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## **Truth and Reconciliation Commissions and Transitional Justice in Africa: Lessons and Implications for Kenya**

By George Wachira<sup>1</sup> and Prisca Kamungi<sup>2</sup>

*This Policy Brief is intended to contribute to the public debate on the proposed Truth, Justice and Reconciliation Commission (TJRC) for Kenya. The content is informed by ongoing research being carried out by NPI-Africa and the West Africa Network for Peacebuilding (WANEP). Focusing specifically on respondent's expectations and perceptions, the research aims at drawing out lessons from transitional justice experiences in Africa, in particular the increasingly popular TRC approach. The research examined three countries that have concluded their TRCs or equivalents (Ghana, Sierra Leone and South Africa), one that is in the process of implementing (Liberia) and two that are still considering setting up TRCs (DRC, Kenya). Respondents were drawn from a wide sample of victims, experts, former commissioners, civil society actors, government officials, perpetrators, individuals who gave testimonies or submitted statements to the commissions, relatives of victims, care professionals and researchers, among others.*

### **I. Introduction**

The debate on the formation of a TRC<sup>3</sup> in Kenya has been before the public for some time. In the lead-up to the 2002 elections that marked the end of the 24-year regime of Daniel Arap Moi, opposition politicians and civil society activists advocated for a Truth and Reconciliation Commission (TRC) to address past human rights violations. After the opposition's victory, the new government appointed a Task Force in 2003 headed by Prof. Makau Mutua to seek the public's views on the formation of a TRC.<sup>4</sup> The Task

<sup>1</sup> George Wachira is the Senior Research and Policy Advisor and immediate former executive director (1996-2006) of NPI-Africa. He is the Principal Researcher for the ongoing NPI-Africa and West Africa Network for Peacebuilding (WANEP) research project titled, 'Transitional justice experiences and the rise of the TRC model in Africa: Emerging lessons and implications for post-accord societies'.

<sup>2</sup> Prisca Kamungi is a research consultant at NPI-Africa. The authors can be reached by phone (4441444/4440098) and by email ([flWachira@npi-africa.org](mailto:flWachira@npi-africa.org); [pkamungi@npi-afiica.org](mailto:pkamungi@npi-afiica.org)).

<sup>3</sup> This brief uses the generic term TRC when referring to TRCs in general as implemented in other countries, and TIRC to refer specifically to the proposed Kenyan version of the TRC.

<sup>4</sup> It is noted here that the question posed to the public by the Makau Mutua Task Force limited the choice of the approach to dealing with Kenya's past to only a TIRC. While the report of the Task Force indicates that over 90% of Kenyans favoured the formation of a TIRC, the range of expectations expressed is not confined to the traditional limits of TRCs.

Force recommended the formation of a Truth, Justice and Reconciliation Commission (TJRC) to investigate:

- political assassinations and killings
- . Massacres and possible genocides
- . Political violence and murder of democracy advocates
- Torture, exile, disappearances, detention and persecution of opponents
- Rape
- Politically instigated ethnic clashes and
- . Violations of economic, social and cultural rights

The Task Force further recommended the formation of an independent commission to investigate violations during the Mau Mau liberation struggle. Despite the reported widespread support for it, the TJRC was not set up; instead, the government instituted other transitional justice options such as limited lustration (removal or barring from office of implicated individuals), targeted assistance to victims, institutional reforms, and commissions of inquiry and task forces. The debate came back to life briefly in the run-up to the December 2007 elections, but up until January 2008 the possibility of the TJRC ever being formed looked remote.

Following the unprecedented political crisis and violence triggered by the dispute over the December 2007 presidential election and the international mediation that followed, the parties to the dispute signed the National Reconciliation Accord in February 2008. One of the provisions of that agreement is the formation of a TJRC. It recommends that the TJRC should date its work back to 1963, as did the Makau Task Force. With the entrenchment of the agreement into the constitution in March 2008, the formation of the commission is now a certainty. Its performance and delivery are not. What can Kenyans expect of the TJRC and how can they hold the government and the politicians accountable for the realisation of the three pillars the commission promises, namely, truth, justice and reconciliation?

Citing evidence from countries such as South Africa, Sierra Leone, Liberia and Ghana this brief indicates that previous TRCs have not been as successful as is sometimes assumed. Many people's expectations were not met either because the recommendations were not implemented, or their expectations were outside the mandate and capacity of the TRC. While the South African TRC (SATRC) captured the imagination and gave new prominence to TRCs it has led to a fixation on a particular form of transitional justice at the expense of more careful consideration of the *goals* sought and the context of specific transitions.

