

Monitoring Report of the Truth Justice and Reconciliation Commission

(April 2008-June 2010)

A Case of Concealing Truth to Reward Impunity



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About International Center for Policy and Conflict (ICPC)

The International Center for Policy and Conflict (ICPC) is a non-profit and non-partisan organisation founded in 2005 to create a platform to foster democratic, peaceful, secure and just societies in Africa and globally. The Center is registered in Kenya under the Trustees (Perpetual Succession) Act Chapter 164.

Institutional Objective

The International Center for Policy and Conflict reflects and engages in public policy and law making dialogues, research and analysis as well as advocacy and capacity building on the broad realms of transitional justice, human security, conflict resolution and gender justice in order to prevent conflict recurrence; promote accountability and equality; and deepen culture of justice and respect for human rights and democracy. The Center is meant to establish, promote and build a sustainable human development; and democratic human rights adhering states.

Executive Summary

This report is the first analysis of the Truth Justice and Reconciliation Commission (TJRC) of Kenya which was created on November 2008 after passage and assenting into law of the enabling Truth Justice and Reconciliation Bill. Commissioners were appointed on 3rd of August 2009. It considers the Commission's establishment and its Terms of Reference (TOR) implementation.

Pursuant to the Truth Justice and Reconciliation (TJR) Act 2008,) the Truth Justice and Reconciliation Commission (TJRC) was bound to cause sensitization and education to the public on its purpose, mandate and objectives. Also the Commission was expected to enact such procedures and mechanisms necessary in observation and guarantee of integrity, credibility and effectiveness of its work. This forms the core pillar of this report.

Since its establishment almost one year ago, the Truth Justice and Reconciliation Commission (TJRC) is yet to fully commence its operations. It suffers from underfunding and limited political support. Critically, the prevailing credibility crisis renders it an institutional illegitimacy. Furthermore, several flaws in the TJRC Act have the potential to greatly inhibit the realization of the Commission's mandate.

These flaws include the provisions giving the TJRC authority to recommend amnesty for persons who make full disclosure of facts relating to acts associated with gross human rights violations and economic crimes¹; and the provision of *use immunity* which will protect all persons who appear before the Commission from civil or criminal responsibility in similar matters².

The civil society coalition, Multisectoral Task Force on Transitional Justice (MSTFTJ)³ right from the beginning of the process called for the best procedures and legal guarantees to ensure effective and well safeguarded Truth Justice and Reconciliation Commission (TJRC).

As a result the TJRC law, as passed by Parliament and signed by the President, is a highly flawed framework creating a truth-seeking process with limited chance of carrying out and facilitating a genuine national agenda on addressing the legacy of the past. Its centerpiece is a controversial amnesty recommending chapter.

¹ Section 5(f) of the TJRC Act, 2008

² Section 24(3) of the TJRC Act, 2008

³ The Coalition was formed on March 2008 bringing together the human rights groups and national human rights statutory body, Kenya National Commission on Human Rights (KNCHR). International Center for Policy and Conflict is instrumental in the creation, convening and coordinating the Task Force. Key members are: Kenya Human Rights Commission (KHRC), COVAW, International Commission of Jurists-Kenya (ICJ), Urgent Action Fund (UAF), (CREAW), Centre for Multiparty Democracy (CMD), Kenya Land Alliance and Mazingira Institute.

The experience in many transitional contexts demonstrates that “perhaps more than any other single factor, the persons selected to manage a truth commission will determine its ultimate success or failure”.⁴ This is because, the Commissioners are the public image of the Commission and upon whom the victims look up to for an impartial, fair and open process of truth-seeking.

As a strategy of addressing past human rights and post-election violence serious crimes respectively and simultaneously after 2007 bungled Presidential elections and subsequent vicious violence, two transitional justice mechanisms were agreed. The Commission of Inquiry into Post-Election Violence (CIPEV) to investigate and recommend the appropriate measures to be taken in bringing to justice those behind the post-election violence. It recommended formation of the Special tribunal for Kenya, and in case of default, International Criminal Court (ICC) takes up the matter. The Tribunal and ICC are the core institutional means of addressing impunity.

The other transitional justice mechanism was formation of credible and effective Truth, Justice and Reconciliation Commission (TJRC) to deal with the past human rights violations crimes. The TJRC is mandated to create an impartial, historical record of the past human rights violations; address impunity; respond to the needs of victims; promote healing and reconciliation; and prevent a repetition of the violations and abuses suffered⁵. Both mechanisms (i.e. Tribunal and TJRC) were hybrid, each with an international as well as a national component.

The whole concept of truth, justice and reconciliation in Kenya was mis-conceptualized right from the start leading to very limited understanding of the actual purpose of a Truth Commission. The ill-advised timing, sequencing, composition and limited victims’ and civil society consultations have seen the legitimacy and credibility of the TJRC featuring prominently. The government of Kenya made a further grave mistake of selling the Commission as one to handle post-election violence⁶, and consequently, this has clogged the whole process and denies its sentimental value.

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

⁴ Freeman, Mark and Priscilla Hayner. “Truth-Telling” In *Reconciliation after Violent Conflict: A Handbook*. Stockholm: Institute for Democracy and Electoral Assistance, 2003.

⁵ See Truth, Justice and Reconciliation Act, 2008

⁶ Cabinet decision and communication of July 31, 2010

Legally stated *res ip loquitar*, there is no commitment by the Government and the political elite to ensure that there is real healing and reconciliation in Kenya. The former Secretary of National Cohesion-Dr. Kithure Kindiki- resigned merely after 100 days in office citing frustrations and lack of cooperation to the reconciliation process. Since then there has not been a substantive holder of that office.

This report reflects the summary of the issues raised by victims of past human rights violations and the substantial credibility gap of the TJRC. It captures victims' expectations, fears and recommendations .Further the report captures the internal and external observations during the initial TJRC outreach sessions.

This report is a continuation of the International Center for Policy and Conflict (ICPC) monitor and advocacy on the full implementation of the Kenya mediation agreements of 2008 under its Transitional Justice Programme which have truth seeking as one of its focus areas. The monitoring aims at providing high level insights and policy directions on the operations of the TJRC and sharing the information with TJRC, Government, civil society organizations, Media and development partners in a bid to ensure efficient, credible, legitimate and effective TJRC for Kenya.

The methodology used in preparing this report include direct engagement and observation of the TJRC process, collecting victims' views⁷, tracking media reports and analysis of the reports flowing from workshops and public forums organized by different human rights groups on the Truth Justice and Reconciliation Commission(TJRC). The report covers the period April 2009 to June 2010.

