

AN ATTEMPT TO DEAL WITH THE PAST: EXPLORING KENYA'S LONG ROAD TO A TRUTH COMMISSION

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ABSTRACT

After countries emerge from periods of atrocities, usually committed by the state or groups opposing the state or in a civil war, a need to try to deal with this past arises. Generally, these periods leave powerful legacies of human rights violations including torture, massacres, enforced disappearances or other forms of serious human rights violations. They leave in their wake victims and perpetrators: victims calling for justice and perpetrators who would do anything to prevent their being held to account.

In the last 30 years, this kind of attempt to deal with the past has been carried out within the discourse of transitional justice. Within the general field of transitional justice, there have been various institutions and mechanisms that states have employed in a bid to deal with the past. These have included prosecutions, reparation programmes, sanctioned truth telling and lustration in Central and Eastern Europe. In the last six years, Kenya has grappled with the issue of how to deal with this kind of past.

This paper will therefore explore attempts to deal with the past, using the institution of a truth commission. The proposed truth commission for Kenya is taken as a case study. A review a number of truth commission practices in the past is conducted to provide a framework for analyzing the proposed truth commission. This analysis will cover both the Taskforce on the Establishment of a Truth Commission for Kenya and the Truth Commission Bill 2008 to establish whether its provisions conform to truth commission practices elsewhere.

The paper concludes that the practice of truth commission in general is an important means of dealing with the past, and many countries in transition have looked up to it as one of the preferred institutions in that endeavor. However, this process in Kenya faces serious challenges and there is need for fundamental change in the Kenyan political scene if transitional justice in general and a truth commission in particular are to become a reality.

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DEDICATION

This thesis is dedicated to my immediate and extended family for the sacrifices they have made for me to be this far. They never saw obstacles in my education. Mum, Dad and Brother Simon will forever share a special part in me. A lot of gratitude also goes to the rest of my siblings. It has been a long journey...not yet complete.

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LIST OF ABBREVIATIONS

GoK: Government of Kenya

KANU: Kenya African National Union

KHRC: Kenya Human Rights Commission

KTJRC: Kenya Truth, Justice and Reconciliation Commission

NAK: National Alliance Party of Kenya

NARC: National Rainbow Coalition

TRC: Truth and Reconciliation Commission

TC: Truth Commission

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INTRODUCTION AND BACKGROUND

Introduction

One of the most difficult problems facing countries in transition is the problem of the past. The question of legacies becomes especially grave if the past regime committed serious crimes: mass murder, torture, enforced disappearances, assassinations and so on. Such legacies impose two important and related questions: whether to deal with the past, and if so, how to deal with it. These questions address two issues respectively: acknowledgement and accountability (Huyse, 1995: 52), which are in the core of processes and institutions of transitional justice.

Within the wider transitional justice discussions, several mechanisms and institutions have been utilized to deal with the past. Such mechanisms include prosecution, lustration and truth commissions. In the past, the classic response to ‘settling accounts’ has been prosecution, exemplified by Nuremberg, where the defeated regime’s leaders are dealt with using judicial processes, either through the normal court system or special (inter)national tribunals for example the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) (Teitel 2004, Landsman 1996). However, in the recent times, there has been a gradual turn from prosecution to other mechanisms of dealing with the past, especially toward an increasing use of truth commissions.

Through a historical analysis and process tracing, this paper will explore one of these institutions, the truth commission.¹ It will look into the process and institution of truth commissions in order to establish how, and why they are formed and why sometimes truth commissions are preferred over other transitional justice mechanisms, *especially* prosecution,

¹ Hayner defines truth commissions as “bodies set up to investigate a past history of violations of human rights in a particular country – which can include violations by the military or other government forces or by armed opposition forces.” (2001: 14)

with the main focus being Kenya. In the past six years, there have been various attempts to deal with Kenya's past of human rights abuses and other forms of atrocities, starting with the establishment of the Taskforce on the Establishment of a Truth Commission in Kenya in 2003. This was indeed an acknowledgement that the country had a legacy of a repressive past that needed to be dealt with. This process is still ongoing and the Kenya Truth Commission Bill 2008 formed the next stage for the actualization of this goal.

This paper will seek to answer the following questions: What are the background conditions leading to the establishment of truth commissions? How can truth commissions be justified? Are truth commissions effective in fulfilling the mandate assigned to them? This paper will explore the potential of the Kenya Truth, Justice and Reconciliation Commission (KTJRC) in the light of the Kenyan context. The paper will argue that a truth commission is unlikely to achieve much in Kenya, first because there has been a lack of political will among the political class and second because there has existed a culture of impunity. In addition, seen in the prism of the work of past commissions in Kenya it is likely to be surrounded by controversy and therefore end up not delivering much.

Background

As a democratic wave (Huntington: 1992) started sweeping across the regions of Latin America, Southern Europe and East and Central Europe from the 1970s into the 1990s, countries were being transformed from authoritarianism and illiberal rule to democratic governance (Teitel, 2004). There was a concomitant effect accompanying these changes: the need to confront their past. In many of these countries for example Spain, Argentina, Chile, Poland, the former Czechoslovakia among others, the regimes ruling them had been doing so through an iron fist, usually by force and repression to coerce obedience and crush opposition and to hang onto

power. Simply put, many of these regimes were atrocious. Because of the nature of these regimes, countries transitioning from this authoritarian rule needed to deal with their atrocious pasts and confront their legacies. States were therefore confronted with a choice of how to deal with the past; hence transitional justice. Mutua (2008:1) captures the essence of transitional justice by arguing that

The concept of transitional justice has come to represent the midwife for a democratic, rule of law state. The script for the construction of such a phase is now regarded as an indispensable building block for sound constitutionalism, peace building, and national reconciliation in post-conflict societies or societies emerging out of abusive, authoritarian and fractured pasts.

However, there are various difficulties associated with transitional periods for most countries that want to confront the past of an illiberal rule or conflict. This is because there are many people involved either as victims or perpetrators or as the existence of disintegrated social and state institutions. Still, the need to confront the past is always a choice to be made by these societies, either by themselves or through the assistance of the international community. The question is usually how. The issue of past memory is always there and the answers on how to deal with the past are conducted within the discourse of transitional justice. Forseberg (2003; 67) argues that “it has increasingly {...} become more common place to assert that we cannot simply leave the past behind us, but must carry the burden of history with us. The question is how”. Thus the importance of dealing with the past is amplified.

A justification for the need to deal with the past despite the difficult circumstances that countries in transition confront is elucidated by identifying difficulties that are occasioned by past legacies. For example, in instances occasioned by the end of violent conflicts, or the collapse of a harsh totalitarian state, there is always a need for the communities involved in the conflict, or the oppressors of the prior regime to live together, such as the case of Argentina or South Africa after apartheid. In addition, to these, “the sheer number of participants in the violence, the various

perceptions of who was in the ‘right’ and who was in the ‘wrong’ and the presence of struggling state institutions make the pursuit of justice and reconciliation quite complex. Nonetheless, it is important to have some means by which to acknowledge the crimes committed during a period of totalitarian rule or violent conflict.” (Anderlini *et al* 2005: 1) This is the question that transitional justice seeks to address.

Definitions

Transitional Justice:

What then is transitional justice? “ Transitional justice in short refers to the short term and often temporary judicial and non-judicial mechanisms and processes that address the legacy of human rights abuses and violence during a society’s transition from conflict or authoritarian rule” (Anderlini *et al* 2005:1). Teitel (2000; 90) defines transitional justice as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive regimes”. Transitional justice can also be referred to as “ a field of activity and inquiry focused on how societies address legacies of past human rights abuses, mass atrocity or other forms of severe social trauma including genocide or civil war in order to build a more democratic, just or peaceful future” (www.ictj.org).

From these definitions, it can be seen that transitional justice seeks to achieve some goals for the new society, like peace, democracy or reconciliation by confronting the past through various mechanisms both judicial and non judicial. Anderlini *et al* (2005:1) identify the following goals of transitional justice:

- Addressing and attempting to heal divisions in society that arise as a result of human rights violations and other atrocities,
- Bringing closure and healing the wounds of individuals and society, particularly through ‘truth telling’,

- Providing justice to victims and accountability for perpetrators,
- Creating an accurate historical record for society,
- Restoring the rule of law,
- Reforming institutions to promote democratization and human rights,
- To ensure that human rights abuses are not repeated, and,
- Promoting coexistence and sustainable peace.

The mechanisms of confronting the past include prosecution of perpetrators through national or international jurisdiction bodies, retribution and reparations, establishment of truth commissions or other forms of investigation of the past and lustration (Williams *et al* 2005).

The goals of transitional justice (as identified above) are varied and are contingent upon varying political, legal and institutional conditions. It is worth noting, however, that not all these goals can be pursued simultaneously, or even pursued at all. Political conditions obtaining before and after the fall of authoritarian regimes including how the conflict ended or the form of transition, whether it was a spontaneous or negotiated transition matter a lot in determining whether and how countries decide to deal with the past. Furthermore, the passage of time between the transition and the commitment of atrocities condition which of these goals can be pursued and how.

Mutua (2008: 1) argues that the term transitional justice captures two notions: “first, it acknowledges the temporary measures that must be taken to build confidence in the post-despotic society. Secondly, by its own definition, transitional justice rejects a winner-take-all as a beachhead to the future. In other words, transitional justice calls for deep concessions on either side of the divide.” These requirements of transitional justice set it apart from normal justice, by identifying the extraordinary circumstances in which it is implemented and also sets out some of its expectations.

Truth Commissions

The institution of truth commissions has gained prominence in the last twenty years. As societies grappled with how to deal with the past, the most preferred mechanism was through prosecution. However, for practical and legal reasons, such as high costs, inefficient judiciary, lack of independent judiciary, powerful opponents to attempts at transitional justice and so on, it became increasingly difficult to conclusively deal with the past using prosecution. An alternative had therefore to be sought that would deliver the societal goals of dealing with the past. This alternative came to be known variously as a “truth”, “truth and reconciliation”, or “truth, justice and reconciliation commission”. Other bodies that would still fall within the wider ambit of a truth commission were implemented in various countries in Latin America, such as the “Historical Clarification Commission” in Guatemala, or the “Commission for The Disappeared” in Argentina.

Hayner (1995: 225) defines truth commissions as “bodies set up to investigate a past history of violations of human rights in a particular country – which can include violations by the military or other government forces or by armed opposition forces.” Additionally, the term “truth commission” is used to refer to bodies that share the following characteristics: (1) truth commissions focus on the *past*; (2) they investigate a pattern of abuses over a period of time, rather than a specific event; (3) a truth commission is a *temporary* body, typically in operation for six months to two years, and completing its work with submission of a report ; and, (4) these commissions are officially sanctioned, authorized and empowered by the state, (and also sometimes by the armed opposition, as in a peace accord).” (Hayner 2001: 14) These components of a truth commission are important to delineate it from different bodies, for example general commissions of inquiry, which may be constituted for other specific purposes. It is important to emphasize that a truth commission focuses its attention on a pattern of abuses, rather

than a single event for it to be seen to be fair. Otherwise, focusing on one event might be seen to be targeting a particular group of people or individuals.

For commissions to be effective, they should run on a predefined course as pointed out in the definition, without having too long period to conduct its inquiry. This is in order that it may maintain public interest, work while the momentum for reform is still strong and present its report while the new democratic forces are still keen on dealing with the past before other urgent issues such as economic reconstruction take precedence. This will ensure, or at least make it likely that a commission's recommendations will be implemented. Official sanctioning of truth commissions makes their work more acceptable within the society and also ensures that it is able to gather evidence and at times means the government is bound by the work of the commission as presented in its report. This paper will adopt the definition offered by Hayner as the most comprehensive in covering truth commissions. It also fits within the definition of the Kenyan Truth, Justice and Reconciliation Commission.

Methodology

This thesis combines a case study method combined with a historical analysis. Yin (1994:1) quoted in Vikan (1998), says that the case study method is to be preferred when “‘how’ or ‘why’ questions are posed, when the investigator has little control over events, and when the focus is on a contemporary phenomenon within some real-life context.” While this study is not mainly a ‘why’ one, it has why concerns when trying to inquire why a country in transition may choose one transitional justice mechanism or institution over another. However, the case study method is mainly justified by the ‘how’ and exploratory nature of the study. In this study, mainly secondary materials are used including published books and journal articles in addition to several primary documents, including the Taskforce Report, the Truth, Justice and Reconciliation Bill

2008 and various other documents emanating from the Peace Accord². These materials are used to lay a foundation for truth commission practice in general, and for the analysis of attempts to establish a truth commission in Kenya.

