, identification and reburial of victims amongst other measures.²⁰⁷

Regrettably, this part of the TJRC Report, just like has been the case with regard to amnesty, is yet to be implemented so that a proper assessment can be made as to the effectiveness of the reparations scheme recommended. Kenney notes that the termination of the ICC cases excludes victims of the 2007-2008 PEV from seeking reparations based on the conviction of the accused persons. However, she argues that a case may be made for the victims to be assisted by the ICC through the Trust Fund for Victims (TFV), which has already been established. In her view, this would be better than making an application to the ICC to determine Kenya's responsibility with respect to the 2007-2008 PEV only for purposes of obtaining an order for reparations.²⁰⁸

Though her arguments are valid, it cannot be gainsaid that there have been no efforts by the government towards making reparations. In 2015, President Uhuru Kenyatta directed the treasury to set up a restorative justice fund worth 10 Billion shillings and made an apology on behalf of the government for all past wrongs.²⁰⁹ The impact of these two actions may be debatable but it is irrefutable that they are a step in the right direction. The focus in terms of reparations remains on the monetary as opposed to the non-monetary types of reparations and as such, reparations as a mechanism of transitional justice in Kenya will be judged solely on the basis of the success or failure of the monetary reparations.

207 TJRC Report (2013: 121).

208 Kenney E. 'What Next, For the Victims of Kenya's Post-Election Violence?' <http://www.ijmonitor.org/2016/05/what-next-for-the-victims-of-kenyas-post-election-violence/> (accessed 8 October 2016).

209 Leftie P. 'PEV victims get Sh10bn fund' (*Daily Nation*, 26 March 2015) <http://www.nation.co.ke/news/PEV-victims-get-Sh10bn-fund/1056-2667062-11obmum/index.html> (accessed 8 October 2016).

3.2.2.3.4 Institutional Reforms

One of the issues highlighted in this paper is that there has been a systematic collapse of public institutions in Kenya. This is especially worrying in cases where the public institutions in the midst of violence are unable to carry out their duty accordingly, since they are perceived as the oppressor. The UN Secretary General, when discussing the need to reform public institutions was of the view that

‘Public institutions that helped perpetuate conflict or repressive rule must be transformed into institutions that sustain peace, protect human rights, and foster a culture of respect for the rule of law. By reforming or building fair and efficient public institutions, institutional reform enables post-conflict and transitional governments to prevent the recurrence of future human rights violations. Vetting members of the public service, particularly in the security and justice sectors, is critical to facilitating this transformation, by removing from office or refraining from recruiting those public employees personally responsible for gross violations of human rights. This may also include the disbandment of military, police or other security units that may have been systematically responsible for human rights violations’.²¹⁰

This aptly describes the situation in Kenya during the post-election violence where, rather than turning to the courts to settle the dispute, the citizenry turned to violence. Thus an overhaul of the public institutions was necessary.

Section 48 (2) (e) of the TJRC Act mandated the TJRC to include in its recommendations legal and administrative measures it believed to be necessary. To this end, the TJRC’s work may not have been meaningful or have a substantial impact because the TJRC’s mandate in this respect coincided with institutional reforms that were already underway in conformity with the 2010 Constitution.²¹¹ Having acknowledged its limitations in this regard, the commission made recommendations only in respect of individuals who were considered unfit to hold public office by virtue of allegations that they were responsible for human rights violations.²¹²

210 Guidance Note of the Secretary-General ‘United Nations Approach to Transitional Justice’ (2010: 9) https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (accessed 8 October 2016).

211 TJRC Report (2013: 5-6).

212 TJRC Report (2013: 6 para. 21).

One such case was in relation to massacres where members of the police force and armed forces were implicated.²¹³

It bears noting that the vetting of judges and magistrates began in early 2013 as part of the constitutional reforms. When the presidential election results were disputed in December 2013, unlike in 2007, the opposition leaders went to court because there were no fears that the judiciary had been compromised.²¹⁴ The absence of violence after the 2013 disputed presidential elections is a testament to the success of institutional reforms envisaged in the 2010 Constitution.

