

LLM (Human Rights and Democratization in Africa) 2009

**Exploring transitional justice as a vehicle for social and political transformation
in Kenya**

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DECLARATION

I, EVELYNE ASAALA OWIYE, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has neither previously been submitted nor currently being submitted to any other university for a degree or diploma. Where someone else's work has been used, due acknowledgment has been given and reference made accordingly.

Signed.....

Date.....

Supervisor: Dr. Atangcho N Akonumbo

Signature.....

Date.....

DEDICATION

Osogo Ambani, the embodiment of every modicum of good. *Avec tout mon coeur je marche dans votre vie à jamais.*

Mom and dad, against all odds, you have always been supportive. As papa has taught me how to be 'always positive' and 'never to give up' mama has instilled in me the 'art of persuasion', patience and loyalty. From both of you, I have learnt that the fear of God, humility and hard work pays. *Je ne vous décevrai jamais!*

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Above all, I crown the Lord God Almighty. Only Him would make this happen.

LIST OF ABBREVIATIONS

African Charter	African Charter on Human and Peoples' Rights
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CIPEV	Commission of inquiry into the post-election violence
CSOs	Civil Society Organizations
GEMA	Gikuyu, Embu and Meru communities
GNU	Government of National Unity
ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICESCR	Convention on Economic, Social and Cultural Rights
ICTR	International Criminal tribunal for Rwanda
IDPs	Internally Displaced Persons
KADU	Kenya African Democratic Union
KANU	Kenyan African National Union
KNDRC	Kenya National Dialogue and Reconciliation Committee
LDP	Liberal Democratic Party
MOU	Memorandum of Understanding
NAK	National Alliance of Kenya
NARC	National Alliance Rainbow Coalition
ODM	Orange Democratic Movement
PNU	Party of National Unity
Rome Statute	Rome statute of International Criminal Court
RPF	Rwandan Patriotic Front
TJRC	Truth, Justice and Reconciliation Commission
UN	United Nations
WW	World War

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Chapter One

Introduction

1.1. Background to the study

Recent epochs have been characterized by societies around the world overthrowing oppressive, tyrannical and autocratic regimes and moving towards democratic rule.¹ During these periods, emergent post conflict societies have pondered over at least three critical questions.² First, how do they hold past autocratic regimes to account? Second, in what ways could the emerging democracies be consolidated? Finally, how do they deal with the victims of the abuses of past regimes?

The evolution of the concept of 'transitional justice' in the twenty first century could, therefore, have supplied such 'new democracies' with pertinent panacea. Modern or democratic transitional justice:

...embodies attempts to build sustainable peace after conflict, mass violence or systematic abuse of human rights. It involves prosecuting perpetrators, revealing the truth about past crimes, providing victims with reparations, reforming institutions and promoting reconciliation.³

From the historical narrative relating to countries that have instituted one or other form of transitional justice, three salient variables - which could be regarded as 'pre-requisites' for transitional justice - stand out: the society must have experienced a conflict; mass violence must have occurred; or systemic abuse of human rights must have taken place.⁴ This list is, however, not exclusive and exhaustive. Neither are there hard and fast rules of determining which society is ripe for transitional justice.

A number of states on the African continent have variously experimented with transitional justice. The Republic of South Africa⁵, Rwanda,⁶ Chad,⁷ Sierra Leone,⁸ Nigeria,⁹ Ghana,¹⁰

¹ For example, in the 1980s, the Latin American countries: Argentina, Bolivia, Brazil, Mexico, Chile and Uruguay, embraced different forms of transition to democracy; Asia, East/Central Europe and Africa. Z Miller 'Effects of invisibility: in search of the 'Economic' in transitional justice' (2008) 2 *The International Journal of Transitional Justice* 266-299.

² P Van-Zyl 'Promoting Transitional Justice in post-conflict societies' 209 available at <http://www.dcaf.ch/docs/Yearbook2005/Chapter10.pdf> (accessed 8 October 2009).

³ Van-Zyl (n 3 above) 209.

⁴ Promotion of National Unity and Reconciliation Act 34 of 1995.

⁵ Established by law No. 03/99 of 12 March 1999.

⁶ Established on 29 December 1990 to investigate crimes committed during the eight year rule of Hissein Habre.

⁷ Established by the TRC Act 4 of 2000.

Zimbabwe¹¹ and Liberia¹² have specifically established Truth and Reconciliation Commissions (TRCs). In addition, a few of these countries have undertaken prosecution - either through national courts, traditional mechanisms or hybrid tribunals - of alleged perpetrators.¹³ Some countries, such as Liberia, Sudan, Mozambique and Angola, have dealt with the question of justice by deciding (expressly or otherwise) to avoid it.¹⁴ While others such as the Democratic Republic of Congo (DRC) and Burundi¹⁵ have introduced piecemeal transitional justice legislations or amnesty laws. Still, other states have had failed attempts at transitional justice. Uganda for example, established a Truth Commission;¹⁶ whose upshot has been described as irrelevant.¹⁷ The latest attempt at transitional justice on the continent is underway in the Republic of Kenya, which forms the focus of this research.

In the eventful General Elections of December 2002, Kenyans voted out the Kenyan African National Union (KANU).¹⁸ KANU had governed the country since independence in 1963. The Jomo Kenyatta regime, which took power upon independence, became increasingly corrupt and authoritarian.¹⁹ At the time of his death in 1978, Kenyatta had crafted a state characterized by personal rule, nepotism, public theft and gross violations of human rights.²⁰ Of this regime, a report has observed thus:

In spite of the liberal constitution, the post colonial state was autocratic at its inception because it inherited wholesale the laws, cultures and practices of the colonial state...President Kenyatta quickly created a highly centralized, authoritarian republic, reminiscent of the colonial state...²¹

⁹ Established on 4 June 1999 by President Olusegun Obasanjo to investigate violations of human rights abuses committed between 1 January 1994 and 29 May 1999.

¹⁰ Established in 2002 to investigate human rights violations for the period from 6 March 1957 to 6 January 1993.

¹¹ Established in 1985 by ZANU-PF government to investigate the killings of an estimated 1,500 political dissidents and other civilians in Matabeleland in 1983.

¹² Established by President Ellen Johnson-Sirleaf on 22 June 2006 to investigate human rights abuses that occurred between 1979 and 2003.

¹³ Sierra Leon adopted the Special Court established by the Statute of the Special Court of 2002; In Rwanda the ICTR was established. This was complimented by *gacaca* (traditional) tribunals, and the national courts.

¹⁴ All these countries offered blanket amnesties to all the violators. See Liberia's Comprehensive Peace Agreement, signed on 18 August 2003.

¹⁵ The DRC: Global and inclusive Agreement on Transition, signed 17 December 2002 and Burundi: Arusha Peace and Reconciliation Agreement, signed 28 August 2000.

¹⁶ The Commission was mandated to investigate Human Rights violations by state forces that occurred from Uganda's independence in 1962 up to January 1986.

¹⁷ M Mutua 'Beyond Juba: Does Uganda need a national Truth and Reconciliation process?' (2007) 13 *Buffalo Human Rights Law Review* 20.

¹⁸ Following the re-introduction of multiparty democracy in 1992, Kenya has held four general elections: 1992, 1997, 2002 and 2007.

¹⁹ 'Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission' Chaired by Prof. Makau Mutua, 26 August 2003, page 9.

²⁰ As above.

²¹ (n 19 above) 19-20.

President Daniel Moi succeeded Kenyatta.²² At best, Moi's regime can be described as a perfection of the Kenyatta's. Through the Government and KANU, President Moi exercised extensive control over civic groups, trade unions, the press, the Legislature and the Judiciary.²³ Political murder, politically instigated 'ethnic clashes', detention without trial, arbitrary arrests, torture, false and politically motivated charges of opponents became part of state objectives.²⁴

Upon the change of regime in 2002, an opportunity for transitional justice presented itself. The then Minister for Justice and Constitutional Affairs (the Minister) appointed a Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (the Task Force) in April 2003. The Task Force was mandated to consider the possibility of establishing a Truth, Justice and Reconciliation Commission (TJRC) to deal with the misgivings of the past regimes following which it was to make recommendations to the Minister as to whether the establishment of a TJRC was necessary for Kenya.²⁵ The Task Force advised that there was a need for transitional justice, and that the TJRC was one way of achieving this objective.²⁶ The report and its recommendations were, however, shelved and the sentiments only revived in the aftermath of the December 2007 election violence.

Following the declaration of President Mwai Kibaki as the winner of the General Elections of 27 December 2007, fierce violence ensued. The public contested the presidential results amidst allegations of massive rigging.²⁷

The post election violence period witnessed the establishment of the Kenya National Dialogue and Reconciliation Committee (KNDRC). This became the avenue through which the ruling party (Party of National Unity) and the opposition (Orange Democratic Party) discussed the agenda for power sharing as well as specific issues in need of reform. These talks were initiated by the former Secretary General of the United Nations (UN), Mr. Koffi Anan. Anan and a panel of other eminent African personalities mediated the process.²⁸ On 14 February 2008, the KNDRC adopted a resolution establishing a TJRC as one of the measures to deal with the country's political crisis:

²² Moi took over the reign of power in 1978 in a peaceful transition following the presidential elections that were held within 90 days of Kenyatta's death.

²³ (n 19 above) 20.

²⁴ As above.

²⁵ (n 19 above).

²⁶ (n 19 above) 28.

²⁷ 'Kibaki won fair and square' *The Sunday Standard* 13 January 2008 34.

²⁸ The other panelists included: Benjamin Mkapa, Graca Matchel and Jakaya Kikwete.

We recognize that there is a serious crisis in the country, we agree a political settlement is necessary to promote national reconciliation and unity...such reform mechanisms will comprise...a truth, justice and reconciliation commission...²⁹

The KNDRC also agreed to the establishment of a Commission of Inquiry into the Post-Election Violence (CIPEV).³⁰ This institution was to be mandated to investigate the facts and circumstances related to the violence that ensued in the aftermath of the 2007 disputed presidential elections; prepare a report with its findings and recommendation for redress or any legal measures that could be taken.³¹

Subsequently, CIPEV was established.³² According to its findings, more than 1000 people succumbed to the violence and not less than 500,000 were displaced.³³ In the Commission's recommendations, the need for a Special Tribunal for the prosecution of those who bore the greatest responsibility for crimes against humanity arising from the post election violence of 2007 was emphasized.³⁴

It is against this backdrop that this dissertation investigates the necessity and utility of the various ongoing transitional justice initiatives. In order to do this, the question as to whether Kenya can be classified as a state in transition will have to be resolved first.

Indeed, the occurrence of violence and the negotiation of peace together with the assemblage of a Government of National Unity (GNU)³⁵ seemingly created a 'constitutional moment' when tremendous changes could be effected. The peace negotiators agreed on a number of reform items, amongst them, the review of the Constitution, the investigation of the root causes of the violence and the setting up of a TJRC.³⁶ However, analysts continue to doubt that the moment is ripe for transitional justice measures.³⁷ It is often alleged, for instance, that the perpetrators of the post election violence occupy prestigious and strategic positions in the GNU.³⁸ These positions would ordinarily be imperative in any reform and

²⁹ 'Agreement on agenda item three: How to resolve the political crisis' KNDRC (2008) 3.

³⁰ 'Agreement on CIPEV' KNDRC (2008) 1.

³¹ As above.

³² Kenya Gazette Notice No. 4473 of 23 May 2008.

³³ CIPEV Report (2008) Part IV.

³⁴ (n 33 above) 472-475.

³⁵ This was achieved through the signing of the 'National Accord and Reconciliation Act of 2008'.

³⁶ (n 29 above).

³⁷ O Ambani 'Conditions are hardly right for transitional justice' *Daily Nation* 7 September 2009.

³⁸ G Musila 'Options for transitional justice in Kenya: the Special Tribunal for Kenya, the Truth, Justice and Reconciliation Commission and the International Criminal Court' (2008) *South African Year Book of International Affairs Year book 2*.

transitional initiatives. Pundits also argue that a reconciliatory populace is yet to be attained.³⁹ The nation remains ethnically polarized.

1.2. Literature review

The literature on the general topic of transitional justice is abundant. In his book, Ruti Teitel,⁴⁰ discusses the role played by the law as a normative element of a transitional society. Teitel's discussion is, however, not context-specific but general. To the extent that he makes anecdotal references to previous transitional processes, these are heavily borrowed from the European and Latin American experiences hence may not offer sufficient guidance to Kenya, given the different contexts. Moreover, Teitel limits transitional justice to the 'rule of law'. However, realists have aptly argued that the frameworks used to examine the role of law do not adequately capture the concept of transitional justice in its entirety.⁴¹

The books by John Elster⁴², Priscilla B Hayner⁴³ and Antje Du Bois-Pedain⁴⁴ are yet other key texts in this sphere. While Elster devotes much of his work on the history of transitional justice, Hayner concentrates on the general challenges of truth commissions as mechanisms of transition. Du Bois on the other hand narrows down to the South African experience. Other contributions on this topic are in form of articles. Makau Mutua,⁴⁵ Godfrey Musila,⁴⁶ William Schabas,⁴⁷ and others are some of the scholars that have written on various aspects of transitional justice in Africa. None of these, however, offers a comprehensive analysis of the Kenyan situation as this study undertakes to do.