Justification

An inquiry into truth commissions is justified by their increasing prominence as one of the most effective ways of confronting the past, as opposed to prosecution or other retributive or reparatory mechanisms, while occasionally providing different facets and degrees of each. In particular this kind of atrocious past has been witnessed in Kenya before the regime change in 2003 and again for a brief period in 2008, the second instance which was directly attributed to the failure to adequately deal with the past (Mutua Sunday Nation, 8th February and 29th January 2008, GoK 2003, GoK 2008). Kenya has had a troubled history of repression, assassinations, massive theft of public resources and serious human rights abuses including torture and detention without trial and ethnic cleansing (Mutua, 2001 Klopp, 2001, Human Rights Watch, 1991). It was this legacy that the proposed KTJRC is intended to address. This study will propose recommendations for the implementation of a Kenyan truth commission by studying their practices elsewhere.

² The Peace Accord, signed on February 28 2008 was to end the post election violence and political dispute that arose after the disputed 2007 elections. Apart from agreements on power sharing, it stipulated other undertakings by the new government including the formation of various commissions {Waki and Kriegler} (see foot note 10), and a truth commission, all in a bid to kick start stalled reforms and past attempts to conclusively deal with Kenya's past.

Thesis Structure

This first part of the thesis gives the general introduction to the problem, providing a brief background to transitional justice and truth commissions in addition to the methodology and definitions of the main concepts used in this paper. Chapter one traces the history of truth commissions, and then discusses the practical questions of truth commissions. Issues addressed include for example why a truth commission? Why is timing, the internal procedures and organization and who establishes a truth commission important? The chapter also explores how truth commissions may be justified and the scope of their work.

The second chapter traces the history of state tyranny and human rights abuses in Kenya mainly as a demonstration that indeed, there is a past legacy to be dealt with. The third chapter discusses the Kenyan context in the transitional justice period, and provides a critical analysis and discussion of the politics and controversies surrounding the attempt to establish a truth commission. The two main concrete steps in this endeavor, the Taskforce to inquire into the establishment of a truth commission in Kenya and its report and the KTJRC Bill are discussed.

Finally, in the conclusion, the thesis summarizes the issues dealt with in the thesis and the discussions therein, and charts the way forward for the Kenyan process of establishment of a truth commission.

CHAPTER 1 - THE HISTORY AND PRACTICE OF TRUTH COMMISSIONS.

1.1: Introduction

This chapter will look into the institution of truth commissions (TC)³. It begins by responding to the general question of why societies need to deal with the past, then goes on to trace the history of truth commissions and finally, sketches out a general discussion of TCs in terms of practice.

1.2: To Deal or not to Deal with the Past: Choice or necessity?

Hayner (2001: 3) argues that “while the details of repression might differ widely, as does individuals and national responses, such atrocities leave a *powerful legacy*.” It is this legacy that has led to many questions as to how to deal with the past, if at all. But why should individuals and nations care about the past? Should not the past be forgotten, tucked somewhere deep, away from the social and official memory of a nation?

There are many arguments, within the transitional justice paradigm, for and against attempts to deal with past. Some argue that the best way to move forward is “is to bury the past that digging up such horrific details and pointing out the guilty will only bring more pain and further divide the country”, (Hayner 2001: 5) while on the other side, the argument is that countries have an obligation in international law to prosecute serious human rights violations, and that this is the only way to achieve a break with the past and the establishment of democracy, and re-establishment of the rule of law (Graybill and Lanegran 2004; Landsman1996); or prevent recurrences (Rotberg 2000). Evenson, quoted in (Graybill and Lanegran 2004) identifies these goals as follows: “providing for individual criminal accountability, deterrence, and punishment,

³ Any reference to TC encompasses all truth commissions, even if they are called by different names in different countries.

and establishing a common truth about the past, which can carry the society forward in a process of healing and reconciliation.” Likewise, Aukerman, in Graybill and Lanegran, (2004: 3) identifies these reasons as: retribution, deterrence, rehabilitation, restoration, condemnation and social solidarity”.

These questions of whether to deal with the past have, however, to be seen from the perspectives of all actors involved, including the new democratic government, the victims and the perpetrators. The perpetrators have only one interest in common: to avoid their being held into account and of their officers and officials at all costs. The victims and their families seek retribution for past violations. The transitional government’s interests lie in staying in power, and trying to achieve long-term goals of democratic consolidation (Skaar 1999: 1111). The constellation of these interests, depending on which one is preponderant and especially the relative power of the agents of the former regimes, of the transitional government, and the public opinion on the issue, has fundamental consequences, as these may determine whether and which action will be taken.

Another relevant factor is the context, which has to do with a country’s particular circumstance and the nature of a transition. Sometimes the practical realities of a transition, for example negotiated transition or a situation where a country is devastated by civil war, and has a moribund economy and justice system (Mozambique after the end of civil war) make pursuing transitional justice difficult. In addition, in situations when the previous oppressors remain strong economically, pursuing transitional justice becomes a matter of contention: for example, the new transition government might fear invoking the wrath of the still strong military.

But the big question is: “can a society build a democratic future on a foundation of blind, denied or forgotten history?” (Hayner 2001: 5) Past experience has however demonstrated that it is imperative on societies in transition to deal with the past, as this past always remains as part of

its memory and has consequences on whether the country is able to move forward and establish itself as a democratic, rule of law society in which its citizens can live together in peace without the fear of the return of a predatory state. This is a question that societies have increasingly asked themselves in the recent past, as it has been recognized that how a society decides to confront the past has direct consequences on the future, especially in consolidating newly won democracies and assuring a more peaceful coexistence and national cohesion in the future. In the words of the Taskforce inquiring into the necessity of establishing a truth commission in Kenya:

Equally indisputable is the fact that a ravaged state, such as Kenya, cannot be recreated without an agenda for transitional justice to end public corruption and prevent human rights abuses. But transitional justice cannot be achieved unless the mistakes and atrocities of the past are properly, fairly, and comprehensively investigated, the perpetrators held accountable, and victims recognized and their dignity restored. In other words, the past must be confronted, the state must be audited, and the country must be exorcized of the ghosts of the past that still haunt it. Amnesia would simply lead to the certain death and failure of state and society. (GoK 2003: 11).

This demonstrates that the need to confront the past is always a choice to be made by transitional societies, either by themselves or through the assistance of the international community.

Anderlini, *et al* (2005: 1) go on to justify the need to deal with the past despite the difficult circumstances that countries in transition find themselves in. “When violent conflict ends, or a harsh totalitarian state collapses, the perpetrators and victims of violence must resettle together in their community. This can be immensely difficult considering that they might have been on different sides of the conflict. Nonetheless, it is important to have some means by which to acknowledge the crimes committed during a period of totalitarian rule or violent conflict.”

1.3: Confronting the past: How?

Transitional justice seeks to achieve various goals for the new society like peace, justice, democracy or reconciliation by confronting the past through various mechanisms, both judicial and non judicial. These mechanisms could include prosecution of perpetrators through national or

international judicial bodies, retribution and reparations, establishment of truth commissions or other forms of investigation of the past, and lustration (Williams *et al*: 2005).

While many of these mechanisms might be available to transitioning societies, there is no ‘one-size-fits-all’ solution when it comes to the choice of transitional justice institution. The choice is dependent on the particular goals the society might seek to achieve, the political conditions, or even at times (civil) societal vigilance and public opinion.

In the past, the classic response to ‘settling accounts’ has been prosecution, exemplified by the Nuremberg trials, where the defeated regime’s leaders are dealt with using judicial processes, either through the normal court system or special (inter)national tribunals for example the ICTY and ICTR. (Teitel 2004; Landsman 1996) However, the choice for prosecution has fizzled over time due to the many difficulties involved in prosecutions: “While there is ample reason to conclude that the best response to such violations is, most often, the vigorous prosecution of perpetrators, there were suggestions that there may be situations which, *for practical reasons or on the basis of sound policy, prosecution is inappropriate*” (Landsman 1996: 84).

These reasons would include for example, the uncertainty of the outcome of the process. Additionally, after a conflict or period of repression, the institutions that would pursue prosecution - like the police or the judiciary are usually incapacitated, compromised or still corrupt to pursue the perpetrators. It might also be hard to prosecute because of the large numbers of perpetrators involved. Trials are therefore uncommon, and where they have been tried, they rarely reach the main perpetrators. (Landsman 1996) In some countries, especially in Latin America, blanket amnesties forestalled prosecution. The main obstacle to prosecution, however, has often been lack of political will that warns against the divisive nature of prosecutions. (Hayner 2001: 89)

While each of these institutions has their advantages, they also have limitations. Many countries would prefer prosecution as this is seen as the most direct way of exacting justice for past crimes, but it has its own limitations, including the high number of persons involved, weak state institutions after regime demise, concerns for stability and peace and so on. (Landsman 1996)

The other major way of dealing with the past has been *lustration*, the removal and barring of persons from government employment and other public life, based on their affiliation with the prior regime. This process has been criticized from the perspective of due process guarantees and relying on faulty government files from the previous regime (Hayner 2001). In addition to the limitations presented by many transitional institutions and processes, the choice for a transitional justice institution or mechanism is informed by what are the goals of a society in transition in responding to past atrocities. These goals may be for example to “punish perpetrators, establish the truth, repair or address damages, pay respect to victims and prevent further abuse. Other aims may be promoting national reconciliation, and reducing conflict over the past, or highlighting the new governments concern over human rights and therefore gaining favor from the international community” (Hayner 2001: 11)

1.4: The Turn to the Truth

Due to the unavailability and/or unsuitability of prosecution and other transitional justice processes/institutions, and often as a result of their limitations, many societies in transition started thinking of alternatives, especially when confronted with the ‘*trial or nothing*’ dilemma. In particular, the many shortcomings associated with prosecution were a major drive towards finding an alternative institutional setup of dealing with the past.

Hayner argues the point this way: “It is due to the limited reach of courts, and partly out of recognition that even successful prosecutions do not resolve the conflict and pain associated with past abuses, that transitional authorities have increasingly turned to official truth-seeking as a central component in their strategy to respond to past atrocities.” (Hayner 2001: 14). This is the shift that has led countries to experiment with the institution of truth commissions (TC) as we know it today.

Increasingly now, many countries coming out of tragic pasts –as a result of a repressive regime or civil war are choosing TCs as their preferred method of confronting the past. There has also been a realization, that there are a whole lot of needs arising from such situations that cannot be effectively addressed through trials, “even if the courts function well and there are no limits placed in prosecuting wrongdoers, which is rare”. (Hayner 2001: 11).

Most famously utilized in South Africa, truth commissions have been set up in at least 20 countries (Crocker 2000; Hayner 2001). In a seminal article published in 1994, Priscilla Hayner (1994: 600) avers that truth ‘commissions can play a critical role for a country trying to come to terms with a history of massive human rights crimes’. Most truth commissions have been hailed as largely successful in achieving their set goals, and as better alternatives to other transitional justice institutions as reparations, prosecutions or lustration (Hayner 2001: 7), while still conceding that they have many limitations: ‘at the end of a commission’s work, a country may well find the past still unsettled, and some key questions still unresolved” (Hayner, 2001: 23).

In the recent past, a lot of attention has been given to truth commissions and a lot has been written about them, including how to form them, while the South African Truth Commission (Hayner 1994, 2001; Villa-Vicenzio and Verwoerd 2000; Rotberg and Thompson 2000) remains at the focus of these studies. Hayner’s work on truth commissions remains the most influential, and has shaped the writings on truth commissions.