3.2.3 Implementation of the TJRC Recommendations

With the Report having been handed over to the President, the TJRC Act stipulated that the Commission should then have the report published immediately in the *Kenya Gazette* or any other publication deemed necessary.²¹⁵ Though the Act required the report to be published immediately, it took over a month for it to appear in the *Kenya Gazette*.²¹⁶ This was only the beginning of the endless delays that have plagued this report. Thereafter, the Minister for Justice and Constitutional Affairs was required to table the report before Parliament within 21 days of its publication.²¹⁷ Concurrently, the Minister would also put into effect the implementation mechanism that had been recommended by the TJRC as per Section 48 (2) (f) of the Act so that a monitoring process could begin.²¹⁸ This timeline that is provided for by law was disregarded because the petition to have the TJRC report tabled in Parliament was only taken to Parliament on 15 January 2016 by a member of parliament and not even the

213 TJRC Report (2013: 63).

214 Materu S. (2015:168-171).

215 Section 48 (3) of the TJRC Act.

216 Kenya Gazette Notice No. 856 Vol. CXV. No. 96 dated 28 June 2013
http://kenyalaw.org/kenya_gazette/gazette/notice/132119 (accessed 8 October 2016).

217 Section 48 (4) of the TJRC Act.

218 Section 49 of the TJRC Act.

designated minister.²¹⁹ Even with the petition to table the TJRC report having been tabled in Parliament, one cannot predict when the TJRC report itself will be tabled and implemented, though there has been considerable pressure on the government to do so.²²⁰ This pressure alone, and coming mainly from opposition leaders, does not seem to have prodded the government into action, especially in view of the fact that 2017 is an election year, meaning this issue does not rank highly on the government's agenda.



219 Public Petition dated 15 January 2016 <http://www.jfjustice.net/userfiles/file/Petition%20to%20parliament%20.pdf> (accessed 8 October 2016).

220 Agutu N. and Wekesa C. 'Honour Ntimama by debating TJRC report – Raila' (*The Star*, 13 September 2016) http://www.the-star.co.ke/news/2016/09/13/honour-ntimama-by-debating-tjrc-report-raila_c1419686 (accessed 8 October 2016).

CHAPTER FOUR: RECOMMENDATIONS AND CONCLUSIONS

4.1 RECOMMENDATIONS

4.1.1 Overview

Kenya's transitional justice process was a stand-alone occurrence with no ties to the laws or the various institutions in the country. The transitional justice process did not assign rights and responsibilities to the public, the three arms of government, the devolved governments, civil society or non-governmental organisations so that the various stakeholders could then check and balance each other with the aim of ensuring that transitional justice would be implemented. Furthermore, there was a failure in setting out a time frame and indicators against which the effectiveness of the implemented transitional justice mechanisms could be measured.

Chapter one began by introducing transitional justice in Kenya and providing the 2007-2008 PEV as a background. Chapter Two attempted to investigate the ideal circumstances for implementing of the transitional justice mechanisms. In the case of Kenya, it was concluded that the situation in 2007-2008 PEV did not conform to the traditional context of societies in transition. Whereas there was no regime change that preceded the 2007-2008 PEV, there were human rights violations which were ethnically driven. The study illustrated how the violation of human rights depended on the ethnic tribe the person belonged to, hence identifying the main problem in the 2007-2008 PEV as negative ethnicity. Looking at the contextual precedence set by Latin American countries and later followed by other countries undergoing change, ethnicity has not been dealt with and to this extent Kenya presents a unique situation.

On the whole, the transitional justice process failed in Kenya. Even if one were to dismantle the mechanisms and assess the effectiveness of each one of them, one would still arrive at the same conclusion, none of these mechanisms has had an impact on Kenya eight years later.

4.1.2 Recommendations on dealing with ethnicity/tribalism

The failure to address the issue of tribalism/negative ethnicity within the transitional justice process in Kenya means that one of the major objectives of the process, which is reconciliation, could not be achieved and to this extent transitional justice failed.