Given that the general topic of transitional justice has indeed been examined in books length, the purpose of this research is to identify the relevancy of these writings in a practical situation currently obtaining in Kenya. In order for Kenya to realize the objectives of transitional justice, this research finds the above writings glaringly insufficient. Some of these; the books by P Hayner⁴⁸ and J Elster⁴⁹ are general books that never set out to

³⁹ O Ambani (n 37 above) 10.

⁴⁰ R Teitel *Transitional Justice* (2000).

⁴¹ J Rowen 'Social realities and philosophical ideals in transitional justice' (2008) 7 *Cardozo Pub. L. Pol'y & Ethics Journal* 93.

⁴² J Elster *Closing the books; transitional justice in historic perspective* (2004).

⁴³ P Hayner *Unspeakable truths; facing the challenge of truth commissions* (2001).

⁴⁴ A Du Bois-Pedain *Transitional amnesty in South Africa* (2007).

⁴⁵ M Mutua (n 17 above).

⁴⁶ G Musila 'A preliminary assessment of the Kenyan Truth, Justice and Reconciliation Commission Bill 2008' (2008) 5 *African Renaissance* 40.

⁴⁷ W Schabas 'The relationship between Truth Commissions and International courts: the case of Sierra Leone' (2003) 25, 3 *Human Rights Quarterly* 1047.

⁴⁸ Hayner (n 43 above).

⁴⁹ Elster (n 42 above).

consider Kenya. In that respect they will only inform this study on general concepts and perhaps offer comparative possibilities. Likewise, the focal point of the book by Du Bois-Pedain⁵⁰ and the articles by Mutua⁵¹ and Schabas⁵² is not Kenyan but they offer a range of specific African cases to which this study will make reference.

Although the two papers by Musila⁵³ focus on Kenya, they too are not sufficiently current. While one of them reviews the TJRC Bill which has since been enacted into an Act of Parliament with numerous changes, the other is a critical analysis of CIPEV's recommendations on prosecutions. This does not, however, capture the question of prosecution in its entirety as copious developments have transpired since its publication. Accordingly, this study finds these two articles inadequate in so far as assessing the Kenyan transitional process is concerned. This calls for a comprehensive, analytical, critical and comparative study of the Kenyan situation with other jurisdictions on the continent that have had similar experiences. The substance of this study is informed by these concerns. It is, however, noteworthy that the Kenyan debate is still evolving. This study may, therefore, not be as comprehensive as one that reviews the transitional process *ex post fact*. Inevitably, therefore, this study may, in some respects venture into zones of speculation since neither commentary nor practice exists on some aspects of transitional justice relative to Kenya.

1.3. Research questions

This study poses one main question: How viable are Kenya's transitional justice mechanisms as vehicles for social and political transformation? In addition, there are other subsidiary questions:

1. What are Kenya's transitional justice objectives?
2. Are these objectives achievable in light of the mechanisms chosen and the general context in which they are being rolled out?
3. Has Kenya a legal obligation under international law to institute transitional justice measures?
4. What kind(s) of justice are these mechanisms likely to deliver?
5. Are there general lessons for Kenya to learn from previous transitional societies where similar mechanisms were deployed?

⁵⁰ Du Bois-Pedain (n 44 above).

⁵¹ Mutua (n 17 above).

⁵² Schabas (n 47 above).

⁵³ Musila (n 46 above).

1.4. Significance of the study

The subject of 'transitional justice in Kenya' has been at the centre of contested debates. The questions often raised in these forums remain unresolved, in part because the experiment is still evolving, despite agreement by political players over a general framework. The intention of this study is to join the debate and make a contribution by shedding some light on some of the key issues raised. These issues include: accountability for past human rights abuses; the mechanisms of transitional justice adopted; and the form of justice likely to be rendered. In particular, the dissertation assesses the efficacy of transitional justice mechanisms adopted by Kenya as a tool for democratic transformation. Recognizing the current delicate political situation in Kenya and the different approaches adopted in various contexts, a reasoned study of this kind could make a contribution by providing clarity on these issues.

1.5. Objectives of the study

This research has two major objectives:

1. To assess the feasibility of prosecution and the TJRC as the mechanisms of transition in Kenya and;
2. To establish Kenya's legal obligation under international and domestic law with regard to transitional justice.

1.6. Scope and limitations

Given the constraints of space and the broad nature of the concept of transitional justice,⁵⁴ this study shall be limited to analyzing transitional mechanisms adopted by Kenya which focus on the issues of accountability of the perpetrators of past violations, including the truth commission. Thus, the ongoing constitutional and institutional reform initiatives are beyond the scope of this research.

Since most of Kenya's initiatives (prosecutions and truth commission) are yet to take off, the dissertation reviews the major initiatives in this regard. In particular, the dissertation reviews the Truth, Justice and Reconciliation Act of 2008 (TJR Act) as well as the aborted Bills on the issue of prosecution. The research is further limited by the uncertainty of prosecutions. It is not yet clear whether this will be undertaken by the domestic courts or whether the Kenyan Parliament will eventually establish a Special Tribunal as earlier on contemplated. The referral of the names of the alleged perpetrators to the prosecutor of the International

⁵⁴ See chapter 2 for a comprehensive definition of this concept.

Criminal Court (ICC) by Annan further complicates the matter. Prosecution is thus discussed in all these perspectives.

1.7. Hypothesis

This dissertation proceeds on the following hypothesis:

1. Kenya has an obligation under national and international law to institute transitional justice process after massive abuse of human rights.
2. For the transitional justice process in Kenya to realize its objectives, the mechanisms deployed must attain certain normative standards.
3. Despite the different contexts obtaining in previous transitional societies on the continent, the Kenyan experience could be informed by these prior experiments with transitional justice.
4. The general political context in which the transitional justice process is operating in Kenya informs a number of issues on how the debate is evolving: whether Kenya is ripe for transitional justice and the prospects of success of the mechanisms adopted.

1.8. Research methodology

This dissertation relies significantly on primary and secondary data. This data is collected from books, the internet, journals articles, case law, international and domestic legal instruments as well as newspaper articles and commentaries. While it utilizes primary and secondary research in data collection, it engages in a critical and comparative analysis of the subject.

1.9. Overview of chapters

The current Chapter suffices for an introduction to the research. The second Chapter engages in a conceptual analysis of related and inter-related concepts that will aid the study in research and development of its chapters. This chapter also gives a historical account of transitional justice. It further answers the question as to whether Kenya is a society in transition and lays down the general political context currently prevailing in Kenya. It then concludes by interrogating Kenya's legal obligation on the subject of transitional justice. Chapter three undertakes an in-depth critical analysis of prosecution as one of the transitional justice mechanisms to be undertaken by Kenya. Chapter four then assesses the efficacy of non prosecutorial mechanisms of transitional justice. This analysis will, however, be limited to the TJRC and its related themes on reparation, truth telling and reconciliation. Finally, the study makes its conclusion and recommendations in Chapter five.

Chapter two

Conceptual framework

2.1. Introduction

Having laid the foundation for the study in the previous chapter, this chapter recounts the historical evolution of the theme 'transitional justice'. Likewise, certain key concepts call for definition and elucidation including the very notion of 'transitional justice'. The same applies to other inter-related concepts that are pertinent to this study. The chapter then answers the question as to whether Kenya is a state in transition. Further, it paints a picture of the political context obtaining in Kenya. As to whether 'new democracies' like Kenya have a legal obligation in international law to deploy transitional justice, is yet another issue that this chapter attempts.

2.2. Transitional justice: a historical account

New political regimes are never created on a tabula rasa. Hence any new regime must establish some relationship to the actors and subjects of its predecessor regime. Also it must establish reasons supporting the nature of this retrospective relationship. The retrospective relationship must be justifiable in terms of the new regime. Whereas new authoritarian regimes may be able to repress and destroy the traces and memories of the predecessor regime, this option is precluded in new democracies. The latter must deal, in order to secure their viability and credibility of their principles in the future, with past injustices through means and procedures that are consistent with presently valid standards of justice...⁵⁵

Elster traces the concept of transitional justice back to ancient Athens.⁵⁶ Ancient Athenian regimes encountered problems to which they proffered solutions that can be said to have no contemporary parallels. In two characteristic episodes of 411 BC and 403-404 BC, ancient Athens witnessed restoration of democracy.⁵⁷ In 411 BC, the oligarchs staged a coup that overthrew the democrats from power. This was, however, not to last long as it collapsed four months later following a fall out with its naval troops and the collapse of its alliance with Persia.⁵⁸ Thereafter, the pre-oligarchy democracy was restored. The aftermath of these change of events witnessed transitional justice that emphasized prosecution and deterrence mechanisms. According to Ostwalds, the regime engaged in 'a relentless prosecution of

⁵⁵ C Offe and U Poppe 'Transitional justice in the German Democratic Republic and in unified German' in J Elster (ed) *Retribution and reparation in the transition to democracy* (2006) 239.

⁵⁶ Elster (n 42 above) 3.

⁵⁷ As above.

⁵⁸ Elster (n 42 above) 7.

extremist oligarchs'.⁵⁹ These prosecutions were accompanied by the enactment of new laws that aimed at deterring 'oligarchic recidivism'.⁶⁰ Soon, this democratic regime was to become unpopular following unwarranted persecution and execution of those perceived to be innocent by the public. At its lowest point, this democratic regime marked the end of the Athenian empire after a devastating defeat in the battle of Aegospotami in 405 leading to the re-installation of the oligarchs in 404 under the auspices of Spartan.⁶¹ The oligarchic regime reigned terror. However, it was soon defeated in battle by the democrats in exile at Piraeus.⁶² This necessitated the signing of an amnesty agreement between the two factions under the supervision of Spartan.⁶³ In the aftermath of 404 BC, transitional justice of the Athenian democrats preferred to emphasize on forward-looking issues of social reconciliation as opposed to retribution.⁶⁴ Constitutional amendments too were initiated to revitalize democracy.⁶⁵

Another episode of transitional justice occurred with the restoration of the English monarch in 1660. The Declaration of Breda of 4 April 1660 was the founding document of the English transition.⁶⁶ In this document, a general amnesty was guaranteed to all save for those persons that would be exempted by Parliament. It also embodied economic aspects of which the property that had been confiscated during the interregnum was to be restituted. The American transition after the protracted civil wars of 1780s seems to have borrowed a leaf from the English. The Anglo-American Treaty of 1783 also underscored the aspect of restitution of properties as one form of justice for transitional America.

Centuries later, the post World War II (WW II) German experienced transitional justice in a more complex and dramatic fashion. Complex in the sense that first, the reckoning with past injustices was for the most part orchestrated by foreign conquering powers as opposed to internal forces.⁶⁷ Second, the occupying powers exercised their authority in four different zones with little or no unanimity in their mode of administration of the transitional processes.⁶⁸ Perhaps the Nuremberg trials presented the only organic kernel through which uniformity amongst the responses by the allied powers was manifested.

⁵⁹ Ostwald (1986) 506 as cited by Elster (n 42 above) 8.

⁶⁰ Elster (n 42 above) 8.

⁶¹ As above.

⁶² Elster, (n 42 above) 8.

⁶³ As above.

⁶⁴ Elster, (n 42 above) 3.

⁶⁵ As above.

⁶⁶ Elster, (n 42 above) 50.

⁶⁷ D Cohen 'Transitional justice in divided Germany after 1945' in J Elster (ed), (n 42 above) 59.

⁶⁸ As above. The allied powers included French, America, Britain and the Soviet Union.

The emptying of prisons by the allied powers in 1951 - 55 of German war criminals characterized the dramatic element of this transitional process.⁶⁹ This inevitably invited criticism. While it has been agreed that the need for German support in the cold war was the invisible driving force, other scholars wonder whether transitional justice failed in Germany.⁷⁰ Nevertheless, the post WW II Germany can be said to have embraced the concept of transitional justice in four ways: the allied prosecution of war criminals in national and international military tribunals;⁷¹ 'denazification' programs and other measures designed to isolate dangerous elements of the Nazi regime; compensation of victims and attempts by Germany to prosecute Nazi criminality.⁷²

2.3. Conceptual framework

2.3.1. Defining 'transitional justice'

Though normative arguments for and against particular forms of transitional justice mechanisms abound, attempts to provide a theoretical understanding of this concept are rare. Neither can the definition of this concept be deduced from the wording of any human rights instrument nor is there coherence in the manner in which a few scholars have attempted to define it. The varied ways in which states have embraced the concept in practice further complicates any effort for a universal definition. Indeed, Camp Bell has acknowledged that discourses on 'transitional justice' are themselves in transition.⁷³ Perhaps Teitel offers a more exemplified explanation:

There is no single correct response to a state's repressive past. Which response is appropriate in any given regime's transition is contingent on a number of factors - the affected society's legacies of injustice, its legal culture, and political traditions-as well as on the exigencies of its transitional political circumstance...⁷⁴

Despite the probable shifting terrain of transitional justice, one school of thought envisions this concept as:

The normative and substantive departure by the successor government or state from its predecessor. Thus it could be change from autocracy to democracy, from opacity to transparency, from open shameless graft to fiscal and economic accountability. But that change must be structural, ideological,

⁶⁹ Cohen (n 67 above) 87.