⁷ ICPC in collaboration with MultiSectoral Task Force on Transitional Justice convened two victims' conventions in October 2008 and October 2009. This is in addition to several other meetings convened by other human rights groups that ICPC acted as resource.

Key Recent Events Surrounding Truth Justice and Reconciliation Commission (April 2009-June 2010)

Implementation of Truth Justice and Reconciliation Commission remains an important step towards ensuring accountability for the past human rights violations, land injustices economic crimes and corruption and guarantees that the victims of those violations know the truth, obtain justice and are provided with full reparation.

Soon after the composition of TJRC, the commission was met with different reactions from Kenyans. More questions were being raised on the timing, law and the composition of the commissioners. Most Kenyans felt that the process leading to the setting up of the TJRC lacked consultations and public input and that the appointment process of the Commissioners in exclusive and failed test of transparency. For, instance the Chair Amb. Bethuel Kiplagat credibility was not beyond reproach and that he had a human rights record to defend.

April 20, 2009, when the selection panel was conducting interviews, ICPC on behalf of the Multisectoral Task Force on Transitional Justice issued a public statement calling on the panel to ensure full public participation in the selection. The panel dismissed the call.

On May 30th, 2009, two days after the Selection Panel presented its report and potential 15 candidates to the Parliamentary Committee International Center for Policy and Conflict issued a public statement urging the Committee to allow public scrutiny of the candidates and not reduce the appointment of the Commissioners into a political trade off exercise.

TJRC Commissioners appointed on August 3, 2009.

August 20, 2009 human rights defenders and a group of victims file a legal suit against TJRC and its Chair Amb. Bethuel Kiplagat

On September 2009, TJRC held an induction workshop. Civil society under the banner of the Multisectoral Task Force Transitional Justice presented a detailed memorandum all issues they wanted addressed upfront before the Commission can proceed. TJRC promised to make a comprehensive response to those issues but update it has never honoured that promise.

On 19th January, Religious leaders asked the government to disband TJRC if it has no intentions of making its proceedings and findings public. Kenya Muslim National Advisory Council said it would be a waste of

public funds for TJRC to gather evidence from victims of historical injustices only for its work to be stored in government offices.

On 31st January 2010 Civil Society Organizations (CSOs- Led by International Center for Policy and Conflict and Center for Multi-party Democracy), held a press conference calling for the resignation of TJRC chairman Amb. Bethuel Kiplagat. Their argument was based on the provisions of the Article 10 (6) (a) (b) (c) of the TJRC Act 2008.

ON Feb 4th 2010 Elders representing Lamu residents walked on the TJRC after telling the team that they could not give views until the Indemnity Act was repealed. This was third time TJRC was being rejected by public.

On Feb 05th 2010 Kiplagat whose past has cast the TJRC in the eye of a storm threatening to derail its work came out fighting claiming that he was part and parcel of Kenyans he was in fact for multiparty democracy and was not a defended of Moi regime.

On February 7,2010, Civil Society Organizations held a second press conference where they tabled evidence against the TJRC Chair and what the TJR Act 2008 says about who can serve in the Commission. Virtually all the evidence leveled against the Chair has been in public for long. They argued that; the issues at hand were not generalities but specific. Also the debate was not about forming a tribunal to investigate the competence, misconduct or failure to perform his duties by Amb Kiplagat but the crux of matter was that as per the evidence and what the TJR Act stipulates Amb Kiplagat must at one be called upon to prove a point at the TJRC. This means he has direct interest with the outcome of the TJRC work. He cannot therefore serve in whatever capacity at the TJRC and the TJR Act clearly says so.

On Feb 7th 2010, the commission was once again in the news over the hiring of staff. Questions were being raised over how positions advertised in the press were filled when interviews were not carried out. Pressure continued to mount on the TJRC chair to resign with lobby groups threatening to opt for mass action to oust him.

Later On February 9th 2010, International Center for Policy and Conflict together with other CSOs wrote a letter to Amb. Bethuel Kiplagat and copied it to all commissioners, affirming their support of the commission's work but only after his resignation and further attached all the documents that held evidence against him.

TJRC commissioners said they will go on with their work after ruling that the indemnity act does not interfere with their mandated of investigating all human rights violations committed throughout the country, they supported the amendment of the act on grounds that it denied those who lost loved ones to shift a war avenues of seeking justice,.

Though Bethuel Kiplagat has remained firm that he won't resign, so many organizations have come up asking for his resignation. Some victims have also gone to court to challenge his credibility and others vowing not to appear before the commission if he remains to be the chair.

On Feb 10th 2010 Justice Minister Mutula Kilonzo defended the TJRC dismissing the calls for his resignation as self defeating since some of the NGOs leading the onslaught were part of the Selection Panel that appointed the commissioners. However, documented evidence shows a segment of the civil society called for transparent and open process of nominating the Commissioners. This was rejected by the Panel saying it did not have time and that no such process was provided in the Act.

Feb 11th 2010 a case seeking to stop the TJRC from doing its work failed take off and instead a new hearing date was given after only one of the party showed up in the Nairobi High Courts

On the 15th of February, TJRC Chair Bethuel Kiplagat during the swearing in of TJRC Chief Executive Officer reiterated that he will not resign as demanded. It was also reported that Parliament was considering disbanding the entire team to end the dissent over its composition. This is one of the three options that were under consideration by the Parliamentary Committee on Justice and Legal Affairs.

On the 25th Feb, 2010 ten former Truth chiefs led by Archbishop Tutu of South Africa across the world were united in calling upon the TJRC chair to resign. The calls came as Kiplagat met the Parliamentary Committee Justice and Legal Affairs amid increasing pressure for him to quit.

On Feb 27th 2010 TJCR Vice- chair Betty Murungi offers to resign if the credibility crisis persist. She said she was awaiting the deliberations of parliamentary justice and legal affairs committee on the issue before taking action.

March 5th 2010 TJRC chair softens stand and calls for forgiveness if found to have done any wrong

March 7th 2010 former President Moi came to Kiplagat defence saying he had a good track record.

On the 3rd of March, 2010 cabinet minister Sally Kosgei defended Kiplagat alleging that there was a smear campaign against him. She claimed Kiplagat has always worked for peace. The civil society in the meantime renewed their call on Kiplagat urging him to resign at a public forum.

On 8th March, 2010 Justice Minister Mutula Kilonzo said the TJRC has the legal powers to make its chairman Bethuel Kiplagat clear himself in a public hearing before his fellow commissioners. Mutula said the TJRC can form an inquiry committee to give Kiplagat a fair and open hearing about his past.