The phenomenon of tribalism in Kenya is sometimes also referred to as negative ethnicity and in most cases it is always used with a negative undertone. Tribalism comes from the word tribe which refers to a 'group of people of the same race and with the same customs, language, religion etc. living in a particular area and often led by a chief'.²²¹ In the Kenyan perspective, tribalism (the fact of belonging to a particular tribe) becomes a problem when it is used as a means of oppressing those persons who belong to a different tribe. Tribalism is not exclusive to the 2007-2008 PEV but it can be traced back to pre-independence Kenya in the run-up to the formation of the independence government.²²²

Robert Manners notes that as the British government began to plan its exit from Kenya, two parties that could take over government emerged. One was the Kenya African Democratic Union (KADU), which was the minority party and which was led by Ronald Ngala, Martin Shikuku among others. The other was the Kenya African National Union (KANU), which was the majority party led by Jomo Kenyatta, Tom Mboya amongst others. In April 1962, during the Kenya Constitutional Conference, KANU and KADU could not agree on the formation of a unitary government or a federal government after independence and this was the first time that tribalism reared its ugly head. Manners describes this phenomenon as follows:

'On the surface it appears that KADU's regional views are irreconcilable with KANU's demands for a strong central or unitary government. Thus, Mr. Peter Okondo, Parliamentary Secretary for Finance in the late KADU Government, announced for "Regionalism or death" before the Conference. And Mr. W. C. Murgor, KADU's former Parliamentary Secretary for Internal Security (!) told a rally before leaving for London: "If the British Government refuses to give us majimbo I shall tell my people to sharpen their spears and poison their arrows so that we shall fight when I come back . . . I'll lead the war myself. I therefore appeal to you to sharpen

221 Oxford Advanced Learner's Dictionary 6th Ed. (2000:1279).

222 Manners R. A. 'The New Tribalism in Kenya' (1962) <https://www.jstor.org/stable/pdf/4184349.pdf> (accessed 24 October 2016).

your spears." Mr. Martin Shikuku, KADU's Secretary, announced at the same meeting that the "Abaluhya, Kalenjin, Masai, and Coast people" would declare their independence if regionalism were not adopted at the London Conference. And he added: "If anyone opposes that move, or if people are found in those regions who oppose regionalism it will mean war." Similar declarations of principle and intent were made by other KADU leaders on various public occasions before the Conference'.²²³

The political rhetoric sketched above is still very much alive in Kenya today, with some political leaders, for example, vowing that there will be war if the opposition leader does not win elections in 2017.²²⁴ From the above it is clear that tribalism/negative ethnicity are deeply rooted in Kenya. Furthermore, in Kenya today, as in 1962, political leaders still use tribalism/negative ethnicity to gain political mileage.²²⁵ In 1962, the political leaders 'were guilty of inflaming their public and private speeches, tribal rivalries'²²⁶ without regard to the ensuing violence between different tribes that resulted in many deaths. As such, Kenya's 2007-2008 PEV must be looked at from the point of view of tribalism/negative ethnicity and the role that this phenomenon has played. From such an examination one would then need to determine whether transitional justice could adequately address the problem.

Kenya's transitional justice process began with the constitution of the Truth Justice and Reconciliation Commission as discussed in Chapter Three. However, as the name suggests, the purpose of the commission was to establish the truth, ensure justice and reconcile the parties to the conflict. Reconciliation here being very important to the overall success of the transitional justice process. The word reconciliation comes from the word 'reconcile' which means to bring 'an end to a disagreement and the start of a good relationship again'.²²⁷ The

223 Manners R. A. (1962: 8-9).

224 'We will BURN this country down if Raila does not win in 2017 – Midiwo warns Jubilee' (*Politica*, 25 October 2015) <http://www.politics.co.ke/news/we-will-burn-this-country-down-if-raila-does-not-win-in-2017-midiwo-warns-jubilee-2/> (accessed 5 December 2016); Mbaka J. 'Raila will not accept a rigged election, says opposition' (*The Star*, 5 December 2016) http://www.the-star.co.ke/news/2016/12/05/raila-will-not-accept-a-rigged-election-says-opposition_c1467625 (accessed 5 December 2016).