Drawing on experiences from six African countries, NPI-Africa issues this paper to offer some perspectives on the TRC as a transitional justice model and inform public debate in Kenya. The brief suggests we approach TRCs in Africa with a critical view; it nevertheless recognises that a TJRC in Kenya is now *almost accomplished*. It therefore offers recommendations on the design and purpose of the TRC/TJRC, requisite enabling environment and political will, managing expectations, sequencing from truth recovery to

futuristic safeguards against impunity~ and specific concerns with regard to reparations and reconciliation.

## 11. Transitional Justice and TRCs in Historical Context

Broadly, transitional justice refers to the concern with and practice of how countries in transition—from repression to democracy or from war to peace—address human rights violations and divisions of the past. Transitional justice options range from 'silence,' on one extreme, to national or international criminal prosecutions, on the other. In-between are options such as general or conditional amnesties, vetting and lustration strategies (removal or barring from public office of implicated individuals), institutional reform, truth-recovery, and community-based indigenous processes, among others. Conceptually, transitional justice is perceived to provide a bridge between the repressive or divisive past and a democratic or peaceful future. As a category it embraces a number of goals: accountability of perpetrators, redress for victims, guarding against impunity (and therefore prevention of future violations), promotion of unity and national reconciliation, and the reformation of institutions which may have contributed to the violations or conflicts and divisions of the past. Each of the options or goals poses dilemmas which need to be mediated within a specific socio-political and fiscal/economic context.

Historically incubated in the human rights field, transitional justice was deemed to be relevant to transitional countries having to deal with what have been called egregious human rights violations committed by outgoing regimes.<sup>5</sup> During transitions, negotiators and mediators had to wrestle with how to ensure some accountability by the state and justice for the victims, while at the same time safeguarding peace and stability during a volatile transition. In the context of Latin America and Eastern Europe, for example, departing dictators and their military and civilian supporters wielded much residual power, and could convincingly threaten reprisals if there were attempts by the new regimes to prosecute them. So powerful was General Augusto Pinochet of Chile, for example, that he could negotiate a package that included a comprehensive amnesty for himself and his military colleagues; the position of commander-in-chief of the armed forces even after he had ceded the presidency; and the position of an unelected 'senator for life' after retirement from the military. Under such circumstances, it was argued, an attempt to undertake criminal prosecutions would be unrealistic and counterproductive.

It is in this context that alternative transitional justice options began to be considered. Prosecutions were deemed to be destabilizing or likely to create more conflict, besides the complexity and time-consuming nature of trials and rules of evidence. 'Amnesty clauses' and mechanisms became an inevitable part of transitional agreements~ and instruments such as 'truth commissions' gained currency as the realistic, rather than the ideal, compromise. Truth commissions were considered ideal as vehicles for revealing and acknowledging past violations and possibly instituting reparations for the victims, but without necessarily punishing the violators. Among the critics~ this characteristic of truth

<sup>5</sup> Violations committed by non-state actors in the context of conflicts (for example inter-communal violence) entered the purview of transitional justice later and appeared to lead to a marriage between the human rights and conflict resolution/ reconciliation fields.

commissions portrayed them as tools of political compromise. In short, TRCs were preferred not necessarily because they could deliver on moral-normative ideals such as 'justice', 'healing' or 'reconciliation', but because they offered a way out of likely counter-productive confrontation that could lead to new violence.

'Reconciliation', then, was appended to the quest t(r) truth not necessarily to signal a serious pursuit for it on behalf of the victims, but to assure the apprehensive perpetrators that the truth was not intended to lead to their punishment. In recent times, rising concern for the rights of victims has led to a new approach to transitional justice which eschews blanket amnesty for serious crimes under international law.<sup>6</sup> Hybrid mechanisms are now proposed to delimit amnesties as well as meet the truth, justice and reparation rights of victims.

### III. South Africa and the Rise of the TRC in Africa

Among the available transitional justice choices, TRCs have been claiming a central place in Africa. This interest seems to have been sparked off by the apparent appeal of the South African TRC (SATRC). Post-SA TRC 'truth commissions' in Africa include Nigeria (1999), Sierra Leone (2000), Ghana (2002), and Morocco (2004). Others are being contemplated or implemented in Burundi, Liberia, and the Democratic Republic of the Congo.<sup>7</sup> Kenya is the latest addition to this list.