⁷⁰ As above.

⁷¹ Cohen (n 67 above) 63.

⁷² Cohen (n 67 above) 60.

⁷³ C Bell 'Justice Discourses in transition' (2004) 13 3 *Social and legal Studies* 305-328.

⁷⁴ Teitel (n 40 above) 219.

and fundamental; it cannot be a continuation of the same. The change must signal real and genuine regime change...⁷⁵

Teitel, however, thrusts aside this traditional conception of 'transitional justice' as a procedural move towards a liberal and democratic political system.⁷⁶ In offering an alternate way of thinking, he discards the notion of 'revolution' often associated by theorists to 'transition' and restricts it to the role of law in a society undergoing political transition.⁷⁷ He identifies and classifies these roles into three categories. First, is the adjudication of the rule of law construct of understanding what is fair and just. This entails investigations and prosecution of past wrongdoings. Second, is the aspect of reparatory projects and third, constitutional transition. According to Teitel, it is this legal response that enables a constructive normative shift of regimes. Thus, law, which is shaped by the political circumstances of every case, is what structures the transition. Teitel is, however, quick to point out the difference between the rule of law obtaining in established democracies and transitional rule of law. While the former is prospective in nature, the later is both prospective and retrospective as it oscillates between illiberal values of the past and the liberal norms of the future.⁷⁸

The role played by the law in transitional justice, therefore, epitomizes the rational liberalist way of thinking, namely, that there is, after all, a legal solution to every problem.⁷⁹ Thus, as Teitel reckons, the legal processes 'disavow aspects of predecessor ideology and justify the ideological changes constituting liberalizing transformation.'⁸⁰

This definition is, however, not absolute. According to HLA Hart's theory on the 'rule of recognition',⁸¹ Teitel's analysis can be said to have fallen short of distinguishing between the role played by both 'social rules' and 'law' in transitions. In this philosophy, 'social rules and customs form the primary rules by which people order their daily lives. The rules become law when an authority, validated through secondary rules which determine who has authority,... deems the rules to be law and enforces them as such.'⁸²

⁷⁵ Mutua (n 19 above).

⁷⁶ Teitel (n 40 above) 4.

⁷⁷ Teitel (n 40 above) 7.

⁷⁸ As above.

⁷⁹ Teitel (n 40 above) 7.

⁸⁰ Teitel (n 40 above) 221.

⁸¹ HLA Hart *The Concept of Law* (1997) 89-96. See also, R Dworkin *Law's Empire*, (1988) 2-6, 18.

⁸² Rowen (n 41 above) 93.

For law to play any effective role in a transitional society, such a society must, therefore, embody certain social norms. A cohesive community is, therefore, inevitable. Although societies in transition are often fragile hence lacking the much needed cohesion, yet again, these social values remain very vital even in their weakest. As a prerequisite of law, the crucial step of addressing social realities cannot be ignored. Unless the legal framework designed, at best, turns out to be irrelevant or, at worst, counterproductive to the objectives of the transitional process. In this regard, Teitel's definition can be faulted for failing to acknowledge the crucial role played by these social norms in transitional societies.

Fionnuala and Campbell juxtapose the concept of transition justice to its etymological meaning which implies a journey.⁸³ According to the two authors, the conception of this journey: from non democratic state to a stable democracy: is what they term as transitional justice. They, however, inflate this traditional way of conceptualizing this journey to a much broader understanding. In this regard, the two have observed that:

Yet authoritarian entities may not be the only kind of states to leave in their wake a legacy of serious and systematic rights violation. A similar legacy may manifest in states that have experienced prolonged, structured, communal, political violence, even where the political structures could broadly be considered 'democratic'.⁸⁴

The manifestation of 'transitional justice' in Kenya can be understood through the lens of all these schools of thought. While it is an attempt to traverse a repressive past and embrace a democratic future, the role played by law in this society cannot be gainsaid. Moreover, the conception by Fionnuala and Campbell comes in handy to elaborate the fact that in certain circumstances, transitional justice may be inevitable even where a state's political structures are perceived to be 'democratic'. The role played by social norms too is undeniably cardinal in comprehending Kenya's transitional process. Shrouded in these social norms are what the society terms as the 'wrongdoers' and the 'victims' of past violations. These are the key agents of any transitional process.

2.3.2. Defining 'wrong doers'

Also referred to as 'perpetrators', wrongdoers can be understood in the following four distinct categories: those who issued orders for criminally wrongful acts to be committed; those who executed the orders; the intermediary links in the chain of command; and those who facilitate

⁸³ F Aolain and C Campbell 'The paradox of transition in conflicted democracies' (2005) 27 *Human Rights Quarterly* 172.

⁸⁴ Aolain and Campbell (n 83 above) 174.

the wrong doing.⁸⁵ The four categories of wrongdoers are evident from the summary executions, rape, displacement of people, burning and theft of property which atrocities characterized Kenya's post election violence of 2007.⁸⁶

This is, however, a definition from a moral point of view. The challenge remains the translation of these moral intuitions into legal charges. For example, the challenge posed by the prosecution element in Kenya's transitional process is whether the acts committed by alleged perpetrators meet the threshold required of international crimes. While some of the claims put forward by the alleged wrongdoers are visibly self serving, others are compellingly plausible, yet still others raise genuine moral and legal dilemmas.⁸⁷

2.3.3. Defining 'victims'

On the other hand, the definition of victims is fairly contentious. This is partly because; the question of victims has a dimension on who gets compensated and who participates. These contestable issues have largely informed how national or other processes define who is a victim. Thus, some legal instruments have defined victims as persons, either individually or collectively, who suffer harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that violate their rights as guaranteed under domestic and international law.⁸⁸ According to Tucker, victims can be either direct or indirect.⁸⁹ Victims are direct when they encounter first hand suffering either in person⁹⁰ or materially.⁹¹ Victims are indirect when they 'are the family or heirs of the people who were subjected to suffering by authoritarian regimes'.

In this regard, victims in the Kenyan context can be said to include those whose land has been illegally confiscated by the three regimes, those subjected to torture under the Moi regime, the subjects of political murder under the three regimes, victims of arbitrary arrest and detention, victims of rape and enforced disappearance under the three regimes, those subjected to suffering because of corruption, those displaced by the various 'ethnic clashes' and the post election violence of 2007. Yet again, the notion of victims continues to be a

⁸⁵ Elster (n 42 above) 119.

⁸⁶ See generally CIPEV report.

⁸⁷ Refer to chapter 3.

⁸⁸ Art 1 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. See also section 2 (g) Truth, Justice and Reconciliation Act of Kenya, Act 6 of 2008.

⁸⁹ A Tucker 'Rough justice; rectification in post authoritarian and pot-totalitarian regimes' in J Elster (ed) *Retribution and reparation in the transitional justice to democracy* (2006) 287.

⁹⁰ This is harm to life, body or liberty.

⁹¹ This is the loss of real or personal property. If personal, it can take the form of physical objects or financial assets.

controversial question in practice. A practical answer of who is a victim from a Kenyan standpoint has proven to be obscure. Many accounts of victimhood flourish in the Kenyan context. For instance, given the change of regimes, there is a sense in which yesterday's perpetrators have become today's victims. The broad definition of 'victims' under the TJRC Act⁹² has failed to address this bewilderment.

In fact, with respect to the ICC, the notion of 'victims' is limited to natural persons who suffer harm as a result of only those crimes over which the ICC has got jurisdiction.⁹³ This implies that a majority of persons aggrieved under the abusive regimes of Kenyatta, Moi and Kibaki may not be regarded as victims by the ICC. The limited nature of the definition adopted under the ICC does not, therefore, remedy the situation since the nature of human rights violations in Kenya are not limited to the five crimes over which the ICC has jurisdiction. This posits the transitional process in an awkward position as the societal grievances and expectations remain at variance with the guiding legal framework. Clearly, this complicates the ongoing transitional efforts.

2.4. Kenya as a state in transition

Having supplied a definition of transitional justice and related concepts, the question as to whether Kenya would be considered a state in transition is ripe for consideration. This is done by identifying the various prerequisites of transitional justice in what obtains in Kenya.

A state could be said to be in transition when: it has been under a regime that massively violates the rights of its citizens; it has encountered mass violence or has been in an armed conflict; and such a state is making attempts to deal with its past in order to democratize its future. These attempts may, however, take numerous forms: TRCs, amnesties, prosecutions, purges, institutional reforms, constitutional amendments *et cetera*.

The question as to whether a country is transitional is, therefore, historical and contextual. A historical narrative of the post independence regimes in Kenya perhaps corresponds to the definition of a country in transition. During the Kenyatta regime political murders of ethno-political opponents was co-opted into state objective. For example, the disposal of JM Kariuki in 1975,⁹⁴ the assassination of Tom Mboya in July 1969,⁹⁵ the public shooting of the radical

⁹² (n 88 above).

⁹³ Rule 85 Rules of Procedure and Evidence of the ICC.

⁹⁴ J Londale 'Moral and Political argument in Kenya' in B Berman, D Eyoh & W Kymlicka (eds) *Ethnicity and democracy in Africa* (2004) 91.

⁹⁵ G Muigai 'Ethnicity and the renewal of competitive politics in Kenya' in G Glickman (ed) *Ethnicity, conflict*

Pio Gama Pinto,⁹⁶ characterized the Kenyatta era. Political analysts have further pointed fingers to the Kenyatta regime for the death of other key political opponents who died in questionable circumstances. Some of these include: Ronald Ngala and Argwins Kodhek.⁹⁷ The banning of opposition parties like KPU in 1969 followed by arbitrary arrest and detention of all its political leaders including Shikuku, Seroney, Anyona and Mwaithaga was typical of this epoch.⁹⁸ Irregular allocation of land and embezzlement of government coffers were yet other common phenomena of this era.⁹⁹

Under Moi, 'theft' of public land heightened.¹⁰⁰ Inter ethnic violence sanctioned by the state left thousands of people dead and others displaced.¹⁰¹ The Government established what has come to be called 'torture chambers' in which political opponents were subjected to gruesome torture after moot trials (popularly known as *mwakenya* trials).¹⁰² In 1983, the Government adopted a policy of 'detention without trials' under which several people, especially political opponents, were arrested and subjected to detention under torture.¹⁰³ Hideous economic crimes became the order of the day.¹⁰⁴ The famous 'Goldenberg scandal' and 'Anglo leasing scandal' embezzled Government's large sums of money.

The Kibaki regime began by finalizing the famous 'Anglo leasing scandal'.¹⁰⁵ In its later days, it instituted yet another corrupt scandal that has come to be known as 'the Grand regency scandal'. Moreover, the extensive abusive use of Government machinery in the aftermath of the 2007 election violence is self evident. In its report, CIPEV documents a glaring 405 deaths resulting from police gunshots while 243 others sustained police gunshot wounds.¹⁰⁶ Apart from these extra judicial executions, the police has subsequently engaged with impunity in similar acts. In a report by the Kenya National Commission on Human Rights (KNCHR),¹⁰⁷ one of its major findings is documented as follows:

and democratization (1995) 171.

⁹⁶ R Ajulu 'Thinking through the crisis of democratization in Kenya: a response to Adar and Murunga' (2000) 4(2) *African Sociological Review* 137.

⁹⁷ Ajulu (n 96 above) 141.

⁹⁸ As above.

⁹⁹ Muigai (n 95 above) 171.

¹⁰⁰ Lonsdale (n 94 above) 92.

¹⁰¹ Report by the National Christian Council of Kenya 'The cursed arrow: contemporary report on the politicized land clashes in Rift Valley, Nyanza and western Provinces' (1992). See also report by Africa Watch 'Divide and Rule: State sponsored ethnic violence in Kenya' (1993).

¹⁰² Ajulu (n 96 above) 143.

¹⁰³ As above.

¹⁰⁴ C Odhiambo-Mbai, 'The rise and fall of the autocratic state in Kenya' in W Oyugi, P Wanyande and C Odhiambo-Mbai (eds) *The politics of transition in Kenya: from KANU TO NARC* (2003) 65.

¹⁰⁵ See generally M Wrong *It's our turn to eat* (2009).

¹⁰⁶ (n 33 above) 335, 342-343.

¹⁰⁷ KNCHR 'Follow-up Report on Extra Judicial Killings and Disappearances' August 2008.

Initially, the police mainly used firearms to execute suspects, they subsequently changed their *modus operandi* and have since been using such methods as strangulation, drowning, mutilation and bludgeoning.¹⁰⁸

The murder of Dr Odhiambo-Mbai - a constant critic of the Kibaki administration - and the public shooting of 4 human rights activists by police officers¹⁰⁹ have left unanswered questions about respect for human rights by the Kibaki regime.

The massive human rights violations characterizing the post independence regimes coupled with the recent violence of 2007, ushered in a grand opportunity for the country to embrace transitional justice process. Indeed, the current Government has been responsive by *inter alia* adopting the TJR Act, establishing a TJRC as well as making attempts towards prosecution of alleged wrongdoers. Thus far, an explanation of Kenya as a society in transition cannot be clearer.