225 Ghai Y. 'Tribalism: Heart of Kenya politics?' (*The Star*, 27 August 2016) http://www.the-star.co.ke/news/2016/08/27/tribalism-heart-of-kenya-politics_c1408909 (accessed 24 October 2016).

226 Manners R. A. (1962: 10).

227 Oxford Advanced Learner's Dictionary 6th Ed. (2000:977).

implication here is that there exists a friendly relationship to begin with so that reconciliation then means to re-establish that friendly relationship after a disagreement or dispute. In the case of Kenya, the ultimate objective of the truth commission was to re-establish friendly relationships for the whole nation in order for Kenya to move forward.

The question then becomes, is reconciliation the best tool for conflict resolution where the parties to the conflict did not have a friendly relationship to begin with? It bears noting that the tribes found in Kenya today did not come together to form the nation willingly. Like most African countries, Kenya, as a state, is the result of different ethnic groups that were forcibly amalgamated during the colonial period to form a nation state.²²⁸ What is more, the colonial masters, in a bid to dominate the territories they administered, employed the divide-and-rule tactic that pitted one ethnic group against another, thus intensifying the mutual suspicion and distrust which exists even today.²²⁹ One can, therefore, conclude that there was never any relationship, let alone a friendly relationship, between the tribal/ethnic groups from the start.

Both Robert Manners and Yash Ghai attest to the fact that tribalism/negative ethnicity has been fuelled by suspicion and fear of other tribes other than one's own, rather than any political, philosophical or ideological difference.²³⁰ Thus the road to recovery post-2007-2008 PEV should not have been based on reconciliation. A plausible solution would have been to address the inter-tribal fears and suspicions upon which tribalism is based. Addressing and solving the inter-tribal fears and suspicions would create an opportunity for the different tribes to establish a relationship based on transparency, thus eliminating the issue of inter-tribal fears and suspicion that one tribe wants to dominate the other.

In the alternative, Kenya ought to have adopted the Territorial Self-Governance (TSG) approach to conflict resolution espoused by Stephan Wolff. This approach tries to incorporate sovereignty and at the same time ensure that a territory is answerable to the overall

228 Ocheje P. D. 'When Law Fails: A Theory of Self-Enforcing Anti-Corruption Legislation in Africa' (2011:247).

229 Ocheje P. D. (2011:247).

230 Manners R.A (1962:9) and Ghai Y. 'Tribalism: Heart of Kenya politics?' (The Star, 27 August 2016) http://www.the-star.co.ke/news/2016/08/27/tribalism-heart-of-kenya-politics_c1408909 (accessed 24 October 2016).

authority.²³¹ According to Wolff, ‘the one common feature of this approach is the transfer of certain powers from a central government to that of the (thereby created) self-governing entity, and the relatively independent exercise of these powers. Such arrangements then can incorporate executive, legislative, and judicial powers to varying degrees’.²³² Wolff argues that this approach is effective since it allows the ethnic group to regulate the affairs that concern its members²³³ thus reducing the risk of ethnic tensions on account of one group’s concerns not being addressed adequately. This is the approach that was adopted in the Balkan region.

Though it may seem as a radical step, the solution to tribalism/negative ethnicity of the magnitude that has been witnessed in Kenya could lie in the creation of sovereign regions. As it stands, Kenya’s current 47 counties are more or less demarcated along tribal/ethnic boundaries and as such each group occupies a specific county. With each county being a sovereign region, the issue of suspicion and fear that one tribe would try to dominate another tribe would be greatly minimised. In addition, this arrangement would provide a sense of equality since all regions would be treated equally.

Kenya’s Constitution provides for a semi-federal state through the creation of the 47 counties, however, the main resources of the country still remain under the control of the national government.²³⁴ This does little to quell fears and suspicion that some tribes are allocated a bigger share of the national resources than others. This was a problem in 1962 and remains a problem in Kenya today. Allowing each tribe to govern itself would ensure that the tribe is responsible for generating its own resources and eventually, the tribal leaders of these independent regions would realise what the leaders pushing for federalism realised in 1962 that ‘no viable economic structure could be built on *majimbo* (Swahili translation of

231 Wolff S. ‘Approaches to Conflict Resolution in Divided Societies: The Many Uses of Territorial Self-Governance’ (2010: 6, 8) http://dc-10751-711240033.eu-west-1.elb.amazonaws.com/sites/default/files/page-files/EPP005_0.pdf (accessed 24 October 2016).