March 10th 2010 saw civil rights groups producing documents they claim revealed that TJRC Chair Bethuel Kiplagat mismanaged the Somalia peace process. Kenyans for Justice and Development officials presented the documents to the Parliamentary Public Accounts Committee chair Dr. Bony Khalwale.

11st March former Anglican Church of Kenya Archbishop David Gitari joined several MPs in defending Kiplagat even as civil rights groups called for a freeze on the commission's activities until he leaves. Gitari termed the calls unfortunate.

On March 14th 2010, TJRC commissioners were said to plan a retreat where they were expected to ask Kiplagat to resign.

On March 27th, 2010 Two TJRC commissioners Betty Murungi and Professor Ronald Slye wrote an article⁸ask Kiplagat to resign over three allegations linking to him to past injustices.

On March 29, 2010, Deputy Chair of the Commission, Betty Murungi resigned as the vice chair and on 21st April quit the commission by sending her resignation to President Mwai Kibaki and informed the embattled chairman. In her letters Ms Murungi said she was resigning pursuant to Section 16(b) of the Truth Justice and Reconciliation Commission Act, 2008.

On 30th March 2010, an opinion poll released by revealed that a majority of Kenya were against TJRC chair Kiplagat continued stay. A majority were not aware of the purpose of the commission.

On 31st March, 2010 TJRC appointed a new vice chair, Ms Tecla Namachanja to replace Ms Betty Murungi after her resignation. The move came as embattled commission chairman maintained that he was still in charge and that "internal processes" would resolve the problems dogging the commission.

⁸ Sunday Nation , March 27th , 2010

On 13th April 2010, TJRC chairman Bethuel Kiplagat lost the support of the entire commission, putting in jeopardy his tenure. The commissioners wrote to the Ministry of Justice informing it that Mr. Kiplagat had agreed to step aside and asked Justice and Constitutional Affairs Minister Mutula Kilonzo to ask the Chief Justice to form a tribunal to investigate the chairman. However, later the Chair went against his word and in a press conference said that he was not going to step aside.

Disturbed by the failure of the Truth, Justice and Reconciliation Commission (TJRC) to discharge its duties, the Kenyan government has now initiated the process of disbanding the body.

On 14th April, 2010 the Law Society of Kenya asked Bethuel Kiplagat to reign as head of the TJRC for it to run smoothly.

Justice, National Cohesion and Constitutional Affairs Minister, Mutula Kilonzo, under whose docket the TJRC falls, said on 15th April 2010 that he had asked the Parliamentary Committee on Legal Affairs to work on modalities of disbanding the Commission. He said the entire Commission had failed to carry out its mandate of addressing long-term issues stipulated in Agenda Four of the mediation talks, making the Commissioners irrelevant. Gichugu MP Martha Karua backed calls to call for disbandment of TJRC saying the commission had lost credibility when it started internal wars that led to commissioners calling for the formation of the a tribunal to investigate allegations against their chairman

On 16th April, 2010 eight members of TJRC formerly petitioned Chief Justice Gicheru to name the tribunal to look into their chairman's conduct.

On 19th April, 2010 the ministry of justice said sh96 million had already been spent by the truth commission, which is rocked by the wrangles of chairmanship. Though the commission work has started, the commissioners are distracted by protracted debates over the suitability of Mr. Kiplagat to lead.

On 21st April, 2010 a house team was set to discuss the fate of TJRC. The chairman of Parliamentary Committee on Administration of Justice and legal Affairs said the commission credibility was now questionable after allegation of misconduct by its chair Bethuel Kiplagat

On May 2010, while holding a consultative meeting with the international community and development partners based in Nairobi the Prime Minister Raila Odinga admitted that government knew there were problems with the TJRC and promised an action. This far no action has come along

May 2010, TJRC visits Mt. Elgon holding the public hearings and claiming that it was recruiting and training statement-takers.

June 27th, 2010 TJRC (local press) published the Rules of Procedure. These rules were drafted by the Commission without consultations.

ON June 2010, a private citizen filed a suit in Kisii High Court challenge TJRC and its mandate.

Background

After political vanquish of 40 years of KANU repressive rule on December 2002, a series of efforts have been made to dismantling the corrosive infrastructure of impunity and break with the ruinous past. These efforts have offered a great opportunity to advance the democratization, rule of law and human rights in Kenya. However, it has proved daunting task that would require more investment, coordination and strengthened civic empowerment if the dividends of consolidating the durable and just peace are to be achieved. The country seems internally secure when looked from outside. But the reality on the ground shows otherwise.

The removal of KANU from power in 2002 through the ballot set in high tempo on the political agenda of the consolidation of a transitional justice project in Kenya most notably with the formation of the Makau Mutua task force on a Truth, justice and reconciliation process in Kenya and the commencement of the Constitutional Review Conference at Bomas, all in 2003. The Makau Mutua task force returned a verdict on 26th August, 2003 that 90% of Kenyans wanted a Truth, Justice and Reconciliation process that would offer Kenyans an opportunity to deal with an ugly past of impunity evidenced in the reported cases of egregious human rights violations and economic plunder under the watch of the previous administrations; and to offer Kenyans an opportunities to reconcile and build democratic institutions of governance under the rule of law.

When the report was received by the President, it was shelved with abandon and would have remained stuck in the shelves to date but the ogre of the 2007/8 post election violence thrust the question of impunity in Kenya to the fore once again. It now had been confirmed beyond doubt that it is because impunity had remained intact that the post election violence was perpetrated without fear for consequences on the part of the perpetrators. The agenda of attacking the culture of impunity was once again returned to the table under Agenda Item Number 4 of the National Dialogue and Reconciliation Agreement (the National Accord) where it was scheduled for address.

Under the National Accord framework there are various transitional justice mechanisms that Kenya opted for to deal with impunity and give herself a chance to undertake state reconstruction. They include but not limited to prosecutions; legal, policy and constitutional reforms; and the truth commission.

The Prosecutions were to be undertaken through the establishment of the a Special Tribunal for Kenya and International Criminal Court (ICC) process as was recommended in the Commission of inquiry into the Post election violence (CIPEV) (commonly known as the Waki) report⁹. While the ICC process seems to be on

⁹ CIPEV pages 473- paragraphs 6-13

track and continues to invite cautious optimism in Kenya, the Special tribunal mechanism seems to have been trapped in the murky waters of politics for now.