It is, however, instructive that certain commentators on this subject emphasize the need for a change of regime or guard as a precursor to transitional justice processes.¹¹⁰ The situation obtaining in Kenya (in which there has been no real regime change) has certainly not evaded criticism. According to Ambani:

...Kenya is not experiencing a transition, and it is not about to...The Kenya State has had at least two moments when transitional processes were tenable. First, in 1963, on attainment of independence. Second, in 2002, when the National Alliance Rainbow Coalition (NARC) was overwhelmingly elected to power. Both these moments were thrown out to the dogs. The potentially third moment, happening after the 2007 general elections, aborted somewhere in between the violence and the signing of the Peace Accord.¹¹¹

Although this reasoning may be sound in political theory, it is typical of 'radical idealism'. Conversely, the realist would argue that certain legal steps are necessary to precede political transformation.¹¹² This author holds that it does not matter which of the two comes first: political change or legal steps. Thus, Kenya remains a state in transition and the ongoing legal initiatives are vital in ushering in its political transformation. In fact, under general principles of international law, change or otherwise of regimes does not relieve (the Kenyan)

¹⁰⁸ As above.

¹⁰⁹ 'Activists die with a heavy heart' *Daily Nation* 6 March 2009.

¹¹⁰ Aolain & Campbell (n 83 above).

¹¹¹ O Ambani (n 37 above) 10.

¹¹² Teitel (n 40 above) 1.

Government's human rights duties and obligations.¹¹³ Given that some of the atrocities in Kenya were committed by previous regimes of which successor governments did not respond to, the incumbent government is bound to fulfill its obligations – whether within a transitional justice setting or otherwise.

2.5. Kenya's political context

The dispensation of Kenya's transitional justice is not to be exerted in a vacuum. It is to be achieved within a political context. The current political milieu can best be understood in the framework of Kenya's political history which history is shrouded in ethnic contestation. According to Musila, 'nowhere is ethnicity more at play in Kenya than in the political arena'.¹¹⁴ As a major feature of Kenya's political landscape, ethnicity remains the primary architecture of the current political context. Drawing its lineage from the 'divide and rule' colonial form of government, the post independence elections of 1963 was essentially a political contest between the big tribes (Luo and Kikuyu) coalescing around KANU and the small tribes under the umbrella of Kenya Africans Democratic Union (KADU).¹¹⁵ With KANU emerging as the winner, the then President, Kenyatta, hastened to create what Asingo describes as neo-patrimonialism (personal rule).¹¹⁶

The patron-client political ties that later emerged from this leadership was soon to steer an authoritarian state¹¹⁷ that entrenched the culture of nepotism, public theft, and autocracy amidst horrendous abuses of human rights.¹¹⁸ Leys captures this sad epoch in a most humorous sense:

Kenyatta's court was based primarily at his country home at Gatundu about 25 miles from Nairobi in Kiambu district; but like the courts of old it moved with him, to state house in Nairobi, to his coastal lodge near Mombasa, and his lodge in Nakuru in Rift Valley. This corresponded to his actual roles of Kikuyu paramount and chief national leader of the comprador alliance.¹¹⁹

¹¹³ *Velasquez-Rodriguez v Hondarus (Velasquez-Rodriguez case)*, IACHR, judgment of 29 July 1988 para 184.

¹¹⁴ G Musila 'Federalism and the ethnicity question in Kenya' in G Mukundi (ed) *Ethnicity, human rights and constitutionalism in Africa* (2008) 63.

¹¹⁵ D Kadima 'The study of party coalitions in Africa' in Denis Kadima (ed) *The politics of party coalitions in Africa*, (2006) 191.

¹¹⁶ P Asingo 'The political economy of transition in Kenya' in Oyugi, Wanyande & Odhiambo-Mbai (n 104 above) 19.

¹¹⁷ Asingo (n 116 above) 20.

¹¹⁸ C Odhiambo-Mbai (n 104 above) 51. See also Mutua (n 19 above) 9.

¹¹⁹ Leys *Underdevelopment in Kenya: The Political Economy of Neo-Colonialism* (1975) as cited in Mbai (n 104 above) 64.

Upon his death, Kenyatta was constitutionally succeeded by the then Vice President, Moi. Moi's regime confirmed the rhetoric slur of democracy earlier on orchestrated by the Kenyatta regime. At the height of political hypocrisy, Moi proscribed multi-partyism and embedded a *de jure* one party state in the Constitution.¹²⁰ Not only was allegiance to KANU made a pre-condition to participate in Kenyan politics, this era was also marked by a curtailment of fundamental rights. To wit, curtailment of freedoms of association, assembly, political murder, torture of political opponents, detention without trial, arbitrary arrest and detention, rape, extra-judicial police executions, not to mention impunity, corruption and national decay.¹²¹ Even with the re-introduction of multi-party democracy in 1992,¹²² Moi continued to cling onto power and to govern with an iron fist giving Kenya the notorious identity, that Mbai depicts, as an 'autocratic multiparty state'.¹²³

The political significance of subsequent elections in 1992 and 1997 was undermined by similar trends of ethnic affiliations coupled with armed inter-ethnic clashes.¹²⁴ Initially perceived to have been 'ethnicity proof', the 2002 elections turned out to be yet another ethnic ploy. Even though the then opposition party, National Rainbow Coalition (NARC), which won the election had a reform based ideology,¹²⁵ analysts had earlier on warned that this was yet another super alliance of ethnic groups. Of this election, Mbai wrote:

The December 27, 2002 general elections, although they supposedly resulted in the collapse of the autocratic state, they also prepared fertile ground for the germination of new seeds of autocracy in the country.¹²⁶

Three months after the inception of the Kibaki regime, attempts to 'own the presidency' by an ethnic based cabal of self seekers were already noticeable.¹²⁷ This happened amidst allegations by the Liberal Democratic Party (LDP) - one faction of the coalition Government - that the President had violated the Memorandum of Understanding (MOU) signed between itself and NAK with respect to ministerial appointments.¹²⁸ That efforts were underway to immediately consolidate a new kind of autocracy after this election can thus not be over-

¹²⁰ Kenya was a *de jure* one party state from 1982 to 1992.

¹²¹ Asingo (n 116 above) 22.

¹²² Moi succumbed to pressure from the civil society, religious groups and the opposition leading to a repeal of section 2A of the constitution.

¹²³ Odhiambo-Mbai (n 104 above) 52.

¹²⁴ P Wanyande 'The politics of alliance building in Kenya: the search for opposition unity' in Oyugi, Wanyande and Odhiambo-Mbai (n 104 above) 145. See also Asingo (n 116 above) 28.

¹²⁵ The NARC manifesto encompassed ideals such as: the promulgation of a new constitution; the introduction of institutional reforms and the need to deal with past injustices.

¹²⁶ Mbai (n 104 above) 92.

¹²⁷ As above.

¹²⁸ Wanyande (n 124 above) 151.

emphasized. Prophetically, it did not take more than two years before this coalition of convenience disintegrated and every politician scampered back to their ethnic cocoons as the new Kibaki regime marshaled a new kind of autocracy. The politics of exclusion of non Gikuyu, Embu and Meru communities (GEMA) is what informed the collapse of the NARC coalition.¹²⁹

The 2007 general elections and the associated violence were yet another reflection of how ethnicity has eroded the social and political fabric of the Kenyan society. Although social economic inequalities may have played a role in this violence, the role played by ethnic differences was most dominant. An independent observer has analyzed this incident:

In the slums of Nairobi, Kisumu, Eldoret and Mombasa protests and confrontations with the police rapidly turned into revenge killings targeting the representatives of the political opponent's ethnic base. Kikuyu, Embu and Meru were violently evicted from Luo and Luhya dominated areas, while Luo, Luhya and Kalenjin were chased from Kikuyu dominated settlements...¹³⁰

Despite a GNU, ethnicity remains a key factor to almost every political decision made by the Government.¹³¹ A member of Cabinet once commented that:

For a long time we have labored under the delusion that we are nationalists who think as Kenyans. We pretend that we participate in politics purely on the basis of issues, principles and national interest. But we act on the basis of our tribal and personal interests.¹³²

This summarizes and posits the political context most lucidly. Kenya's political life has been and still remains masked behind the façade of ethnicity. The political significance of elections has diminished. Since independence, politics has only exacerbated ethnic loyalties while constitutionalism, the rule of law, respect for human rights and national integration – which features are central to any political democracy – have been relegated to the periphery. The country has expended much of its moral reserve of 46 years of independence enduring abominable abuses of human rights informed by ethnic considerations. Worse, former regimes have not done much in terms of dealing with the past ills.

¹²⁹ Musila (n 114 above) 63-64.

¹³⁰ International crisis group, Africa report No. 137, 21 February 2008 cited by B Ongaro and O Ambani 'Constitutionalism as a panacea to ethnic divisions in Kenya: a post 2007 election crisis perspective' in Mukundi (n 114 above) 24.

¹³¹ Report on 'The skewed government appointments in Kenya' presented to the ninth Parliament in June 2007.

¹³² K Murungi *The East African Standard* 22 November 1998 cited in Fred Jonyo 'The centrality of ethnicity in Kenya's political transition' in Oyugi, Wanyande and Odhiambo-Mbai (n 104 above) 159.

Clearly Kenya needs respite. It is, however, still unclear as to whether it will get it. The emotional-based desire for revenge, the need to shun current political opponents, the urge to secure key political positions that safeguards political survival in the next general elections of 2012, the quest to protect political sycophants, can be said to be stronger than the desire to carryout impartial justice. Conceivably, therefore, the question that one needs to interrogate is whether the Government has any legal obligation under national and international law to institute a transitional justice process. This might just be the trigger that catapults transitional justice.

2.6. Kenya's legal obligation under national and international law

While experts agree that new democracies emerging from conflict, mass violence or past human rights violations should adhere to established rules of international law, they, however, demur in pointing out what precisely the law requires.¹³³ Although there is clarity on some basic rules relating to international crimes and state responsibility to provide remedies for human rights abuses, there has been lack of clarity as to which remedies should be used. Even as international human rights law bestows discretion upon states as regards the measures to be undertaken in protecting human rights in the domestic sphere,¹³⁴ for its part, international criminal law limits the jurisdiction of international criminal tribunals to five crimes deemed to be of an international nature.¹³⁵ The latter does not, however, suffice in protecting the victims of past human rights violations. For example, the nature of past crimes which informs the objectives of the transitional process in Kenya are not confined to crimes of a criminal nature but take a myriad form of detestable gross human rights violations.¹³⁶ Some of these crimes are neither recognized by the international criminal justice system nor sanctioned by conventional or international customary law.

However, as one author has observed,

When international law defines an act as an offence, the upshot is that the decision whether or not to prosecute offenders is not left to the unfettered discretion of the state, which are subjected to international obligations in the matter.¹³⁷

¹³³ D Orentlicher 'Settling accounts: the duty to prosecute human rights violations of a prior regime' (1991) 100 *The Yale Law Journal* 2551.

¹³⁴ Art 1 the African Charter; Art 2 ICCPR; art 2 ICESCR; and art 2 CEDAW. It is noteworthy that Kenya has ratified all these conventions.

¹³⁵ Art 5 Rome Statute defines these crimes as: genocide, crimes against humanity, and war crimes.

¹³⁶ (n 94-104 above).

¹³⁷ Dinstein *International Criminal law* (1985) 225 as cited in Orentlicher (n 133 above) 2552.

According to Aldana-Pindell, the interpretation of the right to access justice, the right to a fair trial and the right to an effective remedy are what results to the obligation to prosecute.¹³⁸ Similar sentiments have indeed been echoed in the interpretation of international human rights treaties by various international oversight bodies.

Where the investigations...reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law.¹³⁹

While the obligation to prosecute under international human rights treaties can be implied, Kenya has an express mandate under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);¹⁴⁰ and the Rome Statute of International Criminal Court (the Rome Statute)¹⁴¹ to undertake prosecution with respect to conduct prohibited under respective treaties. Under the 'principle of complementarity'¹⁴² enshrined in the latter, national courts have primacy to undertake prosecutions and the jurisdiction of the ICC is only triggered when the state is either 'unwilling'¹⁴³ or 'unable'¹⁴⁴ to do so.

Though scholars have disagreed on the range of human rights protected by international customary law, there is general agreement that customary law prohibits torture, genocide, extra judicial executions, and disappearances.¹⁴⁵ It can, therefore, be argued that these prohibition imports a duty on the state to prosecute such violations whenever they occur and also to offer an appropriate remedy to the victims.

Besides, the Constitution of Kenya guarantees its citizens the protection of their fundamental rights and freedoms.¹⁴⁶ Thus, Kenya has a legal obligation emanating from her national law,

¹³⁸ Aldana-Pindell (2002) 35 *Vand J Transnational Law* 1405, as cited in G Musila 'Whistling past the graveyard: Amnesty and the right to an effective remedy under the African Charter: the case of South Africa and Mozambique' LL.M Dissertation, UP, (2004) 17.

¹³⁹ General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para 18. See also *Velasquez Rodriguez case* para 174.

¹⁴⁰ CAT was ratified by Kenya on 8 March 1996. Art 4 calls upon member states to ensure that torture or attempt to commit torture are offences punishable by appropriate penalties under criminal law.

¹⁴¹ Ratified and domesticated by Kenya via the International Crimes Act Cap 16 of 2008

¹⁴² The preamble para 6 & art 1 Rome Statute.