232 Wolff S. (2010: 6, 8).

233 Wolff S. (2010:8).

234 Article 186 as read with the Fourth Schedule of the Constitution of Kenya.

federalism)'.²³⁵ Moving forward, any cohabitation of two or more tribes within the same region would be based on recognition that each tribe cannot survive on its own.

4.1.3 Recommendations in respect of the truth justice and reconciliation commission

Did the Truth Justice and Reconciliation process achieve the truth? Did it achieve justice? Was there reconciliation? The answer is an emphatic no. On the issue of the truth, one writer captures his expectations aptly stating as follows:

'I was convinced a truth, justice and reconciliation process, even one half-effective, would allow everyone's 'truth' to be put out there; to be challenged and either accepted or discarded. I believed such a platform would give everyone with something to say about issues that plagued our nation an opportunity to speak their 'truth'; be heard; and be challenged. I also believed that such a process would allow Kenyans to weigh their own deeply held opinions against those of other Kenyans, until the factual position on each respective issue was arrived at and a universally accepted common truth developed'.²³⁶

Unfortunately, in its final report the TJRC failed to publish the truth as it had been received from all those persons who appeared before the commission. The publication of such truths would have allowed for discussion to be had across the country in order to arrive at 'a universally accepted common truth' for all Kenyans.

In respect of justice, if one were to use both the international and domestic prosecutions as a yardstick to measure the success or failure, then the transitional justice process failed to deliver justice to the victims. It would be disingenuous to blame this failure on the transitional justice process, bearing in mind that public institutions like the police, the ODPP and the judiciary also played a role that resulted in no prosecutions. Nevertheless, the TJRC had recommended the prosecution of hundreds of alleged perpetrators of human rights violations, but it remains to be seen what the police, the ODPP and the judiciary will do with

235 Manners R. A. (1962:9).

236 Wambugu N. 'The TJRC Report Is a Poisoned Chalice' (*The Star*, 4 August 2014) http://www.the-star.co.ke/news/2014/08/04/the-tjrc-report-is-a-poisoned-chalice_c981549 (accessed 24 October 2016).

these cases once the final TJRC report is adopted by Parliament. This could be the saving grace in as far as dispensing justice is concerned.

Having previously discussed the ethnic tension and conflict that continues to flare up in Kenya to date, and especially in light of the 2017 general elections, it remains to be seen whether Kenyans will unite. Reconciliation, in the absence of friendly inter-tribal relationships, truth and justice, seems far-fetched.

In the end, until the final report of TJRC is tabled in Parliament and adopted for purposes of implementation, the transitional justice process in Kenya will remain exactly that, namely, a report. It is regrettable that the drafters of the TJRC Act failed to provide for the situation that currently faces Kenya wherein the final report of the TJRC is held at ransom by the government. The Minister of Justice, who is now the Attorney-General,²³⁷ has failed to table the TJRC report before Parliament and to give effect to the implementation of the report so as to set in motion the monitoring mechanism.²³⁸ The Attorney-General, having failed to carry out his functions as provided for in the TJRC Act, was in breach of his constitutional duty as provided for under Article 156 (4) (c) and 156 (6) of the Constitution.²³⁹ Thus the public, civil society and other stakeholders of the transitional justice process ought to have filed a constitutional petition against the Attorney-General, seeking to have the court compel him to perform his legal duty. Only time will tell whether the final report will ever see the light of day.

