TRUTH, JUSTICE AND RECONCILIATION COMMISSION OF KENYA: AN ANALYSIS OF ITS COMPLEMENTARY ROLE TO THE INTERNATIONAL CRIMINAL COURT.

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DECLARATION

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DEDICATION

This dissertation is dedicated to my beloved dear parents, Mr. Stephen Kibowen and Mrs. Susan Teriki Kibowen whose love, support and interest in what I was doing enabled me to endure and overcome all the hardships. You still and will always remain to be a source of inspiration to my heart and a pillar of strength.

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Abstract

This dissertation evaluates the Truth, Justice and Reconciliation Commission (TJRC) as one of the modalities of addressing the 2007 post-election violence and the culture of impunity that has marred Kenya. It scrutinizes the credibility of the TJRC and examines to what extent it meets international standards. The dissertation assesses the circumstances leading to the formation (TJRC), its composition, objectives, mandate and powers.

The research analyzes the complimentarity principle in international criminal law and examines the extent to which truth, justice and reconciliation commissions are considered to be an adequate response to crimes that fall within the jurisdiction of the International Criminal Court. It further examines minimum international standards for truth, justice and reconciliation commissions to be termed as acceptable and effective.

List of Statutes

Constitution of Kenya of 1963

International Crimes Act of 2008

National Assembly and Presidential Elections Act of 1969

Truth Justice and Reconciliation Commission Act No 6 of 2008

International Legal Instruments

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005

Rome Statute of the International Criminal Court, Adopted in Rome on 17 July 1998 and Circulated as Document A/CONF.183/9 of 17 July 1998

LIST OF ACRONYMS

CRC	Constitutional Review Commission
ECK	Electoral Commission of Kenya
ICC	International Criminal Court
KADU	Kenya Africana Democratic Union
KANU	Kenya African National Union
SATRC	South Africa Truth and Reconciliation Commission
TJRC	Truth, Justice and Reconciliation Commission
TJRC-K	Truth, Justice and Reconciliation Commission
USA	United States of America
UDHR	Universal Declaration of Human Rights

CHAPTER ONE

1.0 Introduction

In the last decade, Kenya's elections have been characterized by violent ethnic conflicts. The 2007 elections were no different. Between December 2007 and February 2008, violence erupted in different parts of the country. This resulted in a total of *1,133* deaths and close to *500 000* people being displaced from their homes across the country. About 12,000 people flee from their homes to find refuge in the neighbouring countries[1].

It was argued that in fact these violent conflicts were not just about the elections but also as a result of historic injustices.[2] In response to this, the Truth, Justice and Reconciliation Commission (TJRC–K) was established to draw a clear picture of the alleged historic injustices. Parallel to the establishment of the TJRC, the International Criminal Court (ICC) investigator, Mr Ocampo, declared that he would be instituting investigations on the perpetrators of the 2007 violent conflicts.

This dissertation examines the role of the TJRC-K generally and also its relationship, if any, with the work of the ICC.

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[1] Commission of Inquiry into the Post-Election Violence, Report of the Commission of Inquiry into the Post-Election Violence, Experienced in Kenya after the General Elections, held on 27th December 2007 (Waki Commission), pg 344.

[2] Lydiah Kemunto Bosire, The Politics of Violence and Accountability in Kenya 16 July 2009, Oxford Transitional Justice Research Working Paper Series

1.1 Background of the study

On the one hand, some scholars[3] argue that the violence that rocked Kenya was as a result of manifestation of the negative side of electoral democracy, in which the privileged fought over control of the state in a context of zero-sum politics. On the other hand, some scholars are of the view that the post-election violence was actually an illustration of a trend "*formalizing violence*" where elites set up, control, or manipulate an alternative security infrastructure[4].

This insecurity, among other things, can be deployed to intimidate opponents[5]. Other scholars[6] still find these explanations incomplete, and instead cite structures of inequality, with a particular focus on grievances over access to land and resources[7]. Many of these explanations privilege the agency of the political class in manipulating tribal cleavages. These conditions propelled lack of security, in the broadest sense, and set the stage for conflict. Trapped in a desperate attempt to secure sustainable peace, justice and reconciliation after the violence that followed the December 2007 elections, the TJRC-K was formed. One of the mandates of the TJRC-K is to investigate historical gross human rights violations which took place between December 1963 and February 2008.

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[3] Adam Ashforth (2009). "Ethnic Violence and the Prospects for Democracy in the Aftermath of the 2007 Kenyan Elections" Public Culture, 21(1): 9-19.

[4] Randall Collins (2008). Violence: A Micro-sociological theory. Princeton: Princeton:14-16 Oxford Transitional Justice Research Working Paper Series

[5] Akiwumi Judicial Commission of Inquiry on Tribal Clashes (1999) Report of the Judicial Commission appointed to inquire into tribal clashes in Kenya: Rift Valley. Date of publication. A available at Http://www.scribd.com/doc/2204752/Akiwumi Report-Rift-Valley- Province> (08 July 2009) [Accessed on 21st June 2110]

[6] Jacqueline Klopp (2001). "Ethnic Clashes' and Winning Elections, The Case of Kenya's Electoral Despotism." Canadian Journal of African Studies, 35(2): 17.

[7] Commission of Inquiry into the Post-Election Violence Report of the Commission of Inquiry into the Post-Election Violence Experienced in Kenya after the General Elections held on 27th December 2007 (Waki Commission), p 308,

Kenya was formerly colonized by the British government but gained her independence in 1963. Distinct from other constitutions[8], the post-independence Constitution of Kenya does not particularly provide for the right to vote, this right is however provided in the *National Assembly and Presidential Elections Act*[9]. The fact that the Constitution does not provide for a right to vote should not be interpreted to mean that it does not recognize this entitlement. On the contrary, *section 43 of the Constitution*[10], which deals with eligibility of a voter, provides for this right by inference.

The Kenyan Constitution was amended in 1982 to make the country a one-party state[11]. Therefore, in presidential elections, the right to vote existed in theory, since practice the choices was limited because there was only one presidential aspirant running for office. However the pressure from internal and external democrats led to the yet another amendment in 1991 to repeal *section 2A*[12]. As a result, Kenya became a multi-party state[13]. From that moment onwards the country was in principal taking the democratic path. According to the Kenyan Constitution, interpreted together with the *National Assembly and Presidential Elections Act*, elections – civic, parliamentary and presidential – must be held after every *5* years[14]. The Electoral Commission of Kenya (ECK) was previously charged with the responsibility of running elections[15]. However following the controversial 2008 election results, which led to post-election violence was his highly attributed to weak Electoral process, thus the interim independent Electoral Commission was put into place with the mandate to run the subsequent elections and replace Electoral

[8] Gambian Constitution 1996, S.26; Afghan Constitution 2004, Art 33.
[9] Section15.
[10] Kenyan Constitution of 1963.
[11] Section 2A ('There shall be in Kenya only one political party, the Kenya African National Union')
[12] By Act No 12 of 1991.
[13] Section 1A of the Constitution declares that Kenya is a 'multiparty democratic state'.
[14] See s 9 of Constitution of Kenya.
[15] See s 41, 42 and 42A of the Constitution. National Assembly and Presidential Elections Act 1969, s 17A

Commission of Kenya to curb the reoccurrence of such violence and restore confidence of the Kenyan people towards Electoral Commission.

During any general election, the stakes are usually high. And, for many aspirants and their supporters, assuming office means gaining access to power and, ultimately, control over important resources. In some African states, having one of your 'own' persons in power can determine the level of development in your region. Where resources are limited, and regions depressed, it makes the contest for political seats particularly important. Elections, therefore, provide an opportunity to remove lawfully a person or party from government, which the majority believes has not delivered, and replaces them with one that voters believe will meet their needs. Generally speaking, individuals participate in elections in order to elect or re-elect into office a government which they believe will improve, in particular, their economic situation. Whether or not a candidate ultimately delivers once he or she is in office is another inquiry.

Against this background, many opposition parties base their campaigns upon a platform of change. This approach is usually aimed at countering the record of achievement that sitting governments put forward to justify seeking re-election.

In *Zimbabwe,* for instance, the name of the main opposition party in the 2008 elections – *Movement for Democratic Change* – makes this point. Similarly, in the *USA, Barrack Obama* the first African-American president of the USA promised to bring real transformation if elected into office. Due to such pressure and tension during election time the ball is always thrown to the electoral commission's court. In order to meet internationally acceptable standards, an objective electoral process must meet certain criteria[16]. First, every eligible voter must have the

[16] For these standards, see International Covenant on Civil and Political Rights, GA Res 2200(XXI) UN GAOR, 21st Sess, Supp No 16 at 52, UN Doc A/6316 (1966), 999 UNTS 171

opportunity to participate in the process. Secondly, an independent body should conduct the elections. Thirdly, each vote must carry equal weight. Further, the process must be transparent. Moreover, the results should reflect the number of votes that have been cast. Lastly, dissatisfied candidates must be given an opportunity to challenge the results before independent courts and/or tribunals. In absence of these key ingredients, it is difficult for any election to be deemed free and fair.

Bearing in mind the 'fundamental' magnitude of a presidential election, to reiterate the words of *Thomas Hobbes*[17] and *Justice Breyer*[18], it is reasonably precarious to meddle deliberately with this poll. As the post-2007 election events in Kenya revealed, flawed presidential elections can have catastrophic consequences. Following the announcement of the much-disputed election results, the world witnessed an outbreak of riots and violence in parts of the country, particularly in opposition strong-hold areas. Kenya's status, as a sanctuary of peace in a continent plagued by violence, has since been shattered. The violence caused significant suffering to thousands of people. Within days of the announcement of the presidential result, close to *500,000* people were forced to flee from their homes[19]. Of these, some *12,000* sought shelter in the neighbouring state of Uganda as refugees[20]. It is estimated that *1100* people lost their lives in the post-election violence[21]. Property worth billions of shillings was also destroyed.

(entered into force 23 March 1976) (ICCPR), Arts 2(3) and 25; Universal Declaration of Human Rights, UNGA Res 217 A, GAOR, 3d Sess, 183 plen Mtg at 22, UN Doc A/810 (1948) (UDHR), Arts 8 and 21

[17] T Hobbes Leviathan (Sydney: Broadview Press, 2002) p 215.