¹⁴³ Defined under art 17 (2) (a) Rome statute.

¹⁴⁴ Art 17 (2) 3 (a) of the Rome Statute establishes a specific criterion of determining inability.

¹⁴⁵ T Meron *Human rights and humanitarian norms as customary law* (1989) 210 as cited by Orentlicher (n 133 above) 2582.

¹⁴⁶ Secs 70-86 Constitution of Kenya.

international customary law and treaty law to undertake prosecution of wrongdoers as well as guarantee a remedy to the victims of the past human rights violations.

2.7. Conclusion

This section has attempted to narrate the history of transitional justice. It has also endeavored to demonstrate the various ways in which contemporary scholars conceive the concept of transitional justice. It has further settled concerns as to whether Kenya is a state in transition. The Chapter has shed light on Kenya's political context as well as its legal obligation on this subject.

Chapter three

Assessing prosecution as a transitional justice mechanism

3.1. Introduction

Having established the conceptual framework in the previous chapter, this chapter discusses prosecution as one of the transitional justice initiatives in Kenya. This section does not, however, pretend to deal with this mechanism in any conclusive manner as the discourse is still evolving. Besides, as already highlighted, the fragile political context within which prosecution efforts are being rolled out mirror the frailty exhibited by the probable mechanisms. It is within this context that this chapter distills the various concerns from the envisioned prosecution initiatives.

3.2. The case for prosecution

Teitel has acknowledged that:

Trials are commonly thought to play the leading foundational role in the transformation to a more liberal political order. Only trials are thought to draw a bright line demarcating the normative shift from illegitimate to legitimate rule.¹⁴⁷

Indeed, many scholars ascribe to this school. Orentlicher notes that the laying bare of truth about past violations and condemning them through prosecution deter potential law breakers and inoculates the public against future temptation to be complicit in state sponsored violence.¹⁴⁸ She further observes that societies scourged by lawlessness need only to look at their past to discover the costs of impunity.¹⁴⁹ According to Mark Osiel, the staging of human drama of mass atrocities in a courtroom can have a cathartic effect on society.¹⁵⁰ Certainly, Van-Zyl shares similar sentiments when he argues that ‘prosecution can serve to deter future crimes, be a source of comfort to victims, reflect a new set of social norms and begin the process of reforming and rebuilding trust in government institutions.’¹⁵¹

¹⁴⁷ Teitel (n 40 above).

¹⁴⁸ Orentlicher (n 133 above) 25.

¹⁴⁹ As above.

¹⁵⁰ Mark Osiel *Mass Atrocity, Collective Memory and the Law* 15-22 as cited by Rowen (n 82 above) 98

¹⁵¹ Van-Zyl (n 3 above) 210.

Consolidation of the young democracy, writes Huyse, is yet another cardinal role played by prosecutions.¹⁵² The enforcement of the law through prosecution not only legitimizes the new government but also fosters respect of democratic institutions.¹⁵³ Taking cue, CIPEV was convinced that the instrumental role played by trials was indispensable for Kenya's transition. This is echoed in its recommendations that underscore the need for the establishment of a Special Tribunal to eradicate impunity.¹⁵⁴ Yet, prosecution efforts have proved to be quite controversial in Kenya's transition thus far. This has often threatened to politically divide GNU factions amidst reported attempts by PNU to 'own' and 'shape' the transitional process, especially the prosecution outfit.¹⁵⁵ Besides, while there is a general consent among Kenyans for justice through prosecutions, this has habitually taken an ethnic dimension whenever alleged perpetrators are mentioned. These perpetrators, who frequently happen to be politicians and business people, scuttle back to their ethnic backyards for support against the 'witch hunting' hand of prosecution against their ethnic communities.

Prosecution efforts have been muddled with politics of ethnicity and suspicion of political opponents amidst outrageous proposals by Government to have the TJRC undertake prosecution.¹⁵⁶ Nevertheless, the fundamental role that prosecution is bound to play in Kenya's transitional process cannot be under-estimated. Not only would it abate the deep rooted culture of impunity but could potentially eliminate the reigning sense of betrayal and illegitimacy of the current Government and its institutions.

3.2.1 Prosecution through the ICC

Failure to enact the Statute of the Special Tribunal or, in the event that the tribunal was established, subversion of its operations, CIPEV recommended the referral of the names of the alleged perpetrators to the ICC.¹⁵⁷ Indeed, following failed attempts at legislating the said law, Anan referred an 'envelop' of a list of ostensible perpetrators to the prosecutor of the ICC on 9 July 2009.¹⁵⁸ This step raised laudable excitement among the Kenyan population.¹⁵⁹ Understandably, this euphoria was informed by previous tiresome quests to rid the State the deep-rooted culture of impunity and the fear of possible manipulation of the Special Tribunal given the apparent ethnic and political tensions. In the most part, this

¹⁵² L Huyse 'Justice after transition: on the choices successor elites make in dealing with the past' (1995) 20, *Law and social inquiry* 55.

¹⁵³ Orentlicher (n 133 above) 2543.

¹⁵⁴ (n 33 above) 472.

¹⁵⁵ G Musila 'Options for transitional justice in Kenya: Autonomy and the challenge of external prescriptions' (2009) *International Journal of Transitional Justice* 40.

¹⁵⁶ 'Raila Breaks ranks with cabinet over the Hague trials' *Daily Standard* 26 September 2009.

¹⁵⁷ (n 33 above) 473.

¹⁵⁸ 'Panic as Kenya poll chaos case handed to ICC' *Daily Nation* 9 July 2009.

¹⁵⁹ 'It's The Hague, Kenyans tell violence suspects' *Daily Nation* 18 July 2009.

euphoria was largely misinformed on the legal consequences of Annan's submission. With local newspaper carrying alarming titles such as 'Ocampo takes over Kenya's cases',¹⁶⁰ the majority of Kenyan population has been misled into believing that the ICC is soon instituting prosecution of those mentioned. Three cardinal questions emerge from this discourse: does the referral by Annan trigger the jurisdiction of the ICC? Is the ICC option a feasible idea? Is the ICC, therefore, of any relevance to Kenya's transitional process?

The jurisdiction of the ICC is triggered in three ways: by a State Party referral,¹⁶¹ referrals by the UN Security Council,¹⁶² and on the Prosecutor's own initiative.¹⁶³ Evidently, the transmission by Annan of the 'envelope' does not correspond to any of these criteria. At best, therefore, Annan's submission can be classified as part of the information upon which the Prosecutor may initiate investigations and subsequent prosecutions.

Pundits, however, argue that this is unlikely to ever happen. This is due to the fact that the Kenya Government is unlikely to cooperate, which hand is crucial if such efforts by the Prosecutor are initiated.¹⁶⁴ Given the Government stance on the matter of prosecution, coupled with the fact that most of the alleged perpetrators still occupy senior positions,¹⁶⁵ it is foreseeable that the Government will shun the efforts. Although a referral by the UN Security Council would still have provided another window of opportunity, the Kenyan situation has never featured on any of the agenda's of the Security Council.¹⁶⁶

Nevertheless, the ICC option remains relevant. Even though the power of the Prosecutor to initiate prosecution is one that has never been utilized before, Kenya presents a pioneer opportunity.¹⁶⁷

The importance of fighting impunity in Kenya cannot be under-estimated. As correctly identified by the UN, this is one of the most active ingredients for future genocide.¹⁶⁸ It is, therefore, important that Kenya deals with its past now or prepare for grimmer days in the future. If this is achievable through the ICC, then it is desirable.

¹⁶⁰ 'Deadline expires; Ocampo takes over Kenya's case' *Daily Standard* 1 October 2009.

¹⁶¹ Art 14 Rome Statute.

¹⁶² Art 13 Rome Statute.

¹⁶³ Art 15 Rome Statute.

¹⁶⁴ Musila (n 38 above) 3.

¹⁶⁵ As above.

¹⁶⁶ Musila (n 38 above) 10.

¹⁶⁷ Of the four cases before the ICC, three situations have evoked self referrals: Uganda, the DRC and the Central Africa Republic. The fourth, which involved a non party state to the ICC Statute, Sudan, was referred by the Security Council in March 2005.

¹⁶⁸ Office of the special adviser of the UN Secretary General on the prevention of Genocide: A framework.

In the event this case is eventually taken up by the Prosecutor, the hurdle of 'lack of sufficient evidence' must, nonetheless, be surmounted. Given that the CIPEV report acknowledges that the evidence collected may indeed not meet the standards required of international crimes,¹⁶⁹ the ICC Prosecutor must address this issue. Otherwise, the possibility of an ICC prosecution remains unattainable.

3.3.2. Prosecution through an established Special Tribunal

'The Special Tribunal for Kenya Bill 2009' (Government Bill) was duly drafted by the Ministry of Justice and Constitutional Affairs and forwarded to the Legislature for enactment. On two successive attempts, however, this Bill has been shot down by Parliament.¹⁷⁰ The efforts have not all come to naught, however. Calls for its re-enactment are burgeoning.¹⁷¹ Moreover, in a bid to buttress ongoing efforts in securing a functional prosecutorial outfit in Kenya's transitional process, Civil Society Organizations (CSOs) have drafted yet another Bill (CSOs Bill). The latter bill is yet to be tabled in Parliament. This dissertation now undertakes a critical analysis of the contents of these two Bills

3.3.2.1 A Critique of the aborted Government Bill establishing the Special Tribunal

Seven distinctive aspects of the Bill deserve mention. First, the Bill proposed to bestow unto the Special Tribunal jurisdiction over crimes against humanity, genocide, gross violations of human rights and other crimes committed between 3 December 2007 and 28 February 2008.¹⁷² Such a broad mandate would certainly enhance the dispensation of criminal justice. However, one wonders whether 'other crimes' includes crimes that totally had no relation to election related grievances, which offences can be dealt with by ordinary courts. Second, the Bill suggested for the Special Tribunal 'exclusive jurisdiction' to investigate, prosecute and determine cases.¹⁷³ This implies that the Executive, and in particular, the exercise by the Attorney General of his constitutional powers to institute, takeover and discontinue criminal proceedings¹⁷⁴ cannot be invoked as an excuse to frustrate genuine efforts as has been the case in the past.¹⁷⁵

¹⁶⁹ (n 33 above) 17.

¹⁷⁰ On 12 February 2009 and in March 2009.

¹⁷¹ Human Rights Watch (HRW) letter to Kenyan ministers on the establishment of a Special Tribunal. <http://www.hrw.org/en/news/2009/03/24/kenya-swiftly-enact-special-tribunal>, (accessed 6 October 2009).

¹⁷² Sec 4 & 5 Government Bill.

¹⁷³ Sec 7 Government Bill.

¹⁷⁴ Sec 26, the Constitution of Kenya 1969 (as amended to 2008).

¹⁷⁵ *Stephen Mwai Gachiengo and another v. Republic of Kenya*, Nairobi High Court Criminal Application No. 302 of 2000.

It is, however, noteworthy that the Bill fails to surmount any possible contradictions that the 'exclusive jurisdiction' of the Special Tribunal may have on the existing constitutional position with respect to Attorney General's prosecutorial powers. The Bill could further be faulted for failing to clarify the exercise of the President's powers of commutation and pardon in relation to sentences handed by the Special Tribunal. It is not clear whether the 'exclusive jurisdiction' bars the President from exercising these powers. Third, the Bill incorporates relevant fundamental principles of international criminal law. To wit: the principles of double jeopardy,¹⁷⁶ individual responsibility,¹⁷⁷ and fair trial.¹⁷⁸

Fourth, a majority of the magistrates and the judges in the Trial and Appeal Chambers are not to be Kenyans.¹⁷⁹ This safeguards the integrity of the Special Tribunal against claims of ethnic impartiality or political manipulation. Besides, the mode of appointing these judges is one that guarantees competence, independence and impartiality. The panel of eminent personalities is to submit the names of its nominees for appointment to the Special Tribunal Chambers to the President and the Prime Minister. Where the two fail to agree, the national assembly (of not less than half of all its members) can nominate the person to be appointed and forward the names to the President for appointment.¹⁸⁰ Moreover, the Prosecutor¹⁸¹ and Registrar¹⁸² are also not to be Kenyans.

Another plausible provision is the incorporation of imprisonment and fine as the only forms of punishment.¹⁸³ This implies that although death penalty is *de jure* a form of punishment under Kenyan law,¹⁸⁴ the Bill seeks to abolish it.

Sixth, the failure by the Bill to exclude juvenile offenders from the jurisdiction of the Special Tribunal as is the practice in international criminal law is of concern.¹⁸⁵ The total silence of the Bill on this aspect is worrying. The omission, if enacted, may amount to a violation of existing practice in international criminal law.¹⁸⁶

¹⁷⁶ Sec 15 Government Bill.

¹⁷⁷ Sec 14 Government Bill.

¹⁷⁸ Sec 39, 40, 48 & 49 Government Bill.

¹⁷⁹ Sec 16 and 17 Government Bill.

¹⁸⁰ Sec 18 Government Bill.

¹⁸¹ Sec 30 (3) Government Bill.

¹⁸² Sec 31 (3) Government Bill.

¹⁸³ Sec 53 Government Bill.