The overarching goal of transitional justice is to confront legacies of abuse in a broad manner, the purpose of ensuring accountability for past crimes and preventing new ones from recurring. The objectives of transitional justice include addressing and attempting to heal divisions in society that arise as a result of human rights violations; closing and healing the wounds of individuals and the society of the past; providing legal redress for victims and holding perpetrators accountable; creating an accurate historical record for society; restoring the rule of law; reforming institutions to promote democratization human rights; ensuring that human rights violations are not repeated; and promoting coexistence and sustainable peace¹⁰. A truth commission, as a mechanism of transitional justice, form the core pillar of this agenda of the addressing the legacies of the past.

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

The real problems behind the TJRC process in Kenya originate from lack of proper understanding of the purpose of the TJRC and contextualizing the political conditions under which the TJRC was being established. Kenya is not in a transition moment but rather on continuity.

Kenya is establishing a truth commission under the same repressive constitutional and legal regime; the entire infrastructure of impunity responsible for the human rights violations and corruption is still intact; lack of understand of the significance of timing and sequencing of the processes and the purpose of the TJRC. The government of Kenya fails to acknowledge that TJRC is not a stand alone process. TJRC lacks clarity on its relationship with other transitional justice processes. Yet it is so central.

The passage of the TJRC Act (2008) failed to factor in all these core issues. These are key issues civil society kept raising. This explains why the TJRC that has been set up have fundamental flaws that needed to be treated to ensure that the Commission met internationally acceptable standards for a credible, competent and impartial commission.

Currently, The TJRC is rocked by credibility questions apart from the technical process, product and impact concerns that arise from the fact that witness protection is tenuous, mandate overload, limited capacity and

¹⁰ A summary from Transitional Justice in Kenya: A tool Kit for Training and engagement by ICPC,KHRC, ICJ, (2010),

poor definitions of “perpetrators”, “reparations”, and other decisive terms all make the TJRC journey too risky to take without properly fixing the faults that threaten the process.

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

Current Situation

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

The issue of selection of Commissioners and the legal technicalities that can be an obstacle to the work of the commission has featured prominently in the past and recent past. It should be noted that the truth commission is a unique opportunity for Kenya hence the attention it has attracted locally and internationally. This calls for concerted efforts to correct any weak points in its operationalization as its failure can have a very serious implication for the country’s future peace, stability and development.

The Commission, which consists of up to seven commissioners¹¹, will have two years, with a possibility of a twelvemonth extension, to complete its work. On the completion of its work, it will provide the Government with a report of its findings, and make recommendations as to reconciliation, prosecutions, amnesty and reparations.

In the selection criteria and composition the selection panel set out that the gender consideration was paramount and diversity of the expertise in the commission. It was a requirement that at-least two commissioners be lawyers but not to exceed five. The proposal was to have seven commissioners where three would be foreigners recommended by the Panel of Eminent African Personalities and the rest be Kenyans of integrity chosen through a consultative process.

The TJRC was to examine what happened during the period proposed in the agreement and the context in which it occurred. It will reach out to victims, perpetrators, and witnesses of human rights violations and try

¹¹ Four Kenyans and three foreigners. The Vice-Betty Murungi resigned from her position as Vice-Chair and Commissioner.

to understand all of their points of view. It will take statements from them, hold public hearings, and produce a report on the atrocities and violations of human rights and recommend ways to deal with their effects and prevent them from recurring

This monitoring report has concretely observed and concluded that while formation of a TJRC is a necessary pre-condition to break with the past, it is going to be very difficult for the current TJRC to execute its mandate and achieve its intended objectives. TJRC has completely failed to conduct any meaningful and purposeful public outreach and awareness to the victims and generally the public in order to cause an understanding of the real intention, purpose and focus of the TJRC.

It has operated without rules of procedure publicly debated, adopted and gazetted. There are no victims and witnesses support and protection mechanisms that have been established jeopardizing the exercise and those engaging with it. Further no prior statement taking and analysis to identify the window cases and prioritize the public hearings based on these crucial window cases, and no public known and promulgated operational workplan.

Further this report observes that effective victims, media and civil society engagement have been very limited; fair procedures and regulations such as an independent data and information collection (research and investigations) to facilitate identification of the widow cases completely lacks.

There is no laid down procedure of handling and executing conditional amnesty and reparations as provided for in the TJR Act of 2008. So far the Commission has not in anyway engaged or summoned a perpetrator of any crime under the TJRC investigation mandate. This has rendered the whole exercise of the parading “victims” before a widow dressing of impunity making it a human rights abusers play stage.

The Chair is on record stating that the Commission would administer oath of secrecy to avoid leaking of information to the staff. This does not amount to securing information and storage it. Further the Commission continues to receive very limited local and international support. It suffers from faulty legal framework and minimal goodwill and non-existent operational and financial independence.

On this basis, the TJRC has not yet delivered substantive transitional justice benefits, and its public hearings have seriously compromised the goals of truth, justice and reconciliation. Many of the Commission’s failings to date have their origin in the conceptual, motivation and methods of its establishment, as well as fundamental weaknesses in the implementation of the Commission’s Terms of Reference. The real problems behind the TJRC process in Kenya originate from lack of proper understanding of the purpose of the TJRC and contextualizing the political conditions under which the TJRC was being established. These pre-existing

problems were compounded by the poor design and inadequate consultations with victims and public in its formation. It lacks institutional legitimacy.

OVERVIEW TRUTH JUSTICE AND RECONCILIATION COMMISSION

Truth commissions' across the world have been adopted to confront legacies of the past atrocities. This process has been successful in a number of countries and gaining legitimacy with time though there has been criticism that it is an escape avenue to face the realities of the missions and commissions by the mighty in the society.

The clamor for establishment of a truth commission to address past injustices in the history of Kenya gained momentum towards the sunset of Moi era with Narc government pledge that it would set up a truth commission upon ascend to power in 2002 though this never came to be. Back in 2003, the then newly-elected National Rainbow Coalition (NARC) government expressed support for a Truth, Justice and Reconciliation Commission (TJRC) to inquire into historical injustices, massive or systemic human rights violations, economic crimes and the illegal or irregular acquisition of land occasioned by the Kenya African National Union (KANU).

It appointed a Task Force on the Establishment of a TJRC, chaired by Professor Makau Mutua, to explore the possibility of the said Commission. The Task Force's mandate was to find out if a truth commission was necessary for Kenya, and, if so, to make recommendations on the type of truth commission that ought to be established. The Task Force returned public support of 90% and recommended the immediate establishment of a TJRC before June 2004, with a specific mandate, powers and functions. But, its recommendations were never implemented.