It is not clear to what extent lessons from the already concluded processes are informing the new ones. What is clear is that the SATRC triggered a perceptual shift with regard to the nature of TRCs. A TRC was no longer considered as a compromise option designed to avoid an undesirable eventuality (resumption of violence), but as an essential instrument with inherent benefits and the potential to lead to a desired outcome: reconciliation and the moral rebirth of a nation. The immense moral authority of Nelson Mandela and the virtuous stewardship of the SATRC by Archbishop Desmond Tutu rendered that reasoning convincing, with the latter arguing that retributive justice was 'un-African,' invoking instead the now much repeated concept of *ubuntu*. Borrowing heavily from Judeo-Christian and psychiatric notions of repentance, forgiveness, healing and 'closure', the SATRC emphasized the cathartic effect of victims' truth- or story-telling.

Interestingly, the simultaneous implementation in Sierra Leone of a TRC and criminal trials through the Special Court added weight to the view that TRCs can have independent, inherent value. But while the term 'truth-telling' may imply or assume that *perpetrators* come forward and confess to victims the truth of their complicity, evidence suggests that most perpetrators stay away.<sup>8</sup> The result is a *victim-dominated*, not a *victim-*

<sup>6</sup> This concern is largely spearheaded by the International Criminal Court (ICC).

<sup>7</sup> The proposed TRC for the ORC is a second attempt after the first one (Set up in 2002 with a completion date of 2005) largely failed to meet its objectives. An interesting and problematic feature of the first one was the appointment of its commissioners from among representatives of fighting factions.

<sup>8</sup> This observation has been made generally about the SATRC. A casual observation of the TRC in Sierra Leone and the National Reconciliation Commission in Ghana reveals that most of those who came forward

*responsive* process, this in contrast to the African understanding of justice and reconciliation which emphasises encounter between the perpetrator and the victim leading to restoration.

Without doubt, the SATRC was innovative, pragmatic, and exceptional, both in its actual contribution and the possibilities it represented, particularly when compared to antecedents in Latin America. For this reason, it is widely hailed internationally as the crucial factor which mid-wifed the 'miracle' of South Africa's peaceful transition. It should however be recalled that the SATRC was formed at the end of protracted negotiations which ended that country's apartheid system. The SATRC was only one element of that country's transitional compact: The very end of the apartheid system; the transfer of state power to a new and widely supported political and ideological class; and the buttressing of the transition with a new constitutional dispensation, all offered a real possibility for South Africa's break from the past.

A closer look suggests that the SATRC is less admired inside South Africa where skepticism has been building up fourteen years after the transition. Questions have been raised about the responsiveness of this model, with its victim focus and emphasis on 'truth' and 'reconciliation', to both the gross human rights violations and the wider context of systematic injustices and massive deprivations which characterized apartheid South Africa.

While the TRC succeeded in creating space for public hearings of victims' stories, it did not go far enough to ensure accountability by the perpetrators, let alone responding to the historical and structural injustices of apartheid. In this sense, the SATRC may have circumvented the execution of a broader justice and reconciliation policy agenda and that would have stretched well beyond the immediate transition. In the absence of this broader agenda to deal with the deprived of apartheid, the catharsis afforded by the SATRC was short-lived for the majority who remain underprivileged. Personal and national reconciliation were unachieved and the re-invention of South Africa postponed.

#### IV. Lessons from Africa

##### *1.1. TRCs Have not been as Successful as is often assumed as tools for truth, justice, reconciliation or national unity. This is because:*

From South Africa to Sierra Leone, Ghana and Liberia, respondents questioned the contribution of the TRCs or value addition to the goals of truth, justice, reconciliation or even national unity. Many respondents, including former commissioners or those who worked closely with the TRCs were of the view that while the TRCs are a good idea, they raise expectations that they cannot meet. They fail to contribute to reconciliation or national unity because, by and large, only victims come before them while the perpetrators stay away (South Africa, Sierra Leone) or engage the commission in legal battles (South Africa); or they are politically motivated and formed without consensus

described themselves as victims, with the occasional 'perpetrator' who testified and even more occasionally offered their apology to their victims.