¹⁸⁴ Secs 40, 204 and 296 (2) Penal Code, Cap 63 Laws of Kenya prescribes death as a penalty to the offences of murder, treason and robbery with violence.

¹⁸⁵ Art 6 of Government Bill merely provides that the tribunal shall have jurisdiction over natural and artificial persons.

¹⁸⁶ See for instance, art 7 Statute of the Special Court of Sierra Leone.

The Bill establishes a Tribunal ‘to bring to account those who bear the greatest responsibility of the post election violence.’¹⁸⁷ The Bill does not, however, stipulate the body and the criteria to be used in determining who bears the highest responsibility. Granted that the Kenyan society remains ethnically polarized amidst political distrust amongst the various factions in the GNU, the possibility of this issue being politicized cannot be gainsaid. Consequently, the aftermath of the intended Special Tribunal may end up being more disastrous and the prosecuting outfit may never achieve its objectives of deterrence, retribution, and reparation.¹⁸⁸ The Bill ought to have been clearer as to which body is invested with these obligations.

3.3.2.2. A critique of the CSOs Draft Bill for the Special Tribunal for Kenya

The CSOs Bill addresses some of the concerns raised regarding Government’s Draft Bill. Firstly, the Bill seeks to abolish the presidential powers to pardon those convicted by the Special Tribunal.¹⁸⁹ Secondly, in a bid to ensure a timely institution of the Tribunal, the Bill provides for a maximum of 30 days within which the President, in consultation with the Prime Minister, the Chief Justice and the Attorney General, should bring it into operation.¹⁹⁰ Thirdly, while the Government’s Bill is silent on the Special Tribunal’s relationship with the legislation domesticating the Rome Statute (The International Crimes Act of 2009), the CSOs Bill makes it clear that the Special Tribunal shall apply the International Crimes Act and international law with any necessary modifications.¹⁹¹ Fourthly, the CSOs Bill, laudably, seeks to amend the Constitution by removing the President’s immunity from prosecution.¹⁹² Fifthly, Attorney General’s powers with respect to criminal prosecution are rendered obsolete by the Bill.¹⁹³

Unfortunately, again, the CSOs Bill fails to protect juveniles from prosecution.¹⁹⁴ It also fails to clarify which body should be charged with the responsibility of determining persons with the ‘highest responsibility’ as well as the criteria to be followed. This development is however, commendable and has since attracted public approval.

¹⁸⁷ Para 7 preamble to Government Bill.

¹⁸⁸ See generally the preamble to Government Bill.

¹⁸⁹ Sec 20 CSOs Bill.

¹⁹⁰ Sec 34 CSOs Bill.

¹⁹¹ Sec 1 (3) CSOs Bill.

¹⁹² Sec 7 (2) CSOs Bill.

¹⁹³ Sec 14 CSOs Bill.

¹⁹⁴ Sec 3 CSOs Bill only provides that the Special Tribunal shall have jurisdiction to prosecute all persons.

3.3.3. Prosecution by national courts

As stated above, the ‘principle of complementarity’ underscores the primacy of national courts in conducting prosecutions. Yet Kenya’s national courts have never been perceived as an ideal option for domestic trials of the crimes committed in the 2007 election violence. The courts have a reputation of a dysfunctional national justice system. As recounted by CIPEV, Kenya’s Judiciary has ‘acquired the notoriety of losing the confidence and trust of those it must serve because of the perception that it is not independent as an institution.’¹⁹⁵ The diminished confidence in the Judiciary was accent when the ODM presidential candidate, Raila Odinga, publicly declined to have the disputed elections of 2007 resolved by local courts.¹⁹⁶ This was further vindicated by CIPEV’s finding that local courts are not a tenable alternative. Instead, CIPEV recommended comprehensive institutional reforms aimed, *inter alia*, at restoring confidence and trust in the Judiciary.¹⁹⁷

On 30 July 2009, for the first time, the Cabinet contemplated the option of ordinary courts as the prosecution outfit of the transitional process.¹⁹⁸ This move can only be read with disdain and suspicion for there is hardly any example of successful transitional prosecution through national courts on the continent. Existing experience is mostly about how not to use this forum. For example, in one of the South African *locus classicus*, the TRC instituted charges of contempt against former president PW Botha.¹⁹⁹ The trial court found Botha in contempt for refusal to testify and sentenced him to one year in prison or a fine of \$ 1,600.²⁰⁰ However, despite the coherent and lucid arguments put forward by the Commission on appeal, Botha was released on technical grounds.²⁰¹ Similarly, attempts to prosecute the former Minister of Defence, Magnus Malan, for murder were faltered when the local court found him and all his 15 co-defendants not guilty.²⁰² This sent a message of relief to many who refused to apply for amnesty despite the possibility of national prosecution.²⁰³

Rwanda, where transitional prosecution was initially fully conferred to the ordinary justice system, has had its share of problems. The prosecutions conducted by ordinary courts have

¹⁹⁵ (n 33 above) 460.

¹⁹⁶ Breaking Kenya’s impasse: chaos or courts? Africa policy brief, Africa Policy Institute, page 3 as cited in Ongaro and Ambani (n 130 above) 29.

¹⁹⁷ (n 33 above) 461.

¹⁹⁸ ‘President Kibaki’s Statement,’ *The Standard* 30 July 2009.

¹⁹⁹ ‘Truth and Reconciliation Commission of South Africa Report’ vol. 1 chap 7: Legal challenges.

²⁰⁰ As above.

²⁰¹ As above.

²⁰² C Sriram *Confronting past human rights violations: justice vs peace in times of transition* (2004) 158.

²⁰³ Hayner (n 43 above) 43.

been criticized as having proffered selective justice.²⁰⁴ The atrocities committed by the Rwandan Patriotic Front (RPF)²⁰⁵ soldiers during and after the 1994 genocide have been cushioned from the justice system. According to Ingelaere, the difficult relationship between the RPF-led Rwandan Government and the International Criminal Tribunal of Rwanda (ICTR) is informed, in part, by the possibility that the ICTR might also investigate war crimes committed by RPF soldiers and their commanders.²⁰⁶ Attempts to deal with the impunity stemming from the complexities of using domestic courts are manifested by the utilization of 'universal jurisdiction laws' in prosecuting former RPF commanders. For example, on 6 February 2008, a Spanish court issued arrest warrants of 40 RPF soldiers.²⁰⁷ This includes Joseph Nzabamwita, the Rwandan Minister of Foreign Affairs. Similarly, France issued an indictment against Rose Kabuye, an RPF member and current Chief of State Protocol. Kabuye was duly arrested during one of her official travel in Germany and is in detention awaiting trial in France.

The transitional Government of Ethiopia, which has so far charged 5000 individuals of the previous repressive regime under Mengistu Haile-Mariam, has been characterized by abuse of due process.²⁰⁸ For instance, detainees are held for long without trial. Although most detainees were arrested by 1991, it was not until December 1994 that trials began.²⁰⁹ Besides, several defendants have been tried and sentenced to death penalties in their absentia.²¹⁰ All this happens amidst concerns about the competence and impartiality of the Judiciary and the fact that Ethiopian criminal procedure does not conform to international standards.²¹¹

3.4. The case against prosecution

Analysts of the Kenyan transitional processes have often delegitimized attempts at prosecution on two main grounds. In the first place, it is argued that Kenya is ethnically polarized and unstable hence the already fragile social fabric may further be fractured by prosecution of past violations.²¹² The other thesis is that prosecution is at odds with political

²⁰⁴ B Ingelaere 'The *Gacaca* Courts in Rwanda' *Traditional justice and reconciliation after violent conflict: learning from African experiences* (2008) 45.

²⁰⁵ A *Tutsi* dominated force exiled in Uganda but later defeated the government forces in 1994 and established the current government.

²⁰⁶ Ingelaere (n 204 above) 45.

²⁰⁷ <http://static.rnw.nl/migratie/www.radionetherlands.nl/currentaffairs/080208-Rwanda-indictment-redirected> (accessed 6 October 2009).

²⁰⁸ S Ratner, J Abrams, and J Bischoff, *Accountability for human rights atrocities in international law: Beyond the Nuremberg legacy* (2009)193.

²⁰⁹ As above.

²¹⁰ AI Ethiopia, *Accountability past and present: human rights in transition* 4 (April 1995)

²¹¹ Ratner, Abrams & Bischoff (n 208 above) 194.

²¹² Ambani (n 37 above) 10.

realities in two cardinal ways. One, the political elites responsible for Kenya's transition seem not to be enthusiastic about the process. They themselves are likely perpetrators:

State officials have already committed tremendous usurpation ranging from grand corruption now and in the past, to horrendous human rights violations. They, themselves, are now proper candidates for any sound transitional dispensation.²¹³

In addition, the political class seems to be more pre-occupied with a fierce power struggle as the 2012 general elections advance than transitional justice, especially the prosecution element. Competing notions within the political class are apparent. While some politicians perceive prosecution as a mechanism to rid off their political and ethnic opponents, the majority are not ready to sacrifice their political sycophants given the cardinal role they are bound to play in the next general elections. It follows that despite the general agreement on the need to deal with past atrocities, the divide within the political class is at play in suffocating prosecution efforts.

3.5. Conclusion

This Chapter has assessed the necessity and efficacy of prosecution and the various avenues suggested in Kenya's transitional justice process. As noted, there seem to be hurdles on every path, but a purely national exercise is unlikely to bear fruit.

²¹³

As above.

Chapter four

Evaluating the Truth, Justice and Reconciliation Commission and related themes

4.1. Introduction

Chapter 3 discussed the various prosecution initiatives. This Chapter reviews the TJRC and related themes. As hinted in chapter 1, these themes include: reparations, reconciliation and truth searching. It is noteworthy that the TJRC is barely 3 months old. Thus, it is still carrying out preliminary obligations and has not commenced operation in the proper sense. This Chapter begins by assessing the efficacy of the guiding legal framework and the probability of the TJRC's success. In evaluating the challenges of the TJRC, this section ventures into speculation as the TJRC is yet to begin operations. The chapter then analyses the feasibility of each of the four themes above.

4.2. The case for the TJRC

Given that prosecution can only be a partial response to past human rights violations, there is need for supplementary mechanisms like the TRCs. The fundamental role played by TRCs in any transitional society cannot be over-stated. Not only do they lay bare the violations of the past, but also give an opportunity to the Government, citizens and perpetrators to acknowledge the wrongfulness of these actions.²¹⁴ TRCs, writes Mutua, play a multiple role of cleansing the past, moral reconstruction, and reconciliation after truth and justice.²¹⁵

Given the less controversial nature of the TJRC in Kenya's context, there seems not to be any divergence of opinion as to its institution. Unlike prosecution, there has been a general agreement among the political class, the civil society and the general public as to the need for a functional TJRC.²¹⁶ This goodwill informed the establishment of a TJRC on 22 July 2009. While the TJRC remains a widely accepted idea, some controversial issues emerge from this discourse. This is with respect to the TJRC's relationship with the prosecuting outfit, the capability of the TJRC in realizing its objectives, its independence, efficiency and impartiality.

²¹⁴ Van-Zyl (n 3 above) 211.

²¹⁵ Mutua (n 17 above) 29.

²¹⁶ Musila (n 46 above) 3.

4.3. A critique of the TJR Act

4.3.1. Positive aspects of the Act

The TJR Act²¹⁷ is a product of KNDRC deliberations. This piece of legislation establishes a TJRC with a vast mandate: to investigate and establish a historical record of gross economic crimes and violations of human rights for the period between 12 December 1963 and 28 February 2008; identify the victims of these violations and make appropriate recommendation for redress; identify alleged perpetrators and recommend their prosecution; inquire into irregular and illegal acquisition of public land, inquire into the causes of ethnic tensions and promote healing, reconciliation and co-existence among ethnic communities.²¹⁸

A number of provisions embodied in this Act are quite encouraging in so far as an effective TRC is concerned.²¹⁹ First, gender equity is apparent in the appointment of the commissioners.²²⁰ Second, the enormous powers of the Commission guarantee its independence. It is bestowed with 'all powers necessary for the execution of its functions.'²²¹ These include: investigatory powers, issuance of summonses, and request for assistance of the police, making recommendation on reparation policies, and other policy reform areas.²²²

Third, are provisions on budgetary control. The Act establishes a TJRC Fund to be administered by the Secretary.²²³ These monies are appropriated from the Consolidated Fund, grants, gifts or donations.²²⁴ All payments in respect of the expenses incurred are paid out from this Fund.²²⁵ These provisions minimize the chances of political influence as would have been the case were the Commission's budgetary control be under Central Government. Fourth, the Act guarantees the implementation of the Commission's recommendations in relation to the institutional arrangement, mechanisms and frameworks necessary for the implementation of its decisions.²²⁶ Upon the publication of the TJRC's report, the Minister of Justice and Constitutional Affairs is required to 'operationalise' the implementation mechanism as will have been proposed by the TJRC within six months.²²⁷ The implementation committee is bestowed with supervisory powers over the implementation

²¹⁷ Act 6 of 2008.

²¹⁸ Sec 5 & 6, TJR Act.

²¹⁹ AI, Truth, Justice and Reparation: Establishing an effective truth commission, 11 June 2007.

²²⁰ Sec 10.3 & first schedule sec 7.

²²¹ Sec 7 TJR Act.