1.5: The Practice of Truth Commissions

To understand truth commissions, we need to establish why they are formed in the first place. Hayner (2001: 24) says that while a commission set up to investigate past abuses can have many purposes, the most straightforward reason to set up a TC is sanctioned fact finding: to establish an accurate record of a country's past and thus help to provide a fair record of a country's history and its government's much-disputed acts. (Hayner 1995)

Hayner defines truth commissions as “bodies set up to investigate a past history of violations of human rights in a particular country—which can include violations by military or other government forces or by armed opposition forces” (Hayner 1995: 225). This general definition helps encompass many of the atrocities that happen both in a repressive government and in a civil war with two sides to a conflict. Truth commissions have the following characteristics, that set them apart from other general commissions, like commissions of inquiry: ‘The term “truth commission” is used to refer to bodies that share the following characteristics:

- (1) truth commissions focus on the *past*;
- (2) they investigate a pattern of abuses over a period of time, rather than a specific event;
- (3) a truth commission is a *temporary* body, typically in operation for six months to two years, and completing its work with submission of a report ; and,
- (4) commissions are officially sanctioned, authorized and empowered by the state, (and also sometimes by the armed opposition, as in a peace accord). (Hayner 2001: 14)

It becomes necessary to have these characteristics as they also help in setting the boundaries of truth commissions, ensuring their effectiveness, legitimacy, impact and so on.

1.5.1 Justifying Truth Commissions

While it is generally accepted that truth commissions serve an important role in a transitional society, they have been formed by political authorities as a public relations exercise, an equivalent of a “show trial”. A truth commission’s rationale must be justified by necessity and the potential goals that it would accomplish for society. It must be shown that a truth commission is necessary, especially because of the sacrifices that it makes regarding victims’ justice. It must also be shown to serve a higher good than prosecution. The question of justification of truth commissions goes to address the difficult question that all transitional societies have to grapple with: the tradeoff between truth and justice (Landsman 1996; Guttman and Thompson 2000), although many argue that the trade off is unnecessary and perhaps undesired, as a combination of both is achievable at the same time.

Gutmann and Thompson provide three criteria that a justification for a truth commission should be based: the justification must be moral in principle, practice and perspective. A justification in principle means that it appeals to rights or goods that are comparable to the justice being sacrificed. In this regard, Guttman and Thompson argue that “The stability of a political regime itself is not a moral good or a sufficient reason to sacrifice justice for individuals” (Guttman and Thompson 2000: 23). A justification in practice requires that reasons offered for the establishment of a truth commission be to the “extent possible embodied or exemplified by the commission’s own proceedings”: as such, victims of past injustices should reasonably perceive that a significant aspect of justice, such as punishment of crimes committed against them is not being sacrificed in order to create a truth commission”. Finally, a justification in perspective implies that it should offer reasons that resonate with the majority of the people, not segments of the population. (Guttman and Thompson 2000: 23). These criteria set out the formation of a truth commission as a necessary and worthwhile undertaking, set apart for

example from normal commissions of inquiry used by governments to cool crises and whitewash governmental mistakes.

Why is it important that a truth commission be justified? As a public institution, a truth commission has to show that its existence will serve the interests of society. If it can be shown that its introduction simply equals sacrificing justice (by eschewing prosecution of perpetrators as victims demands or as obligation to international law and international conventions), then it should be avoided. In this regard, Landsman, (1996: 90) argues that there might be instances when the truth commission option should be avoided, “{...}, to avoid creating an easy escape route for governments that desire to choose political expediency over justice and the obligations of international law, limits on the use of the TC alternative ought to be insisted by the international community”. This implies that truth commissions cannot and should not be used in all transitional circumstances, unless fully justified. Landsman (1996: 90) goes on to provide conditions when a truth commission option is not justified, and therefore should be rejected:

- (1) the commission is not structured to make a thorough inquiry and exacerbates delay;
 - (2) compensation is not paid to victims; (This point has to be seen in the wider context of dignifying victims and acknowledging their suffering. It should not be a justifying objective to establish a truth commission in and of itself. Nevertheless, compensation does not have to be in monetary terms however. Even token steps such as rehabilitation of victims by providing medical and psychological help should be important aspects.)
 - (3) the commission is not the product of democratic decision-making;
 - (4) exigent social, economic or political factors make more complete compliance impossible.
- (90).

If these conditions are not present, it would be wise to avoid truth commissions.

1.5.2: The Objectives of Truth Commissions

If a truth commission has been justified in a transitional society, then the next step is the discussion of its objectives. While it might be obvious that the main objective of a truth commission is to investigate and report the truth about past human rights abuses, truth commissions serve several other objectives. (Hayner 2001; Brahm 2007; Huyse 1995) The objectives of any truth commission determine its mandate and operation. The objectives of a truth commission include: investigating, clarifying and acknowledging the truth about past violations of human rights. Also, by performing a sanctioned fact finding, truth commissions are able to provide a detailed account of the patterns of violence, across regions and time, and therefore literally rewriting history (Hayner 2001: 25). This objective, while very noble in itself, however cannot be seen in isolation and has to be combined with other objectives for it to be meaningful. For one could ask after truth, then what? This question is answered by providing other objectives for truth commissions concomitant with it such as reparation for victims.

Hayner also identifies other objectives of truth commissions. She points out that “they seek to prioritize the needs of the victims by giving them a chance to tell their story, possibly in a public forum: “By listening to victims’ stories, perhaps holding public hearings, and publishing a report that describes a broad array of experiences of suffering, commissions effectively give victims a public voice and bring their suffering to the awareness of the broader public”. In addition, “Commissions may also serve the needs of victims by helping design a reparations programme of victims and those killed in political violence. In a few cases, the names of victims compiled by the TC serve as the lists of beneficiaries once a reparations programme is established.” (Hayner 2001: 28)

Truth commissions should also aim to contribute to justice and accountability. These are two very important values that are absent in repressive societies. Through the work of truth commissions, it is possible to identify perpetrators and in instances where a truth commission has been mandated to forward its report to judicial authorities, prosecutions may result, for example in Argentina, or the removal of officials in the military and police services in El Salvador (Kaye 1997). However, the point has often been raised whether truth commissions really serve the purposes of justice, (Brahm 2007; Gibson 2005; Stanley 2001) and in particular, questions would be raised on whether the TRC itself, with its amnesty provisions would have contributed to accountability either. Therefore, this objective has to be seen against the backdrop of what the society feels is more important: securing justice for crimes committed or promoting peace and reconciliation.

Truth commissions also have a major role within their mandate to outline institutional responsibility and to recommend reforms. Crocker, (2000: 106) argues that “To reckon fully with past wrongs, an emerging democracy must identify causes of past abuses and take steps to reform the laws and basic institutions to reduce the possibility that such violations will be repeated” . Institutions such as the military, the police and the judiciary, are always ‘guilty as charged’ when it comes to violations of human rights, the former two as direct perpetrators while the judiciary has in many countries refused to take action to prevent abuses even when its relatively independent, for example in Chile, and has even colluded with state agencies in repression, for example in Kenya (Mutua 1994, 2001; GoK 2003: 20). During the detention and torture era of Kenya’s history, the judiciary was always willing to extend a hand to the secret police and would even at times hold trials at night with only the accused and the prosecutor’s presence and would admit in court evidence extracted from defendants through torture.

Therefore, it behooves any truth commission to make recommendations for institutional reform after establishing responsibility for human rights violations by institutions. Without institutional reforms, it is easy to envisage that violations will be repeated if the institutional and societal conditions that allowed them remain intact. Through its work, a truth commission may contribute to the goal of institutional reforms by identifying the causes of past human rights violations in its pursuit of truth.

Finally, a truth commission should aim to “To promote reconciliation and reduce tensions resulting from past violence,” “Common wisdom holds that the future depends on the past: one must confront the legacies of past horrors or there would be no foundation on which to build a society. By directly confronting the conflicts of old, it is surmised, these conflicts will be less likely to explode into severe violence or political conflict in the future. (Hayner 2001: 30).

However, this objective (of achieving reconciliation) by truth commissions has been questioned by many (Hayner 2001; Stanley 2001; Gibson 2005; and Villa-Vicencio 2001), especially in connection to the South African TRC and as such, remains one of the most contested aims of truth commissions faced with much scepticism. Hayner even goes further to argue that reconciliation should be avoided as part of the name of truth commissions: “On the other hand, the increasing use of truth and reconciliation commission as the generic name { ... } is inaccurate and should be avoided, since many of these commissions on the truth have not held reconciliation as a primary goal of their work, nor assumed that reconciliation would result. (Hayner 2001: 23). Because the work of a truth commission is only ephemeral, it cannot be easily established that it directly led to reconciliation. Moreover, whether reconciliation results from the work of a truth commission is much dependent on how the process proceeds. For example, whether a truth commission is able to engender the telling of the whole truth, other than just establishing historical and legal facts remains also disputed, so is the meaning or interpretation of

reconciliation. (See Meiring 2000: 128-29; Du Toit 2000: 132-133) If victims perceive that amnesty, which is a big aspect of most truth commissions was used to avoid holding their persecutors accountable, achieving reconciliation is difficult to imagine. Simply put, it may be hard to directly attribute reconciliation to the mere existence of a truth commission. (Minow, 2000: 50)

1.5.3: Timing

There are three aspects of timing relevant for truth commissions, the first being the timing of the establishment of the truth commission, the second relating to the time period of human rights violations to be covered in the work of truth commissions, and, third, referring to the time period within which the truth commission is to produce its report. First, it is fundamental that a truth commission be established immediately after the transition moment, when the process will have public support and still has the momentum of the revolution. This might be the only moment when a new president/parliament might have the legitimacy to set up such a truth commission, before public support recedes and new priorities emerge for the new democratic government.

Timing in this perspective also has importance especially concerning evidence. After most transitions, the perpetrators are left in positions of influence especially in the security forces, and therefore have access to much evidence that could be used in truth commission proceedings, and they have the incentives to destroy such evidence, if they have not done so in the period preceding transition, for example in East Germany before unification. Moving with speed could help preserve some of the evidence. The Kenyan Taskforce on the Establishment of a Truth Commission captured the importance of speedy institution of a truth commission, saying that the “Citizens expect this break to be made urgently and soon so that the people can adjust

and plan their lives in a new dispensation,” and that the Taskforce was recommending that a truth commission be established as urgently as possible, not later than one and a half years after the transition. “This recommendation is informed by the fact that truth commissions are most effective when established within the first two years of political transitions or regime change, otherwise governments consolidate their power and retrogress to past practices.” (GoK 2003: 28). Establishing a truth commission as soon as possible will also help a country deal with the violations before governments start having other demands from the citizenry, such as social provision or the need to repair a battered economy.

Second, timing has to do with the period that a truth commission is to remain in operation. Specific timelines ensure that commissions finish their work on time, keep the commissions in focus, and ensure they are able to fulfill their mandates without going on forever, so as to publish the results of their findings and recommendations to an interested and still engaged public. Hayner (1995) and Freeman and Hayner(2003) argue that a commission should plan to complete its mandate within one to two years, while acknowledging that investigations might not be complete within the predefined time limit. The alternative, they argue, is worse, as exemplified by the Ugandan case where the commission there has operated indefinitely. More often, the time limitation imposed on truth commissions means that they cannot investigate all violations committed by the previous regime. Hayner (2001: 222) argues that “{...}, however, it is useful for the report to come out while there is still momentum of transition underway, when a spirit of reconciliation may still be in the air and recommended reforms are more likely to be implemented”. Either way, it is never possible to investigate all crimes, and commissions always have their mandates limited to the “most serious violations”. (Kenya Truth, Justice and Reconciliation Bill GOK: 2008).

Finally, the period of time that a truth commission covers is important. The specific period that a commission's work covers should be adequate, but this is always a matter of dissent. For example, in Kenya, there was disagreement over what period the proposed truth commission would cover, when the idea of a truth commission was broached in 2003. This became an issue again in 2008 when a new momentum for a truth commission was rekindled by the tragic events resulting from the General Election of December 2007, and whose direct result is the current Truth, Justice and Reconciliation Bill. Many were arguing that the truth commission should cover the period immediately after independence in 1963, while there were arguments that that was too far reaching. In the final analysis, the period under investigation was set between 12/12/1963 and 28/02/2008. This is perhaps the longest period ever to be covered by a truth commission, in addition to the South African TRC. It remains to be seen how well the TC will be able to cover the numerous violations in such an extensive period.

1.5.4: Crimes to be Investigated and Commission Powers

Besides time limitations, truth commissions are also faced with financial and human resource limitations. In addition, during repression, there are far too many crimes of diverse nature and victims. In this respect Freeman and Hayner (2003: 6) argue that "accordingly, the commission might be restricted to examining or prioritizing those violations that were most prevalent or considered to have been most serious and pernicious in that particular society." Therefore, every truth commission has to have certain limitations of the crimes it can investigate.