[18] See George Bush v Albert Gore 531 US 98 (2000) at 153 (Stevens and Ginsburg JJ concurring).

[19] Kenya Red Cross Society Electoral Violence.

[20] UNHCR 12,000 Kenyan Refugees Now in Uganda, available at http://www.unhcr.org news/NEWS/47a85a4e2.html

[21] Supra Note 1

The violence ended in *February 2008*, when a coalition government was formed, but 'deep peace' remains elusive and reforms doubtful.

The government responded to underlying causes by establishing four commissions: an Independent Review Commission to examine the electoral process *(Kriegler Commission*[22]*);* a Commission of Inquiry into Post-Election Violence *(Waki Commission)*[23]; a Constitutional Review Commission *(CRC)*[24]*;* and the *Truth, Justice and Reconciliation Commission* (TJRC - K)[25].

In theory, such inquiries play a central role, providing a public account and acknowledgement of the past, which may be healing and provide some comfort. Thus, the Waki Commission has been commended for its criticism of state security services and politicians, and attention to underlying issues of impunity, poverty, underemployment and the 'land issue'. Much more importantly, commissions can make recommendations yet, while Kenya has held many commissions, successive governments have usually failed to introduce any suggested reforms. Unfortunately, this record continues. The most notable absence is of a Special Tribunal – recommended by the Waki Commission to investigate 10 individuals who may have incited, organized and/or financed the violence– with the threat that the 'list' would go to the International Criminal Court (ICC). However, in June 2009 the government agreed to a tribunal by July 2010, which renders any high-level prosecutions prior to the 2012 election campaigns extremely unlikely, while few citizens or police officers have been charged or even investigated.

Unfortunately, the CRC seems set to suffer a similar fate to its predecessor; especially its continued unwillingness to address why Kenyans are divided on certain issues, such as the

[22] June 2008
[23] February 2008
[24] April 2008
[25] March 9th, 2009

benefits, dangers and meaning of devolution. Consequently, there is heavy reliance on the TJRC-K to solve underlying issues. However, the TJRC-K suffers from a paucity of resources[26] and a massive mandate, which includes the need to establish an accurate, complete and historical record of violations of human and economic rights inflicted by the state between December 1963 and February 2008, a picture of possible causes, and investigate corruption and irregular acquisitions of land. The danger is thus that the TJRC-K will add little to the 'truths' established by earlier commissions, while their collective recommendations are delayed until after the next election or indefinitely. Added to this is a deteriorating security situation – with the police and military increasingly acting as a law unto themselves and spread of the *mungiki* model of gang crime and terror – while politicians seem blissfully unaware of seething resentments or, more likely, believe that they can use them to their own advantage.

The unfortunate consequence is that violence, while far from inevitable, seems increasingly likely. At the heart of the problem lies a corrupt and tarnished political system characterized by an 'ethnic logic' of political mobilization and support. To understand local potential for violence one must recognize the interplay between: A highly centralized system in which real power lies with the Office of the President; a lack of faith in key institutions (such as the anti-corruption and electoral commissions, parliament, judiciary and security services); a perception that the post-colonial state is (and has been) ethnically biased; communal discourses of past injustice and marginalization regarding 'lost lands' and political patronage; pressure on elites to present and further ethnic claims; the use of inflammatory and chauvinistic or defensive ethnic language by political candidates and local opinion formers; the use of violence as a political and economic strategy; a culture of impunity for corruption, ethnic incitement and organization of violence; the

[26] Commission of Inquiry into the Post-Election Violence Report of the Commission of Inquiry into the Post-Election Violence Experienced in Kenya after the General Elections held on 27th December 2007 (Waki Commission), p 308, available at http://www.dialoguekenya.org

subsequent normalisation of violence; and finally, but not least, high levels of poverty, inequality, and un (and under) employment especially among the youth

Several politicians have argued that it was necessary to promote healing and reconciliation through the proposed *Truth, Justice and Reconciliation Commission of Kenya*[27] rather than pursuing judicial persecution. Others thought that the prosecutions would threaten the stability of the country, but this revealed a lack of understanding that the short-term neglect of justice for the victims would lay the foundation for future violence and instability in the Kenya. It is against this background that the dissertation analyzes the complementary role of the TJRC.

1.2 Statement of the Problem

The establishment of the TJRC-K alongside the onset of investigations by the ICC raises a question on the relationship between the two institutions. It should be borne in mind that the TJRC-K was established after the Government of Kenya failed to establish a tribunal to try the perpetrators of the violence. A question is therefore raised as to whether the TJRC-K was established to defeat justice and shield perpetrators. If that is the case, did this have any bearing on the ICC decision to commence investigations? This leads to a consideration of the complementarity principle underpinning the work of the ICC as set out in the Rome Statute of the ICC. The preamble of the Rome Statute provides that the Court shall be complementary to national criminal jurisdictions. The research seeks to address the following questions:

What is the status of truth, justice and reconciliation commissions in respect to crimes which fall under the jurisdiction of the International Criminal Court? Should truth, justice and

[27] Hereafter referred to as TJRC –K.

reconciliation serve as an alternative to prosecution hence challenging the admissibility of such cases in the ICC?

What are the international standards that must be met by a truth, justice and reconciliation commission for it to be accepted as an appropriate response to criminal conduct? To what extent do the Truth, Justice and Reconciliation Commission of Kenya meet the international standards? Can it be considered to be capable of effectively exercising its mandate?

What are the considerations in determining that a state is unwilling or unable to carry out investigations or prosecutions hence invoking the jurisdiction of the International Criminal Court? Does setting up of truth, justice and reconciliation mechanisms amount to 'unwillingness' to carry out prosecutions or does it suffice as an appropriate response to criminal conduct?

1.3 Relevance of the studies

In post-conflict countries especially in Africa, the establishment of Truth, Justice and Reconciliation Commissions as a mode of addressing the election violence effects is common. Hence it is imperative to evaluate whether the establishment of the *TJRC* would constitute an adequate response to crimes against humanity committed during post-election violence in Kenya hence removing them from the ambit of crimes to be tried by the International Criminal Court (ICC). In particular the research illuminates the threshold for a credible truth, justice and reconciliation commission that would effectively serve its mandate.

The research findings would be useful to politicians, policy makers, as well as to all Kenyans in understanding the role of TJRC. Furthermore, the data gathered from the result of this study shall serve as guide of other researchers in their quest for additional knowledge, concerning TJRC. The research findings would also interest political scientists, as well as those involved in transitional justice and human rights initiatives.

1.4 Objectives

1. To evaluate if the establishment of the *TJRC -K*, renders the crimes committed during the post-election violence inadmissible before the International Criminal Court (ICC).
2. To critically examine whether the non-prosecutorial measures adopted by Kenyan government through the *TJRC -K* demonstrate intent to bring the perpetrators of post-election to justice as required under *Article 17(a)* of the Rome statute.

1.5 Hypotheses

1. The establishment of the TJRC-K does not oust the jurisdiction the International Criminal Court (ICC) in regard to the alleged crimes against humanity committed after the 2007 elections in Kenya.

2. The non-prosecutorial measures adopted by Kenyan government through (TJRC) as opposed to establishing a tribunal does not demonstrate an intent to bring the perpetrators of post-election to justice as envisaged by *Article 17(a)* of the Rome statute.

1.6 Scope of the Study

The study will focus on the Truth Justice and Reconciliation Commission of Kenya and will not be analyzing the criminal justice system in Kenya.

1.7 Review of Relevant Literature

There is a growing pool of literature on both the work of the International Criminal Court and on Truth Commissions. This chapter discusses relevant literature;

1.7.1 Background to the Post-Election Violence in Kenya

The decision to establish the TJRC-K was envisaged by Amnesty International as an essential step towards ensuring responsibility for past human rights violations and guaranteeing that victims of those violations know the truth, obtain justice and be provided with full compensation[28].

The provisions in the TJRC Act are intended to ensure that the establishment and functioning of the future Truth, Justice and Reconciliation Commission (the Commission) comply with international law and standards. The establishment of the Truth, Justice and Reconciliation Commission of Kenya was decided by the parties to the Kenyan National Dialogue and Reconciliation, which defined its general framework in an agreement on *4 March 2008.*

According to *section 5* of the TJRC Act, the Commission's main tasks are: establishing the facts about human rights violations committed between 12 December 1963 and 28 February 2008,

[28] Helena Cobban: Amnesty after Atrocity? Healing Nations after Genocide and War Crimes. Boulder, CO: Paradigm Publishers, 2007

recommending the prosecution of suspected perpetrators and reparations for the victims and providing a forum for reconciliation. In particular under *section 6* of the *TJRC Act,* the Commission would: investigate the violations, as well as their context, causes and circumstances; identify the individuals and institutions responsible for the violations; identify the victims; educate and engage the public; and make recommendations for reparations and prosecutions, as well as institutional, administrative and legislative reform.

According to *Lydia Kemunto Bosire,*

> "Any policy aimed at addressing Kenya's post-election violence necessarily assumes the existence of a clear understanding of what caused the violence in the first place. While some scholars explain the recent cycle of violence as a manifestation of the negative side of electoral democracy, where elites fight over control of the state in a context of zero-sum politics, others emphasize the trend of in formalizing violence, where elites set up, control, or manipulate an alternative security infrastructure (which, among other things, can be deployed to coerce opponents). Others still find these explanations incomplete, and instead cite structures of inequality, with a particular focus on grievances over access to land and resources. Many of these explanations privilege the agency of the political class in manipulating ethnic cleavages".[29]

Bosire's article only offers one projection of a wider complex of factors that shaped the violence in that it will be misleading and misconceived to advocate that the violence was only as result of manifestation of the negative side of electoral democracy where elites fight over control of state this only explain one face of the wider social, economical and political phenomenon.