²²² Sec 7 (1) and (2), 6I TJR Act.

²²³ Sec 44 (1) TJR Act.

²²⁴ Sec 44 (2) TJR Act.

²²⁵ Sec 44 (3) TJR Act.

²²⁶ Sec 48 (2) f TJR Act.

²²⁷ Sec 49 TJR Act.

process.²²⁸ This is a break from local tradition where recommendations of related commissions are not implemented. The proscription by the Act of amnesty for genocide, crimes against humanity, and gross violation of human rights including extrajudicial executions, enforced disappearances, rape and torture is yet another provision that ensures adherence to international standards.²²⁹

4.3.2. Negative aspects of the Act

Five distinct aspects of the Act raise concerns:

4.3.2.1. Lack of clarity as to the relationship with prosecution mechanisms

Certain provisions of the Act are self contradictory. For instance, the relationship between the TJRC and the probable prosecuting outfit is not clear. While the commission is expected to investigate and make recommendation for prosecution of those responsible for human rights and economic rights violations,²³⁰ the Act guarantees absolute confidentiality of information received by it in form of evidence,²³¹ confessions or admission.²³² One cannot but wonder how the commission will recommend prosecution if all the information it receives is absolutely confidential.

Although proposals have been made for the commission to forward its findings on confidential basis to the prosecuting authorities, for further investigation,²³³ this in itself can be self defeating of the mandate of the Commission. It can deter alleged perpetrators from cooperating with the Commission for fear of giving self incriminating evidence which evidence is very vital if the Commission is to live up to its objectives.

Related to this, is a situation where the defense may seek to rely on the evidence adduced before the TJRC to discredit the credibility of a particular witness before the adopted tribunal. The question that arises is whether the prosecuting authority shall then be compelled to rely on the evidence adduced before the TJRC especially where a witness before the adopted tribunal makes contradictory statement to that made before the TJRC.

²²⁸ As above.
²²⁹ Sec 34 (3) TJR Act.
²³⁰ Sec 6 (f) and (k) ii TJR Act.
²³¹ Sec 24 (3) TJR Act.
²³² Sec 36 (9) c TJR Act.
²³³ AI Kenya, Concerns about the TJRC Bill, (2008) 6.

4.3.2.2. Defective selection process

Of greater concern is the manner in which the six Commissioners to the TJRC are appointed. Preceding their appointment by the President, the Commissioners are selected and recommended to the National Assembly by a Selection Panel comprised of various religious groups, professional bodies and the civil society.²³⁴ However, the manner in which most of these organizations were chosen into the Selection Panel has been lamented.²³⁵ This procedure, according to Amnesty International (AI), does not guarantee independence, impartiality and competence.²³⁶ This is due to lack of a broad-based consultation forum not only with all the civil society organizations but also the victims, human rights defenders and concerned Kenyans.²³⁷

Indeed, upon their appointment, numerous concerns with respect to the impartiality and competence of some of the individuals have come to the fore. For example, the Chair of the Commission has been criticized of having been an obedient senior civil servant of the Moi regime which perpetrated horrendous human rights violations.²³⁸ This demonstrates the lack of public confidence in the Commission hence unclothing its public credibility. The likelihood of these criticisms compromising effective functioning of the Commission is not remote.

4.3.2.3. Witness protection

The Act lacks long term witness protection mechanism. Witness protection under the Act is only limited to holding proceedings in camera and non disclosure.²³⁹ Even though the Witness Protection Act (WPA)²⁴⁰ provides for long term witness protection mechanisms - such as establishment of a new identity, relocation, accommodation, transportation, financial assistance, counseling and vocational training of the witness²⁴¹- the fact that the Attorney General has the sole discretion of deciding who to include in the program and what protection measures to be undertaken,²⁴² leaves the impartiality of such a program questionable especially where the protection of witnesses against the Government is desired. According to Ndubi, this arrangement lacks credibility and independence as ‘those

²³⁴ Sec 9 TJR Act.

²³⁵ AI (n 233 above) 7.

²³⁶ AI (n 233 above) 6.

²³⁷ As above.

²³⁸ M Mutua ‘An open letter to the vice-chair Betty Murungi’ *Daily Nation* 8 August 2009.

²³⁹ Sec 25 TJR Act.

²⁴⁰ Act 16 of 2006 TJR Act.

²⁴¹ Sec 4 TJR Act.

²⁴² Sec 4 & 5 TJR Act.

who are supposed to protect the witnesses are the ones the witnesses are likely to testify against.²⁴³

Albeit the Government may have decided to use the WPA at the TJRC,²⁴⁴ the possibility remains that the TJRC can develop an internal mechanism as did the South African TRC. This raises questions as to whether the TJRC is ready to surmount the requirement of expertise and costs that are related to this arrangement. It, however, is instructive that the WPA is currently being updated by Parliament to have it removed from the AG's office and to create an independent Witness Protection Agency.²⁴⁵

4.3.2.4. Too broad a mandate

The mandate of the TJRC covers the time period between 1963 and February 2008. This is an extremely broad mandate that cannot be realized within the lifespan of the TJRC which is stipulated as 2 years.²⁴⁶ This broad mandate is to a large extent a duplication of the mandate of previous investigatory commissions whose reports have never been implemented.²⁴⁷ Similar fears have been expressed by the UN:

The mandate of the TJRC needs to be comprehensive but narrow enough to be manageable in time and scope. The Commissions investigative responsibility in relation to corruption, land distribution and other 'historical injustices' must be realistic and commensurate with resources and time assigned to the Commission.²⁴⁸

This huge mandate is entrusted to just 9 Commissioners. It follows that Kenya's TJRC is bound to fall victim to the challenge faced by Nigeria's TRC. Initially, the mandate of the Nigerian Commission extended to labour disputes. A few weeks into its work, the Nigerian Commission was compelled to review its mandate by pruning off the labor disputes after realizing that 9 000 out of 10 000 complaints received were based on labor complaints.²⁴⁹

To avoid such eventualities, the TJRC should ensure that it focuses on the most pertinent human rights themes. Like the South African Commission, Kenya could have a committee on human rights violations, the amnesty committee and the reparation and rehabilitation

²⁴³ 'Will witness protection law work?' *The Standard* 26 July 2009.

²⁴⁴ 'Witness Protection law to be used in post-poll trials' *The Standard* 25 September 2009.

²⁴⁵ 'House to amend witness Act' *Daily Nation* 18 October 2009.

²⁴⁶ Sec 20 TJRC Act.

²⁴⁷ Musila (n 46 above) 42-43.

²⁴⁸ Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008 page 17. <http://www.responsibilitytoprotect.org/files/OHCHR%20Kenya%20Report.pdf> (accessed 10 October 2009).

²⁴⁹ Hayner (n 43 above) 69.

committees.²⁵⁰ Although the TJR Act is open to this possibility, it is not certain that Kenya's TJRC will adopt the same internal structure as did the South African one which had a leaner mandate covering a shorter period of 33 years with 17 Commissioners supported by a staff of three hundred professionals.²⁵¹ Given that the Kenyan process is still unfolding, it is important that the TJRC learns from good examples abroad including internal structure. Whatever structure is adopted, the TJRC should work towards efficiency recognizing the limited timeframe within which it has to realize its broad mandate.

4.3.2.5. The challenge of apportioning criminal liability

Borrowing from the South African legislation, the TJR Act bestows unto the TJRC the function of 'identifying the wrongdoers'.²⁵² While this is a laudable provision in establishing the truth, it has to be approached cautiously. According to Zalaquett, not only does naming infringe on the due process of law but also risks apportioning criminal guilt on wrongdoers.²⁵³ Consequently, this may contradict the very spirit of transitional justice - which is the rule of law and human rights. In fact, in a country that is ethnically polarized and politically strained like Kenya, such naming is most likely to have a damaging effect.

As a caveat, procedural safeguards like those adopted by South African TRC must be guaranteed. First, is the requirement to notify those bound to be mentioned by the report beforehand to show cause why they should not be mentioned.²⁵⁴ Hayner, however, points out that such a process ought to be less rigorous than that of a criminal trial.²⁵⁵ Second, is the need to interpret the intent of the language in the mandate.²⁵⁶ Given that the TJR Act guarantees legal representation to those who appear before it,²⁵⁷ one would assume that human rights issues have been contemplated under the Act.

4.4. Foreseeable challenges to the TJRC

It is pre-mature to assess the TJRC's challenges. One can only engage in a projection of possible challenges with the hope that the TJRC will be responsive whenever they arise. The first possible challenge is in relation to the mandate of the TJRC which covers a time period

²⁵⁰ Chapters 3, 4 and 5 Promotion of National Unity and Reconciliation Act 34 of 1995, Republic of South Africa.
²⁵¹ Hayner (n 43 above) 41.
²⁵² Sec 6 (b) TJR Act, sec 4 (a) iii South African Act.
²⁵³ J Zalaquett, Report of the Chilean National Commission on Truth and Reconciliation, xxxii.
²⁵⁴ Hayner (n 43 above) 123.
²⁵⁵ Hayner (n 43 above) 129.
²⁵⁶ Hayner (n 43 above) 123.
²⁵⁷ Sec 28 TJR Act.

of 45 years. In terms of evidence, the likelihood of documentary evidence being altered, death of vital witnesses and memory loss is high.

Moreover, given the current volatile political context in Kenya, the second probable challenge might arise if the whole transitional process becomes politically ethnicized. This implies that the TJRC may not receive co-operation not only from the civil society but also some ethnic groups who may perceive themselves as being victimized by the transitional process. Certainly, this will run counter to the Commission's objectives. Besides, beyond the ethnic question, the broad political context seems to be more focused on the next general elections hence not enthusiastic about the mandate of the TJRC. For example, given the possibility of the TJRC banning those adversely mentioned from vying for political office in the next general elections and the undisputed fact that many politicians do not want the truth to be known before hand, the TJRC is certainly going to be devoid of the imperative political support.

Third, the cooperation of alleged wrongdoers with the TJRC process is depended upon the manner in which the TJRC deals with the controversial issue of sharing information and proposing prosecutions to the probable prosecuting outfit. The TJRC process runs the risk of poor participation by alleged wrongdoers if it fails to clarify these two aspects.

Fourth, the TJRC is bound to face the challenges posed by the Indemnity Act.²⁵⁸ The later Act proscribes indemnity or compensation with respect to offences committed between 25 December 1963 and 27 December 1967 by public officers or members of the armed forces.²⁵⁹ This is self defeating of the TJRC's mandate whose investigations into gross human rights violations extends to the period of time protected by the said law.

Fifth, the TJRC is likely to further face the challenge of legitimacy. While the CSOs seem to be keener on prosecution efforts, the voice of the victims have been largely silenced in the ongoing discourse on the TJRC. These possible contestations do not, nonetheless, down play the importance attached to the TJRC in Kenya's transitional process.

As indicated above, any effective TRC must combine with the aspects of reparations, truth telling and reconciliation. These are the themes often associated with truth commissions.

²⁵⁸ Cap 34 Laws of Kenya.
²⁵⁹ Sec 3 Indemnity Act.

4.5. Reparations

Reparation of victims of past human rights violations have been categorized into five forms: restitution, compensation, rehabilitation, satisfaction and guarantee for non-repetition.²⁶⁰

Restitution is the restoration of an individual to the position held before the human rights abuses. This is most effective where the wrong doers who occasioned harm can be identified. The harm occasioned should, however, be capable of being quantified in monetary terms. From Kenya's viewpoint, this would play at least two instrumental roles. First and foremost, is in relation to the land question that has haunted Kenya since independence. Second, is the restoration of properties that were destroyed, stolen or burnt during the 2007 post election violence.

Where the perpetrators cannot be identified, the Government has a legal obligation to compensate the victims involved.²⁶¹ This compensation should be proportionate to the harm suffered.²⁶² Likewise, rehabilitative measures such as: medical care, respect and non discrimination of victims must be guaranteed by the Government.²⁶³ According to Armstrong and Ntegeye, reparations can also include symbolic measures like apologies, monuments and days of commemorations.²⁶⁴

In order to enable the TJRC to make viable recommendations on reparations, the TJRC ought to engage in extensive collection of views.²⁶⁵ These views should then inform the TJRC's recommendations. However, the TJR Act provides for only two instances when the TJRC may recommend for reparation: after recommending an amnesty and after an individual victim has submitted an application for reparation.²⁶⁶ Clearly, the individualization of this process denies the Kenyan TJRC the opportunity to engage in an extensive collection of views from the victims on reparations as well as making expansive recommendations that may be beneficial to the society at large. Moreover, although section 42 of the TJR Act insinuates the existence of a Fund to cater for reparations, this possibility is remote.

In addition, the entire process of reparation is likely to be even more problematic. The difficulties inherent in differentiating between perpetrators and victims cannot be under-

²⁶⁰ AI (n 219 above) 3.

²⁶¹ See discussion on state obligation in chapter 2.

²⁶² AI (n 219 above) 10.

²⁶³ Sec 25 (7) TJRC Act.

²⁶⁴ A Armstrong and G Ntegeye 'The devil is in the details: the challenges of transitional justice' (2006) 6, 1 *African Human Rights law Journal* 16.

²⁶⁵ AI (n 219 above) 38.