(Ghana)<sup>9</sup> or adequate consultation (DRC). Given their poor follow-up on recommendations, particularly those pertaining to reparations to victims in the context of great material need (South Africa, Sierra Leone, Ghana), TRCs are viewed as largely facilitating the very impunity they set out to reverse as perpetrators get away without accountability while the victims' needs are not met

#### *4.2 Overriding Expectations of Material Compensation*

The majority of the respondents in Ghana, Kenya<sup>10</sup>, Liberia and Sierra Leone cited expectations of material compensation as the greatest motivation for their participation in the TRCs. In South Africa, most people expected not only the truth about the brutality of apartheid, but also compensation, social justice and better access to opportunities. Reconciliation would follow greater sharing between the former beneficiaries and victims of apartheid. In contrast, the reparations programmes in each of the countries have proceeded with minimum success due to inadequate resources or waning political will after the TRC. The majority therefore find the concluded TRCs to be ineffective in responding to their needs and expectations. The phrase 'a waste of time' was used repeatedly by respondents in Ghana, Liberia and Sierra Leone, and in South Africa many say that, in retrospect, the TRC was a hoax, a tool to hoodwink the nation into allowing the beneficiaries of apartheid to keep what they had without organised resistance. Kenya then has to weigh carefully what the primary purpose of the TJRC is to be. Past TRCs have been expected to deliver on 'justice' (in Kenya variously assumed to mean compensation for victims, resettlement, land re-allocation, psychological counselling or prosecution of perpetrators, return of stolen wealth, etc.) even when they had not explicitly stated so. The Kenyan commission now prominently promises 'justice'. What are the implications for people's expectations and the commission's ability to deliver? What levels of compensation can the country afford for what kinds of violations?

#### *4.3 TRCs as Aids to Healing and Reconciliation*

Reconciliation is a long process and a culmination of other processes that may include the victim's acceptance of what happened, encounter with and/or acknowledgement by the perpetrator, recovery from the effects of the event, passage of time, material comfort, psycho-social support, etc. Reconciliation also requires attention to various levels: personal, between individuals or communities, and national. Unfortunately, TRCs are presented as if they, in and of themselves, can deliver reconciliation at all these levels within the timeframe of their mandate. In Liberia, several respondents were of the opinion that personal and community healing and reconciliation were already taking place without the intervention of the TRC. Respondents in three countries asserted that as soon as the violence had ceased, they had embarked on healing themselves through prayer groups, family and community support or traditional processes. For some victims, healing is achievable through silence and motivated forgetting, recourse to religion, resettlement in

<sup>9</sup> In Ghana, the National Reconciliation Commission was legislated following an acrimonious debate in parliament eventually boycotted by the opposition. A majority of the respondents said that the NRC left the country more divided. Some respondents sympathetic to the former regime of President Jerry Rawlings saw the NRC as having been expressly set up to embarrass the former regime, with some pledging to "retaliate" with the formation of a new TRC once their party regained power.

<sup>10</sup> Interviews in Kenya were conducted between February and July 2007 and focused on people's prospective expectations if a TRC/TJRC were ever formed.

new locations and establishing alternative livelihoods. In none of these countries did people feel they needed to wait for a TRC in order to rebuild their lives and communities. To some extent, the TRCs appeared as an interception of their ongoing coping and forgetting. If the TRC was not going to add value to their healing process, their attention and expectation immediately shifted to compensation that would ensure material comfort. In South Africa, participation in the TRC rose considerably when the question of reparations was considered. The lack of reparations then became a major source of disappointment and frustration.

#### *4.4 Truth for What?*

There seems to be no clarity regarding which transition circumstances or contexts call for which matrix of transitional justice goals. A historical review shows that truth-recovery served a practical function in contexts where 'truth' had largely been concealed from the public and state denial could therefore be reversed. In this sense, revelation was an end in itself and did not necessarily have to be tied to any other goal. Current evidence indicates that TRCs in Africa have not acquitted themselves well as vehicles of truth recovery or reconciliation. For most people, the truth is usually already out there, and reconciliation is governed by rules of natural justice. Therefore, the greatest expectation of TRCs is what finally gets to be done with the truth. However, acting on the truth is a difficult political and economic decision. In Kenya, almost all the major violations, from assassinations to communal violence to economic crimes, have been subject of various Commissions of Inquiry, Parliamentary Select Committees, Task Forces and police investigations, with elaborate reports in which perpetrators are named and recommendations made. Some of the commissions (for example the Goldenberg Commission) required the kind of resources, singular focus, time and expertise that a TJRC would be hard-pressed to replicate. The same could be said about the Ndungu Land Commission and others that were assigned very specific tasks. The TJRC is unlikely to add value to the quest for truth and justice, unless it has the power to enforce the implementation of the recommendations of its findings and those of earlier bodies. Conversely, the country does not need a TJRC to order the implementation of previous recommendations. It: on the other hand, the TJRC wants to offer a chance to victims to publicly recount their suffering, then care should be taken to ensure that false hope for redress is not created.