Daniel Branch disagrees with many of accounts' focus on elites, as they insufficiently interrogate the agency of ordinary Kenyans in the Violence. Normalization of violence, Branch argues,

[29] Lydiah Kemunto Bosire, The Politics of Violence and Accountability in Kenya 16 July 2009, Oxford Transitional Justice Research Working Paper Series

> "Is evidence of a society's shifting moral landscape: Kenyans increasingly accept violence in a range of arenas as a means of exerting authority. Elite manipulation of that violence to reduce electoral uncertainty forms only one expression of a wider social phenomenon. Branch's conclusion points to a question that continues to be debated in response to violence by state agents: is there moral and immoral violence? Or is it the case that (as with the dichotomy of political and apolitical violence that Branch finds unhelpful) in time the distinctions dissipate?"[30]

Branch analysis is more comprehensive than Bosire's in that it is more dimensional, it trys to illustrate that the violence was as a result of many complex factors which cannot be describe nor defined by one term or illustrated with one example or factor.

On the other hand, *Gabriel Lynch's*[31] views that both accountability and reform are crucial for any country to move forward, even though there are little indication that the state will take action differently from earlier occurrences of violence. However those reforms to date have been basically shallow and bureaucratical with little focus on the complex issues combine, for the state to move forward it must address: the presidency and its zero-sum politics, impunity and the in formalization of violence, and the politics of ethnicity for it to be back on track. Additional, the way in which Kenyan politics are divided, causing the citizen to lack confidence in their politician, for instance – misses the different meanings of history, incentives and reciprocity in political processes.

In spite of *Lynch's* silent approach, the handover of the Waki envelope to the ICC has generated heated discussion on the significance of historical explanation and transitional justice in broad-spectrum, and of prosecutions in particular. Nevertheless, the Kenyan media is dominated by perplexing descriptions of which mechanism is legally practicable or politically pleasing. The

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[30] Daniel Branch The Normalisation of Violence 17 July 2009 (Oxford Transitional Justice Research Working Paper Series 1)

[31] Gabrielle Lynch: Kenya Post-2008: The calm before a storm, 17th July 2009(Oxford Transitional Justice Research Working Paper Series)

situation appears more complicated when many Kenyans appear to prefer the ICC and have no trust in a national process; while the international NGOs prefer a domestic route because, they argue that Kenya has the institutional capability that can bring justice with some modifications; well-known ODM parliamentarians asserted their plan to actively incapacitate efforts for domestic prosecutions; and cabinet members from both parties argue that the only approach is a domestic tribunal because to do otherwise would mean that Kenya is a failed state

1.7.2 Truth, Justice and Reconciliation Commission

Truth Justice and Reconciliation commissions are generally understood to be bodies put into place to investigate a past history of violations of human rights in a particular nation this include violations by the military or other government forces or armed opposition forces.

The TJRC-K is established under *Section 3(1)* of *TJRC-K Act No 6 of 2008* with the objective of promoting peace, justice, national unity, healing, reconciliation and dignity among the people Kenya

TJRC-K is one of the pillars of the National Accord in Kenya, agreed upon over the 14 February 2008 agreement by the Parties for a Truth, Justice and Reconciliation Commission, and in a spirit of reconciliation and national healing[32]

[32] Erin Daly and Jeremy Sarkin; Reconciliation in Divided Societies: Finding Common Ground, Philadelphia: University of Pennsylvania Press, 2007

1.7.3 Complimentarity Principle

The principle of complimentarity is one of the cornerstones of the architecture of the Rome Statute. It shapes various dimensions of ICC and domestic practice, ranging from prosecutorial approach and criminal strategy to statutory performance and observance.

The operation of complimentarity is of paramount importance for the operation and impact of international criminal justice. International courts and tribunals are only able to accomplish their mandates and leave a permanent trail on society, if they manage to marshal support and legitimate justice efforts at the domestic level[33] The Rome Statute sets out the general contours of the concept in Article 17.

1.8 Methodology

This section discusses the research methods used to collect data that forms the basis of the discussions in this dissertation.

1.8.1 Library research

Data collection was mainly through desk research. The researcher relied on secondary data collected from the selected libraries of Kampala International University, Human Rights Commission library of Kenya, the Law society of Kenya Library and SSRN Electronic library.

The resource materials from these libraries include theses, dissertations, government policies, journals, newspapers, text books and various international law articles. The data recording

[33] J. Craeford, "The drafting of the Rome Statute", in P.Sands (ed), From Nurembery to the Haque. The future of international criminal justice, 2003, 109, et seq (147)

techniques included systematic note taking. Comparative studies on other jurisdictions were also considered by the researcher.

1.8.2 Field research

In order to build up the information collected from secondary sources, the researcher collected primary data. This was done through carrying out interviews. The researcher collected primary data through use of an interview guide while carrying out interviews with Human Rights activists from various NGOs affiliated to ICRC Kenya and legal experts. The total number of respondents interviewed was thirty two. This method was purposely sought because it would give an insight into the underlying perception of truth commissions and their linkage to the work of the International Criminal Court.

CHAPTER TWO

TRUTH COMMISSIONS AND TRANSITIONAL JUSTICE

2.0 Introduction

This chapter explores the nature, formation and the role of the Truth, Justice and Reconciliation Commission as a transitional justice mechanism in addressing past human rights violation in Kenya. It will further discuss the evolving practice of truth commissions and explore claims made on their behalf.

2.1 Definition of Terms

Truth, Justice and Reconciliation Commissions refers to bodies put into place to investigate a past history of violations of human rights in a particular nation.[34] This may include violations by the military or other government forces or armed opposition forces.

The term *transitional justice* refers to a "range of approaches that societies undertake to reckon with legacies of widespread or systematic human rights abuse as they move from a period of violent conflict or oppression towards peace, democracy, the rule of law, and respect for individual and collective rights".[35]

2.2 Truth Commissions as a Transitional Justice Mechanism

To appreciate clearly the role of the Truth, Justice and Reconciliation Commission as a transitional justice instrument in addressing past human rights violation in Kenya, it is of paramount significance to analyze the past historical development of Kenya. This will bring the

[34] Pheroze Nowrojee, "Preparing Intensively for an Effective TRC," Paper Presented in workshop on A Truth, Justice and Reconciliation Commission for Kenya: Prospects and Obstacles," 4-5 July 2003, Nairobi

[35] What is Transitional Justice? By International Center for Transitional Justice ICTJ 022006EN. doc

Post-elections violence experience into perspective hence elucidating on the role to be played by the TJRC-K.

2.2.1 Political History in Kenya since December 1963 to February 2010

The political history of Kenya for the last forty seven years has been characterized with gross human rights violations; this is reflected by misuse of power, which as lead to economic crimes and other injustices[36]. Constitutionalism and the rule of law, are considered the innermost ideals of any political democracy that respects human rights, however this has been absent in Kenya's history. Any Democracy in the world today is defined by a government that is answerable and liberally elected, a government governed by the will of the people, and which the citizen exercises their rights to vote without any impeachment or intimidation of any kind. Furthermore for democracy to exist there must be vibrant and unreservedly and fairly elected parliamentarians in a free and fair election[37]. The state must be governed by the doctrine of separation of powers, in order to guarantee the existence of checks and balances through which the independence of the three arms of the state is assured[38]. If not, there is no other assurance that the state will respect the rule of law and act within established legal norms, processes, and institutions.

The Constitution is therefore not simply a document but the supreme law of the land, the grand norm that guides, defines, and permits all measures by the state.[39] The Constitution places all people at equal footing where none is above the law or can rebel against it whether as an individual or official of the state. This is what defines democratic states from undemocratic ones.

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[36]Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission August 26, 2003 printed by the government printer, Nairobi

[37] Ibid

[38] Henry J. Steiner & Philip Alston, International Human Rights in context: law, politics, morals 711-12 (1996).

[39] Supra note 31

It is the difference between tyranny and freedom the post-colonial state of Kenya has engaged in the most detestable human rights violations and economic crimes never witness before[40]. The reintroduction of multi-partyism in 1991, and the two general elections in 1992 and 1997 did little to elevate the situation rather it aggravated human rights violations and the uncalled shameless theft of public funds and property[41]. The 1963 Constitution provided for a multiparty democracy, which constituted of a freely elected parliament, and guaranteed judicial independence[42]. Even with the existence of the liberal constitution, the post-colonial state was tyrannical from its beginning because it inherited blanket laws, culture, and practices of the colonial state. In or around 1964 the then opposition party named *Kenya African Democratic Union* (KADU), under the leadership of the *Daniel Toroitich arap Moi*, the former President of Kenya since 1978, voluntarily dissolved and joined the then ruling party *Kenya African National Union* (KANU), headed by the nation's first African head of state, the late *Mzee Jomo Kenyatta.* The unification was a significant blow to multi-party initiative since it made Kenya a *one*-party state and paved the way for authoritarian governance[43].

Due to lack of a legitimate and official opposition, even though the constitution allowed parliamentary democracy, President *Kenyatta* swiftly created an extremely centralized, dictatorial republic, reminiscent of the colonial state.[44]. However in 1978 the nation witnessed the demise of President Kenyatta, The then Vice President *Moi* took to the presidency in 1978. However following the aborted coup the then President Moi took a number of radical measures to consolidate personal rule. The consequence of these drastic measures was to intensify

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[40] Ibid
[41] Ibid
[42] H. W. O. Okoth-Ogendo, "Law and Government," in Kenya: an official handbook 27-35 (Republic of Kenya: Ministry of Information and Broadcasting, 1988).
[43] Makau wa Mutua, Human Rights and State Despotism in Kenya: Institutional Problems, 41 Africa today 50 (1994). Jennifer Widener, the Rise of a Party State in Kenya: From Harambee to Nyayo! (1992).
[44] International Commission of Jurists, Democratization and the Rule of Law in Kenya 11 (1997)

repression and radically hold back all freedoms. Considerably, mismanagement, official corruption, and Human Right Violation took the center stage. The national economy was left in tatters[45].

In 1982, after popular calls for a democratic political system, President Moi forced a constitutional amendment, making Kenya officially a one-party state. Amendment provided that "There shall be in Kenya only one political party, the African National Union making Kenya a *de jure* one-party state[46].

Subsequently, the Party and the state became one. Using both the government and KANU, the then President exercised wide and deep power over all government machinery such as civic groups, the security organs, the press, the parliament, trade unions and most critically the judiciary. Political assassination, politically-motivated ethnic clashes, arrest without trial, arbitrary arrests and detentions, false and politically motivated charges of opponents, both genuine and forged, took the center stage. The then executive and their agents committed crimes with impunity. Laws and constitutional amendments, which undermined due process of the law and the independence of the judiciary, were passed with slight or no parliamentary debate so as to suit the interest of the government of the day.