However, the need for a TJRC re-emerged following the violence triggered by the 2007 disputed presidential elections. The Kenya National Dialogue and Reconciliation Committee (KNDRC), led by former United Nations (UN) Secretary-General Kofi Annan and the Panel of Eminent African Personalities, noted that the post-elections violence exposed decades-old divisions over power and resources. The KNDRC agreed on a number of reforms – key among them being the creation of a truth, justice and reconciliation commission (TJRC) to promote national reconciliation, justice and unity.

The NARC government in its wisdom or lack of it failed to implement or even set a triggering system to set up the Commission and it is only after the 2007 Post Election Violence (PEV) that the idea of establishing

the commission was reignited by all the competing parties and it became inevitable for the Kenya National Dialogue and Reconciliation Panel to consider the viability of the commission.

The post-election violence precipitated a disastrous conflict in the country with massive losses of lives, destruction of properties and displacement of hundreds of thousands of Kenyans from their homes. His Excellency Koffi Annan acted as the chief mediator in addressing the post-election violence which culminated in a ground breaking agreement on 28th February, 2008, famously referred to as the “National Accord¹²”, which amongst other issues focused on institutional reforms and address of historical injustices. On 4th March, 2008, the mediation panel¹³ a session chaired by H.E. Oluyemi Adenji¹⁴ signed an agreement to establish a Truth, Justice and Reconciliation Commission with temporal jurisdiction of between December 12th, 1963 and February 28th, 2008 with caveat to unearth the antecedents.

The agreement set out general parameters to investigate violation of human rights whether committed by the state, groups or individuals be it economic crimes and others with a caution for no blanket amnesty specifically for perpetrators of international crimes including crimes against humanity, war crimes and genocide and persons who bear greatest responsibility for crimes to be subject of the commission mandate.

Pursuant to this agreement, the Government of Kenya, on May 9th, 2008 published a bill the Truth Justice and Reconciliation Commission Bill, 2008 in a special *Gazette notice*, No. 23 – to establish and define the mandate, objectives and processes of the Commission and provide for the process of truth, justice and reconciliation.

The truth, justice and reconciliation commission was to be created through an Act of Parliament. The Commission is expected to inquire into human rights violations, including those committed by the state, groups, or individuals and major economic crimes, in particular grand corruption, historical land injustices, and the illegal or irregular acquisition of land, and other historical injustices.

The Civil Society Organizations and the Kenya National Commission on Human Rights working under a Multi-Sectoral Taskforce on Truth Justice and Reconciliation process ¹⁵has been collaborating to ensure that the truth, justice and reconciliation process is carried out in a manner beneficial to Kenyans and posterity; and that the process is not lost through political interference and interests, and that Kenyans are well

¹² It sets out the principles of the power sharing arrangement to break the impasse and is a schedule to the National Accord and Reconciliation Act of 2008.

¹³ On behalf of Government/PNU: Hon. Martha Karua, Sam Ongeru, Mutula Kilonzo and Moses Wetangula with ODM represented by Hon. Musalia Mudavadi, William Ruto, Sally Kosgei and James Orengo.

¹⁴ A nominee of the Panel of Eminent African Personalities.

¹⁵ Task force was formed in April 2008.

informed about and are enabled to meaningfully engage in the process. The idea is to ensure a people-centered, effective and credible Truth, Justice and Reconciliation Commission for Kenya.

Truth, Justice and Reconciliation Commission Act

Appointment and Composition of TJRC

Consequent to the 4th March 2008 agreement, the Minister for Justice, National Cohesion and Constitutional Affairs, in April 2008 published Truth, Justice and Reconciliation Commission Bill. The Bill largely reflected the South African Promotional National Unity and Reconciliation Act which established their Truth and Reconciliation Commission. It received extensive public debate with the civil society organizations calling for improvement of the Bill and specifically auditing the Bill.

There were numerous technical workshops on the TJRC Bill which culminated with a workshop in Mombasa with the Parliamentary Select Committee on Justice and Legal Affairs (PSC). In the outcome views by the CSOs were rejected and there arose allegations of lack of inclusivity in the process. This was illustrated by the rejection (by Deputy Speaker) of a petition¹⁶ submitted to the National Assembly by the CSOs and political parties seeking inter alia;

- i. Not to pass the TJRC Bill before thorough audit;
- ii. Repeal of articles on amnesty, reparations, gender and access to information;
- iii. Repeal all repugnant laws still in the Kenya's statute books such as Official Secret Act, Indemnity Act, Land Titles Act, Protected Areas Act etc.
- iv. Explore practicability of entrenching TJRC into the constitution.

On 23rd October, 2008 the TJRC Bill was passed by the National Assembly by 23 MPs and assented by the president in November 2008. This was far beyond the eight weeks proposed in the TJRC agreement of 4th March, 2008.

Landmines in the TJRC Act

- i. Amnesty provisions¹⁷, the application for amnesty and criteria for consideration is vague and the recommendation to the Attorney General is ridiculous based on the historical machinations of that office;
- ii. Implication of constitutional provisions and statutes incidental to the Transitional justice process for instance Official Secrets Act, Indemnity Act, Land Titles Act, Preservation of Public Security Act etc.

¹⁶ See Mansard dated 5th August, 2008.

¹⁷ See part III of TJRC Act

- iii. Constitution of Selection panel; there arose issues on the procedure of nomination of selection panel, purportedly handpicked by the executive without chance for the nominating institutions participation;

In March 2009, the Selection Panel (SP) was inaugurated in accordance with the Act¹⁸ though National Council of Churches of Kenya failed to take up their position. The SP advertised the vacancies for the Commissioners in April, 2004. 254 applications were received by the Human Resource Firm sub-contracted to undertake the short listing of the applicants. The firm shortlisted 45 candidates to be interviewed by the SP, a section of the CSOs called for publication of all the 254 applicants though their call was never heeded.¹⁹

This meant for the constitution of the SP²⁰ and the appointment of the Commissioners opaque and shrewd in secrecy²¹. This process was meant to be consultative²² though it was more in theory than in practice with some members of civil society questioning the entire process and requesting for publication of the names of all the applicants and the criteria used in short-listing and interviewing. The composition of the commission is haunting it to date with various documentations being cited as grounds to justify the call for the resignation of the chairperson²³. There is also a suit pending in court questioning the legitimacy of the chairperson.²⁴

The SP interviewed the 45 candidates though the list was never released to the public in addition to the modalities of the interviews. This stirred the process with some stakeholders alleging ineptitude of some of the candidates included in the 15 names list forwarded to the Parliamentary Select Committee (PSC) for vetting.