The beauty of transitional justice is that states have the prospect of learning from the experiences of other states. Kenya can borrow a leaf from neighbouring Uganda, which is in the process of adopting a national transitional justice policy, the first of its kind in the world.²⁴⁰ The Ugandan policy takes a holistic approach to transitional justice and some of the tactics

237 Executive Order No. 2 of 2013 http://www.statelaw.go.ke/?page_id=58 (accessed 24 October 2016).

238 Section 49 (1) of the TJRC Act.

239 '156 (4) (c) shall perform any other functions conferred on the office by an Act of Parliament or by the President....156 (6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest'.

240 Otim M. and Kihika K. S. 'On the Path to Vindicate Victims' Rights in Uganda: Reflections on the Transitional Justice Process since Juba' (2015) https://www.ictj.org/sites/default/files/ICTJ-Briefing-Uganda-TJProcess-2015_0.pdf (accessed 4 December 2016).

envisaged are worthy of mention. First, the policy seeks to set up a body charged with overseeing the implementation of the transitional justice mechanisms.²⁴¹ Secondly, the drafters of the policy probably had regard to the fact that transitional justice process cannot be carried out single-handedly by government. As such, the policy creates a network of links between the various actors in government, the church, civil society and non-governmental organisations all of whom are assigned tasks.²⁴² Interestingly, all of the tasks assigned to the various stakeholders are all geared towards ensuring the effective implementation of transitional justice.

Thirdly, the policy bridges the gap between existing laws in Uganda and the transitional justice process. In this respect, the policy incorporates some of the provisions of the Constitution of the Republic of Uganda as well as regional and international instruments which have been ratified by Uganda in order to ensure that the guiding principles of the transitional justice mechanisms are rooted in acceptable international and national standards and best practices.²⁴³ Fourthly, the policy envisages the setting up of a monitoring and evaluation mechanism which from the onset will set out the indicators against which the mechanisms of transitional justice process will be measured over the course of 10 years.²⁴⁴ Lastly, the policy proposes to create intra-linkages between the five transitional justice mechanisms²⁴⁵ to ensure internal cohesion of the process and further facilitate the smooth implementation of each of the mechanisms.

241 The National Transitional Justice Working Group (hereinafter referred to as “NTJWG”) ‘National Transitional Justice Policy’ (2014:4) <https://beyondthehague.files.wordpress.com/2014/05/draft-tj-policy.docx> (accessed 4 December 2016).

242 NTJWG (2014:28-32).

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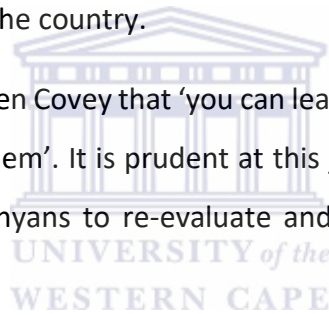
244 NTJWG (2014:27-28).

245 NTJWG (2014:32-34).

4.2 Conclusion

Kenya faced a unique situation in 2007-2008 and this provided an opportunity to deal with one of the biggest challenges that plagues the country, namely, tribalism/negative ethnicity once and for all. By failing to address this challenge and by extension, meet the expectations of Kenyans, the country finds itself on the precipice of another post-election episode of violence, despite transitional justice having been at work for eight years. This necessitates transitional justice scholars and stakeholders to re-evaluate the transitional justice process and mechanisms and perhaps include other non-traditional mechanisms such as territorial self-governance which could prove useful to societies plagued by ethnic conflict that do not fit the mould of typical transitioning societies. Such a radical step would then create an environment where the tribes/ethnic groups having been separated would then begin to see the value in each other, which could then foster friendly relations amongst them and eventually lead to unification of the country.

There is a famous quote by Stephen Covey that 'you can learn great things from your mistakes when you aren't busy denying them'. It is prudent at this juncture – on the precipice of the 2017 general elections – for Kenyans to re-evaluate and overhaul the transitional justice process.



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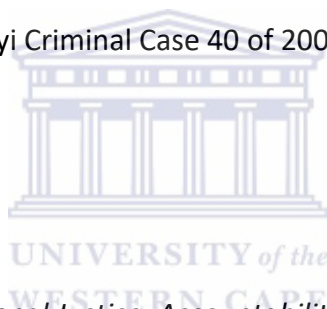
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