Irrespective of the continuous pressure for the authorization of open political competition which took place in 1991, the government turns her back on the installation of democracy. Instead the government used all its resources to disturb a valid transition to democracy. Starting in 1992, the state sporadically engineered and stage manage inter-ethnic violence, particularly against

[45] Supra 36
[46] Sections 2A, Constitution of Kenya (Amendment) ACT NO 7 OF 1982.

communities that were pro opposition political parties. The police and other security agents constantly invoked colonial-era legislation to restrict the activities of the press and civic and human rights groups. The judiciary, which lacked independence, and was viewed by Kenyans as submissive to the executive, continued to be a caged apparatus of repression. Even as the opposition united against KANU in 2002, Mr. *Moi* was still engaged in repressive tactics and the unlawful use of state machinery to stifle the opposition.[47]

Mr. *Mwai Kibaki*, a former Vice President under former President Moi regime, was elected President of Kenya On *December 27, 2002*, ushering in a regime change in the momentous election that unfalteringly ended approximately the two and half decades reign of President Moi and KANU These elections presented Kenyans with indisputable chance to build a democratic state and to tackle the abuses of the past

2.2.2 Human Rights Injustices

Under the four decades regime of KANU the doctrine of the rule of law and the preservation of human rights remained a myth[48]. It can be concluded that this is the era Kenya experienced the most brutal face of atrocities marked with gross human rights violations and economic crime[49]. The most severe of this included; political assassinations, torture and detention without trial, police brutality, massacres of communities, sexual abuse and violence against women and girls, politically instigated ethnic clashes, and a multitude of economic crimes such as the looting of the public purse and land grabbing[50] . All these violations were perpetrated in spite of the Bill of

[47] The Rule of Law Will Prevail , Weekly Review, July 12, 1991, at 26
[48] Supra note 31
[49] Ibid
[50] Ibid

Rights[51] being enshrined in the Constitution. Paradoxically some sections of the Constitution gives individuals basic rights but then restricts them with qualifying limitations, for instance, Section *76(1)*[52], protects individuals against arbitrary search and entry but then Section 76 (2) goes ahead to qualify such protection, by stating that "nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention with above section to the extent that the law in question makes provision, that is reasonably required in the interests of defense, public safety, public order, public morality, public health, town and country planning, the development and utilization of mineral resources, or the development and utilization of any other property in such a manner as to promote the public benefit"[53]. Derogations from the Bill of Rights are also permitted during an emergency.[54]

It is worth noting that doctrine of the rule of law came into greatest challenge 1966 when the growing state approved the Preservation of Public Security Act (PPSA)[55], in reality it re-enacted colonial incarcerated laws. Under the PPSA, the regime detained a number of democratic activists, tortured and harassed their spouses, children, and relatives, and in the process muffled the pressure for democratic change. This was confirmed by the, Attorney General Amos Wako, who stated in 1991 that "a characteristic of the rule of law is that no man, save for the president, and is above the law."[56] However the 2002 general election ushered in a new era of democratic governance when the coalition government took office under the stewardship of President Mwai

[51] Sections 70-83, Constitution of Kenya
[52] 1963 Constitution of Kenya
[53] Ibid
[54] Section 83,Constitution of Kenya
[55] Cap. 57, Laws of Kenya
[56] The Rule of Law Will Prevail , Weekly Review, July 12, 1991, at 26
[56] Supra 45

Kibaki.[57] These paved way for transition to democracy. However the transition is still stifled due to lack of institutions intended to nurture the rule of law and a customs that promotes and protects human rights. In its transition to democracy, Kenya must explicitly and with unbending strength reverse the tarnished character formed by the former regimes and then restructure the state from the scratch. Human rights are the mechanism for the realization of human dignity and the observance of the Rule of law[58] .The task for the apprehension of multi-partyism and human dignity must be beard by the Kenyan Citizen. This is achieved through struggles waged by the civil society, religious organizations, individual politicians, and other Kenyans. It is at this subtle crossroads that human rights values must be deployed to transform the state[59]. However human rights values must do more. They must include the evil characters of the state and twist it into a breathing instrument for the development and maturity of every one of its people. To a state this will be a pipe dream to be realized unless it takes measures to understand human rights in their entirety. That is why human rights must be understood in their whole.[60] These take account of not only the vaunted civil and political rights, which are vital for the essentials of political democracy, but also the neglected economic, social, and cultural rights, which are the decisive structures for social democracy to take effect.

2.3 Transitional Justice in Kenya

The concept of transitional justice is adopted to symbolize and stand for democracy and rule of law. It's a response to systematic or widespread violations of human rights, by recognizing the

[57] Supra 45
[58] Ibid
[59] Ibid
[60] Ibid

victims and promoting possibilities for peace, reconciliation and democracy[61]. It can be regarded as a crucial step for constitution-making, peace-building, and national reconciliation process in states rising out of authoritarianism[62]. In reality, policy-framers and other political leaders have awakened to recognize that a political society that envisages human rights norms cannot be formed unless the society deeply addresses past human rights atrocities. The truth commission has therefore turn out to be the valuable instrument for addressing such past grievances.[63]

The concept of transitional justice appreciates the transitory measures that must be adopted to build up confidence for the reconstruction of a state shattered by human rights violations and crippled by corruption. It also discards the use of any stiff set of rules or criteria which can stifle the peace process in the future. In addition transitional justice calls for deep concessions on both sides of the divide between victims and perpetrators. Never the less the victim nor the perpetrators can never be fully satisfied thus non-concessionary demands or non-conciliatory denials can only frustrate the peace that is crucial for national restoration. Evenly significant is the understanding that transitional justice does not signify exemption for the offenders, for to do so would be to promote a tradition of unaccountability for past abuses. Therefore an equilibrium must be reached between, justice for the victims and reprisal against some of the offenders, and on the other hand, a measure of fairness and forgiveness on the part of victims. This is the probable lane if reconciliation is to turn into a reality[64].

The globe at the present lives in bizarre era at some point in which most societies are in a situation of transition. For most states in *Asia, Africa, Latin America*, and *East/Central Europe*,

[61] Ibid
[62] Ibid
[63] Ibid
[64] Supra 34

the transition is from restricted, particular party, or armed forces regimes into more open societies based on rule of law and respect for human rights. In the more reputable political democracies in the West, the challenges consist of transitions to more varied and advance societies and the role of the state in a variety of social phenomena. The large number of states does not have sufficient human and material resources to achieve significant transitions. Moreover there are no adequate or proper international institutions that can successfully respond to these needs. This means that most states will have to look privately for resources and personnel to effect their transitions to more civilized societies. Therefore new governments have to expertise very well on transitional agendas and programs to restore the state. Fundamental and substantive transformation must be done on Laws, policies, and public institutions also new institutions may have to be formed, while some previous ones may need to be abolished or rehabilitated so as to achieve the desired transition. The public service and the public in broad have to go through profound transformation if the desired state is to be realized. In brief, the society cannot necessarily change if the transition from tyranny and corruption to democracy does not become a reality.

The Kenya situation necessitates the truth commission as the fundamental medium for implementing the scheme of transitional justice. The truth commission is a comparatively latest institution in the world of law and justice; it is about two decades old as a medium for transitional justice[65]. Every nation where it has been established from *Argentina, Uganda, South Africa, El Salvador, Chile, Peru, Ghana, Sierra Leone,* among others has had to invent and modify their institution depending on the particular country's traumatic pas experiences and the

[65] Elliot Abrams, "Truth Without Justice," in Robert I. Rotberg & Dennis Thompson, (eds.), Truth v. Justice: The Morality of Truth Commission, Princeton University Press

balance of the political forces[66]. Truth commissions are formed based on circumstances under which a state's experiences in terms of human rights violation. That is the reason why there is no mode of truth commission anywhere that Kenya can merely imitate; Kenyans ought to study from the encounters of all these countries, and the kind of a truth commission they need to set up and to be mindful of the complexities of Kenya's peculiar history.

The truth commission is currently a globally recognizable notion as a vehicle for a country rising from a phase of gross human rights abuses and detestable economic crimes and wondering how to address them. The term truth commission serves as the standard alias of a type of governmental organ that is projected to assemble evidence of the catastrophic and barbaric past human rights violation and other injustices As a consequence the truth commissions present countries with avenues of responding to years of dreadful human rights violations that cut a crossed the political, ethnic, religious, tribal, economic class, ideological, gender, and other conflicts over justice, power, and the control of economic resources. Truth commissions may perhaps be a substitute to other national responses to these abuses such as criminal prosecutions, and granting blanket amnesties to the perpetrators. Truth commissions are normally established for gross human rights violations that usual courts cannot, or are unwilling, or are unable, to address. Thus it is upon every country to choose whether the truth commission, should deal with the issues of amnesty or prosecution of the perpetrators of such abuses.

Transition in the direction of a more autonomous and participatory government, a government that supports the principles of democracy, of power restricted by law, of formal permissible impartiality, and social justice. Regardless of how the political change occurred; whether through

[66] Ibid

violent or non-violent. What is important is that there is a formidable and substantive change by the incoming government or state from its predecessor. Therefore it could be transformation from monocracy to democracy, from cloudiness to clearness, however that change must be structural, ideological, and fundamental; the reforms must indicate genuine and authentic regime change. Truth commissions hunt for several objectives, which are all interconnected. These range from a kind of a general catharsis in which the country undergoes a profound and acute process of purifying the past. This helps in moral reconstruction, in which a nation scrutinizes credibility of its morality in politics, governance, cultural values, and its analysis of humanity. Ethical restoration implies learning lessons from the past and revising the nation's set of laws. This can act as a means for reconciliation after truth and justice have been told and done. Therefore, society must pass verdict on what it has heard; it must, in effect, set up a moral account of the historical abuses. Another different role, which is perhaps the most significant, is that of the truth telling, where the perpetrators shoulder all, and the victims narrate the horrors witnessed by them by the brutality of the state. After this truth, numerous options are presented: the public may perhaps decide to forget or disregard the reality, sheen over it, or make use of it to bring into book the perpetrators and use it for the moral and political reconstruction of the state. Some commissions may be engaged to seeking the truth, others go for justice or reconciliation, and some may embrace the Truth, Justice and Reconciliation like the Kenyan one. Truth commissions need to be victim centred this means that victims must be permitted to articulate themselves in the tongue of their choice. Many Kenyans are divided; some seek remedy and justice for past violations; however others are devoted to an expedition of forgiveness and reconciliation. However some victims of past abuses have asserted that they may only consider forgiveness after a complete public accountability and justice have been done.