On its part, the PSC, scrutinized the 15 nominees and settled on nine names without disclosing the criteria applied. The PSC tabled the nine nominees in the House accompanied by its report, which was adopted *mutatis mutandis*. The nominees were transmitted to the President for appointment.

On August 3rd, 2009, the President appointed the nine commissioners including the three foreigners.²⁵ Mr. Bethuel Kiplagat was appointed the chairperson, Ms. Betty Murungi was appointed the Vice Chairperson

¹⁸ See section 10 of the Act.

¹⁹ See ICPC statement of April 2009 calling for an open and transparent selection process of the TJRC Commissioners

²⁰ See section 9 and the first schedule of the Act

²¹ See ICPC Press statements of April 20, 2009, May 30th, 2009 and June 26th, 2009 all calling for open process of selection the truth justice and reconciliation commission commissioners. The Statements appealed to the Selection Panel, Parliament and the President respectively.

²² See 4th March, 2008 agreement witnessed by H.E. Oleyumi Adeniji.

²³ See press statement by CMD, ICPC, Haki Focus dated 31 January, 2010 and 7th February, 2010. see also paragraph 1 (page 6) of ICTJ summary report "Truth Telling in Kenya: A workshop on civil society engagement with the TJRC"

²⁴ High Court Civil Suit No of 2009 Nairobi.

²⁵ Bethuel Kiplagat, Betty Murungi, Margaret Shava, Tecla Namachanja, Tom Ojienda, Retired Major Mohammed Farah

(VC), an oversight of the Act²⁶ but her name was never gazetted to this effect though eventually the Commission elected her the Vice-Chair.

Objectives and Mandate of TJRC

Fundamentally the Kenyan TJRC is unique in at least three aspects as compared to other models in the world, the overall objectives as articulated in section 5 is to promote peace, justice, national unity, healing and reconciliation among the Kenyan people.

Unique features of Kenya TJRC.

a. Temporal jurisdictions

Notably it is the first Commission to address issues spanning to at least 45 years in addition to the antecedent feature²⁷, granting leeway to unearth historical injustices as may be incidental to its duties.

b. Terms of Reference

The feature of justice was incidental to other commissions but in the Kenyan context, justice is a component of its TORs, raising the stakes of commission, at this stage it would be prejudicial to assess fairly this aspect.

c. Inclusion of Social Economic Rights

It is the first commission to be granted such powers to investigate social economic rights that were not even granted to the famous South African TRC, this commission if it lives to its mandate may be the setting agenda (sic) for the rest of the world.

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

The TRC will analyze the information it gathers from victims, perpetrators, and others, and will also do its own research. It will use all of this information to write a report that explains what happened. The report will indicate the causes, nature, and extent of abuses of human rights; the circumstances in which they occurred; and whether they were part of a plan or policy by the government, or any other group. The report will also make recommendations about how to prevent the recurrence.

²⁶ Section 11(2) supra

²⁷ Section 5 (2)(i)

Operationalization of Truth Justice and Reconciliation Commission

Pre-preparatory stage

The Act²⁸ provides that the commission would have a grace period of three months to carry outreach activities as well as setting up of the secretariat before commencement of the two year statutory term to finalize and submit its report to the president. This has been more theoretical than factual. It is only in January, 2010 that various vacancies for the secretariat were advertized as well as the first advert on provincial public outreach was published on 27th January, 2010 for the Coast Province²⁹.

These months were also envisaged to allow familiarization with the mandate as well as preparation of rules of procedure, evidence and regulations thereof and the strategic plan of the Commission which are yet to be made public. Impliedly the commission finds itself in a crash programme to live to its mandate³⁰.

There have been allegations that have been neither denied nor confirmed by the Commission or the government that the commission lacks adequate funds to undertake its mandate, a matter that that was raised with the chief mediator H.E. Koffi Annan during his December, 2009 visit to Kenya. This negates the spirit of one of the 4th March, 2008 agreement which sought to caution the commission from financial crisis.

Notably the commission faces legitimacy crisis from a suit filed by a group of former political prisoners alleging that the Chairperson is an interested party in the mandate of the commission having worked as a civil servant in the Moi regime. Legal handles like the Indemnity Act, Protected Areas Act and lack of freedom of information law have also been sighted as major obstacles to the success of the truth commission for Kenya.

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

Most significantly, although the interim secretariat produced ad hoc operational plan with indications of staff and logistic requirements, as well as a timetable for collecting statements, holding hearings and writing the final report, no overall strategy was developed. Further all these projections were not rolled out.

The TJRC has been slow in disseminating information about its operations to victims, the population and to development partners. There has been little discussion of how the objectives of each stage will be achieved,

²⁸ Section 20(2).

²⁹ Voi, Mobasa, Kwale, Malindi and Lamu.

³⁰ Commissioners were appointed on 3rd August, 2009, technically three months later, the period of three years commenced.

and this communication gap has created the disconnection. Public view of the current TJRC is an idle and incoherent outfit of insignificant impact.

This has contributed to increasing citizenry frustration and disappointment as well as international community reluctance to engage with it. The interim secretariat was not mandated by the November 2008 Truth Justice and Reconciliation Act. It was created with assistance of the United Nations Development Programme (UNDP) to facilitate a quick start of the TJRC by performing a series of initial tasks. However, the hiring of consultants to run the interim secretariat was faced with strong accountability criticisms³¹. That process was rife with allegations that it was driven by political favouritism and lack of transparency.

The interim secretariat was slow to locate and establish offices³². It was claimed that this was due to lack of funds. The Commission continues to share offices with the Committee of Experts on the Constitutional Review.

Truth Justice and Reconciliation Commission Preliminary Outreach Assessment/Verdict:

i. General conduct of proceedings and access to documentation

The Coast and Western Provinces being the first TJRC public outreach sessions were expected to have huge implication of the future undertakings of the commission as well as presenting an opportunity for learning and adopting the best practices in its field work in subsequent field visits. Our analysis of the contextual, social and political environment of the visits will be based on the following topical themes.

a. Mobilization

It was evident that in the sittings, there was poor mobilization and no public education in advance of TJRC mission. Several participants complained of the short notice while majority didn't even understand the basic information about the purpose and intention of the TJRC. This raised the question whether the intended beneficiaries of the TJRC were actually the participants on these sessions.