²⁶⁶ Sec 41 & 42.

estimated. For instance, there is a likelihood of the victims under the Kenyatta regimes to have been the perpetrators under the Moi regime and yet again the victims of the Kibaki regime. It can, however, be argued that identifying a victim does not necessarily correspond to the duty to identify corresponding perpetrators. Besides, some categories of victims can easily be identified, like those physically disfigured and the Internally Displaced Persons (IDPs) currently in camps, while others may not be cognizable.

4.6. Reconciliation

Reconciliation as an aspect of TRCs aims at promoting harmony between the victims and the wrongdoers as well as the public as a whole. It is a process of moral reconstruction in which a country takes stock of its morality in politics, governance, cultural values and revises its moral code.²⁶⁷ Given the fact that a large extent of the Kenyan victims and wrongdoers can be defined along ethnic lines, the Kenyan reconciliatory process should take the form of promoting ethnic harmony as correctly envisaged by the TJRC Act.²⁶⁸ The public hearings stipulated under the Act are designed to provide victims and perpetrators a forum for reconciling with each other.²⁶⁹ Both victims and perpetrators are, therefore, extremely essential for any TRC to achieve reconciliation. However, in light of the voluntariness of this procedure and the uncertainty in the relationship between the Kenyan TJRC and probable prosecuting outfit, it is not for certain that alleged perpetrators will avail their cooperation to the TJRC as expected.

Besides, some victims of the post election violence are still in IDP camps. Here, they live in deplorable conditions. Their daily endurance of the abject poverty evident in these camps remains a constant reminder of the suffering they went through. It remains in doubt whether this category of victims is willing to undergo a reconciliatory process. This suffering must be broken first for there to be an effective reconciliatory process. As correctly diagnosed in Sierra Leone, reparations are a pertinent prerequisite of reconciliation.²⁷⁰ Thus, with specific reference to 'guarantee of non repetition' as a form of reparation, the TJRC needs to assure the victims that they will not fall victims again of similar atrocities in future. The TJRC, therefore, needs to work towards promoting institutional and constitutional reform mechanisms.²⁷¹ Only with such reparatory assurances will the TJRC be able to achieve effective reconciliation.

²⁶⁷ Mutua (n 19 above) 24.

²⁶⁸ Sec 6 (s) TJR Act.

²⁶⁹ Sec 5 (g), (h) and (i) TJR Act.

²⁷⁰ Sierra Leone TRC Report vol. 1 page 10.

²⁷¹ AI (n 219 above) 12.

4.7. Truth seeking

Human rights bodies have held repeatedly that victims, their families as well as the general public have a right to know the whole truth about the past human rights violations.²⁷² This right has been presented by the Inter-American Court on Human Rights (IACHR) as a free standing remedy in itself (besides reparations and prosecutions of at least the most serious crimes).²⁷³ It entails information as to the causes, reasons, the condition and circumstances of the violations, identification of the wrong doers²⁷⁴ and in some cases death and the whereabouts of disappearance of their loved ones.²⁷⁵ This truth has multi faceted goals. According to Tutu, the truth forms a basis for reconciliation.²⁷⁶ It may also be used to sanction the wrong doers for prosecution or for political and moral reconstruction of the state.²⁷⁷ Truth, writes Henken, has a deterrence effect on the perpetrators.²⁷⁸ To achieve these objectives, it is important that any TJRC is independent, impartial and effective. Perhaps the Kenyan TJRC can learn some of the don'ts from the South African TRC. The later Commission has been criticized for establishing selective truths or succumbing to political pressures. As Hayner has reckoned:

...To avoid upsetting various parties, the commission delayed or decided not to issue subpoena or such orders against several key individuals or institutions, among them the headquarters of the South African Defence Force and the ANC....the commission was also strongly criticized by human rights organizations for not issuing a subpoena against the minister of Home Affairs and Inkatha freedom party president Mangosuthu Buthelezi for fear of possible violence.²⁷⁹

Mahmood Mamdani, has further criticized the South African TRC for producing a 'diminished truth'.²⁸⁰ Basically, the criticism is that by adopting a narrow view of the truth - limiting human rights violations to a few thousand people who were able to gain access to the South African TRC - the commission obscured the systematic and deeply pernicious effects of apartheid. The TJRC must, therefore, not only insulate itself against political pressure and ethnic bias

²⁷² IACHR, *Ellacuria v. El Salvador*, Case No. 10488 of 1999 (*Ellacuria case*). See also HRC, *Elena Quinteros Almeida and Maria del Carmen Almeida de Quinteros v Uruguay*, (Communication No. 107/1981), para. 14.

²⁷³ *Ellacuria case*.

²⁷⁴ AI (n 219 above) 6.

²⁷⁵ Article 32, Additional Protocol I to the 1949 Geneva Conventions.

²⁷⁶ Truth and Reconciliation Report of SA (1999) 17.

²⁷⁷ Mutua (n 19 above) 24.

²⁷⁸ A Henkin 'State crimes: punishment or pardon' in Neil and Kritz (eds) 3 *Transitional Justice* (1995) 184, 186 as cited by J Sarkin and E Daly 'Too many questions, too few answers: reconciliation in transitional societies' (2003) 35, 1 *Columbia Human Rights Law Review* 666-667.

²⁷⁹ Hayner (n 43 above) 42.

²⁸⁰ M Mamhood 'A Diminished Truth' In W James and L van de Vijver (eds) *After the TRC: Reflections on Truth and Reconciliation in South Africa* (2001) 58.

but must establish as much 'full truth' as possible. This can be achieved in two cardinal ways. First, by having procedures that promote the widest possible access; and secondly, by inquiring into the 'systemic' and structural causes of violations for instance constitutional, institutional, at all levels of economic, social cultural systems. Failure to do so will certainly compromise its ability to create a holistic account of the truth and will also violate 'the right to truth' of the victims, their families and the society at large.

4.8. Conclusion

This section has attempted an assessment of the TJRC and related themes in Kenya's transitional process. It has concluded that the legal framework establishing the TJRC has inherent strengths, but also numerous weaknesses which the Commission must surmount to realize its objectives. Similarly, the TJRC must address the various concerns that may hinder the realization of truth, reconciliation and reparation.

Chapter five

Conclusion and recommendations

5.1. Introduction

This dissertation has assessed the various transitional justice initiatives in Kenya as keys for democratic transformation. The research has established that the fragile ethnic and political tensions characterizing Kenya continue to undermine prosecution efforts. Impunity remains a core problem.

Second, the investigation has further ascertained that the legal frameworks upon which the probable prosecutorial outfit and the TJRC are structured have certain in built weaknesses. Besides, the credibility of the TJRC has gradually weaned due to unanswered questions of transparency, independence and competence.

5.2. Conclusion

Transitional justice has proven indispensable for countries emerging from past human rights violations, autocracy or conflict and are grappling towards democracy. Kenya corresponds to a country in transition. The Government has a legal duty arising from her obligations under treaty law, customary international law and national laws to deal with past human rights violations. Such obligations involve the deployment of mechanisms that guarantee the prosecution of wrong doers and redress for the victims.

The Government has been responsive and has since adopted numerous transitional initiatives. Key among these include the TJRC and various attempts at prosecution. The question that arises is whether these mechanisms measure up to the stipulated threshold. In order for Kenya to live up to her dreams of an effective transitional process, these mechanisms must embody certain normative standards.

Prosecution as one of the mechanisms adopted by Kenya has been infested by politics swathed in ethnicity. In addition, the focus by the political class on the forthcoming elections of 2012 has orphaned the prosecution mechanism the much needed political will to drive the transitional process.

The possibility of establishing a Special Tribunal gives the impression of an idea that is too distant. This is because of Parliament's reluctance, on two different occasions, to pass the

relevant law. Besides voting against the Bill establishing the Special Tribunal, the Bill itself exhibits numerous frailties: It fails to surmount the probable constitutional challenges that may arise in relation to the Attorney General's powers on prosecution and the applicability of the President's constitutional powers of commutation and pardon in relation to sentences handed down by the Special Tribunal; it also fails to exclude juvenile offenders from the jurisdiction of the Special Tribunal as is the practice in international criminal law; it further fails to designate the body responsible for establishing those who bear 'the greatest responsibility' and the criteria to be used.

Although the CSOs have attempted to clarify on some of these issues by drafting yet another Bill, the CSO's Draft Bill has also fallen short of addressing all the weaknesses. Like the Government Draft, the CSOs Bill fails to protect juveniles from prosecution. It also fails to provide guidance as to the body responsible and the criteria to be used in determining who has the highest responsibility.

The possibility of ICC prosecutions equally seems remote. Granted that some of the alleged perpetrators are the very architects of Kenya's transitional process and they still occupy crucial Government positions, it is not certain that the Government will refer the matter to the ICC. The possibility of referral by the Security Council likewise is farfetched. The Security Council seems to be less interested in Kenya's case as this has never featured on any of its agendas. Perhaps the only probable way of referral would be the Prosecutor's exercise of his *proprio motu* powers. It is, however, questionable if the prosecutor is ready to pioneer this mode of referral. Furthermore, this mode of referral is encumbered with numerous obstacles which the Prosecutor must first triumph. Most important of this is the need for cooperation with the Government. This is necessary in facilitating the Prosecutor's subsequent investigations. As illustrated, the Government is unlikely to cooperate.

The possibility of using domestic courts is on the other extreme end. Having acquired the identity of a dysfunctional justice system, resort to this mechanism shall be viewed with suspicion.

The TJRC on the other hand, which seems to have received unanimous political approval, is gradually losing grasp of public credibility. The public has lamented the political hand in the appointment of the Commissioners. Moreover, the guiding legal framework portrays numerous aspects of concern. These are: lack of effective witness protection mechanisms, lack of clarity on the relationship between the TJRC and the probable prosecuting outfit, extremely broad mandate for the Commission and the naming of perpetrators. Failure to address these issues will totally cripple the TJRC process.

Against this backdrop, the study makes the following recommendations.

5.3. Recommendations

5.3.1. Recommendations on prosecution

A Special Court or the ICC remain the only feasible prosecutorial mechanisms. Parliament ought to adhere to her obligations and adopt relevant legal frameworks instituting the Special Tribunal. This legislation should reflect the standards of international criminal practice and address the concerns raised by this research. First, this legislation should surmount the probable constitutional issues arising from the Attorney General's powers of prosecution as well as the applicability of the President's constitutional powers of commutation and pardon in relation to sentences handed down by the Special Court, if the avenue is adopted. Second, this legislation should protect juvenile offenders from prosecution. Third, it must also designate the body responsible for establishing those who bear 'the greatest responsibility' and the criteria to be used. Finally, the mandate of the Special Tribunal in relation to 'all other crimes occurring between 3 December 2007 and 28 February 2008'²⁸¹ must be reviewed. An interpretation of this provision would mean that the Special Tribunal has an exclusive mandate with respect to all criminal matters occurring during the post election violence of 2007. This is not true as the jurisdiction of the Special Tribunal is limited to only those with the highest responsibility in relation to offences relating to the election violence.

5.3.2. Recommendations on the TJRC and related themes

With respect to the TJRC, the following is recommended. First and foremost is the establishment of effective witness protection mechanisms. The TJR Act must be reviewed to accommodate long term witness protection like that under the WPA. Unlike WPA, the TJR Act must not subject the exercise of these powers to the discretion of the Attorney General. Alternatively, the TJRC can develop internal structures aimed at witness protection as did the South African TRC. Second, the TJRC must clarify its relationship with probable prosecuting outfit. This should be clear especially with respect to sharing information and proposing prosecution. This research recommends that the TJRC abolishes its powers on referring prosecutions. It should, however, retain the provisions on total confidentiality. Where a witness before the adopted tribunal gives statements contrary to that made before the TJRC, upon an application by the defence, only the judges should be allowed to peruse through the evidence given to the TJRC to ensure consistency. Third, the extremely broad mandate of

²⁸¹ Sec 4 Government Bill.

the commission must be streamlined through the operation of the TJRC. For instance, the TJRC can decide to align its working framework through three working committee as indicated in chapter 4. This will enable it to concentrate on the issue of human rights violations, which is the essence of the transitional process. Finally, the TJRC must clarify its intent of naming alleged perpetrators and must also adopt the necessary caveats as indicated in chapter 4 above.

As regards the achievement of the three themes associated with the TJRC, the following recommendations are made. With respect to reparations, this study recommends that the TJRC should not limit its recommendations on reparations to only the two instances envisaged under the guiding legal framework. It should, however, widely engage the victims' views, which should then inform its recommendations.

Second, reconciliation can only occur if the victims know who and what they are forgiving.²⁸² The TJRC must, therefore, ensure the participation of perpetrators if reconciliation is to be achieved. Of yet another concern is the need to break the ongoing chain of suffering apparent to some victims. The victims of the post election violence who are still living in IDP camps must be permanently resettled. Ultimately, the Kenyan TJRC by itself cannot achieve reconciliation and alter the ethnic patterns of the country in 2 years. This is a long term process that is also dependent on a host of other variables.²⁸³

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²⁸² J Sarkin and E Daly 'Too many questions, too few answers: reconciliation in transitional societies' (2003) 35, 1 *Columbia Human Rights law Review* 667.

²⁸³ Sarkin & Daly (n 282 above) 675.

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