2.4 The Truth Justice and Reconciliation Commission of Kenya

The need for a TJRC-K to inquire into historical injustices, systemic human rights violations, economic crimes, and the illegal or irregular acquisition of land by previous governments was first acknowledged by the incoming National Rainbow Coalition government in 2003. The government appointed a Task Force on the Establishment of a TJRC-K, chaired by Professor *Makau Mutua*. The task force recommended the creation of a TJRC-K before June 2004, with a specific mandate, powers, and functions. However, its recommendations were ignored by the government until *February 2008*

The TJRC-K is established under *Section 3(1)* of the *TJRC-K Act No 6 of 2008* with the objective of promoting peace, justice, national unity, healing, reconciliation and dignity among the people of Kenya TJRC-K is one of the pillars of the National Accord in Kenya, agreed upon over the 14 February 2008 agreement by the Parties for a Truth, Justice and Reconciliation Commission, and in a spirit of reconciliation and national healing.

2.4.1 Broad-spectrum of TJRC-K

The TJRC-K mandate is to inquire into human rights violations, as well as those committed by the state, groups, or individuals. This includes but is not restricted to politically motivated violence, assassinations, community displacements, settlements, and evictions. The TJRC-K is further mandated to inquire into major economic crimes, in particular grand corruption, historical land injustices, and the illegal or irregular acquisition of land, especially as those related to conflict or violence. Other historical injustices shall also be investigated[67].

The TJRC-K objective is to inquire into such events which took place between *December 12,*

[67] S.6 (n-o) of the TJRC-K Act No 6 of 2008

1963 and February 28, 2008. Though, it will be essential look at the past history to this date in order to understand the nature, origin, or circumstance that led to such violations, violence, or crimes.[68]

The TJRC-K shall obtain statements from victims, witnesses, communities, interest groups, persons directly or indirectly involved in events, or any other group or individual; It will carry out investigations and research; hold hearings; and engage in activities as it determines to advance national or community reconciliation[69]. The Commission may offer confidentiality to persons upon request, in order to protect individual privacy or security, or for other reasons. The Commission shall solely determine whether its hearings shall be held in public or in camera.[70]

No blanket amnesty will be provided for past crimes. Individual amnesty may be recommended by the Commission in exchange for the full truth, provided that serious international crimes (crimes against humanity, war crimes, or genocide) are not amnestied, nor persons who bear the greatest responsibility for crimes covered by the Commission.[71]

The Commission is mandated to complete its work and submit a final report within two years. The final report shall state its findings and recommendations, which will be submitted to the President and will be made public in fourteen days and tabled in Parliament.

2.4.2 Guiding values envisaged by the TJRC-K ACT

The TJRC-K in carrying out its mandate shall reflect the following principles and guidelines provided under the TJRC-K Act, bearing in mind international standards and best practices:

[68] S.5 (a-b) TJRC Act No 6 of 2008
[69] S.7 TJRC-K Act No 6 of 2008
[70] S.25 TJRC Act No 6 of 2008
[71] S.34 TJRC Act No 6 of 2008

Independence: Under the provisions of s.21 TJRC-K Act, the Commission shall function independent from political or other form of c ontrol or influence. It shall establish definite working methodologies and work plan, as well as for investigation and reporting, and will set out its own budget and staff plan.[72]

Fair and balanced inquiry: In performing its duties, the Commission is obligated to guarantee that it seeks the truth devoid of influence from other factors[73]. In representations to the community through hearings, statements, or its final report, the Commission shall ensure that a fair account of the truth is provided.

Appropriate powers: Under the wording of s.7[74] the Commission bears powers of investigation, as well as the right to call persons to speak with the Commission, and powers to make recommendations that shall be considered and implemented by the government or others. These recommendations may include measures to advance community or national reconciliation; institutional or other reforms, or whether any persons should be held to account for past acts.[75]

Full cooperation: S, 7[76] is to the effect that Government and other State offices shall provide information to the Commission on request, and provide access to archives or other sources of information. It is urged that other Kenyan and international individuals and organizations also provide full cooperation and information to the Commission on request.[77]

[72] S. 21 TJRC Act No 6 of 2008
[73] Ibid
[74] S. 7 TJRC –K Act No 6 of 2008
[75] Ibid
[76] Ibid
[77] S.8 TJRC-K Act no 6 of 2008

Financial support: The TJRC-K work would be funded by the Government of Kenya, which will grant a considerable share of the Commissions budget[78]. Extra funding could be obtained by the Commission from donors, foundations, or other independent sources.[79]

2.4.3 Selection and Composition

The Commission consists of nine commissioners; with gender balance taken into account. In accordance with S. 10 TJRC Act, three of the commissioners are international experts, that is, Ms Gertrude Chawatama (*Zambia*), Mr Berhanu Dinka (*Ethiopia*) and Mr Ronald Slye (*US*). The other commissioners, who are Kenyans, are: Mr. *Bethuel Kiplagat* (Chairman), Mr Tom Ojienda, Ms Margaret Wambui Ngugi Shava, Ms Tecla Namachanja and Major General (Rtd) Ahmed Sheikh Farah.

The members are required to be persons of high moral integrity, well regarded by the Kenyan population, and to have range of skills, backgrounds, and professional expertise. As a whole, the Commission is to be perceived as impartial in its collectivity, and no member should be seen to represent a specific political group. At least four of the nine commissioners shall have knowledge in human rights law.[80]

In keeping with international best practices, and to ensure broad public trust in and ownership of the process of seeking the truth, the national members of the Commission were chosen through a consultative process. The three international members were selected by the Panel of Eminent

[78] S.43 (a) TJRC Act No 6 of 2008
[79] S.43 (c) TJRC Act No 6 of 2008
[80] S.10 TJRC Act No 6 of 2008

African Personalities, taking into account public input.[81]

In light of the above discussion it is of paramount important to analyze whether TJRC-K embraces minimum requirement to be internationally and domestically acceptable as a vehicle of Transitional Justice

For the TJRC-K to be reputable it needs to assure itself that it has extensive support within Kenya. A legitimate truth commission is not imposed upon a country's population by ruling elites. Rather the truth commissions should be supported by an Act of a democratically elected Parliament, or through a referendum. However in times of political tension or when it deems fragile to discuss such matters in public then consideration may be given to other avenues such as secret negotiation among all the stack holders as was the case in South Africa, where amnesty protection was a key feature of secret negotiations between the ANC and National Party government.[82] To insist on transparent, nationwide decision-making at all points in the process could frustrate the successful reconstruction of a healing nation thus, leaders should be allowed to formulate proposals in private negotiations and then submit them with the backing of key leaders and interest groups for public debate and approval.[83]

For the TJRC-K to embrace Truth Commission requirement it ought to work with other programmers of transformation. A nation that establishes a truth commission without any

[81] S.10 (a) Truth Justice and Reconciliation Commission Act No 6 of 2008

[82] Wilson, R. (2001), The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State. Cambridge: Cambridge University Press

[83] Declan Roche: British Journal of Criminology Truth Commission amnesties and the International Criminal Court 2005

accompanying reforms raises fears about its dedication to the process of reparation and reconciliation. Truth commissions should also be expected to take positive steps to attempt to repair victims' harm. Interviews with victims reveal that financial reparation is often less important to them than 'emotional restoration'[84] which is promoted by acknowledging victims' suffering and giving them an opportunity to speak and, if they wish, confront their perpetrators. Representative acts of reparation, such as the re-burials, monuments, museums and other 'physical markers of past violence and repression'[85] can also help ease victims' pain and suffering. However, though important, these acts are no substitute for more practical forms of reparation. Thus for any Truth Commission to be analyzed as having minimum standard should be expected perceive such steps.

Kenya's truth commission suffers a credibility problem; the current president of the republic of Kenya is not impartial. Mr. Kibaki was the Vice-president when some of the worst crimes were committed in Kenya. He may not have had a direct hand in the crime but the concept of negligence still applies to him. Mr. Kibaki's associates were also some of the people who are likely to be investigated by the TJRC-K. The truth commission formed in Kenya can be looked at as for political convenience and improvement of academic discourse. It is for political convenience because the truth itself is not in any dispute but wider political interests are being served by being seen to be doing something. A truth commission is a tool used to provide amnesty to people who confess to their crimes and explain why they had to commit to those crimes crude as they were. If they explain to a satisfactory level they go scot-free. Such actions will perpetuate the mentality that crimes can be erased from the past of powerful people, sacrificing justice for decorum

[84]Mendez, J. and Mariezcurrena, J. (2003), 'Unspeakable Truths', Human Rights Quarterly, 25: 237-56
[85] Hamber, b. and Wilxon, r. (2002), 'Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies', Journal of Human Rights, 1/1: 35-53

Also integrity and credibility of the Commission chairman Ambassador Bethwell Kiplagat has been put to question. The fact that Kiplagat is adversely mentioned in the Commission Inquiry into the Irregular/ Illegal Allocation *(Ndung'u Report)* is enough prove that he fails on account of the provisions of Section 10 of TJRC-K Act 2008. The Act clear stipulates, that Notwithstanding the provisions of subsection (5), no person shall be qualified for appointment as a Commissioner unless such person (a) is of good character and integrity, (b) has not in any way been involved, implicated, linked or associated with human rights violations of any kind or in any matter which is to be investigated under this Act. TJRC is expected to investigate and scrutiny of historical land questions. He thus lacks legal and moral integrity to be at the helm of the Commission.