#### *4.5 TRCs cannot be Alternatives to Functioning Institutions and National Values*

TRCs are too often being viewed as a panacea for the failure of institutions in Africa, or used to evade confronting hard political questions. In the case of Kenya, some of these failures are well-known: the judiciary, the investigative and law enforcement institutions. From previous commissions of inquiry, task forces and research, there is hardly any more that can be said about wealth inequalities, the land policy, economic crimes such as the Goldenberg scandal, or politically incited ethnic violence. As indicated above, in the absence of concerted institutional reform and capacity backed by political will, any new recommendations of a TJRC will not be implemented. Similarly, in the absence of core national ethical values to which the country can rally, the TJRC in Kenya could become the venue of contestation on all manner of 'truths' where everyone will vie for the victim tag and no one will be found responsible for any of the violations and crimes.

#### *4.6 Catharsis is Impermanent and Expectations are Dynamic*

As indicated earlier, the greatest contribution of the SATRC was the creation of space for victims to publicly tell their stories. This provided cathartic relief for those that had a chance to speak out and those who identified closely with their stories, as did the opportunity for the black people to vote for the first time in 1994. However, lessons from South Africa suggest that catharsis is temporary, particularly if other hoped-for changes remain unachieved. Depending on the circumstances of the transition, expectations can be minimal and so any positive changes can draw euphoric celebration. With time, though people begin to expect regime change to translate into more tangible benefits. The different levels of expectation are carried to the TRC process, and its ultimate appraisal by the people is based on its ability to respond to these expectations. For the majority who remain poor or unhealed after telling the truth, the TRC served the interests of the rich, the intellectual<sup>11</sup> and political class. Besides, failure to stringently implement recommendations on reparations has created new levels and dynamics of resentment. Catharsis cannot be an end in itself: but the beginning of a process of healing and reconstruction of individual and collective lives.

#### *4.7 Guarded and Subjective 'Truth'*

The expectations, fears and political leanings of witnesses can to a large extent determine the testimony or 'truth' they bring before the commission. For example, in the case of Ghana, the manner in which the NRC was publicised led to great expectations that appearing or making a statement to the NRC would result in substantial monetary compensation. Thus, the majority of the witnesses and statements before the NRC largely focused on violations that led to financial loss, for example forceful acquisition of private property by the state, or business people who were accused of hoarding goods and were subsequently forced to sell off their stocks at a loss, leading to the collapse of their businesses. In South Africa, perpetrators carefully crafted 'the truth' in statements drafted with the help of lawyers to avoid implicating themselves in crime, to fit their acts within the definition of 'politically-motivated acts', and to secure amnesty. Some witnesses admitted to submitting highly subjective narratives in a vengeful quest or to qualify for reparations.

#### *4.8 Thin on justice - Crime and Perpetrator 'Laundering'*

In South Africa, the TRC is perceived as having been too lenient with perpetrators and hard on victims and survivors. The construction of apartheid as a consequence of debased human nature rather than as a systematised violation of human rights presented perpetrators as persons to be pitied and not punished. In this spirit some survivors were unduly persuaded or coerced to drop legal charges. Many perpetrators did not appear before the commission, and those who did told partial truth. Most were unrepentant. Regardless, those that applied for and obtained amnesty, appeared to fare much better than their victims. By

<sup>11</sup>In Ghana some respondents talked about a class of people who appeared to be driven by curiosity about other people's suffering, describing the interest in victim's stories as having some entertainment value and verging on voyeurism. In South Africa the more scholarly appraisals laud the public revelations, the ending of official denial of gross human rights violations and claims of ignorance, the documentation of the divisive past, and the building a common narrative as the major achievements of the TRC. In one hearing of the TRC in Sierra Leone witnessed by this researcher in 2003, a large portion of the small audience was made up of researchers and the media.

appearing before the amnesty commission, the perpetrators managed to unburden themselves of the social *stigma* as unrepentant violators even when they were actually not repentant. For some, release and closure were immediate, and before society they were now cleansed of their deeds and free to move on with their lives. However, the victims had to wait, first, for the commission to recommend reparations and, then, for the actual implementation. In the event, the reparations have mostly remained unimplemented or disappointingly meagre. The appearance of preferential treatment of perpetrators has heightened a sense of grievance among victims. Further, there was the expectation that those perpetrators who failed to disclose their acts and apply for amnesty would be prosecuted. These prosecutions have not materialised, save for the high profile prosecution and suspended sentence for a former apartheid government minister who had tried to make amends by symbolically washing the feet of one of his former victims. Some persons who had been found guilty through criminal investigations applied for and obtained amnesty.