These limitations are both for practical and efficiency purposes, though every individual victim and civil society organizations would hope for the commission to investigate all types of crimes and all cases presented to it. The kind of violations to be investigated must be clearly stipulated in a commission's terms of reference, whether established by presidential decree

(Argentina, Chile) or through parliamentary legislation (South Africa, Kenya). A clear stipulation ensures that a commission investigates the most serious human rights violations and provides manageable recommendations in its final report. Perhaps one solution to the limitation of crimes to be investigated is to have the commission run concurrently with other mechanisms, that assist those victims left out (for example when victims of torture that did not lead to death are left out, like in Argentina) with programmes for their physical and mental rehabilitation and provision of medical services and schooling for their families, even if such arrangements are not undertaken within the ambit of the truth commission process.

1.5.5: Who Establishes a Truth Commission?

The question of whom or what body establishes a truth commission arises in all societies in transition. This is because it has important ramifications on legitimacy and efficiency. In most instances, truth commissions are established by the executive arm of government – prime minister or president. This has been the case in many South American countries including Argentina and Chile.

Truth commissions can also be established through parliamentary legislation, the most famous of this kind being the South African TRC. The proposed Kenyan truth commission is also established through an Act of Parliament, contrary to the recommendations of the Taskforce which recommended that it be established through presidential order, arguing this to be the most reliable, expedient and effective route. The third major way that a truth commission might be set up is through United Nations sponsorship (for example in El Salvador and Sierra Leone).

The wisdom of who is to establish a truth commission is informed by similar factors influencing the whole transition process, such as the nature of a transition, the relative power of the new democratic forces and the prior regime or its protégés. If elements of the previous regime

are still in positions of influence in the police, the military or have embedded themselves in the new political dispensation, the presidential option might be hard to achieve. The easier options would be parliamentary enactment or the involvement of international institutions like the UN. Each of these forms of establishment has their own justifications. For example, Alex Boraine argues that the parliamentary establishment of the TRC engenders legitimacy by having a democratically elected body participating in its formation. In the case of South Africa, it would have been hard on the South African case for the president to promulgate a commission immediately after the transition, making the option of parliamentary enactment more viable there.

While UN sponsorship would give a truth commission more legitimacy in terms of impartiality and objectivity, a UN sponsorship is more appropriate in countries where institutions have collapsed, mainly due to a civil conflict, such as in Sierra Leone. In the final instance, the choice over whom or what institution will set up a truth commission boils down to whether a country is interested in pursuing transitional justice. Hayner (1995) also argues “that finally, it does not matter how or who establishes a truth commission in terms of its success. Rather, it is their terms of reference, resources, and general investigative powers they have that ultimately decide their impact”.

1.5.6: Internal Organization and Procedures

After the establishment of a truth commission, there are several aspects that influence their success, internal organization being one of them. It has generally to do with how the operations of a TC are carried out. Internal procedures are usually left at the discretion of the commissioners, although others may be enshrined in the Parliamentary act or presidential decree establishing them, and define whether hearings will be held in public or whether a commission will have the power to subpoena, search and seize. The Parliamentary enactment usually provides

more concrete operational procedures than the presidential decree, for example the South African TRC. (Hayner 2001: 214). Sometimes the commission's terms of reference can severely circumscribe the procedures and operations of truth commissions, thereby affecting its outcome. For example, the Guatemalan TC was forbidden from "individualizing responsibility" and its work was not to have any 'judicial aim or effect'. (Hayner 2001: 32) Therefore, a truth commission's operational procedures are contingent upon the terms of reference or their establishment act's provisions.

Usually, how a commission is created – by parliament legislation, presidential decree or through a negotiated agreement –has a direct effect on its procedures and operations, especially since this affects the powers granted to the commission, including such questions as whether the commission can make (legally) binding recommendations. Internal organization and procedures of a truth commission are important, because they could easily be deemed to be the most important criteria in assessing commission's effectiveness and credibility of its work. For example, commissioners' disagreement on issues such as witness selection or whether to hold public or private hearings will have a bearing on the outcome. In addition, so are the effects that time and financial restrictions may have on TCs with regard to fulfilling their mandate especially if there are disagreements on procedure and operations.

1.6: Expected Outcomes

This is perhaps the most important aspect of a truth commission. This is because it is the gauge of how successful it was in its work. A commission's expected outcome is set at the onset by the establishing act, because it is generally the act that defines a commission's operational procedures and sets its mandate. For many commissions, the initial point of establishment has

singularly been decisive in whether they were perceived as successful or not after the completion of their work.

Expected outcomes have generally to be viewed within the terms of reference and mandate(s) assigned to the commission. This is because they set out what the commissions will do, impose limitations of time and also define what crimes can be investigated. As such, this should be the criteria for assessment. Generally, most truth commissions are charged with the responsibility of investigating the truth and the circumstances surrounding any abuse, conducting hearings, either in public or where necessary, *in camera*. Others are given the mandate to recommend prosecutions for perpetrators and provide reparation for victims. Exceptionally, a truth commission may be charged with the responsibility of promoting societal reconciliation, though this remains controversial and viewed with a lot of skepticism as to its achievement; or to issue amnesty to perpetrators who individually apply for amnesty, make full disclosure, do it in public and seek forgiveness from their victims.

1.7: Conclusion

This chapter has laid down the practical aspects of truth commissions, and in the discussion, it has been seen that many of these aspects matter for their work to be successful. While all these practical issues may be conclusively dealt with, truth commissions still face many challenges, such as hostile or unsuitable political environments, and some provisions of truth commissions and their goals might remain controversial and contested even after their work is completed. This general account of truth commissions forms the basis for the exploration of the proposed Kenyan Truth Justice and Reconciliation Commission.

CHAPTER 2 -THE KENYAN CONTEXT: JUSTIFICATION FOR A TRUTH COMMISSION

2.1: Background

There is no doubt whatsoever that Kenya has had an atrocious past. This chapter deals with a brief background on the Kenya situation, including its human rights record up to the point where initial attempts to deal with the past through a truth commission came to being. In its short history of independence, the Kenyan people have had to endure periods characterized by massive human rights abuses, including torture, detentions without trial, political assassinations ethnic cleansing and massive theft of public resources. These have been widely documented. (Africa Watch 1991; Klopp 2001; Mutua 1994, 2001; GoK 2003) These kinds of abuses continued as late as the year 2002 when that year's election brought about a regime change. This chapter will endeavor to put the Kenyan context into perspective in relation to the need for a truth commission.

The Kenyan state has been under some form of despotism, from British colonial rule and the two presidencies under Jomo Kenyatta and Daniel Moi after independence. It is not the intention of this paper to go beyond independence from colonialism, because the colonial state was basically formed to oppress the 'natives' and its main tools of rule was terror. After independence from colonialism, there was hope that this would bring democracy and equal rights for all. Though the independence constitution was not fully democratic, it is subsequent amendments that turned it into a despotic one.⁴

⁴ When the state became *de jure* one party after the dissolution of opposition parties in 1966, constitutional amendments were easily passed through parliament and concentrated all executive power with the president. Political

In particular in Kenya, the people waged a bloody campaign to rid themselves of the yokes of the colonizers in anticipation of a better life after the departure of the colonizers, but this was not to be. The new government would even take away the freedom of the citizens that they had so fiercely fought for. It is this kind of despotism, as discussed in the subsequent section(s) that was the precursor, and facilitator of the myriad of human rights abuses that were committed. It is the background described here that informed the formation of the Taskforce⁵ that was to inquire into the need for establishment of a truth commission for Kenya. It has continued to characterize the demand for a truth commission by the Kenyan society. While the Kenyan situation is clearly not as stark as it had been in most countries that had difficult pasts, it raised considerable concern among the international community especially regarding human rights abuse that for a long time was institutionalized by the state and served by its institutions, such as the police and the judiciary.

In the introduction to its report, (see footnote 3) the Taskforce concedes that “The political history and governance of the Kenyan state is a catalogue of gross human rights, the arrogance of power, and the commission of mind boggling economic crimes. Constitutionalism and the rule of law, which are the central features of any political democracy that respects human rights, have been absent in Kenya’s history” (GoK 2003: 19). It such a legacy that has been the hallmark of the Kenyan state.

pluralism was however restored in 1992. The problem of too much power in the presidency continues to be one of the main problems in Kenya, and any attempts at constitutional revision to change this among other major constitutional issues seem highly unlikely in the near future. (The East African Standard online, 20th May 2009) This was also one of the main issues whose lack of consensus was partly blamed on the defeat of the draft constitution in the 2005 referendum. (See Klopp 2001: 477, Brown 2001: 726)

⁵ Officially known as the Taskforce on the Establishment of a Truth, Justice and Reconciliation Commission, it was appointed in April 17 2003 and given until August of that year to conduct its hearings across the country and present its report to the Government. Its Report was submitted to the Government through the Ministry of Justice and Constitutional Affairs on August 26 2003.

2.2: A Short History of Tyranny in Kenya From Kenyatta to Moi: The Beginning and Entrenchment of the Despotic State

Kenya's turn to despotism and human rights violations can be traced back to soon after independence, when the first president, Jomo Kenyatta started to consolidate power, first by banning opposition parties, and soon by detaining without trial, anyone who disagreed with him. The independent constitution (promulgated in December 1963) was somehow democratic, with a federal form of government and a multi party system, but many democratic provisions were altered through a raft of constitutional amendments to make Kenya a unitary and one party state, and an increasing centralization of power in the president, which also increased intolerance to opposition, both during the Kenyatta and Moi periods. (See Klopp 2001: 477; Brown 2001: 726; Mutua 1994: 50) Matters came to a head, as far as human rights violations are concerned, in 1969 when the first political assassination, that of Tom Mboya took place. In a subsequent demonstration against this assassination, several people were shot by police and no one was ever brought to account. The aftermath led to the banning of all political parties except KANU, which was the party of the then President Kenyatta. Soon after, in 1975, another high profile political assassination took place, that of politician J.M. Kariuki. A subsequent inquest linked senior government officials to the murder. Repression was directed at people who opposed the establishment, either within the government or as opposition figures. (Africa Watch 1991: 6)

However, the turn for the worse in Kenya's human rights record came with the ascendant of Moi into power⁶. President Moi then took a number of important measures to consolidate personal rule. The net effect of these measures was to heighten repression and dramatically

⁶ Moi, president of Kenya from 1978 to 2002, presided over Kenya's darkest post independent history. His authoritarian regime was maintained by very extreme repression, including torture, killings, enforced disappearances, detention without trial, charges on sedition and treason and serious curtailment of basic human rights like freedom of speech, assembly and right to a fair trial.

curtail all freedoms. This was to be the hallmark of his 24 year presidency. The turn for the worst in the history of repression was occasioned by an unsuccessful coup against Moi in 1982. The aftermath resulted in persecution and witch-hunts. Africa Watch (1991) says that the pattern of subsequent trials would herald an era of torture where anyone accused of opposition to the government would be tortured to confess to crimes they never committed, in a magistrate's court without a witness or defense lawyer for the defendant, and heavy prison sentences would be imposed after. Sabar-Friedman (1997: 4) notes this period as "characterized by extensive official violence and systematic torture, surveillance and censorship, abductions and detentions without trial, and the deadly use of police and armed forces." Commenting on its report, the Taskforce characterized the Moi-KANU regime as "marked by shameless graft, abominable human rights violations, impunity, and national decay." (GoK 2003: 9)

This campaign of violence intensified in late 1980s and early 1990s when Kenyans started agitating for a return to democracy and multiparty politics after Kenya was made a *de jure* one party state in 1982. The campaign of repression, massive public theft and the utter disregard of any rule-of-law principles continued well into the sunset days of the Moi presidency. The State, KANU officials and their agents committed crimes with impunity. Laws and constitutional amendments, which abrogated due process protections and the independence of the judiciary, were passed with little or no parliamentary debate. (For a well documented chronicle of human rights violation and state despotism in Kenya, see Africa Watch 1991; GoK 2003; Klopp 2001; Mutua 1994, 2001) This history would serve as a powerful motivation at attempts to establish a truth commission.