Notably, there were no posters in the local dialects alerting of the meetings and their purpose. Of concern is that the commission strategy of mobilization was based on identified personalities who are perceived to be critical opinion leaders in the region (largely local politicians and provincial administrators). Objectively this sent the wrong signals and dented the commission's impartiality further.

³¹ On Feb 7th 2010, the commission came under severe scrutiny once again in the over the hiring of staff.

³² TJRC is hosted at the Committee of Experts on the Constitutional Review offices

In the transitional process, all players ought to feel to be relevant, consequently not even members of the CSOs or a section thereof should be seen to be the right hand organization (sic) to the transition justice process. Unfortunately this may not have been the case. Some of the venues used were not perceived to be neutral or secure enough.

b. Organization of the sessions

It was noted that each session was scheduled to commence at 9.00 am and end at 1.00 p.m. Each speaker was required to articulate their views within two minutes. Basically this was too short for substantial issues to come out considering the wide mandate entrusted upon the commission. There is need to consider thematic presentation of views e.g. about their perception on the commission work and mandate, land and other substantive issues so that to cover a wide range of issues and avoid repetition and skewed submissions.

Local leaders as opposed to victims seemed to dominate the sessions ‘on behalf of victims’. This has dire consequence to the whole of the truth seeking process in Kenya.

It is clear the TJRC had not done a prior statement taking to identify the window cases and the survivors. In the end, it turned out to be more of the usual local discourse experienced during ordinary commissions or committees of inquiry.

The sitting arrangements further gave the evidence of the mindset of the TJRC Commissioners and the local provincial administration. It also exposed the lack of understanding of both the Commissioners and local planners of the purpose and mandate of the TJRC.

c. Communication and Information dissemination

The commission distributed simplified version of TJRC Act prepared by civil society³³ though in some later meetings it had its own booklets stating the mandate of the commission, objectives and composition of the commission both in Swahili and English languages.

Most of the commissioners (apart from the chairperson) preferred addressing the participants in English. Though there were translators, this put off majority the side of participants many of whom are conversant with Swahili and local dialects.

The foreign commissioners followed the proceedings by relying on the translators. The commission was accompanied by sign language translators to ensure all inclusive process. There is a huge information gap on the mandate and terms of reference of the TJRC. Lack of it was a major impediment on the mission of TJRC

³³ Kenya Transitional Justice Network members material on transitional justice and Truth Commission

in the area. This created confusion on the part of the participants. Simplified brochures and use of local media on the purpose of the TJRC outreach visits needs to be disseminated together with the simplified TJRC Act for quick grasp of TJRC mission in the visited areas.

d. Participation

From a glance, participants articulated their concerns regarding the major historical injustices in their respective region. It was evident that in all meetings there were two groups; *the political elite and the victims*; this was illustrated by the arising differences in views presented in the meetings.

Majority of the participants were ignorant of TJRC mandate and its operational processes and equated it to the usual Commissions of Inquiry formed by the President. Regrettably, the withdrawal of the CSOs from engagement with the TJRC process had a huge impact.

Very few written submissions were given to the commission. This is attributable to the short notice as well as lack of clarity in addressing the Commission as there lacked defined Rules of Procedure from the commission communicated well in advance. These visits presented a useful opportunity to test the effectiveness' and applicability of the TJRC rules of procedure³⁴. The TJRC did not have such rules or the workplan.

e. Gender perspective

The participants were fairly representative of both genders and the moderator allowed views in three categories; men, women and the youth each presenting in turn. Curiously missing attendants were young ladies and every time there was a chance for the youth, it was dominated by the men who basically focused on the unemployment, lack of opportunities and victimization by the securities agencies. It was only in Mombasa during the CSOs forum that a group of young ladies sought to make a submission to the commission as regards vulnerability of young ladies to early marriages³⁵ as well as prostitution due to social - economical strains in the region.

It was evident that women are left to tend their families solely after demise of their husbands arising from wildlife/human conflicts or execution by security agencies with little or no compensations³⁶.

³⁴ The Kwale incident, where one speaker, Mr. Rashid Sengeza made a plea for his life due to participation puts the commission on the spot in addressing the security of witnesses and information that it receives.

³⁵ At time forced due to cultural ideologies.

³⁶ The case of Elizabeth Ngano who lost both her husband in 2008 and first born son in 2009 (both killed by elephant) with just Kshs. 200,000 as compensation with a big family to look after, was really a sad story. Other women have faced similar horrors due to death of their husbands during the Kaya Bombo clashes.

The few representatives of women groups felt that Sexual Offences Act was inadequate in terms of addressing defilement and rape cases or else it was not enforced with vigour³⁷. There were feelings of despair amongst the women due to the high level of dispossession.³⁸ Further it was observed that many women had a lot of reservations in coming out to participate and speak.

ii. Basic conduct appropriateness and fairness

As noted earlier, the leader in charge of mobilization for the visits moderated the sessions and there being no clear set out guidelines on the presentations, there was confusion particularly when one intended to make a written submission.

In a truth seeking process, the process must be organized and planned in such a way that all actors (whether of perpetrators or victims) are given sufficient time opportunity to tell their story.

It was clear that the Commission lacked a strategy for addressing all the groups particularly the perceived perpetrators e.g. in Kwale when the councilors (**alleged perpetrators**)³⁹ were not given a chance to be heard.

iii. Substantive legal and policy making process

The Act is unique in terms of its provisions seeking to address; truth, justice and reconciliation with the objects being set out in Section 6 of the TJRC Act. Fundamentally the effectiveness of the commission is dependent on two crucial factors that;

- a. Whether it will be able to win the confidence of its target groups (victims and perpetrators);
- b. The perception among the members of the public that if it enjoys institutional legitimacy.

In Kenya, though the job of the commission is to change the beliefs and attitudes as a process of societal transformation, there seems to be lack of concerted efforts to have an inclusive process that would really facilitate honest and candid dialogue about the legacies of the past. To change the attitudes of the citizenry, TJRC must strive to be viewed as a credible and effective institution. As was in Sierra Leone, the public perception of a commissioner is critical to its success.

³⁷ Testimony of Mwana Mtetu Salimu, Binti Mohamed Juma

³⁸ A case in hand is narration by a barren woman with no one to take care of her whose land was grabbed by a Powerful Minister during President Moi regime.

³⁹ This phenomenon was repeated throughout all “public hearings” that TJRC so far has conducted. This poses a fundamental problem to the credibility and authenticity of evidentiary data and collaborative evidence needed by the TJRC to make its final findings and recommendations.