#### *4.9 Role of Strong Champions and Moral Authority*

In South Africa, the role and stewardship of Archbishop Desmond Tutu and his Judeo-Christian persuasion was crucial, as was the towering moral authority of Nelson Mandela. Their involvement gave credence to the possibility that a TRC can be a vehicle for the moral rebirth of the nation once it honestly confronted the truth of its past and broke from it in favour of a more inclusive, justice- and human rights-minded society. This aspiration of a moral rebirth was given South African expression through the concept of *ubuntu* that emphasises mutual recognition, inclusivity, restoration of vital documents and evidence, the domination of the TRC hearings by victims, the unrepentant attitude or refusal by the architects and guardians of apartheid to participate, and the continuation of economic and social inequalities, all contributed to the defeat of this aspiration. Today, a look at some of the possible indicators of 'a new South Africa' or 'rainbow nation' with a 'common national narrative',<sup>12</sup> is not compelling: racial integration remains unachieved; land redistribution remains an *emotive* issue; employability among black people remains low; and overall, there is a general sense that the transition remains incomplete and in need of a new perspective and leadership.

#### *4.10 Regime confidence and addressing the root causes of conflict*

Transitional justice choices are inextricably political and dictated by the level of security and confidence a regime enjoys. Individual experiences of violation and trauma differ, but the underlying causes of violent power struggles are often deeply embedded in the structures of state power, the economy, resources and social relations. For example, land ownership, access and control are highly emotive issues and investigations into land appropriation and use can increase animosity between communities rather than encourage reconciliation. Getting to the bottom of such issues requires political will, courage and regime stability. Besides, the time-frame of TRC investigations avoids historical periods associated with complex distributive justice issues such as colonial era violations or violations associated with powerful individuals and *!fOUps*. TRCs tend to subordinate truth recovery to reconciliation by seeking non-controversial truth, thereby skirting the root

<sup>12</sup>The idea of a 'common narrative' in South Africa is contested, with many being of the view that there remain exclusive Black, Coloured and White narratives and social spaces.

causes of communal tensions. As a result, overlooked issues could resurface over time and require renegotiation outside the space and public goodwill provided by the TRC.

#### *4.11 Addressing gender concerns*

Truth Commissions are under increased pressure to create free and safe spaces to address the often-overlooked sexual and gender-based violence (SGBV) suffered by women and children. Many women are unwilling to speak out about their painful experiences in open forums, or due to cultural prejudices, commissioners may be insensitive to gender concerns or de-emphasise them. Sierra Leone and South Africa offer useful lessons for dealing with SGBV. After consultations with individuals and organisations, the SATRC incorporated a gender perspective: commissioners and staff received training on gender-related issues, and special hearings dedicated to women's testimony were arranged in the different regions. The SATRC acknowledged that although SGBV is viewed as a private matter, evidence of the nature of abuse showed a relationship to the political context, and therefore women and children were encouraged to break the silence. Noting that the presence of male commissioners may inhibit women in their testimony, the composition of panels was negotiated with witnesses. Some women were also allowed to tell stories on behalf of others, in groups and some times in camera.

The Commissioners and staff were required to be sensitive to the cultural norms in specific communities about gender issues. NGOs held preparatory workshops with rural women to help them know how to deal with the media, and the SATRC engaged civil society groups, notably church women groups, to assist women tell their stories. The SATRC also paid attention to the role of women perpetrators, and the reparations policy ensured women victims directly received the reparations package. In Sierra Leone, special attention was paid to the experiences of women and children in the civil war, particularly the impact of amputation, abduction and their use as combatants, labourers and sex slaves. However, in South Africa it was found that access to reparations increased stress and gender-based violence, as spouses fought for control or relatives demanded to share. While steps have been taken to ensure Truth Commissions are gender sensitive, care should be taken to protect witnesses and beneficiaries of reparations from concomitant exploitation and abuse.