CHAPTER 3 - A TRUTH COMMISSION FOR KENYA

3.1: Introduction:

As seen from the preceding chapter, Kenya was and still is a candidate of efforts to address its past. It has had the conditions described as repressive and atrocious and prescribed necessary to be dealt with by one or other measure of transitional justice, for its case a truth, justice and reconciliation commission. A lot of ground has been covered in this endeavor, though it remains to be seen whether a truth commission will materialize. This chapter will look into the concrete steps, through a presentation and discussion of the two most important documents in this endeavor, the Taskforce Report and the Truth, Justice and Reconciliation Bill 2008. These two documents need to be considered simultaneously as while the Taskforce Report recommendations were never implemented, it formed a basis for the drafting of the Bill. Both documents represent critical moments in the endeavor to deal with Kenya's past.

3.1.1: The 2002 Election and the Drive for a Truth Commission

As has been discussed above, Kenya had a notorious legacy of serious human rights abuses. Therefore, as it increasingly became apparent that a regime change was imminent in the 2002 General Election⁷, there was an increasing desire, both from the citizenry and the political class on the need to make a clean break with Kenya's dark past of egregious human rights violations and lack of rule of law. It was also meant to address massive theft of public resources through corruption that had once made Kenya being ranked the third most corrupt country in the world after Pakistan and Nigeria. In fact, the upcoming election would be won or lost on the

⁷ A General Election in Kenya takes place every five years, and the elections are held for the local councils, parliament and for the president.

promise of fundamental reforms in the country. It is this kind of momentum for change that would give an impetus at attempts to form a truth commission and other transitional justice measures in general.

Through the aforementioned strong arm tactics, massive theft of public resources to reward cronies and members of his inner circle, electoral gerrymandering and variously using ethnic cleansing, (Klopp 2001, Akiwumi Commission 1999 and Kiliku Committee) the Moi regime had clung to power even after the reintroduction of multiparty politics in 1992. Preceding every electoral cycle, the government would organize ethnic clashes in areas where some communities were viewed as pro-opposition in order to displace them and disenfranchise them in the election. (Klopp 2001, Akiwumi Commission 1999 and Kiliku Committee, KHRC 1998, Waki Report, especially chapter 12) This happened variously around 1991/92 and in 1997. Hundreds of people were killed and hundreds of thousands displaced and remain squatters and internally displaced until this day as they were never allowed to return to their previous homes. The regime's position was also enhanced by a fragmented opposition.

It seemed assured that KANU would win the forthcoming elections in 2002. However, a few weeks to the election, opposition forces joined hands and formed what was then called the National Alliance Party of Kenya (NAK). Its candidacy was endorsed by the leading church organizations and even the leading human rights advocacy group, the Kenya Human Rights Commission (KHRC). The KHRC argued that its endorsement was necessitated by the Moi-KANU regime's "utter failure to develop the country and its creation of a culture of corruption", while saying it was impressed by NAK's ability in uniting other smaller parties, the talent and expertise its membership included and the integrity and commitment to change of its leader, Mwai Kibaki. (Makau-Athena 2003: 9). Soon after this endorsement, a faction that came to be known as the "Rainbow Coalition" would split from KANU, after their disaffection with Moi's

handpicked successor. The KHRC called them conservatives or “spiritual children” of KANU. They however joined NAK to form the National Rainbow Coalition (NARC) that defeated KANU after four decades in power. Mwai Kibaki became the third president of Kenya, on an opposition party ticket. This election was held as a milestone in Africa, where an incumbent agreed to give power to a victorious opposition, because Moi agreed to hand over power peacefully. At last, a hope for reform and change and a clean break with Kenya’s dark past was ushered. That celebration was immature.

At first, the reform agenda was set on course with the quick establishment of two commissions of inquiry, the Bosire Commission and the Ndung’u Commission. The former was to investigate Kenya’s biggest financial scandal, the Goldenberg Scandal, totaling more than US dollars one billion, at that time estimated to be roughly ten per cent of Kenya’s GDP. (Simiyu 2008: 22) The latter was to investigate irregular and illegal allocation of public land. It is in this spirit that the Taskforce⁸ to inquire on the establishment of a truth, justice and reconciliation commission was appointed by the government in April 2003, and presented its report to the government in August 2003. This effort can be seen within the broader theme of the reform programme that the new government had been voted on, including the war on corruption, free basic education and delivery of a new constitution.

All these reflected the commitment and consensus existing then within the Kenyan society on the need to make a clean break with past. Kenyans would soon be severely disappointed. The endorsement of NAK by the KHRC and other civil society bodies would soon be regretted after election as the new democratic forces tasted power and the reform agenda that

⁸ Officially known as the Taskforce on the Establishment of a Truth, Justice and Reconciliation Commission, it was appointed in April 17 2003 and given until August of that year to conduct its hearings across the country and present its report to the Government. Its Report was submitted to the Government through the Ministry of Justice and Constitutional Affairs on August 26 2003.

had propelled them to victory was put to the back burner. These ills were to be seen within the general breakdown of law and impunity in the Kenyan society during the Moi rule. However, the Taskforce report and the two aforementioned Commissions of Inquiry reports would soon suffer the fate of their predecessors:⁹ non implementation, disregard of findings and challenges in the courts. The Taskforce was comprehensive and thorough in its work, and among other recommendations, was the immediate establishment of a truth, justice and reconciliation commission.

3.1.2: The Taskforce and its Report

This section will discuss the Taskforce Report in terms of the mandate, and recommendations. It will also endeavor to discuss why it was never implemented. The Taskforce Report is considered because of the background it provided for the momentum and current efforts at a truth commission, and also as a way of showing the difficulty of following on reforms in Kenya going by the fact that it was forgotten as soon as it was published, as the new regime started to consolidate power and return the country to its lawless past.

The Taskforce report was intended to produce recommendations, among others, for the establishment of a truth commission, and was hoped to usher in a new era in the Kenyan society, and as it were, produce a rebirth of the Kenyan state. The work of the taskforce was therefore an important element of the dynamic for change, and had there been an implementation of its ‘spirit

⁹ Commonly known by the names of their chairpersons, these include the Akiwumi Commission, constituted to inquire into ethnic clashes in 1991-92 and 1997, Bosire Commission– to investigate Kenya’s biggest financial scandal, Ndung’u Commission – to inquire into irregular and illegal allocation of public land, Kriegler Commission– to inquire into the conduct of the 2007 General Election, the Waki Commission to inquire into Kenya’s post-election violence. Among all these commissions, only the Waki Commission’s Report was immediately made public, but not without contention. None of its recommendations have been implemented. Several other taskforces are formed every year. While the power to establish a commission of inquiry lies with the President, a taskforce can be set up by any cabinet minister, though both operate in almost similar ways.

and letter', it would have formed perhaps the second watershed in Kenya's short history, apart from the attainment of independence. It had the potential to produce a new Kenya. It represented the fact that a consensus existed at that period, both within the Kenyan society and among the political class for the need for a complete transition and transformation. (GoK 2003: 9).

By claiming that a transitional justice agenda was demanded by the people of Kenya, the Taskforce was able to provide a legitimate basis for the establishment of a truth commission and declared to the government that it did not have a choice but to fulfill the will of Kenyans: "{...} it must be clearly stated that the Task Force itself does not have any views that are independent from those of the people of Kenya. The conclusions of the Task Force are those of the majority of Kenyans who submitted their views to the Task Force, and which conclusions the Task Force believes are a reliable barometer of the opinion of the majority of Kenyans." (GoK 2003: 10) As a final buttress to the support for a truth commission, the Taskforce report proclaimed that

The people of Kenya have spoken, and it is the obligation of the Task Force to faithfully report on what Kenyans have told it. Kenyans have asked their government to immediately establish a truth, justice, and reconciliation commission. They have overwhelmingly said that the truth about the past must be known, that perpetrators must be identified and punished, that victims must be accorded justice, and that reconciliation is only possible after the truth is known and justice is done. (GoK 2003: 12)

A legitimate ground for pursuing transitional justice was therefore laid.

In addition by identifying the goals of a democratic transition, such as a return to the rule of law, and guaranteeing human rights and other basic freedoms, the Taskforce was signaling that pursuing transitional justice is the only way of guaranteeing a transition to democracy by a society with a legacy of repression and human rights abuses, a point in which many scholars of political transitions concur. (Hayner 2001, Teitel 2000, Rotberg 2000) While its brief was only to inquire into the formation of a truth commission, the Taskforce reports that its formation would be one component of the broad and complex practice of transitional justice (GoK 2003: 12). It

was therefore arguing for more than just a truth commission. By arguing on why there was the need to redeem the Kenyan state and restore its moral and political fibre, and to establish democracy, the Taskforce was able to justify the need for a truth commission based not only on practical concerns, but also on principle.

The terms of reference of the Taskforce were to among others,

- to recommend to the Minister for Justice whether a the establishment of truth, justice and reconciliation commission was necessary for Kenya, and if so,
- to recommend to the Minister how and when such a commission should be established; the membership of such a commission; the terms of reference of such a commission; the powers and privileges that should be conferred upon the commission in the execution of its mandate; and the historical period to be covered by the commission's investigations'.

(GoK 2003: 13)

3.1.3: (Some) Components of the Report

As identified above in Chapter 2, regarding the practical aspects of a truth commission, the Taskforce was to come up with concrete steps to help establish this body. Seen in the light of the terms of reference and the mandate granted to it, the Taskforce came up with several recommendations. Because of the complexity and the comprehensiveness of the Taskforce report, it is not possible to discuss all of its provisions in this paper. However, some aspects of it deserve mention.

Firstly, some of the recommendations were truly fundamental and key to the functioning of a truth commission. Second, the range of human rights violations to be investigated by a potential truth commission deserves mention, as it helps to somehow justify a commission's

existence and to shed light on the nature of the previous regimes. This discussion forms the next two subsections.

3.1.3.1: Summary of Recommendations

Without seeing any recommendation as inferior, the following recommendations are identified as the major ones: The Taskforce recommended, among others:

- That the Government of Kenya establishes a Truth, Justice, and Reconciliation Commission (TJRC);
- That the President of the Republic of Kenya establishes a TJRC pursuant to the powers granted him by the Constitution of the Republic of Kenya;
- That the TJRC have all the powers provided for, and contemplated, in the Commissions of Inquiry Act, Chapter 102 of the Laws of Kenya;
- That a TJRC must be established immediately, and in any case, not later than June 2004;
- That the TJRC holds, unless it deems it necessary, all its sessions in public, which must be live on radio and television;
- That the TJRC have the power to investigate human rights violations and violations of economic, social and cultural rights;
- That the TJRC have access to all government reports and other records as well as any evidence that it deems necessary for the discharge of its functions;
- That the TJRC have the power to recommend redress such as restitution, compensation, and reparations;
- That the TJRC have the power to recommend lustration or the barring of offenders from holding public office;
- That the TJRC be empowered to negotiate with perpetrators of economic crimes for the return of stolen property and funds in exchange for recommendations of limited amnesty and immunity;
- That the TJRC have the power to recommend prosecutions of offenders;
- That the TJRC, in its final report, which shall immediately be made public, makes any other recommendations that it deems fit for the reform of the state;

3.1.3.2: A Brief Commentary on the Recommendations

These recommendations represented what the Taskforce hoped would be the most essential elements and mandates of a truth commission. The range of recommendations can vary as an attempt by the Taskforce to provide breadth to the work of the commission especially because of the inherent difficulties involved in the negotiations to establish such commissions. Such difficulties relate to such issues as who is to establish a truth commission, time period to be covered by the work of a truth commission, crimes to be investigated and those ones to be left out and especially and issues to do with reparation or amnesty. These are all difficulties identified by many truth commissions, including the South African TRC and also this debate that has characterized Kenya's attempt to establish a truth commission. By this, the possibility of legislation would have been avoided, especially because it is generally vulnerable to multifarious competing interests.

The first recommendations were clearly to show the unanimous consensus that existed for the establishment of a truth commission while at the same time, showing that a legal framework already existed through which a legitimate and constitutional truth commission could be established. The Commissions of Inquiry Act¹⁰ was the easiest way through which a truth commission could have been established. While the formation of commissions have been abused in the past by governments to deflate public opinion in the past (which is common practice in Kenya), they have also been used for good use. (See Simiyu 2008 for a comprehensive account of commissions of inquiry.)