The TJRC-K Act has also problematic provisions which need to be amended. For example, the provisions on reparation are ambiguous and remain 'highly problematic' as they require TJRC to assess and make recommendations on individual applications for compensation to victims of gross human rights violation which are likely to overburden the commission.[86]

Also there is need for the review of the Witness Protection Act of 2006 to guarantee the safety of the witnesses who will provide information to the commission. The TJRC-k should make robust efforts to protect victims during the proceedings, particularly because many perpetrators remain at large and hold positions of influence and power in the society. These issues must be addressed urgently before the TJRC-K is said to have embraced minimum standard required of truth commission

[86] S.41 TJRC-K Act No of 2010

2.5 CONCLUSION

The above chapter concludes that considering the long persistent injustices done to innocent citizens of Kenya for the last four decades by the perpetrators who have never be held accountable, it is time for justice to be met. The truth must be discovered the perpetrators should be held accountable. The TJRC-K is therefore a crucial institution which will facilitate the accountability and healing process,

CHAPTER THREE

APPLICABILITY OF THE PRINCIPLE OF COMPLEMENTARITY

3.0 Introduction

This chapter examines the complementarity principle in detail. It discusses the background, nature and its operation.

3.1 Background and Nature of the Principle of Complementarity

From the drafting of the Rome Statute, the principle of complementarity has been one of the core concepts, fundamental to the functioning of the International Criminal Court (ICC). The idea of complementarity developed over a period of almost 75 years prior to the adoption of the 1998 Rome Statute and since the 1919 Peace Treaties.[87] The principle of complementarity is one of the cornerstones of the work of the ICC. It shapes the scope of ICC and domestic practice, ranging from prosecutorial approach and criminal rule to statutory operation and observance.[88]

The concept of complementarity is of overriding significance for the operation and impact of international criminal justice. International courts and tribunals are only able to accomplish their mandates and leave a permanent mark on society, if they manage to mobilize support and genuine justice efforts at the domestic level.[89]

The Preamble of the Rome Statute emphasizes that the Court "shall be complementary to

[87] ICC and Complementarity from Theory to Practice, International Research Project, Universiteit Leiden
[88] Cf. G. Fitzmaurice, The Law and procedure of the International Court of justice, Vol. 2, 1986, 438-439.
[89] Ibid

national criminal jurisdictions"[90]. In effect the complementarity principle is intended to conserve the mandate of the domestic courts as courts of first instance in trying international crimes.

Article 17[91] sets out clearly certain points for a determination of admissibility of a case. A case is therefore inadmissible where one of the four factors mentioned in the first paragraph of *Article 17* is given. In the same breath *Article 17 (1)* establishes a binding but comprehensive list of inadmissibility criteria. Where none of those exists, the case is admissible[92]. However, all cases and situations before the court have to be carefully measured against the factors mentioned in article 17.

3.1.1 The underlying principle of Complementarity

In order to appreciate the principle of complementarity and to aid the interpretation of the different provisions that define the concept substantively and procedurally, it is important to analyze the underlying ethos.

The most apparent fundamental concern that complementarity principle of the court is designed to protect and serve is the independence of both the state parties and third parties[93]. In universal international law, states are obligated to exercise criminal jurisdiction over acts within their jurisdiction[94]. The use of criminal jurisdiction can definitely be held to be a vital feature of

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[90] Para 10 of the Rome Statute

[91] Rome Statute

[92] B, Broomhall, International Justice and the International Criminal Court, Between sovereignty and the Rule of Law, 2003, 90, MeiBner

[93] Bergsmo, See note 12, 99, R.E Fife "international Criminal court, Where it goes" Nord J. int'L L 69 (2000), 63 et seq (72)

[94] D.D Ntanda Nsereko, "The international Criminal Court: Jurisdictional and Related issues", Criminal law Forum 10 (1999), 87 et seq. (117); ICTY, prosecutor V. Tadic, Decision on the defence motion for interlocutory Appeal on jurisdiction 2 October 1995, separate Opinion judge Sidhwa, reprinted in: A KLP G. Sluted, Annotated leading cases of international criminal Tribunals for the Former Yugoslavia 1993-1998), 97 et Seq. (121 para 83

sovereignty itself.[95] It is different from the right of states to exercise criminal jurisdiction over crimes enclosed in the statute, the preamble refers to the duty of every state (not limited to state parties) to exercise its criminal jurisdiction over those responsible for international crimes[96]. The theory of complementarily principle may therefore be to guarantee that states abide by that duty, either by prosecuting the alleged perpetrators themselves, or by providing for an international prosecution in case of their failure to do so.

It goes without saying that the principle of complementarily was intended to allow for the prosecution of certain crimes at the international level where national systems are not doing what is necessary to avoid impunity and to deter a future commission of crimes. Furthermore and distinct from the existence of a duty to prosecute, the complementarily principle is surely designed to encourage states to exercise their jurisdiction and thus make the system of international criminal law enforcement more successful.

It may also be viewed that the court is the custodian of human rights of the accused in the national enforcement of international criminal justice, and that this directive is implied in the complimentarily principle as defined by *Art17 to 19*[97]. *Article 17*[98] itself stipulates that, in determining whether a state is unwilling to prosecute, the court shall have regard to the principles of due process recognized by international law.

Nevertheless, this has been subject of criticism. It has been argued the ICC was not established

[95] CF 1. Brownlie, principles of public international law 5th edition, 1998, 289 and 303 see ibid to the different bases on which states may exercise jurisdiction
[96] Preamble, Para. 6
[97] The Rome Statute of International Criminal Court
[98] Ibid

as a human rights court *stricto sensu,*[99] it was established to deal with situations where a miscarriage of justice and a breach of human rights have been committed and make sure the perpetrators are brought to books. These are the cases envisaged by Article 17 which attempts to capture and more closely define those scenarios[100]. The equivalent goes for the *adhoc tribunals*, where the discrepancy of national processing's with standard of a fair trial exceptionally allows the tribunal to exercise jurisdiction in *a ne bis in idem* situation only if the defendant benefited from such deviations[101]. In addition, international law provides extra, appropriate remedies to tackle breaches of human Rights of the accused in the context of other instruments and institutions.[102]

Another probable reason behind the principle may be seen in a right of the accused to be prosecuted by domestic authorities and be tried before a domestic court; unless those authorities or courts are unable or unwilling to do so. Article 19 (2) (a) should consequently rather be interpreted as resting the accused or suspect with standing to raise an issue that relates to state sovereignty.[103] A right of the accused to be tried before a domestic court is therefore not recognized. The Appeal chamber of the ICTY, although admittedly operating in the context of primacy, rather than complimentarily, reached a smaller conclusion in the *Tadic* interlocutory Appeal on jurisdiction. The chamber rejected the appellant's argument that he has an exclusive right to be tried by national courts under national laws. Given that the ICTY's statutory framework granted the same fair trial rights to the accused as national courts, the transfer of

[99] Fife, see note 21, who also correctly points out that this does not mean that the work of the court may not lead to an increased protection of human rights and that the court is not obliged to respect human rights when operating itself (67).
[100] Bourdon / DuVerge, see not 9, 98
[101] see Art 10 (2) ICTY statute and 9 (2) ICTR statute
[102] Bourdon / Duverger, see note 9
[103] Prosecutor V Tadic, Decision on the Defence motion for interlocutory Appeal on jurisdiction, 2 October, 1995, printed in ILM 35 (1996), 35 et Seq 50, Para. 55.

jurisdiction to an international tribunal did not infringe any rights of the accused[104]

In understanding that the ICC scope will essentially be restricted for reasons due to resource constraints;[105] The Rome Statute has envisaged a set-up of courts on the national and international level possibly including hybrid tribunals, similar to those established in *Rwanda, Kosovo* or *East Timor*. In the struggle against impunity, the ICC will simply be able to serve as a court of last resort where justice cannot be achieved on a national level. Besides the complementarity principle pays honor to the realization that national the system are closer to evidence and that the crimes under the jurisdiction of the court are normally to be prosecuted in the state where they have been committed[106] The Complimentarity principle is thus not a just "*a reluctant concession*, but a substantive and sound operating rule that recognizes that trials closer to the scene of events at issue have inherent practical as well as expressive value.[107]

3.2 Conclusion

The principle of complementary has been largely intended to strike a substantial balance between state sovereignty to exercise jurisdiction and the recognition that, for the effective prevention of such crimes and impunity, the international community has to step in to ensure these objectives and retain its credibility in the pursuance of these aims[108]. At the same time, the principle of complementarity is an implicit restriction of state sovereignty, not because it establishes a duty to prosecute, but because it takes away the possibility for states parties to remain inactive, even

[104] Ibid para. 62.
[105] (ICJ), case concerning the Arrest warrant of 11 April 2000 (Democratic Republic of the Congo Vs Belgium), 14 February 2002, Diss op. Van Den Wyngaert, reprinted in ILM 41 (2002), 536 et seq (639)
[106] Report of the AdHoc committee on the establishments of an international criminal court, note 9, para 31.
[107] J.E. Alvavez, the New Dispute Settlers. (Half) Truths and consequences", Tex int'LL.J 39 (2003-2004), 405 et Seq. 437
[108] Williams, see not 2 MN 20

under a breach of international law in cases where a duty to prosecute exists under other instruments. The principle as a result gives sound effects to, and without a doubt completes the idea of an effective decentralized prosecution of international crimes.

CHAPTER FOUR

TRUTH COMMISSIONS AND THE INTERNATIONAL CRIMINAL COURT

4.0 Introduction

This chapter analyzes the status accorded to truth commissions in respect of crimes falling within the jurisdiction of International Criminal Court. It further highlights the minimum standard required for truth commissions. The discussion will focus on the Truth, Justice and Reconciliation Commission of Kenya.

4.1 The Relationship between Truth Commissions and the ICC

The relationship between truth commissions and the ICC is not expressly stipulated under the Rome Statute. However, truth commissions might operate as an alternative to prosecution by the international court in future[109]. In *2007,* the ICC Office of the Prosecutor (OTP) published a Policy Paper, which aimed to explain the task for truth commissions and other transitional justice mechanisms[110]. The Paper expounded that the ICC Office of the Prosecutor views future truth

[109] M.H. Arsanjani, 'The International Criminal Court and National Amnesty Laws', 93 American Society of International Law Proceedings (1999) 65-68; J. Dugard, 'Dealing with the Crimes of a Past Regime: Is Amnesty Still an Option?', 12 Leiden Journal of International Law (1999) 1001-1015; J. Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International
Criminal Court', 51 International and Comparative Law Quarterly (2002) 91-117; D. Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court', 14 European Journal of International Law (2003) 481-505; M.P Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court', 32 Cornell International Law Journal (1999) 507-527; A. Seibert-Fohr, 'The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions', 7 Max Planck Yearbook of United Nations Law (2003) 553-590 and C. Stahn, 'Complementarity, Amnesties and Alternative Forms of Page10 Justice: Some Interpretative Guidelines for the International Criminal Court', 3 Journal of International Criminal Justice (JICJ) (2005) 695-720.