Though the Act is explicit in terms of the mandate, there are statutes that have an impact on the effectiveness of the commission, namely; Official Secrets Act, Indemnity Act as well as the provisions on amnesty. Also there is a huge volume of information held by the state yet it is so crucial to uncovering certain atrocities of the past.

iv. Summary of Observations and Recommendations

a. Observations

- i. It would be very difficult for the current Truth Justice and Reconciliation Commission (TJRC) to deliver and fulfill its mandate. The most immediate and vital step to jumpstart the process must be to call for an all-inclusive multi-stakeholder consultative forum to address the fundamental problems facing the TJRC and the wider transitional justice agenda with purpose of charting a common step forward. At the moment the process is an exercise in futility.
- ii. It is to the interest of the whole country that a credible and effective TJRC be set-up to document the correct patterns of past transgressions against people of Kenya to avoid historical revisionism and denials.
- iii. An analysis of the TJRC establishment, terms of reference and public response and hearings reveals deep-seated problems facing the Commission. The TJRC appears to have been established more out of concern to enhance public relations than to contribute substantively to credible and genuine truth telling and national reconciliation.
- iv. The truth commission may fail to reconcile and heal the nation as the image of the commission as a credible and legitimate institution is in question as evidenced by walkouts, protests, legal challenges and fallouts within the commission.
- v. With its creation process conducted with limited consultations and no serious thought-through implementation mechanisms, it has contributed to the operation of deeply flawed process that fall short of international standards, practices and the local transitional justice needs. The Commission's subsequent internal attempts to resolve ambiguities in its mandate and restore its credibility have been fraudulent, weak and ineffective.
- vi. The Commission does not seem to have understood its purpose and mandate adequately gauging from how it has conducted its work. The TJRC's activities have largely been conducted without vital documents and key operational requirements. Uncoordinated and ill-informed public hearings and unprofessional statement-taking have been the only substantial public activity undertaken to date by

the Commission. Unfortunately, the public hearings were tainted by lack of prior civic education and by the way they were conducted.

- vii. The ambiguities and focus on one-sided part of the story about the atrocities provide a basis for poorly designed hearings. Alleged perpetrators and experts are never involved or consulted. The public hearings and accounts given, while a welcome attempt at truth-seeking, they were presented without contradiction or collaborative information from the public and or affected persons.
- viii. The significance of well-informed public hearings' and statement taking should not be overlooked. They provide balanced platform for both the perpetrator's and victim's version of their truth publicly. This is important especially in situations involving high level suspected perpetrator on the committed crimes.
- ix. Ironically, despite the Commission's mandate to "establish the conclusive truth," its public hearings have instead served to render some already conclusive truths inconclusive.
- x. The composition of the commission as currently constituted puts its relationship with the victims at jeopardy. The proceedings so far conducted serves as evidence to this glaring fact. There is danger of lack of legitimacy and ownership of the commission by the intended beneficiaries (victims and perpetrators).
- xi. The lack of Rules of Procedure, operational workplan and civic education at this initial stage of the commission is a wasted opportunity for testing their effectiveness to facilitate an informed review in the future work of the commission.
- xii. Lack of clarity and common understanding of the truth seeking process by the citizenry as evidenced poses a challenge in terms of the quality of statements when the truth commission begins its work.
- xiii. The commission lacked a clear witness protection mechanism⁴⁰
- xiv. The lack of a well structured engagement with the diverse stakeholders and employment of divide and rule by the commission creates room for suspicion and casts doubt on its integrity and success.
- xv. Lack of an effective secretariat to carry background research and brief the commission on each region's, individual's or groups' expectation(s) put the TJRC on spot in terms of preparedness, understanding and executing its mandate.

⁴⁰ Evidenced in Kwale where a participant complained about being threatened by local leaders.

- xvi. Civil society and media are vanguard of the TJRC. It is necessary for future effective TJRC to ensure these two institutions are well involved in the process to offer their resources to encourage and facilitate popular participation. They are needed to assist with education efforts and to act as a watchdog.
- xvii. Civil society feels betrayed by a process that it has advocated and lobbied for since dawn of struggle for change in Kenya. It is becoming increasingly apathetic about the ability and will of the TJRC to reveal the truth and heal a divided nation – the crux of the TJRC’s mission. While some organizations continue to work with the TJRC to assist with education, many others have turned to other options of truth seeking and accountability about the past.
- xviii. The fact that the statement-taking and public hearings so far present a distorted body of evidence to the public makes difficult for the final report and recommendations to be strong and credible. It is highly doubtful that the process will achieve a concrete and uncontested evidentiary data and information .
- xix. Finally, in addition to the key Commission’s report and findings, a significant opportunity for the TJRC to make a substantive contribution to the future of Kenya lies in its recommendations. If the TJRC formulates its recommendations independently and carefully and bases them on findings supported by credible evidence, it still has an opportunity to make a positive contribution to transitional justice in Kenya in the long term. However, this is in doubt unless Commission is overhauled and reconstituted afresh with a fresh beginning and ownership.

b. Recommendations

Based on the issues identified above, the International Center for Policy and Conflict recommends:

- a. Address pertinent credibility and legitimacy issues inflicting TJRC being raised by the various stakeholders. Convene a national multi-stakeholder forum to charter the cause of action. Achieving an all inclusive truth-seeking process guarantee collective ownership of the process and its outcomes.
- b. Develop and disseminate widely the rules and regulations of procedure and operational plan of the TJRC through a consultative process. Set out a stake- holder’s engagement strategic plan.

- c. Before resuming public hearing and or collecting evidence, it is necessary to undertake a fore study, take solid statements, identify window cases and release a schedule in good time to allow for effective public preparations and participation.
- d. Simplify and translate legal framework governing TJRC in diverse dialects for maximum reach of the intended beneficiaries of the work of the commission.
- e. Take all possible efforts to verify and rectify the public record by correcting apparently doubtful evidence given at TJRC hearings and statements by carefully scrutinizing the evidence especially accounts by accused persons that are contradicted by corroborated documentary evidence or statements of witnesses such as victims who have no apparent motive to fabricate their testimony
- f. Expressly rebutting in its final report any significant allegations made in public hearings that are found to be untrue or substantiated.
- g. Identifying and naming in its final report witnesses who were dishonest in the TJRC's public proceedings
- h. Making a determination that no amnesties and reparations will be recommended without publicizing this decision as far as possible. The TJRC must actively seeking input from victims and undertaking to prioritize this input in formulating its final recommendations.
- i. Ensure TJRC is completely independence from the government in its operations and formulation of final report and recommendations