¹⁰ The purpose of this Act is "to provide for the appointment of commissioners to inquire into and report on matters of a public nature referred to them by the President, to prescribe their powers, privileges and duties, and to provide for other matters relating thereto." To achieve this objective, the President is vested with powers to issue a commission to a commissioner or commissioners to inquire "into any matter into which an inquiry would, in the opinion of the President, be in the public interest." It is also provided that "every commission shall direct how the commission shall be executed.

The other major recommendations had to do with the operational issues of the truth commission, such as holding public hearings. For the truth to be interrogated by the victims involved, it is imperative that it be presented in public. This forms one of the most important legacies of the South African TRC. Public hearings are also important in the process of granting amnesty. Most amnesty provisions make it mandatory for perpetrators to come out in public and confess to their crimes. In the absence of this, it is difficult to gauge the truthfulness of such confessions if made in private. In the South African case, amnesty was only to be granted to perpetrators after it was applied for on an individual basis, after making ‘full disclosure’ and doing it in an open hearing (Boraine 2000: 148). In this case however, no distinction was made of crimes, such as crimes against humanity that international law proscribes from being granted amnesty. All crimes were eligible for amnesty, the only major condition being that one had to show political motivation for such crimes. In the Kenyan case, similar conditions as above apply, except that in this instance, there is no amnesty possible ‘for crimes against humanity or genocide within the meaning of international human rights law’. (TJRC Bill 2008, Article 34)

While granting amnesty for crimes committed during a repressive regime is vehemently opposed by victims and human rights organization, in South Africa, this was seen as the only way of moving the transition forward in a peaceful way. Reservations are always expressed that granting amnesty is rewarding impunity (Mamdany 2001; Boraine 2000). Such issues have also arisen in the Kenyan case (GoK 2008: 443). Many a time, amnesty has been used to grant blanket amnesty to many perpetrators, for as long as one fulfills the conditions set for it, everyone becomes eligible. Therefore, while amnesty has been couched in ‘conditional amnesty’ terms, the conditions are generally vague or too wide so as to cover most of the perpetrators. This is one of the biggest criticisms against the TRC, for granting amnesty to

apartheid system perpetrators, the apartheid system as a whole was not condemned as a system (Mamdany 2001).

The recommendations on terms of reference of a future truth commission provided a comprehensive mandate, allowing for example the negotiation with perpetrators who were willing to provide reparation or return stolen wealth revealing the acknowledgement that not everyone can be dealt with by prosecution. This point applies to the amnesty provisions. Amnesty provisions, even when provided for individualized crimes are still not widely accepted, as the possibility to tell the whole truth by perpetrators cannot be guaranteed. These questions were raised in South Africa and also came up in the second phase of Kenya's winding road to a truth commission.

The Taskforce also recommended a wide range of powers that the commission should enjoy. A wide spectrum of powers conferred on a commission is crucial, because of the complexities involved in their work. Such issues as access to government records or hostile witnesses is crucial to its work, and therefore such powers as having unlimited access to such records. So are powers to search, seize or subpoena witnesses. Usually enshrined in a commission's terms of reference, they perhaps form one of the most crucial determinants of a commission's success.

3.1.3.3: Violations Proposed for Investigation

From the onset, the Taskforce was aware that not all violations can be investigated by a commission, certainly due to the limitations of time, finances and the geographical expanse of the country. Such limitations on the scope of investigations have been identified by other past truth commissions, and generally prove a moral quandary deciding which violations are to be

investigated and perhaps reparation or rehabilitation provided. There is always a feeling by some of the victims being left out, such as those in Argentina who were not covered by restitution when they were tortured without the torture resulting in death, thus perceptions that their suffering is neglected.

The choice of the violations to be investigated, and perhaps the time period to be covered constitute some of the fundamental issues when establishing a truth commission. The Taskforce therefore was of the view that a truth commission addresses certain categories of violations. These violations “must be those that indicate a systemic pattern or state policies, actions that were carried out as policies of the state to abrogate the rights of Kenyans,” “with due regard to the purposes of an effective, timely, and the least burdensome truth commission.” (GoK 2003: 30) The Taskforce identified and recommended for investigation a group of six violations, including political assassinations and killings, massacres and possible genocides, political violence and killing of democracy advocates, torture, detention, exile, disappearances, rape, and persecution of opponents, politically instigated ethnic clashes, and violations of economic, social and cultural rights. (GoK 2003: 32). This constellation of violations, when seen against the need for efficiency and practical considerations (see section 2.4.4 in this paper), and the time usually considered ideal that a truth commission should run was, however, a wide ranging one, and was adequate to cover all the serious violations in Kenya’s past history.

3.1.4: (Accounting for) the Failure to Implement the Taskforce’ Report

To understand the dynamics and politics surrounding the truth commission and the reform agenda in general, it is important to understand the way politics is done in Kenya. Generally, political competition is organized on ethnic basis. The other main basis of Kenyan politics is around the accumulation of power for personal aggrandizement. (Economist.com, April 23, 2009,

the East African Standard Online, April 19 2009) Apart from this, no one in the political establishment seems keen to follow on reforms, and all quarrels in the two coalition governments since 2003 are about who appoints whom to what position. For example, at present, the Cabinet, which is supposed to approve all government policies including essential reforms agreed during the mediation process in 2008 rarely meets. (The East African Standard online 3rd March 2009, 2nd May 2009, 6th April 2009)

As the elite agreement to dislodge Moi and KANU from power in 2002 was between reformers and late comers in the reform movement, many of them had benefited from or participated in the atrocities perpetrated by the in the previous time. Therefore, the momentum for change was false and any fire it had would fizzle out. It therefore became impossible even to follow on the promise to set up a truth commission. This is mainly due to the fact that soon, the elite arrangement that had propelled the Rainbow Coalition to power would unravel due to disagreements about power sharing between the two groups, NAK and Rainbow coalition. The only occupation among the two groups was who was to win the 2007 elections. In this environment, any reforms, especially the establishment of a truth commission, which needs broad social consensus, became impossible to pursue. It is in the same perspective that attempts at comprehensive constitutional reform became a hostage to politics surrounding the 2007 elections.

These late comers were a splinter group from KANU, and the only reason they left KANU was because one of their own was not nominated for the presidency. In fact, they only broke ranks two months before the election. As such, their move was not based on principle. How did they hinder the reform movement? Known as the “Rainbow Coalition” they joined the new government under a party called the Liberal Democratic Party. This group had served under Moi for many years. As such, they had participated in, directly and by association, in many of the atrocities of the regime they had served. Therefore, any attempts to dig into the past were

opposed, and they were even very vocal against any attempts to hold the officials of the former regime accountable.

The other angle to this story is that as soon as a new government was formed, disagreements on many issues emerged between the Liberal Democratic Party and the NAK side of government. These disagreements and new political realignments meant that any slight consensus about the need to reform the state was dashed. (Simiyu 2008: 21). The political squabbles that resulted brought this group back with many elements in KANU with which they had broken ranks in 2002 and the reform agenda was forgotten in the midst of competition to gain power in the 2007 General Elections. The two sides to the earlier agreement, NAK and the “Rainbow Coalition” were now only focused on the 2007 elections. Their campaign would later be based on whipping ethnic and communal tension, and could be directly linked to the violence that rocked the country after the 2007 and elections, and again produce a new drive for dealing with the past.

This was due to several factors. First, the ethnic nature of politics in Kenya means that any attempt to hold anybody to account is interpreted as a witch-hunt and persecution of the ethnic group that that person comes from. Politicians and other influential individuals always retreat to their ethnic cocoons and cry for communal protection. This is the reason why Moi and his cronies and their officers could not be held accountable as they would say their ethnic group is being persecuted. They also wielded immense economic power which they could use to destabilize the state.

Another major problem was that the transition was not a complete one. After the elite agreement to dislodge Moi from power, the old state apparatus, its institutions and staff was left intact. These forces, still occupying power in the military, the police and the judiciary would soon start frustrating the reform agenda. The anti reform wing soon split from the government. This

split had serious consequences. It led to the defeat of the attempt to usher a new constitution that was to reorder the Kenyan society when a draft constitution was defeated in a referendum in November 2005. While there were several factors blamed on the failure of the referendum, including lack of consensus on key issues such as territorial organization of the state – federal or unitary, and the nature of government – parliamentary, presidential or semi-presidential, the main reason for the defeat of the referendum is because the anti-reformists saw it as a new way to gain political ascendancy, called on their supporters to reject the draft constitution even without reading it, while couching the argument as being against the draft's provisions. This attitude is captured by the words of a protester opposing the draft in this conversation with a journalist:

We do not want this constitution

Why?

It's bad for democracy

Have you read it?

No. Raila¹¹ told us so!

He said?

Yes. He has read it for us. And it is bad. We know it. So we are burning it.

(Aungo 2007: 53).

Additionally, as Kenyan politics is based on personal aggrandizement, the new leaders settled on the business of “eating”¹², the Kenyan “it’s our turn to eat way”,¹³ and the only concern for politicians is personal benefit from office. Corruption and financial scandals are the order of the day in Kenya, and the only consensus that exist among the political class is mutual participation in corrupt activities (The Economist.com, April 23 2009, East African Standard online, April 19 2009, the Daily Nation online, May 17 2009) It’s in this background that the

¹¹ Raila Odinga was the leader of the ‘NO’ campaign, and the splinter group that had re-united with the old KANU officials after disagreements with the other partner in government.

¹² Eating is generally a euphemism for corruption, as the group that wins the presidency, especially as an ethnic coalition use this opportunity to enrich themselves and their ‘constituencies’ through theft of public resources and other forms of patronage.

¹³ This is the way public office, especially by politicians is viewed. It has been blamed for encouraging impunity in Kenya as all that matters for politicians is personal enrichment, and therefore other urgent matters take a backseat. This culture is well documented in a book of the same title by Michela Wrong, 2009: Fourth Estate. The accuracy of the contents and its motivation are however contested.

business of reform was forgotten entirely. In this environment therefore, it became hard to implement any reforms. Soon, the reform agenda was forgotten, and politicians became busy by shifting their attention to the election of 2007. Thus, the Taskforce report that had recommended the establishment of a truth commission “soon, and in any case not later than June 2004” (GoK 2003: 10) was soon forgotten, while the Government had committed itself to implement the Taskforce recommendations. This could be seen mainly as a result of lack of consensus on the previously agreed reform agenda after political disagreements emerged in the government. President Kibaki had by this time lost the broad political support and mandate he had when he was elected, making it impossible for the setting up of such a body that required wide consultation and agreement and acceptance by the widest possible social bases.

It is also important to see the Taskforce within the perspective of commissions of inquiry in Kenya. It is rare for the country to go without one or the other commission or taskforce in any year, but their final reports are rarely ever made public, leave alone become implemented despite their being huge burdens on the taxpayers. (Mutua, Sunday Nation, 14th December 2008) In the event they are made public, they released with reservations by the appointing authority if they are critical of the establishment. This involves mainly a statement by the president’s office that either the commission exceeded its mandate, its recommendations lack evidence, or some of the persons adversely mentioned were not given a chance to clear their names, opening up the avenue for contesting such reports in the courts and totally disregarding their recommendations. Another way of watering and discrediting their reports is to have the culprits go to court and have their names expunged from the reports (GoK 2008: 456). Commenting on the matter and specifically the Akiwumi Commission the Waki Commission said that,

Our view is that the lackadaisical manner in which the government dealt with the Akiwumi Report only goes to illustrate that the state was not particularly interested in resolving once and for all the issue of ethnic violence. Those who benefited from it were secure in the knowledge that the report, notwithstanding its

deficiencies, would continue to gather dust and the issue of ethnic violence would be on the back burner to be resurrected when the next election came.(Waki Commission 2008: 456)

This is what happened with both the Bosire and Akiwumi Commissions. Commissions of inquiry have more been used to deflate public opinion, create the impression that something is being done or simply as a whitewash, or at times as a way of creating jobs for friends, accusations that have been found hard to refute in the history of Kenyan commissions of inquiry, other than provide a solution or closure to matters of public interest. As such their usefulness has been questioned. To illustrate this point, in the last six years, in addition to the Taskforce, there have been five commissions of inquiry and several taskforces. Several others precede these.¹⁴

3.2: A New (false) Momentum for a Truth Commission

The period from the beginning 2008 represents the second stage in the convoluted and winding road to transitional justice in Kenya. While it was not a deliberate decision at reforms and attempts to deal with a sad history, it is nevertheless a critical moment, first because it brought home the truth about the tragedy that could happen to nations that refuse to confront their past. The crisis was an indictment on the failed reform agenda. (Waki Commission, 2008, Mutua Daily Nation 26th October 2008). The new truth commission, to be established as part of the peace agreement, was therefore like an imposed institution on the political establishment, as it was reluctantly agreed upon. Although some concrete steps have been taken towards the setting up of a truth commission, the most important one being the enactment of the Kenya Truth, Justice and Reconciliation Commission Bill (KTJRB) 2008, a lot remains to be desired in this endeavor. The dilly dallying on implementing this crucial aspect of the reform process is symbolic of the political class's reluctance to deal with the past, just as other aspects of the accord, such as

¹⁴ See footnote 8

establishing a local tribunal to prosecute perpetrators of the electoral violence has come to naught.