[110] International Criminal Court, Office of the Prosecutor, Policy Paper on the Interests of Justice, September 2007, ICC-OTP-2007

commissions as fulfilling a complementary role to criminal trials[111] nevertheless it important to note that the establishment of a truth commission will not oust the jurisdiction of the court[112].

However, the creation of the ICC and the obligations imposed upon state parties under the Rome Statute can be interpreted to prioritize prosecution as a response to human rights violations at national and international levels. It, therefore, implies that future truth commissions will be complementary to courts but will play a secondary role to prosecutorial institutions.

TJRC-K in its current form has exhibited some elements of unwillingness or inability to genuinely carry out the investigations as required under *Article 17* of the Rome Statute. The notion in the Preamble of the Rome Statute of the ICC is that the Court shall be complementary to national criminal jurisdictions[113].The complementarity principle conserves the primacy of domestic prosecutions for those responsible for international crimes. The ICC can only intervene under *Article 17(1) (a)*[114] if a state is "unwilling or unable genuinely to carry out the investigation or prosecution". Unwillingness is defined in *Article 17(2)*[115] as the initiation of proceedings created for the purpose of shielding the person concerned from criminal responsibility, or in a context where proceedings are unduly delayed or conducted in a manner "inconsistent with an intent to bring the person concerned to justice". Inability is defined under *Article 17(3)* to include a lack of institutional capacity, as well as the "unavailability" of the national judicial system or enabling legislation, for purposes of carry out proceedings.

For the complementarity principle to apply, a state must be in position to conduct criminal

[111] A. Tejan-Cole, 'Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission', 6 Yale Human Rights and Development Law Journal (2003) 139-159
[112] Ibid
[113] Preamble, para. 10
[114] Rome Statute of the International Criminal Court
[115] Supra note 2

proceedings since non-criminal proceeding are generally viewed to be inconsistent with the complementarity doctrine within the meaning of *Article 17(1) (a)*. Under the existing Kenya laws, the domestic courts only have jurisdiction over international crimes committed after 1st January 2009 when the International Crimes Act came into force. Thus the Kenya government was required to establish a tribunal to prosecute the perpetrators of the post election violence. Instead the government established a weak truth commission which has been reluctant in carrying out its mandate. This was interpreted as an act of unwillingness thus forcing the former UN Secretary General, Kofi Anan, to surrender the list of the alleged perpetrators to the prosecutor of ICC.

4.1.1 The status of truth, justice and reconciliation commissions in respect to crimes which fall under the jurisdiction of the International Criminal Court

The ICC Statute sets out the powers and jurisdiction of the Court. None of the Statute's 128 articles contains any reference to the topics of truth commissions or amnesties. *Article 86* of the Rome Statute Provide for the general obligation of the state to cooperate with the Court in its investigations and prosecutions this include; arrest and surrender,[116] and the provision of other forms of assistance that the Court may require in conducting investigations and prosecutions[117].

The forms of assistance are listed in Article 93 and include: identifying and locating persons[118]; taking and producing evidence;[119] questioning of persons;[120] serving documents;[121] facilitating

[116] Arts 89-92 and 101-102
[117] Arts 93-96 and 99
[118] Art. 93(1)(a)
[119] Art 93(1)(b)
[120] Art 93(1)(c)
[121] Art 93(1)(d)

the appearance of witnesses and experts;[122] examining sites; [123] executing searches;[124] providing records and documents; [125] protecting victims and witnesses[126] and freezing the proceeds of crime.[127]

Most truth commissions do not have the power to grant amnesty to perpetrators. The great majority, in fact, recommend in their final report that there be criminal prosecutions or judicial investigations leading to possible prosecutions for the events that they have documented, and they often turn over any evidence they have to prosecuting authorities. Because a truth commission by its very nature is working with information pertaining to crimes, and often massive crimes, careful consideration must be given to the relationship between its investigations and those of any separate criminal procedure. As non-judicial bodies, commissions themselves of course cannot prosecute anyone. They must rely on the judicial system to carry forward any criminal case.

It should also be noted that amnesties for serious violations of human rights and humanitarian law war crimes, crimes against humanity and genocide are generally considered illegal under international law, regardless of whether they are given in exchange for a confession or apology. Such an amnesty would violate the accepted Guidelines for United Nations Representatives on Certain Aspects of Negotiations for Conflict Resolution.[128]. Furthermore several international

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[122] Art 93(1)(e)
[123] Art 93(1)(f)
[124] Art 93(1)(g)
[125] Art 93(1)(h)
[126] Art 93(1)(i)
[127] Art 93(1)(j)
[128] See the Secretary-General's report on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616), which confirms and further outlines this prohibition of amnesty for war

treaties and customary law make it apparent that blanket amnesties granted to a whole class of perpetrators are illegal[129]. A state can only bar the ICC from prosecution in cases where a truth commission grants amnesties on an individual basis in accordance with strict, transparent criteria. However the ICC will intervene in a country which followed the example of Chile, where Pinochet granted blanket amnesties to himself and his fellow generals, but would respect truth commissions that grant amnesties only to those individuals who make full confessions in public hearings and demonstrate that their crimes were politically motivated.[130]

The TJRC-K Act under s. 34(1) provides that the TJRC-K cannot recommend amnesty to perpetrators accused of international crimes. This in essence it means that its role is limited to investigations leading to recommendations for prosecution of such perpetrators.

Therefore, the work of the TJRC-K is not a bar to prosecution. It would only have been a bar if the ICC was convinced that it was carrying out solid investigations to enable Kenya to prosecute. It is clear that domestic courts in Kenya cannot prosecute the international crimes committed between 2007 and 2008 because the International Crimes Act of 2008 applies to crimes committed after 1st January 2009.

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crimes, crimes against humanity and genocide. These Guidelines were first established by the United Nations in a note sent by the Secretary-General to United Nations representatives in 1999. See also the updated Set of Principles for the protection and promotion of human rights through action to combat impunity, principle 24: restrictions and other measures relating to amnesty (E/CN.4/2005/102/Add.1).

[129] Declan Roche British Journal of Criminology 2005 Truth Commission amnesties and the International Criminal Court

[130] SATRC website at: http://www.doj.gov.za/trc/amntrans/index.htm.

4.2 Standards required of a truth, justice and reconciliation commission for it to be considered to be capable of effectively exercising its mandate

The following are fundamental principles enshrined in a legitimate truth commission.

4.2.1 Political will and operational independence

Truth commissions are successful if there is genuine political will for thorough investigation and truth recording. Political will and operational independence is said to exist when authorities cooperate in allowing commission access to official documents and easy accessibility of public funds allocated to its work. The Government is required provide records to the commission, knowledge of the acts and events under investigation should be expected to provide information to the commission, either in public hearings or, at the discretion of the commission, in private meetings. Such support for a commission's work should coincide with clear operational independence.[131]

The legitimacy and public confidence that are crucial for a successful truth commission process depend on the commission's ability to carry out its work without political interference. Once established, the commission should operate free of direct influence or control by the Government, including in its research and investigations, budgetary decision-making, and in its report and recommendations. Where financial oversight is needed, operational independence should be preserved. Political authorities should give clear signals that the commission will be operating independently[132].

TJRC-K lacks political will and operational independence this because real political change has not occurred in Kenya for the last 40 decades. Powerful political barons of our society have not

[131] Rule-of-Law Tools for Post-Conflict States Truth Commissions United Nations New York and Geneva, 2006 Palais des Nations, 8-14 Avenue de l Paix, CH-1211 Geneva 10, Switzerland
[132] Ibid

melted away with the change. The current President of Kenya was either a collaborator to some of these abuses or turned deaf ears while they occurred. For instance, His Excellency President. Kibaki was a Vice-president when some of the worst atrocities happened including the "Wagalla" massacre. H e may not have had a direct hand in the crime but the concept of negligence still applies to him. President's Kibaki's lieutenants were also some of the people who are likely to be investigated by the truth commission.

Also, the integrity and credibility of the Commission chairman Ambassador Bethwell Kiplagat has been challenged. Evidence has been adduced linking him to past injustices.

Thus it can be argued that the truth commission being advanced in Kenya is intended for political expediency and advancement of academic discourse therefore it cannot effectively exercise its mandate.

4.2.2 County-specific model

It is expected that every truth commission will be distinctive to the country is intended to serve this helps it to respond effectively to the national needs and peculiar situation different of that nation and special opportunities present. Whereas many technical and operational best practices from other commissions experiences may suitably be incorporated, no one set of truth commission model should be imported from one nation to another[133]. This is also applicable to the design of the commission's mandate as well as its specific operational aspects. Many key aspects and decision should be based on local circumstance. This approach is probable to produce a stronger commission and improve a sense of national ownership[134]. Kenya has had a

[133] Ibid
[134] Ibid

relatively dictatorial past. But this does not fall either in the category of war, apartheid or military dictatorship. It is therefore important to structure the activities of the TJRC-K in a way that is compatible to the social terrain in Kenya.

4.2.3 Personnel

The Commission consists of seven members; with gender balance taken into account three of the members are international. The members are suppose to be persons of high moral integrity, well regarded by the Kenyan population, and include a range of skills, backgrounds, and professional expertise. As a whole, the Commission is to be perceived as impartial in its collectivity, and no member should be seen to represent a specific political group. At least two but no more than five of the seven commissioners should be lawyers.[135]

In regard to gender-balance the TJRC-K is well represented.

4.2.4 Victims

Truth Commission is mandated to protect victims of certain types of abuses. For example, some commissions are directed to give special attention to abuses against women and children, or to victims of sexual abuse[136]. The commission may need to establish special procedures for such populations, such as assuring children a greater degree of confidentiality be they children who were victims or perpetrators of abuse or setting up specific procedures for survivors of sexual abuse to take part in hearings. It is best for the terms of reference to guide the commission to give special attention to these or other special populations, but to let the commission itself take the specific operational decisions.