#### *4.12 TRCs as Avenues for Restorative Justice*

It has been argued that TRCs promote restorative justice as opposed to retributive justice. Restorative justice has been described as a process whereby all stakeholders in an offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future. It redefines crime as violations against human beings-not the abstract state-and justice as based on restoration, itself based on reparation, symbolic or material. It encourages victims, offenders and the community to be directly involved in resolving conflict, and supports offender accountability through meetings between perpetrators and victims, as well as apologies from perpetrators. In the encounter, the wrong and the remedy are mutually agreed upon. In most African settings, 'justice' and 'reconciliation' are not abstract, but are expressed and ritualised in practical terms that encompass reparation as a means to restoration. In this sense, 'restoration' does not necessarily preclude 'retribution': many reconciliation processes and rituals in Africa embrace an element of punishment, whether by means of paying a fine or being made to

lose face. 'Restoration' of the victim is tied to some act of atonement by the perpetrator or the perpetrator's community. However, as already indicated, experience from South Africa, Ghana and Sierra Leone shows that key perpetrators stay away from the TRCs, thereby denying the processes the restorative aspect of encounter. A focus on only those who 'bear the greatest responsibility' in Sierra Leone meant that people who directly and visibly afflicted atrocities on communities were not indicted by the Special Court, while in South Africa many freedom fighters were dissuaded from appearing before the TRC for fear of implicating their seniors or political parties. TRCs can be better avenues for restorative justice if they resonate more with basic tenets of human rights and understandings and principles of justice and reconciliation of societies concerned.

#### *4.13 Clarity of Terminology and Goals*

TRCs in Africa have shied away from offering clear definitions of the terms they use in a manner that could indicate the goals sought and what the public should expect. This lack of clarity means that the concepts and praxis of 'truth', 'justice' and 'reconciliation', are being referred to imprecisely and, unfortunately, thus renders them subject to scepticism. For example, it is not clear what constitutes reconciliation, and at what point or in what time frame after truth telling it is expected to happen. The SATRC identified four levels of reconciliation: personal, victim-perpetrator, community, and national reconciliation but it did not suggest how each of these levels was to be addressed. Other terms that need to be defined include 'victim', 'perpetrator' and 'justice'. In South Africa the criteria for recognition of victims, acknowledgement and reparations for different types of violation are contested. Tensions also arise between acknowledged and unacknowledged victims, such as the freedom fighters in South Africa.

In what some scholars call the metaphor of the victim, those viewed as perpetrators also claim to be victims of the system, and the demarcation of groups needing to be reconciled blurs. In other contexts, victims who have managed to move on believe they do not need to reconcile. Ignoring the nuances so as to focus on national or political reconciliation can create a facade of reconciliation at the community level. In the absence of overt war, reconciliation becomes a class issue. Bitterness, hatred and propensity for violence persist among the poor, for whom there is little real change. Ambiguity also surrounds the meaning of justice: justice for whom? How should it be achieved? What form of justice-punishment for the wrong-doers or reparation for the victims, or both? The concepts of justice, reconciliation and reparation tend to merge amongst victim groups. For instance, in South Africa material compensation is often equated to 'reconciliation' with both the loss and injury, and with the perpetrators. Justice is perceived as the right to reparations, with 'pro-justice' advocacy groups such as Khulumani in South Africa denouncing passiveness as they continue to struggle for social justice.

On the other hand, some South Africans want to forget history and be content with moral victory. By and large, however, these would be the kind of elite people who have been aided to 'forget' by their having gained a social or economic hold in the new dispensation. The discourse on the 'good victims' (those who make no demands) and the 'bad victims' (those who advocate rights-based access to reparations, for example Khulumani) highlights contending perceptions and expectations of the TRC process. For the former, freedom was

not about money and financial compensation, but to others the defeat of apartheid must translate into compensation by beneficiaries of the system. In Kenya, the TJRC will have to carefully untangle the terminological muddle as clarity of terminology holds the key to setting realistic goals and expectations

#### *4.14 Mandate of the TRC*

TRC processes have tended to commence without careful examination of either their resonance with the needs and expectations of the people or their capacity to deliver on their stated and inferred objectives. Failure to deliver on promised or assumed outcomes can tarnish the concept of reconciliation and the success of TRCs. Lessons from South Africa, Ghana and Sierra Leone suggest that the role of TRCs in the transition process is not well understood or critically thought through. For many, dealing with the past means dealing with the impact of conflict or repression, hence expectations are of a structural nature. Yet TRCs have narrow mandates focused on specific human rights violations and are limited to time frames that may not correspond to perceived historical injustices and complex socio-economic dynamics.

In most transition contexts, perceptions of inequality and marginalisation underlie intractable conflicts or power struggles that TRCs emerge to mediate and to create a bridge to peace. The unrealistic perception of the TRC as a panacea for all these issues creates dissonance between the expectation and the mandate of the TRC. For most people, the only thing that changes during the so-called transition is the departure of the old regime or the cessation of violence. Socio-economic grievances remain largely the same after the transition and the TRC, thereby nurturing resentment and a sense of betrayal. Most TRCs have neither the mandate nor the capacity to address demands for justice, which can only be met through follow-up mechanisms or competent institutions such as the judiciary.