While the 2002 elections were heralded as a true regime change, (GoK 2003: 9; Mutua Sunday Nation October 19 2003) and one of those opportune moments, like the commonly referred ‘constitutional moments’, to reorder the Kenyan society and herald a new beginning, nothing was to come out of it. The dramatic events following the 2007 General elections changed this and produced a new momentum for a truth commission. The Taskforce report was never implemented, a drive for constitutional change was hijacked by partisan politics and Kenya was back to its old ways. What was to transpire after the election was to forever change the country. It was not a surprise though. It was an indictment of a society that had refused to confront its past. The aggravating factor was that the election campaigns were premised on ethnic coalitions, and their main claim was to help correct “historical injustices.”¹⁵ It was rarely about policy and issues of the day.

The electoral battle was organized under two coalitions, the Orange Democratic Movement (ODM) and the Party of National Unity (PNU). The ODM was a scion of the members of the “Rainbow Coalition” and other officers and politicians of the Moi regime with whom they had broken ranks with prior to the 2002 elections, and coalesced around Raila Odinga while PNU mainly composed of the former NAK, plus a section of KANU and other small parties, coalescing around president Kibaki. Their main distinction was however regional and ethnic, the most salient features over which political life is organized in Kenya.

Because it was a very tight election, no side was willing to concede defeat. Soon, election violence was to engulf the country for a period of two months, literally bringing the country to a

¹⁵ This was a vague and oblique phrase, as no one could really point to what ‘historical injustices’ were. However, a casual explanation was that it was reference to such issues as land, and access to power and jobs for some communities. (See Waki Commission, 2008: 23)

halt, and caused an estimated 1500 deaths, thousands of maiming and rape and over half a million displaced. This event was blamed on Kenya's failure not to deal with its past, especially regarding impunity (Mutua Sunday Nation 26th October 2008; GoK 2003; GoK 2008; ICTJ 2008). It was felt that had the country gone the truth commission way after the election of 2002, there was a real chance for the country to lay to rest some of the grievances that formed some of the basic excuses for the violence, such as what has been mentioned as historical injustices, committed by the previous regimes.

This event rekindled a momentum for new institutional reforms and in particular, the setting up of a truth, justice and reconciliation commission. This was within the wider framework of agreements on reform, which was part of the negotiation to end the crises. It was felt that this was the only way to avoid future cataclysm occasioned by elections. The mediation effort, facilitated by the African Union was led by the former Un Secretary General Kofi Annan. It was intended to seek a sort of power sharing agreement after neither side in the election was willing to concede defeat. An agreement to set up a "Grand Coalition" government was signed between the protagonists, Mwai Kibaki and Raila Odinga on February 28th 2008, marking the end of a bloody chapter of Kenya's tumultuous past. After two months of chaos, a peace agreement was signed, established a grand coalition government between the two protagonists in the electoral dispute, Raila Odinga and Mwai Kibaki.

Through what was called "The National Dialogue and Reconciliation Committee", a national accord was signed on February 2008, setting among others, the establishment of TJRC. There was an admission that the political crisis had revealed deep-seated and long-standing divisions within the Kenyan society," (GoK 2008 a, b) and points to the need to address them. It read in part:

A Truth, Justice, and Reconciliation Commission (“the Commission”) will be created through an Act of Parliament, which will be adopted by the legislature within the next four weeks. The Commission will inquire into human rights violations, including those committed by the state, groups, or individuals. This includes but is not limited to politically motivated violence, assassinations, community displacements, settlements, and evictions. The Commission will also inquire into major economic crimes, in particular grand corruption, historical land injustices, and the illegal or irregular acquisition of land, especially as these relate to conflict or violence. Other historical injustices shall also be investigated. The Commission will inquire into such events which took place between December 12, 1963 and February 28, 2008. However, it will as necessary look at antecedents to this date in order to understand the nature, root causes, or context that led to such violations, violence, or crimes.

The stage was therefore set for the establishment of a truth commission. A TJRC Bill was soon presented to parliament for debate.

However, the process of establishing a truth commission after 2008 has not been without controversy. As a result of the atrocities committed during the post-election violence, many of which were blamed for their instigation and funding by influential politicians and business people (GoK 2008), there was the question of how to deal with the perpetrators of the violence who were identified by the Commission of Inquiry into Post-Election Violence hereafter referred to as the Waki Commission. The Commission had been set up “to establish the facts and circumstances surrounding the violence and to make recommendations on this and other matters” (GoK 2008: VII). Among its recommendations, was that in order to discourage impunity, there was need to set up tribunal to investigate and prosecute the perpetrators of post election violence, failure of which the names of those people identified as possible perpetrators would be forwarded to the International Criminal Court (ICC) for prosecution. An unknown number of politicians and business persons were identified by the Waki Commission as the main culprits behind the violence and hence commission of crimes against humanity. This list was never made public, unlike the report, but it was given to the chief mediator, Kofi Annan, for onward transmission to the ICC, in the event that a local tribunal was not set up to try them. Nothing so far has come out of this, as a bill to establish the tribunal was defeated in parliament in February 2009 (East

African Standard online 15th , 18th and 25th February 2009; 1st March 2009; Daily Nation online, 12th February 2009).

Seen within the wider perspective of transitional justice, issues of impunity and blanket amnesty for perpetrators arose. There were calls for unconditional and blanket immunity for perpetrators of the post election violence, with the claims that those people who perpetrated did so in the name of justice, leading one of Kenya's erstwhile human rights defenders and proponent of transitional justice to comment that, "I have heard it said that those guilty of murder and rape committed those offences to fight for democracy. If I heard that right, then this will be the first time that pro-democracy forces have used murder and rape as tools of democratization. (Mutua, Sunday Nation, May 25th 2008).

These issues characterized the debate on both the tribunal and the truth commission and while the bill establishing the commission was passed in parliament, similar provisions for a general amnesty were included, though the bill was later revised to include only individualized amnesty and to exclude amnesty for the most "gross violations, including genocide and crimes against humanity" (GoK 2008). A bill to set up the tribunal was defeated in parliament and many months after the TJRC Bill was passed, little remains to be seen in practical efforts to set up the truth commission.

3.3: The Kenya Truth, Justice and Reconciliation Bill 2008: Another False Start?

The importance of the enactment of this bill cannot be disputed. Its provisions are wide ranging, but some of them are to be disputed¹⁶. While many of the Bill's provisions are directly adapted from the Taskforce on the Establishment of a Truth Commission for Kenya Report,

¹⁶ The main ones include its amnesty provisions, the provision that it can be sued, which opens room for it to be embroiled in legal battles, during and after its work by anybody mentioned as potential perpetrators.

some issues, especially the controversy on amnesty dominated the debate during the writing of the Bill, especially after the post election events were included in the mandate of the new truth commission. The other controversy surrounded the nomination of members of the truth commission, especially in a way that would be representative of as a wide regional, ethnic and other considerations in a commission that was to have only seven commissioners, in a country with more than forty ethnic groups and each wanting representation.

However, with hindsight and the experience of the blood letting during the post election violence, there was general consensus among the political class that a truth commission might finally help Kenya avoid such occurrences. Therefore, the Bill was able to be easily debated and passed in parliament. On the day of passing it, it was adopted unanimously, and a few days later, the President assented to it and the panel that was to select the commissioners was soon appointed. (the East African. online edition, 24 October 2008; 29th November 2008; 17th March 2009) Despite many of these efforts, it remains to be seen whether the truth commission will become a reality. This section briefly discusses the Bill and some subsequent steps as a final push towards a truth commission. It's important to mention that while the Taskforce Report was never implemented, its provisions largely informed the formulation of the Bill. The Bill was first presented to the Kenyan Parliament in May 2008, and was finally passed in October 2008.

The Bill is discussed in this section as an important document and step towards a truth commission. A full discussion of its provision is not therefore intended. In its first assessment by the civil society and other concerned parties, including Amnesty International, Human Rights Watch, the International Center for Transitional Justice (ICTJ) and Peacenet Kenya, the Bill was seriously disputed. Human Rights Watch said it was deeply flawed, especially it's amnesty provisions that provided, by application to the commission, for a blanket and unconditional amnesty for gross human rights violations, the fact that the truth commission can be sued,

placing in the Minister of Justice powers to approve the commission's finances. The scope of investigations to be granted to the commission and only a period of operation of two years was also contested. HRW called for the bill's amendment, "if it was not to become another whitewash." (www.hrw.org). Amnesty International also took issue with similar issues (www.amnesty.org). The amnesty provisions were later amended (www.ictj.org). However, the Bill's enactment was seen as an important milestone.

Seen in light of truth commission practice, the amnesty provisions were not very out of line with others of similar nature, for example in South Africa, where practically everybody and all violations were eligible for amnesty. But with the growing prominence of international law, it is now commonly understood that countries have an obligation to prosecute serious human rights violations, especially if they amount to either crimes against humanity or genocide. On this respect, the Kenyan bill, under pressure from civil society, was later amended and only minor crimes are eligible for amnesty.

In addition, whenever amnesty for crimes arises, there is always the question of what that means for impunity. Therefore, many people argue against amnesty as it is seen as encouraging impunity. It is the view of this paper that amnesty is to be avoided, because even if it is a way of encouraging reconciliation, it has a potential of encouraging the repetition of similar crimes in the future when perpetrators do not face justice. It may also send to the victims the message that their suffering was not acknowledged and duly recompensed.

The other criticism arose from the fact that the commission can be sued. While this provision might have been included to promote issues of due process, it has been the most widely abused clause in the process of commissions in Kenya, and has been used to challenge their work both during and after their operations. Many have faced lawsuits by persons adversely mentioned leading to the delaying of either completion or writing of their reports. After their

reports are made, persons mentioned adversely go to court or parliament and have their names expunged from the reports rendering the reports worthless. The Bosire and the Akiwumi¹⁷ Commissions were both sued, the former during and after its report and for the latter, the main culprit was exonerated by the High Court, and for the Akiwumi Commission, after its report was presented to the government, the individuals adversely mentioned as perpetrators were able to have their names removed from the report before it was tabled in Parliament. Therefore, while seemingly harmless, this provision is potentially the biggest obstacle to the commission finishing its work in time, or in the implementation of its recommendations.

According to truth commission practice, it is always advisable to have a manageable range of violations to be investigated. (Freeman and Hayner 2003: 6). The Kenyan Taskforce also highlighted similar issues when recommending what crimes can be reasonably and practically investigated (GoK 2003: 21). However, the proposed Kenya truth commission was saddled with a mandate too wide as to make it hard to complete its work in the intended two year period. Of particular concern are land issues, which while they may lie at the heart of social animosity and suspicion that was ostensibly partly responsible for the post election violence, they are not suitable for the investigation of a work commission, and might occupy most of its time. It is for this reason that it would have been advisable to unbundle such issues from the work of the commission. The history of land issues goes back into the colonial period, well beyond the period of investigation of the truth commission. They are likely to boggle down the work of the commission. It is with this in mind that it has been proposed that a separate body deal with land issues, by for example Human Rights Watch (Human Rights Watch, quoted on www.appablog.wordpress.com).

¹⁷ See footnote 8

Apart from the criticisms, some of its provisions deserve some mention. First, as part of a peace agreement, the commission is quasi-international. Three of the commissioners are to be appointed from non Kenyans by the ‘Panel of Eminent African Personalities’¹⁸. The main reason for having commissioners who are non Kenyans participate in the process was to enhance the legal standing of the commission as an international body, and also to eliminate suspicions that would obviously be created in a commission appointed from different political persuasions, (Hayner 2001) a fact that is inescapable in constituting the commission. This would give the commission more legitimacy in its work and final report, as it increases its impartiality.