[135] S.7 (b) TJRC Act No 6 of 2008

[136] The Truth Commissions in Sierra Leone and Haiti called for Specific Attention to Victims of Sexual Violence, and, in the case of Sierra Leone, to Children who were Victims or Perpetrators in the Conflict.

4.2.5 Powers

The TJRC-K has powers of investigation, including the right to call persons to speak with the Commission, and powers to make recommendations that shall be considered and implemented by the government or others. These recommendations may include measures to advance community or national reconciliation; institutional or other reforms, or whether any persons should be held to account for past acts[137]. They are further given powers of subpoena, search and seizure, and witness protection. To protect the rights of those persons who may be compelled to testify against themselves when served a subpoena, the commission is also given the power to grant *use immunity,* whereby individuals can be assured that information they provide will not be used against them in any criminal proceeding.[138]

4.3 Conclusion

The above chapter as discussed in details the minimum key elements for the truth commission to be analyzed as credible and effective in performing its obligation. To a large extent, the TJRC has adhered to these standards. However it falls short of the crucial need to have the public support and confidence that is required for it to carry out its mandate. It also does not have financial independence and the political will supporting the mandate of the TJRC-K. These being fundamental requirements, it is likely that the work of the TJRC-K will be highly criticized. The TJRC-K has not yet started its core tasks and therefore some of the issues cannot be analyzed at this stage.

[137] S. 6 TJRC Act No 6 of 2008

[138] Use Immunity does not Extinguish Criminal Responsibility and should not be Mistaken for Amnesty. It merely makes certain Evidence Inadmissible in Court.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This chapter sums up the key findings and makes recommendations necessary to enable the TJRC-K to achieve its mandate. Effective investigations carried out by the TJRC-K would no doubt complement the work of the ICC hence bringing to an end the culture of impunity in Kenya.

5.1 Conclusion

The dissertation has pointed out that the operation of the TJRC-K does not oust the jurisdiction of the ICC to try perpetrators of the 2007 post-election violence. It has been argued that under Article 17 of the Rome Statute, the ICC will not charge a perpetrator if a State is carrying out investigations and prosecutions. Why then would did the ICC prosecutor, propio motu, decide to mount investigations with a view to prosecute yet the TJRC is supposed to be carrying out investigations? The dissertation has illustrated that in fact, the work of the TJRC-K cannot be construed as investigations that will lead to prosecution. The fact that the government of Kenya refused to establish a tribunal and the fact that the International Crimes Act of 2008 applies to offences committed after 1st January 2009 suggests unwillingness on the part of the government to prosecute the crimes against humanity that were committed between 2007 and 2008.

It has however been argued that the TJRC-K can complement the work of the ICC through determining the truth and providing relevant information that would enable the ICC to mete out

justice. Be that as it may, the TJRC –K can only perform this role if some of the issues that have been raised in this dissertation are addressed.

Truth, Justice and Reconciliation commissions are usually formed in order to try and understand why a powerful class of society used crude and inhuman methods against the lower class members of the society. For example, it was established in Argentina after the military dictatorship fell and a democratically elected government was formed. It was used in South Africa after the white minority rule was dethroned and it was used in Sierra Leone after a war that divided the country into warring factions on a tribal footing.

The common aspect among these commissions is that they were established after the powerful faction that terrorized the public was disarmed. The perpetrators of the crimes had used a policy (say apartheid of *South Africa*), a dictatorship (*Argentina*) and war (*Sierra Leone*) to facilitate their monstrous actions. The perpetrators at the time of committing the crimes were following the procedure that they developed to commit these crimes. They could hardly therefore be called as common criminals. Kenya has had a relatively dictatorial past. But this does not fall either in the category of war, apartheid or military dictatorship. The mandate of the Kenya Truth Justice and Reconciliation Commission is to shed light on historic injustices and to make recommendations for measures to address these. However the dissertation has pointed out issues that cast doubt on the genuineness on the part of the Government of Kenya in establishing the TJRC-K.

It has been argued in this dissertation that the TJRC-K's credibility can be challenged. Kenyans

in the recent past have compellingly pressurized Ministers, Permanent Secretaries and other civil servants on the issue of accountability and corruption. However, inspite of the pressure placed upon the Hon. Kiplagat, he still remains the chairman of the TJRC-K. He lacks legal and moral integrity to be at the head of the Commission.

Appointment of ambassador Kiplagat contravenes the provisions of section *10 (6) (a) (b) (c)*[139] read together with section *6 (b)*. According to the Act the Chair has the sole responsibility of "directing and supervising the work of the Commission". The fact that Kiplagat is adversely mentioned in the Commission Inquiry into the Irregular/ Illegal Allocation of land famously known as *(Ndung'u Report)* raises the question whether he has the moral authority to direct and Supervise the work of the TJRC-K. The Act clear stipulates, that no person shall be qualified for appointment as a Commissioner unless such person; -

(a) is of good character and integrity,

(b) has not in any way been involved, implicated, linked or associated with human rights violations of any kind or in any matter which is to be investigated under this Act and

(c) Shall be impartial in the performance of the functions of the Commission under this Act and who will generally enjoy the confidence of the people of Kenya. [140]

The TJRC-K is expected to investigate and scrutinize the issue of historical land questions yet the chair is implicated in such wrongs. Will he investigate himself? Indeed the TJRC-K lacks integrity and credibility to carry out effective work.

[139] TJRC-K Act 2008
[140] S. 10. TJRC-K Act 2008

5.2 Recommendation

5.2.1 Institutional Reforms;

As mentioned, in the Waki Report women in Kenya were violated and had no access to justice during the post-election violence. Hospitals were not set up and gender recovery centers were not well equipped and slow. The police force is also in a miserable state and a complete overhaul is required. These are examples of certain things that must change. However, there is no repentance from the police force and the judiciary. The police tend to think that they are above the law. There is a role for everybody in Kenya to play and there is need to find away to deal with people in a transparent manner.

The TJRC-K needs to work closely with government institutions such as the police and Hospitals in their quest of searching the truth. Thus, if such institutions are not reformed then TJRC-K work will be frustrated by such corrupt and inadequate institution.

5.2.2 Composition of the TJRC-K

TJRC-K needs to have commissioners who are non-partisan; appointed through open and transparent process; respected and fair-minded individuals of high moral standing. Following the accusations levied against the chairman of the TJRC-K, the commission needs to reclaim public confidence. This can be done by removal or resignation of the chairman.

5.2.4 Independence of TJRC-K,

TJRC-K should be institutionally independent and sufficiently funded; it should be separate and non partisan this can be achieved by selecting commissioners who are credible and of very high

moral integrity so as to avoid being compromised. Also having credible commissioners enhances political will and accountability of the commission thus making it independent. The funding of the commission should be made in a more transparent sufficient method so as to enable the commission meet its need.

5.2.5 Mandate of TJRC-K

It should have sufficiently expansive mandate but its conclusions should not be predetermined. A balance between too broad mission and one that can be realistically accomplished over a relatively limited time period is important, although some key issues may be usefully highlighted against a broader historical backdrop. Abuses beyond the specific mandate might be linked to the main subject of truth-seeking to complete the bigger picture. The Commission mission should be flexible enough allowing new information to inform the direction of the TJRC while focused enough, whether by time period or types of abuses under investigation, to ensure that the TJRC can draw meaningful conclusions and recommendations from its work. Commissions generally have a mandate to explore causes and consequences of abuses and make findings and recommendations.

5.2.6 Powers of TJRC-K

A truth commission should have an effective investigation entailing the power to subpoena witnesses and documents and to protect individuals and information, in aid of its mandate to seek the truth. It should not make a generalized offer or expectation of immunity in exchange for truth, but rather a robust investigative power which should utilize all available avenues for seeking information while respecting the rights and security of witnesses. TJRC should wield the

power to grant 'use immunity' to compel the testimony of an individual who invokes right against self-incrimination, by making that person's testimony (or evidence derived from it) unavailable as evidence against him in a criminal case. Though this issue requires careful scrutiny in South Africa, some important information was secured in a select number of cases through the power to subpoena individuals and to compel answers under guarantees of use immunity. The individualized use of this type of immunity is limited and strategic cases may be one form of an investigative tool but, on balance, should not be necessary. If this power is wielded by partisan commissioners or used to further a political agenda, its use and results could undermine the commission's credibility and the greater cause of truth and accountability.

5.2.7 Safeguards of security-related information

Safeguards are required to protect national security-related information but not to cover up politically embarrassing facts or other information about wrongful conduct that pose no national security risk. The Commission should be grounded in openness and transparency, but it should have the ability to review information and hold hearings privately where strictly necessary to protect the security of individuals and to avoid real national security risks. The legitimacy and the credibility of commission will have an enormous bearing on whether it will be trusted to confront hard truths or fall back upon exaggerated claims of security needs.

5.2.8 Cooperation

Government agencies must be encouraged and, where necessary, pressed into cooperation with the TJRC. This requires political will at the highest level of government. TJRC should gather information developed from diverse sources and engage in through review and analysis of that

information, especially in the light information gathered during the cause of the commission's investigation. The commission should consider that will happen to the information it has gathered over the course of its mandate once its business has concluded

5.2.9 Public engagement, comprehensive and accessible reports

Through public hearings outreach efforts and ultimately an accessible report, TJRC must aim to spark public interest and debate. It should provide a well documented basis for its findings and recommendations for any further investigations, reforms preventive and remedial measures. This will enable public officials to engage the issues in a new light and to use the report as a valuable tool for education, making policy and drawing lessons for the future. In light of the above, it is recommended that if a country establishes a credible and independent truth commission, then the prosecution of the perpetrators should be delayed until truth commission winds its work so as to allow harmonious co-existence of the two bodies.

6.0 Conclusion.

The TJRC-K is not a bar to prosecution by the ICC. Section 34(3) of the TJRC-K clearly stipulates that no amnesty will be recommended by the Commission in respect to International crimes. However, the TJRC-K should be overhauled to enable it to carry out effective investigations which would complement the work of the ICC.

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