#### *4.15 Design of the TRC*

Recommendations are often ignored, partially implemented or altered due to cost implications or to protect political interests. These challenges are often foreseeable but tend to be ignored at the point of design, perhaps due to time constraints or the need to secure political backing. Operational issues such as definitions and internal cohesion and connection of the TRC working committees, staffing and resource allocation are typically not ironed out prior to the setting up of truth commissions. Consequently, important elements are left out of the process, leaving many loose ends. South Africa is said to have spent eighteen months designing its TRC, but still had to take emergency decisions in its course to respond to unforeseen elements such as urgent reparations.

#### *4.16 Transitional Justice and New Victims*

Implementation of recommendations can lead to new victims and make reconciliation more difficult. In South Africa, this was felt through loss of inherited property or reversed access to opportunities. In Kenya, the limited lustration targeted at public officials hired under the Moi regime created a wave of anger and resentment by those who felt victimised and, by extension, their communities. Similarly, the partial implementation of the recommendations of the Ndungu Report on illegal land acquisitions led to evictions from

forests and therefore new landlessness. This has been interpreted in political and ethnic terms.

#### IV. Implications for Kenya

The National Peace and Reconciliation Agreement has halted Kenya's march to the precipice for now, but the peace remains very tenuous and needs to be buttressed by a new constitutional and economic order that decentralises political power, facilitates distribution of wealth and unites the country. Kenya is therefore at a decisive juncture, and there is a great need for clarity on the linkages with other elements of the national peace and reconciliation agreement.

Kenya should use the TJRC as a forum for honest self-examination that could lead to the emergence of a new united country based on values of social justice, equitability, care, honesty, industry and freedom. To do so, the TJRC will have to assess the lessons of previous TRCs, improving on the successes and avoiding their shortcomings in order to achieve its intended purpose and leave a legacy. We recommend therefore that the TJRC should:

1. Safeguard its integrity as a process committed impartial truth recovery and initiating the process of reconciliation based on values of social justice, honesty, industry and freedom. From the start, the TJRC should send a strong signal of integrity and impartiality and guard against political manipulation by leaders, ethnic elites and political parties that might want to protect implicated individuals. Strong moral leadership from religious institutions and respected Kenyans will be crucial.
2. Articulate clear and realistic goals with regard to each of the key elements (truth, justice and reconciliation) and communicate these to the public. These clarity should be reflected in the design and mandate of the TJRC
3. Guarding against becoming a vehicle for perpetuating impunity. Given the previous use of violence and of displacement and dispossession of people as a political strategy, the TJRC should send a strong signal that this is inconsistent with the requirements of peace and justice. In this regard, the TJRC should avoid the pitfall of the false equivalence of wrongs: there can be no justification for the taking of a life of another innocent Kenyan and those responsible should face prosecution and public censure.

Kenyans should have realistic expectations of the TJRC and should not expect it to resolve all current and past problems. Civil society should maintain pressure for strong institutions and the implementation of sound policies on land, elimination of corruption and government waste, human rights protection, resource management and distribution, and immediate attention to the land-displaced and urban-homeless

(See accompanying paper for Summary of Issues and Recommendations)

## V. Conclusion

Truth Commissions have played a significant role in creating a forum to reveal and discuss a denied and painful past, documenting a shared history and creating the bridge to a future free of group hatred and human rights violations. The noble values and aspirations that inform and guide Truth Commissions create the 'magical moment' when the people of a nation are willing to sacrifice personal needs for the achievement of the common good and rebirth of the society in which they live. However, the same values and aspirations are inconsistent with human rights principles of accountability and criminal responsibility, which subjects TRCs to criticism as vehicles of impunity. Truth commissions also evade addressing socio-economic and legal-historical distributive justice questions such as poverty, inequality and marginalisation. Perpetrators also tend to stay away yet are granted amnesty. At the same time, victim-friendly recommendations are ignored, delayed or partially implemented. This not only makes reconciliation more difficult, but also obscures any real success achieved by the TRC in the long term. Lessons from countries that have tried truth commissions indicate that the concept and objectives are good, but the process of implementation is often compromised by political imperatives and the need to sidestep costly reparations. Kenya needs to examine and learn from these lessons to avoid deferment of the objectives of learning the truth and achieving community reconciliation.

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