The participation of international commissioners might also create pressure to release the report to the public, and implement the recommendations of the commission. The main disadvantage, also identified during parliamentary discussions of the Bill, and which led the Bill to be amended to include six, rather than the four originally intended local commissioners, is the possibility that the views and experiences of international commissioners might dominate and unduly influence the work of the commission and adoption of the final report as they have voting rights in the commission. (the East African Standard, online edition, October 24th 2008). Another six commissioners are to be appointed by a selection panel enshrined in the Bill (like in the case of South Africa and Sierra Leone), from among the Kenyan public, ‘with regard to gender equity and regional balance’. By making it a quasi-international truth commission, it was intended that it will be seen as impartial by politically opposed groups. Hayner (2001: 217) argues that “a commission will have greater public support if members are selected through a consultative process,” while urging the selectors should also ensure “fair representation of political views,

¹⁸ This means the African Union Panel of Eminent African Personalities spearheading the mediation efforts in Kenya following the post-2007 election crisis. They included the former UN Secretary General Kofi Annan, President Jakaya Kikwete of Tanzania, Graca Machel, wife to Nelson Mandela and former Tanzania president Benjamin Mkapa.

ethnic or regional groups and gender.” The provisions of regional balance is important in a multi ethnic and divided society like Kenya, but issues of the un-representative character of the commission will probably arise, as these are usually understood as ethnic representation.

The Bill provided for an amnesty process, originally as a general amnesty for anyone who applied and qualified for it, without any regard to the nature of their crimes. In the final Bill however, the general amnesty provided in the original bill was abandoned, and the Bill says that the commission “cannot grant nor recommend amnesty if the act, omission or offence ... constitutes crimes against humanity or genocide, within the meaning of international human rights law.” (Article 34)

While all sorts of amnesties exist in the process of truth commissions, their legal enactment faces challenges. In the first instance of legislated amnesty in South Africa, many victims found them unacceptable and even challenged in court. They are generally seen as being insensitive to victims suffering and antithetical to countries’ obligations under international law. Others argued it was the only way of facilitating reconciliation. (Boraine 2000), while Mamdany (2002:34) argues that the amnesty provision of the TRC extended impunity to most perpetrators of apartheid.

In the Kenyan context, the issue of amnesty is surely a way to extend impunity to the perpetrators. Many of the human rights violations committed during the Moi presidency and particularly during the post election violence were perpetrated for personal benefit, and the political motivation attached as a condition for amnesty only serves as a guise to cover murder and other atrocious acts. For example, even after it was in public knowledge who perpetrated many of the human rights violations, including torture and ethnic cleansing, no one was ever held to account. It should therefore have been no wonder that much of the killing and displacement during the post election violence was most vicious in places where it happened before, especially

in Kenya's Rift valley Province. Therefore, any claims for amnesty in Kenya are not intended for any reconciliation, and is based purely on politics, and the need by major perpetrators to get amnesty by proxy because they could influence legislation in parliament. Therefore, amnesty in the Kenyan context can only mean impunity and likelihood that violence will be used again for personal political ends.

Another important issue that deserves mention is the powers of commission. (Article 7) To enable it function smoothly, the commission is to be empowered with wide ranging powers. The commission was granted with among others, powers to

- 'gather by any means it deems necessary, any information it considers relevant, including reports, records and documents or any information from any source, and to compel the production of such,
- to visit any establishment or place without giving prior notice and to enter upon any land or premise which is material to the fulfillment of the commission's mandate,
- interview any individual, group or members of organizations or institutions at the Commission's discretion,
- request information from the relevant authorities of a foreign country and to gather information from victims, witnesses, government officials and others in foreign countries, summon any serving or retired public officer to appear in person before it to produce any document, thing or information that may be considered relevant to the function of the commission,
- request and receive police assistance as needed in the enforcement of its powers.

The powers mentioned herein are crucial if a commission's work is to proceed. Because commissions usually rely on information, documents and reports that may already be in the hands

of perpetrators or government agencies reluctant to release them, it is critical that a commission has the power to use all means necessary to gain access to them, and to force their production before it. Such powers to enter any place and to compel witnesses are therefore crucial. Sometimes, some crucial documents, information or evidence may be in the hands of foreign governments, such as the case of the United States on Latin American countries, though such information is not easy to access, (Hayner 2001: 241) necessitating that a commission be given powers to access them. However, this has to be questioned whether it is practical to compel when foreign governments are not willing to cooperate. Despite powers to access information by commissions, this remains one of the hardest parts of commission work, mainly because such documentation and information is destroyed before a regime change, and has been documented in diverse countries such as South Africa, Guatemala and Argentina. (Hayner 2001: 239-240)

One of the other most important issues when establishing a truth commission is the functions it is going to have, or rather, envisaged that it is going to have. A clear definition of functions, taken together with the objectives that a truth commission seeks to achieve should always be written in the terms of reference and mandates as a guide post so that the commission does not stray off. Too many functions imposed on a commission may mean that it is not able to fulfill them, especially given the limitations of time and space. With a total of twelve functions (Article 6) for the Kenyan truth commission, there are concerns that the mandate is too wide, with too many functions and therefore it has been argued it is unlikely to cover the important issues. (Human Rights Watch, quoted on www.appablog.wordpress.com). Hayner (2001: 72-73) talks about the importance of having a sufficiently broad and flexible mandate, to allow investigations into all forms of abuse, while at the same time explicit limitations imposed on what the commission will investigate and report. The functions given to the Kenyan truth commission

seem too many and therefore are likely to overwhelm the commission and perhaps lead to inefficiency.

Finally, a word about the objectives of the truth commission needs to be said. In the assessment of the likelihood of a truth commission being measured as successful, the objectives set for it at the beginning are fundamentally important. The objectives of the Kenya truth commission,

shall be to promote peace, justice, national unity, healing and reconciliation among the people of Kenya,” by among others, establishing an accurate record of violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office, both serving and retired, between 12th December 1963 and 28th February 2008, including the antecedents, circumstances, factors and context of such violations, perspectives of the victims, motives and perspective of the persons responsible for commission of the violations.” The commission is also to investigate gross human rights violations and violations of international human rights law including massacres, sexual violations, murder and extra-judicial killings, and determining those responsible, inquiring into acts of state repression including torture, cruelty and degrading treatment for political objectives, and hence recommend the prosecution of perpetrators of gross human rights violations and determine ways and means of redress for victims of gross human rights violations, and compiling a report with recommendations and measures to prevent the future occurrence of such violations. (Article 5)

From the foregoing, the Commission is given a really ambitious set of objectives, to be achieved through different measures. While the ways to achieve these objectives are clear and practical, it remains to be seen how such a wide objective can be achieved. Lofty ambitions for truth commissions are wont to raise public expectation and perhaps result in disillusionment when they fail to materialize. Some of the set objectives, especially reconciliation remain highly contested. (Brahm 2007; Gibson 2005; Stanley 2001; Mamdany 2002; Hayner 2001) Hayner especially has argued that a certain level of disappointment is bound to arise after the work of a truth commission is finished, and therefore advises for the setting down of achievable objectives. (Hayner 2001: 8)

3.4: Conclusion

As I have argued elsewhere in this paper, commission performance record in Kenya is dismal. As such, irrespective of the declared intent, the objectives and functions set for the commission, it might be viewed with skepticism. The fact that the Taskforce Report was not implemented is also telling, though there is clear evidence that many of its recommendations and provisions were incorporated in the Bill.

In addition, the consensus that had existed when the Bill was being discussed and passed no longer exists, and as happened to the taskforce report, it looks that the attempt to establish a truth commission will once again become hostage to politics as the two groups that formed the Grand Coalition government rarely see eye to eye, and the government is essentially moribund, as politicians again focus on the next election, and it has become practically to agree on anything.

CONCLUSION

The task of this thesis was to explore the work of truth commissions, and in particular Kenya's attempt at dealing with the past and the challenges this has encountered. Apart from the fact that a truth commission has several goals to procure for a society coming from an atrocious past or one of conflict, the paper has identified that the main reason why societies are increasingly turning to truth telling is mainly because of the problems fraught with earlier institutions and mechanisms of dealing with the past, especially prosecution, constricted by both practical and policy reasons. As such, truth commissions have emerged as rightful and justifiable institutions of transitional justice, other than just second best alternatives.

In the current discourse on truth commissions, as discussed in chapter two, it has been seen that it has become imperative that countries deal with their pasts, generally not as a matter of choice, but of necessity if such societies are to successfully hope for the return of rule of law, stability, peace and a democratic transition. The nature and structure of commission is contingent upon the goals that a society coming from an atrocious past may want to pursue, but the bottom line is that such goals must have a social consensus if a truth commission may hope to succeed, usually within the constraints of institutional, legal and political circumstances that such societies usually find themselves in.

This thesis has also been able to establish both the background and need for transitional justice in Kenya, which is to be procured through a truth commission, while identifying the major actions taken in the attempt to deal with the past. They include the setting up of the Taskforce on the Establishment of a Truth Commission and enactment of the Kenya Truth, Justice and Reconciliation Bill 2008. While the Taskforce had been constituted as part of a general reform agenda after regime change in 2002, its report was never acted upon as new political realities

emerged that made agreement on essential reforms, including the writing and passing of a new constitution impossible. The second attempt at dealing with the past was rekindled by the 2007 post election violence, deliberated upon and signed as part of a peace accord, and therefore generally seen as imposed from above. It was not consensual, and the slow speed at making the drive for a truth commission could be explained thus.

From the foregoing, it seems that while it is possible to declare intent, it is not easy to follow up on it, especially in terms of reforms within the Kenyan context. It has been shown here that any attempts at reform are wont to be still born, and that the work of past commissions is instructive of the conditions under which a truth commission will operate in Kenya. Unless a renewed commitment is made by the political class to the processes of transitional justice in the long term, it will remain elusive. It can conclusively be claimed that the lack of political will remain the biggest impediment to attempts at dealing with the past.

Also, because of Kenya's experience with impunity in the past, it can also be argued that a purely reconciliatory truth commission will be just another commission, with recommendations that are unlikely to be unimplemented, or worse still, trashed in the courts, in parliament or by 'reservations' accompanying them from the Presidency upon release of the commissions' reports. It is in this light that this paper buttresses its argument that in many circumstances, unless a truth commission is accompanied by complementary transitional justice mechanisms, *especially* lustration and prosecution; it is unlikely to achieve much, especially in the Kenyan context.

Merit or moral probity is rarely a qualifying criterion for leadership in Kenya, mainly due to the twin problems mentioned above: ethnicity and the need for personal aggrandizement. As long as one commands a sizable ethnic bloc, or enough material resources to buy patronage and votes, they are able to get themselves into positions of influence, mainly politics, where they are able to scuttle reforms from within. Therefore, the work of any future truth commission must be

accompanied by prosecution of perpetrators and barring them from public service, if the country is to move on, and demonstrate that human rights violators are unwelcome in society.

In spite of the identified difficulties in establishing a truth commission for Kenya, the steps already taken and the clamor for reform that still resonates in the country should be reason for optimism. It must also be acknowledged that the process of dealing with the past, and especially using the institution of truth commission has not been easy for many countries, and is always ridden with controversy of one nature or another. This is not a justification for countries to eschew dealing with the past, but more a challenge and demonstration that it remains an imperative for societies that want to make a clean break with the past. Continuous encouragement and pressure from both the civil society and the international community should be maintained on the Kenyan political class on the need to conclusively pursue transitional justice, with the clear choice of inaction being continued societal animosity and a threat to a return to a past of human rights abuse. This said therefore, the institution of truth commission remains of fundamental importance for the Kenyan society.

The main limitation that this paper encountered was in trying to inquire into a process of a truth commission which has not yet been formed. Despite this, and the fact that the process of establishing the truth commission is still difficult and insecure, the work carried out in this thesis is still relevant in addressing legacies of the past, and the conditions and motivations that have led to this initiative. This limitation irrespective, it has helped identify some of the issues that could help explain why the drive for a truth commission is yet to be attained. In this regard, this paper forms a basis for future process tracing of the Kenyan truth commission process and also provides motivation for further study on what direction it takes, and also, the future outcome of this convoluted process may provide lessons both for the Kenyan society and others faced with similar difficulties and experimentation.

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